



## 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

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# 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

Sarah Craig, Anurag Deb, Eleni Frantziou,  
Alexander Horne, Colin Murray, Clare Rice  
and Jane Rooney



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FOR NORTHERN IRELAND



Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission



NORTHERN IRELAND  
HUMAN RIGHTS  
COMMISSION



# **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**

**Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne,  
Colin Murray, Clare Rice and Jane Rooney**



This report was commissioned by the Equality Commission for Northern Ireland (ECNI) further to its role, with the Northern Ireland Human Rights Commission (NIHRC), as the Dedicated Mechanism under Article 2(1) of the Ireland/Northern Ireland Protocol. This paper was written by Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney for the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. The views expressed within this paper are those of the authors and do not necessarily represent the views of the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission or the Irish Human Rights and Equality Commission, nor the employers of the authors. Responsibility for any statements, errors or omissions in this report rests with the authors. This paper is not intended to be relied upon as legal advice applicable to any individual case.

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## List of Abbreviations

<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination Against Women
<b>CFR</b>	European Union Charter of Fundamental Rights
<b>CJEU</b>	Court of Justice of the European Union
<b>CTA</b>	Common Travel Area
<b>ECHR</b>	European Convention for the Protection of Human Rights
<b>ECNI</b>	Equality Commission for Northern Ireland
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>HRA</b>	Human Rights Act 1998
<b>IHREC</b>	Irish Human Rights and Equality Commission
<b>NIHRC</b>	Northern Ireland Human Rights Commission
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCRC</b>	UN Convention on the Rights of the Child
<b>UNCRPD</b>	UN Convention on the Rights of Persons with Disabilities

# Executive Summary

## Background

Article 2 of the Protocol on Ireland/Northern Ireland, contained within the Withdrawal Agreement concluded between the United Kingdom and the European Union, outlines a commitment to non-diminution of rights in Northern Ireland post-Brexit. This commitment is underpinned by the Belfast/Good Friday Agreement 1998 and its provisions on Rights, Safeguards and Equality of Opportunity, which saw these elements as integral to creating the necessary conditions for facilitating peace in Northern Ireland in the wake of conflict. That the United Kingdom and European Union constructed Article 2 on this basis is reflective of the emphasis that was placed on the 1998 Agreement in the Brexit negotiations and assertions that the Agreement must be upheld in any deal between the two sides. The expansive yet ambiguous framing of the 1998 provisions, while politically sufficient at the time of agreement, have acquired a legal significance in the wake of Brexit. Article 2 represents a reaffirmation of commitment to the 1998 provisions, while simultaneously demanding clarity in the relationship between domestic and European Union law, and obligating an ongoing monitoring process of this post-Brexit.

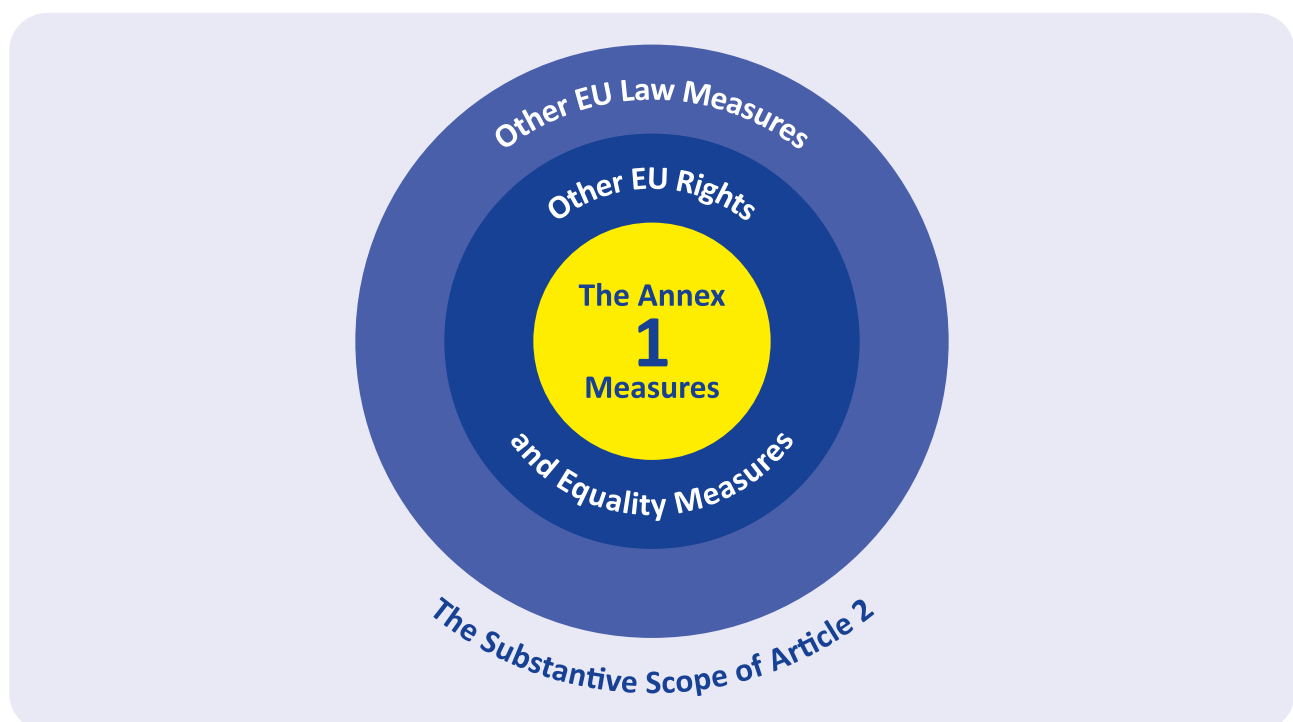
The legal framework for rights and equality in Northern Ireland is fragmented in being drawn from multiple legal spheres. There are examples of pre-Brexit divergence in this area of law from that in place elsewhere in the United Kingdom, and a differentiated legal landscape for rights now operates compared to that applicable to Ireland. European Union law provided a common ground across these jurisdictions, and the Directives contained in Annex 1 to the Protocol identify specific examples of the commitment to uphold the protections in place at the end of the Brexit transition/implementation phase which continue to apply within Northern Ireland and where the United Kingdom has made a commitment that Northern Ireland law will be updated to reflect new developments in European Union Law. However, these do not reflect the entirety of the scope of pre-Brexit rights provisions in force in Northern Ireland, nor do they account for other areas of European Union law that interact with them currently. This means that the full extent of Article 2's non-diminution commitment extends beyond the content of the Directives listed in Annex 1. Article 13 of the Protocol provides for Annex 1 Directives to be added to and amended. This means that monitoring of legal developments in European Union law continues to be important after the end of the transition period. This provision could enable Northern Ireland law to keep pace with relevant new developments, provided that there is an effective mechanism by which Northern Ireland's power-sharing institutions can communicate their opinion over such developments to the Joint Committee.

Article 2 is therefore far more complex than its succinct wording might initially suggest. Lingering ambiguity around the requirements and means to ensure non-diminution of equality and human rights protections for people in Northern Ireland, and the extent of the United Kingdom’s legal obligations to maintain dynamic alignment in Northern Ireland make for a complex set of arrangements. It also necessitates consideration of legislative competence within the United Kingdom in terms of where responsibility both does and ought to rest with regard to ensuring regulatory alignment required under Article 2, as well as the role of the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission as the dedicated mechanism and domestic courts in contributing to this collective effort. The Commissions as the dedicated mechanism have a duty to oversee, advise, and report on, rights and equalities issues falling within the scope of the commitment under Article 2 of the Protocol.

## Research Aims and Methodology

This report works through several stages to map the extent to which European Union law continues to apply within Northern Ireland after Brexit. The analysis presented and recommendations made have been reached on the basis of an extensive mapping exercise in terms of European Union law and policy. These exercises cover European Union measures that have been enacted or have been proposed between December 2020 and January 2022 that could have implications for Northern Ireland law given the Article 2 commitments and developments in Court of Justice of the European Union (CJEU) case law relevant to these commitments in the same period.

## Key Concepts



The provisions of European Union law to which the substantive scope of Article 2's obligations apply are not fully catalogued. The measures listed in Annex 1 are explicitly included and covered by an obligation for the United Kingdom to ensure dynamic alignment between the relevant law in force in Northern Ireland and these measures. Beyond those measures, the scope of the non-diminution obligation covers any measure of European Union law in force at the end of the Brexit implementation/transition period, which provided a legal basis for protecting one or more of the commitments made under the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. Those provisions are, themselves, not fully enumerated, providing a zone in which it is possible to argue that measures, even beyond European Union rights and equality law, touch upon this section of the 1998 Agreement. In each instance, however, it is necessary to demonstrate how the measure in question underpins some elements of this section of the 1998 Agreement and to be able to connect its diminution to the United Kingdom's withdrawal from the European Union.

The Protocol's requirements for alignment between the rights and equality rules operating in the law of Northern Ireland and European Union law fall into two categories:

## THE PROTOCOL'S ALIGNMENT REQUIREMENTS

### DYNAMIC ALIGNMENT

EU Measures  
Listed in Annex 1

### NON-DIMINUTION:

EU Measures in force on 31 December 2020 which underpin a "Rights, Safeguards and Equality of Opportunity" commitment in the 1998 Agreement

First, where a European Union law measure is included in Annex 1 (at present six Directives) then there is a comprehensive requirement of dynamic alignment; the law in Northern Ireland must reflect developments in the operation of these Directives, including measures amending or replacing them. Second, where any European Union measure in force on or before 31 December 2020 underpins a 'Rights, Safeguards and Equality of Opportunity' commitment in the 1998 Agreement, then the law operative in Northern Ireland as a result of Brexit cannot diminish that protection. This is a fixed obligation; it applies to European Union obligations as they existed during the Brexit implementation/transition period. In a further layer of complexity, new European Union measures can be added to Annex 1, creating new dynamic alignment obligations.

## Key Findings

While European Union membership facilitated broad alignment of equality and human rights law across the island of Ireland, and also between Northern Ireland and Great Britain, some significant areas of divergence existed prior to Brexit. These did not pose immediate legal issues prior to Brexit, but in the post-Brexit context, North-South divergences raise potential issues in terms of Article 2's non-diminution commitment, which gives legal significance to some terms of the 1998 Agreement which would previously have been regarded as aspirations. The research indicates that divergences of rights and equality protections between Ireland and Northern Ireland loom or already exist, including in the areas of work-life balance, age discrimination in access to goods, facilities and services, pay transparency reporting, and gender reassignment. The priority of this report, alongside its annexes, is to detail these significant developments and explain their relationship with European Union law.

The role of the Commissions is of integral importance to ensuring that these pre-existing and potential areas for divergence to occur do not give rise to opportunities for measures to slip through that would undermine the Article 2 commitment. There are two key aspects to what is necessitated from the Commissions in this regard: exerting influence on the approach taken by the Northern Ireland Executive and the UK Government in making laws to ensure they are compliant with the requirements of Article 2 through pre-legislative scrutiny and reporting; and its direct duties with regard to the enforcement of Article 2.

In terms of enforcement of Article 2 within domestic courts, legal certainty remains to be established with regard to the interpretation of laws within this area. Direct effect is a vital concept within European Union law, because the aspects of European Union law to which it applies provide for legal rights and obligations which can be enforced within the legal systems of European Union Member States even if there is no adequate domestic implementing legislation. In the context of Article 2, direct effect is clear with regard to the Annex 1 Directives, but the UK Government has accepted, including before the courts, that the concept also applies to the broader commitment to non-diminution under Article 2. This acknowledgement gives the Article 2 non-diminution commitment practical significance within litigation, but it also means that the courts will likely be drawn into defining the boundaries of this commitment.

Of particular note, the Belfast/Good Friday Agreement 1998's Rights, Safeguards, and Equality of Opportunity provisions are committed to apply to 'everyone in the community' – a narrow interpretation of this differs greatly to an expansive one, and can alter an interpretation of the scope of Article 2's requirements. Article 2's scope is tied to this aspect of the 1998 Agreement, and there is potential for the courts to be the source for providing clarity on this. Until such a point, this ambiguity remains.

The Protocol also includes more extensive commitments with regard to case law of the CJEU than those in place within the main body of the Withdrawal Agreement. In Chapters 4 and 5 we therefore highlight a range of recent CJEU decisions which continue to have implications for how particular legal rules operate in Northern Ireland and which in some cases necessitate law reform.

The complexity of the legal landscape for equality and human rights in post-Brexit Northern Ireland means that there is a real potential for domestic developments to fail to keep pace with European Union law developments, particularly in relation to areas under development that are likely to fall within the scope of Article 2 in the future. In order to be most effective, the Commissions must work with the Northern Ireland Executive to prioritise an agreed and principled approach as to how Article 2 of the Protocol should be implemented to ensure that any new measures that fall under the scope of Article 2 in the future are compliant with it in Northern Ireland. Monitoring developments beyond the core scope of Article 2 (that is, the six Annex 1 Directives) will be just as important in this regard as its role in overseeing compliance with Article 2 requirements. This is especially pertinent in light of Article 13 of the Protocol in relation to changes to the content of Annex 1 provisions.

Article 2 is far from a panacea to the challenges of Brexit for human rights and equality law in Northern Ireland. There remain uncertainties over aspects of its operation and, unlike the Protocol provisions relating to trade in goods, the European Union institutions do not have a role in overseeing its operation. Litigation, and the work of the Withdrawal Agreement's committee structures, will likely help to clarify the operation of Article 2, but its complexity entails that its implementation will require continuous monitoring and in tandem with this, appropriate and clear duties must be established for the Northern Ireland Executive, and the UK Government, in particular in their communication with the Commissions.





## Overarching Recommendations

This report highlights several key themes in assessing the impact of Brexit relating to divergences of equality and human rights standards and European Union best practice on the island of Ireland. We make specific recommendations relating to particular legal developments in several chapters, and these are summarised at the conclusion of the report alongside our overarching recommendations.

Our overarching recommendations for practical measures that can be adopted, which would help to improve the protection of rights and equality in Northern Ireland, encompass four major areas: tracking European Union law and policy developments; considering the impact of equivalence for Article 2 of the Protocol; exploring the legislative options for maintaining alignment required under the Protocol (with regard to the law making of both the Northern Ireland Assembly and the United Kingdom Parliament); and Westminster's supporting role.

### *Tracking European Union Law and Policy Developments*

- The Northern Ireland Assembly must address the current shortcomings of Northern Ireland law resultant from developments in CJEU case law. Current Northern Ireland disability legislation continues to be based upon comparators which the CJEU has found do not meet European Union law requirements (Case C-16/19, *Szpital Kliniczny*) and potential shortfalls exist with regard to effective judicial protection and access to effective remedies (Case C247/20 VI). Developments in the field of religious freedom also require attention (Cases C-804/18 and C-341/19, *WABE & Müller*).
- The European Commission must follow through on its commitment to provide an information website detailing developments in European Union law which, under the terms of the Protocol, must be reflected in the law of Northern Ireland. The provision of such information for the Commissions, Northern Ireland Executive and UK Government is essential for the effective implementation of Article 2.
- In line with section 78A(3) of the Northern Ireland Act 1998, the Northern Ireland Executive should commit to publicly respond to the Commissions' recommendations regarding Article 2's implementation, mirroring the UK Government's commitments.

### *Impact of Equivalence for Article 2*

- The UK Government must, at a minimum, ensure that the terms of the Protocol are adhered to and that the particular obligation to ensure dynamic alignment with the Annex 1 Directives is met.
- The UK Government and European Union should commit to new European Union laws relating to human rights and equality being added to the Annex 1 Directives on a case-by-case basis, as provided under the Protocol's Article 13(4), with particular consideration being given to alignment of standards across the two jurisdictions on the island of Ireland to address the 1998 Agreement's aspirations regarding cross-border equivalence.

### ***Legislative Options for Maintaining Alignment as Required by the Protocol***

- At present, the onus rests on the Northern Ireland Assembly to legislate where needed to maintain compliance with the United Kingdom's Protocol commitments, with legislation also empowering Westminster to step in to legislate in extraordinary circumstances. These could cover circumstances of collapse of Northern Ireland's devolved institutions, but also specific failures to address the Protocol's Article 2 obligations. A range of possible approaches exist for enhancing and clarifying these arrangements:
  - The Northern Ireland Executive could be placed under positive duties to bring forward primary legislation to maintain convergence – analogous to those in place under sections 28D and 28E of the Northern Ireland Act 1998, which cover strategies for the Irish language, Ulster Scots, poverty and social exclusion.
  - Northern Ireland Departments could be placed under positive duties to maintain convergence by means of secondary legislation – analogous to sections 28D and 28E, but by secondary legislation – which would require amendment to Northern Ireland Act 1998.
  - Northern Ireland Departments could be placed under positive duties to maintain convergence by means of secondary legislation (as with the previous option) but only via the draft affirmative procedure (affirmative resolution) and without being subject to Northern Ireland Ministerial direction/control (or being under direction/control of the Secretary of State instead).
  - Because the international obligations imposed by the Withdrawal Agreement rest on the UK Government, a new memorandum of understanding needs to be concluded between the UK Government and the Northern Ireland Executive to clarify when the UK Government will seek to use the powers available to Westminster under the Withdrawal legislation to legislate to make good shortfalls in rights protection required by Article 2 and Annex 1 resultant from inertia in Northern Ireland's power-sharing institutions.
- Northern Ireland should implement the UNCRPD in domestic legislation.
- Consolidated rights and equality legislation in Northern Ireland would not only provide better protection against multiple forms of discrimination, but also to facilitate the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission in carrying out their duties to oversee, and report on, rights and equalities issues falling within the scope of the commitment under Article 2 of the Protocol.

### ***Westminster's Supporting Role***

- A new memorandum of understanding explaining how the UK Government and Northern Ireland Executive will engage with alignment issues and interact with the Commissions' proposals is necessary.

# Introduction

The special rights and equality protections concluded for Northern Ireland as part of the Withdrawal Agreement between the United Kingdom and the European Union are sometimes perceived as being uncomplicated because they are largely encapsulated in a single provision of the Protocol on Ireland and Northern Ireland: Article 2 (and a related annex, Annex 1).<sup>1</sup> This report highlights the complexity inherent in these arrangements and assesses both the extent to which European Union law continues to apply within Northern Ireland after Brexit and the divergences in rights protection which stem from Brexit. The report is based upon mapping exercises providing an account of the relevant European Union measures which created enforceable legal obligations at the end of the Brexit transition/implementation period, the case law of the Court of Justice of the European Union (CJEU) applicable to those measures and the European Union measures which have since entered force, or which are currently being proposed, which might have implications for Northern Ireland even after Brexit.

Chapter 1 explains the Rights, Safeguards and Equality of Opportunity provisions of the Belfast/Good Friday Agreement 1998,<sup>2</sup> the centrality of these provisions to the Agreement, the Agreement's understanding that the arrangements in place in Northern Ireland will provide a baseline of rights protections, and the extent to which there can be said to be a requirement of equivalence in terms of these protections between the jurisdictions of Ireland and Northern Ireland. It thereafter outlines the relationship between the 1998 Agreement and the UK-EU Withdrawal Agreement, and details how the commitments to non-diminution of rights and equality protections for Northern Ireland and dynamic alignment with regard to particular measures shaped the Brexit settlement. It also explains the key legal concepts addressed in this report, including equivalence, dynamic alignment, non-diminution (and the distinction between this concept and non-regression).

Chapter 2 explores the current degree of equivalence in rights and equality protections between the jurisdictions of Ireland and Northern Ireland, and some of the notable deviations between the rights and equality arrangements of both jurisdictions. It examines the extent to which the commonalities between these arrangements rested upon European Union law prior to the United Kingdom's withdrawal from the European Union, and the extent to which European Union law facilitated differences in application of the law between these jurisdictions. It also reflects upon the extent to which the equivalence of rights between Ireland and Northern Ireland exists in the context of arrangements applicable to Ireland and the

1 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020.

2 *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).

United Kingdom beyond the 1998 Agreement. This includes those obligations related to the Common Travel Area and under the terms of the Trade and Cooperation Agreement between the United Kingdom and the European Union.<sup>3</sup>

Chapter 3 provides a detailed account of the operation of Article 2 of the Protocol on Ireland and Northern Ireland, exploring the terms of both its general non-diminution commitment and specific dynamic alignment commitment regarding the Annex 1 Directives. It also addresses the direct effect of Article 2's terms within the meaning of Article 4 of the Withdrawal Agreement and of the implications of these rules for courts and tribunals within Northern Ireland, including how they oblige those bodies to draw upon CJEU case law in their implementation of the rules of European Union law relevant to Article 2. It also explains the safeguard mechanisms applicable to these rules and the process by which updates to relevant European Union rules are considered under Article 13 of the Protocol. This is an important aspect of the report in light of the first cases addressing Article 2 in Northern Ireland's courts.

Chapter 4 provides an account of the ongoing operation of the Annex 1 Directives in the law of Northern Ireland following the end of the Brexit transition/implementation period. This includes an account of how these Directives operate in light of the latest CJEU case law developments and good practice initiatives. It explores the legal reforms which would be necessary in Northern Ireland to meet the Protocol's requirements of dynamic alignment in regard to these measures. It also provides an account of how developments in these equality protections under European Union law should be reflected in the law of Ireland and Northern Ireland following the end of the Brexit transition/implementation period.

Chapter 5 explores the broader range of the European Union rights and equalities law which is relevant to the operation of Article 2's general non-diminution commitment, addressing European Union legislation, and relevant CJEU case law and European Union good practice initiatives, recognising the importance of each of these elements. We draw these multiple elements of European Union law and policy into the substantive examples discussed in the chapter, because CJEU case law works to interpret and explain European Union legislation, and best practice guidance responds to the resultant holistic account of European Union law. The aim of this chapter is to explore the limits of the aspects of European Union law relevant to the 1998 Agreement's Rights, Safeguards and Equality of Opportunity provisions.

Chapter 6 addresses the extent to which European Union good practice statements/initiatives have positively impacted on equality and human rights in Northern Ireland and Ireland prior to the end of the Brexit transition/implementation period. It also tracks the challenges for Northern Ireland's institutions in contributing to, and keeping track of, new European Union policy developments and the extent to

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<sup>3</sup> *Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (2021) OJ L 149/10.

which it is good practice or a legal obligation for changes in European Union law relevant to rights and equality to be implemented in Northern Ireland's law. We explore the necessary processes by which Northern Ireland's institutions, and the UK Government on whom the Article 2 obligations ultimately fall, will need to interact with the Withdrawal Agreement's committee system and assess how European Union law developments can best be (particularly where they must be) reflected in the law of Northern Ireland. The chapter considers the discretionary space provided by European Union directives and the extent to which the potential exists for cross-border cooperation and alignment on implementation in Ireland and Northern Ireland.

The Overarching Conclusion and Recommendations chapter provides an account of the project team's general conclusions and our recommendations regarding the implementation of Article 2 of the Protocol in light of the foregoing analysis of the interaction between its terms and the 1998 Agreement.



# Chapter 1: Mapping Rights and Equality in Northern Ireland After Brexit

## 1.1 Introduction

Discussions of human rights and equality issues have all-too-often been marginalised in the Northern Ireland context. Narratives about the Northern Ireland conflict which were focused on particular actors or inter-community tensions did not always emphasise how establishing a legal framework which protected against discrimination was one of the major goals of the peace process and a precondition for stabilising society in Northern Ireland.<sup>4</sup> In 1998, however, the Belfast/Good Friday Agreement ‘identified equality and human rights as a central element in a new constitutional settlement’.<sup>5</sup> The equality and human rights protections at work within the law of Northern Ireland have long been dispersed across a range of legal instruments, and by the 1990s, European Union law was playing a particularly prominent part of this picture. As the United Kingdom took steps to withdraw from the European Union after the result of the 2016 referendum, it became a generally accepted priority for negotiations that the European Union law provisions which had played a part in securing these commitments would be safeguarded.<sup>6</sup> Whatever else has remained unsettled about Northern Ireland’s governance arrangements in the decades since 1998, Article 2 of the Northern Ireland Protocol within the UK-EU Withdrawal Agreement affirms the ongoing significance of the equality and human rights commitments made in 1998.

This chapter outlines the terms of the 1998 Agreement and establishes its connection to the drafting of Article 2 of the Northern Ireland Protocol.<sup>7</sup> Although this provision has been a generally accepted (or, in the UK Government’s terms, ‘not controversial’<sup>8</sup>) element of the Withdrawal Agreement, its terms are complex and provide both for the maintaining of some European Union law standards as they existed at the point of Brexit and broader obligations that Northern Ireland should remain aligned with particular parts of European Union equality law as they develop.

4 See Jennifer Todd, ‘Unionism, Identity and Irish Unity: Paradigms, Problems and Paradoxes’ (2021) 32 *Irish Studies in International Affairs* 53, pp. 55-56.

5 Christopher McCrudden, ‘Equality’ in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart, 2001) 75, p. 75. See also Mary Robinson, ‘Equality and Human Rights - Their Role in Peace Building’ (Stormont Hotel Speech, 2 December 1998) and Aoife O’Donoghue, ‘Non-discrimination: Article 2 in Context’ in Federico Fabbrini (ed.), *The Law & Politics of Brexit: Volume IV The Protocol on Ireland/Northern Ireland* (OUP, 2022) 89, p. 92.

6 See Colin Murray, Aoife O’Donoghue and Ben Warwick, *Discussion Paper on Brexit* (NIHRC and IHREC, 2018).

7 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020, Protocol on Ireland/Northern Ireland, Article 2.

8 UK Government, *Northern Ireland Protocol: The way forward* (July 2021) CP 502, para. 37.

The potential extent of these requirements has yet to be fully tested in court, but must be understood in light of their being grounded in the 1998 Agreement. This chapter therefore introduces the key concepts connected to the application of the Protocol, and, in particular, the ideas of cross-border equivalence in terms of rights and equality protections, and the scope of dynamic alignment and non-diminution of protections.

## 1.2 The 1998 Agreement

As Christopher McCrudden has noted, there are two significant rights and equality agendas at work within the 1998 Agreement (relating to the specific issue of ‘national identification’ and the general protection of rights and equality in social contexts).<sup>9</sup> The national identification agenda relates to the ability of the people of Northern Ireland to identify and be accepted as British, Irish or both.<sup>10</sup> This was a live issue throughout debates on how Brexit would operate in the context of Northern Ireland, in which people who identify as Irish will continue to be European Union citizens,<sup>11</sup> whereas those who identify solely as British will not be. The impact of Brexit in this regard has been subject to intensive analysis, and is not covered by the operation of Article 2 of the Protocol on Ireland/Northern Ireland.<sup>12</sup> This report therefore focuses upon the Agreement’s legacy for the protection of rights and equality in social contexts, and how this informs our understanding of the operation of Article 2.

Rights, Safeguards and Equality of Opportunity are the subject of a prominent section in the 1998 Agreement. The parties to the Agreement committed to a broad statement of the ‘civil rights and religious liberties of everyone in the community’. The term ‘everyone in the community’, however, is undefined. A minimalist interpretation might regard this term as covering everyone resident in Northern Ireland, but the composition of a community is always changing, and more holistic accounts of the community would encompass anyone who is in the territory of Northern Ireland. The UK Government, indeed, supports quite a broad reading of the term as applicable to everyone subject to Northern Ireland law.<sup>13</sup> This is significant in light of the number of people who live and work on different sides of the border; this formulation would appear to extend the commitment to those who work in Northern Ireland but do not live there (frontier workers), at least in some regards.

9 Christopher McCrudden, ‘Equality’ in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart, 2001) 75, p. 89.

10 *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), Article 1(vi).

11 Note that the UK’s withdrawal from the EU, in making Northern Ireland no longer the territory of an EU Member State, necessarily affected the way in which EU citizens in Northern Ireland interact with EU law. See Colin Murray and Ben Warwick, ‘The Strange Case of Northern Ireland’s Disappearing Rights in the EU-UK Withdrawal Negotiations’ (2019) 19 *European Yearbook of Human Rights* 35.

12 See Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, *‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit* (NIHRC and IHREC, 2020).

13 UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 8.

The term community, in this part of the Agreement, could potentially even have implications for people across Ireland.<sup>14</sup>

This statement in the Agreement affirmed, in particular, rights to ‘free political thought’, to ‘freedom and expression of religion’, to ‘pursue democratically national and political aspirations’, to ‘seek constitutional change by peaceful and legitimate means’, to ‘freely choose one’s place of residence’, to ‘equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity’, ‘to freedom from sectarian harassment’, to the ‘full and equal political participation’ of women, to the ‘right of victims to remember as well as to contribute to a changed society’.<sup>15</sup> Further commitments were made by ‘[a]ll participants’ to ‘[r]espect, understanding and tolerance in relation to linguistic diversity’<sup>16</sup> and to the ‘need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division’.<sup>17</sup> The UK Government have accepted that these provisions are relevant to the operation of Article 2 of the Protocol, noting that the open framing of the 1998 Agreement means that the workings of Article 2 ‘may not be limited to’ these commitments.<sup>18</sup>

This account of rights and equality issues under the 1998 Agreement was explicitly informed by ‘the background of the recent history of communal conflict’,<sup>19</sup> and as such, was intended to reflect the most prominent aspirations of the parties to the Agreement for Northern Ireland. Not only do these aspirations cover a broad range of civil, political, economic and social rights, they are not presented as an exhaustive list but as important priorities against the backdrop of the Northern Ireland conflict. These aspirations were supported by legal commitments by the UK Government to incorporate the European Convention on Human Rights into the law of Northern Ireland and to provide statutory equality obligations upon public authorities.<sup>20</sup> These commitments within the 1998 Agreement provided a basis for the enactment of the Human Rights Act 1998 and parts of the Northern Ireland Act 1998.<sup>21</sup> These new measures, however, took their place alongside other protections for rights and equality of opportunity operating within the law of Northern Ireland, including those arising from European Union law which were already playing a prominent role in protecting against certain forms of discrimination.<sup>22</sup>

14 Christopher McCrudden, ‘Rights and Equality’ in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2021) 143, p. 145.

15 *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, Rights, Safeguards and Equality of Opportunity, Human Rights, para. 1.

16 *Ibid.*, Economic, Social and Cultural Issues, para. 3.

17 *Ibid.*, Economic, Social and Cultural Issues, para. 5.

18 UK Government, *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) para. 9.

19 *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, Rights, Safeguards and Equality of Opportunity, Human Rights, para. 1.

20 *Ibid.*, Human Rights, para. 2.

21 See Northern Ireland Act 1998, s. 6(2)(c) and (e), s. 24(1)(a) and (c) and s. 75.

22 Christopher McCrudden, ‘Equality’ in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart, 2001) 75, p. 99.



The 1998 Agreement also set out a range of equality and human rights commitments applicable to Ireland, which would ‘ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland’.<sup>23</sup> Once the Agreement was implemented, it was agreed that the statutory Human Rights Commissions in Ireland and Northern Ireland would work together as a Joint Committee to provide a forum for consideration of rights protections on the island as a whole. In this regard, the 1998 Agreement specifically envisaged the Joint Committee considering a Charter of Rights for the Island of Ireland, which provides for a further illustration of the connectedness of such concerns across the two jurisdictions.<sup>24</sup>

Equality and human rights protections were thus envisaged in the 1998 Agreement as an important bulwark against the societal pressures which had fuelled the Northern Ireland conflict and as an essential basis for a post-conflict society in Northern Ireland. Northern Ireland’s law remains grounded upon these arrangements, with its range of protections spread across a collection of different measures which have been incrementally adapted and augmented, as we shall address in depth.<sup>25</sup> Indeed, developments applicable in other parts of the United Kingdom, such as the systematisation of equality law under the Equality Act 2010, have not been extended to Northern Ireland. This point of divergence has had significant knock-on effects in terms of equality protections within Northern Ireland law. To take but one example, the secondary legislation based on the Equality Act which imposes reporting requirements on large employers regarding the gender pay gap does not apply in Northern Ireland,<sup>26</sup> and the equivalent regime established by the Northern Ireland Assembly has not entered into force.<sup>27</sup> In this and other respects, Northern Ireland has come to lag behind other jurisdictions across the United Kingdom and Ireland in terms of equality protections.<sup>28</sup>

At this early point in this report, it must be emphasised that in two significant regards the commitments within the Agreement are expansively framed. First, the protections explicitly mentioned in the Agreement provide a non-exhaustive account of how rights and equality protections would apply in Northern Ireland. Second, the legal reforms introduced in the implementation of the Agreement by the United Kingdom did not tell the full story of how these commitments were to be subject to legal safeguards. This part of the 1998 Agreement also made connection between the protections being put in place in Northern Ireland and the taking of ‘comparable’ steps within Ireland as a jurisdiction. The most prominent development in Ireland’s law in light of this commitment was the enactment of the European

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23 *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, Rights, Safeguards and Equality of Opportunity, Human Rights, para. 9.

24 Northern Ireland Human Rights Commission and Irish Human Rights Commission, [The Advice of the Joint Committee on a Charter of Rights for the Island of Ireland](#) (2011).

25 See Chapter 2.

26 Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GB).

27 Employment Act (Northern Ireland) 2016, s. 19.

28 ECNI, [Gaps in equality law between Great Britain and Northern Ireland](#) (2014). See below, Chapter 2.3.

Convention of Human Rights Act 2003, which requires Ireland's domestic courts to draw upon the ECHR in their interpretation of legislation. Although the loose framing of some of these terms mean that they could be considered to have been political commitments within the 1998 Agreement, they have nonetheless taken on particular legal significance in the context of Brexit's application to Northern Ireland.

### 1.3 The 1998 Agreement and Article 2 of the Protocol

In the course of negotiations over Brexit, the commitments contained within the 1998 Agreement came to be regarded as a baseline in terms of rights and equalities protections which must be protected against potential breaches resultant from the United Kingdom's withdrawal from the European Union. Under the December 2017 Joint Report, the UK Government explicitly recognised the contribution made by European Union law and practice to the realisation of the 1998 Agreement's provisions on rights and equality and made significant commitments to sustain these arrangements:

The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which European Union law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in European Union law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.<sup>29</sup>

In terms of scope, European Union law's protections against a range of forms of discrimination is highlighted, but the language of this pledge is expansive – the concept of non-diminution was to be inclusive of this aspect of European Union law, but the commitment was intended to extend beyond this. This paragraph included a further commitment by the United Kingdom to facilitating the work of the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland to safeguard these protections within the law of Northern Ireland.

The pledges contained within the 2017 Joint Report were translated into legal form in Article 2 of the UK-EU Withdrawal Agreement's Protocol on Ireland/Northern Ireland. The first paragraph of Article 2 states the United Kingdom's substantive legal obligation:

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29 Phase 1 Report, *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union* (TF50 2017, 19) 8 December 2017, para. 53.

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, and shall implement this paragraph through dedicated mechanisms.

The terms of this first paragraph of Article 2 draw directly upon the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. In doing so, it generates legal obligations from the terms of a substantial section of the 1998 Agreement, much of which was drafted in loose language or framed as aspirations. These legal obligations fall into two categories. First, the United Kingdom makes a general commitment to ensuring no diminution of certain rights and equality protections operating in Northern Ireland as a result of Brexit. Second, reading Article 2 in the context of other Protocol provisions, the United Kingdom makes a specific commitment to maintain dynamic alignment between the law of Northern Ireland and the operation of a collection of European Union measures listed in Annex 1.<sup>30</sup>

In line with paragraph 53 of the 2017 Joint Report, the second paragraph of Article 2 commits the UK Government to facilitating the work of the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland ‘in upholding human rights and equality standards’. The United Kingdom’s implementation of these provisions under the European Union (Withdrawal Agreement) Act 2020 created a linkage between the two paragraphs of Article 2 in enacting that the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission are, for the purposes of domestic law, to fulfil the role of the ‘dedicated mechanism’ for the purposes of these obligations.<sup>31</sup> Furthermore, under Article 14 of the Protocol, these bodies are empowered to raise ‘any matter of relevance to Article 2 of this Protocol’ with the Specialised Committee of the Protocol on Ireland/Northern Ireland established under the Withdrawal Agreement.<sup>32</sup>

Where an all-island dimension to rights and equalities issues exists, the Northern Ireland bodies and the Irish Human Rights and Equality Commission ‘will work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment’,<sup>33</sup> and the two Northern Ireland bodies and the Joint Committee of representatives of the Human Rights Commissions of

30 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), Protocol on Ireland/Northern Ireland, Article 13(4).

31 European Union (Withdrawal Agreement) Act 2020, s. 23 and Sch. 3, introducing new powers for the Commissions under the Northern Ireland Act 1998, s. 78A to 78E. See 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, 20.

32 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), Article 165.

33 UK Government, [UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) para. 19.

Northern Ireland and Ireland have the capacity to raise matters with the Specialised Committee of the Protocol on Ireland/Northern Ireland.<sup>34</sup> As will be explored in detail in a later section of this report,<sup>35</sup> Article 2 is, in summary, designed to protect the operation of rights, safeguards and equalities of opportunity as set out in the 1998 Agreement, but only to the extent that they can be demonstrated to have been underpinned by European Union obligations prior to 31 December 2020.

## 1.4 Key Concepts

### *Non-Diminution*

This report thus explores the application of a series of important legal concepts to the terms of Article 2 of the Protocol on Ireland/Northern Ireland. Throughout the report we will be engaging with the concept of ‘no diminution’, in the context of the Article 2 commitment to maintain European Union law protections for rights and equality in operation in Northern Ireland’s law notwithstanding Brexit. Discussions of Article 2 have sometimes tended to conflate a standard of non-diminution with concepts such as non-regression and non-retrogression. An example can be found in the UK Government’s explanation of the operation of Article 2:

We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any *regression* in the rights set out in that chapter, but the commitment nonetheless provides a legally binding safeguard. It means that, in the extremely unlikely event that such a *diminution* occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts and, should their challenges be upheld, that appropriate remedies are available...<sup>36</sup>

These terms, however, carry different meanings in the context of international rights and equalities protections. Whereas non-diminution provides an absolute baseline and a state would find itself in breach of its international obligations if it was to undercut that standard, non-regression (sometimes described as non-retrogression) is a more flexible standard. In particular, non-regression clauses can, in given circumstances, allow for protections to be curtailed more strictly than that baseline standard.<sup>37</sup> The Trade and Co-operation Agreement between the United Kingdom and the European Union, for example, includes non-regression provisions relating to labour and social standards. Unlike Article 2, however, the commitment to ‘not weaken or reduce...its labour and social levels of protection’ is qualified; the relevant

34 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), Protocol on Ireland/Northern Ireland, Article 14(c).

35 See Chapter 3, particularly section 3.2.

36 UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 6 (emphasis added).

37 See Aoife Nolan, Nicholas Lusiani, and Christian Courtis, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP, 2014) 121, pp. 140–141.

reduction has to operate ‘in a manner affecting trade or investment between the Parties’.<sup>38</sup> This commitment, moreover, is enforced by arbitration between the United Kingdom and European Union,<sup>39</sup> and it does not permit affected private actors to protect their interests through domestic litigation as Article 2 does.<sup>40</sup>

Throughout this report we maintain that non-diminution is the relevant standard contained within the Withdrawal Agreement. Under Article 2, the concept of a diminution covers any reduction of rights and equalities standards related to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement, as set in European Union law on 31 December 2020, which could not take place if the United Kingdom had remained a Member State of the European Union.<sup>41</sup> This date thus takes on particular significance; the extent of the general non-diminution obligation could be said to be ‘frozen’ at this point; it does not track to subsequent developments in European Union law.<sup>42</sup>

### **Dynamic Alignment**

Beyond the general non-diminution protections established in Article 2, there are also Protocol provisions relevant to the ongoing alignment of rights and equalities standards between the law in force in Northern Ireland and the requirements of European Union law. With regard to the provisions listed in Annex 1 of the Protocol, we will characterise the Protocol obligation as being one of comprehensive and dynamic alignment between Northern Ireland law and these measures. This means that, if these measures are amended or replaced, or if the interpretation of them changes in new CJEU case law, the law in force in Northern Ireland will have to reflect these changes.

Beyond the measures listed in Annex 1 of the Protocol, a legal obligation for full dynamic alignment does not apply. There nonetheless remains an obligation for Northern Ireland law to reflect relevant CJEU case law regarding European Union law measures adopted before December 2020 which touch upon the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.<sup>43</sup> It is also open for the European Union and the United Kingdom to agree to add new measures to the list of Annex 1 provisions and to consider partial steps in this regard where a new European Union law measure is relevant to these issues.

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38 *Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (2021) OJ L 149/10, Article 387(2).

39 *Ibid.*, Article 389(2).

40 See Aoife O’Donoghue, ‘Non-discrimination: Article 2 in Context’ in Federico Fabbrini (ed.), *The Law & Politics of Brexit: Volume IV The Protocol on Ireland/Northern Ireland* (OUP, 2022) 89, p. 102.

41 Thomas Liefländer and Daniel Denman, ‘The Withdrawal Agreement, Protocol on Ireland/Northern Ireland’ in Manuel Kellerbauer, Eugenia Dumitriu-Segnana and Thomas Liefländer (eds), *The UK-EU Withdrawal Agreement: A Commentary* (OUP, 2021) 407, pp. 414-416.

42 Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, *‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit* (NIHRC and IHREC, 2020) p. 42.

43 See Chapter 5.

### **General Principles of European Union Law**

It might therefore be assumed that the Protocol commitment is primarily related to the European Union's equality *acquis* (the area of European Union law primarily focused on tackling discrimination against protected characteristics). The dynamic alignment concept is indeed connected to the operation of the measures listed in Annex 1 of the Protocol. This currently extends to six Directives which make up an important part of this *acquis*. Beyond these specific protections, however, the foundation of Article 2's general non-diminution commitment is defined by the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. This commitment does not transform this part of the 1998 Agreement into "free-standing" obligations; the operation of the right, safeguard or equality protection in question must be derived from European Union law measures enforceable in Northern Ireland law before the end of December 2020.

This report therefore explores the extent to which this commitment in Article 2 could reach into broader elements of European Union law. From the outset, however, it is important to recognise that European Union law operates as a coherent whole, underpinned by general principles, including fundamental rights and equality before the law.<sup>44</sup> These principles inform the operation of European Union law:

The Court's case law on these so-called 'general principles of EU law', sourced from international human rights law and the constitutions of the Member States, has long been a primary source of EU law...Where EU institutions act, or where Member States are acting within the scope of EU law, individuals can rely on these general principles as well as the Charter of Fundamental Rights for protection.<sup>45</sup>

It is conceptually difficult to separate parts out of the general operation of European Union law on the premise of their relevance to the 1998 Agreement without assuming that their operation will continue to be explained by these general principles. Indeed, Article 4 of the Withdrawal Agreement maintains the significance of such general principles in the interpretation of elements of European Union law which remain operative within the United Kingdom after Brexit. These principles therefore remain significant to the operation of the Article 2 obligations. As we shall discuss in detail below, the CJEU regularly draws on the European Union's Charter of Fundamental Rights<sup>46</sup> to explain the operation of these general principles.<sup>47</sup>

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44 See Takis Tridimas, 'Fundamental rights, general principles of EU law, and the charter' (2014) 14 Cambridge Yearbook of European Legal Studies 361.

45 Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *'Rights, Opportunities and Benefits' in Northern Ireland after Brexit* (NIHRC and IHREC, 2020) p. 20.

46 Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

47 See Chapter 5, sections 3-8.

## **Equivalence**

A further key concept which needs to be introduced is that of equivalence under the terms of the 1998 Agreement. As Alyson Kilpatrick, Chief Commissioner of the Northern Ireland Human Rights Commission, has emphasised in evidence before a House of Lords Committee, a major factor in the Commission's thinking is 'the Belfast/Good Friday agreement recognition of the importance of equivalence of rights on the island of Ireland'.<sup>48</sup> In the same evidence session, it was emphasised by the Equality Commission for Northern Ireland that:

If there were a roll-back on rights in Northern Ireland, we could end up with Ireland, which would be required to keep pace with EU law, having stronger equality rights, whereas citizens in Northern Ireland, on the other side of the border, could have potentially progressively fewer rights.<sup>49</sup>

The position of the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission is that '[t]he equivalence of rights, on a North-South basis, is a defining feature of the Belfast/Good Friday Agreement 1998'.<sup>50</sup> Throughout the Brexit process, however, this position was disputed by the UK Government, which has maintained that the 1998 Agreement 'does not require North-South equivalence of rights and equality protections'.<sup>51</sup> Understanding the scope of the concept of equivalence in rights protections between Ireland and Northern Ireland, derived from the 1998 Agreement, therefore underpins the extent to which the United Kingdom might be under an obligation to extend dynamic alignment, or at least a presumption of dynamic alignment, to European Union rights and equalities measures beyond the six Directives currently listed in Annex 1.<sup>52</sup>

## **1.5 Mapping the New Territory of Rights and Equality Protections**

This report is based upon a recognition that Northern Ireland has long been in a distinct position in terms of its legal framework for protecting equality and human rights. Following the 1998 Agreement, a set of rights and equality protections were put in place which operated differently from those in place in other parts of the United Kingdom. Indeed, the fragmentary nature of Northern Ireland's distinct equality protections have meant that as a jurisdiction it has long been more directly reliant on European Union measures than other parts of the United Kingdom, where the Equality Act 2010 is the major touchstone.

48 European Affairs Committee Protocol on Ireland/Northern Ireland Sub Committee, [Oral Evidence](#) (15 September 2021) Q2.

49 Ibid., Q8 (Roisín Mallon, ECNI).

50 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](#) (March 2018) p. 6.

51 UK Government, [UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) para. 23.

52 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 United Kingdom's withdrawal from the European Union, under the agreed terms of the Protocol, nonetheless makes this distinction more significant. Following Brexit, the legal protections for human rights and equality applicable in Great Britain are subject to considerable change through domestic legislation. One of the first steps taken within the 2018 Brexit legislation was to prevent the continuing application of the European Union's Charter of Fundamental Rights<sup>53</sup> from the point at which Brexit became operative.<sup>54</sup> Although significant elements of European Union equality law, as it existed at the date of Brexit, remain applicable as retained European Union law, the United Kingdom Parliament has the ability to alter how these protections operate in Great Britain. Ireland, at the same time, will continue to be subject to the obligations of a European Union Member State to fully implement European Union law.

In Northern Ireland, Article 2 of the Protocol ensures that a range of European Union law continues to be directly effective, insofar as it was in place before the end of the Brexit transition/implementation period on 31 December 2020 and can be connected to the commitments contained within the 1998 Agreement. This means that the relevant elements of European Union rights and equality law can be relied upon in legal actions within the Northern Ireland courts. Under this provision it can even be said that 'there can still be a role for the Charter in Northern Ireland'.<sup>55</sup> The ongoing UK Government commitments to accelerate the process for the amendment of retained European Union law, through the proposed Brexit Freedoms Bill,<sup>56</sup> and the uncertainty around the reach of the Article 2 obligations with regard to European Union Law, thus make it imperative to map the range of European Union law which could be connected to the terms of the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.

In some important respects, the extent of the United Kingdom's binding commitments under the Withdrawal Agreement are tied to European Union law as it operated in Northern Ireland on 31 December 2020. In other regards, the United Kingdom is obliged to ensure that the law applicable in Northern Ireland tracks developments in certain parts of European Union equality law. This makes for a complex set of obligations, which are likely to make the functioning of rights and equality law in Northern Ireland increasingly different from surrounding jurisdictions in the years ahead.

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53 Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

54 European Union (Withdrawal) Act 2018, s. 5(4)-(5). See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *'Rights, Opportunities and Benefits' in Northern Ireland after Brexit* (NIHRC and IHREC, 2020) p. 44-46.

55 Brice Dickson, 'Implications for the Protection of Human Rights in a United Ireland' (2021) 32 *Irish Studies in International Affairs* 589, 595.

56 See UK Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (2022) pp. 20-33.



# Chapter 2: Equivalence and Divergence in Rights and Equality Protections in Ireland and Northern Ireland

## 2.1 Introduction

This chapter explores the current degree of equivalence and significant divergences in rights and equality protections between the jurisdictions of Ireland and Northern Ireland. It highlights the extent to which these extend to areas outside the scope of European Union law (and which are not therefore subject to the operation of the Protocol). The European Union was created as a legal order by its Member States, and its areas of competence are those which these states have granted to its institutions through the Treaties, because those states saw advantages in coordinating or harmonising the operation of certain rules between them.<sup>57</sup> From the earliest days of the European project, much of its work involved rules with regard to the trade in goods, provision of services and movement of people between Member States. All of these facets of the work of the European Union draw in issues of rights and equality of treatment, and these became significant strands of European Union law.

This chapter adopts the following structure. First, it provides an outline and context of rights and equality protection in Northern Ireland and Ireland, emphasising the different constitutional arrangements, their relationship with European Union and ECHR law, and how that affects rights and equality implementation. Secondly, it considers significant areas of equivalence and divergence in equality legislation between Northern Ireland and Ireland, highlighting which legislation has come into effect as a result of European Union law, which European Union law falls within Annex 1, as well as other areas of rights and equality outside European Union law. It highlights divergences in four areas where Ireland has higher standards of protection than Northern Ireland: lack of consolidation of rights and equality legislation; protection against age discrimination in access to goods, facilities and services; pay transparency reporting; and gender reassignment. Thirdly, the chapter highlights cross-border issues that require significant cooperation between Ireland and the United Kingdom in the Common Travel Area regarding immigration measures and childcare support.

57 The extent of European Union competences thus remains important in any discussion of rights relating to European Union measures; the provisions of the European Union CFR, for example, only apply when some aspect of European Union law is being implemented; Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Article 51.

## 2.2 Rights and Equality in Northern Ireland

### *The Northern Ireland Act 1998*

The Northern Ireland Assembly is empowered, under the Northern Ireland Act 1998 to make laws on issues that are transferred, and not categorised as ‘excepted’ or ‘reserved’ to the competence of Westminster.<sup>58</sup> Although there is no comprehensive list of transferred or devolved matters provided in the Northern Ireland Act, equality law is recognised as devolved because it is not listed as a reserved or excepted matter. The Equality Acts 2006 and 2010 largely do not extend to Northern Ireland.<sup>59</sup> While there are divergences in substantive rights between Great Britain equality law and equality law in Northern Ireland, measures have often been introduced in Northern Ireland to reflect developments in equality law in the rest of the United Kingdom. Further, jurisprudence and precedent arising from litigation under the Great Britain Equality Acts is often used in litigation to interpret Northern Ireland Orders and Regulations on equality.<sup>60</sup>

Section 75 of the Northern Ireland Act consists of an equality of opportunity duty and a good relations duty. The equality of opportunity duty, which operates independently of European Union law, requires public authorities to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without. The good relations duty, which likewise does not flow from European Union law, requires that public authorities in carrying out their functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion and racial group.<sup>61</sup>

Protection against direct discrimination on grounds of religious belief or political opinion has constitutional status in Northern Ireland. This hierarchy of a protected ground is not legally enshrined elsewhere in the United Kingdom or Ireland. The historic antecedent of this protection is found in the Government of Ireland Act 1920, which established the Parliament of Northern Ireland, and made provision for a Parliament of Southern Ireland, and which prohibited both Parliaments from making any law which prohibited the free exercise of religion or advantaged one religion over the other.<sup>62</sup> The Northern Ireland Constitution Act 1973 provided that certain types of legislation enacted by Northern Ireland’s devolved institutions

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58 Northern Ireland Act 1998, s. 4(1). ‘Excepted’ (Sched 2); ‘Reserved’ matter (Sched 3); ‘Transferred’ matter is any matter which is not excepted or reserved.

59 Although there are exceptions, for example, Equality Act 2010, s. 217(3): Each of the following also forms part of the law of Northern Ireland—(a) section 82 (offshore work); (b) section 105(3) and (4) (expiry of Sex Discrimination (Election Candidates) Act 2002); (c) section 199 (abolition of presumption of advancement).

60 See further, Brice Dickson and Brian Gormally (eds), *Human Rights in Northern Ireland: The CAJ Handbook* (Hart 2015) chapters 13-18.

61 Northern Ireland Act 1998, s. 75(2).

62 Government of Ireland Act 1920, s. 5.

should be void, to the extent that it discriminated against any person or class of persons on the ground of religious belief or political opinion.<sup>63</sup> Paragraph 3 of the Rights, Safeguards, and Equality of Opportunity section of the 1998 Agreement stipulates that the ‘British Government intends, as a priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation’. This limitation is preserved in the Northern Ireland Act.<sup>64</sup> This legislation also prohibits the Northern Ireland Assembly and Ministers for Northern Ireland departments from making any legislation or doing any act that constitutes direct discrimination on the ground of religious belief or political opinion.<sup>65</sup>

### ***Westminster Legislation and International Human Rights Obligations***

Northern Ireland equality law has also been directly influenced or changed by other domestic, transnational, and international bodies including Westminster, international human rights courts and institutions, and developments in Ireland.

Special status is accorded to the European Convention on Human Rights (ECHR), incorporated through the Human Rights Act 1998 (HRA), under the United Kingdom’s devolution arrangements. Section 6 of the Northern Ireland Act provides that ‘(1) A provision of an Act [of the Northern Ireland Assembly] is not law if it is outside the legislative competence of the Assembly’ including when the issue the Assembly has legislated upon is not a devolved issue, that is, it falls within an excepted or reserved matter. The Assembly also acts outside of its legislative competence when legislation is ‘(c) incompatible with any of the [ECHR] rights’ which are incorporated into domestic law through the Human Rights Act 1998.<sup>66</sup> Schedule 2, paragraph 3 states that excepted matters include ‘international relations, including relations with territories outside the United Kingdom...and other international organisations...but not (c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law’. Schedule 2, paragraph 3 does not mean that deciding the content of human rights is within the exclusive competence of the devolved legislature and executive. It also does not mean that the executive and legislature can choose to deny human rights observation and implementation.

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63 Northern Ireland Constitution Act 1973, s. 17(1).

64 Northern Ireland Act 1998, Schedule 14, para. 21.

65 Northern Ireland Act 1998, s. 6(2)(e) and s. 24(1)(c).

66 Section 24 states further that ‘[a] Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights’. It is important to note that the meaning of subordinate legislation under the Northern Ireland Act is different from its meaning under the Human Rights Act. The latter meaning includes Acts of the Northern Ireland Assembly, the former definition does not.

The HRA not only has retroactive effect but prospective effect through the obligation on courts to read legislation as compatible with the ECHR 'so far as it is possible' to do so.<sup>67</sup> The HRA therefore has a unique status within the United Kingdom's constitutional order. It explicitly states that the continuing operation or enforcement of subordinate legislation will be affected if it is incompatible with human rights as decided by the courts.<sup>68</sup> The HRA characterises an 'Act of the Parliament of Northern Ireland' and an 'Act of the Northern Ireland Assembly' as subordinate legislation.<sup>69</sup> Not only secondary but 'primary' legislation of the devolved legislature can be affected by the HRA. This position was confirmed in the case quashing Northern Ireland legislation which prevented same sex couples from adopting.<sup>70</sup>

In terms of rights that relate to equality under the HRA, the United Kingdom and Ireland are bound by Article 14 of the ECHR which provides for non-discrimination on the grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. It is a parasitic right which means that Article 14 cannot, in itself, create a cause of action. It must be invoked in conjunction with another substantive right. Articles 8-12 ECHR, covering the qualified rights to private and family life, religion, expression, association and marriage, can also raise matters relating to equality. United Kingdom courts and the European Court of Human Rights, on occasion, do not additionally adjudicate upon the separate requirements of Article 14 in the circumstances where the finding of a violation under another substantive right suffices.<sup>71</sup> Protocol 12 is a free-standing right of non-discrimination. Neither the United Kingdom nor Ireland have ratified this protocol due to concerns that it would generate additional rights-based litigation.<sup>72</sup>

In relation to both compliance with the ECHR incorporated through the HRA, and other international human rights and equality obligations, Westminster has taken measures in certain circumstances to ensure that Northern Ireland equality law aligns with the rest of the United Kingdom and Ireland when the Northern Ireland Assembly has not been in operation. For example, this has taken place in the context of European Union law on sex discrimination,<sup>73</sup> the introduction of same sex marriage,<sup>74</sup> and decriminalisation of abortion and provision of abortion services

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67 Human Rights Act 1998, s. 3(1).

68 Ibid, s. 3(2)(b).

69 Ibid, s. 21.

70 *Re E's application* [2007] NIQB 58, [2008] NI 11, [63] (Gillen J): '...the [HRA] clearly contemplates that subordinate legislation which is incompatible with Convention rights may be quashed...'. See further, Jack Simson Caird, 'The Supreme Court on Devolution' (House of Commons Library, [Briefing Paper Number 07670](#) (27 July 2016)).

71 See Helen Fenwick, 'Article 8 ECHR, the "Feminist Article", Women and a Conservative Bill of Rights', [UK Constitutional Law blog](#) (5 June 2013).

72 See Nicholas Grief, 'Non-discrimination under the European Convention on Human Rights: A critique of the UK Government's refusal to sign and ratify Protocol 12' (2002) 27 *European Law Review* 3.

73 Sex Discrimination (Amendment of Legislation) Regulations 2008 ([SI 2008/963](#)). See further, 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.

74 Marriage (Same-sex) Couples and the Civil Partnership (Opposite-sex) Couples Regulations 2019 introduced pursuant to s 8 of the Northern Ireland (Executive Formation etc) Act 2019.

under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>75</sup> In terms of reform of domestic violence law in Northern Ireland, in the absence of a Northern Ireland Assembly the UK Government was going to include measures in the Domestic Abuse Bill to ensure that Northern Ireland was more closely aligned with protections on domestic abuse with the rest of the United Kingdom in order to comply with its international obligations under the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).<sup>76</sup> But with the restoration of the Assembly and UK Government consultation with the Minister of Justice for Northern Ireland, it was agreed that the Assembly would introduce measures and so the provisions were removed from the Domestic Abuse Bill.<sup>77</sup>

The Vienna Convention on the Law of Treaties 1969 requires that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.<sup>78</sup> A number of factors have contributed to Westminster introducing human rights and equality measures in areas which are ordinarily considered to be within devolved competence: when Northern Ireland’s laws are anomalous with regard to the rest of the United Kingdom and/or Ireland; when Northern Ireland laws have been found to be in violation of international human rights standards in United Kingdom domestic courts; when efforts have been made over a number of years to amend the law through the Northern Ireland Assembly with no result or no prospective result; when the international human rights institutions have noted the United Kingdom’s non-conformity with their standards as a result of Northern Ireland’s lack of compliance.<sup>79</sup>

There is also the distinct issue of the UK Government taking steps to prevent devolved institutions from incorporating an international human rights treaty where it is not incorporated elsewhere in the United Kingdom. This issue arises in the context of Brexit with regard to treaties such as the UN Convention on the Rights of Persons with Disabilities (UNCRPD), and has hitherto been treated as a European Union treaty in the United Kingdom’s jurisdictions insofar as it applies to

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75 Abortion (Northern Ireland) Regulations 2020 (SI 2020/345), 25 March 2020 and Abortion (Northern Ireland) (No. 2) Regulations 2020 (SI 2020/503), 13 May 2020 pursuant to Section 9 Northern Ireland (Executive Formation and Exercise of Functions) Act 2019.

76 Istanbul Convention (adopted 11 May 2011, entered into force 1 August 2014). The Pre-legislative scrutiny committee of the Domestic Abuse Bill England and Wales: Joint Committee on the Draft Domestic Abuse Bill, Draft Domestic Abuse Bill, First Report of Session 2017-2019 para 17.

77 Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021. See ‘Further Government Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill’, Session 2017-2019 HL Paper 378/HC 2075; Draft Domestic Abuse Bill, 3 March 2020, Para 7, page 2.

78 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, Article 27.

79 For further reading on the context of Westminster legislating to introduce human rights and equality measures in Northern Ireland, see Jane Rooney, ‘Standing and the Northern Ireland Human Rights Commission’ (2019) 82 MLR 525; Conor McCormick and Thomas Stewart, ‘The Legalisation of Same-Sex Marriage in Northern Ireland’ (2020) 71 NILQ 557; Ronagh McQuigg, ‘Northern Ireland’s New Offence of Domestic Abuse’ (2021) Statute Law Review 1–19 (advanced access); Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6th March 2018, [CEDAW/C/OP.8/GBR/1](#), para. 85 and 86 (hereafter CEDAW 2018 inquiry report).

European Union obligations.<sup>80</sup> Within the United Kingdom's domestic jurisdictions, unincorporated treaties have limited significance in litigation, whereas the CJEU has drawn more extensively upon overlapping commitments by the European Union.<sup>81</sup> This generates pressures within Scotland, Wales and Northern Ireland to respond to potential shortfalls in protections following Brexit by enacting legislation to give effect to treaties with rights and equality implications which the United Kingdom has signed up to, but not incorporated into domestic law.

Different approaches to such treaties across the United Kingdom's jurisdictions may have implications for human rights and equality alignment with the Republic of Ireland and keeping pace with developments, particularly with regard to the introduction of the European Accessibility Act, and other European Union law not transposed into Northern Ireland law before the end of the transition period.<sup>82</sup> In terms of leaving the European Union, all three devolved legislatures withheld consent to the terms of the United Kingdom's Withdrawal in January 2020. The Sewel Convention, a political convention which provides that the United Kingdom Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature,<sup>83</sup> did not prevent Westminster from deciding upon the provision or deprivation of international human rights and equality measures under European Union law.<sup>84</sup>

Recently, the United Kingdom Supreme Court found that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, a bill incorporating the UN Convention on the Rights of the Child (UNCRC) into Scottish domestic law, was outside the competence of the Scottish legislature.<sup>85</sup> This was due to the particular reading of the Bill rather than a rule that devolved legislatures cannot legislate to incorporate international human rights obligations that are not incorporated elsewhere in the United Kingdom.<sup>86</sup> The devolved institutions can nonetheless incorporate international human rights treaties where they are not incorporated elsewhere in the United Kingdom, as seen in the legislation which has given effect to the UNCRC in Wales.<sup>87</sup> The 2019 Concluding Observations of CEDAW requiring decriminalisation and provision of abortion were only implemented in Northern Ireland.<sup>88</sup> Abortion has not been decriminalised in England and Wales

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80 European Communities (Definitions for Treaties) (UNCRPD) Order 2009 ([SI 2009/1181](#)).

81 See *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [79].

82 This measure is due to be transposed in Northern Ireland in June 2022.

83 Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, para. 14.

84 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [139]. See Christopher McCrudden and Daniel Halberstam, 'Miller and Northern Ireland: A Critical Constitutional Response' (2017) 8 UK Supreme Court Yearbook 1.

85 *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference by the Attorney General and the Advocate General for Scotland - European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42.

86 Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and 'Modifying' the Scotland Act', [UK Constitutional Law blog](#) (15 October 2021). By contrast, in 2011 the Welsh Government successfully made the UNCRC law in Wales, via the Rights of Children and Young Persons (Wales) Measure 2011.

87 The Rights of Children and Young Persons (Wales) Measure 2011.

88 The Abortion (Northern Ireland) (No. 2) Regulations 2020.

(it is not an issue devolved to Wales), or Scotland; some therapeutic exemptions were provided to applicable offences against the person. The example cited as regards Wales demonstrates that a devolved jurisdiction can incorporate international human rights obligations and make those rights justiciable within that nation, where no other part of the United Kingdom has incorporated those treaty provisions. Human rights commitments already operate asymmetrically across the United Kingdom.

In conclusion, in light of the fact that protection against direct discrimination on grounds of religious belief or political opinion has constitutional status in Northern Ireland by virtue of the Northern Ireland Act 1998, political and religious beliefs therefore have priority as a protected ground. The Human Rights Act 1998 has a special status within the devolution arrangement requiring devolved legislatures and executives to act within the requirements of the ECHR as interpreted by the courts. Westminster has played a role in introducing legislative reform in Northern Ireland in the areas of rights and equality within particular contexts, including in order to implement international human rights standards.

### ***Rights and Equality in Ireland***

The Equal Status Acts 2000-2018 prohibit discrimination, harassment, sexual harassment and victimisation in the disposal of goods and provision of services to the public in Ireland. This includes public services, transport, financial, housing and educational services. The Equal Status Acts also require the providers of goods and services to make reasonable accommodations for people with disabilities.<sup>89</sup> The Employment Equality Acts 1998-2015 prohibit discrimination, harassment, sexual harassment, and victimisation in employment, including in relation to access to employment, terms and conditions of employment, and dismissal. The Employment Equality Acts also require employers to make reasonable accommodation for people with disabilities.

The Equal Status Acts and Employment Equality Acts both prohibit discrimination on the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller community. The family status ground includes parents, pregnant women, and carers. In addition to these nine grounds, the Equal Status Acts specifically protect people who are in receipt of rent supplement, housing assistance, or social welfare payments from discrimination in the provision or termination of accommodation services and related services or amenities.<sup>90</sup> This legislation is, in certain respects, more extensive than Northern Ireland equality legislation, as we discuss in more detail herein.<sup>91</sup>

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89 IHREC, *The Equal Status Acts 2000-2018: A guide to your rights if you are discriminated against in accessing goods or services* (2020).

90 For more information, see the following IHREC research report, *Housing Assistance and Discrimination: Scoping study on the housing assistance ground under the Equal Status Acts 2000-2018*.

91 See section 2.3.

The Public Sector Equality and Human Rights Duty (the Public Sector Duty) is set out in section 42 of Ireland's Human Rights and Equality Commission Act 2014. It imposes a statutory obligation on public bodies to, in performing their functions, have regard to the need to eliminate discrimination, promote equality of opportunity and treatment, and protect the human rights of its staff and persons to whom it provides services.<sup>92</sup> Section 29 of the 2014 Act defines human rights, for the purposes of the Duty, as meaning those rights and freedoms of individuals which are protected by the Irish Constitution; by the European Convention on Human Rights Act 2003; and by provisions in other international treaties which have been given 'the force of law' in Ireland.

The equality legislation implements the provisions of the amended Gender Equal Treatment Directive (Recast),<sup>93</sup> Framework Employment Directive,<sup>94</sup> and Race Equality Directive.<sup>95</sup> The Traveller community ground has to be read and interpreted in the light of the Race Equality Directive. These Directives take precedence over Irish law which should be read and interpreted having regard to the provisions of the Directives, pursuant to section 2 of the European Communities Act 1972 in Ireland. This provision provides for direct incorporation of European Union law into Ireland's domestic law.<sup>96</sup>

In contrast to Northern Ireland, Ireland has a written constitution that has articles that help strengthen equality protections in some areas.<sup>97</sup> All legislative measures must be compliant with Bunreacht na hÉireann – the Constitution of Ireland – which contains articles relating to equality. Articles 40 to 44 outline the fundamental rights of 'citizens'. For example, Article 40.3.1 of the Constitution requires the State to respect, defend and vindicate, as far as it is practical, the 'personal rights of the citizen'. Furthermore, Article 40.1 states that 'all citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function'. The rights and restrictions of rights under the Constitution can be changed by referendum. The offence of blasphemy was, for example, removed

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92 This has not necessarily had as broad an affect as the duty under the Equality Act 2010 (GB) and the extensive operation of Equality Impact Assessments under its terms; see Tom Hickman, 'Too hot, too cold or just right? The development of the public sector equality duties in administrative law' [2013] Public Law 325, 340.

93 Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation replaced older directives; Directive [79/7/EEC](#) and Directive [2010/41/EU](#) contain a prohibition of direct and indirect sex discrimination applicable to statutory social security schemes and to self-employment respectively; sex discrimination is prohibited in access to and the supply of goods and services (Directive 2004/113/EC); the Pregnancy Directive (92/85/EEC); the Parental Leave Directive (2010/18/EU) and the Part-time Work Directive (97/81/EC).

94 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

95 Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

96 European Communities Act 1972 (Ireland), s. 2: [F]rom the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties. Section 2 has been subsequently amended but without changing its substantive meaning; see Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart, 2020) p. 63.

97 Although note that the Irish Constitution does not mention gender. Articles 41(2)(1) and 41(2)(2) recognise a narrow role for women, in the home and as mothers, with no similar passage regarding fathers.



from the constitution through referendum in 2018. That same referendum also made changes to the regulation of divorce by removing the constitutional requirement for a defined period of separation, and by substituting a provision on the recognition of foreign divorces.<sup>98</sup>

In terms of concerns regarding the principle of equivalence and the potential for greater rights protection in Ireland as a result of membership of the European Union, and the progressive development of European Union equality law, there are a number of points that should be kept in mind.

The Third Amendment of the Constitution Act 1972 sets out the relationship between the Irish Constitution and European Union law. It provides that ‘No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities’.<sup>99</sup> Section 2 of the European Communities Act 1972 provides for the supremacy and direct effect of European Union law. But the Irish Supreme Court has suggested that there are certain limitations on European Union law supremacy which mirror the *Solange* principle that national constitutions may resist European Union law developments when they encroach upon fundamental rights enshrined in the national constitution. In *Crotty v Taoiseach*,<sup>100</sup> it was held by a majority that where the government, in conducting foreign policy, purported to alienate any powers of government or fetter the sovereignty of the state, such action would be beyond the power conferred upon it by the Constitution. The state’s ratification of Title III of the Single European Act was outside the powers of the government in the sphere of foreign relations, and required a referendum for constitutional licence to ratify.<sup>101</sup>

Prior to constitutional reform of abortion law, the Irish judiciary held that the Irish constitution took precedence over fundamental rights regarding freedom of movement and access to services. In *SPUC v Grogan* the provision of the location, name, and contact details of abortion clinics in England in a printed guidebook was found to be unlawful.<sup>102</sup> The case was the subject of an unsuccessful preliminary reference to the CJEU.<sup>103</sup> This demonstrates the extent to which, in cases concerning morally and socially sensitive issues, the Irish Courts placed particular emphasis on the Irish Constitution, and even the CJEU adopted a restrictive approach as to whether abortion provision amounted to the provision of services.

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98 Thirty-seventh Amendment of the Constitution (Repeal of Offence of Publication or Utterance of Blasphemous Matter) Act 2018; Thirty-eighth Amendment of the Constitution (Dissolution of Marriage) Act 2019. See further below on abortion reform and reform to same sex marriage.

99 Originally Article 29.4.3°, now Article 29.4.6°, which has been subsequently amended, without changing its substantive meaning, to provide that ‘[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union ...’.

100 *Crotty v An Taoiseach* [1987] IR 713.

101 See further Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart 2020) pp. 65-66.

102 *Society for the Protection of the Unborn Child v Grogan* [1989] IR 753.

103 Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v Grogan*, [EU:C:1991:378](https://eur-lex.europa.eu/eli/j/cj/1991/378).

The principle of equivalence under the Belfast/Good Friday Agreement 1998 relates to levels of protection of human rights across the two jurisdictions on the island of Ireland. As noted above, the principle has shaped rights protections in both jurisdictions. Ireland was an original signatory to the Convention in 1950, and one of the first states to accept the right of individual petition in 1953. However, it did not incorporate the ECHR into domestic law until 2003. It was as a result of the equivalence concept under the 1998 Agreement that Ireland enacted the European Convention on Human Rights Act 2003. This measure was legislative and not constitutional, unlike the European Union treaties which are enshrined in the constitution. The 2003 Act applies residually 'where no other legal remedy is adequate and available'.<sup>104</sup> It also has hierarchically lower legal status than the Irish Constitution, existing to supplement the enumerated and unenumerated rights already operative within the constitutional order.<sup>105</sup> By contrast, under the United Kingdom's HRA 1998, the Westminster Parliament remains able to legislate contrary to Convention rights,<sup>106</sup> but the Northern Ireland Act 1998 makes it outside the competence of the Executive and Assembly to legislate or act contrary to the ECHR. With such different constitutional arrangements, direct comparisons over the effectiveness of rights protections are therefore difficult. The ECHR, moreover, allows each of the Council of Europe states to have a margin of appreciation, or degree of discretion, in deciding the scope of certain rights protections.

The ECHR Act 2003 follows the interpretative approach of the HRA insofar as the courts are only able to make a declaration of incompatibility for legislation that is not compliant with the requirements of the ECHR (rather than voiding the legislation). It also includes the obligation to interpret and apply statutes in a manner compatible with the Convention in so far as is possible.<sup>107</sup> This approach has been noted as 'odd' in the Irish context, 'given that it was developed with specific reference to the UK's tradition of parliamentary supremacy and a concomitantly weak role for the judiciary in the vindication of fundamental rights'.<sup>108</sup> The 'legal, political, and social experience of judicial rights-enforcement in Ireland would have made some form of constitutional or quasi-constitutional incorporation both politically possible and normatively desirable'.<sup>109</sup> It is possible that the Irish government were cognisant of the principle of equivalence and meeting commitments in the Belfast/Good Friday Agreement 1998 when considering the limitations on the operation of the ECHR within Ireland's domestic law under the ECHR Act 2003.<sup>110</sup>

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104 European Convention on Human Rights Act 2003, s. 5.

105 Ibid., s. 4: it is intended 'to enable further effect to be given, subject to the constitution, to certain provisions of the ECHR'.

106 In such circumstances, under section 19 of the Human Rights Act 1998, the Government is expected to acknowledge that the legislation is potentially incompatible with Convention rights, but the Government wishes to proceed anyway.

107 European Convention on Human Rights Act 2003, s. 5 (declaration of incompatibility), s. 2 (interpretation obligation).

108 Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart, 2020) p. 94.

109 Fiona de Londras, 'Declarations of incompatibility under the ECHR Act 2003: A workable transplant?' (2014) 35 *Statute Law Review* 50.

110 Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart 2020) 95-96.

There is continuing evidence that the Irish government places limitations on equality legislation to maintain alignment with the United Kingdom in certain areas. For example, Ireland is not a signatory to the Employer Sanctions Directive<sup>111</sup> as a 'result of its unique relationship with the UK'.<sup>112</sup> A key objective of the Directive is to dissuade employers from recruiting migrants in an irregular situation. Ireland's decision not to sign up to the Directive has been expressly connected to the aim of ensuring that it is not attracting undocumented workers and thereby avoid putting pressure on the Common Travel Area arrangements (which continue after Brexit, as we discuss below<sup>113</sup>). Concern over 'pull factors' for migration and entry into the Common Travel Area via Ireland have been prominent in the context of United Kingdom Home Office post-Brexit migration policy.<sup>114</sup>

In conclusion, it is clear that there has been a degree of alignment between Ireland and the United Kingdom on equality and rights protection. The different constitutional arrangements, the much more complex constitutional arrangement in Northern Ireland, and as it is outlined in the sections below, the disparate nature of Northern Ireland equality and rights law, means that there are challenges to keeping track of rights and equality alignment. Further, it causes challenges for proposing mechanisms that are complementary to both constitutional settings for ensuring alignment in the future.

## 2.3 Equivalence/Divergence in Equality Law in Ireland and Northern Ireland

### *Employment: Discrimination on Grounds of Religious Belief or Political Opinion*

Discrimination in the provision of goods, facilities or services, in employment and vocational training, on the ground of religious belief or political opinion is prohibited by the Fair Employment and Treatment (Northern Ireland) Order 1998,<sup>115</sup> an Order in Council issued under the Northern Ireland Act 1974.<sup>116</sup> In 2003, the Order was amended by the Fair Employment and Treatment Order (Amendment) Regulations (NI) to meet the requirements of the European Union Framework Directive on Employment.<sup>117</sup> The Order covers direct and indirect discrimination, harassment and victimisation, on the ground of religious belief or political opinion.<sup>118</sup> Although Ireland has long provided constitutional protections for freedom of religion,<sup>119</sup> in the

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111 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

112 33rd Dáil, Parliamentary Question to the Minister of State at the Department of Enterprise, Trade and Employment, [EU Directives](#) (2 November 2021).

113 See section 2.5.

114 See Sylvia de Mars and Colin Murray, 'With or Without EU? The Common Travel Area after Brexit' (2020) 21 German Law Journal 815.

115 Fair Employment and Treatment (Northern Ireland) Order 1998 ([SI 1998/3162](#)).

116 Northern Ireland Act 1974, Schedule 1, para. 1.

117 EU Framework Directive, Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See Mapping Exercise 1.

118 Fair employment and Treatment (Northern Ireland) Order 1998, s. 3.

119 Bunreacht na hÉireann, Article 44.

employment context these have been reinforced by statutory measures implementing the same European Union obligations.<sup>120</sup> European Union law, it should be noted, does not provide protections for religion or belief outside of the employment context.

In the employment context, discrimination on grounds of religious belief or political opinion have attracted special measures under European Union law. Positive discrimination measures were put in place from 2001-2011 to ensure that at least 50% of new recruits to the Police Service of Northern Ireland were Roman Catholics.<sup>121</sup> A special opt-out from the European Union Framework Directive had to be negotiated to make this legislation compliant with a European Union directive establishing a general framework for equal treatment in employment and occupation.<sup>122</sup> This special provision was put in place as a positive discrimination measure unique to Northern Ireland and not in place in Ireland or Great Britain.

Article 15 of the Council Directive entitled ‘Northern Ireland’ provided that ‘[i]n order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation’. Article 15(e) of the same Directive provided for the exemption for recruitment of teachers.<sup>123</sup> Both of these provisions were formulated in a manner which allowed their exceptions to be altered through domestic legislation. Westminster legislation ended the requirements in relation to police recruitment<sup>124</sup> and legislation relating to the School Teachers Exemption was passed by the Northern Ireland Assembly at the end of March 2022.<sup>125</sup>

### **Employment: Sex Discrimination**

The two pieces of legislation regulating sex discrimination in employment are the Equal Pay Act (NI) 1970 and Sex Discrimination (NI) Order 1976 which implement the Gender Equal Treatment Directive (Recast) and the Framework Directive on Employment contained in Annex 1.<sup>126</sup> While European Union law does not make

120 Employment Equality Acts 1998–2021 (Ireland), s. 37. There has been critical commentary with regard to the extent to which this statutory protection reflects the requirements of the Framework Directive on Employment; Amy Dunne, ‘Tracing the Scope of Religious Exemptions Under National and EU Law: Section 37(1) of the Irish Employment Equality Acts 1998–2011 and Ireland’s Obligations Under the EU Framework Directive on Employment and Occupation, Directive 2000/78/EC’ (2015) 31 *Utrecht Journal of International and European Law* 33.

121 Police (NI) Act 2000, s. 46.

122 EU Framework Directive, Council Directive [2000/78/EC](#), 27 November 2000. This Directive entered into force on the 2 December 2000. Member States were required to transpose the Directive into domestic law by 2 December 2003.

123 It was later challenged as a violation of the European Convention on Human Rights but was unsuccessful. *Re Parson* [2003] NICA 20, [2004] NI 38.

124 See Debbie Kohner, ‘The Equality Framework in Northern Ireland’ in Brice Dickson and Brian Gormally (eds), *Human Rights in Northern Ireland: The CAJ Handbook* (Hart, 2015) 263, p. 266. A Bill relating to the School Teachers Exemption was passed by the Northern Ireland Assembly at the end of March 2022; Fair Employment (School Teachers) Act 2022 (NI).

125 Fair Employment (School Teachers) Act 2022 (NI).

126 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and 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 (recast). See Mapping Exercise 1.

a distinction between contractual and non-contractual terms, the Equal Pay Act regulates sex discrimination arising in terms and conditions of individual contracts of employment concerning pay, whereas the Sex Discrimination (NI) Order 1976 concerns other aspects of employment including non-contractual pay and benefits. The Sex Discrimination Order goes beyond employment and also covers discrimination in the fields of education, provision of goods, facilities, services and disposal and management of premises, consent for assignment, and sub-letting. The Sex Discrimination (Northern Ireland) Order 1976, sections 30-36A, implement European Union Directive 2004/113/EC, which addresses ‘the principle of equal treatment between men and women in the access to and supply of goods and services’.<sup>127</sup> European Union law does not cover Northern Ireland sex discrimination law on education. The Employment Equality (Sex Discrimination) Regulations (NI) 2005 and Sex Discrimination (Amendment of Legislation) Regulations (NI) 2008 prohibited discrimination on grounds of pregnancy and maternity leave pursuant to the Equal Treatment Directive 2002/73/EC.<sup>128</sup> In Ireland, elements of the Employment Equality Acts 1998–2015 address these European Union obligations.<sup>129</sup>

Sex equality legislation in Northern Ireland does not prohibit discrimination by public authorities on grounds of sex in the exercise of their public functions. Section 149 of the Equality Act 2010 does prohibit discrimination by public authorities on the grounds of sex in Great Britain, as part of the public sector equality duty. The CEDAW committee in its 2019 Concluding Observations recommended that the United Kingdom ‘[e]nsure the uniform and effective application of the public sector equality duty, so that all public bodies across its jurisdiction systematically undertake gender equality impact assessments’.<sup>130</sup>

### ***Employment: Sex Discrimination - Pay Reporting Transparency***

Section 19 of the Employment Act (Northern Ireland) 2016 sets out the requirement for employers to publish information relating to the pay of employees for the purpose of showing whether there are differences in the pay of male and female employees.<sup>131</sup> Section 19 has not yet been brought into force. The requirement to ensure equal pay is set out in European Union Directive 2006/54/EC, the Gender Equal Treatment Directive (Recast), contained in Annex 1, as complemented in 2014 by a Commission Recommendation on pay transparency.<sup>132</sup>

Although there is no underpinning European Union law on pay transparency as of yet, on 4th March 2021, the European Commission produced a Proposal for a directive to strengthen the application of the principle of equal pay for equal

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127 Council Directive [2004/113/EC](#) of 13 December 2004.

128 A directive not listed in Annex 1.

129 Employment Equality Acts 1998–2015 (Ireland), ss. 18-27.

130 See CEDAW Committee, *Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland* (2019) para. 16(b).

131 It also required employers to publish information on disability pay gaps and ethnic pay gaps.

132 EU Commission, [Commission Recommendation on pay transparency and the gender pay gap - Frequently Asked Questions](#) (7 March 2014).

work or work of equal value between men and women through pay transparency and enforcement mechanisms. Article 8 of Chapter II, 'Pay Transparency' imposes a requirement on Member States to report 'on pay gap between female and male workers. This provision requires employers with at least 250 workers to make publicly available and accessible certain information such as the pay gap between female and male workers in their organisation...'.<sup>133</sup> Northern Ireland equality legislation does not include provisions on pay gap reporting. This is at odds with the European Union recommendations, Republic of Ireland legislation, and equality legislation in Great Britain.

In Ireland, the Gender Pay Gap Information Act 2021 was signed into law on 13 July 2021. Once commenced by ministerial order, it will require private and public sector employers, subject to employment thresholds, to report and publish information relating to their gender pay gap, and, where there is a gap, to explain why there is a gap and what measures are being taken to reduce it.<sup>134</sup> Once commenced, the mandatory reporting obligations will initially only apply to employers with more than 250 employees, with the Act applying to employers with more than 150 employees after 2 years and to employers with more than 50 employees after 3 years. Employers with less than 50 employees will not be required to report. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 apply to all private and voluntary sector employers with 250 or more employees in Great Britain. The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 apply to specified English authorities, specified cross-border authorities and specified non-devolved authorities across England, Scotland and Wales. It has been suggested that Northern Ireland introduce pay gap reporting mechanisms either in line with European Union/Great Britain provisions or the Republic of Ireland, in compliance with the principle of equivalence. For example, the CEDAW Committee in its 2019 Concluding Observations to its eighth periodic report recommended that the UK Government afford the same protection provided through the Equality Act 2010 to ensure provisions of gender pay gap reporting are brought into effect in Northern Ireland.<sup>135</sup>

### ***Age Discrimination in Access to Goods, Facilities and Services***

The Employment Equality (Age) Regulation (NI) 2006 protects against age discrimination in the employment context and in some educational sectors.<sup>136</sup> Unlike in Great Britain and Ireland, there is still no general protection in Northern Ireland against age discrimination in access to goods, facilities and services.<sup>137</sup> There is a draft European Union Directive on prohibiting age discrimination in access to goods,

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133 EU Commission, Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [4.3.2021 COM\(2021\) 93](#).

134 Gender Pay Gap Information Act 2021 (Ireland).

135 Committee on the Elimination of Discrimination against Women, *Concluding observations on the 8th periodic report of United Kingdom of Great Britain and Northern Ireland (2019)* [CEDAW/C/GBR/CO/8](#), para. 44(c).

136 See further, Employment Equality (Repeal of Retirement Age Provisions) Regulations.

137 Equality Commission for Northern Ireland, [Gaps in equality law between Great Britain and Northern Ireland](#) (March 2014).

facilities and services, as well as religion and belief, which has yet to be finalised and brought into force.<sup>138</sup> In Ireland, the Equal Status Acts 2000-2018 list age as a protected characteristic<sup>139</sup> and prohibits discrimination against adults on grounds of age in the disposal of goods and provision of services.<sup>140</sup>

### **Gender Reassignment**

Northern Ireland has legislation that protects against indirect discrimination on the grounds of gender reassignment in the areas of employment and vocational training, pursuant to European Union case law.<sup>141</sup> However, recent CJEU case law has exposed the lack of protection against direct discrimination in the United Kingdom in the area of social security. In the 2018 case of *IMB v Secretary of State for Work and Pensions*, the applicants successfully invoked the 1978 European Union Directive on Equal Treatment for Men and Women in Matters of Social Security to argue that a refusal to grant her a pension at the female retirement age in national courts because she had not annulled her marriage amounted to direct discrimination.<sup>142</sup>

The Gender Recognition Act 2015 in Ireland has provided a mechanism for transgender individuals to have their preferred gender legally recognised by the State. When (adult) applicants in Ireland provide a statutory declaration in the prescribed form requesting a permanent change in their legal gender status, they are (generally) subject to no further pre-conditions and are issued a gender recognition certificate.<sup>143</sup> A person aged 16 or 17 may also apply for a gender recognition certificate, however this must be done on their behalf by an adult and the process is subject to a number of pre-conditions being met, including the provision of medical certificates and the consent of a parent or guardian. Scotland has introduced proposals for a system of self-declaration, under its draft Gender Recognition Reform (Scotland) Bill (the draft Bill).<sup>144</sup> Section 2 of the United Kingdom's Gender Recognition Act 2004, which applies to Northern Ireland, requires that applicants must provide evidence that they: have or have had 'gender dysphoria' (a mental health classification associated with experiencing distress because of one's gender identity); and have lived in their preferred gender for a period of two years prior to their application.<sup>145</sup>

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138 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, [02.07.2008 COM\(2008\) 426](#).

139 Equal Status Act 2000, s. 3(2)(f).

140 Equal Status Act 2000, s. 5.

141 Sex Discrimination (Gender Reassignment) Regulations (NI) 1999; Case C-13/94, *P v S and Cornwall County Council*, [EU:C:1996:170](#).

142 Case C-451/16 *IMB v Secretary of State for Work and Pensions*, [EU:C:2018:492](#), relevant to Directive [79/7/EEC](#), 19 December 1978.

143 Argentina, Malta, Denmark, Ireland, Norway, Sweden, Colombia and Belgium have adopted gender self-identification.

144 Scottish Government, Gender Recognition Reform (Scotland) Bill: A consultation by the Scottish Government, December 2019.

145 Though see [JR111's application for judicial review \[2021\] NIQB 48](#), in which *Scofield J* considered that the use of 'disorder' to classify gender dysphoria in the Gender Recognition Act 2004 was incompatible with the rights of trans individuals under Article 8 of the ECHR (at [156]). The precise relief flowing from this finding was subject to further submissions from the parties to the case and has not been published in the judgment. Thus, it is not known, at the time of writing, whether *Scofield J* will grant a declaration of incompatibility or read the Gender Recognition Act using powers under section 3 of the Human Rights Act 1998.

Under European Union law, individuals who have lived for a significant period as persons of a gender other than their birth gender and who have undergone gender reassignment must be considered transgender.<sup>146</sup> Following an inquiry and consultation into reform of the 2004 Act, the United Kingdom Parliament's Women and Equalities Committee proposed that 'the requirement of a diagnosis of gender dysphoria in order to obtain a Gender Recognition Certificate should be removed from the Gender Recognition Act, moving the process closer to a system of self-declaration'.<sup>147</sup>

### **Sexual Orientation**

In relation to sexual orientation, the Employment Equality (Sexual Orientation) Regulations (NI) 2003 were brought forward under direct rule. Parts II and III, which protect against discrimination on grounds of sexual orientation in the context of employment and vocational training, implement European Union Directive 2000/78/EC.<sup>148</sup> This is one of the Annex 1 Directives. The Equality Act (Sexual Orientation) Regulations (NI) 2006 dealing with discrimination outside employment and training were introduced under section 82 of the Equality Act 2006, and not as a result of European Union law.

Legislative developments on same sex civil partnership and marriage have taken place in Northern Ireland and Ireland. These developments were not as a result of European Union law; it is not within the competence of the European Union to harmonise approaches to these issues across Member States. The Civil Partnership Act 2004, an Act of the United Kingdom Parliament, introduced civil partnerships for same-sex couples across the United Kingdom, including Northern Ireland. Section 8 of the Northern Ireland (Executive Formation etc) Act 2019 imposed a duty on the Secretary of State for Northern Ireland to make regulations to enable same-sex marriage and opposite-sex civil partnerships in Northern Ireland by 13 January 2020. That duty came into force on 22 October 2019 in the absence of a restored Northern Ireland Executive by 21 October 2019. The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 allowed same-sex couples in Northern Ireland to form a civil marriage and opposite-sex couples to register a civil partnership. The Marriage and Civil Partnership (Northern Ireland) (No. 2) Regulations 2020 allow same-sex couples to convert a civil partnership to a marriage, and opposite-sex couples to convert a marriage to a civil partnership, in Northern Ireland.

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146 Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, [EU:C:2006:256](#).

147 Women and Equalities Committee, *Reform of the Gender Recognition Act*, Third Report of the Session 2021-22, (2021) HC 977, para. 96. The UK Government's rejection of this recommendation has recently been published as an [annex](#) to the report.

148 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See Mapping Exercise 1.



In Ireland, civil partnerships for same-sex couples were first introduced by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Following a successful referendum campaign in 2015, Article 41(4) of the Irish Constitution was amended to make provision for same sex marriage in 2015.<sup>149</sup> The fact that Northern Ireland was not in conformity with Ireland in this regard was a factor which influenced debates over reform in Northern Ireland.<sup>150</sup>

### **Reproductive Rights**

In 2018, a referendum in Ireland resulted in a repeal of the eighth amendment to the Irish Constitution, which had had the effect of limiting the legal circumstances of abortion to when the pregnant person's life was at risk, and the introduction of the thirty-sixth amendment, which provided for the regulation of termination of pregnancy. Regulation was subsequently made by way of the Health (Regulation of Termination of Pregnancy) Act 2018.<sup>151</sup> As with gay marriage, the fact that after this referendum the law in force in Northern Ireland with regard to abortion was so divergent from the law in Ireland was a factor which influenced debates over the reforms in Northern Ireland discussed above.<sup>152</sup>

### **Racial Discrimination**

The UN Committee on the Elimination of Racial Discrimination's criticism of the United Kingdom for failing to enact anti-racism legislation for Northern Ireland was instrumental in securing the enactment of the Race Relations (Northern Ireland) Order 1997 (amended by the Race Relations (Amendment) Regulations (Northern Ireland) 2003 and 2009). The European Union Race and Ethnic Origin Directive<sup>153</sup> and Framework Directive<sup>154</sup> have altered the law in this area. The 2003 Regulations implement the European Union Burden of Proof Directive<sup>155</sup> which changes the onus of showing that the actions of the respondent were not discriminatory from the applicant to the respondent. The Order outlaws racial discrimination in the workplace, in education, in the availability of goods, facilities and services, and in the disposal and management of premises. These measures further prohibit discrimination or harassment by public authorities in administering social security, healthcare, or other 'social advantage' not falling within 'goods, facilities or services'.<sup>156</sup>

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149 Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015, which provided that marriage may be contracted in accordance with law by two persons without distinction as to their sex.

150 See Jane Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82 MLR 525.

151 Thirty-sixth amendment of the constitution act 2018, which provided for the regulation of termination of pregnancy. See Fiona de Londras and Máiréad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol UP, 2018).

152 See section 2.2.

153 Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

154 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See Mapping Exercise 1.

155 Council Directive [97/80/EC](#) of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

156 See further Ciaran White, 'Race Discrimination' in Brice Dickson and Brian Gormally, *Human Rights in Northern Ireland: the CAJ Handbook* (Hart 2015) p. 329.

The Equal Status Acts 2000-2018 implement the European Union Race Directive and Gender Goods and Services Directive in Ireland.<sup>157</sup> They protect against discrimination in buying products and accessing services including public services, transport, financial, and educational services. Similar protections in respect of discrimination in the workplace are set out in the Employment Equality Acts 1998-2015. Both pieces of legislation cover nine protected grounds including race, which includes a person's race, colour, nationality or ethnic or national origins. Membership of the Traveller Community is covered under racial discrimination in both Northern Ireland and Ireland pursuant to the Race Directive. This is an area where European Union law has facilitated convergence in rights and equality protection on the island of Ireland.

### **Disability Discrimination**

The Disability Discrimination Act 1995 prohibits direct and indirect discrimination faced by people with disabilities in Northern Ireland in employment, goods, facilities and services, in the disposal and management of premises, and by public authorities in the exercise of their public functions.<sup>158</sup> European Union law has led to changes in the operation of this legislation, including the Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004, the Disability Discrimination (NI) Order 2006, and the Special Educational Needs and Disability (NI) Order 2005. However, there is no underpinning European Union law as regards disability rights outside of the workplace that are covered by Northern Ireland legislation. The Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission are the independent mechanism for monitoring implementation of UNCRPD in Northern Ireland under article 33(2).

The Equal Status Acts 2000-2018 in Ireland prohibit discrimination, harassment, sexual harassment and victimisation of people with disabilities in the disposal of goods and provision of services. They also require the providers of goods and services to make reasonable accommodations for people with disabilities.<sup>159</sup> Similar protections in respect of discrimination and reasonable accommodation in the workplace are set out in the Employment Equality Acts 1998-2015. The definition of disability operating in Ireland under this legislation is broader in its scope than European Union law.<sup>160</sup> Furthermore, the Disability Act 2005 places a statutory

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157 Council Directive [2000/43/EC](#) of 29 June 2000 implementing equal treatment between persons irrespective of racial or ethnic origin contained in Annex 1; Council Directive [2004/113/EC](#) of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services contained in Annex 1.

158 The Disability Discrimination (Meaning of Disability) Regulations (NI) 1996 set out the definition of disability.

159 IHREC, 'The Equal Status Acts 2000-2018: A guide to your rights if you are discriminated against in accessing goods or services' (2020).

160 The definition of disability in Ireland's Equal Status Acts 2000-2018 and Employment Equality Acts 1998-2015 does not require that an impairment be of a certain severity in order for someone to be protected under the disability ground. See IHREC, [Submission on the Review of the Equality Acts](#) (December 2021) p. 23. The definition that applies to the EU Framework Directive, which has been developed in the case law of the Court of Justice of the European Union, requires that individuals have an identifiable limitation related to an impairment which explicitly impacts on their ability to work. See Lisa Waddington, 'Saying All the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law' (2015) 22 *Maastricht Journal of European and Comparative Law* 576-591.

obligation on public service providers to support access to services and facilities for people with disabilities generally. The Irish Sign Language Act 2017 recognises the right of Irish Sign Language (ISL) users to use ISL as their native language and the corresponding duty on all public bodies to provide ISL users with free interpretation when availing of or seeking to access statutory entitlements and services. The Irish Human Rights and Equality Commission is the designate independent mechanism for monitoring implementation of UNCRPD in Ireland under article 33(2) of that Convention.<sup>161</sup>

European Union law has thus facilitated convergence in equality law between Northern Ireland and Ireland in terms of protection against disability discrimination. The developments in the protection against discrimination in the provision of goods and services, however, provide an example of how Ireland's equality law is developing beyond the baseline requirements of the Directives relating to equality, and of the space this opens up for cross-border divergence.

## 2.4 Lack of Consolidated Rights and Equality Legislation in Northern Ireland

Incremental change to non-discrimination legislation in Northern Ireland, including significant amendments and updates required by European Union law to implement and incorporate European Union regulations and directives, has left Northern Ireland equality law 'piecemeal, complex, inconsistent and incomplete'.<sup>162</sup> In Northern Ireland there are over 80 operative pieces of legislation, conferring different levels of protection, which is confusing for employers, service providers and, most importantly, individuals who may be subject to discrimination. This raises serious concerns regarding access to justice, as it is difficult for an individual to navigate all of the legislation.<sup>163</sup>

The Committee of the Convention on the Elimination of Racial Discrimination made recommendations that the United Kingdom should adopt a single equality law and a Bill of Rights, or that the Equality Act 2010 is extended to Northern Ireland.<sup>164</sup> Further recommendations have been made to introduce consolidated codification of rights and equality legislation, including a Charter of Rights for the Island of Ireland in order to more fully comply with the principle of equivalence under the Belfast/Good Friday Agreement 1998,<sup>165</sup> the Ad hoc Committee on a Bill of Right's most recent

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161 The Assisted Decision-Making (Capacity) (Amendment) Bill 2021 proposes to provide a statutory basis for the Commission's UNCRPD monitoring role by way of amendment to the Irish Human Rights and Equality Commission Act 2014. See Head 85, [Assisted Decision-Making \(Capacity\) \(Amendment\) Bill 2021](#).

162 Debbie Kohner, 'The Equality Framework in Northern Ireland' in Brice Dickson and Brian Gormally (eds), *Human Rights in Northern Ireland: The CAJ Handbook* (Hart, 2015) 263, p. 266.

163 Ibid, p. 270.

164 Committee on the Elimination of Racial Discrimination, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (14 September 2011) [CERD/C/GBR/CO/18-20](#), para. 19.

165 See NIHRC/IHREC, [Advice of the Joint Committee on a Charter of Rights for the Island of Ireland](#) (2011). See also Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021) Chapters 6 and 7.

proposals for a Northern Ireland Bill of Rights,<sup>166</sup> and the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission have both supported and called for the adoption of a Single Equality Act.<sup>167</sup>

In contrast to Northern Ireland, Ireland has consolidated equality laws in the Equal Status Acts 2000-2018 and the Employment Equality Acts 1998-2015. This ensures a comprehensive source of equality legislation and facilitates equal access to justice. Consolidated rights and equality legislation would facilitate the work of both the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission in carrying out their duties to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment under Article 2 of the Protocol.

## 2.5 Ireland and the United Kingdom: Interconnections

When Ireland and the United Kingdom were both part of the European Union they agreed arrangements with the European Union to prevent European Union law from impacting upon the working of the Common Travel Area.<sup>168</sup> In addition to not joining the Schengen Agreement, Ireland and the United Kingdom secured opt-outs from the area of freedom, security and justice, and often co-ordinated their use of opt-outs in light of the workings of the Common Travel Area.<sup>169</sup> This co-ordination has consequences for the legal protections available in Ireland. For example, Ireland opted out of the Employer Sanctions Directive,<sup>170</sup> which provides some protections for undocumented migrant workers, as a 'result of its unique relationship with the UK'.<sup>171</sup>

The Withdrawal Agreement permits the United Kingdom and Ireland to continue to operate the Common Travel Area provided its workings do not conflict with Ireland's European Union obligations.<sup>172</sup> Notably, Article 3(2) of the Protocol indicates that:

The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.

166 Ad Hoc Committee for a Bill of Rights, [Report of the Ad Hoc Committee on a Bill of Rights](#) (2022) NIA 156/17-22.

167 See, for example, ECNI, [Response Of The Commission For Northern Ireland To The Proposals For A Single Equality Bill For Great Britain](#) (September 2007).

168 Treaty on the Functioning of the European Union 2008 O.J. (C 115), Protocols 19-21.

169 See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, [Discussion Paper on the Common Travel Area](#) (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018) pp. 28-29.

170 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

171 33rd Dáil, Parliamentary Question to the Minister of State at the Department of Enterprise, Trade and Employment, [EU Directives](#) (2 November 2021).

172 [Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union](#) (30 January 2020), Protocol on Ireland/Northern Ireland, Article 3. See Sylvia de Mars and Colin Murray, 'With or Without EU? The Common Travel Area after Brexit' (2020) 21 *German Law Journal* 815, 824-826.

Nonetheless, since the end of the Brexit transition/implementation period, the United Kingdom has sought to diverge from European Union law related to migration. The Nationality and Borders Act, passed in April 2022, for example, makes explicit provision to disapply elements of the Trafficking Directive which had been part of retained European Union law.<sup>173</sup> This removal of protections, insofar as they apply to Northern Ireland, raises issues for the implementation of Article 2 which will be explored later in this report.<sup>174</sup>

Following Brexit, moreover, there is not the same facility for the United Kingdom and Ireland to align in terms of the opt outs that both are taking. As a result, either the United Kingdom will have to explicitly inform Ireland which European Union measures relating to freedom, security and justice it regards as inimical to the maintenance of the Common Travel Area (in effect, instructing Ireland which opt outs it should exercise) or the Irish Government will have to explain policy choices. These choices will either involve prioritising the perceived needs of the Common Travel Area or the priorities of European Union law, against a backdrop of increasing divergences between Ireland and the United Kingdom in terms of the law applicable to migration resultant from the UK Government's post-Brexit priorities. In either eventuality, the outworking of Brexit will have implications for rights and equality protections related to migration in Ireland.

The United Kingdom and Ireland have put in place equality measures to assist in childcare support post-Brexit. A Memorandum of Understanding has been concluded between both states which, in part, addresses childcare support for cross-border workers claiming benefits.<sup>175</sup> Prior to this non-binding agreement, United Kingdom social security law confined payment of Working Tax Credit and its successor benefit, Universal Credit, to families using accredited childcare providers.<sup>176</sup> Following a legal challenge, the Child Benefit and Child Tax Credit (Persons of Northern Ireland) (Amendment) Regulations 2020 were passed in Northern Ireland to enable accredited childcare approved in other states to be recognised for financial support within Universal Credit, one of the purposes of which was to assist working families on low incomes.<sup>177</sup> This is an example of UK-Ireland cooperation in ensuring equality measures dealing with the specific circumstances of working cross-border on the island of Ireland are put in place post-Brexit.

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173 Directive [2011/36/EU](#) and Nationality and Borders Act 2022 (UK), s. 73.

174 See Chapter 3. These developments have been the subject of critical commentary; NIHRC/ECNI, [Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#) (27 January 2022).

175 *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and Associated Reciprocal Rights and Privileges* ([8 May 2019](#)).

176 Social Security (Claims and Payments) Regulations Part 11 Claims.

177 See further Emily Logan and Les Allamby, 'A peace treaty and Human Rights Protection on the island of Ireland' (2021) 43 HRQ 538-566.

## 2.6 Conclusion and Recommendations

This chapter has provided an overview of how, prior to the end of the Brexit transition/implementation period, European Union law facilitated the alignment of many laws on rights and equality in Northern Ireland and Ireland. However, there remain significant areas of divergence across these legal systems and some of these are the subject of draft European Union proposals that could soon come into effect. The following material summarises the major existing divergences, before we turn to consider the application of Article 2 of the Protocol given this rights and equality situation.

Our **recommendations** are:

**Consolidated Rights and Equality Legislation:** Northern Ireland's rights and equality law is not comprehensively codified. Ireland has consolidated equality laws in the Equal Status Acts 2000-2018 and the Employment Equality Acts 1998-2015. This ensures a comprehensive source of equality legislation, and facilitates equal access to justice. Consolidated rights and equality legislation in Northern Ireland is a preliminary step that we **recommend**<sup>178</sup> should be taken, not only to provide better protection against multiple forms of discrimination, but also to facilitate the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission in carrying out their duties to oversee, and report on, rights and equalities issues falling within the scope of the commitment under Article 2 of the Protocol.

**Age Discrimination in Access to Goods, Facilities and Services:** There is still no general protection in Northern Ireland against age discrimination in access to goods, facilities and services.<sup>179</sup> As discussed below,<sup>180</sup> there is a draft European Union Directive on prohibiting age discrimination in access to goods, facilities and services, as well as religion and belief, which has yet to be finalised and brought into force.<sup>181</sup> In Ireland, the Equal Status Act 2000 lists age as a protected characteristic<sup>182</sup> and prohibits discrimination against adults on grounds of age in the disposal of goods and provision of services.<sup>183</sup> This is a major shortfall in equivalence of protection across the jurisdictions which we **recommend** be addressed in Northern Ireland legislation.

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178 A summary of recommendations is provided at the end of the report.

179 ECNI, *Gaps in equality law between Great Britain and Northern Ireland* (March 2014).

180 See Chapter 4, section 3.

181 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, [2.7.2008 COM\(2008\) 426 final](#), 2008/0140 (CNS).

182 Equal Status Act 2000 (Ireland), s. 3(2)(f).

183 Equal Status Act 2000 (Ireland), s. 5.

**Pay Transparency Reporting:** Within a 2021 European Commission proposal for a new directive to strengthen the application of the principle of equal pay for equal work, Article 8 of Chapter II, on ‘Pay Transparency’, would introduce a requirement on Member States to report ‘on the pay gap between female and male workers. This provision requires employers with at least 250 workers to make publicly available and accessible certain information such as the pay gap between female and male workers in their organisation...’.<sup>184</sup> Ireland introduced the Gender Pay Gap Information Act 2021 in July 2021 which, when commenced, will impose a mandatory reporting obligation on employers with more than 250 employees (extending to employers with more than 150 employees after 2 years and employers with more than 50 employees after 3 years). In Great Britain, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 apply to all private and voluntary sector employers with 250 or more employees. We **recommend** that section 19 of the Employment Act (Northern Ireland) 2016 should be brought into force in order to keep pace and align with rights and equality protection in Ireland and the rest of the United Kingdom.<sup>185</sup>

**Gender Reassignment:** A divergence has emerged regarding laws on gender reassignment in Northern Ireland and Ireland regarding the right of trans individuals to self-declaration. In Ireland, the Gender Recognition Act 2015 provides a mechanism based on self-declaration for transgender individuals over the age of 18 to have their preferred gender legally recognised by the State. Scotland is introducing proposals for a system of self-declaration.<sup>186</sup> In Northern Ireland, as in England and Wales, the applicant must provide evidence that they have or have had ‘gender dysphoria’ and have lived in their preferred gender for a period of two years prior to their application. We **recommend** that this divergence be the subject of urgent consideration.<sup>187</sup>



184 EU Commission, Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms [4.3.2021 COM\(2021\) 93 final](#).

185 See also ECNI, [Gender Pay Strategy and Pay Reporting - Policy Recommendations](#) (August 2019).

186 Scottish Government, Gender Recognition Reform (Scotland) Bill: A consultation by the Scottish Government, December 2019.

187 See ECNI, [Gender Law Reform Summary Report: Policy Priorities and Recommendations](#) (November 2016), p. 11.

# Chapter 3: Overview of Article 2 of the Protocol

## 3.1 Introduction

Article 2 of the Protocol has already been the subject of extensive analysis.<sup>188</sup> This chapter will not seek to rehearse this material. Nonetheless, it is important to briefly explain the structure of the provision and the obligations it generates. This chapter will thus provide a detailed account of the operation of Article 2 of the Protocol on Ireland and Northern Ireland, on the direct effect of its terms within the meaning of Article 4 of the Withdrawal Agreement,<sup>189</sup> and of the implications of these rules for courts and tribunals within Northern Ireland (including the extent to which they oblige those bodies to draw upon CJEU case law in their implementation of European Union law rules). It will also consider the UK Government's stated views on the operation of Article 2, briefly note the work of the Commissions established to monitor compliance with Article 2, as well as the other oversight mechanisms and the process by which updates to European Union rules are considered under Article 13 of the Protocol.

## 3.2 Operationalising Article 2's Commitments

### *Substantive Rights and Equality Protections*

The United Kingdom's Article 2 obligations relate to the specific Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement and not to other parts relevant to rights and equality issues. The Northern Ireland High Court has already noted that claims related to Article 2 must draw upon the terms of that part of the 1998 Agreement,<sup>190</sup> and that Article 2 does not extend to cover the parts of the Agreement related to the birthright of the people of Northern Ireland to identify and be accepted as British, or Irish, or both.<sup>191</sup>

Article 2 commits the United Kingdom to ensuring that no diminution of the range of protections covered in this section of the Agreement 'results from its withdrawal from the Union'. This can be read as a 'but for' test; 'whether *but for* the UK's exit

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188 See, for example, Paul Evans, Alexander Horne and Tasneem Ghazi, *Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol under the UK's January 2020 Withdrawal Agreement with the EU* (ECNI, 2022).

189 Article 4 of the Withdrawal Agreement provides, amongst other things, 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'.

190 *Re Chuinneagain's Application for Judicial Review* [2021] NIQB 79, [26] (Scofield J). This decision could be subject to appeal, but academic commentary supports Scofield J's position; Christopher McCrudden, 'Rights and Equality' in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2021) 143, p. 145.

191 *Ibid*, para. 22-23. See also: *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), Article 1(vi).



that diminution would have been able to occur, legally'.<sup>192</sup> This commitment covers legal developments which arise from devolved legislation, Westminster legislation which applies in Northern Ireland, and changes in case law. We will unpack the extent of this obligation in terms of its reach into different elements of European Union law in the forthcoming chapters, but for now it suffices to note that this language covers European Union law in force in the law of Northern Ireland at the date at which Brexit became effective (the end of the transition/implementation period on 31 December 2020) which contributes to securing the 1998 Agreement's commitments to rights, safeguards and equality of opportunity, and prevents diminutions to those protections as a result of Brexit.

Although Article 2 also involves explicit commitments with relation to the six European Union Directives related to equality listed in Annex 1 to the Protocol,<sup>193</sup> requiring that the law in operation in Northern Ireland reflects developments to these Directives as part of European Union law, the language of Article 2 is expansive. The broader commitment to non-diminution of rights and equality protections extends beyond these Directives to other relevant areas of European Union law. As a result, no analysis of the operation of Article 2 is complete if it becomes fixated upon the specific provisions in Annex 1. One of the priorities of this report is to map the extent to which European Union law is relevant to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. The UK Government has confirmed that Article 2 of the Protocol comes within the ambit of Article 4 of the overall Withdrawal Agreement, meaning that it can be relied upon in litigation and that its terms are covered by the European Union law concepts of direct effect and supremacy.<sup>194</sup>

Reflecting these commitments, Schedule 3 to the European Union (Withdrawal Agreement) Act 2020 amends the Northern Ireland Act 1998, introducing a restriction on the legislative competence of the Northern Ireland Assembly and the powers of Northern Ireland Ministers and departments, which prevents them from acting in a way which is incompatible with Article 2(1) of the Protocol. Section 7A of the European Union (Withdrawal) Act 2018 establishes a more general recognition that Westminster legislates in light of the United Kingdom's Withdrawal Agreement commitments, which it must be emphasised encompasses Article 2.

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192 Christopher McCrudden, 'Rights and Equality' in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2021) 143, p. 148 (emphasis in the original).

193 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; 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; Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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; 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.

194 Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020). This parliamentary response is discussed in Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *'Rights, Opportunities and Benefits' in Northern Ireland after Brexit* (NIHRC and IHREC, 2020) p. 43.

### *The Dedicated Mechanism*

The European Union (Withdrawal Agreement) Act in 2020 empowered the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission to monitor the implementation of Article 2(1) of the Protocol.<sup>195</sup> These oversight powers, which reflect functions of both Commissions and which can be exercised jointly, or separately, are important and wide ranging.<sup>196</sup> They include a pre-legislative oversight role. This enables the Commissions to monitor and report to the UK Government and Northern Ireland Executive on the implementation of Article 2(1), require a response to their recommendations, and enable them to issue formal advice to the Assembly on compatibility of legislative proposals with Article 2(1). This role is significant and should allow Northern Ireland's statutory Commissions to be proactive in advising on the scope of the obligations under Article 2.

A second element places a duty upon the Commissions to educate and inform the general public in Northern Ireland about the operation of Article 2.<sup>197</sup> However it is the third element which may be most notable: the power to bring, intervene in, or assist persons with, legal proceedings in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol.<sup>198</sup> Importantly, Article 4 of the Withdrawal Agreement provides, amongst other things, 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'. This requirement, as noted above, is reflected in section 5 of the 2020 Act, which introduced section 7A into the European Union (Withdrawal) Act 2018.

This is a particularly significant provision. The House of Lords Constitution Committee observed that it ensures that 'the legal supremacy of the Agreement, apply to all aspects of the Agreement through, if necessary, the disapplication of 'inconsistent or incompatible domestic provisions'.<sup>199</sup> It functions in a similar way to section 2 of the European Communities Act 1972 when the United Kingdom was a Member State. Although not a European Union law treaty, the Agreement's provisions are intertwined with the European Union law concepts of direct effect and supremacy. This means Article 2 continues to be enforceable within Northern Ireland's courts and tribunals after Brexit (an issue which is discussed in further detail below).

Finally, there is likely to be some monitoring of the obligations under Article 2 by the Specialised Committee that was established under the Withdrawal Agreement which is dedicated to the implementation of the Protocol on Ireland/Northern Ireland.

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195 European Union (Withdrawal Agreement) Act 2020, Schedule 3.

196 Any such reports are made to both the Secretary of State for Northern Ireland and the Executive Office in Northern Ireland and should be laid before Parliament and the Northern Ireland Assembly. Additionally, a report made under s78B 'may require the Secretary of State or the Executive Office in Northern Ireland to reply in writing to any recommendations contained in the report, explaining what steps have been taken or are planned in response to the recommendations'.

197 Northern Ireland Act 1998, s. 78A and 78B.

198 Northern Ireland Act 1998, s. 78C and 78D.

199 House of Lords Constitution Committee, *European Union (Withdrawal Agreement) Bill*, 1st Report of Session 2019-2021 (2021) HL 5.

How the Commissions might interact with the Joint and Specialised Committees established under the Withdrawal Agreement was considered in some detail in the 2021 expert report.<sup>200</sup>

### 3.3 The UK Government's Account of the Article 2 Obligations

In August 2020, the UK Government published a document, entitled '*Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland*' (hereafter '*the Explainer*'), in which it gave an account of what it believed to be the United Kingdom's obligations under Article 2.<sup>201</sup> This document set out the Government's views on a number of important issues, including: what the commitment to 'no diminution of rights, safeguards and equality of opportunity' means; who is covered by the commitment; which rights are in scope and what will amount to a breach; how the UK Government is implementing the commitment; and what remedies will be available should a breach occur.

The Government acknowledged that '[o]ur international obligations under the Withdrawal Agreement became United Kingdom domestic law when Parliament passed the European Union (Withdrawal Agreement) Act 2020 in January 2020'.<sup>202</sup> The *Explainer* sets out the twin obligations which exist under Article 2(1). The first is that the UK Government must 'ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the United Kingdom leaving the EU'.<sup>203</sup> Second, the *Explainer* also acknowledges that the commitment to no-diminution of rights has 'a future-facing element'.<sup>204</sup> In practice, this means that:

Any relevant new protections implemented in domestic law in Northern Ireland between now and the end of the transition period will also fall within the scope of the 'no diminution' commitment. In addition, in the event that certain provisions of EU law setting out minimum standards of protection from discrimination – those listed in Annex 1 to the Protocol – are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections.<sup>205</sup>

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200 See Paul Evans, Alexander Horne and Tasneem Ghazi, [Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#) (ECNI, 2021).

201 UK Government, [UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020).

202 Ibid., para. 5.

203 Ibid., para. 6.

204 Ibid., para. 7.

205 Ibid., para. 7.

This future facing commitment applies only to the six Directives set out in Annex 1 to the Protocol and not to other existing European Union Directives that provide rights for equality, or future European Union equality related Directives that may be introduced (save to the extent that they might result in changes to the Directives included in Annex 1).

The *Explainer* also sets out the scope of the rights which are protected under Article 2(1) to the Protocol and acknowledges that these go further than the provisions relevant to the dynamic alignment commitment, as set out in Annex 1. Some of these rights are currently implemented in ‘retained EU law’ – via the European Union (Withdrawal) Act 2018 – or in rights contained in domestic law in Northern Ireland. Although retained law can in most circumstances be modified or repealed by new domestic legislation, Article 2 provides specific safeguards insofar as it applies.

The measures covered by Article 2 include, but are not limited to, the Victims’ Directive, the Parental Leave Directive and the Pregnant Workers’ Directive, as well as some specific measures aimed at protecting the rights of persons with disabilities. Article 2 also covers certain European Union underlying rights and principles, which to an extent overlap with those incorporated into our domestic legal regime by the European Union (Withdrawal) Act 2018.<sup>206</sup> Accordingly, the *Explainer* states that, while the 2018 Act did not preserve the Charter of Fundamental Rights, as a result of these provisions, if the rights and principles underpinning the Charter exist elsewhere in directly applicable European Union law, or European Union law which has been implemented in domestic law, or retained European Union case law, ‘that law will continue to be operational’.<sup>207</sup> In addition, the UK Government has recognised that the 2018 Act also generally requires the United Kingdom’s domestic courts to interpret retained European Union law that has not been modified ‘in accordance with the general principles of European Union law as those principles existed immediately before the end of the transition period’.<sup>208</sup> As we discuss in later chapters, this account of the Protocol obligation could obscure Article 2’s reach. It has free standing effect as a basis for protecting rights by virtue of Article 4 of the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2018, and does not depend on retained European Union law, under section 5 of the 2018 Act, remaining unaltered. This account also fits awkwardly with the reality that CJEU case law now discusses many of the general principles relevant to rights and equality in terms of their place in the Charter.<sup>209</sup>

However, if a right or equality protection was not included in Annex 1 of the Protocol or was not applicable in Northern Ireland at the end of the transition period, it will not be protected under the Protocol, even if it might otherwise be considered to

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206 See, for example, the European Union (Withdrawal) Act 2018, s. 5(4), s. 5(5) and Schedule 1.

207 See Chapter 2, section 2.

208 UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 14.

209 See Chapter 5.

be relevant to human rights protection in Northern Ireland. The House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol asked the Government for further clarity on the scope of rights protections in October 2021. In response, the Minister of State at the Northern Ireland Office, Conor Burns, MP, replied that ‘ultimately, it will be a matter for the domestic courts to decide whether or not a right is in scope of the commitment, and whether any alleged diminution of that right is in fact attributable to the UK’s withdrawal from the EU’.<sup>210</sup>

### 3.4 Oversight and Enforcement of the Article 2 Obligations

#### *The Commissions as Dedicated Mechanism*

On 15 September 2021, the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland took evidence on the functioning of Article 2 of the Protocol from the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland. The Committee focused extensively on the work of the Dedicated Mechanism. Geraldine McGahey, Chief Commissioner of the Equality Commission for Northern Ireland, indicated that, under the auspices of the Dedicated Mechanism, the two Commissions can exercise their powers jointly or separately. She noted that the Commissions were, nonetheless, ‘required to work very closely in partnership across a whole wide range of areas, not least to ensure there is no duplication of effort and the most economical use of our resources’.<sup>211</sup>

The Chief Commissioner of the Equality Commission for Northern Ireland set out a series of issues which she believed might cause issues under Article 2 or which have arisen in relation to Brexit, including the voting rights of European Union citizens, new requirements for pet passports for assistance dog owners, the Pay Transparency Directive and difficulties in accessing kosher and halal food by the Jewish and Muslim communities respectively. She also highlighted the fact that the Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission had used their powers and engaged with the UK Government in relation to the United Kingdom Internal Market Bill and its implications for the Article 2 commitment.<sup>212</sup> It is notable that in December 2021, the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol found it necessary to write to the Northern Ireland Office to press them on many of the issues which had already been raised by the Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, including kosher and halal products, the Pay Transparency Directive, and voting rights.<sup>213</sup>

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210 Conor Burns, MP, ‘Letter to the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol’ ([24 November 2021](#)).

211 European Affairs Committee Protocol on Ireland/Northern Ireland Sub Committee, [Oral Evidence](#) (15 September 2021), Q1.

212 Ibid., Q4 and 5.

213 House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, Letter to Conor Burns MP, Minister of State at the Northern Ireland Office ([16 December 2021](#)).

That letter also highlighted the fact that, despite having almost a year to put systems in place, there were still ongoing discussions about establishing future arrangements for legislative scrutiny related to the Protocol. The Sub-Committee was forced to reiterate a request that the Government provide Explanatory Memoranda ‘for draft UK legislative proposals that are likely to engage Article 2(1) of the Protocol, and for draft EU proposals which amend or replace the Directives listed in Annex 1 to the Protocol, as well as other relevant EU legislation that the Commissions judge are relevant to the provisions of Article 2’.<sup>214</sup>

The 2021 expert report had previously noted that for the Commissions to fulfil their role, it would require ‘adequate information surrounding the compatibility of any new legislation or proposals with Article 2 of the Protocol’ and recommended that ‘the UK government should provide adequate, or better detailed, explanatory memoranda for any measures likely to engage Article 2(1) of the Protocol’.<sup>215</sup>

### **Alignment**

European Union law relevant to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement has not stood still since the end of the transition/implementation period. The Protocol’s arrangements on the extent to which there is an obligation upon the United Kingdom to ensure that the law operative in Northern Ireland must reflect developments in European Union Law therefore need to be understood. The Protocol sets out two applicable processes relevant to Article 2. First, under Article 13 of the Protocol, the United Kingdom is under a general obligation to ensure the law applicable within Northern Ireland reflects developments in European Union law in terms of the specific measures listed in Annex 1 to the Protocol.<sup>216</sup> This means that, if any measure is being proposed which amends or replaces any of the six European Union Directives listed in Annex 1, under Article 15 of the Protocol, the European Union will keep the United Kingdom informed through the Joint Consultative Working Group, providing the United Kingdom with the opportunity to share feedback on these proposals, but the United Kingdom will be under an obligation to ensure that relevant changes made after 31 December 2020 are reflected in the law of Northern Ireland.

The second set of arrangements, under Article 13 of the Protocol, cover any new European Union measure ‘that falls within the scope of this Protocol, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol’. These arrangements therefore cover any European Union law development relevant to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement other than the six Annex 1 Directives.

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214 Ibid.

215 Paul Evans, Alexander Horne and Tasneem Ghazi, *Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol under the UK’s January 2020 Withdrawal Agreement with the EU* (ECNI, 2021) p. 9.

216 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), Protocol on Ireland/Northern Ireland, Article 13(3).

For such measures, ‘the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol’.<sup>217</sup> Thereafter:

As soon as reasonably practical after the Union has informed the United Kingdom in the Joint Committee, the Joint Committee shall either:

- (a) adopt a decision adding the newly adopted act to the relevant Annex to this Protocol; or
- (b) where an agreement on adding the newly adopted act to the relevant Annex to this Protocol cannot be reached, examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect.<sup>218</sup>

The Joint Committee’s outcomes are binding on both the European Union and the United Kingdom, but ‘the balance of representatives means that they will be issued by a process of mutual consent’.<sup>219</sup> In other words, across a broad range of European Union law developments, decisions will have to be made as to whether the law of Northern Ireland should align with these developments, and if a decision is taken not to commit Northern Ireland to full alignment, whether partial alignment would advance ‘the good functioning of this Protocol’.<sup>220</sup>

### **Enforcement**

One further significant consideration for the application of Article 2 is the case law of the CJEU. Under the general part of the Withdrawal Agreement, the general application of CJEU jurisprudence regarding the European Union law concepts contained within the Agreement is restricted as a result of Brexit. Where the Protocol is at issue, however, these restrictions do not apply:

Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, 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.<sup>221</sup>

The ‘implementation and application’ of European Union law covered by the Article 2 obligation must therefore reflect the CJEU’s interpretation of those measures. A full understanding of these obligations cannot therefore be reached without Northern Ireland’s institutions taking ongoing cognisance of the CJEU’s decisions insofar as they are relevant to the Article 2 non-diminution commitment.

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217 Ibid., Article 13(4).

218 Ibid., Article 13(4).

219 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.

220 See Chapter 6, sections 3-5.

221 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), Protocol on Ireland/Northern Ireland, Article 13(2).

However, it is important to note at the outset that Article 12 of the Protocol, which provides for the continued jurisdiction of the CJEU in respect of certain parts of the Protocol, does not extend to Article 2.<sup>222</sup> The Northern Ireland courts must continue to follow CJEU jurisprudence, but the CJEU cannot itself entertain Commission enforcement actions related to this provision.

The UK Government *Explainer* highlights the fact that, unlike the rules of the European Union single market in goods and related level-playing field obligations, such as state aid rules, the jurisdiction of the CJEU does not extend to the operation of the Protocol's rights and equality obligations and that the rights contained in Article 2 will instead be protected by the United Kingdom's domestic courts. The *Explainer* states that:

[T]he commitment [...] provides a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the United Kingdom Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts.<sup>223</sup>

The Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland have a direct role in the enforcement of Article 2. Both Commissions may bring or intervene in judicial proceedings, whether for judicial review or otherwise, in so far as they relate to an alleged breach (or potential future breach) of Article 2(1).<sup>224</sup> Both Commissions are also entitled 'to assist persons in legal proceedings' in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol in a wide range of circumstances.<sup>225</sup>

### **Direct Effect**

As noted above, the Withdrawal Agreement and associated domestic legislation mean that certain provisions are invested with the European Union law concepts of direct effect and supremacy, provided that they meet the requirements for direct effect. Murray and Rice have suggested that with regard to Article 2 of the Protocol, 'the EU Directives relating to equality listed in Annex 1 of the Protocol have all long operated on the basis that they are directly effective within domestic law'. However, 'the broader commitment to non-diminution of rights is, by its nature, more vague, and this want for clarity put the direct effect of this commitment in doubt'.<sup>226</sup>

222 This provision has proved contentious and has been the subject of continued dialogue between the UK Government and the European Union, particularly following the publication of the Government's Command Paper, *Northern Ireland Protocol: The way forward* (2021) CP 502. However, at the time of writing, no substantial changes were expected to the continued CJEU jurisdiction provided for under Article 12. It is worth noting that if a case raises cross-border issues, affected individuals may be able to access the CJEU from the Republic of Ireland.

223 UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 6.

224 Northern Ireland Act 1998, section 78C.

225 Northern Ireland Act 1998, section 78D.

226 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, 22.



This uncertainty has, to an extent, been addressed. In January 2020, the UK Government stated, through a Written Answer in the House of Lords, that it ‘considers that Article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts’.<sup>227</sup> This was subsequently confirmed by the Northern Ireland High Court in the case of *SPUC Pro-Life Ltd*, where Colton J observed that: ‘Article 2 has direct effect and legal persons such as the applicant in this case are able to rely on it in domestic courts’.<sup>228</sup> Although there remain some question marks over whether the full extent of Article 2’s substantive commitments meet the formal requirements for direct effect, any effort to resile from this commitment would have serious implications for the operation of Article 2.

Under Article 4 of the Withdrawal Agreement, any provisions or concepts of European Union law referred to in the Withdrawal Agreement as a whole shall continue to be interpreted by United Kingdom courts and tribunals in conformity with the general principles of European Union law and the relevant case law of the CJEU delivered before the transition/period ended, and United Kingdom courts and tribunals are also required to continue to have due regard to CJEU case law developments after December 2020 insofar as they are relevant to the Withdrawal Agreement.<sup>229</sup> The Government’s *Explainer* states that when a United Kingdom court is considering the interpretation of any of the Directives listed in Annex 1, ‘this will be done in conformity with any relevant case law of the CJEU’.<sup>230</sup> This brief statement with regard to the Annex 1 Directives might create the impression that the obligation under this part of the Protocol reflects the general Article 4 requirements. Under Article 13(2) of the Protocol, however, a specific obligation regarding CJEU case law applies to the Annex 1 Directives which is more extensive than the general position under Article 4. As was confirmed in the *SPUC Pro-Life Ltd* case, ‘the limitations in these provisions that only require conformity with the CJEU jurisprudence up to the end of the transition period in the interpretation of the Withdrawal Agreement do not apply in the interpretation of the Protocol’.<sup>231</sup>

The *Explainer* thereafter notes that when considering matters relating to the ‘no diminution’ commitment, ‘the UK courts will, under the European Union (Withdrawal) Act 2018, be free to have regard to judgments of the CJEU made after the end of the transition period, where relevant’.<sup>232</sup> Given that European Union legislation has been developing since the end of the transition/implementation period in December 2020, there must be some leeway in how the domestic courts

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227 Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020).

228 *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [77].

229 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020, Article 4(4) and 4(5).

230 UK Government, [UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) para. 16.

231 *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [93] (Colton J).

232 UK Government, [UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) para. 16.

deal with relevant CJEU judgments; the latest CJEU might be interpreting law which does not apply in Northern Ireland. Distinct from, but sometimes overlapping with the Article 2 ‘no diminution’ commitment, where United Kingdom courts and tribunals are interpreting retained European Union law, there are general provisions regarding the role of CJEU jurisprudence. The *Explainer* states that:

In essence, if the retained EU law has remained on the domestic statute books unmodified since the end of the transition period, the court must interpret the retained EU law in accordance with relevant judgments of the CJEU made before the end of the transition period. If the retained EU law has been modified, it may also be interpreted by the court in line with CJEU jurisprudence from before the end of the transition period if doing so is consistent with the intent of the modifications.<sup>233</sup>

This discussion of retained law potentially adds to confusion around the scope of these requirements. In our assessment, the Protocol’s obligation upon the United Kingdom courts and tribunals to ensure ongoing conformity with relevant CJEU case law applies to the interpretation of the Annex 1 Directives, and the UK Government has also confirmed that domestic courts and tribunals must have regard to CJEU case law applicable to measures covered by the ‘no diminution’ commitment. But the domestic courts are the final arbiters of the meaning of conformity and due regard in this context. Given that the direct jurisdiction of the CJEU does not extend to Article 2 rights and equality obligations, there remains a risk that this complex set of arrangements could open up space for divergent interpretations of European Union law provisions.<sup>234</sup>

The question of the jurisdiction of the CJEU over the Withdrawal Agreement more generally has been a matter of continuing controversy. The UK Government’s Command Paper, *The Northern Ireland Protocol: The Way Forward*, which was published in July 2021, argued that new dispute settlement arrangements should be adopted, based around consultative processes and international arbitration between the parties. Even if there is some reform to the CJEU’s jurisdiction in response to the UK Government’s concerns, when it comes to the operation of Article 2 the wording of Article 13 means that developing CJEU case law will continue to inform the operation of the equality and human rights obligations under the Protocol. The UK Government **must not** attempt to undermine the domestic law mechanisms, particularly section 7A of the European Union (Withdrawal) Act 2018, which enable these rights and equality protections to operate fully within Northern Ireland law.

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233 Ibid., para. 16.

234 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, 2.

### 3.5 Conclusion and Recommendations

Article 2 of the Protocol and the associated domestic legislation which implements its provisions provide significant protections for rights in Northern Ireland. However, this chapter demonstrates that the Article is subject to a series of limitations. First, aspects of its operation are uncertain, and, if disputes arise, it is only likely to be fully defined following litigation. Second, unlike the single market provisions of the Protocol, Article 2 is not subject to direct supervision by the European Institutions (including the CJEU). Third, although the more clearly defined elements of Article 2 will benefit from ‘direct effect’, the broader commitment to non-diminution of rights is less clear cut. This is not an immediate concern; the UK Government’s acceptance that all of Article 2 is covered by direct effect has not hitherto been called into question.<sup>235</sup> Any move to weaken this position, however, would produce considerable legal uncertainty when it comes to the enforcement of Article 2.

Similar issues arise in respect of the commitment to keep pace with new rights protections: while the commitment is very clear cut in respect of those rights set out in Annex 1 to the Protocol, it is far from certain what might happen in respect of other equality-based rights going forward. The Commissions retain a critical role in this regard. First, in respect of its pre-legislative scrutiny and reporting (which could be used as a pre-emptive method of shaping the scope of Article 2, based on expert reports conducted on European Union law). Second, in respect of its direct role in the enforcement of Article 2. Both of these powers will have to be used judiciously and proactively if the aims of Article 2 are to be fulfilled.

Our **recommendation** is:

- The UK Government must not attempt to undermine the domestic law mechanisms, particularly section 7A of the European Union (Withdrawal) Act 2018, which enable specific rights and equality protections to operate fully within Northern Ireland law.

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235 As we highlighted above, this has been affirmed in the High Court; *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [77].

# Chapter 4: Implications of Annex 1 Directives for Northern Ireland Law

## 4.1 Introduction

### *Scope*

The Withdrawal Agreement provides that there shall be no diminution in respect of equality and human rights in Northern Ireland as a result of Brexit. However, in respect of the following six Directives, there is not only an obligation not to fall below the existing level of protection of fundamental rights in the European Union as it stood at the end of the transition period (further discussed in Chapter 5), but also an obligation to track and to keep pace with further developments. These Directives are:

- 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;
- 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 (recast);
- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- 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;
- 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.

The present chapter provides an account of the operation of the Protocol Annex 1 Directives in the law of Northern Ireland following the end of the Brexit transitional period. It includes an account of how these Directives operate in light of the latest CJEU case law and legislative developments, and explores the legal reforms which would be necessary in Northern Ireland to meet the Protocol's requirements of dynamic alignment in regard to these measures. The chapter also identifies areas where legislative initiatives relevant to Annex 1 are ongoing, and provides an update on their state of transposition.

## **Methodology**

Our analysis in this chapter is underpinned by Mapping Exercises 1 and 2, which are attached to our report. These mapping exercises provide a systematic review of the European Union case law (Mapping Exercise 1) and legislative and non-legislative developments (Mapping Exercise 2) for the Annex 1 Directives. Our systematic review was based on date-defined and term-specific searches of each of the Annex 1 Directives on official European Union databases (curia.eu and eur-lex.eu, respectively). The relevant dates searched for each of the directives were 1 January 2021 – 14 January 2022. Where the last European Commission report on the Annex 1 Directives was issued before the end of the transitional period, the date range was extended to the date of publication of the last Commission report. The results of the review were subsequently coded by the researchers as core (C) or peripheral (P), to indicate their relevance to the Annexed Directives. This was done to improve the readability of the mapping exercises, as several of the results we identified did not bear significant practical relevance to equality and human rights.

This chapter draws out the most significant aspects of the recent developments identified in these mapping exercises, insofar as these could lead to divergence of standards between European Union law and Northern Ireland law. We have also included in our discussion core developments that could engage the dynamic alignment obligation in theory, even where we did not consider that changes to domestic legislation were necessary (because domestic law already meets the requisite standard). However, because the Mapping Exercises offer an exhaustive list of all recent developments, including those mentioning the Annex 1 Directives as a merely peripheral issue, rather than as a core consideration, our analysis does not discuss all of the sources identified in the mapping. Additionally, our analysis does not duplicate information already covered in the most recent European Commission reports on the Annex 1 Directives, except where this is essential for coherence or context. Where the most recent European Commission reports predate the end of the transitional period, the analysis does provide an assessment of developments since the date of the last report, to facilitate continuity and completeness in our recommendations.

## **Structure**

Our analysis proceeds by considering the changes which are currently required from the perspective of dynamic alignment based on recent European Union case law and legislative developments, cross-cutting developments in European Union law and likely future developments within the material scope of the Annex 1 Directives. Within these broader sections, we have employed a thematic approach, to avoid duplication and enhance the readability of our proposals. This is both because our mapping revealed several overlapping references to different Annex 1 Directives in the case law and because our assessment of the need for legislative change is based on the combined effect of the cases and legislation revealed in our mapping exercises. The substantive areas of equality law where we have identified significant changes or potential upcoming changes include the manifestation of religious symbols; disability

discrimination; strengthened proportionality and access to justice requirements; pay transparency; horizontal issues that may be addressed by a future framework directive, such as intersectionality; as well as parental leave and pregnant workers' rights. In this chapter, we also indicate areas where developments have occurred that have not yet resulted in divergence, but could do so in the future, such as part-time work and work/life balance.

## 4.2 Areas Where Legislative Change is Required to Ensure Dynamic Alignment

### *Manifestation of Religious Symbols at Work*

#### **Relevant EU Legal Instruments**

Annex 1 instruments directly affected:

- Directive 2000/78: clarification of the scope of direct discrimination under Article 2; heightened standard for the justification of indirect discrimination

Annex 1 instruments indirectly or potentially affected:

- Directive 2000/43/EC; Directive 2006/54/EC on gender equality: no consideration presently because of the impossibility of claiming these issues as intersectional points in conjunction with Directive 2000/78. This relates to discussions of a broader directive by the European Commission.

Other legal instruments:

- Article 21 of the EU Charter of Fundamental Rights (superseded by the general principle of equality)
- Article 10 of the EU Charter of Fundamental Rights (superseded by the general principle of freedom of religion and Article 9 ECHR)
- Article 16 of the EU Charter of Fundamental Rights (superseded by the general principle of freedom to conduct a business)

#### **Relevant Northern Ireland Legal Instruments**

1. The Fair Employment and Equal Treatment (Northern Ireland) Order 1998

Arguably the most significant recent development at the European Union level relates to religion as a protected characteristic in the context of Directive 2000/78, hereafter 'Equality Directive'. The last European Commission report highlighted that Member States would welcome further clarification on the role of religion in the workplace.<sup>236</sup>

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<sup>236</sup> European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')* [19.03.2021 COM\(2021\) 139](#), p. 22.

On 17 July 2021, the Court handed down a significant Grand Chamber ruling in *WABE and Müller*, which partially clarifies the application of the Equality Directive to the wearing of religious symbols at work.<sup>237</sup> It should be noted that, although the judgment was handed down after the end of the transitional period, the reference for a preliminary ruling was made before the end of the transitional period and, as such, must be observed in the United Kingdom as a whole in line with Article 89 of the Withdrawal Agreement, without any need to draw upon the more extensive Protocol obligations specifically relevant to the interpretation of CJEU case law in the Northern Ireland context.<sup>238</sup>

The ruling concerned two joined cases from Germany, each involving a female Muslim employee who had been asked to remove her headscarf by a private sector employer. The first claimant was a special needs teacher at WABE, a nursery school chain, which had a policy that prohibited *all* religious symbols at work. The second claimant was a sales assistant at the cosmetics and drugstore chain Müller Handels, which had a policy prohibiting ‘conspicuous or large-sized’ symbols. The legal question in both cases was the same: do religious neutrality policies that ban some or all religious symbols constitute discrimination within the European Union’s Equality Directive and, if so, do they constitute indirect or direct discrimination? Whereas the former can be justified by reference to occupational requirements, the latter cannot.

In view of the Directive’s clear emphasis on the right to equal treatment, as opposed to the right to religious freedom at work more widely, the ruling distinguished policies that are pursued consistently across all faiths from those singling out the adherents of specific faiths. The Court departed from the Opinion of the Advocate General, who had suggested that classifications of religious symbols based on generic characteristics, such as their size, amount to indirect discrimination that can be justified, for example, because small-scale symbols, such as a cross, can be easily hidden, whereas large-scale symbols cannot.<sup>239</sup> Instead, the Court found that differentiating between religious symbols based on characteristics such as size or scale amounts to direct discrimination under Article 2(2) of the Directive, and cannot be justified except by reference to a narrow list of occupational requirements, rather than by a commercial policy of neutrality.<sup>240</sup>

At the same time, and in this regard following the Advocate General’s Opinion, the Court found that the Equality Directive ‘must be interpreted as meaning that an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that

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237 Joined Cases C-804/18 and C-341/19, *IX v WABE eV and MH Müller Handels GmbH v MJ*, [EU:C:2021:594](#) (hereafter ‘*WABE and Müller*’).

238 See Chapter 3, section 3.

239 Opinion in *WABE and Müller*, para. 74.

240 *WABE and Müller*, para. 73.

directive, provided that that rule is applied in a general and undifferentiated way'.<sup>241</sup> The judgment acknowledges, however, that even *prima facie* non-discriminatory policies affect believers who manifest their religion by wearing symbols more adversely than individuals who do not wear symbols at all (for example, due to adherence to a faith that does not require them to do so or due to lack of religious or philosophical beliefs altogether). As such, dress codes stipulating requirements for the wearing of any symbols should be considered indirectly discriminatory contrary to the Directive, unless they can be justified by a legitimate aim and do not go beyond what is required to achieve that aim.<sup>242</sup>

In so finding, the Court affirms its earlier case law in *Bouagnaoui* and *Achbita*, by holding that company rules restricting religious symbols can 'be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality in the workplace, in order to take account of the wishes of its customers or users'.<sup>243</sup> However, the Court clarifies that the means of achieving this legitimate aim must be appropriate as well as necessary, and that the relevant standard is one of strict proportionality in respect both of 'the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it'.<sup>244</sup> Like the European Court of Human Rights in *Eweida*,<sup>245</sup> the CJEU accepts that 'an employer's desire to display, in relations with both public- and private-sector customers, a policy of political, philosophical or religious neutrality may be regarded as legitimate'<sup>246</sup> and indeed notes that the employer's wish to project an image of neutrality forms part of the freedom to conduct a business recognised in Article 16 of the Charter, 'in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'.<sup>247</sup> Nevertheless, the employer is now required to prove stricter proportionality conditions.<sup>248</sup>

In this respect, the case has a direct significance for Annex 1 of Article 2 of the Protocol. The Court's key findings from the perspective of dynamic alignment can be summarised as follows: first, policies that treat religious symbols differently based on considerations such as their size or scale amount to direct discrimination under Article 2(2)(a) of Directive 2000/78 and cannot be justified.<sup>249</sup> However, a rule which is applied in a general and undifferentiated way across the wearing of *all* religious symbols does not amount to direct discrimination.<sup>250</sup> Employers can, therefore, justify such a policy, provided that they are able to show that the policy pursues a legitimate

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241 Ibid., para. 74.

242 Ibid., para. 59.

243 Ibid., para. 60. See also, to that effect, judgment of 14 March 2017, Case C188/15 *Bouagnaoui and ADDH*, [EU:C:2017:204](#), para. 33; Case C-157/15 *Achbita v G4S Secure Solutions NV*, [EU:C:2017:203](#), para. 37-38.

244 *WABE and Müller*, para. 61; see also, judgment of 16 July 2015, Case C-83/14 *CHEZ Razpredelenie Bulgaria*, [EU:C:2015:480](#), para. 112.

245 *Eweida v The United Kingdom*, App. Nos 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013.

246 *WABE and Müller*, para. 63.

247 Ibid. See also Case C-157/15 *Achbita v G4S Secure Solutions NV*, [EU:C:2017:203](#), para. 37-38.

248 *WABE and Müller*, para. 68-69.

249 *WABE and Müller*, para. 78.

250 *WABE and Müller*, para. 74.



aim, that it is suitable for achieving this aim, and that it does not go beyond what is required to achieve it.<sup>251</sup>

The CJEU accepts that a purely commercial aim can in principle be considered legitimate,<sup>252</sup> but employs strict proportionality both regarding ‘the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it’.<sup>253</sup> This means that employers must show that their policies satisfy a three-stage proportionality review. More specifically, they must show:

- a) that there is a ‘genuine need’ for a neutrality policy,<sup>254</sup> for example, because adverse commercial consequences could ensue from the absence of such a policy;<sup>255</sup>
- b) that the terms of the policy are appropriate to achieving the purpose for which it is employed; and
- c) that the practical application of the policy has been systematic (rather than arbitrarily applied in practice) and strictly limited to the minimum necessary to achieve its ends.<sup>256</sup>

The **implications** of these findings for law and policy in Northern Ireland are the following:

- In the adjudication of matters pertaining to the implementation of the Framework Equality Directive, Northern Ireland courts and employment tribunals must assess the existence of direct and indirect discrimination based on the findings elaborated above;
- Northern Ireland must ensure that any legislation restricting or prohibiting the wearing of specific classes of symbols is changed, even if it does not target the symbols of specific religions but only generic features thereof (such as their scale or prominence);
- It is advisable for guidelines to be drawn up for the benefit of employers in Northern Ireland, which clarify: a) that the prohibition or restriction on the wearing of religious symbols at work based on the particular characteristics of those symbols (for example, their size or scale) is in all cases unacceptable; and b) that any generalised prohibition or restriction on the wearing of religious symbols at work must be justified by a legitimate aim for which the employer is able to adduce evidence of genuine need (including of a commercial nature). Further, the measures taken to achieve such an aim must be both suitable to achieving that aim and confined to the least restrictive approach towards the manifestation of religion.

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251 Opinion in *WABE*, para. 59.

252 *WABE and Müller*, para. 63.

253 *WABE and Müller*, para. 61; see also, judgment of 16 July 2015, Case C-83/14, *CHEZ Razpredelenie Bulgaria*, [EU:C:2015:480](#), para. 112.

254 *WABE and Müller*, para. 64.

255 *WABE and Müller*, para. 67.

256 *WABE and Müller*, para. 68-69.

Our **recommendations** are made whilst taking note of the fact that the Directive makes specific provision in Article 15(2) thereof for the status of school teachers in Northern Ireland. While the Directive defers to national laws in this respect in order to ensure inclusion and equality of opportunity in the specific context of Northern Ireland, the application of this provision in Northern Ireland under the Fair Employment and Equal Treatment (Northern Ireland) Order 1998 was overly sweeping and would have been unlikely to meet European Union scrutiny, particularly on proportionality.<sup>257</sup> Further, even if a different view were to be taken in respect of the compatibility of these measures with European Union law, due to a wide reading of Article 15 of the Directive, the above analysis would still apply to Ireland as a Member State, and divergence of standards would ensue thereby.

More specifically, there are two concerns with the text of the Fair Employment and Equal Treatment (Northern Ireland) Order 1998. First, the concept of indirect discrimination as detailed in Sections 3(2)(b) and 3(2)(A)(b) of the Order is too restrictive in its use of comparators. The Order provides:

- 2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of [F1 a provision of this Order, other than a provision to which paragraph (2A) applies,] if—
- [...]
- (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—
- (i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and
- (ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and
- (iii) which is to the detriment of that other because he cannot comply with it.

[F1(2A) A person also discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of any provision referred to in paragraph (2B) if—

[...]

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257 This legislation has recently been reformed by the Northern Ireland Assembly; see Chapter 2, section 3.

- (b) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—
  - (i) which puts or would put persons of the same religious belief or of the same political opinion as that other at a particular disadvantage when compared with other persons;
  - (ii) which puts that other at that disadvantage; and
  - (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

The above text is incompatible with the finding in *WABE and Müller* that indiscriminate rules concerning religious symbols place believers at large at a disadvantage, compared to non-believers. This finding is broader than the formulation set out in the text of the Order detailed above, which requires that discrimination be shown for a specific class of believers (that is, believers of a specific faith or political opinion) but does not extend to believers as a broader group, to be distinguished from non-believers. It is essential to expand the wording of the Order to ensure that discrimination that tackles multiple faiths or all faiths is also covered.

Secondly, Section 71 of Part VIII of the Order excludes school teachers from significant protections offered to other workers under Part VII of the Order and altogether excludes them from claims regarding discrimination at the recruitment stage. It is essential to review the sweeping character of this exclusion. Particularly in view of the fact that *WABE* is a chain of nursery schools in Germany, the *WABE and Müller* ruling highlights that broad exclusions of this type are unlikely to be accepted. Even though they can still be justified by the need to ensure an ethos of neutrality in an educational setting, such measures should still be subjected to legitimacy and proportionality scrutiny. This finding is more widely supported by the proportionality analysis that the CJEU has recently employed in respect of sectoral exemptions, as detailed in sub-section c) below. We note that the Fair Employment (School Teachers) Act, passed by the Northern Ireland Assembly in March 2022, removes the exclusion of schoolteachers from non-discrimination on grounds of religion, placing them on the same footing as other employees. This addresses the incompatibility with European Union law and the potential for divergence from the standards applicable in Ireland.

Finally, European Union developments in the field of religious freedom raise broader considerations for equality and human rights in Northern Ireland, as they concern the interaction between the manifestation of religion as interpreted by the CJEU, on the one hand, and the freedom of expression and manifestation of religion enshrined in the Belfast/Good Friday Agreement 1998, on the other. The *WABE and Müller* ruling is more widely linked to the interpretation of the following substantive

rights and safeguards within the 1998 Agreement:

- the right to freedom *and* expression of religion;
- the right to free political thought, as the reasoning in *WABE and Müller* extends to philosophical belief;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.

Because of the interaction between the commitments made in the 1998 Agreement and the Protocol, Northern Ireland and Ireland may have to ensure a higher level of protection of the freedom of religion in the workplace than that which is applicable in the rest of the European Union, in respect of a) the manifestation of religion or philosophical belief through symbols and b) in respect of the compounded discriminatory effect that restrictions on religious symbols may have in respect of gender and ethnicity. Despite the fact that the *WABE and Müller* ruling clarifies that the possibility to manifest religious and political beliefs is not necessarily intrinsic in the concept of discrimination under Directive 2000/78 and that employers may, with justification, restrict it (provided they do not restrict only *some* manifestations of religion or belief), this does not mean that the standard in Northern Ireland and Ireland cannot be higher. Indeed, the 1998 Agreement's terms might drive the agenda for a further accommodation in this field.

### **Disability Discrimination**

#### **Relevant EU Legal Instruments:**

- Annex 1 instruments directly affected:
- Directive 2000/78: clarification of the scope of direct discrimination on grounds of disability; expansion of the concept of disability discrimination to intra-group discrimination; relationship with Article 5 of UNCRPD established, to ensure further integration of persons with disabilities

Other legal instruments:

- United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities: interpretation of EU secondary legislation compatibly with Art 5
- Article 21 of the EU Charter of Fundamental Rights (superseded by the general principle of equality)
- Article 26 of the EU Charter of Fundamental Rights (superseded by the general principle of integration of persons with disabilities)

## Relevant Northern Ireland Legal Instruments

- Disability Discrimination Act 1995

Another area specifically identified by the European Commission as a field where there are ongoing legal developments, yet where further legislative action may be required, is disability discrimination.<sup>258</sup> While the Court's earlier case law on disability discrimination had been cautious, a series of recent cases have set out a stronger position both in relation to added requirements, conditions, or incentives for the integration of persons with disabilities in the workplace, and in relation to justifications for the exclusion of persons with disabilities from certain professional roles.

In its judgment of 26 January 2021 in *Szpital Kliniczny*,<sup>259</sup> the Court significantly elaborated on the concept of disability within the Equality Directive. The claimant in this case was an employee of *Szpital Kliniczny*, who challenged her employer's decision to grant a disability allowance to workers with a disability on the condition that they submitted their disability certificates after a specific date chosen by the employer, thus excluding from the allowance workers who had submitted their certificates before that date. The claimant questioned the compatibility of the employer's actions with Directive 2000/78/EC, which prohibits discrimination on grounds of disability. The Court noted that 'by referring, first, to discrimination 'on' any of the grounds referred to in Article 1 of the Equality Directive and, second, to less favourable treatment 'on' any of those grounds, and by using the terms 'another [person]' and 'other persons', the wording of Article 2(1) and (2) of that directive does not permit the conclusion that, regarding the protected ground of disability referred to in Article 1 thereof, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities'.<sup>260</sup> Thus, disability discrimination may comprise any form of 'less favourable treatment or particular disadvantage [...] experienced as a result of disability'.<sup>261</sup> It is not confined to less favourable treatment of persons with disability by reference to those who are not disabled and includes less favourable treatment *within* a class (that is, discrimination amongst persons with disabilities) provided that discrimination or less favourable treatment is inextricably linked to the protected characteristic.

Moreover, the Court found that discrimination which occurs because of a criterion inextricably linked to disability, such as supplying a disability certificate after a certain date, amounts to *direct* discrimination, and therefore cannot be justified.<sup>262</sup>

258 European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')* [19.03.2021 COM\(2021\) 139\(final\)](#), pp. 23-24.

259 Judgment of 27 January 2021 in Case C-16/19, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, [EU:C:2021:64](#).

260 *Ibid*, para. 29 (emphasis added).

261 *Ibid*, para. 29 (emphasis added).

262 *Ibid*, para. 51-53.

To put the matter simply: if we are discriminating against someone because of something associated with their disability (for example, their inability to provide a disability certificate by a certain date) this is still direct discrimination, that is, as if they were being discriminated against because of the disability *per se*, because the discrimination is still only rendered possible by the existence of a disability. This type of discrimination is nearly always impossible to establish if the comparator used is a non-disabled person (because the discrimination does not pertain to all disabled persons, but only to those who cannot supply the certificate). Discrimination can only be established by comparing the treatment of members of the same class (individuals sharing the disability, but not the ability to provide, for example, a certificate).

Further developments pertain to indirect discrimination on grounds of disability. In its '*Jurors*' ruling,<sup>263</sup> the Court was asked to assess whether the total exclusion of a blind person from participating in criminal proceedings as a paid juror could be justified on the basis of Article 4(1) of that Directive, which provides genuine and determining occupational requirements can justify restrictions on access and do not, therefore, amount to discriminatory treatment. National law did not clearly set out minimum requirements for the fulfilment of jury duty in criminal proceedings. A key point in this case was that the European Union has acceded to the UNCRPD, Article 5(2) of which provides that appropriate measures must be taken for the integration of persons with disabilities. Following the Opinion of the Advocate General,<sup>264</sup> the Court held that the concept of genuine and determining occupational requirements justifying indirect discrimination on grounds of disability under Articles 2(2)(a) and 4(1) of Directive 2000/78/EC must be read in the light of Articles 21 and 26 of the Charter of Fundamental Rights of the European Union as well as – crucially – Article 5 of the UNCRPD.<sup>265</sup> This means that totally depriving a blind person of any possibility of performing the duties of a juror in criminal proceedings could not be justified as a genuine occupational requirement.<sup>266</sup>

The Court had already reached a similar conclusion in *Tartu Vangla*.<sup>267</sup> This case was a preliminary reference from Estonia, which concerned the compatibility with Directive 2000/78/EC of national legislation strictly prohibiting the continued employment of a prison officer whose auditory acuity had fallen below a standard prescribed in national law. In this case, too, notwithstanding that the law at issue clearly prescribed the relevant requirement of auditory acuity, the Court refused to accept the exclusion. Following the Opinion of the Advocate General,<sup>268</sup> it found

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263 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisija za zashtita ot diskriminatsia and VA* ('*Jurors*'), [EU:C:2021:862](#).

264 Opinion in *Jurors*, *ibid*, para. 100-104.

265 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisija za zashtita ot diskriminatsia and VA* ('*Jurors*'), [EU:C:2021:862](#), para. 63.

266 *Ibid*, para. 62-64.

267 Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla*, [EU:C:2021:606](#).

268 Opinion in *Tartu Vangla*, *ibid*, para. 103.

that an absolute bar on further employment was unjustifiable for two reasons: first, there should be an individual consideration of whether the employee was capable of performing the duties arising from his employment, where appropriate after the adoption of reasonable accommodation measures (in line with Article 5 of Directive 2000/78/EC), such as assigning him to a particular service or authorising him to wear a hearing aid.<sup>269</sup>

There are immediate **implications** for law and policy in Northern Ireland stemming from our analysis of disability discrimination, which concern the interpretation of Articles 1 and 2 of Directive 2000/78/EC. First, as shown by the *Szpital Kliniczny* ruling, Northern Ireland must ensure that the implementation and interpretation of disability discrimination pursuant to Article 1 of Directive 2000/78/EC does not render the concept of disability dependant on the *absence* of disability as the key comparator, that is, that disability discrimination also comprises discrimination between persons with disabilities. The existence of *any* discrimination resulting from disability must be accommodated, even if this treatment is less favourable by reference to other members of the protected class, rather than outside it.

Secondly, it is also clear that Article 2 of the Directive should be interpreted as meaning that any form of discrimination which is inextricably linked to a protected characteristic amounts to direct discrimination, rather than indirect discrimination, even where the challenged measure does not explicitly identify the protected characteristic as the reason for the exclusion. These clarifications of the concept of disability discrimination must inform legislation and are binding upon domestic courts.

Thirdly, as shown by both the *Jurors* and *Tartu Vangla* rulings, justifications for the exclusion of persons with a disability from certain professional roles, including public service roles, must be scrutinised closely. More specifically, following these rulings, public bodies in Northern Ireland **must** comply with the following principles:

- blanket exclusions of persons with a disability from a professional service are eliminated, as such exclusions cannot be justified under Articles 2(2) and 4(1) of Directive 2000/78.
- exclusions of persons with disabilities may only be justified as genuine occupational requirements where the exclusion is clearly limited to aspects of the role that cannot be performed because of the disability; **and**
- the exclusion is assessed **only after** measures of integration of persons with disabilities have been taken to allow them to perform their duties (in line with Article 5 of the Directive); **and**
- where an exclusion from specific functions remains necessary, alternative measures of integration of the person with a disability have been considered.

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269 Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla*, [EU:C:2021:606](#), para. 52-53.

Whereas some of these findings are already covered by the Disability Act 1995, there is a clear statutory incompatibility between the definition of direct discrimination set out in *Szpital Kliniczny* and the definition of direct discrimination in Section 3(A)(5) of the Act, which must be addressed. Whereas, as indicated above, European Union law now recognises that there is direct discrimination on grounds of disability where an individual has been treated differently due to a condition solely stemming from their disability, the Act posits the absence of disability as a comparator. Section 3(A)(5) of the Disability Act states:

A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

This formulation is overly restrictive and must be changed to ensure that discrimination within the class of persons sharing a disability is included, as the key consideration for direct discrimination to occur is whether a person has been treated adversely for a reason that is inextricably linked to their disability, rather than assessing how persons not sharing the disability have been treated.

Beyond the above-mentioned developments regarding the concept of disability discrimination and the need for measures securing integration of persons with disabilities, the case law on disability discrimination highlights a shift in the Court's understanding of the integration of persons with disabilities from an aspirational protection to an enforceable element of European Union equality law, both because of the application of Article 26 of the Charter and because of the obligation to comply with Article 5 of the UNCRPD.

This view of disability as also a key area for further development is supported by concrete legislative initiatives. For example, the European Parliament has recently adopted a Resolution calling for amendments to the Equality Directive to ensure the full integration of Persons with disabilities and give further effect to the UNCRPD.<sup>270</sup> The need for further legislative change has also been identified by the European Commission in its most recent report on Directive 2000/78/EC.<sup>271</sup> It is therefore advisable to continue to track issues of disability discrimination as a key area of future change where dynamic alignment will be required.

270 European Parliament resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2021) OJ C 474/04.

271 European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')* [19.03.2021 COM\(2021\) 139\(final\)](#), pp. 23-24.



### 4.3 Developments Across Different Areas of Equality Law

Our analysis has shown that strict proportionality and effective judicial protection are common patterns in the case law and legislative initiatives across different areas of equality law, and therefore merit attention in relation to all six instruments listed in Annex 1.

#### *Proportionality*

The Court's recent approach to age discrimination, disability discrimination, and religious discrimination displays a consistent preference for a stricter and more detailed standard of proportionality scrutiny to justifications of restrictive measures, with a particular emphasis on the need for individual circumstances to be taken into account. In addition to the examples of religious symbols and disability discrimination, identified earlier, this is evident from Case C-914/19 *Ministero della Giustizia (Notaires)*, which was decided by the Court's Grand Chamber on 3 June 2021.<sup>272</sup> In this case, the Court considered a rule that precluded individuals aged over 50 years from applying to public competitions for registration as notaries. The Italian State had justified this rule by reference to the need to maintain continuity in the notarial profession, which would not be achieved if individuals acceded to the profession at an age close to retirement. The Court emphatically rejected this argument on grounds of legitimacy and proportionality. First, the Court expressed doubts as to the practical value (and hence the legitimacy) of this goal. Secondly, the Court noted that, in any event, the complete exclusion of the over-50s from notarial competitions went beyond what was necessary to achieve this aim, as it operated in a generalised manner and did not take into account the now much higher ordinary retirement age. This is a significant development, as it can be contrasted with the Court's earlier jurisprudence, which had focused on a lower standard of in-principle appropriateness of measures taken pursuant to Article 4 of Directive 2000/78/EC, rather than their legitimacy and necessity strictly construed.<sup>273</sup>

It is therefore **recommended** that both in their assessment of justifications adduced for indirect discrimination and in their analysis of genuine occupational requirements under Directive 2000/78/EC, domestic courts should apply a strict proportionality scrutiny, and should pay particular attention to the way in which the employer handled the applicant's individual circumstances.

#### *Effective Judicial Protection*

Both the case law in this field and recent legislative initiatives highlight a continuing emphasis on effective judicial protection within European Union equality law. The clearest indication of this stems from Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, which was decided by the CJEU's Grand Chamber

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272 Case C-914/19 *Ministero della Giustizia (Notaires) v GN*, [EU:C:2021:430](#).

273 See, for example, judgment of 14 March 2017 in Case C-157/15 *Achbita*, [EU:C:2017:203](#) and judgment of 14 March 2017 in Case C-188/15 *Bouagnaoui*, [EU:C:2017:204](#).

on 15 April 2021. The case concerned a settlement under Swedish legislation that allowed an airline to pay compensation to a Chilean passenger whom it had subjected to additional controls without at the same time acknowledging that discrimination had occurred. The Court noted that Articles 7(1) and (2) of the Race Equality Directive are specific expressions of Article 47 of the Charter (the right to an effective remedy, as further enshrined in the general principle of effective judicial protection).<sup>274</sup> In other words, the Directive must be viewed as closely linked to these provisions of the Charter and these provisions determine the interpretation that should be given to the Directive. The Court went on to find that, while Member States are free to choose the nature of such 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>275</sup> The Court’s approach shows that a careful review of the remedies available for discriminatory treatment in relations governed by private law is required, in order to ensure that the remedies offered are dissuasive both in terms of their practical effectiveness (for example, compensation) and in terms of their symbolic impact on the victim of discrimination (for example, the recognition of wrongdoing).

It is essential to note that whereas *Braathens* concerned the Race Equality Directive only, the Court’s reasoning is not necessarily confined thereto. Rather, the Court’s analysis rests upon the significance of the general principle of effective judicial protection in European Union law (as enshrined in Article 47 of the EU Charter of Fundamental Rights), in the light of which all aspects of European Union secondary law are interpreted. Indeed, similar findings have previously been made in respect of Directive 2000/78/EC.<sup>276</sup>

It should thus be assumed that the need for effective judicial scrutiny in relation to the Race Equality Directive can be extended across the Annex 1 Directives. The need for dynamic alignment means that it is advisable to review the remedies available for discrimination in respect of all of the Annex 1 Directives, to ensure that they are sufficiently dissuasive and that they appropriately designate discrimination as the harm being remedied.

Whereas it is not clear whether divergence would be established at present, the case law highlights areas that could prospectively require attention. Specifically, if the proposed reforms under the Judicial Review and Courts Bill are adopted in the United Kingdom, they could result in a reduction of access to court (an issue further discussed in Chapter 5). In *Braathens*, the Court highlights that, at least insofar as racial discrimination is concerned, access to court must always be possible in the final instance and the remedies provided must explicitly set out to rectify the discrimination suffered by the victim, as well as being financially dissuasive.

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274 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, [EU:C:2021:269](#), para. 33-34.

275 *Ibid.*, para. 38.

276 Judgment of 25 May 2018 in Case C-414/16 *Vera Egenberger*, [EU:C:2018:257](#).

In Northern Ireland, remedies for racial discrimination in the context of employment and the provision of goods and services are set out in the Race Relations (Northern Ireland) Order 1997.<sup>277</sup> Whereas its provisions empower courts and tribunals in Northern Ireland to determine discrimination complaints and to provide compensation, their terms arguably make victims more likely to seek out-of-court settlements. Concerns have long been raised about the need to remove significant unjustifiable anomalies and complexities within the race equality legislation which have led to difficulties and confusion for those seeking to exercise their rights, by comparison to Great Britain's Equality Act 2010.<sup>278</sup> We **recommend** reform of the 1997 Order, in the context of moving to unified equality legislation, to provide clarity to victims regarding their right to judicial protection *in addition* to any such settlements and to clarify that jurisdiction cannot be excluded by private agreement.

#### 4.4 Areas of Future Relevance to Annex 1 (no current divergence)

##### Relevant EU Legal Instruments:

Annex I instruments directly affected:

- Directive 2006/54/EC
- Directive 79/7/EEC

Annex I instruments potentially affected

- Directive 2000/78

Other legal instruments:

- Article 157 TFEU
- Article 20 of the EU Charter of Fundamental Rights ([equality before the law] superseded by the general principle of equality)
- Article 21 of the EU Charter of Fundamental Rights ([non-discrimination] superseded by the general principle of equality)
- Article 23 of the EU Charter of Fundamental Rights ([equality between men and women] superseded by the general principle of equality)

##### Relevant Northern Ireland Legal Instruments

- The Welfare Reform (Northern Ireland) Order 2015
- Social Security Contributions and Benefits (Northern Ireland) Act 1992
- Equal Pay Act (Northern Ireland) 1970
- Sex Discrimination (Northern Ireland) Order 1976 (Part III)

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277 Race Relations (Northern Ireland) Order 1997, Articles 52 and 54.

278 ECNI (2022) [Race Law Reform Policy Position - Priorities and recommendations \(equalityni.org\)](#), see para 1.30

### ***Part-Time Work and Other Non-Standard Employment Arrangements***

In the interest of completeness, there have been some notable developments in CJEU case law on part-time work and other non-standard employment arrangements, particularly in relation to gender equality in respect of pension entitlements. In this respect, the Court has provided clarifications regarding the breadth of the non-discrimination obligation enshrined in Directive 2006/54/EC on gender equality in particular. However, while this line of case law indicates important elements that should be taken into account in interpreting Northern Ireland legislation in the future, we do not currently identify any incompatibilities that require immediate attention from the perspective of dynamic alignment.

In Case C-841/19 *JL v Fogasa*, decided in March 2021, the Court considered a question of indirect discrimination on grounds of gender in the context of part-time work. The case concerned a question for a preliminary ruling on the interpretation of Articles 2(1) and 4 of Directive 2006/54. Spanish courts sought guidance on whether these provisions should be interpreted as precluding national legislation which, as regards the payment by the liable national institution of the wages and compensation that had not been paid to workers due to the insolvency of their employer, provided for a ceiling to that payment for full-time workers which was reduced *pro rata temporis* for part-time workers in accordance with the hours worked. The reduction placed female workers at a particular disadvantage, because the majority of part-time workers are female. It was therefore capable of discriminating against women indirectly and had to be justified by legitimate reasons and a proportionality assessment. On the facts, the Court decided that the *pro rata temporis* rule taking into account the amount of time actually worked by a part-time worker, as compared with that of a full-time worker, constituted an objective ground that justified a proportionate reduction of the rights and employment conditions of a part-time worker.<sup>279</sup>

In Case C-843/19 *INSS v BT*, the Court was asked to consider whether Article 4(1) of Directive 79/7 precludes national legislation which makes a worker's right to an early retirement pension subject to the condition that the amount of that pension is at least as much as the minimum pension amount to which that worker would be entitled at the age of 65 years, in so far as that legislation puts female workers at a particular disadvantage compared with male workers because workers in the affected fields, such as domestic work, are mostly female. The reason for this question was that, in fields such as domestic work, the minimum pension entitlement at 65 years would often require a state supplement, as the level of contributions would not in itself have been sufficient. In this sense, workers whose pensions at 65 years would have required a supplement, were prevented from seeking early retirement. The Court affirmed, in January 2021, that if, as it appeared from the evidence (which it was ultimately for the national court to assess),

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279 Case C-841/19 *JL v Fogasa*, [EU:C:2021:159](#), para. 43. See also, to that effect, Case C-395/08 and C-396/08 *Bruno and Others*, [EU:C:2010:329](#), para. 65 and Case C-476/12 *Österreichischer Gewerkschaftsbund*, [EU:C:2014:2332](#), para. 20.

the body of workers to whom a supplement had to be paid was significantly and systematically female, then a measure that prevented those workers from voluntarily seeking early retirement under the same conditions as other workers would be indirectly discriminatory.<sup>280</sup> It would therefore require objective justification.<sup>281</sup> Such a justification was available in this context, too. As the Court noted:

The exclusion from access to an early retirement pension of persons who voluntarily intend to take an early retirement, but for whom such a pension would give rise to a right to a pension supplement, intends to preserve the finances of the Spanish social security scheme and seeks to prolong the working life of those persons. As is apparent from the order for reference, in the absence of such an exclusion, the right of the persons concerned to receive an early retirement pension would have harmful effects on the implementation of those objectives, in so far as it would allow, inter alia, those persons to work for less time, by taking their retirement early, without however having to suffer a reduction in the amount of their future pension.<sup>282</sup>

Questions about whether non-standard work arrangements constitute unjustifiable indirect discrimination have also arisen in the context of Directive 2000/78/EC. In line with the Court's generous assessment of the need to balance wider social benefits with restrictions on the benefits provided to certain classes of workers, such as public sector workers, the Court held in *Olimpiako Kentron* that labour reserve systems are justifiable (provided that they meet proportionality safeguards).

### **Work/Life Balance**

The deadline for European Union Member States to transpose the 2019 Parental Leave Directive<sup>283</sup> is 2 August 2022. This new measure does not change an Annex 1 Directive, and so there is no strict obligation that law in Northern Ireland must reflect these developments. The Directive makes significant improvements to the legal position of parents and carers, but Northern Ireland already fulfils the majority of the minimum standards set out in the Directive, including the right to paid paternity leave.

One shortcoming in Northern Ireland law, however, is the creation under this Directive of a non-transferable right to parental leave of two months. While, at present, Northern Ireland recognises a right to shared parental leave, as a matter of best practice, with a view to ensuring alignment in employment rights across the island of Ireland, we **recommend** that the Northern Ireland Assembly should consider legislation providing for a non-transferable period of parental leave of at least two months from August 2022. Such a reform would not necessarily expand the overall existing provision for parental leave, as this already exceeds the four months'

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280 Case C843/19 *Instituto Nacional de la Seguridad Social v BT*, [EU:C:2021:55](#), para. 31.

281 *Ibid.*, para. 32.

282 *Ibid.*, para. 40.

283 Directive [2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers.

minimum set out in the directive. If the law in Northern Ireland is to fully reflect these developments, parental leave would also have to be compensated at least at the level of sick pay for at least two months for each parent. This will usually already be possible in Northern Ireland, under the current operation of maternity leave and shared parental leave, but an adjustment to the framework would be required to ensure that parental leave is independently compensated for the non-transferable period.

## 4.5 Conclusion and Recommendations

This chapter has sought to illustrate that the deep alignment which the Protocol requires in relation to the Annex 1 Directives does not simply require the tracking of new European Union legislative developments, but on a day-to-day basis, careful consideration of the implications for Northern Ireland's law of ongoing case law developments by the CJEU. Northern Ireland is the only part of the United Kingdom which is obliged to track these developments but as we will continue to explore in this report, Northern Ireland's institutions can continue to draw upon Ireland's experience of adapting a comparable legal order to changes in these European Union obligations, drawing in particular upon the 1998 Agreement's terms relating to cross-border rights and equality equivalence.<sup>284</sup>

Our recommendations are:

- In the adjudication of matters pertaining to the implementation of the Framework Equality Directive, Northern Ireland courts and employment tribunals must assess the existence of direct and indirect discrimination based on the findings explained in this chapter with regard to religious symbols at work.
- Northern Ireland must ensure that any legislation restricting or prohibiting the wearing of specific classes of symbols is changed, even if it does not target the symbols of specific religions but only generic features thereof (such as their scale or prominence).
- It is advisable for guidelines to be drawn up for the benefit of employers in Northern Ireland, which clarify:
  - a) that the prohibition or restriction on the wearing of religious symbols at work based on the particular characteristics of those symbols (for example, their size or scale) is in all cases unacceptable; and
  - b) that any generalised prohibition or restriction on the wearing of religious symbols at work must be justified by a legitimate aim for which the employer is able to adduce evidence of genuine need (including of a commercial nature). Further, the measures taken to achieve such an aim must be both suitable to achieving that aim and confined to the least restrictive approach towards the manifestation of religion.

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284 See Aoife O'Donoghue, 'Non-discrimination: Article 2 in Context' in Federico Fabbrini (ed.), *The Law & Politics of Brexit: Volume IV The Protocol on Ireland/Northern Ireland* (OUP, 2022) 89, p. 101.

- Northern Ireland must ensure that the implementation and interpretation of disability discrimination pursuant to Article 1 of Directive 2000/78/EC does not render the concept of disability dependant on the *absence* of disability as the key comparator.
- Issues of disability discrimination must be tracked as a key area of future change where dynamic alignment will be required.
- Domestic courts should apply a strict proportionality scrutiny and pay particular attention to the way in which employers handle the applicant's individual circumstances, both in their assessment of justifications adduced for indirect discrimination and in their analysis of genuine occupational requirements under Directive 2000/78/EC.
- The Race Relations (Northern Ireland) Order 1997 should be reformed to provide clarity to victims regarding their right to judicial protection in addition to any such settlements and to clarify that jurisdiction cannot be excluded by private agreement.
- The Northern Ireland Assembly should consider legislation providing for a non-transferable period of parental leave of at least two months from August 2022.



# Chapter 5: Broader Implications of Article 2 for Equality and Human Rights Protections in Northern Ireland

## 5.1 Introduction

### *Scope*

This chapter provides an account of recent European Union case law and legislative developments in the fields of equality and human rights law following the end of the Brexit transition/implementation period in December 2020, identifying areas beyond the scope of the Annex 1 Directives where Northern Ireland's institutions should consider enacting legal changes to reflect developing practice on equality and rights over-and-above the Protocol's requirement of non-diminution in respect of equality and human rights. The chapter also identifies areas where legislative initiatives relevant to equality and human rights beyond the Annex 1 Directives are ongoing and provides an update on their state of transposition.

### *Methodology*

Our analysis in this chapter is underpinned by Mapping Exercises 1, 2, 3 and 4, which are available on request. As already indicated in Chapter 4, Mapping Exercises 1 and 2 provide a systematic review of the European Union case law and legislative and non-legislative developments, respectively, for the Annex 1 Directives. Following the same methodology, we also reviewed case law (Mapping Exercise 3) and legislative and non-legislative developments (Mapping Exercise 4) relating to fundamental rights beyond the scope of the directives listed in Annex 1 of the Protocol. To ensure that our analysis captures developments in European Union equality and human rights law which are relevant for Northern Ireland to the fullest extent possible, we chose our mapping of fundamental rights based on rights covered by the Rights, Safeguards and Equality of Opportunities provisions of the Belfast/Good Friday Agreement 1998.

Thus, our systematic review was based on term-specific searches of legal instruments relevant to the rights set out in the 1998 Agreement on official European Union databases on eur-lex.eu in order to identify legislative and non-legislative developments. Our mapping of case law developments was conducted based on term-specific searches of the provisions of the EU Charter of Fundamental Rights that broadly correspond to the rights covered by the 1998 Agreement's terms relating to Rights, Safeguards and Equality of Opportunities, namely Articles 1, 10, 11, 20, 21, 22, 23, 26, 40, and 45 of the Charter.



These provisions cover, respectively, the following rights: human dignity; the freedom of expression; equality before the law; non-discrimination; linguistic diversity; equality between women and men; the integration of persons with disabilities; the right to vote; and the right to move freely. The reason for our use of Charter provisions for this part of our analysis is that the Charter is reliably referred to in CJEU case law and, as such, it provides a clear basis for identifying relevant developments in this field.

The chapter draws out the most significant aspects of the recent developments identified in these mapping exercises, insofar as these could lead to divergence of standards between European Union law and the law of Northern Ireland, and further reflects on selected recent developments not included in the mapping period, yet which could result in divergence, particularly in respect of remedies.

### **Structure**

Our analysis proceeds by considering the fundamental principles of the non-diminution obligation, and then goes on to discuss broader developments in European Union human rights and equality law, which we identify in the following main areas: the integration of persons with disabilities beyond the employment context, the rights of migrants (including formalities associated with free movement, minimum welfare requirements), linguistic diversity, the right to effective judicial protection, and voting rights of European Union citizens. As highlighted above, the European Union Charter of Fundamental Rights continues to have relevance under the Article 2 non-diminution commitment;<sup>285</sup> we therefore also provide an analysis of how domestic courts may approach developments in European Union fundamental rights under the non-diminution obligation, in light of the removal of the Charter from retained European Union law.

## **5.2 Fundamentals of the Non-Diminution Obligation**

In each one of the examples we work through in this chapter, we conduct our analysis on the basis that the non-diminution obligation is multifaceted. We can distil the analysis contained in Chapter 3 into two key elements. First, it must be demonstrated that the Rights, Safeguards and Equality of Opportunity provisions of the 1998 Agreement are engaged. These terms, as we have seen, are open textured in that the rights enumerated are not intended to provide for a closed list, but not open ended. Any application of these terms must be alive to the qualifications within this particular section of the 1998 Agreement. Thus, Article 2 claims cannot relate to rights provisions contained in other parts of the 1998 Agreement (such as the birthright provisions relating to nationality). Moreover, in the 1998 Agreement, the pledges within this section apply to ‘everyone in the community’.

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285 See Chapter 3, section 3.

Whereas we have argued above for an expansive account of this commitment, this qualification could be the subject of litigation, and it will potentially fall to the courts to determine its scope.<sup>286</sup> The boundaries of the concept of community need to be interpreted with special regard to the importance of this decision for marginalised groups within Northern Ireland, including asylum seekers and irregular migrant labour.<sup>287</sup> An inappropriately restrictive account of the concept of ‘the community’ would, for example, have implications for the application of Article 2 to European Union law such as the Trafficking Directive which provides protections for marginalised groups within the community which have been subject to human trafficking.<sup>288</sup> Not all elements of the Rights, Safeguards and Equality of Opportunity provisions, however, have equal potential to generate Article 2 obligations. Given the focus of European Union law, ‘the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity’ assumes particular importance in much of the following discussion. In short, all applications of Article 2 must start with the 1998 Agreement; no claim can be brought within its scope without establishing a connection to its Rights, Safeguards and Equality of Opportunity provisions.

Second, non-diminution provides a ‘but for’ test; to summarise the analysis of Chapter 3, ‘but for’ the United Kingdom’s withdrawal from the European Union, the protections provided by European Union law relevant to the 1998 Agreement’s Rights, Safeguards and Equality of Opportunity provisions would continue in force as they had applied on 31 December 2020. For Article 2 to apply, it will have to be shown both that there was an operative European Union protection and that the diminution of that protection has been enabled by Brexit. This means that aspects of European Union law remain frozen, as they stood at the end of the Brexit implementation/transition period in December 2020, in their application in Northern Ireland law. As European Union law develops following this point in time, Northern Ireland’s institutions will be left looking back to a particular iteration of European Union law which is no longer the subject of deliberations in European Union institutions and agencies. This will create particular challenges which we will address in the next chapter. For this chapter, however, it is notable that Northern Ireland’s courts must continue to have due regard to relevant CJEU decisions, but those decisions will increasingly relate to successor European Union legislation to that applicable in Northern Ireland.<sup>289</sup> This will create a particularly difficult zone for the courts’ determinations of how CJEU jurisprudence applies in Northern Ireland.

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286 See Chapter 3, section 2.

287 See, in this regard, NIHRC, *Response to the Public Consultation on a Draft Refugee Integration Strategy (2022)* para. 2.7.

288 See Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, *Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill* (27 January 2022).

289 See Chapter 3, section 4.

### 5.3 Integration of Persons with Disabilities

Whereas issues of disability discrimination have already been partly addressed in our analysis of recent developments under Directive 2000/78/EC in Chapter 4, the case law on disability discrimination highlights a broader shift in the Court's understanding of the *integration* of persons with disabilities, from what used to be an aspirational protection in earlier case law<sup>290</sup> to an enforceable element of European Union equality law,<sup>291</sup> both because of the application of Articles 21 and 26 of the EU Charter of Fundamental Rights and because of the obligation to comply with Article 5 of the UNCRPD.<sup>292</sup>

Similarly, the European Parliament has adopted a resolution on the integration of persons with disabilities both in the context of employment law and beyond it, which specifies the need for Member States to take measures that foster integration and full compliance with the UNCRPD and invites the Commission to propose legislation on the rights of Persons with Disabilities outside the employment context (to which Directive 2000/78/EC is limited).<sup>293</sup> At the same time, the concept of disability remains one of the points of contention in the adoption of a horizontal directive on equal treatment, with some Member States insisting on a narrower conception of disability that excludes temporary illness.<sup>294</sup> As such, before fully addressing the question of disability as part of a revised approach to equal treatment under a new framework directive, it is likely that interim measures will be put in place to strengthen the integration of persons with disabilities beyond Directive 2000/78/EC or its potential successor under a horizontal directive on equal treatment.

To anticipate such a development, it is **recommended** that Northern Ireland should fully implement the UNCRPD in domestic legislation. Although the UNCRPD is currently protected under the domestic law in Northern Ireland as a result of European Union law, this protection does not extend beyond the scope of

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290 See, for example, judgment of 11 July 2006 in Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, [EU:C:2006:456](#); judgment of 22 May 2014, C-356/12, *Glatzel v Freistaat Bayern*, [EU:C:2014:350](#); judgment of 18 December 2014 in Case C-354/13 *Kaltoft v Municipality of Billund*, [EU:C:2014:2463](#).

291 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisija za zashtita ot diskriminatsia and VA* ('Jurors'), [EU:C:2021:862](#).

292 Articles 21 and 26 of the EU Charter of Fundamental Rights provide for the protection from discrimination on grounds of disability and for the integration of persons with disabilities, respectively. Article 5 of the UNCRPD goes further than these provisions, as it includes an explicit obligation of reasonable accommodation. It provides:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'

293 European Parliament resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2021) OJ C 474/04.

294 Interinstitutional File 2008/0140(CNS), 23 November 2021, [14046/21](#), p. 7.

application of European Union law.<sup>295</sup> Its effect is limited to matters which would have been European Union competences, as confirmed by the ruling in *SPUC*.<sup>296</sup> Yet, whereas developments on disability discrimination beyond the field of employment law are only subject to the non-diminution obligation under Article 2, as opposed to the dynamic alignment obligation in respect of the Annex 1 Directives, the overlap is increasing and is likely to be further eroded, in the event that a horizontal directive on equal treatment replacing Directive 2000/78/EC is ultimately adopted.

## 5.4 The Rights of Migrants

Other case law developments which will be relevant to the obligation to keep pace with European Union law in the Protocol include protections of the right to move and reside freely in other Member States (Article 45 of the Charter) and the rights of migrants, more widely. In a recent judgment in *Stolichna obshtina rayon Pancharevo*, handed down on 14 December 2021,<sup>297</sup> the Court considered the non-recognition in Bulgaria of a birth certificate issued in the United Kingdom, which listed two mothers as the child's parents (but did not indicate the biological mother). The CJEU found that this was incompatible with Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of the Citizens' Rights Directive.<sup>298</sup> In the case of a child who is a Union citizen and whose birth certificate designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged:

- (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and
- (ii) to recognise, as in any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

This development relates to the mutual recognition obligation of Member States in matters relating to the recognition of citizenship of the European Union as a 'fundamental status' of nationals of the Member States.<sup>299</sup> The obligation to recognise that status and not to dissuade or subject the exercise of the right to move freely to supplementary conditions extends even to matters considered sensitive or central to the constitutional identity of the Member States.

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295 See *In re NIHRC* [2018] UKSC 27, [331] (Lord Kerr)

296 *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [104] (Colton J).

297 Judgment of 14 December 2021 in Case C-490/20, *Stolichna obshtina, rayon Pancharevo*, [EU:C:2021:1008](#).

298 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77.

299 Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [EU:C:2001:458](#), para. 31.

Another key area of migration law where European Union equality and human rights case law has developed beyond the Annex I Directives concerns the material implications of the commitment to human dignity under Article 1 of the Charter of Fundamental Rights for European Union secondary legislation, such as regulations and directives, especially in the context of migration. In Case C-94/20 *Land Oberösterreich v KV*,<sup>300</sup> the Court assessed the compatibility with Directive 2004/38/EC and Article 21 of the Charter of Fundamental Rights of a requirement that third country nationals prove basic language proficiency as a condition of eligibility for housing benefit, when this condition did not apply to European Union citizens. The Court found that mastery of a language does not always relate to ethnicity or race, so that arguments that race/ethnicity discrimination could be made out because of the existence of language requirements were unsuccessful.

As noted in Chapter 4, the Court discussed the compatibility of this requirement with the Race Equality Directive restrictively, so that there is currently no need to make immediate changes regarding the application of this directive. Still, the judgment has a significant wider impact on the protection of linguistic diversity in the European Union, in line with Article 22 of the EU Charter of Fundamental Rights.<sup>301</sup> More specifically, in relation to the Race Equality Directive, the case confirmed that nationality should not be assimilated with ethnicity or race, and that linguistic requirements cannot be seen as constituting discrimination on grounds of race or ethnicity, except insofar as they differentially impact a defined racial or ethnic group. By contrast, linguistic requirements impacting third country nationals as a whole fall outside the scope of the Directive.<sup>302</sup>

Nevertheless, the case makes a significant contribution to the European Union's approach towards the rights of migrants. The Court considered, within the meaning of Directive 2004/38/EC, that housing benefit was likely to amount to a 'core benefit' under Article 11(4) of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents,<sup>303</sup> as housing benefit makes an essential contribution to the Directive's objective of social integration by ensuring a decent standard of living above the poverty line.<sup>304</sup> While the matter was ultimately left to domestic courts to decide in light of their assessment of the broader system of benefits offered to migrants, the Court agreed with the Advocate General that the Directive requires the disbursement of benefits required to ensure a dignified standard of living, as it should be interpreted in line with Article 1 of the Charter (the right to human dignity). Additional eligibility conditions for this benefit for third country nationals would therefore be incompatible with European Union law.<sup>305</sup>

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300 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#).

301 Article 22 of the Charter provides that 'the Union shall respect cultural, religious and linguistic diversity'.

302 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#), para. 55-56 of the judgment. See also judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, [EU:C:2015:480](#), para. 100; of 6 April 2017, *Jyske Finans*, C-668/15, [EU:C:2017:278](#), para. 27 and 31; and of 15 November 2018, *Maniero*, C-457/17, [EU:C:2018:912](#), para. 47-48.

303 Judgment of 25 November 2003 (OJ 2004 L 16, p. 44).

304 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#), para. 42 (see also para. 59 of the Opinion).

305 *Ibid*, para. 49.

This conclusion is not the product of an isolated case. Crucially, in its judgment on the Universal Credit benefit in *CG v The Department for Communities in Northern Ireland*, the Court specifically found that national authorities were under an obligation to disburse Universal Credit to a Croatian national who had already been granted a temporary right to reside in the United Kingdom, despite the fact that the authorities could have refused the application based on the absence of sufficient resources under Article 7 of the Citizens' Rights Directive (Directive 2004/38/EC).<sup>306</sup> The Court held that the United Kingdom could not exclude from a subsistence benefit such as Universal Credit a European Union citizen without sufficient resources to whom it had granted a right to reside, solely on the basis of her nationality.<sup>307</sup> It was also essential to ensure, in line with the right to human dignity enshrined in Article 1 of the Charter, that the individual could benefit from a dignified standard of living.<sup>308</sup> Whereas, on the facts of the case, it was not clear whether the decision to refuse Universal Credit exposed the EU citizen in question to a serious risk of breaches of the right to human dignity, the Court nevertheless emphasised that 'where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, [the] authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions.'<sup>309</sup>

As such, we **recommend** that Northern Ireland law should ensure that all migrants covered by the protections enshrined in European Union legislation, such as the Citizens' Rights Directive (Directive 2004/38/EC), are provided with the core material benefits required for a minimally dignified standard of living in order to comply with the requirement of non-diminution in relation to the general principle of human dignity (Article 1 of the Charter). It remains for national authorities to ensure what that minimum level amounts to, but it is clear from the ruling that the benefits provided should be sufficient to prevent destitution.

More generally, the principle of human dignity is acquiring an important role in structuring the minimum welfare standards for migrants who do not have sufficient resources. In *CG v The Department for Communities in Northern Ireland*, the Court held that, in accordance with Article 1 of the Charter, national authorities must 'ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the Member States, who has a right of residence on the basis of national law, and who is in a vulnerable situation, may nevertheless live in dignified conditions'.<sup>310</sup> This is further supported by the *K.S. and M.H.K.* ruling, where the Court (following the Advocate General's Opinion) associated the concept of human dignity with the possibility of access to the labour market for individuals who are residing in the Member State in question pending an application for asylum.

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306 Case C-709/20, *CG v The Department for Communities in Northern Ireland*, [ECLI:EU:C:2021:602](#), para. 78.

307 *Ibid.*, para. 81.

308 *Ibid.*, para. 89.

309 *Ibid.*, para. 93.

310 Case C-709/20, *CG v The Department for Communities in Northern Ireland*, [ECLI:EU:C:2021:602](#), para. 89.

During that time, it is essential that they are provided with the means of lawfully achieving a dignified living standard.<sup>311</sup>

## 5.5 Linguistic Diversity

Linguistic diversity is another area where further developments beyond the Annex I Directives may be expected in the near future. There has not been significant litigation in this field in European Union law to date.<sup>312</sup> Even though recent case law distinguishes language requirements from non-discrimination obligations, it has now taken the important step of recognising linguistic diversity as a relevant consideration in the context of the equal treatment for migrants, due to its protection in Article 22 of the Charter.<sup>313</sup> In a further recent case on this issue, the Advocate General suggested a strong interpretive role for Article 22 of the Charter, albeit that neither he nor the Court ultimately gave direct effect to this provision.<sup>314</sup>

## 5.6 Effective Judicial Protection

The right to effective judicial protection is being shaped into one of the most significant elements of European Union human rights law, and is currently the most litigated provision of the Charter.<sup>315</sup> Beyond the *Braathens* case, which was discussed in the preceding chapter, recent rulings by the Court's Grand Chamber, such as the *Appointment of Judges* case,<sup>316</sup> have further strengthened the significance of effective judicial protection as an enforceable right, affirming its links to all areas of European Union human rights law. More specifically, Article 47 of the Charter, which protects the right to an effective remedy and to a fair trial, is becoming a significant supplementary ground in various areas of human rights litigation, such as to support free movement rights for dual citizens<sup>317</sup>, and to challenge delays in a criminal trial process.<sup>318</sup> In turn, the CJEU has shown considerable willingness to affirm a right to judicial review across these cases. It is, therefore, strongly **recommended** that access to court and judicial oversight of administrative matters are accepted by all relevant public bodies to be part of the Protocol's non-diminution commitment.

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311 Judgment of 14 January 2021 in Joined Cases C-322/19 and C-385/19, *K.S., M.H.K. v The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland, The Attorney General* (C-322/19), and *R.A.T., D.S. v Minister for Justice and Equality* (C-385/19), [EU:C:2021:11](#), para. 69.

312 See the [data](#) on case law references provided by the Fundamental Rights Agency.

313 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#).

314 Case C-64/20, *UH v An tAire Talmhaíochta, Bia agus Mara, Éire, An tArd-Aighne*, [EU:C:2021:207](#). See, particularly, para. 81 of AG Bobek's [Opinion](#) in this case, delivered on 14 January 2021.

315 See further Eleni Frantziou, 'The Binding Charter Ten Years On: More Than A Mere Entreaty?' (2019) 38 *Yearbook of European Law* 73 and Giulia Gentile, 'Two Strings to one Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case-law: between Procedural and Substantive Fairness' (2020) *Market and Competition Law Review* IV(2), for empirical studies of the prominence of Article 47 EU Charter of Fundamental Rights in the Court's case law.

316 Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, [EU:C:2021:153](#).

317 Case C-490/20, *V.M.A. v Stolichna obshtina, rayon „Pancharevo*, [EU:C:2021:1008](#).

318 Case C-769/19 *Spetsializirana prokuratura (Vices de forme de l'acte d'accusation) v UC and TD*, [EU:C:2021:28](#). We note that, although the Court did not find a violation of the Charter in this case, it is crucial that the matter was considered admissible.

In particular, as judicial protection under Article 47 of the Charter of Fundamental Rights goes beyond Article 6 of the European Convention of Human Rights in providing for an effective remedy and legal aid,<sup>319</sup> it is essential to ensure that the application of UK-wide legislation, such as the Judicial Review and Courts Act 2022 and potential reform of the HRA 1998,<sup>320</sup> does not compromise this specific protection for access to justice and effective judicial protection in Northern Ireland law. The exclusion of Northern Ireland from the effect of certain provisions of the Judicial Review and Courts Act 2022 potentially reflects this priority.

Article 47 of the Charter also has important remedial implications for the vindication of other substantive rights. In its ruling in *Egenberger*, where Article 47 was used to supplement a substantive breach of the protection from discrimination enshrined in Article 21 of the Charter, the Court held: ‘Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such [...] Consequently, [...] the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.’<sup>321</sup> The meaning of ‘full effectiveness’ is, in turn, explored in the *Francovich* case, which provides: ‘[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>322</sup> The right to effective judicial protection is thus particularly significant for exploring the limits of Article 2. Although it is not one of the rights explicitly listed in the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement, for those rights to be meaningful (as Article 2 requires) there must be scope for them to be vindicated in the event of disputes. Moreover, as indicated above, the CJEU views effective judicial protection as a procedural right that is integral to European Union law, both in the field of equal treatment and in respect of other directly effective rights. As such, effective judicial protection must be viewed as inherent in the concepts of ‘safeguards’ and ‘civil rights’ within this section of the 1998 Agreement.

The potential reach of this concept was highlighted in March 2022, when the CJEU ruled that the United Kingdom had wrongfully required private comprehensive

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319 Article 47 of the Charter of Fundamental Rights provides:  
‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.  
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.  
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.

320 Judicial Review and Courts Act 2022 (UK), s. 50.

321 Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, [EU:C:2018:257](#), para. 78-79.

322 Case C-6/90 *Francovich and Bonifaci v Italy*, [EU:C:1991:428](#), para. 33.



sickness insurance cover as part of its residence requirements upon European Union Citizens in relation to Article 7(1)(b) of Directive 2004/38 (the Citizens' Rights Directive).<sup>323</sup> This was because, given the nature of the NHS as a public health provider, 'the fact remains that, once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b)'.<sup>324</sup> As a result of this ruling, it is evident that many European Union citizens resident in the United Kingdom in recent decades have been wrongfully obliged under the United Kingdom's Immigration Regulations 2006 to purchase private health insurance.<sup>325</sup> It is unclear what the implications of this ruling for ongoing immigration policy are in the rest of the United Kingdom. However, both with regard to European Union citizens who were affected by this policy prior to the United Kingdom's withdrawal from the European Union, and with regard to the ongoing obligations in Northern Ireland under the Protocol, the situation is more complex.

In respect of the rights of European Union citizens who were affected by this policy in other parts of the United Kingdom before Brexit, the legal position is governed by section 6 and Schedule 1 of the European Union (Withdrawal) Act 2018. These provisions stipulate, respectively, that domestic courts are not bound by any decision of the CJEU following the end of the transitional period and that '[t]here is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*'.<sup>326</sup> Although the Withdrawal Agreement provides that the ruling in *VI* has binding force as it is a ruling relating to pre-Brexit facts,<sup>327</sup> European Union citizens resident in the United Kingdom prior to Brexit have a time-limited opportunity to use it as the basis of a *Francovich* damages claim. More specifically, whereas the United Kingdom has an obligation, under Article 89 of the Withdrawal Agreement, to make good breaches of European Union law stemming from preliminary references sent to the CJEU during the transitional period, the financial implications of this obligation are restricted by the limitation on damages built into the European Union (Withdrawal) Act.

In line with Schedule 8 of the European Union (Withdrawal) Act, even though the individuals in this case had accrued rights during a time when European Union law was fully operational, any claims for damages founded upon the ruling will only be allowed before domestic courts if they are brought within two years from the end of the transitional period, that is, until 31 December 2022. This limitation is problematic. As the Withdrawal Agreement enjoys primacy over domestic law, decisions such as *VI* are arguably unaffected by the remedial limitations made in Schedule 1 of the European Union (Withdrawal) Act altogether (pertaining both to the rule in

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323 Case C247/20 *VI v Commissioners for Her Majesty's Revenue & Customs*, [EU:C:2022:177](#).

324 *Ibid.*, para. 69.

325 See Sylvia de Mars, 'Economically Inactive EU Migrants and the NHS: Unreasonable Burdens Without Real Links?' (2014) 39 *European Law Review* 770.

326 European Union (Withdrawal) Act 2018 (UK), Sch. 1, para. 4.

327 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020, Article 89.

*Francovich* and to the disapplication of domestic enactments, which is also excluded in certain instances). If the limitations are enforced by domestic courts and individuals are thereby prevented from litigating violations of their rights premised upon the Immigration Regulations for any facts pre-dating the end of the transitional period, this could be seen as undermining the obligation to comply with European Union judgments and, as such, may constitute a violation of the Withdrawal Agreement on this basis.

The above concerns also apply, and are significantly heightened, in the context of Northern Ireland. Indeed, beyond the considerations detailed above, there is a strong case that rights regarding health care and benefits such as those at stake in *VI* (Child Tax Credit and Child Benefit) fall within the 1998 Agreement's concept of a right to 'equal opportunity in all social and economic activity'. The wrongful requirement of comprehensive sickness insurance arguably prevented European Union migrants from being able to rely on or, at least, enjoy the full benefit of, public health provision and the aforementioned social security benefits on an equal basis to others in the community. The limitations within the United Kingdom's withdrawal legislation could thus be considered breaches not only of the Withdrawal Agreement, but also of the Northern Ireland Protocol, as they result in a *remedial* diminution of rights falling within the scope of Article 2.

In light of the primacy of the Withdrawal Agreement, therefore, it may be argued that courts in Northern Ireland should not be subject to the limitation enshrined in Schedule 1(4) of the European Union (Withdrawal) Act, in relation to rights with Article 2 relevance. Most importantly, though, the non-diminution obligation is not a static one: while it only captures the interpretation of European Union law that existed before the end of the transitional period, its application is intended to be prospective. Unlike the rest of the United Kingdom, therefore, Northern Ireland should be regarded as under an obligation to allow European Union citizens to obtain compensation for pre-transitional period failures to recognise their entitlement to the relevant benefits. The *VI* case could also be read as supporting prospective obligations to provide settled and pre-settled European Union citizens in Northern Ireland and their family members with a right to public comprehensive healthcare, as well as a right to claim certain tax deductions, such as Child Tax Credit, and social security benefits, such as Child Benefit, on the same terms as United Kingdom and Irish citizens. More broadly, European Union citizens resident in the United Kingdom should be able to establish ongoing rights to the benefits which should apply pursuant to the correct interpretation of Directive 2004/38 even after the end of the transitional period, provided their residency commenced during or before the transitional period.

We therefore **recommend**, that courts in Northern Ireland and courts addressing the law as it applies in Northern Ireland should not be barred from providing compensation for violations of European Union fundamental rights in areas with Article 2 relevance.

## 5.7 The Continued Relevance of the EU Charter of Fundamental Rights

One of the most significant **implications** of our analysis of the case law across different areas of equality and human rights law is that the CJEU consistently refers to European Union secondary legislation as a ‘specific expression’ of the provisions of the Charter of Fundamental Rights. In the abovementioned ruling in *Land Oberösterreich v KV*,<sup>328</sup> the Court recently clarified its earlier judgment in *Kamberaj*,<sup>329</sup> which concerned the scope of application of European Union equality and human rights law, and confirmed that the Charter is relevant, in principle, for the interpretation of any element of secondary legislation. Whereas the Charter of Fundamental Rights does not form part of retained European Union law, as already noted in Chapter 3, the Charter of Fundamental Rights and the case law pertaining thereto should be taken into account to meet the Protocol’s non-diminution commitment for Northern Ireland. In particular, whereas references to the Charter are superseded in United Kingdom law by references to the general principles of European Union law in line with sections 5(5) and 6(3)(a) of the EU (Withdrawal) Act 2018,<sup>330</sup> both the relevance of the Charter in Northern Ireland under Article 2 of the Protocol and the fact that the Court of Justice extensively relies on the Charter to inform its interpretation of European Union secondary legislation, mean that it is more practical for fundamental rights developments to be tracked by reference to the Charter, regardless of whether an associated general principle can be identified. For this reason, our analysis proceeds by referring to relevant provisions of the Charter.

Moreover, the retention of general principles under the Withdrawal Act is contentious in important respects. Crucially, there are two possible interpretations of how this retention of general principles should operate: the first option would be that United Kingdom courts (within and outside Northern Ireland) should take into account all references to the Charter *as if* they had amounted to general principles. The second possible reading of general principles is that United Kingdom courts should only take into account as general principles of European Union law those provisions of the Charter which have previously been the subject of litigation. These provisions include the rights to linguistic diversity, the integration of persons with disabilities, as well as employment protections, such as paid annual leave and access to social security. The commentary diverges significantly on whether these provisions should be considered general principles of European Union law: on the one hand, the Government’s right-by-right analysis suggested that they are to be viewed as merely aspirational protections that do not amount to general principles. This would mean that they are not capable of invocation before domestic courts after the end of the transitional period.<sup>331</sup> On the other hand, European Union

328 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#).

329 Case C-571/10, *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia autonoma di Bolzano*, [EU:C:2012:233](#).

330 HM Government, ‘[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/?](#)’ (7 August 2020) para. 14.

331 HM Government, [Charter of Fundamental Rights of the EU Right by Right Analysis](#) (5 December 2017).

commentary – including by the Court’s current President writing extra-judicially – suggests that *all* of the Charter’s provisions are general principles of European Union law, but that the Court may also go on to develop new general principles in the future (although this has not happened so far).<sup>332</sup> There is no clear test for assessing whether a right amounts to a general principle of European Union law – a problem rendered more difficult by the CJEU’s consistent reliance on the Charter, without reference to ‘general principle’ status.

The existence of this broader debate about the meaning of general principles is especially problematic for courts in Northern Ireland, which will have to ensure full compliance with the non-diminution commitment, and *must* therefore take into account any Charter provisions (and pre-existing general principles) that are relevant to the application of Article 2 of the Protocol.<sup>333</sup> In this context, an overly narrow understanding of the general principles of European Union law could lead both to lack of clarity and, potentially, to errors that contribute to diminution.

We therefore **recommend** that the broader approach is adopted by courts in Northern Ireland, and that all references to the Charter are considered as references to a corresponding general principle of European Union law, which should be taken into account. This would prevent legal uncertainty about the relevance of new developments on the Charter, such as on linguistic diversity and human dignity, which had not been extensively litigated before the end of the transitional period,<sup>334</sup> and would mean that these provisions should be used – at least – as interpretive tools.

Beyond their quality as interpretive aids, we also note that general principles of European Union law have previously given rise to strong individual remedies in their own right. This opens up a further possibility of diminution in the level of protection of fundamental rights in Northern Ireland. More specifically, in addition to our analysis of potential claims in damages under the rule in *Francovich*, discussed earlier, some general principles, such as non-discrimination,<sup>335</sup> effective judicial protection, and fair working conditions including paid annual leave,<sup>336</sup> have been found to enjoy direct effect in vertical as well as in horizontal relations.<sup>337</sup> When combined with secondary European Union legislation (notably directives),

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332 Koen Lenaerts and Jose Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU law’ (2010) 47 CMLRev 1629, 1655.

333 We note that the need to take the Charter into account substantively was acknowledged in *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [117]-[118] (Colton J), but it remains unclear whether future litigation will draw upon the general principles of EU law or the Charter provisions *per se*. A further question arises as to whether the Charter provisions could have direct effect in Northern Ireland under Article 2. However, as this point was not material to the facts, it was not determined in this judgment.

334 See Eleni Frantziou, ‘The Binding Charter Ten Years On: More Than a Mere Entreaty?’ (2019) 38 Yearbook of European Law 73.

335 Case C-144/04, *Mangold v Helm*, [EU:C:2005:709](#); Case C-555/07 *Kücükdeveci v Swedex*, [EU:C:2010:21](#).

336 Cases C-569/16 and C-570/16 *Stadt Wuppertal v Bauer and Willmeroth v Broßonn*, [EU:C:2018:871](#); Case C-684/16 *Kreuziger v Land Berlin and Max-Planck-Gesellschaft*, [EU:C:2018:874](#); Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank*, [EU:C:2019:402](#).

337 Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, [EU:C:2018:257](#).

these provisions gave rise to individual remedies, such as compensation, which had been significant in private law litigation, as they allowed domestic courts to disapply legislation and provide compensation to the victim by another private actor. Private law claims based on the general principles of European Union law (known as ‘*Mangold* actions’)<sup>338</sup> had been used extensively in employment and pension disputes in the United Kingdom in situations where no comparable remedy existed in domestic law independently of European Union law.<sup>339</sup> Schedule 1(3) of the Withdrawal Act precludes future actions of this type from arising in the future.<sup>340</sup> By contrast, as already indicated in Chapter 3, Article 4 of the Withdrawal Agreement 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’. Considering that the Withdrawal Agreement enjoys primacy in all its aspects through, if necessary, the disapplication of ‘inconsistent or incompatible domestic provisions’.<sup>341</sup> Arguably, therefore, Article 2 of the Northern Ireland Protocol continues to engage remedies obsolete in the rest of the United Kingdom due to Schedule 1 of the Withdrawal Act. This is because, if remedies such as disapplication are not available, this would be a diminution of safeguards underpinned by European Union law before withdrawal.

We would, therefore, **recommend** that the Northern Ireland Executive assess the continued possibility of this form of liability in Northern Ireland law and provide guidance clarifying the position of private actors who may be affected, such as employers.

## 5.8 The Voting Rights of European Union Citizens

Under European Union law, European Union citizens resident in European Union Member States other than their home state enjoy rights with regard to local government.<sup>342</sup> This is particularly significant in the Northern Ireland context, because the local government franchise also provides the basis for the franchise for Northern Ireland Assembly elections.<sup>343</sup> At the end of the Brexit transition/

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338 ‘*Mangold* actions’, following Case C-144/04 *Mangold v Helm*, established that the general principles of EU law, such as non-discrimination, can be invoked as such and generate a remedy, for example, compensation, provided a case falls within the material scope of application of EU law.

339 See, for example, *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62; [2019] A.C. 777; *Walker v Innospec* [2017] UKSC 47; [2017] All E.R. 1004. For a more extensive account of the problems of removing *Mangold* actions under the Withdrawal Act, see Eleni Frantziou, ‘The Horizontal Effect of Human Rights after Brexit: A Matter of Renewed Constitutional Significance’ (2021) 4 EHRLR 365.

340 Schedule 1(3) of the EU (Withdrawal) Act 2018 provides: ‘(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law. (2) No court or tribunal or other public authority may, on or after IP completion day]— (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.’

341 House of Lords Constitution Committee, [European Union \(Withdrawal Agreement\) Bill](#), 1st Report of Session 2019-2021 (2021) HL 5.

342 EU Charter of Fundamental Rights, Article 40.

343 The Northern Ireland Assembly (Elections) Order 2001 (SI 2001/2599), Article 4.

implementation period, European Union citizens resident in Northern Ireland remained entitled to vote in local government elections and elections for the Northern Ireland Assembly. Restrictions to these arrangements might thus be thought to raise issues with the non-diminution commitment.<sup>344</sup> The UK Government's stated position, however, is that 'there should not be a continued, automatic right to vote and stand in local elections solely by virtue of being an EU citizen'.<sup>345</sup> Legislation giving effect to this proposal does not, it should be noted from the outset, affect Irish citizens resident in Northern Ireland, as their electoral rights are not dependent upon their European Union citizenship.

While some post-Brexit voting rights cases have already been heard, this litigation has concerned the voting rights of British citizens and their loss of European Union citizenship, rather than the rights of European Union citizens *per se*. In this respect, the General Court has already dismissed two actions challenging the loss of European Union citizenship and inability of Britons resident abroad to vote in the 2016 referendum, and appeals on both of these issues are currently pending before the CJEU.<sup>346</sup> Further actions of note have been initiated by the European Commission in two cases (against Poland and the Czech Republic) for failing to allow European Union citizens to become members of political parties and to stand in municipal elections. Although the cases are still pending, and no Opinion has been issued at the time of writing, their progress will inform the scope of voting rights under Article 2 of the Protocol in light of the obligation on the Northern Ireland courts to keep pace with CJEU decisions.<sup>347</sup>

In this area of law, the Article 2 commitments operate alongside the specific citizens' rights provisions in the Withdrawal Agreement. These provisions protect the rights of European Union citizens resident in the United Kingdom provided that they were resident before 1 January 2021.<sup>348</sup> For European Union citizens who take up residency in the United Kingdom after this date the citizens' rights provisions do not provide for comparable protections. For 'new' resident European Union citizens, Westminster has legislated in the Elections Act 2022 to connect electoral rights to whether or not a reciprocal arrangement exists for United Kingdom citizens resident in European Union Member States (such arrangements have already been concluded with Spain, Portugal, Luxembourg and Poland).<sup>349</sup>

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344 See ECNI/NIHRC, *Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland in the Elections Bill (4 March 2022)*.

345 Chloe Smith, MP, HC Deb., Written Statement UIN HCWS99 (17 June 2021).

346 Case C-502/21 P, *David Price against the order of the General Court (Tenth Chamber, Extended Composition) delivered on 8 June 2021* in Case T-231/20, *Price v Council*, 13/08/2021.

347 Case C-814/21, *European Commission v Republic of Poland*, 4/2/2022; Case C-808/21, *European Commission v Czech Republic*, 18/2/2022; Case 501/21 P, *Appeal brought on 13 August 2021 by Harry Shindler and Others against the order of the General Court (Tenth Chamber, Extended Composition) made on 8 June 2021 in Case T-198/20, Shindler and Others v Council*, 13/08/2021.

348 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020) UKTS 3/2020, Article 23.

349 Elections Act 2022, s. 14 and Sch. 8.

Devolution adds a level of complexity to the operation of these restrictions, as the local and devolved-legislature franchises have been devolved in Scotland and Wales. Both of their devolved institutions have enacted legislation to enfranchise many foreign national residents (including European Union citizens), limiting the scope of the Elections Act.<sup>350</sup> Westminster, however, continues to legislate for the franchise in Northern Ireland, and the new legislation makes important modifications in this regard.<sup>351</sup> These amendments require consideration in light of the Protocol's operation.

The Article 2 non-diminution commitment protects the European Union rights which underpin elements of the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement which existed on 31 December 2020. The electoral rights of European Union citizens can be accommodated within this part of the 1998 Agreement. People resident in Northern Ireland, irrespective of nationality, are part of the community and electoral rights connect directly to the 1998 Agreement's commitment to the 'right of free political thought'. At issue, however, is the operation of Article 2's requirement that the diminution be resultant from Brexit; 'but for' the United Kingdom's withdrawal from the European Union, the diminution of rights at issue could not have taken place. In this regard, European Union law protects the right of European Union citizens who move between Member States to participate in local government elections.<sup>352</sup>

On a direct application of this test, had it not been for Brexit, United Kingdom legislation could not restrict this right without breaching European Union law. The Protocol on Ireland/Northern Ireland could therefore operate to provide an avenue to challenge the Elections Act's restrictions on democratic participation with regard to local elections in Northern Ireland, in a way which does not apply to such elections in England.<sup>353</sup> The UK Government has nonetheless made two responses to the possibility of an Article 2 challenge in the course of parliamentary discussion over the new law. First, ministers assert that voting rights for European Union citizens must be treated as ancillary rights, and that Brexit has restricted freedom of movement:

[T]he UK is no longer a Member State, EU citizens self-evidently no longer enjoy the right to reside here under the EU Treaties and so the ancillary Article 22 TFEU right to vote and participate in municipal elections is no longer applicable ...<sup>354</sup>

350 See Colin Murray, 'Prisoner Voting and Devolution: New Dimensions to an Old Dispute' (2021) 25 *Edinburgh Law Review* 291, 300-308.

351 Elections Act 2022, s. 11 and Sch. 6.

352 Treaty on the Functioning of the European Union, Article 22.

353 See ECNI/NIHRC, *Joint ECNI/NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland and the Elections Bill* (4 March 2022).

354 Conor Burns, MP, Letter: Article 2 of the Protocol on Ireland/Northern Ireland (25 March 2022), p. 2.

Second, the UK Government notes that the legislation maintains ‘the voting and candidacy rights of EU citizens who were resident here by the end of the Withdrawal Agreement transition period (31 December 2020),<sup>355</sup> buttressing its claim that the law is Article 2 compliant on the basis that no one who enjoyed the right during the implementation/transition period will be adversely affected by the new measures. Any litigation related to these measures would therefore test how the courts approach the ‘but for’ test under Article 2. If the courts do not accept that the caveats within this legislation protect the right as it applied in December 2020, section 7A of the European Union (Withdrawal) Act 2018 will operate to disapply the restrictions which conflict with the Protocol, even though they are contained in statute. A similar case for an Article 2 protection, however, cannot be made regarding Northern Ireland Assembly elections. As European Union law does not provide European Union citizens with a right regarding elections which are not local elections, it is not possible to construct a legal challenge to any restrictions to European Union Citizens’ electoral rights in this regard through Article 2.<sup>356</sup>

## 5.9 Trafficked Persons

The Nationality and Borders Act 2022 disapplies elements of the Trafficking Directive<sup>357</sup> which had hitherto been part of retained European Union law.<sup>358</sup> Although the Trafficking Directive is not listed in the Annexes to the Protocol, the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland highlight that the measure is ‘closely linked to’ the Victims’ Directive, which the UK Government accepts is included within the non-diminution commitment contained in Article 2 of the Protocol.<sup>359</sup> This removal of protections for trafficked persons, insofar as they apply to Northern Ireland, therefore raises potential Article 2 issues.

The UK Government again dismiss these concerns, asserting that the Trafficking Directive is too far removed from the substance of the rights of victims under the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement;

It is clear from the language used in this section, from the object and purpose of the Agreement and from its overall context, that the drafters had in mind the victims of violence relating to the conflict in Northern Ireland as opposed to all victims in a broad, general sense.<sup>360</sup>

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355 Ibid., p. 2.

356 Oran Doyle, David Kenny and Christopher McCrudden, ‘The Franchise in Irish Unification Referendums’ (2021) 32 Irish Studies in International Affairs 183, 200.

357 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

358 Nationality and Borders Act 2022 (UK), s. 73.

359 NIHRC/ECNI, *Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill* (27 January 2022) para. 3.2.

360 Baroness Williams of Trafford, *Letter to Lord Jay of Ewelme* (1 April 2022), p. 2.



As we have noted above, however, this part of the Agreement does not function as a closed list of rights, as this statement suggests.<sup>361</sup> Once again, the UK Government and the Northern Ireland's statutory Commissions adopt divergent approaches to the scope of Article 2, and the operative extent of its terms will likely only be settled by the litigation of more of these contentious issues.

## 5.10 Conclusion and Recommendations

This chapter has highlighted some of the challenges with applying the non-diminution standard in light of the nature of European Union law. The standard requires those seeking to rely on it to establish both that the interest that they wish to protect was covered by the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement, and also that this commitment was underpinned by some element of European Union law operative at the end of the Brexit transition/implementation window. As we have demonstrated in the examples we have examined in this chapter, the combination of these requirements can be particularly demanding. The language of the commitments within the 1998 Agreement is vague, and considerable work will be required by the courts to translate aspirational commitments into the basis for legal rights and obligations. Likewise, European Union law has not stayed still since 31 December 2020, and it will become increasingly challenging to unpack exactly what the law required at that date as European Union measures and jurisprudence develop.

Much therefore depends on the approach of the Northern Ireland courts to non-diminution claims under Article 2. Under the Protocol, there is no facility for the Northern Ireland courts to issue a preliminary reference to the CJEU on the correct interpretation of the relevant European Union law. Indeed, the longer the Protocol is in effect, the more it would become outside the normal functioning of the CJEU to assess the requirements of European Union law at a date in the past. The mapping exercises appended to this report are thus intended to be read alongside this analysis as providing a detailed account of how the European Union law most clearly relevant to Article 2 functioned at this key juncture.

Our **recommendations** are:

- Northern Ireland should fully implement the UNCRPD in domestic legislation.
- A broad approach should be adopted by courts in Northern Ireland to understanding the general principles of European Union law, and all references to the Charter should be considered as references to a corresponding general principle of European Union law.

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361 See 5.2. Also Chapter 3, sections 2 and 4.

- Northern Ireland law should ensure that all migrants covered by the protections enshrined in European Union legislation, such as the Citizens' Rights Directive (Directive 2004/38/EC), are provided with the core material benefits required for a minimally dignified standard of living in order to comply with the requirement of non-diminution in relation to the general principle of human dignity (Article 1 of the Charter).
- That access to court and judicial oversight of administrative matters are accepted by all relevant public bodies to be part of the Protocol's non-diminution commitment.
- Courts in Northern Ireland should not be barred from providing compensation for violations of European Union fundamental rights in areas with Article 2 relevance.
- That the Northern Ireland Executive assess the continued possibility in Northern Ireland of liability on the basis of '*Mangold* actions', that is, private law claims based on the general principles of European Union law and provide guidance clarifying the position of private actors who may be affected, such as private employers.



# Chapter 6: Tracking European Union Policy and Legal Developments

## 6.1 Introduction

This chapter addresses the challenges for Northern Ireland's institutions in keeping track of European Union law and policy developments beyond the scope of the Annex 1 Directives. We have already explained how the general non-diminution obligation under Article 2 of the Protocol can most easily be explained as a static obligation; it depends upon the European Union law in operation at the end of the Brexit implementation/transition period. In the last chapter, we discussed the range of measures covered by this obligation. In this chapter, we supplement this picture with soft-law initiatives of the European Commission and Agencies, exploring how they operated prior to Brexit to inform the work of Northern Ireland's institutions in tackling rights and equality issues.

European Union law has not, moreover, stopped developing since 31 December 2020, and Ireland remains subject to these developments as a Member State. Under the Protocol, moreover, arrangements exist for additional European Union measures to be added to the Annex 1 list applicable to Northern Ireland. Having explored some of the most significant measures in train, we address the extent to which it might be good practice (and will in some circumstances be a legal obligation) for these developments to be reflected in Northern Ireland's law. We thereafter address how the United Kingdom and European Union can best operate the Withdrawal Agreement's committee system to facilitate Northern Ireland's institutions, and particularly the Commissions in their Article 2 role as dedicated mechanism, in tracking relevant European Union law developments. Finally, we explore the potential benefits of cross-border cooperation and alignment with regard to the implementation of European Union rights and equality measures in Ireland and Northern Ireland post-Brexit.

## 6.2 European Union Guidance and Policy Initiatives Prior to Brexit

The development of new legal measures is only one tool available to the European Commission for enhancing the effectiveness of European Union law. The Commission, alongside relevant European Union Agencies such as the European Union Agency for Fundamental Rights (FRA), also relies upon a range of good practice statements, practical guides, recommendations, initiatives and expert reports to shape European Union Member State approaches to European Union law obligations. In recent decades, as the scope of European Union law has expanded

alongside the number of Member States, these ‘soft law’ initiatives have become an increasingly prominent part of the operation of the European Commission and European Union Agencies.<sup>362</sup> In regard to social policies in particular, the Open Method of Coordination has frequently seen the Commission pursue its policy objectives through ‘a process of mutual policy learning and advice’.<sup>363</sup>

### **Gender Pay Gap Reporting Requirements**

Gender pay gap reporting requirements provide an illustrative example of how soft-law European Union initiatives have positively impacted on equality and human rights across the United Kingdom and Ireland prior to Brexit, and some of the limitations in these developments. At the time of writing, the Pay Transparency Directive, requiring mandatory pay reporting by large employers, remains a proposal being considered by the European Union institutions. Indeed, the United Kingdom’s consistent opposition to social legislation and maintenance of a lightly-regulated labour market has long been identified as a notable factor in stalling the development of European Union social legislation.<sup>364</sup> The European Commission thus embraced soft law approaches in this field, under the auspices of the European Employment Strategy, which was informed by a 1996 Commission communication prioritising the ‘mobilisation of legal instruments, financial resources and the Community’s analytical and organisational capacities in order to introduce in all areas the desire to build balanced relationships between women and men’.<sup>365</sup>

In 2014 the European Commission made extensive recommendations on pay transparency, involving public reporting broken down by gender<sup>366</sup> and oversight by official equality bodies in Member States.<sup>367</sup> In a further example of the tools available to the Commission beyond legislation, this work would be advanced by the Commission funding expert analysis of the gender pay gap across the European Union.<sup>368</sup> Notwithstanding the absence of legislative measures, these suggestions have informed legislation in Great Britain (enacted under the Equality Act 2010<sup>369</sup>) and Ireland.<sup>370</sup> The Commission does not always lead with new legal obligations; these legal developments in Great Britain and Ireland reflected elements of the Commission’s policy recommendations under its broad Gender Strategy.

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362 See Manuel Souto-Otero, Timo Fleckenstein and Rod Dacombe, ‘Filling in the gaps: European governance, the open method of coordination and the European Commission’ (2008) 23 *Journal of Education Policy* 231, 233-235.

363 Margarita León, ‘Gender Equality and the European Employment Strategy: The Work/Family Balance Debate’ (2009) 8 *Social Policy and Society* 197, 199.

364 Colette Fagan and Jill Rubery, ‘Advancing gender equality through European employment policy: the impact of the UK’s EU membership and the risks of Brexit’ (2018) 17 *Social Policy and Society* 297, 300-301.

365 EC Commission, *Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities* [21.02.1996 COM\(1996\) 67](#), p.5.

366 EU Commission, [Commission Recommendation of 7.3.2014 on strengthening the principle of equal pay between men and women through transparency](#) (2014/124/EU), para.2.

367 *Ibid.*, para.13.

368 Christina Boll and Andreas Lagemann, *Gender pay gap in EU countries based on SES (2014)* (2018) p.8.

369 Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GB).

370 Gender Pay Gap Information Act 2021 (Ireland).

In Northern Ireland which, in contrast to other parts of the United Kingdom, does not enjoy the legal foundation of the Equality Act 2010, the Equality Commission for Northern Ireland used these European Commission recommendations to promote the enactment and amendment of gender pay gap reporting legislation under the Employment Act (Northern Ireland) 2016.<sup>371</sup> It also relied upon the European Commission recommendations on oversight by national equality bodies to encourage the extension of its own powers in this regard.<sup>372</sup> The uptake of these recommendations, and indeed the operationalisation of the Northern Ireland scheme, was adversely affected by the collapse of the Northern Ireland Assembly in 2017 and remains unaddressed. It nonetheless remains important to highlight how significant the European Commission's soft law activity in this field has been as a driver for change which is drawn upon by equality bodies, and others, to encourage law reform.

As part of the European Union legislative process, European Commission communiques on the development of new European Union legislation on equality and human rights issues have frequently provided a useful staging post for the Equality Commission for Northern Ireland, as Northern Ireland's official equality body, to urge the Executive into appointing a lead department and in ensuring that consultations provided for an appropriate range of participation.<sup>373</sup> The European Commission frequently issues specific transposition and implementation guidance regarding complex directives, such as the Victims' Directive,<sup>374</sup> and it is commonplace to see it follow up this work with analysis of progress towards implementation.<sup>375</sup>

### **European Union Agencies and Networks**

Alongside European Commission initiatives, the work of European Union Agencies and Networks are often significant in the justice, rights and equality sphere.<sup>376</sup> The operation of the European Arrest Warrant, for example, is dependent on mutual recognition of criminal justice standards across the European Union.<sup>377</sup> Strict harmonisation in the criminal justice sphere, however, has been particularly difficult in spheres such as criminal justice, with the United Kingdom maintaining a range of opt outs from European Union legislation. The European Union has thus relied upon 'judicial training, judicial exchanges or by improving the mechanisms for liaison between judicial authorities' to complement the minimum standards set by European Union legislation.<sup>378</sup>

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371 ECNI, [Gender Pay Strategy and Pay Reporting](#) (2019) para. 6.41.

372 Ibid., para. 9.38.

373 See, for example, Colin Harper, Simon McClenahan, Bronagh Byrne and Hannah Russell, *Disability programmes and policies: How does Northern Ireland measure up?* (ECNI, 2012) p.53.

374 See EU Commission, [DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU](#) (2013).

375 See EU Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU*, [11.05.2020 COM\(2020\) 188 final](#).

376 See Morten Egeberg, Jarle Trondal and Nina Vestlund, 'The quest for order: Unravelling the relationship between the European Commission and European Union agencies' (2015) 22 *Journal of European Public Policy* 609, 621.

377 See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, [Discussion Paper on the Common Travel Area](#) (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018) pp. 75-77.

378 European Union Committee, *The European Union's Policy on Criminal Procedure* (2012) HL 288, para. 79.

The European Union Agency for Fundamental Rights (FRA) has, moreover, provided an additional source of policy recommendations for official human rights and equality bodies. Its work, for example on the reporting of hate crime, has frequently provided analysis specific to Northern Ireland as a jurisdiction.<sup>379</sup> This report also highlighted the common policing approach across Ireland, Northern Ireland and Great Britain when it came to hate crime.<sup>380</sup> The work of the European Union FRA has informed the pre-Brexit research commissioned by the Equality Commission for Northern Ireland, including on what would become the Annex 1 Directives. The FRA issues important opinions on the implementation of aspects of European Union law, such as the equality directives,<sup>381</sup> as part of its formal objective ‘to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights’.<sup>382</sup> The Opinion on the equality directives featured prominently in an expert report prepared for the Equality Commission for Northern Ireland.<sup>383</sup> The FRA also engages in specific case study work, for example making significant comparative reports into the treatment of Travellers in relation to housing in the United Kingdom and Ireland.<sup>384</sup>

In addition, the European Network of Equality Bodies (Equinet) has helped promote equality in Europe by supporting and enabling the work of national equality bodies. Its policy positions have contributed to the European equality agenda by offering expert advice on equality and non-discrimination policy and legislation, based on the experience of equality bodies. Its commissioning of expert research papers has also helped to inform policy makers in the area of equality and helped to provide expert input in response to relevant developments in the equal treatment field. As a not-for-profit organisation which involves European Union and non-European Union states, Brexit does not prevent the participation of the Equality Commission for Northern Ireland in Equinet.

Brexit has ended the United Kingdom’s involvement in the comparative evaluation and regular benchmarking processes which are the hallmarks of the Open Method of Coordination, curtailing the flow of such valuable information for Northern Ireland’s institutions and civil society networks. Following the United Kingdom’s withdrawal from the European Union, moreover, pressures towards legal divergences will increase. The United Kingdom, after all, has long been regarded as exercising a constraining effect on the European Union’s policy priorities, with their particular

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379 EU FRA, *Hate crime recording and data collection practice across the EU* (2018) p. 92.

380 *Ibid.*, p. 60.

381 EU FRA, *Opinion – 1/2013: Opinion of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the equality directives* (2013).

382 Council Regulation [168/2007/EC](#) of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Article 2.

383 Graeme Banks, Eoin Hamilton and Fiona Rooney, *Inequalities in Participation in Public Life in Northern Ireland* (Ipsos Mori, 2015) p.187.

384 FRA, *Case Study: Traveller Participation in decision making on housing issues, Ireland* (Publications Office, 2009); FRA, *Case Study: A model of Traveller needs assessment, United Kingdom, Luxembourg*, Publications Office (Publications Office, 2009).

human rights and equality implications.<sup>385</sup> This discussion thus turns to consider European Union law currently in train and why it might be relevant to the operation of the Protocol.

### 6.3 Post-Brexit Developments in European Union Rights and Equality Law

As explained in previous chapters, the general non-diminution obligation under Article 2 does not provide for dynamic alignment between Northern Ireland law and relevant European Union law. Beyond the measures listed in Annex 1, Article 2 generates an obligation fixed to the end of the Brexit implementation/transition period. In this section we explore the difficulties created by this complex mixture of non-diminution and dynamic alignment. Whereas European Union law provides for a cohesive set of rights and equalities protections which operate with reference to each other, the Article 2 arrangements leave Northern Ireland law only partially aligned with particular European Union equality law on an ongoing basis. As European Union law develops, this is likely to prove a challenging system of obligations to operate. The Protocol on Ireland/Northern Ireland does include mechanisms for new measures to be added to Annex 1, and in light of these challenges, it might in some circumstances make Northern Ireland's post-Brexit rights and equality law more cohesive and workable for its democratically elected institutions, together with the UK Government, to consider the addition of further European Union measures into Annex 1.

As we have seen in the above analysis, Northern Ireland being outside the ambit of the Equality Act 2010 has seen its jurisdiction fall behind some of the developments under the ambit of that Act. The following analysis identifies some of the ongoing developments in the field of European Union rights and equality law which could reshape these areas of law, and which will leave decision makers with responsibility for Northern Ireland with the choice of continuing with outmoded measures or taking steps for full or partial alignment with these developments.

#### *Horizontal Directive on Equal Treatment*

The six directives contained in Annex 1 of the Northern Ireland Protocol attest to the disjointed nature of European Union equality law. These existing directives cover different protected characteristics and extend protections relating to these across various forms of human interaction. Directive 2000/43/EC provides protections against discrimination on grounds of race or ethnic origin across employment, access to goods and services, social security and education. A combination of Directive 2006/54/EC, Directive 2004/113/EC and Directive 79/7/EEC protect against discrimination on the basis of gender in employment, access to goods and services and social security. Directive 2000/78/EC, however, which covers the protected characteristics of disability, religion/belief, age and sexual orientation is markedly narrower in scope, being applicable to a person's workplace.

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385 See Colette Fagan and Jill Rubery, 'Advancing gender equality through European employment policy: the impact of the UK's EU membership and the risks of Brexit' (2018) 17 *Social Policy and Society* 297, 313.

These limitations have meant that the replacement of Directive 2000/78/EC, establishing a general framework for equal treatment on the basis of a broad range of protected characteristics, has been on the European Union legislative agenda since 2008. A horizontal directive could tackle some of the key shortcomings with the operation of this Annex 1 Directive identified in the case law and Commission reports,<sup>386</sup> such as intersectional discrimination, and the proposals would widen the application of European Union equality law beyond employment and occupation. The earliest iterations of this proposal were considered in the context of the drafting of the Equality Act 2010, which reflected the expansive conception of equality law under consideration at European Union level. That the 2010 Act does not apply to Northern Ireland would mean that a considerable reworking of Northern Ireland equality law would be needed if the Horizontal Directive was agreed.

This legislative proposal nonetheless requires unanimity in the Council, which has not been achieved despite years of discussion. Although inter-institutional dialogue on the text of the directive has been ongoing, the latest communication from the Council reiterates the need for further work, as two Member States continue to have overarching reservations about the concept of the Directive.<sup>387</sup> At present, therefore, it is not envisaged that Northern Ireland institutions will imminently have to reconsider legislation in contemplation of alignment with European Union law. As Directive 2000/78/EC is an Annex 1 Directive, this proposal, if enacted, would exemplify a measure which the Protocol requires be transposed into Northern Ireland law.

### **European Accessibility Act**

In April 2019, the European Union passed the European Accessibility Act, with an implementation deadline for Member States of 28 June 2022 (to become effective by 2025).<sup>388</sup> This legislation is intended to harmonise standards and further regulate the accessibility of products and services within the internal market. It is thus intended to benefit not only businesses, but also consumers who are older people or people with a disability. As the implementation deadline was after the end of the transitional period and the legislation was not transposed into United Kingdom law before its end, there is no ongoing obligation to implement it. We note, however, that Ireland remains under an obligation to transpose the Act, which could lead to a divergence of standards. The Irish implementing measures have not been published at the time of writing. Once they have been, we **recommend** that Northern Ireland should consider alignment in this field which, albeit not *directly* covered by Article 2, is nevertheless *relevant* to it, as it affects products used by older people and people with a disability.

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386 These date back to European Commission, *Commission Staff Working Document Accompanying the Proposal for a Council Directive on Implementing Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation* SEC (2180) 2008 2.7.2008.

387 Interinstitutional File 2008/0140 (CNS), 23 November 2021, [14046/21](#).

388 Directive [2019/882/EU](#) of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, OJ L 151/70, 7.6.2019.



### ***Pay Transparency***

The European Commission proposed a new directive on pay transparency on 3 March 2021,<sup>389</sup> which is intended to strengthen the application of Directive 2006/54/EC through a series of measures, including reporting obligations for private companies. The directive has not encountered significant opposition so far and the Council adopted it in June 2021.<sup>390</sup>

In Coreper on 1 December 2021 a broad majority of delegations supported the work done by the Presidency and agreed that the compromise text is a solid base for future negotiations with the European Parliament. A few delegations regretted that the text had not been subjected to further discussion at technical level. While some delegations were not yet in a position to lift their general scrutiny reservations, the broad majority of delegations agreed that the text is mature enough to be forwarded to the EPSCO Council<sup>391</sup> with a view to reaching a General Approach. At the time of writing, the text is awaiting approval by the European Parliament, and has entered the Committee review process and interinstitutional negotiations.<sup>392</sup>

As noted in previous chapters, Northern Ireland's pay transparency legislation has lagged behind other parts of the United Kingdom, where regulations have been passed under the Equality Act 2010. As these proposals may relate to the amendment of an Annex 1 Directive, and equality is a devolved issue in the Northern Ireland context, they could become the first example of legislation that Northern Ireland's devolved institutions are obliged to transpose into the law of Northern Ireland as a result of Article 2 of the Protocol.

### ***Early-Stage Proposals: Platform Work and Artificial Intelligence***

Two significant sets of legislative proposals which are currently being considered by European Union institutions, on platform work and artificial intelligence, have the potential to transform aspects of European Union rights and equality protection. Both proposals remain at an early stage and have not been the subject of a vote in the Parliament or Council at the time of writing. As such, they do not yet engage the Protocol's requirements at this stage. Nevertheless, if implemented, they are likely to significantly improve the protection of equality and human rights law. They have the potential to apply both within and beyond the scope of the current Annex 1 Directives, highlighting how difficult it is to circumscribe the limits of the dynamic alignment obligation with regard to amendments to those directives.

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389 Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [COM/2021/93 final](#).

390 Interinstitutional File 2021/0050(COD), 2 December 2021, [14317/21](#).

391 Employment, Social Policy, Health and Consumer Affairs Council.

392 European Parliament, 'Equal pay for equal work between men and women (pay transparency and enforcement mechanisms)', [2021/0050\(COD\)](#).

First, the European Commission has recently laid down a **proposed Directive of the European Parliament and of the Council to improve the working conditions relating to platform work in the European Union**, which is motivated by the digitisation of the workplace, particularly in the aftermath of the Covid-19 crisis.<sup>393</sup> The proposal is intended to create minimum working conditions for platform workers by tackling some of the key problems pertaining to this form of employment, including by making platform work subject to employment rights, such as information and consultation within the undertaking, as well as setting requirements of decent pay and benefits.

Second, as part of its aspiration to create a European approach to Artificial Intelligence, the European Commission has set out **proposals for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence**.<sup>394</sup> If approved, the Regulation will set out a harmonised approach towards the use of AI technology in the European Union. While the proposed Regulation is not limited to equality and human rights issues, it makes a significant contribution in this regard, as it sets out a system of compensation for violations of human rights as a result of the use of AI technology. This is likely to be especially important in the fields of privacy and equality, as the targeting of individuals associated with particular groups through algorithmic calculations has been identified as a key cause of structural exclusion.<sup>395</sup> This proposal complements earlier initiatives regarding the fair use of private data in the European Union, such as the Data Governance Act.<sup>396</sup>

### ***Gender Balance in Non-Executive Director Roles***

A **proposed directive on gender balance in non-executive director roles**,<sup>397</sup> which was originally proposed in 2012 but had reached a plateau in institutional negotiations, was discussed again by the Council on 14 March 2022 and a common position was adopted.<sup>398</sup> Although this does not mean that the directive has been approved at this stage, the adoption of a common position means that further negotiations with the European Parliament on a final text will now restart and, since the directive enjoys broad support within the European Parliament, it is expected that these negotiations will be successful. While the text remains in draft form, the proposed Directive's principal tenet is that Member States should ensure that listed companies employ at least 40% female members in non-executive director roles.

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393 Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union, [SWD\(2021\) 396 final/2](#), 15 December 2021.

394 Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Part 1/2, [SWD\(2021\) 84 final](#), 21 April 2021.

395 Ibid, pp. 19-20

396 European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act), [COM\(2020\)767 final](#), 25 November 2020.

397 European Commission, Proposal for a Directive of the European Parliament and of the Council on Improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, [COM\(2012\)614](#), 14 November 2012.

398 Council of the EU, '[Member States adopt a general approach on an EU directive aiming to strengthen gender equality on corporate boards](#)', Press Release, 14 March 2022.

### ***Combating Violence Against Women and Domestic Violence***

Combating gender-based violence is a key aspect of the European Commission's Gender Equality Strategy (2020-2025).<sup>399</sup> On 8 March 2022, the Commission adopted a **proposal for a directive to combat violence against women and domestic violence**.<sup>400</sup> The proposal takes significant steps in setting out common rules to protect victims by, *inter alia*, proposing the criminalisation of gender-based violence, and its punishment by imprisonment (variable depending on the type of offence); enhancing mechanisms of access to justice for victims; and including within its scope online violence (such as cyber-stalking), as well as offline violence, both physical and emotional. The proposal has now been placed on the European Parliament's legislative train for 2022, but no specific dates for votes have been announced at the time of writing.<sup>401</sup>

## **6.4 Challenges in Tracking Post-Brexit Developments**

Beyond these specific European Union policy initiatives, it has undoubtedly become more complex for stakeholders in Northern Ireland to follow the work of the European Commission and Agencies and apply what they are doing in the context of Northern Ireland law in the context of the Protocol's requirement that important elements of European Union rights and equality law must continue to operate in Northern Ireland after Brexit. The Protocol imposes dynamic alignment requirements with regard to the Annex 1 Directives. Beyond this obligation, Northern Ireland law must at a minimum maintain rights and equality protections derived from European Union law at the end of the Brexit transition/implementation period, insofar as these are required by the terms of the 1998 Agreement.

European Union law, however, continues to develop, and no European Union institutions are explicitly tasked with monitoring the application of the non-diminution baseline. The remit of Agencies such as the FRA extends to European Union Member States, and not to informing debates over what constitutes non-diminution for the purposes of Article 2 of the Protocol across the range of law to which this requirement applies. It is therefore the task of Northern Ireland's statutory Commissions to manage these variable speed alignment requirements and the challenges that they pose.

In its October 2021 Non-Paper on *Engagement with Northern Ireland Stakeholders and Authorities* the European Commission went some way to recognising the challenges faced by Northern Ireland institutions in managing the Protocol:

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399 European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025', [COM\(2020\) 152 final](#), 5 March 2020.

400 European Commission. 'Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence', [COM\(2022\) 105 final](#), 8 March 2022.

401 European Parliament, [Legislative Train Schedule](#).

The European Union is aware that transparency is a crucial element for building trust in Northern Ireland and there is clearly room for improvement. The Commission is working on setting up a website that would in a clear and comprehensive way show the European Union legislation applicable in Northern Ireland (covering also the dynamic alignment aspect). That will significantly contribute to greater transparency for the people of Northern Ireland.<sup>402</sup>

This pledge is unilateral and, by its terms, already being operationalised (although the promised website is yet to go live). This active tracking of new European Union legislation relevant to the Protocol's dynamic alignment requirements will be useful, but earlier flagging of relevant parts of the Commission's Work Programme would be preferable, facilitating detailed preparation and contributions from Northern Ireland stakeholders to relevant consultations.

This pledge will, moreover, be more difficult to apply in regard to Article 2 than the Commission's narrative suggests. On its terms, the pledge discusses the active European Union law which must continue to be applied in Northern Ireland under the Protocol. This is relatively easy to track, if by no means uncontroversial, in the context of the Protocol's trade provisions; the Protocol specifically mandates the European Union law which must apply in Northern Ireland in this regard.<sup>403</sup> This pledge does not, however, appear to encompass the undefined requirements of European Union law which could be encompassed by Article 2's non-diminution requirement. As the annexes to this report demonstrate, there are many European Union measures which arguably touch upon the Rights, Safeguards and Equality of Opportunity provisions of the 1998 Agreement in at least part of their operation. Some of these measures, notably in areas like climate change legislation under the European Green Deal, might involve equality protections in their operation, but dynamic alignment is required as a result of the Protocol's trade provisions and not the operation of Article 2.

Nor is a resource like the proposed website necessarily useful in terms of tracking when it might benefit the functioning of rights and equality in Northern Ireland to add a measure to the Annex 1 list. Such decisions are to be taken by the European Union and the United Kingdom, and not as a function of the binding terms of the Protocol. The European Commission's in-development website will likely, when it goes live, help with tracking the specific dynamic alignment requirements regarding the measures already listed in Annex 1. Beyond these measures, the scope of Article 2's non-diminution requirement and decisions over the appropriateness of adding measures to Annex 1 will be subject to the expert input of the Equality Commission and Human Rights Commission and to interactions between the United Kingdom and the European Union in the Joint Consultative Working Group and

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402 EU Commission, *Protocol on Ireland and Northern Ireland Non-Paper: Engagement with Northern Ireland Stakeholders and Authorities* (2021) para. 10.

403 See Lisa Claire Whitten, 'The Protocol: 'dynamic alignment' in post-Brexit Northern Ireland' *UK in a Changing Europe Blog* (2021).

the Withdrawal Agreement's committee structures. Notwithstanding the capacity of the Commissions to raise issues with the implementation of Article 2 with the Specialised Committee on issues related to the implementation of the Protocol on Ireland and Northern Ireland, its deliberations take place behind closed doors and there is no comprehensive public record of its decision making. There is thus a shortfall in transparency around how proposals around Article 2 are handled by these mechanisms.

These issues are compounded by the exclusion of Northern Ireland from European Union data collection and equality reporting. For example, the European Commission has committed in its latest Work Programme to revising the Barcelona targets regarding childcare provision.<sup>404</sup> These targets have explicitly been connected to the reduction of gender inequality in employment.<sup>405</sup> Following Brexit, however, although Northern Ireland remains subject to dynamic alignment requirements regarding the directives on gender equality, it is more difficult to assess their impact when there is no ongoing analysis of Northern Ireland under these targets. The Equality Commission and Human Rights Commission risk being left without any measures by which to assess the effectiveness of the law in force in Northern Ireland. As agendas such as this generate legislative initiatives, notably in the context of the Barcelona targets around shared parental leave,<sup>406</sup> the Commissions will find it difficult to unpack and explain the potential benefits for Northern Ireland in following such developments.

### **Parental Leave Directive**

As noted above, the Assembly should consider whether to follow one such development, the Parental Leave Directive,<sup>407</sup> by amending the Work and Families (Northern Ireland) Act 2015. The Directive was adopted in 2019 and EU Member States, including Ireland, must transpose this instrument by August 2022. The Directive's provisions on carers' leave rights and paid parental leave requirements create scope for divergence between Northern Ireland and Ireland. The Irish Government has, at the time of writing, pledged implementing legislation ahead of the deadline,<sup>408</sup> but has also noted the extended transposition period, to August 2024, regarding the Directive's new paid parental leave requirements.<sup>409</sup>

This European Union legislation is not, under the Protocol, subject to explicit dynamic alignment requirements, but it interacts directly with the operation of some of the Annex 1 Directives and thus raises issues as to whether the Northern Ireland Assembly should legislate to align with European Union law as a matter of

404 EU Commission, *Commission Work Programme 2022: Making Europe stronger together*, [19.10.2021 COM\(2021\) 645 final](#), p. 9.

405 *Ibid.*, p. 9.

406 EU Commission, *Barcelona Objectives (2018)* pp. 15-16.

407 Directive [2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers.

408 See Roderic O'Gorman, TD, Dáil Éireann Debate, [Written Answer 375](#) (24 March 2022).

409 Directive [2019/1158/EU](#), Article 8(3) and 20(2).

best practice and also whether moves should be made to add such measures to Annex 1. The detailed information generated by the Barcelona targets would aid in the Assembly's decision making over such a reform.

## 6.5 Voluntary Alignment

The Protocol thus weaves a complex series of patches into Northern Ireland law to address shortfalls resultant from Brexit. Some of those patches require dynamic alignment, but the general position is characterised by a non-diminution standard. As European Union law works as an interlocking whole, the result is that the law in operation in Northern Ireland might not operate effectively without some movement beyond minimum compliance with the requirements of the Protocol. For example, the European Commission is processing the outcomes of a consultation on setting **minimum standards for the operation of equality bodies**.<sup>410</sup> This initiative does not directly relate to the substantive requirements of the Annex 1 Directives, but since the Equality Commission for Northern Ireland continues to perform many of the functions of the equality bodies of European Member States, the research team would **recommend** that the law governing its operations should be reconsidered against any resultant baseline proposals.

New measures can only be added to Annex 1 through a process of negotiation between the United Kingdom and the European Union through the Withdrawal Agreement's committee system. In light of the highly contentious nature of some elements of the Protocol, such agreement might appear unlikely in the short term. It is worth remembering, however, that the safeguarding of European Union equality protections under Article 2 has been markedly less contentious than the operation of the Protocol's trade arrangements. The interplay between the UK Government and the devolved institutions (assuming that they are fully functional) nonetheless remains significant. Matters relating to equality are generally part of the competences of Northern Ireland's devolved institutions. **Legislation passed by the Northern Ireland Assembly can mirror developments in European Union law even where it is not expressly required to do so by the Withdrawal Agreement.**

In addition to instances in which it will improve the operation of equality and rights standards in the law of Northern Ireland to mirror developments in European Union law, the 1998 Agreement's concept of cross-border equivalence is significant.<sup>411</sup> The concept of equivalence in the 1998 Agreement does not require exact alignment between the two jurisdictions on the island, and as we have seen in earlier chapters is framed as baselining protections to the standards applicable in Northern Ireland.

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410 EU Commission, *Commission Work Programme 2022: Making Europe stronger together*, [19.10.2021 COM\(2021\) 645 final](#), p. 10.

411 *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, Rights, Safeguards and Equality of Opportunity, Human Rights, para. 1.

The motivation behind these provisions, however, was to ensure a broad set of shared standards across the jurisdictions, thereby addressing a legacy of concerns about the operation of discriminatory law or law which did not meet human rights standards on either side of the border.<sup>412</sup>

Post-Brexit, Ireland will be obliged to maintain European Union rights and equality standards as a Member State. The concept of cross-border equivalence in rights and equality protections could therefore be invoked in support of additional measures being added to Annex 1 or voluntary mirroring of particular aspects of new developments in European Union law through Northern Ireland Assembly legislation. The benefits of such alignment will need to be established on a case-by-case basis and are not a legal requirement under the Protocol. Nonetheless, the more closely a new European Union measure relates to the operation of the Annex 1 Directives, the more that the combination of the need to make Northern Ireland law (so connected to European Union law in these areas) operate effectively and the concept of cross-border equivalence generate a presumption towards alignment.

## 6.6 Conclusion and Recommendations

The requirements of dynamic alignment between the law of Northern Ireland and European Union law in the context of the Protocol has proven particularly controversial in political debate within Northern Ireland. Although Article 18 provides a safeguard in terms of the Northern Ireland Assembly being able to vote at regular intervals on the continuation of the trade provisions of the Protocol, this is not the same as Northern Ireland's institutions having an active say over specific legislative proposals.<sup>413</sup> Indeed, in regard to the Annex 1 Directives relevant to Article 2, dynamic alignment obligations would persist notwithstanding an Assembly vote to end the Protocol's trade arrangements. Notwithstanding that controversy, the Northern Ireland courts have recognised that the Protocol provides safeguard mechanisms which address democratic requirements.<sup>414</sup>

In this context, the work of the Commissions takes on particular significance. The Protocol leaves scope for multiple approaches to be adopted to the Article 2 obligations which extend beyond the Annex 1 Directives. Although non-diminution provides for a baseline obligation, it could be supplemented in particular cases by adding new measures to Annex 1 or voluntarily aligning Northern Ireland law to European Union law on a case-by-case basis. In each instance, these decisions must be made on the basis of a combination of factors, including the workability of

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412 See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press, 2018) p. 89.

413 European Scrutiny Committee, *Nineteenth Report of Session 2021–22* (2022) HC 121-xviii, para 1.47.

414 *In re Jim Allister and others (EU Exit)* [2021] NICA 15, [150] and [158].

the proposal in light of Northern Ireland law (including the elements of European Union law operating within it), and the degree of alignment which is enabled across neighbouring legal systems. The Commissions are the statutory bodies best placed to make recommendations in this regard. In light of the complex interactions between equality as a devolved issue, and the Protocol's Article 2 obligations ultimately resting on the United Kingdom, a new memorandum of understanding explaining how the UK Government and Northern Ireland Executive will engage with alignment issues and interact with the Commissions' proposals is necessary.

Our **recommendations** are as follows:

- The Irish implementing measures with regard to the European Accessibility Act have not been published at the time of writing, however, we recommend that Northern Ireland should consider alignment in this field which affects products used by older people and people with a disability.
- The law governing the operations of the Equality Commission for Northern Ireland should be reconsidered against any European Commission proposals for the operating baseline standards for equality bodies arising from the ongoing work to establish these standards.
- A new memorandum of understanding should be promulgated explaining how the UK Government and Northern Ireland Executive will engage with alignment requirements between Northern Ireland and European Union law relevant to Article 2 and making explicit their obligations to interact with the Commissions' notifications regarding such alignment.



# Overarching Conclusions and Recommendations

## 7.1 Key Themes

This report highlights several key themes when assessing the impact (and potential impact) of Brexit in respect of the potential divergence of equality and human rights protections and European Union best practice on the island of Ireland. As we note in Chapter 2, while European Union law facilitated the alignment of many laws on rights and equality in Northern Ireland and Ireland, there were already areas of divergence prior to Brexit. Post-Brexit, these may well be exacerbated, particularly in respect of a number of areas in which divergences of rights and equality protections between Ireland and Northern Ireland are in train or already operative. Significant rights and equality areas at issue include: age discrimination in access to goods, facilities and services; pay transparency reporting; gender reassignment; accessibility and work-life balance. Accordingly, it is evident that it should be a priority for the Northern Ireland Executive and Northern Ireland's statutory Commissions to have an agreed and principled approach as to how Article 2 of the Protocol should be implemented to ensure that new measures do not fall between the cracks. We envisage that the mapping exercise conducted for the purposes of this report will help to highlight both areas of current divergence and also where laws may need to be aligned.

As Chapter 3 makes clear, while Article 2 of the Protocol, and the associated domestic legislation which implements its provisions, provide significant protections for rights in Northern Ireland, it should not be seen as a panacea, since it suffers from a number of limitations. Its ambit is uncertain and, unlike the single market provision of the Protocol, it is not subject to direct supervision of the European institutions. The Article 2 commitments relating to the Annex 1 Directives clearly benefit from 'direct effect', but significantly the UK Government has accepted that this concept also applies to the more loosely defined commitment to non-diminution of rights. Similar issues arise in respect of the commitment to keep pace with new rights protections: while the commitment is very clear cut in respect of those rights set out in Annex 1 to the Protocol, it is far from certain what might happen in respect of other equality-based rights as European Union law continues to develop.

Consequently, the role of the Commissions will be critical: first, to ensure that both pre-legislative scrutiny and reporting influence the approach of the Northern Ireland Executive and the UK Government; second, in respect of their direct role in the enforcement of Article 2.

In terms of practical measures which would help support the aims and objectives of the Commissions, our final conclusions and recommendations can usefully be broken down into three major areas; tracking European Union law and policy developments; considering the impact of equivalence for Article 2 of the Protocol; and exploring the legislative options for maintaining convergence as far as required under the Protocol.

## 7.2 Tracking European Union Law/Policy Developments

It is essential that timely information is provided, both to Northern Ireland's statutory Commissions and the authorities in Westminster and Stormont, if Article 2 is to be implemented effectively. It will therefore be vital for the European Union to meet its commitment to provide a user-friendly website to track law and policy developments which it regards as being relevant to the obligations under Article 2 of the Protocol. Beyond this, the three annexes to this report on CJEU case law, the Annex 1 Directives and other European Union law which could be relevant to the 1998 Agreement's Rights, Safeguards and Equality of Opportunity provisions provide a current account of the scope of these areas of law and information on how we have gone about tracking these elements.

Given that the Commissions appear to be shouldering a considerable burden in relation to the United Kingdom's compliance with Article 2, where the Commissions raise queries on the operation of those obligations, the Northern Ireland Executive should reaffirm the UK Government's public commitment (on its behalf) to responding to the Commissions' recommendations regarding the implementation of Article 2, in light of the legal obligation contained in section 78A(3) of the Northern Ireland Act 1998.<sup>415</sup> We also note the recent recommendations by the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland that the Government should (a) 'deposit in Parliament and provide Explanatory Memoranda on draft European Union proposals which amend or replace the Directives listed in Annex 1 to the Protocol, as well as other European Union legislation relevant to the provisions of Article 2' and (b) ensure that the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, as well as Committees in Westminster and the Northern Ireland Assembly, are kept informed of wider developments in European Union law relevant to Article 2. We **recommend** that the UK Government accepts both of these recommendations as being essential to ensuring the smooth operation of Article 2 of Protocol.<sup>416</sup>

415 UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 24. An example of such a response by the UK Government to the Commissions is noted here; Conor Burns, MP, *Letter: Article 2 of the Protocol on Ireland/Northern Ireland* (25 March 2022) p. 2. In other instances, the UK Government has made less satisfactory indirect responses to the Commissions through Westminster committees; Baroness Williams of Trafford, *Letter to Lord Jay of Ewelme* (1 April 2022) p. 1.

416 Sub-Committee on the Protocol on Ireland/Northern Ireland, *Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland* (22 March 2022) [HL 177](#), para. 51-52.

### 7.3 Equivalence and Article 2

In some important respects, the extent of the United Kingdom's commitments under the Withdrawal Agreement are tied to European Union law as it operated in Northern Ireland at the point of Brexit. In other regards, the United Kingdom is obliged to ensure that the law applicable in Northern Ireland tracks developments in certain parts of European Union equality law. The Protocol will leave Northern Ireland with a complex and unique set of rights and equality arrangements. The distinctive nature of the legal obligation under Article 2 makes it possible that Northern Ireland's rights and equality arrangements will soon look very different from those of the jurisdictions in Great Britain or Ireland. A range of policy options result.

At a minimum, we **recommend** that the UK Government must ensure that the terms of the Protocol are adhered to and that the particular obligation to ensure dynamic alignment with the Annex 1 Directives is met. Neither this, nor the non-diminution obligation apply to the other parts of the United Kingdom. However, although these requirements provide some clarity in terms of minimum compliance for the Northern Ireland Assembly and Executive, they do not take account of the fact that European Union law works in an integrated fashion and that the operation of Article 2 will rapidly give rise to significant gaps between the law in operation in Northern Ireland and European Union law, which will likely hamper the application of the Protocol's standards.<sup>417</sup>

In our view, the most workable option in these circumstances would be for new provisions to be added to the Annex 1 Directives on a case-by-case basis. This would secure multiple benefits. First, it helps to ensure equivalence across the two jurisdictions on the island of Ireland, reflecting the 1998 Agreement's linkages between these jurisdictions' rights and equality protections. The concept of equivalence, under the terms of the 1998 Agreement, is subject to multiple interpretations, but at a minimum, it envisages Northern Ireland providing a baseline for the two jurisdictions. Second, there is no possibility of Northern Ireland mirroring the other United Kingdom jurisdictions, as they are not held to the Article 2 non-diminution standard. Therefore, as post-Brexit divergences occur, Northern Ireland's institutions cannot rely on implementation in other United Kingdom jurisdictions as a model to follow, if such developments do not track or exceed the requirements of European Union Law, insofar as Northern Ireland remains subject to dynamic alignment.

The potential benefits of adding to the list of Annex 1 measures will vary from case-to-case. This places an onus upon Northern Ireland's statutory Commissions (working in conjunction with the Northern Ireland Executive and the UK Government) to track relevant European Union law developments (as discussed). There may thereafter be challenges in ensuring that relevant provisions are incorporated into the law of Northern Ireland.

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417 See Chapter 3.

## 7.4 Legislative Options for Maintaining Convergence Regarding Article 2

The undeniable controversy surrounding the Protocol's trade provisions could, at some juncture, also impact upon the alignment requirements which arise as a result of Article 2 in relation to European Union law as it develops. The Northern Ireland Executive and Assembly will be required to transpose new developments relevant to the Annex 1 Directives into Northern Ireland law as a result of these requirements. A range of options are available for maintaining or strengthening the obligations upon the Northern Ireland Executive and Assembly which reflect the significance of the human rights and equality provisions at issue:

1. Current Model – Onus on Northern Ireland Assembly to legislate where needed, with Westminster to legislate in extraordinary circumstances (for example, circumstances of Northern Ireland Assembly collapse).

**Pro:** Involves no change to current devolution arrangements.

**Con:** Measures which are related to the Protocol have, to date, been politically divisive and there is a high likelihood that measures could be affected by a petition of concern; possible United Kingdom liability for Protocol breaches.

2. Northern Ireland Executive placed under positive duties to bring forward primary legislation to maintain convergence – analogous to sections 28D and 28E of the Northern Ireland Act 1998 (strategies for the Irish language, Ulster Scots, poverty and social exclusion).

**Pro:** Emphasis on devolved responsibility.

**Con:** Requires amendment to the Northern Ireland Act 1998 and even then it may not secure these aims because of the political sensitivity around the Protocol (notwithstanding *Conradh Na Gaeilge's application for judicial review* [2017] NIQB 27, the Northern Ireland Executive is yet to adopt an Irish language strategy).

3. Northern Ireland Departments placed under positive duties to maintain convergence by secondary legislation – analogous to sections 28D and 28E, but by secondary legislation – requires amendment to Northern Ireland Act 1998.

**Pro:** Emphasis on devolved responsibility, secondary legislation can be subject to negative resolution even when Northern Ireland Assembly not in session, so long as it is not formally prorogued (s 41(2) Interpretation Act (Northern Ireland) 1954).

**Con:** Departmental functions under Ministerial control and direction ‘at all times’ (Departments (NI) Order 1999, Art 4(1)) so might be susceptible to ministerial objections; reduced democratic accountability as most secondary legislation enacted via negative resolution.

4. Northern Ireland Departments placed under positive duties to maintain convergence by secondary legislation (as with the previous option) but only via the draft affirmative procedure (affirmative resolution) and without being subject to Northern Ireland Ministerial direction/control (or being under direction/control of the Secretary of State instead).

**Pro:** Emphasis on devolved responsibility, democratic scrutiny with affirmative resolution, but ringfenced from political disputes within the Executive.

**Con:** Weakens Northern Ireland Ministers’ control over Departments; requires amendment to Northern Ireland Act 1998.

5. Westminster legislates as needed – not necessary to amend Northern Ireland Act 1998 as Westminster can legislate anyway (and this use would be covered by the processes introduced under the European Union (Withdrawal Agreement) Act 2020), but possible new memorandum between Westminster and the Northern Ireland Assembly, stating explicitly that Westminster has responsibility for maintaining convergence under Article 2 in the event of blockages in the devolved process:

**Pro:** United Kingdom compliance with Article 2 of the Protocol will be ensured notwithstanding the ongoing volatility at the Northern Ireland Assembly.

**Con:** A *de facto* return of devolved competence to Westminster.

We do not make a formal recommendation with regard to these options, but have set them out with their relevant advantages and disadvantages. For now, Approach 1 provides the basis for general implementation of the Protocol’s Article 2 legislative obligations, with Approach 5 providing something of a supporting role.<sup>418</sup> Significant effectiveness and/or efficacy challenges are entailed in the various options for strengthening the obligations upon Northern Ireland’s institutions (Approaches 2, 3 and 4). That the Protocol’s requirements reflect international obligations upon the United Kingdom will therefore always entail a role for the UK Government and Parliament should there risk being a breach of the Article 2 obligations as a result of deadlock within Northern Ireland’s devolved institutions (Approach 5).<sup>419</sup> We thus explore Westminster’s role in more depth in the following section.

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418 See 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, 11-14.

419 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, Article 27.

## 7.5 Westminster's Supporting Role

Should Westminster be called upon to protect Northern Ireland's special rights and equality protections under the Protocol, even when Northern Ireland's devolved institutions are operational, it already possesses powers which enable it to do so under the European Union (Withdrawal Agreement) Act 2020. For this to be an effective safety net, however, we **recommend** that the UK Government should make explicit the circumstances in which it will intervene, potentially in a new Memorandum of Understanding with the Northern Ireland Executive, to prevent prolonged periods in which the Article 2 obligations are not fulfilled. We highlight three factors which are of vital importance to this role.

First, the Secretary of State for Northern Ireland possesses powers under section 26 of the Northern Ireland Act 1998 to direct the fulfilment of international obligations, including those relating to the Protocol.<sup>420</sup> The power to make these directions includes directions to introduce Bills into the Northern Ireland Assembly and to make, confirm or approve subordinate legislation.<sup>421</sup> Thus far, however, the Secretary of State has declined to make such directions in relation to Protocol-related matters,<sup>422</sup> and it is far from clear that such powers *will* be exercised, because these powers are discretionary.

Second, the European Union (Withdrawal) Act 2018 (as amended) empowers the UK Government to make any subordinate legislation necessary to implement the Protocol, in what is an extremely broad power of delegated law-making.<sup>423</sup> This power has already been used to make changes to the Northern Ireland Act in relation to the democratic consent process outlined under Article 18 of the Protocol,<sup>424</sup> which itself has been the subject of ongoing litigation.<sup>425</sup> This litigation aside, the changes made to the Northern Ireland Act were extensive and complex, and were made under the affirmative procedure.<sup>426</sup> Subordinate legislation, whether made under the negative or the affirmative procedure, cannot be amended by Parliament, but only approved or negated in its entirety. As such, any proposals which involve amendments to the Northern Ireland Act, should be made, as far as possible, through primary legislation as the United Kingdom Parliament is able to exercise greater scrutiny over Bills than subordinate legislation.<sup>427</sup>

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420 Northern Ireland Act 1998, s. 26(2).

421 Northern Ireland Act 1998, s. 26(3).

422 Christopher Leebody, '[Halt to post-Brexit NI Protocol checks 'matter for Executive' as Brandon Lewis confirms UK won't intervene](#)' *Belfast Telegraph* (2 February 2022).

423 European Union (Withdrawal) Act 2018, s. 8C(1).

424 The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

425 *Re Allister and others' application for judicial review* [2021] NIQB 64 and *In re Jim Allister and others (EU Exit)* [2021] NICA 15.

426 European Union (Withdrawal) Act 2018, sch. 7, para 8F(1).

427 See NIHRC/ECNI, Written Evidence to the European Scrutiny Committee ([2022](#)), para. 4.7.

Third, when considering legislative options to address Article 2's dynamic alignment requirements, legislation must avoid amending devolved competences by a sidewind. As the operation of the Protocol continues and new European Union law developments are brought within its scope, the implementation of this future law may have implications for devolved competence and reserved and/or excepted matters under the Northern Ireland Act 1998. An analogy may be drawn here with the Nationality and Borders Act,<sup>428</sup> which contains a specific provision to disapply retained European Union law derived from the Trafficking Directive<sup>429</sup> where that law conflicts with its provisions.<sup>430</sup> As the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland noted in their briefing to the House of Lords on this legislation, the disapplication provision appears to be directed at reserved matters and not transferred matters.<sup>431</sup> This distinction is predicated on the Explanatory Notes, but is not made explicit in the legislation.

The distinction stands at odds with the fact that the Bill makes provision in *explicitly* transferred matters (such as local authority duties in relation to children) in the three devolved territories,<sup>432</sup> while the disapplication provision relates to any 'provision made by or under this [legislation]'.<sup>433</sup> In order to maintain a uniform United Kingdom approach to immigration matters, the legislation reaches into transferred matters to disapply retained European Union law with limited consideration of how this disapplication affects Article 2 obligations. This legislative process took little account of the relationship between devolved competence, retained European Union law and the Protocol, in the Northern Ireland context, and thus raises concerns of an inadvertent realignment of, or encroachment into, devolved competence while implementing future European Union law as it is added to the Protocol. This is especially important in the context of equality law in Northern Ireland, which was overwhelmingly made at Westminster and has largely been untouched by the Northern Ireland Assembly. Moreover, it is a matter of concern that scrutiny of European Union law developments relating to Article 2 in Parliament is not yet settled.<sup>434</sup>

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428 See Chapter 5, sections 2 and 9.

429 Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

430 Nationality and Borders Act 2022, ss. 73(1).

431 Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#) (27 January 2022) p. 7.

432 See Nationality and Borders Act 2022, Part 4 (age assessments).

433 *Ibid.*, s. 73(1).

434 See European Affairs Committee, *Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland* (2022) HL 177, para. 65-66.

## 7.6 Summary of Chapter Recommendations

### Chapter 2

- Consolidated rights and equality legislation in Northern Ireland is a preliminary step that we recommend, both to provide better protection against multiple forms of discrimination, and to facilitate the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission in carrying out their duties to oversee, and report on, rights and equalities issues falling within the scope of the commitment under Article 2 of the Protocol.
- The major shortfall in equivalence of protection across the jurisdictions with regard to age discrimination in access to goods, facilities and services should be addressed in Northern Ireland legislation.
- Section 19 of the Employment Act (Northern Ireland) 2016 should be brought into force in order to keep pace and align with rights and equality protection in Ireland and the rest of the United Kingdom.
- The divergence in laws on gender reassignment in Northern Ireland and Ireland regarding a right of trans individuals to self-declaration requires urgent consideration.

### Chapter 3

- The UK Government must not attempt to undermine the domestic law mechanisms, particularly section 7A of the European Union (Withdrawal) Act 2018, which enable specific rights and equality protections to operate fully within Northern Ireland law.

### Chapter 4

- In the adjudication of matters pertaining to the implementation of the Framework Equality Directive, Northern Ireland courts and employment tribunals must assess the existence of direct and indirect discrimination based on the findings explained in this chapter with regard to religious symbols at work.
- Northern Ireland must ensure that any legislation restricting or prohibiting the wearing of specific classes of symbols is changed, even if it does not target the symbols of specific religions but only generic features thereof (such as their scale or prominence).
- It is advisable for guidelines to be drawn up for the benefit of employers in Northern Ireland, which clarify:
  - a) that the prohibition or restriction on the wearing of religious symbols at work based on the particular characteristics of those symbols (for example, their size or scale) is in all cases unacceptable; and



- b) that any generalised prohibition or restriction on the wearing of religious symbols at work must be justified by a legitimate aim for which the employer is able to adduce evidence of genuine need (including of a commercial nature). Further, the measures taken to achieve such an aim must be both suitable to achieving that aim and confined to the least restrictive approach towards the manifestation of religion.
- Northern Ireland must ensure that the implementation and interpretation of disability discrimination pursuant to Article 1 of Directive 2000/78/EC does not render the concept of disability dependant on the *absence* of disability as the key comparator.
  - Issues of disability discrimination must be tracked as a key area of future change where dynamic alignment will be required.
  - Domestic courts should apply a strict proportionality scrutiny and pay particular attention to the way in which employers handle the applicant's individual circumstances, both in their assessment of justifications adduced for indirect discrimination and in their analysis of genuine occupational requirements under Directive 2000/78/EC.
  - The Race Relations (Northern Ireland) Order 1997 should be reformed to provide clarity to victims regarding their right to judicial protection in addition to any such settlements and to clarify that jurisdiction cannot be excluded by private agreement.
  - The Northern Ireland Assembly should consider legislation providing for a non-transferable period of parental leave of at least two months from August 2022.

## Chapter 5

- Northern Ireland should fully implement the UNCRPD in domestic legislation.
- A broad approach should be adopted by courts in Northern Ireland to understanding the general principles of European Union law, and all references to the Charter should be considered as references to a corresponding general principle of European Union law.
- Northern Ireland law should ensure that all migrants covered by the protections enshrined in European Union legislation, such as the Citizens' Rights Directive (Directive 2004/38/EC), are provided with the core material benefits required for a minimally dignified standard of living in order to comply with the requirement of non-diminution in relation to the general principle of human dignity (Article 1 of the Charter).
- That access to court and judicial oversight of administrative matters are accepted by all relevant public bodies to be part of the Protocol's non-diminution commitment.
- Courts in Northern Ireland should not be barred from providing compensation for violations of European Union fundamental rights in areas with Article 2 relevance.

- That the Northern Ireland Executive assess the continued possibility of liability on the basis of '*Mangold actions*' in Northern Ireland law and provide guidance clarifying the position of private actors who may be affected, such as employers.

### Chapter 6

- The Irish implementing measures with regard to the European Accessibility Act have not been published at the time of writing, however, we recommend that Northern Ireland should consider alignment in this field which, albeit not directly covered by Article 2, is nevertheless relevant to it, as it affects products used by persons who are older people and people with a disability.
- The law governing the operations of the Equality Commission for Northern Ireland should be reconsidered against any European Commission proposals for the operating baseline standards for equality bodies arising from the ongoing work to establish these standards.
- A new memorandum of understanding should be promulgated explaining how the UK Government and Northern Ireland Executive will engage with alignment requirements between Northern Ireland and European Union law relevant to Article 2 and making explicit their obligations to interact with the Commissions' notifications regarding such alignment.



# Appendix 1: Mapping Exercise 1: CJEU Case Law Mapping of Annex 1 Directives

## Methodology

The mapping of CJEU case law was completed for the following Annex 1 Directives:

1. 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
2. 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 (recast)
3. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
4. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
5. Directive 2010/41/EU 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
6. 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

As noted within the document herein, the date range for each search was from 31/12/2020 (end of the transition period) to 14/01/2022 to allow for an analysis of the case law mapping to be completed prior to the submission of this report.

For the case law contained within this document, the exact methodology inclusive of the search parameters has been noted for each Directive. All case law searches took place on the curia.eu database. Further to this, a relevance key has been implemented to highlight cases deemed Core (C) or Periphery (P). This was implemented as case law was flagged whereby the Directive was either significant and pivotal to the judgment reached, or alternatively mentioned only in passing.

The following mapping reflects that distinction so that an analysis could be carried out on cases which were deemed core to the parameters of report and the aforementioned Directives. However, for completeness and transparency of the process, all case law mapped has been included in the document herein notwithstanding if it has been referenced to within the report.

CJEU Case Law Mapping of Annex 1 Directives table is available upon request by emailing [dmu@equalityni.org](mailto:dmu@equalityni.org)

## Appendix 2: Mapping Exercise 2: CJEU Case Law Mapping of Non-Annex 1 Directives: Select EU Charter Mapping

### Methodology

The mapping of CJEU case law was completed for the following EU Charter provisions, broadly corresponding to Rights, Safeguards and Equality of Opportunity (Strand Three) aspect of the Belfast (Good Friday) Agreement 1998. The Charter provisions included Articles 1, 10, 11, 20, 21, 22, 23, 26, 40, and 45 of the Charter. As noted within the report, the reason for the use of Charter provisions to map case law developments was due the fact it provided a clear basis for identifying case law developments within the field of equality and human rights more broadly.

As noted within the document herein, the date range for each search was from 31/12/2020 (end of the transition period) to 14/01/2022 to allow for an analysis of the case law mapping to be completed prior to the submission of this report.

For the case law contained within this document, the exact methodology inclusive of the search parameters has been noted for each Charter provision. All case law searches took place on the curia.eu database. Further to this, a relevance key has been implemented to highlight cases deemed Core (C) or Periphery (P). This was implemented as case law was flagged whereby the Directive was either significant and pivotal to the judgment reached, or alternatively mentioned only in passing. The following mapping reflects that distinction so that an analysis could be carried out on cases which were deemed core to the parameters of report and the aforementioned Directives. However, for completeness and transparency of the process, all case law mapped has been included in the document herein notwithstanding if it has been referenced to within the report.

CJEU Case Law Mapping of Non-Annex 1 Directives table is available upon request by emailing [dmu@equalityni.org](mailto:dmu@equalityni.org)

## Appendix 3: Mapping Exercise 3: Note on ‘Rights, Safeguards and Equality of Opportunity’ Table

This table lists measures identified by the Commissions at the outset of this research for further analysis alongside adopted legislative measures (only) which relate to those measures (identified by the Commissions) since the end of the implementation period and until 31 January 2022. The Commissions are currently undertaking further work to identify EU measures within the scope of the non-diminution commitment under Protocol Article 2 and will publish that in due course.

It is important to note that this is not an exhaustive list, in part because it cannot be: new EU law will have to be screened for the purpose of determining whether such new law ought to be brought within the scope of the Protocol, particularly as additional rights and safeguards (existing within or added to EU law) are examined to determine whether they are captured by the phrase ‘civil rights ... of everyone in the community’ contained in the Rights Safeguards and Equality of Opportunity part of the Belfast (Good Friday) Agreement 1998.

The table should not be read in an entirely horizontal manner. Instead, the regulations and directives (and any developments therein) are grouped into sections of the table marked by bold borders. Each such section should be read as corresponding to the ‘Rights, Safeguards and Equality of Opportunity’ (‘RSEO’) rights which sits horizontally aligned with the top of such a section. In other words, the following is one complete section and should be read accordingly:

<b>RSEO</b>	<b>Measure identified by Commissions</b>	<b>Legislative Development</b>
	<b>Measure identified by Commissions</b>	<b>Legislative Development</b>

Two points are important to note.

First, no non-legislative elements (including decisions, policy, reports) have been included. This is because it is far from clear that the substantive rights under Rights Safeguards and Equality of Opportunity are part of the dynamic alignment duty under Article 2 of the Protocol. Thus, it is unclear to what extent alignment needs to be maintained with these additional measures in order to discharge the Article 2 duty.

Second, no Northern Ireland legislation has been listed in this table. This is because the measures identified by the Commissions deal with subjects which may lie outwith the Protocol itself. An example is the Anti-Trafficking Directive (2011/36/EU), which, although the Commissions consider falling within the scope of the Protocol, is not listed in any of the Annexes. While any developments concerning the Anti-Trafficking Directive *may* at some point in the future, be added to the Protocol by the Joint Committee of the UK and the EU (using its powers under Article 13(4) of the Protocol), it is not presently included in the Protocol. It is important that the reference to Rights Safeguards and Equality of Opportunity in Article 2 does not expand the reach of the Protocol beyond its own (present) boundaries. In these circumstances, *mapping* these additional EU measures to Northern Ireland law remains difficult.

Rights, Safeguards and Equality of Opportunity table is available upon request by emailing [dmu@equalityni.org](mailto:dmu@equalityni.org)

## Appendix 4: Mapping Exercise 4: Note on Annex 1 Table

### 1. Reading the workbook

- a. The workbook is divided into six spreadsheets – one for each directive under Annex I of the Protocol:
  - i. [79/7/EEC](#): directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security
  - ii. [2000/43/EC](#): directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
  - iii. [2000/78/EC](#): directive establishing a general framework for equal treatment in employment and occupation
  - iv. [2004/113/EC](#): directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services
  - v. [2006/54/EC](#): directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
  - vi. [2010/41/EU](#): directive 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
- b. The directives are ordered chronologically, from left to right in the workbook.
- c. Each directive is titled at the top of its respective spreadsheet.
- d. The main tables are to be read left to right: you can track each document from the date of its adoption to its reference, its originating institution, relevance to Rights Safeguards and Equality of Opportunity of the Good Friday Agreement, category of alignment, relevance and notes.
- e. The relevant Northern Ireland legislation in each spreadsheet is to be read vertically, mapped to their corresponding directive as a whole; in other words, the relevant legislation is not mapped to each document listed in the main table. The reason for this is that the work done by the EU institutions in respect of each directive (sometimes, involving multiple directives under Annex I, as indicated in the notes column) does not have a corresponding document or report in Northern Ireland.

- f. The alignment categories are ‘obligatory’ and ‘desirable’:
  - i. ‘obligatory’ is for any work done which relates to the substance of the main Annex I directives (for example, the principle of gender equality in relation to economic recovery from Covid-19 relates to the application of the principle of gender equality, even if the principle is applied in a context – Covid-19 recovery – which is outwith the Protocol as a discrete subject)
  - ii. ‘desirable’ is for anything that is not obligatory, but that might be adopted in order to achieve better alignment with EU laws and practices, whether already adopted or in draft form. Please note: better alignment does not imply a legal obligation, but only a suggestion.
  
- g. The spreadsheets are in Excel and not Word because of the number of columns in each spreadsheet. This is important for the following reasons:
  - i. The columns relating to the origin of different documents indicates the EU institutions whose work needs to be tracked in the immediate future in order to maintain the dynamic alignment required under Article 2 of the Protocol.
  - ii. Marking the document origins by colour provides an easier metric to visualise than streams of text. This is crucial because it demonstrates an important aspect of dynamic alignment: where something is coming from is as important as understanding what is coming, enabling the Commissions to understand the networks necessary to ensure a relatively smooth future dynamic alignment.

## 2. Some points of analysis

- a. Different styles of law: the Annex I directives mandate principles of equality and non-discrimination to apply in different contexts. The equivalent legislation in Northern Ireland largely follows this model, except in the case of Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation), where protected characteristics are dealt with under individual laws in Northern Ireland. This makes the task of dynamic alignment more difficult, because more laws have to be amended in response to the Annex I directives being amended or replaced, or new EU laws added to the Protocol which may fall within the parameters of Article 2.



- b. Different speeds of legal development: although some of the Annex I directives are older than others, there is work underway to update the EU equality *acquis* to extend non-discrimination guarantees horizontally. By contrast, equality and non-discrimination law in Northern Ireland has largely ossified. There is no single equality statute, which makes it difficult to comprehensively address combined or intersectional discrimination. That said, the debate on intersectional discrimination in legislation at the EU level has yet to be settled.
- c. The relevant legislature: barring one statute (the Equal Pay Act (Northern Ireland) 1970), all of Northern Ireland's equality and non-discrimination law has been made at Westminster, whether by statute or through secondary legislation. The modern Northern Ireland Assembly has enacted no legislation in this field since its inception. This is an important point because although the international obligation under Article 2 of the Protocol rests with the UK Government, the field of law with which Article 2 is concerned is a transferred matter under the Northern Ireland Act 1998.
- d. The division of labour: from the gathered data, there is no clear division of law and policy between the EU institutions. While the bulk of policy proposals and reporting originated with the European Commission, there are also frequent examples of the Council of the European Union and the European Parliament engaged in recommending policy or changes to policy as implemented by the European Commission. This is in addition to the role of the European Parliament and the Council of the European Union in making laws for the EU.
- e. Emerging fields: some major fields in which the EU equality and non-discrimination *acquis* (in particular the principle of equality between men and women) is being extended includes climate change, artificial intelligence and the regulation of platform work. While these areas are not explicitly covered under the Protocol, EU legal developments in these fields could be added to the Protocol (via the Joint Committee). Even if this did not happen, it may be desirable to maintain parity due to legislative or policy developments in Northern Ireland (for example, [climate change legislation](#) currently progressing in the Assembly) or the UK ([National AI Strategy](#)).

Annex 1 table is available upon request by emailing [dmu@equalityni.org](mailto:dmu@equalityni.org)







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