



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Call for Expression of Interest on the  
interaction between the EU Charter of  
Fundamental Rights and Article 2 of the  
Ireland/Northern Ireland Protocol**

**December 2022**

**The Northern Ireland Human Rights Commission is seeking to contract research on the interaction between the EU Charter of Fundamental Rights and Article 2 of the Ireland/Northern Ireland Protocol.**

**The deadline for submitting a quotation is 12 noon on Monday 23 January 2023.**

## 1.0 Background

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with section 78A(1) of the Northern Ireland Act the Commission monitors the implementation of Article 2(1) of the Protocol on Ireland/NI of the UK-EU Withdrawal Agreement (Protocol Article 2) to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the United Kingdom (UK)'s withdrawal from the EU. The Commission exercises this mandate alongside the Equality Commission of Northern Ireland (ECNI), as part of the 'dedicated mechanism' framework.
- 1.2 Pursuant to Section 78A(7), the Commission is seeking to conduct research to examine the ongoing relevance of the EU Charter of Fundamental Rights (EU Charter), general principles of EU law and Court of Justice of the European Union (CJEU) jurisprudence in NI after the UK's withdrawal from the EU.
- 1.3 The EU Charter contains rights and freedoms under six titles; dignity, freedoms, equality, solidarity, citizens' rights and justice. The Charter includes "third generation" fundamental rights, such as data protections and guarantees on bioethics. It contains a specific emphasis on the promotion and protection of the rights of the child, including by enshrining the best interests of the child principle.<sup>1</sup> In 2009, the Charter became legally binding on the EU with the entry into force of the Treaty of Lisbon.
- 1.4 The UK/EU Withdrawal Agreement, including its Ireland/Northern Ireland Protocol (the Protocol), reproduces commitments to the EU Charter in respect of EU law still in place after the withdrawal.<sup>2</sup> Protocol Article 2 provides an additional layer of human rights and equality protections in NI, which adds a further dimension to how the EU Charter interacts with human rights and equality provisions conferred by EU law in NI.

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<sup>1</sup> Article 24, EU Charter of Fundamental Rights.

<sup>2</sup> Article 2(a) and Article 4(1), UK-EU Withdrawal Agreement.

## 2.0 Article 2 of the Ireland/Northern Ireland Protocol

- 2.1 During the negotiations leading to the UK's withdrawal from the EU, both the UK and EU recognised that human rights and the Belfast (Good Friday) Agreement required consideration and protection. Both parties affirmed that the 1998 Agreement must be protected in all its parts, including in its practical application and the totality of relationships set out in the agreement.<sup>3</sup> Furthermore, the Ireland/Northern Ireland Protocol recognises that EU law has provided a 'supporting framework' for the rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement.<sup>4</sup>
- 2.2 In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement, as a result of the UK leaving the EU. To fall within scope of Protocol Article 2, the human right or equality protection being relied on must therefore be covered by the relevant chapter of the Agreement and have been underpinned by EU law on 31 December 2020.
- 2.3 Protocol Article 2 includes a commitment to 'keep pace' with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol.<sup>5</sup> That means that if the minimum standards in the Annex 1 Directives are updated or replaced, the UK Government must ensure that domestic legislation in Northern

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<sup>3</sup> Joint report from the Negotiators of the EU and UK Government progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the EU, 8 December 2017, para 42.

<sup>4</sup> Preamble to the Ireland/Northern Ireland Protocol. The underpinning EU law for the rights, safeguards and equality of opportunity protections within scope of Protocol Article 2 include all the obligations the UK EU membership.

<sup>5</sup> Council Directive 2004/113/EC, 'EU Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services', 13 December 2004; Directive 2006/54/EC, 'EU Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation', 5 July 2006; Council Directive 2000/43/EC, 'EU Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', 29 June 2000; Council Directive 2000/78/EC, 'EU Council Directive establishing a general framework for equal treatment in employment and occupation', 27 November 2000; Directive 2010/41/EU, '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', 7 July 2010; Council Directive 79/7/EEC, 'EU Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security', 19 December 1978.

Ireland reflects any substantive enhancements in relevant protections.<sup>6</sup>

- 2.4 In addition to the six Directives, there is other relevant EU law that underpins rights set out in the relevant chapter of the Belfast (Good Friday) Agreement. The UK Government has identified that these include, but are not limited to, the EU Victims' Directive;<sup>7</sup> the EU Parental Leave Directive;<sup>8</sup> and the EU Pregnant Workers' Directive.<sup>9</sup> In addition, the Commissions have identified a range of other measures which fall within the non-diminution commitment.<sup>10</sup> The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.<sup>11</sup>
- 2.5 The UK has incorporated the Withdrawal Agreement, including the Protocol, into domestic law through the EU (Withdrawal Agreement) Act 2020. Section 7A EU (Withdrawal) Act 2018 provides that all rights, obligations and remedies from the Withdrawal Agreement, including Protocol Article 2, are recognised and available in domestic law. The Commission, alongside ECNI, has been given additional powers to oversee the UK Government's commitment under Protocol Article 2.<sup>12</sup> The Commission is responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.
- 2.6 The Commission has taken the following approach when assessing whether Protocol Article 2 is engaged, and establishing a potential breach:

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<sup>6</sup> Northern Ireland Office, 'UK Government Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?', (NIO, 2020), at para 13.

<sup>7</sup> [Directive 2012/29/EU](#), 'Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

<sup>8</sup> [Directive 2010/18/EU](#), 'Council Directive implementing the revised Framework Agreement on parental leave', 8 March 2010.

<sup>9</sup> [Directive 92/85/EEC](#), 'Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', 19 October 1992.

<sup>10</sup> See Appendix 1 of the NI Human Rights Commission and Equality Commission NI, 'Working Paper: Scope of Article 2(1) of the Ireland/NI Protocol to the Withdrawal Agreement 2020', (NIHRC and ECNI, 2022).

<sup>11</sup> *Ibid.*

<sup>12</sup> Sections 78A-E, Northern Ireland Act 1998

- (i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?
- (ii) Was the right, safeguard or equality of opportunity protection:
  - (a) underpinned by EU law binding on the UK on 31 December 2020?
  - (b) Given effect in NI law, in whole or in part, on or before 31 December 2020?<sup>13</sup>
- (iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?
- (iv) Did this diminution occur as a result of the UK's withdrawal from the EU?

### 3.0 The EU Charter and Withdrawal Agreement

- 3.1 Article 6 of the Treaty on the European Union (TEU) lists three formal sources for EU human rights law, the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (EU Charter) and general principles of EU law. "General Principles of EU law" refers to a body of legal principles, including human rights, developed by the European Court of Justice (ECJ), derived from national constitutional traditions, the ECHR and other international treaties.<sup>14</sup> Article 2 of the UK-EU Withdrawal Agreement includes the TEU and the EU Charter within its definition of Union law.<sup>15</sup>
- 3.2 EU human rights standards, including the EU Charter and General Principles are binding on the EU and its institutions and bodies. The EU Charter can be considered to have direct effect where it meets the test of being sufficiently precise and unconditional.<sup>16</sup> It places an obligation on the national courts to "guarantee the full effectiveness of those articles by disapplying, if need be, any

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<sup>13</sup> Where UK and NI law was out of alignment with EU law on 31 December 2020, the absence of a 'domestic implementing measure' is not an insurmountable obstacle to demonstrating a diminution of Protocol Article 2, provided the EU legal obligation existed and was capable of having direct effect on that date. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 88-90 for further discussion of the relationship between EU underpinning law and Article 2.

<sup>14</sup> Paul Craig and Gráinne De Búrca, 'EU Law: Text, cases and materials', (Oxford, 2020), at 430.

<sup>15</sup> Article 2(a)(i), UK-EU Withdrawal Agreement.

<sup>16</sup> *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, 17 April 2018, para 78.

contrary provision of national law”.<sup>17</sup> The EU Charter applies only in respect of the scope of EU law.<sup>18</sup>

- 3.3 Article 4(1) of the UK-EU Withdrawal Agreement states “Provisions... of EU law made applicable by this agreement shall produce in respect of and in the UK the same legal effect as those which they produce within the Union and its Member States”.<sup>19</sup> Article 4(1) applies both to the provisions of the Withdrawal Agreement and EU law made applicable by it. Moreover, any reference to EU law concepts or provisions in the Withdrawal Agreement must be interpreted and applied in accordance with the methods and general principles of EU law.<sup>20</sup> Therefore, the EU Charter will continue to inform the application and interpretation of any EU law and concepts referred to in the Withdrawal Agreement.<sup>21</sup> This is an exception from Section 5 of the EU (Withdrawal) Act 2018, which provides that the EU Charter is not carried over by the general rules on the retention of EU law and is not part of UK law on or after 1<sup>st</sup> January 2021.
- 3.4 Article 4(2) of the Withdrawal Agreement states “the UK will ensure compliance with [Article 4(1)], including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation”.<sup>22</sup>
- 3.5 When EU Member States are implementing EU law, they are required to “respect rights, observe the principles and promote the application” of the EU Charter.<sup>23</sup> Where a relevant EU measure cannot be read to be compatible with the EU Charter, the Charter must take precedence. The application of the EU Charter is confined to when Member States are acting within the scope of EU law and does not extend the field of application of EU law.<sup>24</sup>

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<sup>17</sup> Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, Case C-414/16, 17 April 2018, para 79.

<sup>18</sup> Article 51, EU Charter of Fundamental Rights.

<sup>19</sup> Article 4(1), UK-EU Withdrawal Agreement.

<sup>20</sup> Article 4(3), UK-EU Withdrawal Agreement.

<sup>21</sup> Thomas Leaflander, ‘The UK-EU Withdrawal Agreement: a Commentary’, (OUP, 2021), at 39; Article 4(3) of the Withdrawal Agreement produces the same legal affect at Article 51(1) EU Charter.

<sup>22</sup> Article 4(2), EU-UK Withdrawal Agreement.

<sup>23</sup> Article 51(1), EU Charter of Fundamental Rights.

<sup>24</sup> Article 51, EU Charter of Fundamental Rights.

## General Principles of EU law

- 3.6 Article 6(3) of the TEU provides that fundamental rights, “as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law”. Article 2 of the UK-EU Withdrawal Agreement includes general principles of EU law within its definition of Union law.<sup>25</sup>
- 3.7 Section 6 of the EU (Withdrawal) Act 2018 sets out how retained EU law is to be read after exit day. Section 6(1) states that UK courts are not bound by decisions or principles laid down by the CJEU on or after exit day. Section 6(3) provides that any questions regarding the meaning of unmodified retained EU law will be determined by UK courts in accordance with relevant “pre-exit” CJEU case law and general principles.<sup>26</sup>
- 3.8 Schedule 1 of the EU (Withdrawal) Act 2018 downgrades the significance and application of EU General Principles across the UK statute book. But Article 4 of the Withdrawal Agreement re-asserts their significance for the interpretation of the treaty itself and of EU law and concepts referenced within it. Under Article 4(4), UK courts are only required to interpret relevant EU law or concepts referenced in the treaty, in line with CJEU case law handed down before the end of the transition period. UK courts must also have due regard for EU case law after that date.<sup>27</sup>
- 3.9 However, Protocol Article 13 creates an exception in relation to continued alignment with CJEU jurisprudence, stipulating that provisions of the Protocol referring to EU law shall “be interpreted in conformity with the relevant case law of the CJEU” and distinguishes this obligation from the timebound requirement under Article 4 of the Withdrawal Agreement.<sup>28</sup>
- 3.10 Therefore, this creates an additional obligation in respect of the Protocol, including Article 2. Annex 1 to the Protocol lists six equality directives, which as noted above, require dynamic alignment. It is the Commission’s view that the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law,

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<sup>25</sup> Article 2(a)(ii), UK-EU Withdrawal Agreement.

<sup>26</sup> UK Government, ‘European Union (Withdrawal) Act 2018: Explanatory Notes’, (UK Gov, 2018), at para 111.

<sup>27</sup> Article 4, UK-EU Withdrawal Agreement.

<sup>28</sup> Article 13(2), Ireland/Northern Ireland Protocol. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 93; Colton J noted that there is no temporal limitation on Article 13(2) of the Protocol.

the EU Charter and the relevant EU Treaty provisions, these will continue to have relevance in NI. The Commission is also mindful that future case law of the CJEU which, for example, references established and longstanding general principles or rights under the EU Charter will continue to have relevance to Protocol Article 2 and its interpretation.

## **4.0 Annexes 2-5 of the Ireland/Northern Ireland Protocol**

- 4.1 Annex 2 of the Protocol lists all of the required pieces of legislation that still apply to NI to keep it aligned with EU product standards, namely in agri-food production and environment. Protocol Article 5(4) states “the provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the UK in respect of NI”.
- 4.2 Annex 3 of the Protocol lists provisions of EU law that relate to the governing of VAT and excise. Protocol Article 8 identifies that Annex 3 provisions shall apply to and in the UK in respect of NI, Protocol Article 8 also states that “the Joint Committee shall regularly discuss the implementation of this article”.
- 4.3 Protocol Article 9 provides that provisions of EU law relating to wholesale electricity markets listed in Annex 4 of the Protocol shall apply to and in the UK in respect of NI. These provisions apply to the generation, transmission, distribution and supply and trading of electricity, particularly in relation to the wholesale market in Ireland and NI.
- 4.4 Annex 5 of the Protocol contains EU law relevant to the provisions of EU state aid. Article 10 of the Protocol notes that these provisions will apply to the UK “including with regard to measures supporting the production of and trade in agricultural products in NI, in respect of measures which affect that trade between NI and the EU which is subject to this Protocol”.
- 4.5 Protocol Article 13(3) provides that where the Protocol refers to EU law, “that reference shall be read as referring to a Union Act as amended or replaced”. Therefore, the UK Government is obligated



to ensure that any amendment to, or replacement of, an EU law listed in the Protocol is reflected in NI law. As noted above, Protocol Article 13(2) provides that EU law listed in the Protocol shall be read in conformity with relevant case law of the CJEU, similar to the keeping pace obligation for the EU equality Directives listed in Annex 1 of the Protocol.

- 4.6 It is the Commission's view that the measures in annexes 2-5 will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter and the relevant EU Treaty provisions, these will continue to have relevance in NI. The Commission is also mindful that future case law of the CJEU which, for example, references established and longstanding general principles or rights under the EU Charter will continue to have relevance to the measures Annexes 2-5 and their interpretation.

## Key Research Aims

The Commission is conscious of wider work considering how the EU Charter, General Principles and CJEU case law applies in the UK post Brexit, in respect of the Withdrawal Agreement and including Protocol Article 2. However, the Commission is specifically interested in exploring the degree to which the EU Charter and EU General Principles contribute to the protection of human rights in NI and how those rights are enforced as a result of the Withdrawal Agreement, including the NI Protocol in its entirety.

It is therefore expected that the research will undertake the following non-exhaustive list of tasks:

- In the context of the Commission's expectation of more detailed research projects flowing from this piece, and noting the Commission's preliminary work in this area,<sup>1</sup> the researcher is asked to set out a high-level interpretation of the continuing application and impact of the EU Charter and EU General Principles for the enjoyment and enforcement of human rights in NI law resulting from the UK-EU Withdrawal Agreement and the Protocol on Ireland/Northern Ireland.
- The analysis should be illustrated by way of example / case study, e.g. looking at particular Directives, EU Charter Articles, General Principles or CJEU judgements of significance.

- It would be helpful if examples/ case studies chosen included reference to a measure in each of the following categories, in order to demonstrate the potential impact of the EU Charter and EU General Principles in terms of human rights protection in different contexts:
  - Directives listed in Annex 1
  - EU measures identified by the Commissions as falling within the scope of Protocol Article 2 but not specified in any Annex of the Protocol<sup>2</sup>
  - EU measures identified by the Commissions as falling within the scope of Protocol Article 2 and also included in any of Annexes 2-5 of the Protocol.
  
- In respect of the examples identified, the researcher is asked to set out how the Charter, or particular Charter articles and / or general principles, inform the application and interpretation of the measures identified, including in respect of existing caselaw, remedies and enforcement.
  
- The researcher may wish to identify trends or, for example, the implications of particular judgments for the interpretation of EU law more broadly.
  
- The researcher is invited to suggest areas for further research in this area.

## **Exclusions**

The Commission acknowledges that the EU (Withdrawal) Act and ongoing developments in relation to the Retained EU Law Bill, currently in passage, affect /will affect (respectively) the interpretation of retained EU law across the UK, including how the EU Charter and General Principles apply more generally in UK law. While this wider context is important, it is intended that this piece is focused on NI in particular. Parallel research is currently being carried out on the environment, human rights and Protocol Article 2. This research may refer to certain aspects of the EU Charter, General Principles and CJEU case law where relevant to the environment. The Commission requires that there be no duplication of illustrative examples of how the Charter applies across the two research pieces. We will ensure that the researchers are kept apprised of related projects and will facilitate collaboration where possible.

## **Specification**

The successful contractor will be required to:

- Engage with the NIHRC to clarify the parameters of the project;
- To undertake both desktop research and any potential interviews with key stakeholders which may include civil society organisations, practitioners, service providers, academic or policy makers in this field; and
- To submit an interim report by 31 March 2023 and, having taken account of the NIHRC's comments, a final report by 30 June 2023. These timeframes are negotiable with the NIHRC.

The NIHRC retains all rights to the intellectual property and will be responsible for future decisions regarding the publication of the report. In all publications, the role of the contractor will be duly acknowledged.

Further dissemination opportunities will follow from this research in the form of a seminar and/or round table event which will be hosted and funded by the Northern Ireland Human Rights Commission.

The Director (Human Rights after EU Withdrawal) will be available to liaise with the successful contractor for the duration of the project, to resolve any queries concerning the research or the Commission's requirements in respect of the final draft.

## **Application**

Interested contractors are invited to:

1. Write a brief letter of motivation, alongside an annex of relevant experience and publications (no than four pages in total), demonstrating:

- experience of each member of the research team in undertaking research in one or more of the following fields (to ensure coverage across of the range of relevant experience):
  - ECHR;
  - EU law, with a particular focus on EU human rights law;
  - the UK's withdrawal from the EU; and
  - Ireland/Northern Ireland Protocol;
- knowledge and understanding across the research team of the key issues relating to the EU Charter of Fundamental Rights and CJEU case law; General Principles of EU law; the UK's withdrawal from the EU; Ireland/Northern Ireland Protocol;
- how they will conduct the research, including how the research team will ensure the research adds value to pre-existing research;
- how they will ensure value for money; and
- how quality assurance will be guaranteed.

It is expected that interested contractors will provide an outline of the proposed approach to the project, including the methods they will employ for ascertaining and ensuring that the Commission's requirements are met.

2. Quote a fixed price of no more than **£20,000** (inclusive of VAT) for writing and presenting a final report detailing a breakdown of how many days will be allocated to specific tasks undertaken by research team members, alongside a daily financial rate for each researcher. The proposals will be assessed for value for money.
3. Provide details of two referees who can comment on their ability to deliver the type of document described in the above specification.
4. The award of the contract will be based on: the applicants' competence to undertake the work, judged from the content of the letter of motivation and previous experience; how effectively the proposal will be delivered in practice; and value for money. The Commission reserves the right not to accept the lowest quotation.

## **Human Rights Policy**

Tenderers must confirm that their organisation has a human rights policy. Those tenderers who have been selected will be asked to provide a copy of their organisational human rights policy prior to award of contract.

## **GDPR Policy**

Tenderers must confirm that their organisation has a GDPR policy. Those tenderers who have been selected will be asked to provide a copy of their organisational GDPR policy prior to award of contract.

**Any questions about the project should be emailed to [Eilis.Haughey@NIHRC.org](mailto:Eilis.Haughey@NIHRC.org) who will arrange a prompt response.**

**Please email your application to [Accounts@NIHRC.org](mailto:Accounts@NIHRC.org) by 12 noon on Monday 23 January 2023**

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