NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Windsor Framework Article 2: Enforcement and Remedies

Anurag Deb, Eleni Frantziou, Sylvia de Mars, Colin Murray and Aoife O'Donoghue

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List of Abbreviations

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CFR	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CTA	Common Travel Area
ECHR	European Convention for the Protection of Human Rights
ECNI	Equality Commission for Northern Ireland
EU	European Union
EUSM	European Union Single Market
EUWA	European Union (Withdrawal) Act 2018
IHREC	Irish Human Rights and Equality Commission
IMA	Independent Monitoring Authority
NIHRC	Northern Ireland Human Rights Commission
REULA	Retained EU Law (Revocation and Reform) Act 2023
RSEO	Rights, Safeguards and Equality of Opportunity
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCRC	UN Convention on the Rights of the Child
UNCRPD	UN Convention on the Rights of Persons with Disabilities
WA	EU-UK Withdrawal Agreement
WF	Windsor Framework

Executive Summary

Introducing Article 2

Article 2 of the Windsor Framework (WF), as part of the Withdrawal Agreement concluded between the United Kingdom (UK) and the European Union (EU), provides a broad commitment to non-diminution of rights in Northern Ireland as a result of Brexit. This commitment relates to measures within the scope of the Rights, Safeguards and Equality of Opportunity (RSEO) chapter of the Belfast/Good Friday Agreement 1998. It reflects the common UK-EU position within the Brexit negotiations that the 1998 Agreement must not be undermined by the Withdrawal Agreement and the significance of the 1998 Agreement's rights and equality protections as an essential basis for building a post-conflict society.

Before Brexit, EU law provided a common baseline for a range of rights and equality protections across the legal jurisdictions of Ireland and the UK. The Directives contained in Annex 1 to the WF reflect specific commitments to apply these EU law protections within Northern Ireland as if it were still part of an EU Member State. However, Article 2's general non-diminution commitment extends beyond the content of the specific Directives listed in Annex 1. There is an overarching commitment which operates to prevent the diminution of other parts of EU law which provided rights and equality protections in Northern Ireland insofar as they can be connected to the relevant chapter of the 1998 Agreement.

The law operative in Northern Ireland must align with these requirements or the UK will be in breach of its Withdrawal Agreement obligations. This report does not focus on the detail of the Article 2 commitments, but addresses what happens if they have been breached in terms of the available remedies. Remedies are legal procedures that affected parties can use to obtain legal redress. Redress, in the context of Article 2, involves steps which can be taken to secure the rights and equality commitments contained in that provision. The Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) act as the Dedicated Mechanism for safeguarding the terms of Article 2, with duties to oversee, advise, report on, and with litigation powers to protect, rights and equality issues falling within its scope.

Chapter Recommendations

- **The Windsor Framework, as it stands, is inaccessible, having been overlayed by Joint Committee Decisions which alter the effect of certain provisions and add additional provisions into the original text. UK and EU should cooperate to publish a consolidated version of the Windsor Framework to make it a more accessible document.**
- **The UK Government should ensure that the NIHRC and ECNI are sufficiently resourced to undertake their full role under Article 2 of the Windsor Framework.**

Public Enforcement of EU Law and Remedies for Breaches of EU Law

This chapter addresses the key remedial concepts of EU law and their relevance for human rights and equality, both in vertical disputes between individuals and Member State authorities and in horizontal disputes between private actors before Member State courts. These concepts include:

- Direct Effect
- Indirect Effect (Consistent Interpretation)
- State Liability in damages (*Francovich* claims)
- Article 47 of the EU Charter of Fundamental Rights.

The chapter also provides worked-through examples of the causal relationship between a breach of an EU rule that has a *binding* character and each of the abovementioned remedies.

Chapter Recommendations

- **The Dedicated Mechanism institutions should ensure they have sufficient expertise both in house and within their networks to recognise effective remedies under EU law in order to be able to track divergence post-Brexit.**
- **It is essential to ensure financial reparation from the State for sufficiently serious violations of EU law remains available to individuals to comply with the non-diminution requirement of Article 2 WF.**

Private Enforcement: National Courts' Interaction with EU Law

This chapter first assesses the enforcement of EU law and the process for awarding reparation under the above remedial mechanisms, both at the EU level through Articles 258 and 267 TFEU and at the domestic level, when the UK was a Member State (including the disapplication of domestic statutes). This provides for a baseline for Northern Ireland post Brexit, in light of the non-diminution standard applicable under Article 2.

It then explores the changes to the account of remedies and procedures necessitated by the operation of Article 2. Article 2 is specifically excluded from CJEU oversight and the Commission enforcement mechanism, so this chapter will consider the procedures which must operate to secure comparable remedies notwithstanding these shifts in the operation of EU law in Northern Ireland. This analysis is conducted in light of the remedies amounting to safeguards for rights and equality protections within the meaning of the Rights Safeguards and Equality of Opportunity Chapter of the 1998 Agreement.

Chapter Recommendations

- **While the relationship between the binding character of EU law and the principles of direct effect and consistent interpretation is clear in EU law, domestic confirmation of that relationship would be beneficial to enhance legal certainty and clarify the scope of the obligations under Article 2 WF. In particular, EU law has a binding character, even where it is not directly effective, and in that case gives rise to the principle of consistent interpretation. EU law that is directly effective gives rise to both consistent interpretation and, where this fails, disapplication of legislation. While domestic courts may be able to read domestic law consistently with EU law without the need to resort to disapplication, maintaining the *power* to disapply legislation where necessary for directly effective provisions of EU law falling within the scope of Article 2 WF is an essential aspect of 'non-diminution'.**
- **While non-diminution is not triggered by the absence of a preliminary reference system for Article 2 *per se*, it may be triggered if the absence of a preliminary reference system results in diminution (eg, because it is subsequently proved that domestic courts applied EU law erroneously) in cases**

where they previously would have been under an obligation to make a preliminary reference request.

- **In light of the degree to which private enforcement of a range of EU law provisions remains a significant and distinctive feature within the Northern Ireland jurisdiction post Brexit, the Dedicated Mechanism institutions should use their educational powers under the Northern Ireland Act 1998 to prioritise public understanding, particularly within legal service providers, of the extent to which EU law continues to operate.**

Addressing breaches of Article 2

This chapter works through specific elements of how the post-Brexit system of remedies provided under the Withdrawal Agreement and implementing legislation operates in relation to breaches of EU law covered by Article 2. This includes adopting and elucidating explicit positions on each of the following scenarios:

- The remedies available in circumstances of incomplete or inadequate transposition of an EU measure into Northern Ireland law where it should have been fully operative before 31 December 2020;
- The significance of direct effect (and the limitation for remedies in its absence);
- The application of *Francovich* and Article 47 EU CFR remedies under Article 2 (contrasting Northern Ireland and Great Britain);
- The operative remedies where a public body is found to be acting in breach of Article 2;
- Remedies in the context of horizontal proceedings where an Article 2 breach is identified.
- The development of interim remedies (to prevent individuals such as asylum seekers being moved out of Northern Ireland to negate Article 2 rights);

Chapter Recommendations

- **The applicability of the *Francovich* rule, and the related remedies, are the subject of considerable confusion in light of the general post-Brexit exclusion of its operation in UK**

domestic law under the EU Withdrawal Act 2018. The Commissions should thus push the UK Government to acknowledge that this general position does not preclude its application under Article 2 WF and should support relevant litigation to establish this point in practice.

- **This chapter has highlighted that there are elements of Article 2 which extend beyond static obligations, and requiring tracking of EU law developments, particularly under the Annex 1 directives. In this context, the cross-border work of the Joint Committee should prioritise shared issues in the tracking of relevant EU law developments.**

The Withdrawal Agreement's Remedial Mechanisms

Whereas Chapter 4 addressed the remedies which are required by Article 2 in the context of the UK's domestic legal order and particularly the Northern Ireland jurisdiction, Chapter 5 addresses consequent remedial processes should no action be taken by the UK to address breaches of Article 2. This chapter explains how breaches of the Withdrawal Agreement can be addressed by the EU through the Withdrawal Agreement's committee system and arbitration processes:

- Compliance mechanisms following breach, including the operation of Article 174 arbitration;
- The powers of the Dedicated Mechanism where it identifies potential breaches of Article 2 and the remedies it should be able to seek from the courts in such circumstance.

Chapter Recommendations

- **The Dedicated Mechanism institutions should develop a public policy on when they will feed issues connected to Article 2 into the Specialised Committee. This should include information for litigants on raising the possibility of the ECNI and NIHRC raising issues with the Specialised Committee, and which of these bodies to approach depending upon the subject matter of particular cases.**

Conclusion

Having highlighted several key aspects of how the system of remedies operate to protect the rights contained within Article 2 WF, in this

conclusion, we also work through a structured example to demonstrate the operation of various remedies relevant to Article 2, comparing arrangements before and after the UK's withdrawal from the EU.

Chapter 1: Introducing Article 2

Introduction

This chapter tackles two aspects of the rights and equality context that arises out of the operation of both the 1998 Belfast/Good Friday Agreement (1998 Agreement)[1] and the UK-EU Withdrawal Agreement.[2] Both centre on Article 2 of the Ireland/Northern Ireland Protocol or as amended, the Windsor Framework (WF).[3] First, it provides a contextual overview of the substantive operation of Article 2. An outline of the roles played by the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) as parts of the Dedicated Mechanism follows. These two aspects are considered in the overarching context of the impacts the WF is already having, across case law and legal policy, alongside the future potential impact of Brexit regarding remedies for breaches of EU law in Northern Ireland.

Detailed analysis of Article 2 and its various effects across frontier workers,[4] immigration rights,[5] healthcare,[6] refugees and migrants,[7] and on women[8] are available from both NIHRC and ECNI and this chapter will not repeat the analysis available in these sources. This is a novel area of law and this chapter provides an overview of the context in which remedies or enforcement for breaches of EU law continue to have effect in Northern Ireland. It does not attempt to exhaustively cover the areas of application of Article 2.

Two other elements of relevance intertwine. First, a multi-layered mix of actors was involved in remedies and enforcement of EU obligations prior to Brexit and has developed under the Withdrawal Agreement. This includes the UK court system and the Court of Justice of the European Union (CJEU) alongside the devolved Northern Ireland institutions, the wider UK legal order and the European Commission and Parliament.

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[1] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473.
[2] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Official Journal of the European Union, Document 12020W/TXT (L 29/7), 31 January 2020.
[3] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/Northern Ireland (now called Windsor Framework), Decision no 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
[4] Sylvia de Mars and Charlotte O'Brien, *Frontier Workers and their Families: Rights after Brexit* (2023).
[5] Alison Harvey, *Legal analysis of immigration or related rights & equality protections in Northern Ireland after Brexit* (2021).
[6] Tamara Hervey, *Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol* (2022).
[7] Alison Harvey, *Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum* (2023).
[8] Katharine Wright, Ruth McAreavey and Rebecca Donaldson, *The Impact of Brexit on Women in Northern Ireland* (2024).

Second, is the role of substantive rights and equality alongside the various procedural mechanisms for monitoring, reviewing and implementing Article 2. EU rights and equality law includes the EU Charter of Fundamental Rights (CFR),[9] directives relevant to equality, EU citizenship rights, data protection and a plethora of other rights obligations found in Treaties, directives and regulations and across the decisions of the CJEU. This amounts to an internally complex system, and the connections between it and the WF are still being worked out.[10] EU law, and specifically its remedies, thus remains relevant to law within the UK in ways which will be outlined across this report.

Article 2 WF's direct reference to Rights, Safeguards and Equality of Opportunity (RSEO) sections of the 1998 Agreement places it directly into current UK-EU legal relations. Before the 2016 referendum and during Brexit negotiations, there were some suggestions that EU law did not have relevance for the 1998 Agreement, and therefore it did not need to be considered in the context of Brexit. Nonetheless, the explicit intention of the 1998 Agreement was to establish a legal order in Northern Ireland where rights and equality were integral. Significant elements of the 1998 Agreement were, and remain, underpinned by EU law, including the general prohibition on discrimination on the basis of belief, religion, or political thought under Article 21 of the CFR. This required that aspects of EU law remained in place after Brexit, as they were part of ensuring the continuation of that negotiated settlement.[11] This chapter addresses how rights and equality protections that originate in EU law and operate in Northern Ireland under Article 2 WF continue to underpin the 1998 Agreement. At present, however, as it has been overlayed by Joint Committee Decisions which have altered the effect of certain provisions and added additional provisions into the original text, the WF cannot be read as a single document, increasing confusion about its terms.

1998 Agreement

Article 2 WF is very much intertwined with the 1998 Agreement. The requirement for a substantive human rights infrastructure in Northern Ireland as necessary for a transition from conflict was widely understood during the negotiations of the 1998 Agreement.[12] The 1998 Agreement was also negotiated in the context of both Ireland and the United

[9] European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 14 December 2007.
[10] Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[11] Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press, 2018) 17.
[12] Christine Bell, 'Dealing with the past in Northern Ireland' (2002) 26 *Fordham International Law Journal* 1095, Christopher McCrudden, 'The Origins of "Civil Rights and Religious Liberties" in the Belfast-Good Friday Agreement' (2024) 75 *Northern Ireland Legal Quarterly* 443.

Kingdom's EU membership, and their anticipated continuing membership. This means that at least some of the human rights and equality guarantees, that are dispersed across several legal documents stemming from the 1998 Agreement were situated within EU law.[13] This necessitated that any withdrawal from the European Union would require human rights to be part of the negotiation, and this was accepted by all sides early in the negotiation.[14]

Extending in scope since the 1998 Agreement, human rights and equality are now spread across a range of legal documents with an array of jurisdictional applications, which include international, EU and Council of Europe commitments. Some, such as the UK's 1998 Human Rights Act, were intended to implement the rights and safeguards provisions of the 1998 Agreement. Other extensions, such as those that emerge from EU law, including the reforms and extensions of the range of Directives relevant to equality issues, the CFR and a range of CJEU case law, further supplemented this new legal order. Each of these further fulfilled the commitments of the 1998 Agreement, by underpinning the commitments to the 'civil rights and religious liberties of everyone in the community'.[15] These EU law changes, alongside the European Convention on Human Rights as well as a range of other international legal obligations created a rich tapestry of interconnected human rights provisions within Northern Ireland.[16]

The 1998 Agreement human rights and equality commitments include obligations towards equivalence of rights on the island,[17] towards incorporating and enabling recourse to the European Convention on Human Rights,[18] alongside the enumerated and unenumerated RSEO provisions which necessitate a fair functioning criminal justice system. These coupled with UK constitutional rights, both from the Human Rights Act 1998 and residual civil liberties jurisprudence that operate, alongside and, at time intertwines with, EU law creates a substantive infrastructure.

RESO Chapter of the 1998 Agreement states:

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community.

[13] Sylvia De Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering Two Unions* (Policy Press 2018) 3-9.
[14] 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.
[15] Eleni Frantziou and Sarah Craig, 'Understanding the Implications of Article 2 of the Northern Ireland Protocol in the Context of EU Case Law Developments' (2022) 73(S2) *Northern Ireland Legal Quarterly* 65.
[16] Kathryn McNeilly and Aoife O'Donoghue, 'Mapping the Tapestry: National and International Human Rights Frameworks in Northern Ireland and Ireland' (2023) 34(2) *Irish Studies in International Affairs* 1.
[17] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para. 9.
[18] European Convention on Human Rights and Fundamental Freedoms (1953) 213 UNTS 222, see also Joint Declaration by the British and Irish Governments' (April 2003) Annex 3, para. 2.

> Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - 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 right of women to full and equal political participation.

Para 12 of the 1998 Agreement includes the right of victims:

> to remember as well as contribute to a changed society', with commitment by '[a]ll participants' to '[r]espect, understanding and tolerance in relation to linguistic diversity'[19] and to the 'need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.[20]

This is a non-exhaustive list, and includes civil, political, economic and social rights, including EU rights and equality protections that existed prior to and evolved following the 1998 Agreement.[21]

'Everyone in the community' was explored by Humphreys J in *In re NIHRC*. Here he emphasised that its ambit was not restricted to the Unionist and Nationalist communities, as some earlier judgments appeared to imply,[22] but that 'everyone' meant all those in Northern Ireland, including, for example, asylum seekers.[23] This is also supported

[19] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para. 3.
[20] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para. 5.
[21] *In re Dillon* [2024] NIKB 11, [114]. See Christopher McCrudden, 'Equality' in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart, 2001) 75, 99.
[22] *In re White* [2000] NIQB 11, and its rewritten feminist judgment; Catherine O'Rourke, '*In the Matter of an Application by Evelyn White for Judicial Review* [2000] NI 432, [2004] NICA 1', in *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart, 2017) 250-262.
[23] *In re NIHRC and JR295* [2024] NIKB 35, [68].

by the UK Government's 2020 *Explainer* on the interpretation of Article 2 WF.[24]

The 1998 Agreement also provided for the creation of statutory human rights and equality bodies which now encompass the NIHRC, and the ECNI. It also includes the Joint Committee which comprises the NIHRC and the Irish Human Rights and Equality Commission (IHREC). These bodies were an important part of the Brexit negotiation, ensuring that human rights and equality were on the agenda and aiding in the creation of Article 2 WF.[24]

Article 2 of the Windsor Framework

The 1998 Agreement contains rights unaffected by Brexit. But Article 2 confirms the UK's human rights and equality commitments under the 1998 Agreement remain intact following Brexit. Since coming into operation Article 2 has already had a significant impact across several cases and is being embedded as a key element of the human rights and equality infrastructure of Northern Ireland. In general, the Courts have taken, what was described in the *Dillon* case as a 'generous and purposive' interpretative approach in line with customary international law on treaty interpretation and commitments of the British and Irish Governments to the 1998 Agreement.[25]

Article 2 (1) states:

> 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.

In brief, the first section of Article 2(1) directly references the 1998 Agreement and commits to non-diminution, while the second expressly references EU anti-discrimination laws. All aspects of Article 2(1) are to be implemented via dedicated mechanisms.

The Withdrawal Agreement and the WF must be interpreted in accordance *pacta sunt servanda* (agreements must be kept) and other international legal obligations on treaty interpretation and implementation.[26] EU law

[24] UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 8.
[25] *In re Dillon* [2024] NIKB 11, [532]-[535]. The Court of Appeal noted that it was unnecessary to invoke the Vienna Convention in this particular case; *In re Dillon* [2024] NICA 59, [115].
[26] See Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011).

that comes within the bounds of 1998 Agreement's 'Rights, Safeguards and Equality of Opportunity of Rights' are covered by non-diminution. While under the second half of Article 2(1) the EU Directives, as listed in Annex 1 of the WF regarding discrimination are also subject to non-diminution, however this second half is also subject to dynamic alignment.[27] The reference to Union law, here and elsewhere in the WF puts Article 2 into the overall legal framework of the Withdrawal Agreement and requires that it not be read in isolation, but rather alongside Article 13(3) WF and the Withdrawal Agreement as a whole. In short, Article 2 must be treated as one part of an overarching treaty.

Contained within UK's Withdrawal Agreement Act is the recognition that the 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' created within or arising from the Withdrawal Agreement are 'recognised and available in domestic law' as per European Union Withdrawal Act 2018, section 7A(2).The UK Supreme Court in the *Allister* case found that under section 7A of the European Union (Withdrawal) Act 2018 (EUWA), the WF (or Protocol) is operative in domestic law and must be given effect.[28] This provision works in tandem with Article 4 of the Withdrawal Agreement, where the UK acknowledged that it would give domestic legal effect to a range of its Withdrawal Agreement commitments.[29] Article 4 further provides that 'the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions' must be in place.[30] The full implications of these commitments are explored in the substance of this report, but in short domestic enactments must be disapplied where they are inconsistent with the Withdrawal Agreement and the EU Law that it makes applicable in the UK.[31]

Union law under Article 2 WF is broadly defined, including general principles of EU law[32] as well as, for instance, the CFR.[33] EU human rights and equality provisions enter the WF through different paths:

- EU law listed in the WF and covered by RESO within the 1998 Agreement;

[27] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, WF, Annex 1.
[28] *In re Allister and Peeples* [2023] UKSC 5, [2024] AC 1113.
[29] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 4(1).
[30] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 4(2).
[31] See *In re Dillon* [2024] NICA 59 and *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307.
[32] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 2(a)(ii). See Takis Tridimas, *The General Principles of EU Law* (2nd edn) (OUP, 2006) 29-35.
[33] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 2(a)(i).

- EU law listed in the WF but not covered by RESO within the 1998 Agreement;
- EU law not listed in the WF but included under RESO within the 1998 Agreement;[34] and
- EU law neither listed in the WF nor covered by RESO within the 1998 Agreement but is still applicable to the Northern Ireland context alongside retained EU law that applies in Northern Ireland.

As regards to the six equality directives listed in Annex 1, this requires dynamic alignment between EU law and Northern Ireland law.[35]

The six provisions in the Annex to the WF are:

- 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.

To take full cognisance of dynamic alignment, Article 2(1) should be read together with Article 13 and Annex 1.[36] How dynamic alignment operates is set out in the WF. Article 13(3) WF states that any reference to a Union

[34] For a non-exhaustive list see ECNI/NIHRC, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (Dec 2022).
[35] Race Equality Directive: Directive 2000/43/EC; Framework Directive (religion and belief; age; sexual orientation; and disability): Directive 2000/78/EC Gender Goods and Services Directive: Directive 2004/113/EC; Equal Treatment Directive (Recast) (employment): Directive 2006/54/EC; Equal Treatment Directive (self-employment): Directive 2010/41/EU; Equal Treatment Directive (social security): Directive 79/7/EEC.
[36] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1 Article 13(2) and 13(3)

Act, which includes those Directives in the Annex, refers to a Union Act as amended and replaced, it is not a snapshot of those Directives on the date of Withdrawal but rather as they evolve and change. Annex 1 Directives area also subject to the non-diminution requirements of Article 2. In short, it requires dynamic alignment. Any amendments that the EU undertakes regarding the Directives listed in the Annex require the UK to amend and implement the laws connected to the Directive regarding Northern Ireland.[37] The amending, implementing and interpretation must be undertaken in conformity with the interpretations of the CJEU of the Directives and wider Union law.[38]

The Court of Appeal has set out a six-part test for the application of Article 2 in the *In re SPUC* case, which has since been treated in *In re Dillon* as a useful interpretive aid with regard to Article 2.[39] It states that:

(i) A right (or equality of opportunity protection) included in the relevant part of the 1998 Agreement is engaged.

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.

(iii) That Northern Ireland law was underpinned by EU law.

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU.[40]

Each subsequent court decision has drawn on this test as a starting point when examining Article 2's applicability. Part (i) of the test requires that the 1998 Agreement's RSEO elements are engaged. This includes, 'everyone in the community' as per Humphreys J in *In re NIHRC* to mean all those in Northern Ireland and not just nationalist/unionist communities regarding how can rely on Article 2.[41]

Part (ii) requires that the right must have been in effect 'in whole or in part' by 31 December 2020, this includes any rights or equality protections that should have been implemented in Northern Ireland but

[37] The NIHRC and ECNI have so far identified three directives as triggering dynamic alignment. For examine, as regards the EU Pay Transparency Directive, see the Joint NIHRC and ECNI, *Briefing Paper on the EU Pay Transparency Directive* (Mar 2024).
[38] The NIHRC and the ECNI issue periodic reports on Divergence; Joint NIHRC, ECNI and IHREC Report, *EU Developments in Equality and Human Rights* (May 2025).
[39] *In re Dillon* [2024] NICA 59, [92]-[96].
[40] *In re SPUC Pro-Life Ltd (Abortion)* [2023] NICA 35, [54].
[41] *In re NIHRC and JR295*, [2024] NIKB 35, [68].

had not yet been fully transposed from EU law on that date.[42] In the *Dillion* case in the High Court Colton J used the criteria above to interpret Article 2, and made a clear link to the EU Victims' Directive, and from here, connected the Directive to the CFR.[43] He states that any transposition of Union law must also have due regard to the European Commission's guidance on its implementation.[44] In *Dillon,* this enabled the claimant to meet part (iii), the requirement that EU law must have underpinned the right being claimed, and that it comes within the scope of Union Law as is defined under the Withdrawal Agreement.[45] Part (iv) follows directly from here stating that this element of EU law was removed, in whole or in part, following the UK's withdrawal from the EU. Part (v) requires there is a diminution of that right, which is discussed further below, but in *Dillon* Colton J found that the Legacy Act was incompatible with the Victims' Directive, and so involved a diminution of the rights for victims of crime provided by that Directive. And finally, the test required that this would not have been lawful had the UK remained in the EU.[46]

Non-diminution is an essential element of Article 2.[47] Non-diminution is an absolute baseline, preventing the reduction in rights. In *re SPUC Pro-Life Ltd* the High Court confirmed that Article 2 has direct effect, meaning it may be used by individuals to enforce their rights before courts, as regards to non-diminution.[48] Non-diminution relates to all rights and equality standards contained in RSEO under the 1998 Agreement, where these were protected as a result of EU obligations prior to 31 December 2020.[41] This date is significant, providing the point at which the state of development of a right or equality protection within EU law is assessed.[49]

An important element of this is the framing of non-diminution is that it 'results from its withdrawal from the Union'. This is an important step in the process of understanding the operation of Article 2(1) that it would not have been lawful had the UK remained in the EU. The UK Government has committed itself to non-diminution stating that even in the case

[42] See Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (ECNI, 2022) 82.
[43] Acknowledged by the UK Government in its explainer on Article 2; UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 13.
[44] *In re Dillon* [2024] NIKB 11 557, Directive 2012/29 of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The EU Guidance does not form part of binding EU law.
[45] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 2, Article 4.
[46] Christopher McCrudden, 'Rights and Equality' in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2021) 143.
[47] Aoife O'Donoghue, 'Non-Diminution: Article 2 in Context' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Part IV* (OUP, 2022) 89-106.
[48] *In re SPUC Pro-Life Ltd (Abortion)* [2022] NIQB 9, [77], this was confirmed in *In re Dillon* [2024] NICA 59.
[49] Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, Continuing EU Citizenship - 'Rights, Opportunities and Benefits' in Northern Ireland after Brexit (NIHRC and IHREC, 2020) 42.

where it occurred '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'[50] In *Dillon* the Court of Appeal appeared to suggest that it is a domestic law issue as to whether diminution has occurred, it is important to note however that the CJEU remains the final arbitrator of the meaning of EU law, and while there is no direct route for UK courts to make a preliminary reference to the CJEU, it is possible that it may make a determination of diminution via the arbitration processes within the Withdrawal Agreement.[51]

The 1998 Agreement's RSEO provisions formed part of the basis for the UK's incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland (and into wider UK) law. Because of the interrelationship with Article 2, the role of the UK Human Rights Act 1998 and any reform proposals around the operation of ECHR rights in domestic law must have due regard to the UK's commitments during the Brexit process. Withdrawal from the ECHR would undermine the UK's obligations under the 1998 Agreement, but because it would not be directly connected to operative EU law, it could not be litigated on the basis of Article 2. Nonetheless if it resulted in any operative rights derived from EU law being reduced this would lead to a violation of Article 2, and it would trigger overlapping human rights safeguards within the UK–EU Trade and Cooperation Agreement.

The ECHR and CFR rights possess many overlapping provisions.[52] They possess very wide potential for application across economic, social, political and cultural, environmental, employment rights. These overlaps connect these rights to UK domestic law and the Human Rights Act 1998.[53] In the *Dillon* case in the Court of Appeal, it was made clear that the Court considered that the CFR could not be invoked independently, that rather it is necessary that there is another aspect of EU law for the CFR to rest upon. While the Court found that it is possible that the CFR might develop further, 'we do not consider that, at the critical date for the purposes of article 2(1) WF [Windsor Framework], the CFR underpinned or was understood as underpinning RSE [Rights, Safeguards and Equality of Opportunity] rights in that way'.[54] As has been pointed out, this reading of Article 2 is at odds with the requirement to interpret EU law in

[50] UK Government, *UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland* (2020) para. 6.
[51] Withdrawal Agreement Art 174(1). See Anurag Deb and C.R.G. Murray, 'By their Powers Combined: The Two Article 2s at Work in the *In re Dillon* Challenge to the Legacy Act' [2025] *European Human Rights Law Review* 178, 184.
[52] See Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury, 2021).
[53] Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[54] *In re Dillon* [2024] NICA 59, [143].

line with the CJEU, with no temporal limit placed upon it.[55] This aspect, as such, remains subject to the CJEU's development of the CFR.

In the *Dillon* judgments by both High Court and Court of Appeal, the specific legislation was disapplied, making clear the extent of the remedies available under Article 2.[56] This form of remedy was reaffirmed in the *Re NIHRC* case.[57] These are both significant as they demonstrate the extent of Article 2 potential as regards to remedies.

Dedicated Mechanism

Article 2(2) brings the 1998 Agreement to the fore once more and the role of the human rights (NIHRC) and equality (ECNI) institutions in ensuring that the RSEO provisions are maintained. These institutions, including the all-island Joint Committee, were central to establishing rights and equality as part of the Brexit settlement.[58]

Article 2(2) states:

> The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

The NIHRC and the ECNI are the 'Dedicated Mechanism' as designated by the UK Government. The IHREC is not part of the Dedicated Mechanism, though it is part of the Joint Committee. While there is no requirement for the Joint Committee to have a specific role under Article 2(2) as part of the Dedicated Mechanism, the UK is under an obligation to facilitate related work. There is an opportunity to harness the working of the Joint Committee of the NIHRC and the IHREC to understand shifts in EU law, particularly as Ireland is subject to the changes to which dynamic alignment applies. Northern Ireland, in the areas of non-diminution, also provides a benchmark in those areas where there is potential for diminution in Ireland. This is particularly important given the 1998

[55] See Anurag Deb and C.R.G. Murray, 'By their Powers Combined: The Two Article 2s at Work in the *In re Dillon* Challenge to the Legacy Act' [2025] *European Human Rights Law Review* 178 and Tobias Lock, Eleni Frantziou, Anurag Deb *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[56] *In re Dillon* [2024] NIKB 11; *In re Dillon* [2024] NICA 59.
[57] *In re NIHRC and JR295* [2024] NIKB 35.
[58] Sylvia de Mars and Aoife O'Donoghue, 'Law and scale: lessons from Northern Ireland and Brexit' (2024) 44 *Legal Studies* 201.

Agreement's requirement of equivalence of rights on the island, and so the necessity of this base line not to be breached.

The NIHRC and the ECNI have powers to monitor the implementation of the WF and report to the Secretary of State for Northern Ireland and The Executive Office on this area.[59] Both have powers to advise the Northern Ireland Assembly and the UK government on legislative and other implementation measures including compatibility, to promote wider public understanding of Article 2, to bring, or intervene in, legal proceedings in respect of an alleged breach (or potential future breach) of Article 2 and to assist individuals in relevant legal proceedings.[60] Both Commissions also provide regular reports to the Northern Ireland Executive and the UK Government on the implementation of the Withdrawal Agreement.

In *In re SPUC* the Court of Appeal stated the importance of both Commissions in the process of understanding and implementing Article 2, and in particular their role in bringing to attention potential breaches of Article 2 in proposed legislation.[61] Both Commissions' involvement in instigating or intervening directly in cases (often following advice given to the Government on potential breaches) has already been central to Article 2's development.[62] Their work involved in monitoring new law, advising, public engagement and litigating is vast and ensuring both Commissions have the capacity to continue this work in a comprehensive manner forms part of the UK's obligations under Article 2(2) to continue this work. The requirement of the UK Government to support their work includes ensuring they are properly resourced and supported.

EU Law

As already outlined, the term Union law, as used in the WF should be read to include all relevant aspects of EU law under Article 4 of the Withdrawal Agreement. This includes the wide range of human rights and equality obligations under the WF that come directly from Union law as defined under the Withdrawal Agreement.[63] Article 4 of the Withdrawal Agreement, which refers to 'Union law' states that the EU law that is applicable under the Withdrawal Agreement, continues to have the same legal effects in the UK, as it does in EU member states, as will be outlined

[59] ECNI, IHREC, NIHRC, Ireland/Northern Ireland Protocol of the European Union (EU) Withdrawal Agreement, Article 2: island of Ireland dimension - Memorandum of Understanding (March 2021).
[60] EU (Withdrawal Agreement) Act 2020, amending the Northern Ireland Act 1998.
[61] *In re SPUC Pro-Life Ltd (Abortion)* [2023] NICA 35, *In re Dillon* [2024] NIKB 11; *In re Dillon* [2024] NICA 59.
[62] *In re SPUC Pro-Life Ltd (Abortion)* [2023] NICA 35, [72]. See Anurag Deb and C.R.G. Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: A new frontier in human rights law?' (2023) 6 *European Human Rights Law Review* 608.
[63] Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).

further in this Report. This includes direct effect and primacy while continuing processes of interpretation in line with the CJEU.

Article 4 of the Withdrawal Agreement states:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

The Article 4 obligations are relevant to any 'provisions of this Agreement referring to Union law or to concepts or provisions thereof', which encompasses Article 2 WF. Section 7A of the EUWA connects these Article 4 obligations to UK domestic law.[64] The overall effect of Article 4 and section 7A is that if a law is introduced into UK domestic law that is inconsistent with the aspects of the Withdrawal Agreement which are covered, these laws can be disapplied by the Courts.

Under the Withdrawal Agreement some of the interpretative effects of the CJEU's jurisprudence within UK domestic law were brought to an end on 31 December 2020. However, under Article 13(2) and 13(3) WF, the CJEU's interpretation continues to apply where Union law is referenced within the WF. As developed under the CJEU's case law, the general principles of EU law are a primary source and are used both to interpret and enforce EU law.[65] All secondary sources of EU law must comply with these general principles, and they have direct effect. This makes them of particular relevance to reading Article 2 WF. These general principles include the principle of proportionality; the principle of equality; legal certainty and legitimate expectations; the right to judicial protection; rights of defence; transparency; abuse of rights; the principle of effective remedies in national courts, including state liability; and, most importantly, EU fundamental rights.[66]

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[64] EUWA 2018, s. 7A.
[65] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 2(a)(ii), Takis Tridimas, *The General Principles of EU Law* (2nd ed, OUP, 2006) 29-35.
[66] Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 13.

The CFR is not explicitly mentioned in the WF, and it was expressly removed from UK law under the EU Withdrawal Act. Nonetheless case law confirms that the CFR comes within the structure of the EUWA and the WF and so remains relevant to the application of various aspects of EU law within Northern Ireland.[67] The CFR lies at the core of the protection of fundamental rights within the EU.[68] As discussed, the CFR has some overlaps with the ECHR.[69] The ECHR is an important part of the 1998 Agreement human rights framework, and is also connected to UK domestic law via the Human Rights Act 1998. As regards to Article 2 case law the difference in remedies available between the Human Rights Act 1998 and Article 2 has become significant, even where the rights overlap. There are also several areas of the CFR that go further than the ECHR, including Article 1 on human dignity, Article 8 on protection of personal data, Article 13 on freedom of the arts and science, Article 15 on the freedom to choose an occupation and to engage in work, Article 16 on the right to conduct a business and article 18 on the right to asylum.[70] The difference in remedies available to litigants is likely to become a significant point of litigation strategy in the future.

Remedies/Enforcement in EU law

In general, remedies are the awards made by a court because of its decision. Remedies include awards by courts following judicial review of the activities of public bodies. The EU Treaties do not use the term remedies, but rather refer to the enforcement of obligations. Nonetheless the term is used by the CJEU and within EU scholarship. Section 7A of EU Withdrawal Act 2018 (EUWA) translates the UK's Withdrawal Agreement commitments into UK domestic law. Article 4(1) of the Withdrawal Agreement preserves EU remedies where EU law remains part of UK law, and it has been breached. This includes direct effect and that parties can rely on these provisions in court. The WF is an intrinsic part of the Withdrawal Agreement, but Article 12 WF provides for special rules applicable to the implementation, application, supervision and enforcement of its terms and the dual roles of the UK and the EU in this process, which does not expressly include Article 2.

Regarding Article 2 WF, the ability of parties can directly rely on aspects of the WF was accepted by the UK Supreme Court in the *Allister*

[67] See *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307, [92] and *In re Dillon* [2024] NICA 59, [137].
[68] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/1, Article 2(a)(i).
[69] For scope and interpretation, see European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 14 December 2007, Article 52.3.
[70] Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 18.

judgment.[71] This has since been reiterated by the courts to Article 2 WF, with particular significance for the remedy of disapplication of statutes. For Colton J in *Dillon*, 'any [statutory] provisions … which are in breach of the WF should be disapplied'.[72] Humphreys J in *NIHRC and JR295* stated quite bluntly that '*Factortame* is still in play'.[73] As the case law demonstrates, and in contrast to what is available under the Human Rights Act, this remedy/enforcement allows courts to disapply Acts of the Westminster Parliament.[74] This makes it a very significant litigation tool.

Conclusion

The nature of EU remedies, their role prior to Brexit and in Northern Ireland post Brexit will now be discussed across the following chapters. Article 2 is now an important tool for human rights and equality protections. Its full operation remains to be fully teased out by the Courts, but already its ramifications are being felt across the UK.

Recommendations

- **The Windsor Framework, as it stands, is inaccessible, having been overlayed by Joint Committee Decisions which alter the effect of certain provisions and add additional provisions into the original text. UK and EU should cooperate to publish a consolidated version of the Windsor Framework to make it a more accessible document.**
- **The UK Government should ensure that the NIHRC and ECNI are sufficiently resourced to undertake their full role under Article 2 of the Windsor Framework.**

[71] *In re Allister and Peeples* [2023] UKSC 5, [2024] AC 1113, [74] (Lord Stephens).
[72] See the High Court, *In re Dillon* [2024] NIKB 11, [527], and the Court of Appeal, *In re Dillon* [2024] NICA 59, [150].
[73] *In re NIHRC and JR295* [2024] NIKB 35, [57].
[74] Human Rights Act 1998, s. 21. See *In re E* [2007] NIQB 58, [2008] NI 11, [63].

Chapter 2: Public Enforcement of EU Law and Remedies for Breaches of EU Law

Introduction

Chapters 2 and 3 set the baseline for the primary question that this report is investigating: what has the impact of Brexit been on access to remedies for breaches of EU law in Northern Ireland? To answer this question, we first have to consider how EU law was enforced in the UK when it was a Member State; what remedies EU law sets out; and how those remedies could be accessed by individuals when the UK was a Member State. Because this covers a wealth of material, we have split the analysis into two distinct parts: chapter 2 considers enforcement of EU law at the *EU level*, by considering the role the role of the Commission in enforcing EU law. This chapter also considers how the EU approaches remedies for breaches of EU law discovered in the Member States. Chapter 3 will follow on from this work to consider aspects of enforcement of EU law at the *national level* – or, what happens when private parties raise issues of EU law in domestic courts. In drawing a distinction between *actions brought by the Commission* and *actions brought by private parties,* we enable a clear analysis of the post-Brexit picture both when it comes to 'public' enforcement of EU law, and 'private' enforcement of EU law before national courts.

Chapter 2 will first discuss the concepts of 'enforcement' and 'remedies' as they are understood at the EU level, as this is distinct from how they are used in most domestic legal systems. Following this, it will consider only EU-level enforcement avenues against Member State action or inaction.[75] This is the route of 'public' enforcement against a Member State for a failure to fulfil an obligation initiated by the European Commission under Article 258 TFEU. The chapter then considers the EU system of remedies – addressing both 'national procedural autonomy' and the specific remedy of state liability. The EU's general approach is to leave remedies for breaches of EU law discovered in domestic proceedings to the realm of national law, via a doctrine called 'national procedural autonomy'. This has recently been reinforced by Article 47 CFR. State liability is the only remedy that the CJEU has ever established; it means that a Member State can be liable in damages for breaches of EU law for which it bears responsibility and which cause demonstrable harm to a private party.

[75] It is important to note that EU law also provides for a system of remedies against EU action, through actions for annulment and damages liability, under Articles 263 and 267 TFEU. We do not consider remedies against the EU, as they are outside the scope of this report. They are fully explained in: Paul Craig, *EU Administrative Law* (2nd edn, OUP, 2012) 668-702.

Once we have discussed these components of the EU enforcement and remedial system, we will consider to what extent they have 'survived' the Brexit process – as well as what has replaced them in the Withdrawal Agreement and the WF, where appropriate. The final subsection of the chapter will consider explicitly what role Article 2 WF might play in bringing some of the EU enforcement and remedial system back to Northern Ireland.

Explanation of Terms

In domestic law, the concept of 'remedies' is used to describe any award made by a court as part of a judicial decision. This encompasses compensation – in the form of damages – as well as more nebulous 'awards', such as declarations in favour of one party or another. Further, access to justice via particular avenues – such as, for example, judicial review – is also sometimes described as 'remedial' in nature.

The EU uses the concept of 'remedies' differently and does not use the term 'remedy' to describe the 'access to justice' mechanisms that national law would consider of a remedial nature. These mechanisms are normally just described as part of the *enforcement* of EU law: so, a mechanism like 'direct effect' of EU law is typically seen as an enforcement mechanism, rather than a remedy. The below table briefly summarises all the concepts related to EU enforcement and remedies that will be used in Chapters 2 and 3 and explains how we conceptualise them.

EU Law Concept	Brief Definition	Practical Effect
Art 258 TFEU, infringement proceedings	The Commission enforces EU law where Member States have breached it.	The EU's public enforcement mechanism.
National Procedural Autonomy	National remedies for breaches of EU law have to be effective and equivalent (but there do not need to be specific new remedies).	Part of the EU approach to remedies (but not a specific remedy).
Article 47 CFR – Right to an Effective Remedy	Where a private party encounters a breach of EU law, they are	Part of the EU approach to remedies (a right to effective

	entitled to an effective remedy.	remedies, but not to a specific remedy).
State Liability	Where a sufficiently serious Member State breach of EU law causes harm to a private party, the latter can claim damages from the Member State.	The only specific EU remedy awarded to private parties for breaches of EU law, albeit still awarded at national level.
Article 267 TFEU, preliminary references	Domestic courts ask the CJEU for an interpretation of EU law in a domestic dispute.	A part of reinforcing the primacy of EU law, and so of enforcing EU law.
Primacy	EU law takes primacy over national law in the case of conflicts, and conflicting national law must be reinterpreted or set aside (i.e. disapplied). [see 'consistent interpretation and 'disapplication, respectively].	A core EU law doctrine – enables private enforcement of EU law.
Direct Effect	Provided that it meets certain conditions, EU law can be relied upon directly in national court proceedings. It is broken down to vertical direct effect and horizontal direct effect [see 'vertical direct effect' and 'horizontal direct effect'].	A core EU law doctrine – gives effect to the principle of primacy in situations where consistent interpretation is impossible, as it allows for the disapplication of domestic law.

Vertical Direct Effect	Reliance on direct effect in a dispute with a public body	EU law that can be relied upon in actions against parts of the State and other public bodies
Horizontal Direct Effect	Reliance on direct effect in a dispute with a private party	EU law that can be relied upon in actions against other private parties (eg, companies, private employers, etc)
Consistent interpretation	National courts are obliged to interpret national law compatibly with EU law insofar as that interpretation is not *contra legem* (i.e. contrary to the express wording of the legislation).	A core EU law doctrine –gives effect to the principle of primacy without resulting in the disapplication of domestic law.
Disapplication	Where national law cannot be read compatibly with EU law and a private party invokes a provision of EU law that meets the conditions for direct effect, national law must be set aside and EU law must be applied directly.	Not a core EU law doctrine, but a consequence of the principles of direct effect and primacy. NB: disapplication is not in itself a 'remedy' in the strict sense. By setting aside incompatible legislation, the domestic courts can award appropriate remedies in accordance with EU law, such as compensation.

Public Enforcement of EU Law: Article 258 TFEU

The only 'public' mode of enforcement of EU law envisioned in the Treaties is set out in Article 258 TFEU. It involves the European Commission, as so-called 'guardian of the Treaties', investigating and pursuing Member State breaches of EU law. Article 258 TFEU reads as follows:

> **Article 258 TFEU (emphasis added)**
>
> If the **Commission considers** that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a **reasoned opinion** on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may **bring the matter before the Court of Justice of the European Union**.

As of December 2024, 4,111 Commission-initiated actions for a declaration of failure by Member States to fulfil their obligations under the Treaties have reached the CJEU. However, unlike the system of preliminary references discussed in the following chapter, where the CJEU's interpretation is central to the domestic dispute being resolved at all, the Article 258 TFEU process – also known as 'infringement proceedings' – is focused on compliance and does not always result in or require a ruling by the CJEU. Rather, the Article 258 process takes place in several consecutive steps, and only in situations where extra-judicial enforcement has been exhausted does the CJEU get involved. These steps are:

1. The Commission alerts the Member State to its suspicion of a breach and commences an informal discussion with that Member State's permanent representative in Brussels.
2. Where this process does not satisfy the Commission's questions, the Commission will formally start Article 258 TFEU proceedings by sending a **letter of formal notice** to the Member State in question.
3. In response to this, the Member State is invited to submit its **observations** – or, in other words, a response to the Commission's findings in the letter of formal notice.
4. Where the Commission is *not* satisfied on the basis of the observations submitted, it will issue a **reasoned opinion** – which

instructs the Member State on how to remedy the breach of EU law the Commission has observed.

5. Should the Member State not comply with the **reasoned opinion**, the Commission can bring a case against that Member State before the CJEU on the specific grounds stated in the reasoned opinion.

If the CJEU finds for the Commission, the consequence is a binding verdict that requires the Member State in question to remedy its breach of EU law. Where a Member State fails to comply with a CJEU ruling, the Commission can start separate proceedings before the CJEU to subject the Member State to a fine, under Article 260 TFEU. This fine can take the shape of a lump sum payment, or a penalty payment.[76] There is therefore a requirement to change domestic law and policies until they are compliant with EU law, to the Commission's satisfaction, and a risk of severe fines for failure to do so. However, and in light of the limited scope of EU law, the CJEU cannot actually stipulate how the Member State ought to amend national law in order to fully comply. Rather, these changes must be initiated at Member State level, and the Member States retain some measure of discretion in how they comply with the CJEU's ruling.

The text of Article 258 TFEU highlights its functioning, as well as its shortcomings: action taken under Article 258 TFEU is wholly at the discretion of the Commission. In other words, the Commission can observe breaches of EU law within Member States and actively choose *not* to pursue them – whether for political reasons,[77] or for caseload management purposes. This means that there are situations where a private individual can be heavily affected by a breach of EU law, but the matter simply is not pursued by the Commission. This ultimately explains why private enforcement of EU law is necessary to complement the public mechanism in Article 258 TFEU.

Even where the Commission *does* take action, infringement proceedings are not without shortcomings. The administrative phase of the proceedings takes significant time – as such, a pre-judicial enforcement action can already take over a year, and once the CJEU becomes involved, it is more likely to last several years. The Article 258 TFEU process is consequently not a 'quick' resolution for breaches of EU law.

The final shortcoming of this process, of course, is in relation to access: as it is a purely public enforcement mechanism, it does not directly

[76] The CJEU has on occasion imposed both a lump sum and a penalty payment, where infringements were deemed particularly serious; see, eg, Case C-610/10 *Commission v Spain* EU:2012:781.
[77] As the Member States have regularly argued; see Case C-416/85 *Commission v UK* EU:C:1988:321; Case C-415/85 *Commission v Ireland* EU:C:1988:320; Case C-70/99 *Commission v Portugal* EU:C:2001:355. The CJEU has never been receptive to those arguments, declaring the Commission's discretion as absolute and not subject to judicial review.

involve private parties that may be affected by breaches of EU law at all. It can change domestic law and policy. It is thus essential to emphasise that the Article 258 process does not in itself provide remedies for any harms suffered by individuals because of non-compliance with EU law. It also cannot tackle breaches of EU law committed *by* private parties. Thus, Article 258 TFEU targets more *wide-reaching* breaches of EU law, but is unlikely to be of much assistance in situations where breaches affecting only a limited number of EU nationals in a single Member State.

EU-Level Remedies

When it comes to remedies for breaches of EU law, the CJEU has been much more hands-off than might be expected, given the profound impact that EU law has had on the law of the Member States since the 1950s. Rather than setting out a specific list of remedies, the CJEU has mostly focused on creating a remedial 'toolbox' that sets out a series of conditions that remedies for breaches of EU law awarded at national level must comply with. In fact, since the 1950s, the CJEU has created only *one* specific remedy: state liability in damages. Otherwise, the CJEU's involvement in remedies can generally best be described as 'supervisory'.

(i) National Procedural Autonomy

Ever since the Treaty of Rome, EU law has in principle afforded a degree of procedural autonomy to the domestic legal order regarding the specific ways of giving effect to the requirements of EU law.[78] As such, the CJEU will not normally stipulate which *domestic remedies* should be awarded to give effect to EU law once it has given an authoritative interpretation of the meaning, nature, and intended outcomes of EU law. It is incumbent on the domestic courts, however, to ensure that the domestic remedies chosen are appropriate for giving full effect to EU law and that the nature of the particular EU law in question (eg, as directly effective or not) has been taken account in that determination.

Member States thus enjoy 'national procedural autonomy' when it comes to remedies, provided that those remedies meet certain baseline requirements. This is because Member States in principle retain competence to determine their domestic legal procedures. This approach was first codified in the Lisbon Treaty, under Article 19 TEU, which requires that 'Member States shall provide remedies *sufficient* to ensure *effective legal protection* in the fields covered by Union law' (emphasis added). The concept of effectiveness serves multiple purposes in Article

[78] Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.

19 TEU, stipulating both that remedies themselves must be appropriate (in giving effect to EU law), but also that they must be *accessible* to those wishing to avail of them. This is further supported by Article 47 CFR (the right to an effective remedy), discussed in more detail in Section VI of this chapter. This provision can be read as aligning with the requirement set out in Article 19 TEU, where the focus on remedies is not in determining *what* they are, but in ensuring that they are *effective*.

When remedies are or are not effective has been further clarified by the CJEU's case law, long before Article 19 TEU was added to the Treaties in 2009. The CJEU's early approach in this regard can be gleaned from cases like *Humblet,*[79] *Comet,*[80] and *Rewe.*[81] The concept of 'national procedural autonomy', as first alluded to in the *Rewe* case of 1976, is perhaps better called 'national procedural *responsibility',* as the CJEU has shown that it *will* test national remedial systems for their effectiveness. In this case, the applicants wished to set aside a national time-limit for reclaiming damages for charges they had paid in contravention of EU law. However, the CJEU accepted that, provided that the national procedures were reasonable and applied equally to EU matters as to other matters of domestic law, EU law 'did not, in the absence of harmonization, require the creation of new national remedies'.[82] The *Unibet* case also sets out the boundaries of the Member States' autonomy well: in that case, an online gambling service requested a specific remedy from the Swedish courts, which they were not able to grant under national law – though they were able to grant other, similar remedies. The CJEU confirmed that the point of the EU Treaties was not to 'create new remedies…. other than those already laid down by national law', and that compliance with EU law would *only* require the formation of new remedies where 'no legal remedy existed' in the national legal system.[83]

Overall, the *Pelati* case summarises what 'national procedural autonomy' amounts to, concluding that national remedies satisfy EU law requirements where they are *equivalent* and *effective*.[84] Equivalence simply means that remedies for breaches of EU law have to be 'no less favourable' than remedies available for breaches of similar areas of domestic law. Effectiveness, per the CJEU, means that the remedy must be accessible, in the sense of not being 'practically impossible or

[79] Case C-6/60, *Humblet v Belgium*, EU:C:1960:48.
[80] Case C-45/76, *Comet BV v Produktschap voor Siergewassen*, EU:C:1976:191.
[81] Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.
[82] Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 704.
[83] Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*. EU:C:2007:163, para. 40-41.
[84] Case C-603/10, *Pelati v Republika Slovenija,* EU:C:2012:639, para. 23-25.

excessively difficult' to obtain.[85] The majority of the case law has been on 'effectiveness', with the CJEU regularly considering inadequate remedies that are too difficult to access because of administrative and legislative hurdles. Remedies for a range of breaches of EU law – from a failure to implement a directive altogether to a failure to implement it correctly, or to comply with Treaty provisions or regulations- have consequently been investigated for procedural restrictions in accessing them as well as for certain shortcomings in their content, such as setting limits to financial compensation for breaches that were absent from the EU law they were meant to be complying with.[86] Such remedies have been struck down by the CJEU as not complying with the EU law requirement for providing an *effective* remedy, with the CJEU in these cases not hesitating to suggest to domestic courts (which are ultimately called upon to award those remedies) what an adequate remedy would look like. For example, in *Uniplex*, the CJEU considered that a limitation period that required proceedings in England and Wales to be brought 'promptly and in any event within three months' did not meet the effectiveness criterion because it created uncertainty to the extent that it allowed domestic courts discretion to dismiss cases for not meeting the limitation period even prior to the three-month time limit, whereas a clear limitation period of three months would have been acceptable.[87]

[85] Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*. EU:C:2007:163, para. 43 and Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 5.
[86] See Case C-208/90, *Emmott v Minister for Social Welfare,* EU:C:1991:333; Case C-410/92, *Johnson v Chief Adjudication Officer (Johnson II),* EU:C:1994:401; Case 14/83, *Von Colson,* EU:C:1984:15; Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)*, EU:C:1993:335.
[87] Case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority*, EU:C:2012:639, para. 40-43.

(ii) Article 47 CFR

Article 47 CFR - Right to an effective remedy and to a fair trial

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.

Article 47 CFR is a recent addition to the remedial toolbox of EU law: it is not a remedy in itself, but a right conferred on individuals by the CFR, which is binding on both the EU and in the Member States when implementing EU law.[88] Yet, unlike in other jurisdictions, such as the ECHR, where similar procedural rights have been viewed as parasitic upon more substantive protections, Article 47 CFR has acquired a particularly important role in EU law in the last decade, being used both on its own as well as in conjunction with other provisions of EU law in order to ensure effective redress at the domestic level.

Earlier research has shown that Article 47 CFR is, by a large margin, the most often invoked provision of the CFR, being used in a range of disputes spanning across different areas of EU law.[89] Indeed, Article 47 has been used both on its own[90] and alongside substantive rights, such as non-discrimination, in order to emphasise that domestic courts are in principle expected to assess but also *proactively ensure* the availability of effective remedies for violations of EU law.[91] Moreover, Article 47 CFR has been used in conjunction with provisions of the Treaties outside the CFR, such as Article 19 TEU, which shows that it is an especially versatile

[88] European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 14 December 2007, Article 51(1). On the nature of the 'scope of EU law' requirement in this provision, see Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[89] Eleni Frantziou, 'The Binding Charter Ten Years on: More than a 'Mere Entreaty'?' (2019) 38 *Yearbook of European Law* 73, 79-84.
[90] Case C-243/09, *Fuß v Stadt Halle,* EU:C:2010:717.
[91] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung,* EU:C:2018:257.

protection that does not just apply to strengthen substantive fundamental rights, but has relevance in all fields of EU action.[92] The CJEU's keen use of this provision has rendered the CJEU's supervision of domestic remedies stricter in at least two respects.

First, Article 47 CFR can be used to capture process-based violations of fundamental rights, on which the substantive provisions of EU law subject to implementation in the Member States, such as equality directives, do not offer sufficient detail. For example, in its judgment in *Braathens*, the CJEU considered the compatibility with the Race Equality Directive[93] of a private settlement between an airline and a passenger who had been subjected to racial discrimination.[94] The settlement was reached in accordance with Swedish implementing legislation, but the passenger challenged it, because it did not entail any formal acknowledgement that discrimination had occurred. While there was no explicit requirement in the directive that wrongdoing be acknowledged in the domestic proceedings, the CJEU read in this requirement by relying on Article 47 CFR. It found that Articles 7(1) and (2) of the Race Equality Directive are 'specific expressions' of Article 47 CFR.[95] While it affirmed that Member States are in principle free to choose the nature of national procedures and the corresponding remedies, they must ensure that these remedies result in 'real and effective judicial protection of the rights that are derived from [the Racial Equality Directive]'.[96] The CJEU then found that the remedies chosen to implement the Race Equality Directive could not be considered effective, because they did not explicitly require an admission of wrongdoing (i.e. that the defendant had subjected the claimant to discrimination). While neither the Race Equality Directive nor Article 21 CFR (non-discrimination) specifically provided that reparation should have a symbolic dimension, rather than being merely financial, the CJEU read this requirement into the legislation, because of the need to comply with remedial effectiveness in the sense of Article 47 CFR.

Another example where Article 47 was used in a situation substantively occupied by another provision of the CFR (Article 31 CFR) is *Fuß*.[97] In this case, a firefighter was forcibly transferred to an operational role when he requested that his working hours comply with the requirements of the Working Time Directive.[98] There, the CJEU found a violation of Article 47 CFR due to the lack of dissuasive penalties for the employer making the

[92] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.
[93] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.
[94] Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269.
[95] Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269, para. 33-34.
[96] Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269, para. 38.
[97] Case C-243/09, *Fuß v Stadt Halle,* EU:C:2010:609.
[98] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

transfer, but not a breach of Article 31 CFR, which protects the right to fair and just working conditions, which the CJEU did not go on to analyse in its reasoning. The CJEU noted that

> fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.[99]

This shows that Article 47 CFR is starting to add a stronger layer of remedial oversight in cases where the substantive provisions of domestic law on which the violation of EU law rests are not sufficiently detailed in terms of remedies. This approach tightens the criterion of 'effectiveness', placing further limits on national procedural autonomy.

Crucially, as further highlighted explained below and in Chapter 3, Article 47 CFR enjoys direct effect in its own right and can, therefore, trigger the disapplication of primary legislation at the domestic level regardless of the 'pedigree' of other provisions invoked in the dispute in question. As the Court has put it, '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'.[100] The importance of this finding cannot be overstated, as it means that relying on Article 47 CFR is possible even if neither the provision bringing the CFR within the scope of EU law (eg, a provision of a directive invoked in a dispute between private parties) nor any other relevant substantive provision of the CFR would not normally give rise to direct effect. For example, in *KL*, the Court used Article 47 to order the reinterpretation and, if necessary, disapplication of national legislation permitting dismissal without a statement of reasons for certain workers, even though neither the framework directive governing the dispute in question nor the right to unfair dismissal (Article 30 CFR) would have allowed this. However, given that the absence of reasons for dismissal was a prerequisite for seeking a remedy against dismissal before domestic courts, the Court held that it undermined Article 47 CFR.[101] This led the Court to rule that if domestic courts could not interpret the applicable national law in a way which is consistent with Article 47 CFR, to guarantee the full effectiveness of that article they

[99] Case C-243/09, *Fuß v Stadt Halle,* EU:C:2010:609, para. 66.
[100] Case C-243/09, *Fuß v Stadt Halle,* EU:C:2010:609, para. 78-79.
[101] Case C-715/20, *KL v X,* EU:C:2024:139, para. 79.

ought to disapply, in so far as necessary, any contrary provision of national law.[102]

Second, the CJEU uses Article 47 CFR as a 'warning' mechanism, reminding national courts of their obligation to find effective remedies for substantive violations of EU law in order to avoid a further, procedural violation of the right to an effective remedy. This is best highlighted by the *Egenberger* case.[103] In that case, the claimant had applied for a temporary position with a development organisation wholly owned by various German protestant churches and their affiliates. The position did not have a religious character: it would have mainly involved the drawing up of a report concerning the UN Convention on the Elimination of All Forms of Racial Discrimination. However, the claimant was not invited to interview despite being shortlisted, because she was not a member of a Protestant church; the post went instead to an active member of that church. The respondent relied on the German implementation of Article 4 (2) of the Equal Treatment in Employment Directive,[104] which contains a 'religious ethos exception' that allows churches and other religious organisations to treat persons differently according to their religion if that 'person's religion or belief constitute a genuine, legitimate and justified occupational requirement'. According to German law, the decision whether such an occupational requirement existed was to be determined by the organisation itself 'in view of its right to self-determination', so that judicial review was severely limited to a review of the plausibility of such a decision on the basis of the church's self-perception.[105] The CJEU found that this requirement was substantively incompatible with Article 21 CFR, so that the case would have to return to the domestic court to remedy the discrimination. Given the lack of judicial remedies in domestic law, however, the CJEU also highlighted that, *unless* the narrow judicial review provisions offered in domestic law were read differently or disapplied (following the principles of consistent interpretation and direct effect, further discussed in chapter 3), there would be a second violation of EU law – this time, of Article 47 CFR.

It follows that Article 47 CFR adds an important fundamental rights dimension to the EU remedial toolbox, which strengthens the CJEU's scrutiny over the effectiveness of national remedies. This is not to say that national procedural autonomy is abandoned: as these cases highlight, the CJEU continues to emphasise that it is primarily for domestic courts to assess (subject to the CJEU's supervision) the effectiveness of domestic remedies, as well as – crucially – to find

[102] Case C-715/20, *KL v X,* EU:C:2024:139, para. 82.
[103] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung,* EU:C:2018:257.
[104] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[105] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, EU:C:2018:257, para. 31.

appropriate remedies within the domestic legal system. In turn, domestic courts have responded to these judgments by recognising the autonomy that EU law affords them subject to the criteria of effectiveness and equivalence. For example, when the *Braathens* case returned to the Swedish courts for final assessment, the latter accepted that a written admission of guilt before the Discrimination Ombudsman following the CJEU's ruling was sufficient to meet the criteria set out by the CJEU, thereby rejecting a request for a further declaratory judgment.[106] Nevertheless, the case law on Article 47 CFR shows that EU control over effectiveness is growing, and can now be considered to contain a requirement of *dissuasiveness* of the remedies chosen for the defendant who has violated EU law, especially in cases concerning fundamental rights.

(iii) State Liability

As indicated above, the EU – via the CJEU – has created one specific remedy for breaches of EU law since its establishment. Where the actions of the state violate EU law (including through incompatible legislation) and a private party sustains serious damage displaying a direct causal link with that violation, domestic courts must award financial compensation under the so-called *Francovich* principle of state liability in damages. After setting out the principle in outline in the *Francovich* case,[107] the CJEU clarified the conditions for state liability in its ruling in *Brasserie du Pêcheur*:

> [EU] law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.[108]

State liability is thus a clear remedy, in that it will result in damages for the affected party. But it is important to bear in mind that it has a secondary purpose too, which is that of penalising the Member States for a failure to comply with EU law in a manner parallel to the fines envisaged under the Article 258-260 process. Indeed, while successful state liability claims are subject to the *Brasserie* conditions – conditions which are not met in all instances of Member State violations of EU law – they will often follow a finding that a Member State has infringed EU law under the public

[106] Case O-2343/18, *Braathens Regional Aviation,* 21 December 2021.
[107] Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, EU:C:1991:428, para. 33. See also Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v SS for Transport, ex parte Factortame*, EU:C:1996:79.
[108] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v SS for Transport, ex parte Factortame*, EU:C:1996:79, para. 51.

enforcement procedure initiated by the Commission. In this sense, state liability can be considered to form part of the EU's enforcement processes just as much as it is a stand-alone remedy.

Initially, state liability was mainly used to remedy violations of EU rights that lacked direct effect. For example, *Francovich* itself was a claim by a group of employees in Italy whose employer had become insolvent, who sought compensation for wages owed at the time of the dissolution of the company. Whereas an EU directive had been specifically put in place to protect workers in this situation, the provisions of the directive could not be relied upon against the employer directly.[109] Consistent interpretation was also impossible, as Italy had altogether failed to enact implementing legislation. In this situation, the only course of action available to the workers in question was to claim compensation from Italy for its failure to comply with EU law, since that failure had caused them to suffer measurable financial damage.

Compensation under the state liability principle is thus the only remaining option where other remedial avenues have failed and, for this reason, it is often used as a fallback strategy: it lacks the flexibility and adaptability to personal circumstances that characterise cases decided under the principles of direct effect and consistent interpretation and does not have any immediate effects on national law. By contrast, as Chapter 3 will further highlight, direct effect and consistent interpretation have more permanent and wide-ranging effects in this regard: through direct effect, national law may be disapplied altogether. Through consistent interpretation, national law is re-read in an EU-law-compatible manner. Thus, both direct effect and consistent interpretation extend beyond the facts of a single case and have structural implications for domestic law in areas governed by EU law. It is for this reason that we cannot consider them simply 'remedies', but fundamental interpretive principles of EU law that affect its operation and bear broader consequences for domestic law. By contrast, state liability in damages is merely a claim for financial compensation to restore the claimant to the situation in which they would have been but for the state's failure to fulfil its EU law obligations. It is specific to the facts of each claim and does not directly affect domestic law, even though it may affect it indirectly, through its dissuasive impact on the offending state, both in financial terms and because it confirms that state's EU-law-incompatible conduct.

While *Francovich* treated state liability as a remedy that existed *particularly* in situations where other domestic enforcement proved impossible, *Brasserie* made clear that state liability could exist in

[109] This is because the provisions of a directive cannot be invoked in themselves in private litigation unless there is a corresponding general principle or Charter provision, which was not applicable in this case.

conjunction with direct effect and/or consistent interpretation: the fact that a remedy could be arrived at via a different claim before the domestic courts did not mean that the state was *no longer liable* for harms suffered by a private party. In particular, the long stretch of time spent waiting for CJEU rulings being issued after preliminary references (as discussed in Chapter 3) meant that by the time national law was amended to become compliant with EU law, private parties sustained years of financial harm, as was the case in *Brasserie*. As the CJEU put it, therefore, direct effect was a 'minimum guarantee' of rights – but could not always result in parties not 'sustaining damage as a result of a breach of [Union] law attributable to a Member State'.[110]

It follows that, while it is often treated as a 'last resort' remedy in EU law, and one that is far less used than direct effect and consistent interpretation in national proceedings because these enforcement mechanisms are often easier to establish as well as being preferable remedially, state liability remains available for any sufficiently serious breach of EU law attributable to a Member State's actions or inactions. The CJEU has provided some clarification on what a 'sufficiently serious' breach is by finding that non-implementation of a directive or not changing national law after a CJEU finding of incompatibility with the Treaties always satisfied that threshold.[111] Where EU law leaves some scope for discretion or different interpretations, however, it is less likely that a Member State will be found guilty of a 'sufficiently serious' breach.[112]

One final key element of state liability as a remedy is its reach: it is not only administrative 'organs of the State' that can be held liable under the doctrine. In *Köbler*, the CJEU made clear that the state can also be held responsible for violations of EU law caused by the judiciary, if its decisions of last resort on a matter of EU law were manifestly wrong and resulted in harm for a private individual or company.[113] As will be discussed in Chapter 4, the same would hold true for a situation where the UK Supreme Court - the highest instance domestic arbiter in matters pertaining to the Withdrawal Agreement - fails to uphold a relevant provision of the Withdrawal Agreement, thereby causing harm to one or more legal persons. However, it is important to emphasise that the state liability threshold for judicial breaches of EU law is higher in that it only captures manifest infringements by a court of final instance, as a lower threshold would cripple national court mechanisms and overwhelm the CJEU with preliminary references. State liability vis-à-vis domestic courts

[110] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame*, EU:C:1996:79, para. 20.
[111] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* EU:C:1996:375.
[112] Case C-140/97, *Rechberger* EU:C:1999:306; Case C-392/93 *British Telecom* EU:C:1996:131.
[113] Case C-224/01, *Gerhard Köbler v Republik Österreich* EU:C:2003:513, para. 53.

is thus only intended to avoid sufficiently serious and *manifest* misinterpretations of EU law by the judiciary, such as where the domestic court failed to follow relevant CJEU case law.[114]

In principle, a breach of *any* EU law measure can result in state liability. Due to the nature of the *Brasserie* conditions, however, state liability is typically encountered in areas where there is an obvious pecuniary dimension, such as trade disputes about charges or non-fulfilment of contractual payments. By contrast, the application of state liability to fundamental rights under the CFR and general principles of EU law has been the cause of some uncertainty. In practice, state liability has been used much less frequently in this field than consistent interpretation and direct effect. Despite calls by some Advocates General to rely on state liability more regularly,[115] the CJEU's approach is easy to understand in this context: when it comes to fundamental rights, state liability under the *Brasserie* conditions would be difficult to establish, as causality and measurability of the loss would often be difficult to make out.

Consider, for example, a case like *Association de Médiation Sociale.*[116] The case concerned a French law on employee representation, which required staff representation for all organisations that employed over 11 staff on standard contracts – but failed to consider staff on non-standard contracts for this tally. Staff started a dispute and attempted to base it on non-compliance with Article 27 CFR, which guarantees adequate information and consultation within undertakings; but the CJEU determined this provision was not directly effective and so dismissed the claim. Before doing so, however, it stressed that a finding that Article 27 CFR is not directly effective does not preclude a claim for state liability if a party is 'injured' as a result of a Member State's failure to comply with Article 27 CFR.[117] But what would such an injury look like? Even through this provision arguably confers a right on individuals, it contains no financially measurable content. A failure to ensure its protection *may* have resulted in decisions that adversely affected employees, but it is difficult to envisage a situation where a sufficiently strong causal link could be established between the failure of the state to protect this right effectively and financial damage suffered by the affected employees. In that case, therefore, the applicant trade union had no plausible claim in state liability under EU law.

Similarly, we can imagine that many other fundamental rights cases would result in the same problem if treated under the state liability

[114] Case C-224/01, *Gerhard Köbler v Republik Österreich* EU:C:2003:513, para. 56.
[115] See the Opinion of Advocate General Bobek in Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43, para. 173-185.
[116] Case C-176/12, *Association de Médiation Sociale v Union locale des syndicats CGT et al*, EU:C:2014:2.
[117] Case C-176/12, *Association de Médiation Sociale v Union locale des syndicats CGT et al*, EU:C:2014:2, para. 50.

conditions, rather than being assessed under the need for effectiveness of the domestic remedies, more widely. For instance, it would have been impossible to establish a measurable loss in a scenario like *Braathens*, discussed earlier,[118] where the principal complaint was that the domestic implementing measures for the Race Equality Directive failed to acknowledge discrimination as a self-standing harm, even though they did provide for compensation (which the claimant in this case had already accessed). If it had been assessed under the principle of state liability in damages, the claim would arguably not have succeeded. It is likely that these complicating factors in the attribution of state liability in damages for breaches of fundamental rights have contributed to the coupling of substantive rights violations with Article 47 CFR, which enjoys direct effect, and therefore can act as a vehicle towards remedies better suited to the individual case facts though direct reliance before domestic courts, as discussed above.

Overall, then, the case law so far has not shown state liability to be a primary remedy for violations of fundamental rights, albeit that it remains available in theory. Nevertheless, the Court has affirmed the possibility of state liability in damages as a secondary remedy, in two respects. First, state liability has greater relevance for breaches of EU legislation that has a link with fundamental rights, where that legislation has financial implications. In *Smith v Meade*, for instance, the Court affirmed the possibility of state liability in a case that concerned breaches of a directive on insurance conditions that intended to protect consumers (the principle of consumer protection being covered by Article 38 CFR).[119] While, similarly to *Association de Médiation Sociale*, this CFR provision did not enjoy the heightened protection of direct effect,[120] the inability to obtain a valid insurance had a measurable adverse financial impact on the applicant following an accident, so that in this case it was easier to imagine a successful application of the state liability conditions.

Secondly, and perhaps more importantly, state liability in damages should not only be viewed as a remedy directly addressing violations of fundamental rights by the state – a function that has lesser relevance due to the expansive use of Article 47 CFR by the CJEU – but as a remedy that can be used *following* successful EU law claims in private litigation. Indeed, the most likely use of state liability in the fundamental rights context is by a private violator of a fundamental right, such as a private employer, who has been forced to pay compensation or otherwise suffer financial loss because of the operation of direct effect for a substantive EU law right. In this case, a directly effective EU law provision would first be

[118] Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269.
[119] Case C-122/17, *Smith v Meade*, EU:C:2018:631, para. 56.
[120] Case C-122/17, *Smith v Meade*, EU:C:2018:631, para. 47.

successfully invoked in private litigation or a private settlement. State liability in damages would, however, permit the losing party to recover from the state in a separate claim the losses that they incurred, provided that their conduct was attributable to a seriously erroneous or incomplete implementation of EU law in domestic legislation or because no such legislation was in place. This possibility was highlighted in the Opinion of AG Bobek in *Cresco*: whereas the CJEU found that a private employer had to ensure that holidays for the purposes of religious observance be given to employees in a non-discriminatory fashion because of the operation of the directly effective provision of non-discrimination on grounds of religion (Article 21 CFR), this did not prevent the employer from subsequently seeking to recover the cost of those arrangements, given that they had relied on implementing legislation that was in itself creating the EU-incompatible exceptions.[121] The following example illustrates this.[122]

Relevance of state liability in damages to private law disputes

Private party A (say, an employee) may be able to claim a range of effective domestic remedies, such as exemplary damages or simply arrears of pay, by relying on a directly effective provision of EU law, such as the right to equal treatment, against private party B (say, an employer). B's actions may have been guided by poor implementing legislation in their Member State X, but they cannot use that as a defence against the application of a directly effective provision invoked by A. However, the principle of state liability in damages permits B to subsequently claim from X what they paid in compensation to A.

Finally, it is important to remember that state liability in damages is usually assessed at the national level.[123] As such, the relative absence of state liability case law under the CFR at the EU level should not be understood as denying the possibility of state liability altogether. While state liability therefore has a clear EU-level 'enforcement' purpose underpinning it, its actual effects are most likely to be seen in domestic case law, rather than in CJEU case law.

[121] Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43.
[122] For a more detailed explanation, see Chapter 3.
[123] Barend van Leeuwen and Rónán Condon, 'Bottom Up or Rock Bottom Harmonization? *Francovich* State Liability in National Courts' (2016) 35 *Yearbook of European Law* 229, 231.

Post-Brexit Enforcement and Remedies

Following the end of the Brexit implementation period on 31 December 2020, the UK is no longer an EU Member State and the ordinary enforcement mechanisms of EU law do not, in principle, apply to it. Nevertheless, various aspects of the EU/UK Withdrawal Agreement and WF retain parts of the EU's enforcement apparatus as well as creating new enforcement mechanisms.

(i) In the overarching Withdrawal Agreement

As highlighted earlier in this chapter, Article 258 TFEU gives the Commission an enforcement monopoly for matters concerning EU law. In the *absence* of specific cases brought by individuals affected by EU law, the Commission is the only oversight body that the EU has in place for monitoring and enforcing EU law – and interested parties with unrecognised EU rights will not always bring cases, for any number of reasons (of which the prohibitive cost of going to court is primary). What, then, happens to the Commission's role under the Withdrawal Agreement?

The answer in some scenarios is that nothing takes on the Commission's role, when we look at the matter from a UK perspective. From the EU perspective, however, as an incorporated international agreement that forms an integral part of EU law,[124] where the provisions of the Withdrawal Agreement need to be complied with by the Member States, as they do (for example) in Part 2 on Citizens' Rights, enforcement *does* fall to the Commission. Thus, the remaining twenty-seven EU Member States can be taken to the CJEU for a violation of the Withdrawal Agreement in the same way as they can be for a failure to fulfil their obligations under the EU Treaties. This is because Article 258 TFEU enables the Commission to enforce *any* 'failure to fulfil an obligation under the Treaties' – and Article 216(2) TFEU explicitly says that 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

In terms of the UK, Article 87 WA clearly sets out what happens when the UK has been found to breach EU law *before* it left the EU:

[124] Approved on behalf of the European Union by Decision 2020/135.

Article 87 WA (emphasis added)

1.If the European Commission considers that **the United Kingdom has failed to fulfil an obligation** under the Treaties or under Part Four of this Agreement **before the end of the transition period**, the **European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union** in accordance with the requirements laid down in Article 258 TFEU… The Court of Justice of the European Union shall have jurisdiction over such cases.

…

3.In deciding to bring matters under this Article, the European Commission shall apply the same principles in respect of the United Kingdom as in respect of any Member State.

This is not a hypothetical scenario. On 8 March 2022, the CJEU heard a Commission challenge to the UK's compliance with the EU's Customs Code, regarding a UK failure to fulfil its obligations to combat fraud and collect the correct customs duties on imported goods from China. The facts of the case involve the period of 2011 to 2017, when the UK was still a Member State – and the Commission started its infringement proceedings in 2018, so again while the UK was still a Member State. Article 87 WA makes clear that the fact that the CJEU had not ruled on the case until March 2022 is irrelevant: the facts happened during EU membership, and the action started within four years of the end of the transition period. As such, the CJEU accepted that it had jurisdiction to review the issue and agreed with the Commission that the UK had failed to fulfil its EU obligations, and had consequently under-contributed to the EU budget, albeit that a recalculation of the precise sums owed over the seven years of infringement (an amount exceeding 2 billion Euros in total) was ordered, based on principles set out by the European Commission.[125]

Further actions were initiated in December 2024 in line with Article 87 WA, regarding pre-transitional period failures by the UK to terminate bilateral investment treaties with EU member States contrary to the CJEU ruling on this issue in *Achmea*,[126] as well as regarding the implementation of provisions on the free movement of persons as codified in Part 2 of the Withdrawal Agreement. In the latter regard, the European Commission has announced that, despite having issued a letter of formal notice in 2020 and a reasoned opinion in July 2024, it has not been satisfied with

[125] Case C-213/19, *Commission v UK*, EU:C:2022:167, para. 526.
[126] Case C-284/16, *Slowakische Republik v Achmea*, EU:C:2018:158.

the UK's response and has now referred the UK to the CJEU for failing sufficiently to protect the rights of EU workers and their family members as set out in Part 2 WA.[127]

Thus, Article 87 WA clearly addresses what happens with breaches of EU law (or the Withdrawal Agreement during the transition period), but only insofar as these started *during* the transitional period. However, it leaves open the question of how the Withdrawal Agreement is enforced against the UK for any transgressions that happen *after* the end of the transitional period.

The short answer to this question is that the Commission does not have a role in ensuring that the UK complies with the Withdrawal Agreement as a whole. Where the EU considers that the UK has not fulfilled its Withdrawal Agreement obligations, it will commence consultations in the Joint Committee in accordance with Article 169 WA. Should those not work, it will establish an arbitration panel to rule on the dispute (with CJEU involvement *only* to interpret EU law provisions in the Withdrawal Agreement, where necessary) per Articles 170 WA onwards. Brexit has, in that sense, delivered a form of 'freedom' from the EU institutions: enforcement is primarily political, and in any event 'neutral', without decision-making powers by the EU's enforcement bodies.

There is an exception, however. Part 2 of the Withdrawal Agreement is frequently treated distinctly from the rest of the Withdrawal Agreement, given the gravity of any failure to comply with its provisions. During the Article 50 TEU negotiations on leaving the EU, how to 'enforce' Part 2 was a long-term sticking point, with the EU wanting Commission oversight for the sake of EU citizens in the UK, and where the UK rejected that position, arguing that it failed to respect the UK's sovereignty. In the end, a compromise was delivered:

[127] INFR(2020)2202 and INFR(2011)2054. See, for further details follow this link.

Article 159 WA (emphasis added)

Monitoring of the implementation and application of Part Two

1.**In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the 'Authority') which shall have powers equivalent to those of the European Commission** acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy.

…

3.**The Joint Committee shall assess, no earlier than 8 years after the end of the transition period, the functioning of the Authority. Following such assessment, it may decide, in good faith, … that the United Kingdom may abolish the Authority.**

Thus, to deliver the UK's sovereignty, the EU agreed that the UK could effectively establish its own 'mini-Commission' to oversee Part 2. This Independent Monitoring Authority (IMA), established in the UK by section 15 of the EU (Withdrawal Agreement) Act 2020, has the same powers in the UK as the Commission does in the Member States when it comes to investigating alleged breaches of Part 2: it monitors how UK public bodies protect the rights of citizens and their family members, and promotes the adequate and effective implementation and application of rights. The IMA has the power to carry out an inquiry on its own initiative or following a complaint from a citizen who claims to have a relevant right. To promote the adequate and effective implementation and application of Part 2 rights, the IMA can bring a judicial review or intervene in any legal proceedings.

The IMA has to report to the specialised committee on Part 2 (established by the Withdrawal Agreement) on its experiences on an annual basis; Article 159(2) WA stresses in particular that the committee wants to hear about what the IMA and/or the UK government has been doing to ensure that Part 2 rights are implemented, and it wants to hear about the nature of citizens' complaints about accessing their Part 2 rights. This is not purely a UK obligation, however; the Commission likewise has to report

on how Part 2 is being applied and complained about in the Member States.

One final 'concession' to the UK's desire for sovereignty is found in Article 159(3) WA. If the EU agrees with the UK that the IMA's job has become superfluous, because UK implementation and application of Part 2 is and has been working well, the Joint Committee can take a decision to abolish the IMA *eight years* after the end of the transition period (i.e. in 2028). In reality, of course, this concession is not really one – because the Joint Committee takes all of its decisions by consensus. If the EU has any concerns at all about the UK starting to ignore Part 2 rights *if* the IMA is abolished, it would simply vote against its abolition. The ultimate compromise regarding public enforcement of Part 2, then, is that the UK can have *its own* Commission—but if it were to try to avoid the suggestions and findings of the IMA, the EU undoubtedly would commence dispute settlement at pace.

In terms of the remedial element of enforcement of EU law, as explained above, the EU has remained largely uninvolved in telling Member States *what* remedies they need to make available. The Treaties were silent on remedies until Lisbon, and even now only require 'remedies sufficient to ensure effective legal protection', under Article 19(1) TEU. As highlighted earlier, the CJEU took the Treaties' silence to mean that the EU wishes to take a 'hands-off' approach to remedies, subject to the principles of equivalence and effectiveness analysed earlier, which Article 19 TEU now confirms to be the case. As previously explained, even Article 47 CFR only stresses that those affected by a violation of EU law have the 'right to an effective remedy' – but not any specific *type* of remedy.

In light of EU law's 'bounce back' to the Member States on awarding remedies for EU law breaches, it is unsurprising that the Withdrawal Agreement and the WF are both silent on specific remedies.[128] Much as is the case for determining if indirect effect applies under the Withdrawal Agreement or the WF, we have to look at more general provisions about how EU law works *in* the Withdrawal Agreement and come to conclusions about whether this *incorporates* the CJEU's case law on 'effective' and 'equivalent' remedies. Article 4 WA is the linchpin of this analysis.

[128] Art 21 WF refers to procedural safeguards and judicial redress in respect to any decision by the host State to restrict residency rights under Part 2, but by cross-reference to the EU Citizenship Directive (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 [2004] OJ L 158/77, Art 15 and 31), which also does not set out specific remedies.

Article 4 WA (emphasis added)

Methods and principles relating to the effect, the implementation and the application of this Agreement

1. The **provisions of this Agreement** and **the provisions of Union law made applicable by this Agreement** shall produce in respect of and in the United Kingdom **the same legal effects** as those which they produce within the Union and its Member States.

Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
…

3.The provisions of this Agreement referring to Union law or to concepts or provisions thereof **shall be interpreted and applied in accordance with the methods and general principles of Union law.**

4.The provisions of this Agreement 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 **handed down before the end of the transition period**.
….

The starting point for analysis of the effects of Article 4 WA is looking at Article 4(1). This overarching provision makes it clear that not only the EU law within the WA, but *all of its contents*, will produce *the same legal effects* in the UK as it will in the WA. Article 4(1) explains in its second paragraph that this particularly means that all provisions in the WA that meet the conditions for direct effect will be directly effective in the UK as well – but this is not the only consequence of Article 4(1) WA. In the field of remedies, if *all of the provisions* of the WA are meant to produce *the same legal effects* in the UK as they would in the EU, this means that all provisions of the WA would in principle benefit from the same remedies that all EU law benefits from within the Member States. This has wide-ranging consequences, as we will discuss further: it means in particular that Article 2 WF, when breached in *any way,* should result in the same remedies that breaches of any provision of EU law would result in across the Member States. This is the case even though Article 2 WF - as a unilateral obligation on the UK, subject to Art 5 WA on good faith - itself actually produces *no effects* within the Member States: Article 4(1) WA is

drafted in such a way to make it clear that the WA as a whole, including the WF, is to be treated *as if EU law*, unless stated explicitly otherwise.

The remainder of Article 4 sets out more specific rules for the effects of the EU law in the Withdrawal Agreement, which is of benefit when considering the parts of the WF that expressly reference EU law – such as Annex 1 of the Framework. It is not clear if 'national procedural autonomy', as it has become called, is a general principle of EU law such as to be captured by Article 4(3) WA; and what the reference to the 'methods' of EU law covers is even less clear from the text of Article 4(3) itself. Arguably, however, given their long-standing recognition in the EU's treatment of remedies, both the in-principle deference to Member States in terms of the choice of remedies and, crucially, the requirements of effectiveness and equivalence to which these remedies have traditionally been subjected since the *Rewe* ruling, should be understood as coming within the meaning of Article 4(3) WA.[129] This is particularly so in light of the clarification offered in paragraph 4, namely that the concepts of EU law referred to in the Agreement should be interpreted in conformity with CJEU case law. Remedial effectiveness, in particular, is a well-established general principle of EU law in the Court's case law, which has been codified in Article 47 CFR. This means that the combination of Article 4(1) WA and Article 4(3) WA requires that the entire agreement be 'interpreted and applied' in a manner that ensures the 'right to an effective remedy'.

Thus, if a private individual brings a claim to a UK domestic court that there has been a breach of the Withdrawal Agreement or the WF, the domestic courts will have to make a decision on the case in question – and are likely to award a remedy where this is appropriate. That remedy, even when the UK was still a Member State, would always be a domestic law remedy – and so UK courts will continue to provide domestic law remedies for breaches of EU law. If a claimant wants to argue that the remedy on offer is not an 'effective' one, per the CJEU's interpretation in the *Rewe*[130] and/or Article 47 CFR line of case law, this will also be possible, given that all the pre-Brexit CJEU case law *on* effective remedies applies to the Withdrawal Agreement under Article 4(4).[131] In sum, therefore, the remedies that UK courts granted for breaches of EU law before Brexit will continue to be available for all breaches of *the Withdrawal Agreement* after Brexit … with one possible exception.

The Withdrawal Agreement is silent on the one 'specific' remedy the EU developed, that of state liability in damages. While it is very clear from

[129] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.
[130] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.
[131] Note that, as discussed below, the protection of CJEU case law is stronger under Article 13 WF and will capture at least some post-Brexit CJEU case law.

the content of Article 4 WA that overarching EU principles such as primacy and direct effect apply to the Withdrawal Agreement, when it comes to state liability, we can only make inferences on the basis of paragraphs 1, 3 and 4 of Article 4 WA. First, breaches of the Withdrawal Agreement should produce 'the same legal effects' in the EU as they do in the UK; this would strongly suggest that if a breach of, for example, a provision in Part 2 of the WA is treated in the Member State as triggering state liability, the same should be the case in the UK. This interpretation is further bolstered by considering the origins of state liability: despite the fact that it is absent from the Treaties, it likely can still be captured as a 'general principle' or 'method' of EU law.

State liability is not necessarily the *only* effective remedy available to individuals and Article 47 CFR does not give a specific right to state liability. However, the CJEU developed the principle of state liability on the basis that it was fundamental to and inherent in the Treaty system following 'generally accepted methods of interpretation', as well as forming part of the 'general principles common to the laws of the Member States'.[132] If we look back at Article 4(3) WA, therefore, a strong argument can be made that state liability is captured by this paragraph, just as it is part of the CJEU's pre-Brexit case law, and so has an effect on the interpretation of the Withdrawal Agreement when it is applied or interpreted by domestic courts, in line with Article 4(4) WA. A broad approach as to the 'methods' of EU law has already been accepted by domestic courts.[133]

Section 7A of the EU Withdrawal Act as amended by the EU (Withdrawal Agreement) Act 2020, which implements the WA in domestic law, provides that the rights, powers, liabilities, obligations, restrictions, remedies and procedures arising under the Withdrawal Agreement are to be enforced and given effect in the UK. Of course, this provision does not shed further clarity on how the UK interprets the Withdrawal Agreement's requirements in relation to state liability, given the absence of specific mention of this remedy. The point is rendered more complex given that, from the outset, Schedule 1(4) of the EU Withdrawal Act had abolished state liability in damages for actions arising after the end of the implementation period.[134] However, considering that 'remedies' are included in s.7A, the initial exclusion of state liability in the Withdrawal

[132] *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame*, EU:C:1996:79, para. 27-29; Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* EU:C:1991:428, para. 30-35.
[132] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame*, EU:C:1996:79, para. 51.
[133] See, for example, the final judgment of the Court of Appeal of England and Wales in *Secretary of State for Work and Pensions v AT and others* [2023] EWCA Civ 1307, [86].
[134] In the case of *In re Dillon* [2024] NICA 59, [135], the Court of Appeal expressly considers the effect of this Schedule in light of Article 2 WF.

Act can be considered significantly more limited as far as the Withdrawal Agreement itself is concerned. It has been further tempered by the retention of state liability in Schedule 1(5)(1), 'so far as it would otherwise continue to be, or form part of, domestic law on or after IP competition day by virtue of section 2, 3, 4 or 6(3) or (6) and otherwise in accordance with this Act'. These sections of the EU Withdrawal Act create what is now known as 'assimilated EU law' and mean that state liability will be continue to be available as a remedy for all breaches of *what used to be EU law* that the UK has voluntarily kept on the statute book after Brexit.[135]

Domestic courts have already confirmed that the application of section 7A of the Withdrawal Agreement Act amends the Withdrawal Act and other aspects of domestic law to allow a full application of the Withdrawal Agreement, insofar as the latter applies.[136] Of course, whether state liability exists under the Withdrawal Agreement is still, to an extent, an open question. To date, no case on state liability has made it to domestic courts concerning facts post-dating the Brexit implementation period and thus governed solely by the Withdrawal Agreement. But it is not hard to imagine that one will soon arise. Once it does, the answer is unlikely to depart from the broad approach to the application of Article 4 of the Withdrawal Agreement and of section 7A of the Withdrawal Agreement Act, which has already been established in domestic case law.

(ii) In the Windsor Framework (where distinct)

As stressed above, the volume of EU law applicable under the WF is significantly greater than the volume of EU law applicable under the rest of the Withdrawal Agreement. Unsurprisingly, the EU has had greater concerns about the UK's compliance *with* the WF than it did with the UK's compliance with the remainder of the Withdrawal Agreement.

Nonetheless, much of the WF is enforced via the general enforcement mechanisms of the Withdrawal Agreement, as set out above. Breaches of Articles 1, 2, 3 or 11 WF are consequently dealt with through consultation within the Joint Committee and, if necessary, arbitration, as set out in Articles 169 and 170 WA.

The primary enforcement provision specific to the WF is Article 12 WF.

[135] While the Retained EU Law (Revocation and Reform) Act 2023 (c.28) renamed 'retained EU law' to 'assimilated EU law', Schedule 1(5)(1) of the EU Withdrawal Act 2018 is otherwise untouched.
[136] See *HMRC v Perfect* [2022] EWCA Civ 330; *In re Allister and Peeples* [2023] UKSC 5, [2024] AC 1113.

Article 12 WF (emphasis added)
Implementation, application, supervision and enforcement

1.Without prejudice to paragraph 4, **the authorities of the United Kingdom shall be responsible for implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland.**

2.Without prejudice to paragraph 4 of this Article, **Union representatives shall have the right to be present during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol**, as well as activities related to the implementation and application of Article 5, and the United Kingdom shall provide, upon request, all relevant information relating to such activities. **The United Kingdom shall facilitate such presence of Union representatives** and shall provide them with the information requested. Where the Union representative requests the authorities of the United Kingdom to carry out control measures in individual cases for duly stated reasons, the authorities of the United Kingdom shall carry out those control measures.

The Union and the United Kingdom shall exchange information on the application of Article 5 (1) and (2) on a monthly basis.

3.**The practical working arrangements relating to the exercise of the rights of Union representatives referred to in paragraph 2 shall be determined by the Joint Committee**, upon proposal from the Specialised Committee. […]

Article 12(1) WF sets out the basic, sovereignty-driven rule: the *UK* will be responsible for applying the EU law made applicable by the WF in the UK. In effect, this means that UK institutions are being asked to set up and run the Irish sea border *for* the EU – and to ensure that all products entering Northern Ireland comply with EU law. Article 12(2) WF gives 'EU representatives' unlimited rights to be present at any activities the UK undertakes to implement or apply the EU law found in the WF. EU staff 'checks' at border posts anywhere in the UK (and primarily at ports, where goods destined for or leaving Northern Ireland will be processed) are thus explicitly authorised by the WF, and where these EU representatives ask the UK to inspect specific cargo, the UK authorities are also meant to comply.

Interestingly, the WF says that *how* these 'EU checks' would work in practice would be determined by the Joint Committee after the Withdrawal Agreement's adoption. This was presumably the case because both EU and UK politicians sought to avoid having an 'EU presence' in Northern Ireland, as the simple task set out by Article 12(3) WF proved quite contentious in practice. The UK refused to let the EU set up an office somewhere in Belfast from which to *send* its representatives to do border checks, as this would be far 'too much' presence, with fears that it would bring about the feeling of an 'EU occupation' of Northern Ireland.[137] A compromise struck in December 2020 means that EU representatives can now 'hot-desk' in offices for UK officials who work at the border, as opposed to being permanently present.

The WF in Article 12(4) and 12(5) is very explicit about what the UK and the EU originally agreed to in terms of enforcing EU law:

Article 12 WF (emphasis added)
Implementation, application, supervision and enforcement
…

4. As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10**, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law**. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

5. **Acts of the institutions, bodies, offices, and agencies of the Union adopted in accordance with paragraph 4 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.**

There is no *elegant* oversight solution here, mimicking the EU's institutional setup in specific UK bodies, such as the one in Part 2 of the Withdrawal Agreement. The Commission, quite simply, has the exact same powers with respect to the UK, when it comes to Articles 5 and 7-10 WF, as it does with respect to all EU law in the Member States – and key

[137] As implicitly set out in Decision 6/2020 of the Joint Committee in Article 2(6).

here is the Article 258 TFEU power to bring infringement proceedings against the UK for non-compliance with these specific parts of the WF. Similarly, the CJEU also has the jurisdiction to hear complaints brought by the Commission, and issue penalty payments under Article 260 TFEU in the event that the UK does not comply with a CJEU ruling on a failure to fulfil its obligations under Articles 5 and 7-10 of the WF. Where the EU law in the WF applies, then, the EU is essentially treating the UK as if it were a Member State. It is only in the areas where the WF contains provisions that are *not* EU law that the more general dispute settlement process in the Withdrawal Agreement applies.

Has the CJEU actually *done* anything under the WF, though? At the time of writing, the answer to this is no. The Commission, however, has started Article 258 TFEU infringement proceedings regarding the WF twice already. First, the proposed provisions in the Internal Market Bill 2020 that would have violated (or enabled a violation of) Article 5 WF resulted in the Commission starting its enforcement process in October 2020.[138] These infringement proceedings were halted by the Commission when the UK and the EU reached an agreement on issues related to the original Protocol which involved amendments to the offending clauses of the Internal Market Bill.

A further letter of formal notice was sent to the UK in March 2021.[139] This one concerned a failure by the UK to apply the EU law on the movement of certain goods and pets, as required by the WF; the UK had unilaterally extended so-called 'grace periods' on these goods and on pet travel, whereby the full EU law under the WF would not yet apply to the UK. Earlier 'grace periods' had been agreed *by* the Joint Committee—but this was a unilateral UK action to extend them. The Commission subsequently started infringement proceedings,[140] but combined this action with asking for consultations in the Joint Committee, as the WF does not actually *require* the Commission to start infringement proceedings any more than the EU Treaties do in Article 258 TFEU—and so seeking a resolution via both the infringement proceedings and Joint Committee discussions is entirely possible.

In terms of the EU-level remedial 'toolbox' discussed in this Chapter, there is little distinguishing the WF and the WA: Article 4 WA determines

[138] As this violation took place during the 'transition period', the Article 258 TFEU action was launched under Article 131 WA – which gave the European Commission the power to enforce EU law *during* the transition period. This is distinct from Article 87 WA, which gives the Commission that power *after* the transition period, but essentially achieves the same thing.
[139] European Commission Press Release, 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland', 15 March 2021.
[140] European Commission Press Release, 'Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland', 15 June 2022.

the application of national procedural autonomy and state liability to the WF much the same as it does the WA, and the general principle reflected in Art 47 CFR is maintained in relation to Northern Ireland in the same way that it is maintained in relation to Great Britain. There is, however, one important exception: the prohibition of diminution of rights enshrined in Article 2 WF, which we explore in further detail below.

(iii) The Role of Article 2 WF

In terms of 'EU-level' enforcement of EU law, it was inevitable that some changes would manifest after Brexit. We can see that the Withdrawal Agreement in particular is subject to far less Commission oversight, whereas that oversight has been explicitly maintained in relation to Articles 5-10 WF. The exception in the Withdrawal Agreement is Part 2, which is accompanied by a longer-lasting 'connection' to EU-level enforcement: a local alternative to the Commission (in the IMA) oversees its implementation and application. How do these changes sit with the non-diminution requirement set out in Article 2 WF?

First, again, many of the 'Northern Ireland-specific' measures in relation to EU law enforcement are limited to Articles 5-10 of the WF, in relation to the Irish Sea Border and its functioning. As such, Commission oversight (as maintained in Art 12(4) WF) does not actually apply to *Article 2 itself*. This is confusing, given that Article 2 WF refers to a range of EU law – but this EU law is treated, by the text of the WF, as distinct from Articles 5-10 and the references to EU law therein.

A question may be raised as to whether excluding any part of the WF from this level of Commission oversight is actually *possible* under Article 2 WF: if Article 2 WF requires that there be 'no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity' as a consequence of Brexit, and we find ourselves in a situation where any rights protected by Article 2 WF are being 'diminished' in Northern Ireland, would an inability to have them enforced as they were *before* Brexit not count as a 'diminution'?

This is perhaps easier to argue in relation to CJEU oversight, as we will see in Chapter 3; in terms of *Commission* oversight of the implementation of either EU law or the WF, its role is not specifically to enforce individual rights. Rather, it is there to oversee legal compliance with the EU's requirements at a *State* level, rather than the individual one. It is thereby difficult to argue that even where breaches of EU law took place, anyone had a 'right' to Commission infringement proceedings prior to Brexit – which would mean that there has been no diminution after Brexit in those

proceedings falling away. It is also arguable that the WF's Dedicated Mechanism (of the NIHRC and the ECNI), as set out in Article 2(2) WF, fulfils a similar function to that of the Commission regarding EU law – in that it monitors compliance with Article 2 WF and can bring judicial proceedings in light of breaches of it. While those judicial proceedings would be brought to domestic courts rather than the CJEU, that difference almost acts to enhance rights of individuals, who can work *with* the Commissions to bring proceedings to national court – where they could not participate in any Commission infringement proceedings before the CJEU.[141]

When considering if 'national procedural autonomy' has been diminished, practical examples of UK legislation adopted after Brexit and what their effects are on remedies that were available for breaches of EU law *prior* to Brexit need to be considered. *Dillon* makes for an instructive case here, in that the Northern Ireland Court of Appeal found that where the Legacy Act did not offer remedies that would have been available under the Victims Directive that was applicable to the UK prior to Brexit, this breached Article 2 WF.[142] Such legislative developments would also be contrary to Article 47 CFR, which *continues* to apply to the WF (on account of Article 13(2) WF as well as Article 4(1) WA, which requires the entirety of the Withdrawal Agreement to produce *the same legal effects* in the UK as it does in the EU) – and consequently a claim could be made on that basis, as well as on the basis of a claim under Article 2 in respect of diminution of the EU requirements for an effective and equivalent remedy.

The same holds for state liability. The UK attempted to exclude it explicitly from nationally available remedies: Paragraph 4 of Schedule 1 of the EUWA stated explicitly that state liability (or 'Francovich damages') would no longer be available as a national remedy as of Brexit.

It is highly debatable whether this is permissible under the WA, as set out above; but it is quite clear, given the purpose of Article 2 WF, that it is *not* permissible under the WF. The fact that state liability in damages was available as a remedy prior to Brexit for any breaches of EU law that met the three relevant conditions of breach, causality and harm, but is *no longer available now* for an identical breach, is a diminution of the standard to which rights were protected – so in any situation where a right covered by Article 2 WF is breached, the lack of availability of the only specific remedy available in EU law is clearly contestable under Article 2 WF itself. Schedule 1 of EUWA 2018 is, in this context, incompatible with Article 2 WF – and national courts should ignore that schedule where breaches covered by Article 2 WF surface, which section

[141] See the European Union (Withdrawal Agreement) Act 2020, Schedule 3.
[142] *In re Dillon* [2024] NICA 59, [310].

7A of EUWA 2020 obliges them to do (as indeed they have, so far, done on numerous occasions with regard to other remedial concepts similarly excluded, and most notably the disapplication of legislation).[143]

Conclusion

At the EU level, enforcement of EU law takes place through the Article 258 TFEU mechanism and CJEU oversight of a remedial 'toolbox' that leaves most remedies in the hands of the Member States, *unless* they themselves are responsible for a harm-causing breach of EU law. What those remedies for EU law breaches are, is dependent on facts of a case: domestic courts might consider a suitable remedy in an employment dispute to be financial compensation, reinstatement or recalculation of pension entitlements, de-listing of private information in a privacy dispute, etc. While the CJEU does not stipulate what those remedies need to be, it does in all circumstances require that the remedies offered be fully effective. To this end, the CJEU has started actively to refer to Article 47 CFR (the right to effective judicial protection including an effective remedy), thereby anchoring the need for 'effectiveness' of domestic remedies in the CFR. Finally, in this field, the CJEU uses the principle of state liability in damages as a further incentive for Member States to implement EU law correctly.

The end effect of Brexit is that the involvement of EU institutions in the enforcement of EU law has been greatly diminished in Great Britain, where under the Withdrawal Agreement it will effectively cease by 2028, and reserved to specific aspects of the WF only. This seems *prima facie* compatible with Article 2 WF, which is excluded from the lasting Commission oversight… but it might not be: if breaches of EU law that are covered by Article 2's non-diminution requirement take place, is it perhaps a diminution to not have the Commission – rather than the Joint Committee – investigate those breaches? We are not persuaded that it is, and suspect that the work of the Dedicated Mechanism would be seen as an appropriately non-diminishing alternative, but the argument can be made.

When it comes to remedies, the issues are clearer. The general right to an effective remedy continues to apply across the WA and the WF. However, even if the UK attempts to carve out state liability from domestic court proceedings were possible under the WA on a very restrictive reading of Article 4 thereof, it is certainly not possible in those situations where a breach of Article 2 WF is investigated. Any diminution of rights covered by Article 2 WF cannot be appropriately resolved unless the *same or*

[143] See, for example, *In re Dillon* [2024] NICA 59, [135]; *In re NIHRC and JR295* [2024] NIKB 35.

equivalently effective remedies are available for that breach as would have been when the UK was still a Member State. As we have highlighted above, in EU law, the requirements of effectiveness and equivalence are assessed not only in financial terms, but more holistically and include, eg, symbolic dimensions of *who* is held responsible for a breach of EU law under the system of domestic remedies. Consequently, it is difficult to imagine that anything other than a full application of those principles, including the ability to bring a case against the state and have it pay for a sufficiently serious violation of EU law could be considered to maintain the level of protection of rights that is required by Article 2 WF. Thus, all courts dealing with rights that should not have been diminished after Brexit must also be prepared to grant state liability in damages as a remedy to anyone harmed by those diminished rights.

We will next consider how private parties might be able to claim for such rights before national courts, as Chapter 3 considers the interaction of EU law with national courts in detail.

Recommendations

- **The Dedicated Mechanism institutions should ensure they have sufficient expertise both in house and within their networks to recognise effective remedies under EU law in order to be able to track divergence post-Brexit.**
- **It is essential to ensure financial reparation from the State for sufficiently serious violations of EU law remains available to individuals to comply with the non-diminution requirement of Article 2 WF.**

Chapter 3: Private Enforcement: National Courts' Interaction with EU Law

Introduction

As explained in the introduction to Chapter 2, Chapter 3 considers how national courts interact with EU law in domestic disputes – which is of relevance for considering how national courts should respond to any potential breaches of Article 2 WF. Within the EU, where that interaction involves questions about EU law that national courts are unsure about, the CJEU will become involved, as national courts have either a right or an obligation (depending on where they sit in the national judicial architecture) to refer questions about the interpretation of EU law to the CJEU under Article 267 TFEU. However, in the majority of cases, the national courts have been armed with a range of EU law doctrines that enable them to enforce EU law at the national level *without* explicit involvement of the EU institutions.

This chapter considers both of these elements of private enforcement in detail. First, it will evaluate Article 267 TFEU and how it relates to the enforcement of EU law and to accessing EU law remedies. Following this, the chapter will consider the CJEU's enforcement mechanisms in the same order as they arose before the CJEU. The starting point for that analysis is a full understanding of how EU law is binding upon the EU Member States, including the fact that even in areas where EU law plays a deliberately more limited role, such as the award of specific remedies, the Member States are obliged nonetheless to comply with EU principles when enacting national law. The binding character of EU law is thus closely related to its *primacy* over national law, and both will be addressed as a starting point for considering the relationship between EU law and national law. The chapter will then discuss two key doctrines of EU law, which have important implications for the ways in which individuals can address breaches of their EU law rights: direct effect and indirect effect (also known as 'consistent interpretation'). Finally, the chapter addresses to what extent these EU law doctrines have been preserved after Brexit in the Withdrawal Agreement and the WF – and to what extent, if they have not been preserved, this is compatible with Article 2 WF.

Pre-Brexit EU Law Interactions with National Courts: Article 267 TFEU

Article 267 TFEU (emphasis added)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the **interpretation** of the **Treaties**;

(b) **the validity and interpretation** of **acts of the institutions**, bodies, offices or agencies of the Union;

Where such a question is raised **before any court or tribunal of a Member State**, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, **request the Court to give a ruling thereon**.

Where any such question is raised **in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law**, that court or tribunal **shall** bring the matter before the Court.
…

Over time, national courts have become an essential player in the enforcement of EU law within the Member States; they are a linchpin in the so-called private enforcement of EU law. The CJEU has effectively mobilised national courts to become part of the EU's enforcement arsenal by means of the Article 267 TFEU's preliminary reference procedure: while, in theory, the preliminary reference procedure is a way to enable national courts to obtain clarity on EU law, in practice it has been the means by which the CJEU created an entire private enforcement apparatus involving the national courts. Indeed, the preliminary reference procedure is by far the most significant tool for the interpretation and application of EU law in the Member States because of the sheer volume of preliminary references: 12,873 distinct case references under Article 267 TFEU have been received by the EU courts[144] as of December 2024. This makes the preliminary reference procedure approximately three times more likely to come before the CJEU than the other principal enforcement avenue, Commission-initiated Article 258 TFEU actions for failure to fulfil obligations by the Member States, which we considered in Chapter 2.[145]

[144] Including both the CJEU and General Court.
[145] As noted in Chapter 2, 4,111 actions for a declaration of failure to fulfil obligations under Article 258 TFEU have reached the EU courts at the time of writing.

As is clear from the text of Article 267 TFEU, the preliminary reference procedure is there to assist national 'courts or tribunals' with both questions of *interpretation* of EU primary and secondary legislation and with concerns over the *validity* of EU secondary legislation, when these arise in domestic proceedings. The preliminary reference procedure set out in Article 267 TFEU can thus be used in cases where it is unclear whether the actions of a state authority *or private person* acting within the scope of EU law violate EU law, as well as, more generally, where the *meaning of* EU law is not entirely clear to a domestic court. This is because Article 19 TEU stresses that the CJEU has the exclusive power to interpret EU law, meaning that it is also the only body that can declare *what* EU law means in a legally binding manner. As such, while domestic courts are expected to apply EU law of their own motion when EU law is clear, they are equally expected to make preliminary references to the CJEU to obtain authoritative interpretations of EU law, rather than interpreting the meaning of EU law themselves. The CJEU has made this claim forcefully, reasoning that EU law is an 'autonomous legal order', and that Article 267 TFEU makes clear that the CJEU is intended to be the only court that can determine what the law is therein.[146] In the same vein, when Article 267 TFEU is used to contest the validity of an EU law measure, the CJEU has been adamant that the preliminary reference process be used. The key case here is *Foto-Frost,* where a German court asked if it could declare a Commission Decision invalid outright because it conflicted with a Protocol to the EU treaties that permitted duty-free trade between the-then two parts of Germany. The CJEU said no: only the CJEU is entitled to make that assessment, following a preliminary reference request, in order to ensure a *uniform* interpretation of EU law across the Member States.[147]

More specifically, under the preliminary reference procedure, any domestic court or tribunal can refer (ask) a question to the CJEU about the meaning of EU law at stake in a dispute that it is hearing and, if it is a domestic court from which there is no further prospect of appeal, that court *must* make a preliminary reference if this is necessary to enable it to give judgment and the Member State can face penalties for breach of EU law under Art 258 TFEU if a court of last resort fails to make a preliminary reference.[148] The only exception to this is where the request concerns an '*acte clair'*:[149] a matter so clear from EU legislative texts or

[146] See, for example, Case C-284/16, *Slowakische Republik v Achmea*, EU:2018:158, para. 37.
[147] Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost,* EU:C:1987:452, para. 15.
[148] Case C-224/01, *Köbler v Republik Österreich*, EU:C:2003:513
[149] Case C-283/81, *CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* EU:C:1982:335.

earlier case law[150] that there was no doubt about the answer. This is a strict test, which requires that:

- the correct application (or meaning) of EU law is so 'obvious as to leave no scope for any reasonable doubt'; and
- it is equally obvious to courts of all other Member States; and
- it is equally obvious to the CJEU.[151]

To make a request for a preliminary ruling by the CJEU, the domestic court sends one or more questions to the CJEU together with a summary of the facts of the dispute and orders a stay in national proceedings while the preliminary reference is being reviewed by the CJEU. Once the CJEU delivers its preliminary ruling (an interpretation of EU law based on the questions the domestic court had asked), the domestic court can use that interpretation to decide the dispute before it.

Over time, the CJEU has developed a series of procedural rules that determine if preliminary references are admissible. The CJEU has the discretion to reject *any* reference, though it ordinarily tries to answer the ones that it receives—and where the problems with a question are slight, the CJEU can attempt to reformulate a question so that it becomes answerable. It made this clear in one of its earliest rulings, in *Costa*, when it stated that it had '[the] power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty'.[152]

Nevertheless, there are a number of established admissibility requirements for preliminary references. First, the domestic court must ask questions that the CJEU is presently in a position to answer: they have to be about the meaning of an EU legal concept, and must relate to a real case. The CJEU has rejected references with questions that it considered irrelevant to the dispute the national court faced,[153] as well as hypothetical questions about what EU law *might* say in a given scenario. For example, when the domestic court in *Meilicke* asked a series of questions about an EU directive on company law that were not actually applicable to the dispute before it, the CJEU made clear that it would not answer such questions.[154]

[150] Note that insofar as the matter is clear because an identical issue was clarified in earlier case law, this is known as 'acte clair', a concept which has developed since Joined Cases C-28-30/62, *Da Costa v Netherlands Inland Revenue Administration*, EU:C:1963:6.
[151] Case C-283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* EU:C:1982:335, para. 16.
[152] Case C-6/64 *Costa v ENEL*, EU:C:1964:66, para. 4.
[153] See, for example, Case C-126/80 *Salonia v Poidomani e Giglio*, EU:C:1981:136, para. 6; Case C-343/90 *Dias* EU:C:1992:327, para. 18.
[154] Case C-83/91, *Meilicke v ADV-ORGA*, EU:C:1992:332*,* para. 30.

The CJEU also refuses to rule on so-called 'test cases': cases where there is no actual dispute but instead two parties who broadly agree on the meaning of the law wish to have their interpretation confirmed by the CJEU. The key case here is *Foglia,* where the CJEU found that the parties in the case had worked together in order to force a domestic court to seek CJEU confirmation that a particular French tax was incompatible with the EU treaties. The CJEU was not receptive to such use of the preliminary reference procedure, stating that:

> the duty assigned to the Court by [Article 267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [EU law] which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under [Article 267 TFEU] for purposes other than those appropriate for it.[155]

Other situations where the CJEU has declared references inadmissible are where the national court does not provide enough factual information for the CJEU to be able to provide a clear interpretation of how EU law applies in the dispute in question,[156] as well as where wholly unclear questions have been referred.[157] These, and other conditions that the CJEU's case law has established for admissibility of references, are reiterated in a set of 'recommendations' that the Court provided to national courts in 2018.[158] The key to a successful preliminary reference is consequently a clearly articulated question, situated in enough factual detail to be understandable, on an issue of EU law – and an issue of EU law that is central to the domestic law dispute, rather than being a peripheral matter.

Finally, it is essential to remember that, while any court or tribunal within the domestic legal hierarchy can make a preliminary reference request, and the CJEU has taken a broad view of the judicial function,[159] the referring body must nevertheless be a 'court or tribunal'. In *Syfait I*, the

[155] Case C-244/80, *Foglia v Novello*, EU:C:1981:302, para. 18.
[156] Joined Cases C-320-322/90, *Telemarsicabruzzo v Circostel*, EU:C:1993:26.
[157] See Case C-83/91, *Meilicke v ADV-ORGA*, EU:C:1992:332.
[158] CJEU, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2018) OJ C257/01.
[159] Case C-246/80, *Broekmeulen v Huisarts Registratie Commissie*, EU:C:1981:218.

CJEU developed the following criteria for assessing which bodies can make a preliminary reference request:[160]

1. Is the body in question a body 'established by law';
2. Is it permanent (or has it been established temporarily – like an arbitral panel, for instance);
3. Is its jurisdiction compulsory or optional;
4. Are its procedures *inter partes* (eg, between two disagreeing parties);
5. Does it apply 'rules of law'; and
6. Is it independent?[161]

While these criteria are broad, it is important to note that they do not specifically include arbitration panels. This has been a particularly complex matter within Article 267 TFEU, and the CJEU has considered on a case-by-case basis the extent to which an arbitral panel is established by law, makes binding decisions, and has compulsory jurisdiction. But where arbitral panels are set up with the consent of the parties and are outside of State control, they are deemed to fall outside of Article 267 TFEU.[162]

Having set out the basic principles of the preliminary reference procedure, it will be useful to show how that procedure moves from the domestic level to the CJEU and back through a case example. The case of *King v Sash Window Workshop* offers a useful illustration in this regard.[163] Mr King worked for Sash Window Workshop based on a contract where he was commissioned for work on an occasional basis from 1999 to 2012. He was paid only when commissioned, and when he took annual leave it was unpaid. When he retired, Mr King sought to get paid for the annual leave he took over the course of his 13 years of engagement. Sash WW rejected his claim, arguing that he was a self-employed worker (and so not entitled to paid annual leave). Mr King took Sash WW to a UK Employment Tribunal. That tribunal determined that Mr King was entitled to three different kinds of holiday pay under the EU Working Time Directive,[164] which applied to him despite the nature of his contract. He deserved a payment for annual leave he had not taken in his final year of

[160] Case C-53/03, *Syfait and Others v GlaxoSmithKline (Syfait I)*, EU:C:2005:333, para. 29.
[161] See, for recent examples, Case C-175/11, *H. I. D. and B. A. v Refugee Applications Commissioner and Others* EU:C:2013:45, para. 83; and Case C-377/13, *Ascendi v Autoridade Tributária e Aduaneira*, EU:C:2014:1754, para. 23.
[162] See, for a body excluded from Article 267 TFEU, Case C-125/04, *Denuit v Transorient*, EU:C:2005:69, and for bodies falling within Article 267 TFEU, Case C-284/16, *Slowakische Republik v Achmea*, EU:C:2018:158, and Case C-377/13, *Ascendi v Autoridade Tributária e Aduaneira*, EU:C:2014:1754.
[163] Case C-214/16, *King v Sash Window Workshop,* EU:C:2017:914.
[164] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OH L 299/9.

work; a payment for leave actually taken over the entire 13 years; and finally, a payment for all leave that he had built up but did not take over the course of those 13 years, which amounted to 24 weeks of pay in total. Sash WW appealed the Employment Tribunal's decision, and following a series of further appeals, the Court of Appeal of England and Wales was faced with a single ground of disagreement, regarding the 24 weeks of 'pay for leave not taken between 1999 and 2012'. Sash WW argued that the UK implementation of the Working Time Directive—The Working Time Regulations 1998—precluded Mr King from 'carrying over' untaken annual leave to subsequent years (regulation 13(9)). He therefore could not claim for all 13 years of his employment, but only for his last year. Had he wanted to claim for 1999 through 2011, he should have made that claim in the relevant calendar years, per regulation 30 of the 1998 Regulations. Mr King, on the other hand, argued that he had the right to be paid for leave not taken for every year he worked. He cited the Working Time Directive and CJEU interpretations of it, which had established that the right to claim payment for leave not taken only arose once a working relationship had ended—on that basis, he had brought his claim in ample time, and regulation 13(9) was contrary to EU law and had to be disapplied. To decide the case, therefore, the Court of Appeal had to assess whether the time limit for claiming pay for annual leave not taken in the 1998 Working Time Regulations was compatible with the provisions of the Working Time Directive.

As this was a point of EU law, the Court of Appeal made a request for a preliminary reference to the CJEU. They sent the following questions to the CJEU:

> (1) If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to Article 7 of [the Working Time Directive], is it compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?
>
> (2) If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?
>
> (3) If the right carries over, does it do so indefinitely or is there a limited period for exercising the carried-over right by analogy with

> the limitations imposed where the worker is unable to exercise the right to leave in the relevant leave year because of sickness?
>
> (4) If there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose a limit to the carry-over period in order to ensure that the application of the national legislation on working time does not distort the purpose behind Article 7?
>
> (5) If the answer to the preceding question is yes, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the right set out in Article 7 [of the Working Time Directive]?

The CJEU responded to these questions by separating them into questions 1 and 2-5, which it considered together. On the first question, it held:

> In the light of all the foregoing considerations, the answer to the first question is that Article 7 of [the Working Time Directive] and the right to an effective remedy set out in Article 47 of the Charter must be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave in accordance with the first of those articles, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave.[165]

On the second to fifth questions, the CJEU held:

> [T]he answer to the second to fifth questions is that Article 7 of [the Working Time Directive] must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.[166]

As these proceedings were merely a step in the domestic process, the case then 'returned' to the Court of Appeal, which was due to hear the case and award a final remedy in November 2018, having taken into account the CJEU's response to the questions that had arisen. As is often the case when the CJEU hands down a clear interpretation in favour of the applicant, though, the case was settled before the domestic court was able to apply the CJEU's interpretation. Nevertheless, the Court of Appeal

[165] Case C-214/16, *King v Sash Window Workshop,* EU:C:2017:914, para. 47.
[166] Case C-214/16, *King v Sash Window Workshop,* EU:C:2017:914, para. 65.

ultimately did have the opportunity to apply the CJEU's findings in *King,* in another case a few years later, when a similar issue arose in *Smith*.[167]

EU Doctrines Applicable to National Courts

Being able to ask the CJEU what EU law means is essential in ensuring that EU law is interpreted in the same way across the EU, regardless of which court is asking about EU law – but it does little to ensure that, within the Member States, those interpretations of EU law are actually *complied with*. The CJEU was not blind to this potential enforcement challenge, and used the preliminary reference process from the 1960s onwards to ensure that national courts supported them in enforcing EU law. It did this by establishing several key doctrines in EU law, which (together) ensure that private parties are able to bring a claim based on EU law to a national court, and to have their EU law rights recognised by that court through effective domestic remedies (as already explained in Chapter 2).

(i) Primacy and the Mandatory Character of EU Law

EU law is binding on EU Member States: those who signed up to the Treaties are bound by its contents, which is a concept generally known as '*pacta sunt servanda*' in international law.[168] It is reinforced in EU law in two separate but related ways: first, Article 4(3) TEU indicates that Member States will 'sincerely cooperate' with the EU in achieving goals set out in the EU Treaties, which precludes legally acting to contradict EU law in how it has been interpreted by the CJEU.[169] Second, '*pacta sunt servanda*' is reinforced within each Member State's domestic legal system by the principle of primacy (or supremacy), which is a core constitutional principle of EU law, and underpins all of the concepts that are discussed in the subsequent subsections. While primacy is not expressly written into the EU Treaties, the Member States have confirmed their acceptance of this principle within the parameters of the CJEU's case law in a Declaration annexed to the Lisbon Treaty.[170] First articulated by the CJEU in *Costa v ENEL*,[171] the principle of primacy means that in case of a conflict between EU law and domestic law, the national court must not apply domestic law and must apply EU law instead. Primacy applies to all provisions of EU law, including the CFR and the general principles of EU

[167] *Smith v Pimlico Plumbers Ltd* [2022] EWCA Civ 70.
[168] See Josef L Kunz, 'The Meaning and the Range of the Norm *Pacta Sunt Servanda'* (2017) 39(2) AJIL 180.
[169] See Case C-395/17 *Commission* v *Netherlands*, EU:C:2019:918, para. 95, and the case law cited therein.
[170] Declaration no 17 (Declaration concerning primacy) to the Lisbon Treaty [2008] OJ C 115/344.
[171] Case C-6/64 *Costa v ENEL*, EU:C:1964:66.

law, and defines their interaction with domestic law.[172] Moreover, primacy must be observed by every national court, no matter where in the hierarchy of courts it is situated and independently of whether or not that court would have powers to strike down legislation in the national legal system.[173]

In its practical operation, primacy means that EU law has a mandatory nature in all Member States: a national court *must* consider EU law even where it has not been incorporated in domestic law and *must* attempt to give effect to it. Moreover, in situations where the EU law in question also enjoys direct effect (further discussed below), the duty to give effect to EU law can – and ultimately must – include disapplying any domestic law that clashes with EU law, even if that national law has a constitutional status.[174]

It is essential to emphasise that EU law has a mandatory character in the sense that it produces binding effects and is subject to the principle of primacy in its entirety. This feature – bindingness – should not be equated with the principle of direct effect alone. Rather, as Chapter 2 has already briefly indicated, Commission-initiated enforcement and state liability in damages can arise for Member State failures to comply with either directly effective or non-directly effective EU measures. Further, the CJEU has highlighted that, even in the context of EU law that lacks direct effect, domestic courts must do all that is in their power to give effect to the mandatory character of EU law because of the operation of the primacy principle. For example, in *Popławski II*, a case concerning the execution of Framework Decisions 2002/584/JHA and 2008/909/JHA on the European Arrest Warrant – instruments which do not enjoy direct effect because they fall within the EU's action in the field of Justice and Home Affairs[175] – the Court stated that 'their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of those framework decisions'.[176] As we will go on to highlight in the section on indirect effect below, that obligation is particularly wide-ranging and requires domestic courts to have regard to the entire body of domestic law as well as to change established case law in order to achieve a compatible reading.[177]

[172] See, regarding confirmation of the principle of primacy of the provisions of the CFR, Case C-399/11, *Stefano Melloni v Ministerio Fiscal,* EU:C:2013:107, para. 59-64.
[173] Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal*, EU:C:1978:49.
[174] Case C-11/70, *Internationale Handelsgesellschaft,* EU:C:1970:114.
[175] Note that prior to the Lisbon Treaty, the area of Justice and Home Affairs fell within the third pillar of the Treaties, which did not entail CJEU jurisdiction. While the pillar structure was abolished under the Lisbon Treaty, extending jurisdiction over this area to the CJEU, these framework decisions were adopted on the basis of the former third pillar, under Article 34(2)(b) EU (as it then was), which stated that framework decisions are not to entail direct effect.
[176] Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530, para. 72.
[177] Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530, para. 77-78.

Finally, it is noteworthy that the binding effect of EU law, particularly through the principle of consistent interpretation, extends in certain respects not only to national courts, but to interpretations of EU law by the CJEU as well. This is particularly the case when it comes to the CFR and the general principles of EU law that it has transposed, which apply to both the Member States when they are acting within the scope of EU law and to the EU institutions. In particular, as the Court highlighted in *Kamberaj* and *Commission v Poland*, the interpretation of all provisions of the Treaties, as well as of secondary legislation, must conform to the CFR.[178] The CFR and general principles of EU law must, therefore, be taken into account not only in respect of domestic legislation or enactments, but also in interpreting any relevant provisions of EU law including, for instance, EU legislation underpinning measures considered for diminution under Article 2 WF.[179]

Overall, the EU enforcement principles and remedies considered in this and the preceding chapter can be considered as serving the broader purpose of ensuring the primacy of EU law. But unlike state liability in damages, which can be considered the only true 'remedy' provided by EU law as it is a claim for compensation for the state's failure to implement or correctly implement EU law, direct effect and consistent interpretation leave to the domestic court a degree of discretion as to how to interpret domestic law to give effect to the mandatory character of the EU law in question.

(ii) Direct Effect of EU Law

When the EU Treaties were first drafted, they contained reference to only a single public enforcement mechanism, whereby the Commission would pursue breaches of EU law within the Member States. The Article 258 TFEU procedure, discussed in more detail in Chapter 2, serves a substantial purpose in ensuring that the Member States comply with EU law – but it leaves a significant gap: when a private party experienced a lack of compliance with EU law, they initially had no avenue for pursuing a remedy under the Treaties. Early in the Treaty of Rome's operation, the problems with having only a public avenue for pursuing breaches of EU law became clear, and Member States in effect asked the CJEU for clarification on exactly how EU law was intended to operate in domestic law systems. In the key case of *Van Gend en Loos*,[180] the CJEU made clear that the primacy of EU law, and the fact that EU law extended rights and obligations to individuals, would be meaningless if individuals could

[178] Case C-571/10, *Kamberaj v IPES,* EU:C:2012:233, para. 80 and 92-93; Case C-791/19, *Commission v Poland*, EU:C:2021:596, para. 52-57.
[179] As confirmed by the Northern Ireland Court of Appeal in *In re Dillon* [2024] NICA 59.
[180] Case C-26/63, *Van Gend en Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

not *enforce* those rights when they were breached. As such, the CJEU set out what is now a long-standing, core remedial principle of EU law: *whenever EU law meets certain conditions,* private parties can rely directly on it in national court proceedings, regardless of the existence of domestic implementing legislation and even in the face of subsequent domestic legislation that is incompatible with the EU law in question. This principle is known as 'direct effect'.

Direct effect is not a principle with universal or automatic application to all provisions of EU law. It requires that a provision be clear, precise, and unconditional.[181] Clear and precise have never been controversial criteria: vague allusions to EU goals are not enforceable, but any more than vague commitments in domestic law can be enforced by the courts. Unconditional, as a concept, means that even specific rights-granting EU law provisions cannot be relied upon in national court proceedings if those provisions require further legislative or executive action, i.e. provisions which cannot be reasonably understood as 'self-executing'. This was illustrated in *Cava,* where an instruction to the Member States in a directive was to 'take the necessary measures to ensure that waste is disposed of …'; the CJEU determined that this was clearly not an 'unconditional' provision, as the Member State governments were tasked with developing some sort of domestic waste management system.[182]

Case law following *Van Gend* also introduced the idea that direct effect covers two possible legal relationships and, depending on the source of EU law that individuals try to rely on, it might operate differently. The CJEU thus identified directionality in the operation of direct effect, with two different types of 'legal relationship' operating in different directions:

- Vertical direct effect involves a private party relying directly on EU law when they are taking action *against the state*;
- Horizontal direct effect involves a private party relying directly on EU law when they are taking action *against another private party*.

Van Gend and *Cava* are both examples of vertical direct effect, in that the Dutch equivalent of HMRC and the regional government of Lombardy, Italy, were the respective 'other' parties in those cases; they were clear parts of 'the state'. In *Defrenne* case of 1975, it became clear that *some* EU Treaty provisions could also be relied upon in disputes between private parties before a national court.[183] This case involved a Belgian law that permitted compulsory earlier retirement for females than for males, consequently resulting in a reduced pension entitlement for the former. This was argued to be contrary to what is now Article 157 TFEU, on equal

[181] Case C-26/63, *Van Gend en Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.
[182] Case C-236/92, *Cava v Regione di Lombardia and others*, EU:C:1994:60.
[183] Case C-43/76, *Defrenne v Sabena (No 2)*, EU:C:1976:56.

treatment in employment and, particularly, equal pay. The provision was declared clear, precise and unconditional by the CJEU, which concluded that Ms Defrenne's employer, the private airline Sabena, was obliged to comply with that Treaty provision in much the same way as the Belgian government was, despite the existence of domestic law that permitted the inequality.

Primary Law

Since *Defrenne,* other Treaty provisions that are clear, precise and unconditional have also been found to be both vertically and horizontally effective,[184] meaning that much of the content of the Treaties can now be enforced by national courts in domestic proceedings between private parties as well as between a private party and the state.

The general principles of EU law and provisions of the CFRare also capable of enjoying direct effect under the same terms as the provisions of the Treaties, to which they are equal in status pursuant to Article 6 TEU. The direct effect of the 'administrative law' general principles developed by the CJEU, such as proportionality and transparency, has never been tested in the abstract, because those principles tend to be raised in relation to *other* EU law provisions, which themselves then have to satisfy the requirements of direct effect in order to be brought before national courts.[185] The majority of the case law on the direct effect of general principles, then, concerns general principles that express substantive 'rights' – and which have now been codified into the CFR.

It is worth noting that in cases that concern the application of the CFR, the Court typically assesses the direct effect conditions under a broader test of whether the relevant provision of the CFR is capable of invocation 'as such', i.e. without the need for further legislation to define the core content of the obligation set out in the CFR provision. While the criteria for the direct effect of fundamental rights are not different in theory to other Treaty provisions, therefore, in recent years the Court has mainly emphasised the unconditional character of a right as an indicator of its direct effect.[186]

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[184] See, for example, Case C-438/05, *International Transport Workers' Federation v Viking*, EU:C:2007:772; Case C-341/05, *Laval v Svenska Byggnadsarbetareförbundet*, EU:C:2007:809.

[185] It is noteworthy, however, that the direct effect and ensuing obligation to disapply domestic measures has been affirmed with regard to specific aspects of the general principle of proportionality in cases where the unconditionality requirement of the underlying provisions of a directive was not been made out, such as in the context of the proportionality of sanctions: Case C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, para. 29: 'the requirement of proportionality of penalties laid down in Article 20 of that same directive is unconditional and sufficiently precise to be capable of being invoked by an individual and applied by the national administrative authorities and courts'. See further Stefano Montaldo, 'Handle with care! The direct effect of the requirement of proportionality of sanctions and the remedy of disapplication: *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*' (2023) 60 *Common Market Law Review* 863.

[186] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung,* EU:C:2018:257, para. 76.

CFR rights such as Article 1 (human dignity),[187] Articles 7 and 8 (private life and private data),[188] Articles 21 and 23 (non-discrimination and equality between women and men, including equal pay),[189] Article 31 (fair working conditions including annual leave),[190] Article 47 (the right to a fair trial and to an effective remedy),[191] and Article 50 (*ne bis in idem,* double jeopardy)[192] have all been found to enjoy direct effect. This, of course, is a non-exhaustive list, which continues to grow as the Court's case law on the CFR develops, as already highlighted in earlier research.[193] Some provisions of the CFR have been found not to enjoy direct effect in their own right. For instance, in *AMS*, the Court found that Article 27 CFR on workers' right to information and consultation was not sufficiently precise and unconditional so as to be capable of invocation as such.[194] In turn, since it lacks direct effect, it is not possible to rely on such a provision to have incompatible legislation disapplied. Nevertheless, the effects of provisions lacking direct effect in their own right may still be felt through the principle of consistent interpretation and through the application of related procedural rights that enjoy direct effect,[195] as further explained in the analysis of Article 47 CFR, below.

Like Treaty provisions, the CFR can have direct effect in both vertical disputes between individuals and the state,[196] as well as in horizontal disputes between private persons.[197] This is significant because it means that, unlike most other national and regional/international bills of rights, such as the ECHR, the addressees of the CFR are not only state authorities, but also private parties, such as employers and providers of goods or services. Contrary to the domestic position under the Human Rights Act 1998, for instance, where the application of ECHR rights is mainly limited to actions against public authorities or private actors performing functions of a public nature,[198] fundamental rights protected in EU law that enjoy direct effect can be applied against a private or public

[187] Case C-709/20, *CG v The Department for Communities in Northern Ireland,* EU:C:2021:602.
[188] Case C-362/14, *Schrems v. Data Protection Commissioner*, EU:C:2015:650.
[189] Case C-555/07, *Kücükdeveci v Swedex GmbH*, EU:C:2010:21; and Case C-843/19 *Instituto Nacional de la Seguridad Social (INSS) v BT*, EU:C:2021:55.
[190] Case C-55/18, *CCOO v Deutsche Bank SAE*, EU:C:2019:402; Joined Cases C-569 & 570/16, *Wuppertal v Bauer and Willmeroth v Broßonn,* EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v Shimizu,* EU:C:2018:874.
[191] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung,* EU:C:2018:257, para. 78.
[192] Case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, para. 68.
[193] See further Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[194] Case C-176/12, *Association de Mediation Sociale v Union locale des syndicats CGT,* EU:C:2014:2.
[195] Case C-715/20, *KL v X,* EU:C:2024:139.
[196] Case C-279/09, *DEB v Bundesrepublik Deutschland*, EU:C:2010:811.
[197] Case C-555/07, *Kücükdeveci v Swedex GmbH*, EU:C:2010:21, para. 21.
[198] Note that 'functions of a public nature' under Human Rights Act 1998, s. 6(3)(b), have typically been construed very narrowly: see *YL v Birmingham County Council* [2007] UKHL 27, [2008] 1 AC 95.

body, even where there is valid domestic legislation contradicting the right, or where no domestic legislation has been put in place.[199]

The CJEU's ruling in *Bauer* illustrates this well. In this case, the CJEU found a private employer liable for violating Article 31 CFR (paid annual leave) on exactly the same terms as a public authority, even though the violation stemmed from legislation incorrectly implementing the EU Working Time Directive.[200] Indeed, in this regard, the entry into binding effect of the CFR has rendered partly obsolete (albeit only in the field of fundamental rights)[201] the operation of a rule of EU constitutional law prohibiting the horizontal direct effect of directives in other areas, as further explained in the following subsection.[202] Since the entry into force of the CFR, the CJEU has made amply clear that the stipulations of a directive can be applied to private actors where they simply provide more specific expression of a CFR provision that enjoys direct effect.[203] Even though the provisions of the directive cannot, in themselves, be invoked against a private person (such as a private employer), they can be rendered applicable by the presence of a corresponding general principle or CFR right that independently enjoys direct effect. Over the last five years, this approach has been applied to several grounds of discrimination,[204] as well as to aspects of the right to fair working conditions, including paid annual leave and working time.[205]

Secondary Legislation

Regulations are the 'secondary law' equivalent of Treaty provisions in that they are – like the Treaties – immediately binding within the Member States once they are adopted; they are consequently also both vertically and horizontally directly effective. The same clarity, however, does not exist with respect to directives.

Directives, as already alluded to in Section II above, are not automatically part of domestic legal systems; under Article 288 TFEU they have to be implemented, meaning translated into domestic law, by national

[199] Case C-144/04, *Mangold v Helm,* EU:C:2005:709 and Case C-193/17, *Cresco Investigation GmbH v Achatzi*, EU:C:2019:43. For a longer analysis of the differences between the CFR and the Human Rights Act 1998 in cases between private actors, see Eleni Frantziou, 'The Horizontal Effect of Human Rights after Brexit: A Matter of Renewed Constitutional Significance' [2021] *European Human Rights Law Review* 365.
[200] Joined Cases C-569 & 570/16, *Wuppertal v Bauer and Willmeroth v Broßonn,* EU:C:2018:871.
[201] Case C-261/20, *Thelen Technopark Berlin GmbH v MN,* EU:C:2022:33; Case C-122/17, *Smith v Meade*, EU:C:2018:631.
[202] Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, EU:C:1986:84.
[203] Case C-555/07, *Kücükdeveci v Swedex GmbH*, EU:C:2010:21, para. 21 and Case C-144/04, *Mangold v Helm,* EU:C:2005:709. For a detailed account of the case law see also Elise Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*' (2019) 12:2 *REAL* 185.
[204] See Case C-555/07, *Kücükdeveci v Swedex GmbH*, EU:C:2010:21; Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung,* EU:C:2018:257; Case C-193/17, *Cresco Investigation GmbH v Achatzi*, EU:C:2019:43.
[205] Case C-55/18, *CCOO v Deutsche Bank SAE*, EU:C:2019:402; Joined Cases C-569 & 570/16, *Wuppertal v Bauer and Willmeroth v Broßonn,* EU:C:2018:871.

legislative processes. As such, directives are very expressly directed *to Member States,* and Member States have the responsibility to *bring them into national law*. They typically have two years to do this, and directives do not become binding on or within Member States until this implementing period has passed.

The CJEU quickly found that directives were vertically directly effective, meaning that they could be relied upon in actions against public bodies, where their provisions were clear, precise and unconditional.[206] However, it took a controversial turn in assessing if directives could also be *horizontally* directly effective – as in, they could be relied upon in actions taken against other private parties. In *Marshall,* the CJEU declared that private employers (and other private parties, more generally) could not be held responsible for not complying with a directive in *itself* – rather than with the national law provisions implementing that directive. Directives, in other words, could not 'impose obligations on an individual' and therefore could 'not be relied upon' against an individual, either.[207]

The lasting effect of this denial of horizontal direct effect of directives has been three-fold. First, in terms of enforcing EU law, those in dispute with private parties cannot rely on a directive's content even where it is clear, precise and unconditional. This creates difficult-to-justify differences between those with public employers (eg, staff of public libraries or public authorities) and those with private employers (eg, those working in a local coffee shop). Under the *Marshall* rule, even if discriminated against on identical grounds, covered by the same EU directive, the librarians would be able to go to court on the basis of that directive, but the baristas would not.

Perhaps in recognition of this dissatisfying outcome for individuals, the CJEU has adopted other legal mechanisms to mitigate the lack of horizontal direct effect of directives, although it has never revisited this initial denial as a matter of principle. In particular, as explained above, the lack of horizontal direct effect of directives has now been significantly softened in the field of fundamental rights. In its ruling in *Mangold*, which concerned age discrimination against an older worker in private employment, the Court held that the non-horizontality of directives did not apply in the field of non-discrimination on grounds of age (a finding subsequently extended to other grounds of discrimination and to other fundamental rights). More specifically, as non-discrimination is a general principle of EU law, it forms part of EU primary law, and was thus considered capable of invocation regardless of the non-horizontality of the

[206] Case C-41/74, *Van Duyn v Home Office,* EU:C:1974:133; Case C-148/78, *Criminal proceedings against Tullio Ratti,* EU:C:1979:110.
[207] Case C-152/84, *Marshall v Southampton Area Health Authority,* EU:C:1986:84, para 48.

directive that laid down more specific parameters for its exercise.[208] As a result, the adverse effects of the *Marshall* ruling on fundamental rights were significantly reduced. While it was initially unclear which rights amounted to general principles so as to benefit from the *Mangold* exception, that question has now largely been resolved by the codification of EU fundamental rights in the legally binding CFR.[209] EU fundamental rights, therefore, give rise to direct effect vertically and horizontally under the conditions indicated in the preceding section, even if there is further legislation specifying the conditions for their exercise in the form of directives.

Horizontal direct effect is a concept that has developed in CJEU case law. If it came before the Court today, our earlier example with public librarians and baristas would not stand: the former would be able to invoke the directive directly against the state, while the latter would be able to reach the same outcome by relying on Article 21 of the CFR, which protects against discrimination and is further specified in the directive, which is merely the 'hook' on the basis of which EU law governs the issue (given that the application of the CFR is limited to areas falling within the scope of EU law).[210] The Marshall rule would, however, stand in areas not governed by fundamental rights, such as commercial contracts.[211]

The second lasting effect of *Marshall* is that the CJEU has taken as broad a reading of the concept of 'the state' as possible – so as to enable more 'vertical' claims of direct effect to proceed. In *Foster* and *Farrell*, the CJEU established that any non-public body that is in practice an 'emanation of the state' – meaning that it is under state control or has special powers that ordinary businesses do not – will in fact be treated as 'the state' for the purposes of direct effect.[212] Exactly how much state control is required, or what kinds of powers count as 'special' for these purposes, has not been further specified by the CJEU, and consequently will be developed by national courts across the EU.

The third consequence of the CJEU's denial of horizontal direct effect of directives has arguably been the most impactful; and it is the further mitigation of this denial via a doctrine called, variously, 'indirect effect', 'consistent interpretation' or 'harmonious interpretation'. We will call it 'consistent interpretation' across this report. Given its significance and emergence over the years as a self-standing principle of EU law, we consider it separately in the following subsection.

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[208] Case C-144/04, *Mangold v Helm*, EU:C:2005:709.
[209] For a fuller analysis, see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the EU: A Constitutional Analysis* (OUP, 2019), Chapters 3 and 4.
[210] See also, on this point, Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).
[211] Case C-261/20, *Thelen Technopark Berlin GmbH v MN,* EU:C:2022:33.
[212] Case C-188/89, *Foster v British Gas,* EU:C:1990:313; Case C-413/15, *Farrell v Whitty,* EU:C:2017:745.

(iv) Consistent Interpretation of EU Law

'Consistent interpretation' is a strong interpretive duty for domestic courts, requiring them to interpret national law – if at all possible – in a way that removes any incompatibilities with EU law. This duty also follows from the primacy of EU law but, unlike direct effect, which is subject to the further conditions explained earlier, it applies equally to all EU law – though in practice its focus has been on directives, and particularly in those situations where directives would *not* be directly effective.

The first case where consistent interpretation surfaced was *Von Colson*.[213] The facts illustrate how the whole of private enforcement of EU law works, and so are worth elaborating on.

Von Colson had applied for a post in an all-male prison in Germany. She was rejected for the post on the basis of her gender; the assumption seems to have been that it would have been an unsuitable environment for a woman to work in. This reason for not hiring her was deemed in contravention of the EU's Equal Treatment Directive as in force at that time – and both Von Colson and the prison she had applied for a job with had agreed that this was in fact the case. In practice, Germany had implemented the Equal Treatment Directive – and so Von Colson could rely on that domestic implementation to start her claim.

However, the German implementation of the Equal Treatment Directive was incomplete – in that the directive's provisions on remedies had not been correctly translated. The directive required that those who experienced gender discrimination in employment matters were entitled to pursue *a judicial remedy*; the German implementation, however, made clear that those discriminated against in employment matters were only entitled to get their job application fees back if that discrimination had taken place in the context of hiring practices. Von Colson argued that this was an incorrect implementation of the directive and the national court in Germany asked the CJEU if she could rely on the directive's commitment to a 'judicial remedy' via direct effect, and if so, what that would amount to.

The prison to which she had applied for a job was a clear public body – so vertical direct effect of this directive was in principle possible. However, the CJEU determined that the concept of a 'judicial remedy' was not clear, precise and unconditional, meaning that she would not be able to rely on the directive under the direct effect conditions after all.

The CJEU, however, proceeded to say the following:

[213] Case C-14/83, *Von Colson v Land Nordrhein-Westfalen,* EU:C:1984:15.

> It should, however, be pointed out to the national court that although [the directive] leaves the member states free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained … **It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with [EU] law, in so far as it is given discretion to do so under national law**.[214] (emphasis added)

In other words, while the directive did *not* have a directly effective provision on remedies for breaches of its non-discrimination provisions, the CJEU ruled that the national court had an obligation to try, insofar as legally permitted to do so, to read the *intention* of the directive *into* the domestic implementation measures. The Court indicated that compensation, if seen as an appropriate remedy, had to be adequate – and thereby implied that the original domestic implantation, covering application costs only, was not adequate. However, as is the case under national procedural autonomy (discussed in Chapter 2), the actual shape of any remedy offered to Ms. Von Colson was to be determined by the national court.

The *Marleasing* case confirmed that the interpretative obligation set out in *Von Colson* was to apply in situations that involved an error in the implementation of directives.[215] However, the earlier case of *Murphy* also makes clear that this interpretative obligation is not exclusively relevant to situations where directives are not appropriately implemented in national law; it held that national courts have the obligation to try to interpret national law to give effect to EU Treaty provisions, and only where they cannot do so, to consider setting aside incompatible national law through direct effect.[216] As such, while CJEU case law has most regularly cited this interpretative duty as applying in relation to directives, it is important to recall that this is not exclusively so, and that consistent interpretation applies also to Treaty provisions, as well as to other EU measures, such as EU Framework Decisions.[217] In *Poplawski II,* the CJEU went so far as to say:

> [I]n order to ensure the effectiveness of all provisions of EU law, the primacy principle requires, inter alia, national courts to interpret, to

[214] Case C-14/83, *Von Colson v Land Nordrhein-Westfalen,* EU:C:1984:15, para. 28.
[215] Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA,* EU:C:1990:395.
[216] Case 157/86, *Murphy v An Bord Telecom Eireann* EU:C:1988:62, para. 11. See also Case C-165/91, *van Munster v Rijksdienst voor Pensioenen*, EU:C:1994:359.
[217] Case C-105/03, *Criminal proceedings against Maria Pupino*, EU:C:2005:386 and Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530.

> the greatest extent possible, their national law in conformity with EU law ....[218]

In addition to its broad scope of application, the substantively expansive character of the duty of consistent interpretation in EU law is highlighted in later cases such as *Pfeiffer.* That case concerned the application of provisions in the EU Working Time Directive that lacked direct effect in the dispute the question. The CJEU found that the duty of consistent interpretation under EU law still required the national court to do 'whatever lies within its jurisdiction' to find a compatible reading, by treating the 'whole body of rules of national law' as a potential source of such a reading, rather than merely reviewing the domestic legislation incorrectly implementing EU law.[219] The only limit to the duty is that it falls short of requiring domestic courts to adopt an interpretation that literally contradicts the wording of the legislation.[220]

Similarly, in *Popławski II*, the CJEU reaffirmed that:

> the principle that national law must be interpreted in conformity with EU law requires that the whole body of domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it […].[221]

In that context, the Court has already held that the obligation to interpret domestic law in conformity with EU law requires national courts to change established case law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision and to disapply, on their own authority, the interpretation adopted by a higher court which it must follow in accordance with its national law, if that interpretation is not compatible with the framework decision concerned.[222]

It follows that, whereas it is usually assumed that disapplication is a necessary and exclusive consequence of direct effect, this is so only in respect of the *disapplication of legislative measures*. Even in the absence of direct effect, consistent interpretation requires domestic courts to set aside other forms of domestic decision-making, including otherwise binding case law authorities. In a way, national legislation is only *not* 'set aside' by consistent interpretation because consistent interpretation

[218] Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530, para. 57.
[219] Joined Cases 397/01-403/01, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV,* EU:C:2004:584, para. 118.
[220] Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial,* EU:C:1993:945, para. 20; Joined Cases 397/01-403/01, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV,* EU:C:2004:584, para. 112. This is known as a *contra legem* interpretation (lit. 'against the law').
[221] Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530, para. 77.
[222] Case C-573/17, *Criminal Proceedings against Adam Popławski,* EU:C:2019:530, para. 77-78.

requires that national legislation itself is given a new, EU-compatible meaning. Thus, while only directly effective provisions of EU law can give rise to a duty on domestic courts to disapply domestic legislation, consistent interpretation is also a very powerful mechanism, which applies in virtue of the binding character of all EU law, i.e. capturing a much wider set of provisions, even if they do not enjoy direct effect.

There are, however, some specific limitations to consistent interpretation: it generally cannot apply before a directive's implementation deadline has passed,[223] nor can it be used to aggravate criminal liability beyond what national law specified,[224] or result in a '*contra legem*' (meaning: contrary to the express wording of the law) interpretation of the national law.[225] However, outside of those specific limitations, the obligation to interpret national law consistently with EU law is overarching – and in principle applies to all sources of EU law. In particular, the Court explicitly confirmed the application of the duty of consistent interpretation to the CFRin its ruling in *Dansk Industri,* where it concluded that a directive that had to be consistently interpreted was a manifestation of an overarching general principle captured by the CFR.[226] Following this principle, *all* provisions of the CFR engage an obligation for domestic courts to read national legislation compatibly with the CFR insofar as it is possible to do so.[227]

(v) The relevance of Article 47 CFR for direct effect and consistent interpretation

A final overarching note on the binding effect of EU law is essential since the advent of Article 47 CFR. As already noted in Chapter 2, the CJEU has started to rely extensively on Article 47 CFR as a further means of effective judicial protection. Indeed, Article 47 has been found to have direct effect and, provided that a case falls within the scope of EU law such that the application of the CFR is engaged,[228] it has been used on its

[223] Case C-212/04 *Adeneler v ELOG,* EU:C:2006:443, para. 115; but see also Case C-129/96, *Inter-Environnement Wallonie v Région Wallonne*, EU:C:1997:628, which highlights that there can be some anticipatory effects in cases where the Member State has passed new legislation contradicting a directive during its implementation period.
[224] Case C-168/95, *Criminal Proceedings against Luciano Arcaro,* EU:C:1996:363, para. 42.
[225] Case C-334/92 *Wagner Miret v Fondo de Garantia Salarial*, EU:C:1993:945.
[226] Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.
[227] Note that Article 52(5) CFR makes clear that not all provisions of the CFR contain 'rights'; rather, some reflect principles that are only 'judicially cognisable' when relevant implementing acts in the Member States are considered by the courts. However, it is hard to see how these 'principles' would be raised in court *without* there being some sort of inaccurate national legislation that serves the purpose of implementing legislation; the duty of consistent interpretation would apply to the CFR principles if they are 'judicially cognisable'.
[228] See also, on this point, Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).

own[229] or alongside substantive rights, such as non-discrimination, even where these rights enjoy direct effect in their own right.[230]

The Court also relies on Article 47 CFR in cases where the substantive provision at issue does not enjoy direct effect. For example, in its recent ruling in *KL*,[231] the Court was asked to consider the compatibility with Article 30 CFR (the protection from unfair dismissal) and clause 4 of the framework agreement on fixed-term work[232] of a Polish law that provided for dismissal of certain categories of fixed-term workers without the need to give reasons. Whereas the Court highlighted that neither of these provisions of EU law enjoyed direct effect in the dispute in question, they should be used to ensure a consistent interpretation of the national law in order to ensure the full effectiveness of EU law.[233] Should a compatible reading prove impossible, however, the Court noted that the national law in question also:

> undermines the fundamental right to an effective remedy enshrined in Article 47 of the Charter, since a fixed-term worker is deprived of the possibility, which is however available to a permanent worker, of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination.[234]

Given that Article 47 enjoys direct effect as such, it should be used to disapply any incompatible legislation that could not be read compatibly with the substantive provisions at issue.[235]

It follows that Article 47 CFR can act as a vehicle for the effective implementation through direct effect of other substantive provisions of EU law, even in situations where those provisions are not directly effective, provided that the alleged violation *also* undermines effective judicial protection.

[229] Case C-243/09, *Fuß v Stadt Halle,* EU:C:2010:609.
[230] Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, EU:C:2018:257.
[231] Case C-715/20, *KL v X,* EU:C:2024:139.
[232] Framework agreement on fixed-term work concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999, L 175, p. 43).
[233] Case C-715/20, *KL v X,* EU:C:2024:139, para. 68-74.
[234] Case C-715/20, *KL v X,* EU:C:2024:139, para. 79.
[235] Case C-715/20, *KL v X,* EU:C:2024:139, paras 80-82.

Post-Brexit National Court Interactions with EU Law

(i) In the Withdrawal Agreement[236]

As already highlighted in Chapter 2, the key provision in the Withdrawal Agreement that addresses its relationship to and interaction with national law is Article 4 WA, which—given its importance—is copied out here in full, and emphasised where relevant:

Article 4 WA (emphasis added)

Methods and principles relating to the effect, the implementation and the application of this Agreement

1. **The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States**.

Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

2. **The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation**.

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

4. **The provisions of this Agreement 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 handed down before the end of the transition period.**

5. **In the interpretation and application of this Agreement**, the **United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period**.

[236] The WF is an integral part of the Withdrawal Agreement, but it is addressed separately in this report because it in some respects functions distinctly from the remainder of the Withdrawal Agreement.

Preliminary Reference

Article 4(2) WA places an obligation on the UK to ensure that UK courts will respect the primacy of the Withdrawal Agreement. Ordinarily, one of the main ways in which primacy is observed is via the preliminary reference process under Article 267 TFEU. The fact that domestic courts have the ability (or obligation) to ask the CJEU *what* EU law means ensures that, in cases of conflict, EU law is applied in the way that the CJEU wants it to. Preliminary references, however, are very much an 'EU law' novelty. Other courts do not have these 'reference' processes in place to ensure homogeneity of interpretation of the law—mostly because they all work within the same legal system, and so the appeals system and systems of precedent actually take care of concerns about legal certainty and consistency. So, is there any place for preliminary references in the Withdrawal Agreement, which is an agreement that *contains* EU law, but not an integral part of the EU Treaties?

The EU side in the negotiations about the Withdrawal Agreement insisted that in the areas where EU law applies under the Withdrawal Agreement, preliminary references to the CJEU had to be maintained on the part of the UK. References thus continue to exist in several different forms in the Withdrawal Agreement. The first is in Article 158 WA, which deals with Part 2 on Citizens' Rights. Part 2 of the Agreement ensures that anyone who exercised 'free movement' rights that were affected by Brexit gets to maintain almost all of the EU-law-granted rights they had *before* Brexit. In the EU, the working of Part 2 of the WA is overseen by the CJEU—as all other dimensions of EU law are. In the UK, however, they are supervised by the Independent Monitoring Authority; the UK was simply not willing to give the Commission a specific power to 'supervise' UK implementation of Part 2.

The EU agreed to this, but with the caveat that, to ensure that the provisions in Part 2 were implemented well, domestic courts *maintained* their connection to the CJEU for a period of 8 years. This 8-year period is a compromise: it enables UK courts to ask questions about how Part 2 is meant to work and receive the same answers that the Member States will get, which will (hopefully) ensure that the rights of UK citizens in the EU and EU citizens in the UK, as set out in Part 2, will be applied identically. After those 8 years, it is assumed that any uncertainties about Part 2 will have been clarified by the courts, as those EU citizens in the UK benefitting from the rights protected in Part 2 will have identified any problems they are facing. We thus see the genuine outcome of a negotiation process: the UK has the *independence* it sought and it is able to apply Part 2 using its own institutions, but those institutions can be

steered by the CJEU for a period of 8 years so as to ensure that the relevant provisions (which are by and large provisions of EU law) are applied consistently with EU law. For 8 years, then, this reinforces the supremacy of those EU law rules.

What about the rest of the Withdrawal Agreement? When there are disputes about the rest of the Withdrawal Agreement, including about Part 2 after the end of the 8-year period, the normal dispute settlement process under the Withdrawal Agreement involves discussions in the Joint Committee—and then, if that does not resolve a conflict, independent arbitration.[237]

Where this becomes interesting in terms of embedding the supremacy of at least *some* of the Withdrawal Agreement is in Article 174 WA:

Article 174 WA

Disputes raising questions of Union law

1.Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel.

The arbitration panel shall make the request referred to in the first subparagraph after having heard the parties.

The EU again took a compromise position here. Disputes about the *non-EU-law content* of the Withdrawal Agreement would be settled by independent arbitration, which would decide what the relevant aspect of the Withdrawal Agreement meant—and both parties would then have to comply with this interpretation. This itself reinforces the supremacy of the WA: the 'losing' party would be told to adjust domestic law to whatever the outcome of arbitration is.

If the disputes involve EU law provisions, however, the CJEU takes a more direct role—and the arbitration panel has to engage in a form of

[237] National courts will also play a role in enforcing the Withdrawal Agreement in light of direct effect; this is discussed further below.

'preliminary reference' up to the CJEU. This will guarantee consistency in how EU law works both in the Member States *generally,* and in the Member States when they are acting under the Withdrawal Agreement. The ultimate decision taken in these disputes is still by the arbitral panel, as under Article 267 TFEU the final decisions taken are still by the domestic courts—but there will be a clear steer from the CJEU on the meaning of the relevant provisions of EU law, which again reinforces that the EU law in the Withdrawal Agreement should take precedence over any incompatible domestic law.

A final point worth raising is that of CJEU case law. The Withdrawal Agreement addresses the potential supremacy of CJEU case law directly. If we look back to Article 4(4) and 4(5) of the Withdrawal Agreement, we see that the EU law referred to *in* the Withdrawal Agreement has to be interpreted *consistently* with all CJEU case law that preceded the end of the transition period—and that courts in the UK should have 'due regard' for any later CJEU case law on issues raised by the Withdrawal Agreement.

We can describe this as 'hard' and 'soft' supremacy respectively: the CJEU's pre-Brexit case law is as 'binding' in relation to the Withdrawal Agreement as it was in the UK when we were a Member State. As for the latter request for 'due regard', we will have to wait and see what domestic courts do with post-Brexit CJEU case law in the fields covered by the Withdrawal Agreement; if we get any litigation, it is very likely they will be related to Part 2, but they have not arisen yet.

Primacy

Article 4(1) WA sets out the basic rule: the Withdrawal Agreement should work *in the UK* in the same way that the Treaties (and the Withdrawal Agreement) work in the Member States. Moreover, Article 4(2) makes it clear that this concept of 'the same legal effects' includes the doctrine of supremacy: national courts (and administrative authorities) will have to be given the power to disapply incompatible domestic law provisions. Article 4(2) WA then further stresses that as a matter of *UK implementation* of this requirement, the EU and the UK have agreed that this will be implemented in UK primary legislation.

By ensuring that the WA is 'implemented' in primary law in the UK, the EU effectively ensured that, within the UK legal system, the WA will be as binding across the UK as the Treaties were when it was a Member State. Important here is that Article 4(1) WA makes it clear that these obligations cover the *entire Withdrawal Agreement* – not only its provisions on EU law! In effect, the way in which the Withdrawal

Agreement is written means that it takes the EU law doctrine of primacy and applies it to the whole of this new international agreement between the UK and the EU. Provisions in the Withdrawal Agreement that are not actually pure references to EU law will thus *still* take precedence over any incompatible domestic law.

Direct Effect

The second paragraph of Article 4(1) WA specifies that the idea of the Withdrawal Agreement producing identical 'legal effects' to EU law itself in the Member States means that private parties will have the ability to 'rely directly' on some provisions in the WA – which means in turn that the parts of the WA that meet the conditions for direct effect, discussed above, should be directly effective in the UK. The approach taken here is interesting: it is obvious why, for example, Part 2 of the Withdrawal Agreement was deemed to need direct effect, as private enforcement of citizens' rights has been a fundamental part of the development of EU law on citizens' rights since the 1990s; and to make sure that Part 2 is effective in the UK, that private enforcement must continue. However, it is harder to see when private parties would be able to bring cases about most *other* aspects of the Withdrawal Agreement (excluding the WF) to domestic courts, as the vast majority of the provisions are inter-state, and do not seem to produce rights or obligations for private parties. Nonetheless, should anything else in the WA trigger a breach of individual rights, these can in principle be perpetually enforced before national courts, as a result of Article 4(1) WA.

Consistent Interpretation

Given the fact that directives are not horizontally directly effective, and much of Part 2 on citizens' rights cross-references directives, it is important to consider if the Withdrawal Agreement also addresses the CJEU 'fix-it' doctrines for the absence of horizontal direct effect of directives. The answer on both definitions of the *state* and indirect effect are found, implicitly, in the same part of the Withdrawal Agreement, with Article 4 once more playing a pivotal role.

Articles 4(3) and (4) WA suggest that there may be a difference in how the Withdrawal Agreement is to be treated as a whole and how the *EU law in the Withdrawal Agreement* is to be treated. At a glance, Article 4 reads as if EU did not demand that the *entire* Withdrawal Agreement was to be given indirect effect, or that the CJEU's definition of a 'public body' (or an 'emanation of the state') was to be applied to the *entire* Withdrawal Agreement.

This is slightly misleading, however, in that Article 4(1) WA makes it clear that the Withdrawal Agreement as a whole should produce *the same legal effects* in the UK as it does in the EU – which means it is to be treated *as if* it is an EU Treaty in terms of effect. That consequently means that both the *EU law in the Withdrawal Agreement* as well as *all other provisions in the Withdrawal Agreement* should, under Article 4(1) WA, operate *as if they are provisions of EU law applicable to a Member State*. In other words, the CJEU's doctrines of interpretation and enforcement should apply across the entirety of the Withdrawal Agreement.

Article 4(3) and 4(4) further support this reading when it comes to the specific EU law content of the Withdrawal Agreement, as they stress that the CJEU's case law and its 'methods and general principles' *will* apply to any of the *EU law referenced* in the Withdrawal Agreement. Indirect effect and the 'emanation of the state' doctrines both stem from the CJEU's case law, well before the transition period; and they also reflect interpretative 'methods' of the CJEU that are long-standing. As such, when considering the EU law in the Withdrawal Agreement, UK domestic courts are being told here that they *shall* apply the doctrines of 'emanations of the state' and 'indirect effect' as the CJEU has set them out.

The UK's implementation of Article 4 WA as a whole seems to suggest that the UK has interpreted its obligations as applying across the Withdrawal Agreement: s7A(3) of the EUWA 2018 makes clear that every future Act of Parliament has *to be read* in a way that gives effect to all the rights, obligations and procedures stemming from the Withdrawal Agreement – which is an instruction to domestic courts to read the Withdrawal Agreement *as they would have read EU law* when we were a Member State.

When it comes to private enforcement, especially of the EU law *in* the Withdrawal Agreement, we can see that the big change from EU membership to Brexit lies in *how much* law has to be applied by the UK domestic courts in line with EU enforcement obligations, as the Withdrawal Agreement simply covers far fewer substantive areas of law than the EU Treaties did.

Domestic Implementation of the WA

Article 4 WA is generally implemented via Section 7A EUWA – added to the EUWA by the European Union (Withdrawal Agreement) Act 2020. First, it directly incorporates the UK–EU WA into domestic law. Second, it mandates that the 'rights, powers, liabilities, obligations and restrictions' which are created, or which arise 'from time to time' under the WA, be given legal effect within domestic law 'without further enactment'. Third,

it subjects every enactment, including provisions within the EUWA itself, to the incorporated WA. The immediate consequence of this is the same as under the now repealed section 2(1) of the European Communities Act 1972: the entirety of the WA, *including* the principles which inform its application and scope, as these principles develop or are progressively interpreted, have automatic effect (via section 7A) within the domestic legal sphere in the UK generally and Northern Ireland specifically. This is a faithful implementation of Article 4 WA's requirements.

However, some issues arise in other parts of the EUWA. Schedule 1 EUWA declares that general principles of EU law which emerge after Brexit are not part of domestic law,[238] abolishes the right of action in domestic law grounded on a breach of the general principles of EU law,[239] and prevents disapplication and quashing of inconsistent national law ensuing therefrom.[240] Finally, any possibility of relying on fundamental rights as general principles of EU law in order to bridge the contradiction between the terms applicable in Northern Ireland under the Withdrawal Agreement and WF (further discussed below) and the exclusion of the CFR from domestic law under the EUWA has now been eliminated by the Retained EU Law (Revocation and Reform) Act 2023 (REULA), section 4 of which has ended the availability of general principles of EU law in the domestic legal order entirely as of 1 January 2024.[241] But the apparent incompatibility between the terms of the WA/WF and the terms of the EUWA/REULA is still resolved by section 7A EUWA. The exceptions in Schedule 1 EUWA mentioned above are in turn subjected to a long list of overriding provisions in section 7C, which restores their applicability in the application of 'separation agreement law'. This includes, *inter alia*, Article 4 WA and Article 13 WF. Finally, section 3(1) REULA, which purports to end the supremacy of EU law, applies to assimilated law only (formerly known as 'retained EU law'), thereby preserving supremacy for EU law provisions (that is, law made by the EU directly) as these are made applicable via the WA and the provisions of the EUWA which incorporate it. The same goes for the effect of section 4 REULA.

(ii) In the Windsor Framework (where distinct from the Withdrawal Agreement)

Preliminary References

The volume of EU law applicable to Northern Ireland under the WF is significantly greater than the rest of the Withdrawal Agreement provides,

[238] EUWA 2018, sch. 1, para. 2.
[239] EUWA 2018, para. 3(1).
[240] EUWA 2018, para. 3(2).
[241] REULA 2023, s. 4(2)(a). The provision was brought into force by the Retained EU Law (Revocation and Reform) Act 2023 (Commencement No 1) Regulations 2023, reg 3(b).

and so it is to be expected that the CJEU might be more *concerned* about how that EU law is interpreted in this context—after all, the internal market rules on the movement of goods also apply to and between all the Member States, and it would be unworkable if they meant something different when a Member State traded with Northern Ireland.

However, the WF is still surprising: it reinforces the supremacy of the applicable EU laws found in Articles 5 and 7-10 WF significantly more than the more general binding arbitration provisions that apply to the Withdrawal Agreement as a whole, as well as the non-mentioned provisions of the WF:

Article 12(4) WF
Implementation, application, supervision and enforcement

As regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. **In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.**

This is more expansive than simply allowing the CJEU to offer a 'preliminary reference' during arbitral dispute settlement. When the WF involves the application of EU law, as it does in Articles 5-10, the CJEU is given *the entire jurisdiction* it has in all the Member States—and, very specifically, it has the ability to hear preliminary references from *UK courts* on those provisions of the WF. It is important to stress that this applies to *UK courts* in general: obviously, most of the case law regarding the WF is likely to arise in Northern Ireland, but it could very easily arise on behalf of exporters from Great Britain, who file their complaints about UK or EU application of the WF's trade provisions with their local court. In the entirety of the UK, therefore, domestic courts still have the power (and, in some cases, the duty) to refer questions about the EU law in the WF to the CJEU, with the CJEU issuing a binding interpretation of that EU law.

The WF's approach to CJEU case law is likewise different here than it is under the Withdrawal Agreement. As the EU law in the WF in principle lasts and updates indefinitely, the relevance of the CJEU's case law also

does not have a 'stopping date', such as the end of the transition period. All CJEU case law of relevance to the WF will be binding on the UK as long as the WF is in force:

> **Article 13(2) WF**
>
> **Common provisions**
>
> 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.

How this operates in relation to Article 2 WF is worth unpacking. As Article 2 is a provision in the WF, Article 13(2) WF means that where it 'refers to EU law' – eg, the materials in Annex 1 to the WF – these must be interpreted in line with up-to-date CJEU case law. However, the scope of Article 2 is broader – as discussed in more detail in Chapter 4 – than just Annex 1, and much of what its non-diminution commitment preserves is based on what can be called 'underpinning EU law': the EU law in force in the UK *prior to Brexit*, which sets the non-diminution base-line. This is *not* EU law that is referred to in the WF, and so appears to be unaffected by Article 13(2) WF; instead, 'underpinning EU law' relevant for Article 2 WF must be interpreted in conformity with pre-Brexit CJEU case law, as per Article 4(4) WA.

When it comes to many aspects of the WF, then, very little has changed from EU Membership: EU law has primacy over domestic law, and the CJEU exercises all its usual functions to reinforce that primacy across the entirety of the UK court system. However, when it comes to Article 2's non-diminution commitment, the WF seems to operate a two-strand system, where EU law explicitly listed in the WF receives more 'up to date' treatment than EU law that underpins RSEO as set out in the 1998 Agreement does.[242] This makes for more complexity than is desirable in enforcing rights held under Article 2 WA.

Private Enforcement Doctrines

It is important to stress here, again, that the WF is *part* of the Withdrawal Agreement – consequently, Article 4 WA applies (in full) to the WF as

[242] See Chapter 1.

well. This means that the WF, like the WA, has primacy over national law. The WF is also directly effective, where trigger conditions are met – and not only where the *EU law referenced or cited* in the Framework meets those trigger conditions, but rather where *any* provision meets the trigger conditions. For example, this is the case for Article 2 WF (further discussed below), which domestic courts have accepted to be directly effective in its own right.[243] Additionally, Articles 4(3) and 4(4) WA strongly suggest that consistent interpretation has likewise been maintained in relation to the EU law content of the WF, and Article 47 CFR *has* been maintained by Article 4(3) WA. Those provisions reinforce the overarching obligation set out in Article 4(1) WA, which ensures that the WA produces the same legal effects in the UK as it does in the EU – where the private enforcement doctrines will, as a matter of EU law, be applicable to the Withdrawal Agreement as a whole. As set out above, the UK has implemented these obligations in section 7A EUWA, which makes clear that domestic law must be interpreted in light of the obligations contained in the Withdrawal Agreement.

(iii) The Role of Article 2 WF

Preliminary References

While Article 267 TFEU has been preserved in relation to Articles 5-10 WF, it does *not* apply to Article 2 WF – and, by proxy, to any of the rights protected under Article 2 WF. This absence does not in itself constitute a *diminution of rights*. Individuals do not, strictly speaking, have the right under EU law to have national courts refer questions of interpretation to the CJEU: this is a relationship that is set out between national courts and the CJEU in the Treaties, and whether or not a national court exercises the ability to refer a question is not something that parties to the dispute can challenge or require. Moreover, merely referring a question about the meaning of EU law to the CJEU does not mean that the CJEU will offer an interpretation of a right that is more favourable than the interpretation offered by a domestic court.

However, if we conceptualise the *effect* of an Article 267 TFEU reference – the *consistent meaning* of EU law across the EU – and how that might manifest in practice – *an explanation of what specific EU law rights mean* – it becomes possible to see the absence of a possibility to make preliminary references as a diminution. After all, a private party in any other Member State can *benefit* from CJEU clarification of rights held via Article 267 TFEU, just as any private party in the UK would have been able to prior to Brexit. The absence of preliminary references under Article

[243] *In re Dillon* [2024] NIKB 11, [85]; *In re Dillon* [2024] NICA 59.

2 means that, even if EU principles of interpretation and CJEU case law are taken into account by domestic courts in an Article 2 claim, there is an increased *risk* of substantive diminution because those domestic interpretations may ultimately be erroneous, as well as a procedural diminution in the sense of the absence of the possibility to refer questions to an arbiter that is more specialised in EU law matters. The possibility to ask the CJEU if an expansive reading of, for example, the directives in Annex 1 of the WF is correct might have resulted in acknowledgement of a particular right that the national court otherwise might have been disinclined to give. If those requests for interpretation are no longer possible, a risk of diminution becomes apparent. While Article 13(2) WF means that all provisions of the WF need to be interpreted *in light of CJEU case law,* courts attempting to apply Article 2 WF will never be the genesis of such case law, in the way that Member State domestic courts applying any other bit of EU law can be.

The issue is clearest in a situation where a last instance court has refused to make a reference to the CJEU on an issue where there is a possibility of diminution of rights. In that scenario, the CJEU has previously made clear in the *Köbler* case that the failure to make a reference can give rise to state liability in damages. As the CJEU put it:

> it follows from the requirements inherent in the protection of the rights of individuals relying on [EU] law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance.[244]

Of course, given that Article 2 does not provide for preliminary references and that the preliminary reference system is, as explained above, a dialogical relationship, this cannot be reinstated unilaterally by domestic courts to avoid diminution. But if the absence of a preliminary reference mechanism can be shown to result in diminution (eg, because the domestic courts' understanding of EU law is subsequently proved wrong in the CJEU), then it is at least arguable that individuals should be able to claim damages against domestic courts for any diminution to their rights that is contrary to Article 2 WF, as this would have been available to them before Brexit.

Private Enforcement Doctrines

Article 4 WA makes it clear here that little should have changed since Brexit. Since primacy and direct effect apply to *all* provisions in the WF, and consistent interpretation is likewise likely to apply to all of the

[244] Case C-224/01, *Gerhard Köbler v Republik Österreich* EU:C:2003:513, para. 86.

Withdrawal Agreement (and so the WF), there is no obvious concern here for diminution of rights: any private party in Northern Ireland who wishes to claim for a breach of the WF or Part 2 of the Withdrawal Agreement is able to take a case to court under the same conditions as they would have been able to contest a breach of EU law when the UK was a Member State. The domestic court will be obliged to interpret all dimensions of such a breach the same way as they would have done prior to Brexit – and where there is a clear contradiction between UK law and the WF or the Withdrawal Agreement, the national court will have the power to set aside the relevant domestic law provision. As set out above, both the WA and WF's content *and* UK domestic implementation of those obligations accurately reflect these requirements to date.

Article 2 WF, however, is key in addressing an argument that the UK government may attempt to make if it wishes to limit the effects of Article 4 WA in relation to *some* of the content of the WF. It is possible that it might wish to argue that the EU law enforcement doctrines and remedial system apply *differently* to those EU directives set out in Annex 1 of the WF than they do to the remainder of matters covered by Article 2 WF, which is a wider, frozen-in-time non-diminution guarantee.[245] While Annex 1 clearly *refers to EU law*, the broader non-diminution requirement does not make specific references to EU law at all – and consequently may not be seen to invoke Articles 4(3) and 4(4) WA when interpreted. But this ignores Article 4(1) WA, and its overarching requirement that the Withdrawal Agreement produces the *same legal effects* in the UK as it does in the EU. Article 4(1) WA means that Article 2 WF as a *whole* must produce these EU-reflecting legal effects – which means that it in practice must be read as to be enforceable in the same ways as *any* provision of EU law is in the EU.[246]

As already highlighted in Chapter 2 with regard to state liability, the disaggregation of remedial as well as interpretive doctrines of EU law, such as state liability and direct effect, from the protection of EU rights would be difficult to operationalise within Article 2 WF, given that this provision commits the UK to ensuring in respect of Northern Ireland 'that no diminution of rights, safeguards or equality of opportunity ... results from its withdrawal from the Union'. The Northern Ireland Court of Appeal's *Dillon* judgment confirms that prohibited non-diminution could take one of two forms: either a substantive rights reduction, or a reduction in efficacy of available remedies – and a disaggregation of the remedial and interpretative doctrines from the rights themselves would

[245] See also on this point, Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (ECNI, 2022).
[246] See, confirming that Article 4(1) is applicable to Art 2 WF, *In re NIHRC and JR295* [2024] NIKB 35, [55]-[56].

fall within that second form.[247] Moreover, as the Annex 1 directives referenced in Article 2 are a *subset* of matters to which the non-diminution guarantee applies, it would be incongruous to conceive of two versions of remedies for breaching the same guarantee, when both are covered by identical Article 4 WA protections that, as argued above, appear to preserve the EU's remedial and interpretative doctrines across the Withdrawal Agreement as a whole.

Conclusion

The EU's private enforcement apparatus involves a combination of CJEU oversight via Article 267 TFEU, as well as a range of CJEU-created doctrines that effectively require national courts to hear cases based on EU law where specific conditions are met; to interpret national law in light of that EU law wherever possible; and to set aside incompatible national law if such an interpretation proves impossible. None of these are specifically *remedies* for breaches of EU law as understood in domestic legal systems, but they are the primary vehicle through which the EU ensures that EU law works as it should in the Member States: as set out in Chapter 2, the public enforcement process created by the EU Treaties does assist private parties, particularly because it can make it easier for them to claim state liability in damages in cases where a breach of EU law has already been established. But given that private parties hold the right to effective remedies beyond compensation for egregious failures to comply with EU law, they must also be able to access these remedies via national court proceedings. It is through the private enforcement system explained in this chapter that they are able to do so.

The components of the private enforcement system envisaged by the EU are primacy, direct effect, and consistent interpretation. The chapter has shown that the principle of indirect effect is founded upon the binding character of all EU law, which is derived from the principle of primacy and applies regardless of the more specific conditions for direct effect. As such, understanding its contours is especially important for individuals seeking to rely on provisions that do not meet any of the conditions for direct effect. Direct effect is, however, a special and significant feature of certain EU provisions that meet further criteria of clarity, precision and unconditionality, as it has a clear benefit, compared to indirect effect: a directly effective provision of EU law is always capable of giving rise to disapplication of domestic law (of any form or status, including constitutional law). In particular, direct effect can be invoked to access redress even in situations where domestic legislation *itself* creates an

[247] *In re Dillon* [2024] NICA 59, [149].

incompatibility (in this case, the legislation is set aside) or where no domestic law exists at all. This feature of EU law has traditionally been especially important in states like the UK, where domestic courts do not otherwise have the right to strike down or disapply primary legislation.

The WA and WF retain these private enforcement doctrines, although the ability to send preliminary references to the CJEU is limited in respect of key provisions, such as in relation to Article 2 WF. This may, of itself, mark a diminution of rights, given that this would have been possible prior to Brexit – but this depends on how the concepts of 'rights' and 'safeguards' under the 1998 Agreement are interpreted by the UK courts. Still, the fact that the WA as a whole has primacy and is directly effective where it meets the triggering conditions means that private enforcement of much of the WA, including Article 2 WF, on the basis of the EU law doctrines of direct effect and consistent interpretation will remain possible in Northern Ireland. The continued possibility of disapplying incompatible primary legislation, in particular, will be a central element of maintaining remedial parity between pre-Brexit and post-Brexit standards under Article 2 WF.

Recommendations

- **While the relationship between the binding character of EU law and the principles of direct effect and consistent interpretation is clear in EU law, domestic confirmation of that relationship would be beneficial to enhance legal certainty and clarify the scope of the obligations under Article 2 WF. In particular, EU law has a binding character, even where it is not directly effective, and in that case gives rise to the principle of consistent interpretation. EU law that is directly effective gives rise to both consistent interpretation and, where this fails, disapplication of legislation. While domestic courts may be able to read domestic law consistently with EU law without the need to resort to disapplication, maintaining the *power* to disapply legislation where necessary for directly effective provisions of EU law falling within the scope of Article 2 WF is an essential aspect of 'non-diminution'.**
- **While non-diminution is not triggered by the absence of a preliminary reference system for Article 2 *per se*, it may be triggered if the absence of a preliminary reference system results in diminution (eg, because it is subsequently proved that domestic courts applied EU law erroneously) in cases**

where they previously would have been under an obligation to make a preliminary reference request.

- **In light of the degree to which private enforcement of a range of EU law provisions remains a significant and distinctive feature within the Northern Ireland jurisdiction post Brexit, the Dedicated mechanism institutions should use their educational powers under the Northern Ireland Act 1998 to prioritise public understanding, particularly within legal service providers, of the extent to which EU law continues to operate.**

Chapter 4: Remedies for breaches of Article 2

Introduction

This chapter covers the remedies which exist for breaches of Article 2 WF, whether explicitly as part of the WA as given effect domestically, or by necessary implication. This is more than a question of remedies for breaches of EU law, as covered in Chapters 2 and 3. Article 2 refers to provisions of EU law setting minimum standards from which diminution is prohibited. But Article 2 is anchored to the Belfast (Good Friday) Agreement 1998[248] and the 1998 Agreement is not EU law. This makes the question of remedying breaches of Article 2 WF a mixed question which necessarily involves, but is not limited to, remedies required in EU law. As will be clear in this chapter, the question of remedying breaches of Article 2 is far from settled. Indeed, such remedies give rise to fundamental questions about the nature of this provision and what comes within its scope in the context of rights and equality guarantees in Northern Ireland law.

This chapter begins by setting out the main provisions of the WA and WF (and their implications) which are relevant to the question of remedies for breaches of Article 2. It then explores the domestic legal framework around those provisions and their implications for the Northern Ireland legal order. These implications are then explored in a number of illustrative scenarios in order to demonstrate both what is currently known about remedying breaches of Article 2 and what may lie on the horizon for this question. These examples also mark points to revisit in the future – whether through further research or as a result of litigation.

The architecture of and scaffolding around Article 2 WF

(i) International law

The terms of Article 2 are set out in Chapter 1, above. Within the non-diminution guarantee element of Article 2(1), two main points arise. First, that the 'rights, safeguards and equality of opportunity' to which the provision refers is adopted from ('as set out in') the similarly named RSEO chapter of the 1998 Agreement. Second, the 'area of protection against discrimination' hemmed by specifically listed EU legislation is a subset of the RSEO rights, and thus the latter goes beyond protection from discrimination.

[248] 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, Multi-Party Agreement.

Article 2(1) WF is supported by two key provisions. The first – Article 4 WA – provides, in the relevant parts, that all provisions of the WA (including the WF and thus Article 2) which are capable of satisfying the conditions for direct effect under EU law have direct effect;[249] that 'inconsistent or incompatible' domestic provisions be judicially and administratively disapplied;[250] and that the provisions of the WA (including the WF) 'referring to [EU] law or to concepts or provisions thereof' shall be interpreted and applied in accordance with the 'methods and general principles' of EU law.[251] The second – Article 13 WF – mandates that any provisions of the WF referring to EU law or to concepts and provisions thereof shall in their interpretation conform with relevant CJEU case law;[252] and further that all references to EU laws in the WF 'shall be read as referring to that [EU law] as amended or replaced'.[253]

Together, the scaffolding around Article 2 WF imbues the provision with certain characteristics of EU law such as direct effect and primacy, while ensuring that the specific EU laws referred to in Article 2 remain dynamically aligned with the EU itself. This is also reinforced by the overall insistence of the WA that its provisions and those of the EU law made applicable by the WA produce the 'same legal effects' in the UK as they would within Member States of the EU.[254] Consequently, even though Article 2 itself is a provision of the WF (and thus the WA) rather than being a provision of EU law, the WA ensures that Article 2 has much of the same character and consequence as EU law.

But much as it might appear that the WA and WF settle the question of remedies for breaching Article 2 in the domestic plane, certain complexities remain. For one thing, Article 2 makes a significant reference to a list of rights with no antecedence in EU law. The RSEO chapter of the 1998 Agreement underpinned a settlement to bring an end to the violent and deadly civil conflict in Northern Ireland sometimes colloquially referred to as 'the Troubles'. Agreed at a time when the UK was an EU Member State, the RSEO has no contingency provisions setting out what might happen in the event of a UK withdrawal. Moreover, the 1998 Agreement itself was and is a political document,[255] not intended for legal enforceability as such. The courts in Northern Ireland have read the 1998

[249] WA, Article 4(1) second subparagraph.
[250] WA, Article 4(2).
[251] WA, Article 4(3).
[252] WA, WF Article 13(2).
[253] WA, WF Article 13(3).
[254] WA, Article 4(1), first subparagraph.
[255] Chris Ó Rálaigh, 'From Constructive Ambiguities to Structural Contradictions: The Twilight of the Good Friday Agreement?' (2023) 35 *Peace Review* 404. See also, Anurag Deb and C.R.G. Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: A New Frontier in Human Rights Law?' [2023] *European Human Rights Law Review* 608, 611.

Agreement in a way which is rich in potential and thus consequential for remedies. This is our starting point.

The non-diminution guarantee aside, Annex 1 of the WF lists the six Directives ('Annex 1 Directives') which collectively form the 'area of freedom against discrimination' to which Article 2(1) refers. These Directives,[256] caught by the dynamic alignment obligation under Article 13(3), must be implemented in Northern Ireland law as they are amended or replaced in EU law.

(ii) Domestic law

The text of Article 2 WF, with all its attendant possibilities, is given effect in UK domestic law in two important ways. The first is the general gateway or conduit provided by the EUWA (as amended), section 7A of which provides for all 'rights, powers, liabilities, obligations, restrictions, remedies and procedures'[257] which arise 'from time to time' 'by or under' the WA to be 'recognised and available in domestic law'[258] and 'enforced, allowed and followed accordingly'.[259] This provision also subjects the entirety of the UK statute book – whether existing or emerging – to these rights, powers and obligations.[260] That this provision provides the same 'conduit pipe'[261] to the WA – and within it the WF – as its predecessor provision in the European Communities Act 1972 had done for EU law, was confirmed by the UK Supreme Court in *Allister and Peeples*.[262] Consequently, the WF, including Article 2, supersedes the legal effect of any inconsistent domestic law by virtue of section 7A, which to that extent mirrors Article 4 WA. In the breadth of its language, section 7A also gives effect to any and all principles of EU law, including those regarding the latter's interpretation, enforcement and remedies, as required internationally by Article 4 WA.

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[256] 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; and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
[257] EUWA 2018, s. 7A(1) and (2).
[258] EUWA 2018, s. 7A(2)(a).
[259] EUWA 2018, s. 7A(2)(b).
[260] EUWA 2018, s. 7A(3).
[261] *R (Miller) v Brexit Secretary* [2017] UKSC 5, [2018] AC 61, [65] (Lord Neuberger).
[262] *In re Allister and Peeples* [2023] UKSC 5, [2024] AC 1113, [107] (Lord Stephens). Note that the WF was then called the 'Ireland/Northern Ireland Protocol' and this is the title by which it appears throughout *Allister and Peeples*.

The second relevant statute is the Northern Ireland Act 1998 – the settlement underpinning the devolved administration of Northern Ireland. By its terms, the Northern Ireland Assembly (the devolved legislative body for Northern Ireland) is legally incompetent to enact legislation which is in breach of Article 2(1) WF.[263] This is in contrast with the Assembly's competence to enact legislation in breach of any other part of the WF, since the deletion of the restriction on that competence relating to EU law.[264] While the Assembly is competent to enact such legislation, the Northern Ireland Act 1998 is also subject to section 7A of the EUWA, meaning that any Assembly legislation which breaches the WF (outside of Article 2(1)) will be disapplied in the same way as Acts of the UK Parliament. Nevertheless, the distinction between Article 2(1) and the rest of the WF for its consequences on the Assembly's legislative competence matters in respect of remedies (as covered in more detail below). Buttressing the Assembly's incompetence to enact law in breach of Article 2(1) WF is a bar on devolved Ministers and Departments from making any secondary legislation or taking any action which is incompatible with Article 2(1).[265] These competence restrictions carry implications for remedies.

The Annex 1 Directives are implemented through a variety of domestic legislation within Northern Ireland. Some of these are concerned with matters beyond the provisions of any of the Annex 1 Directives, such as social security for bereavement, but nevertheless the legislation identified here[266] and any other legislation used to implement the obligations within the Annex 1 Directives fall within the scope of Article 13(3). This means that they must be updated in response to any amendments or replacements in the Annex 1 Directives.

However, lawmakers (at Stormont and at Westminster) should take care that the domestic legislation used to implement the Annex 1 Directives – whether primary or secondary legislation – is not inadvertently amended in breach of these Directives. This may happen, for example, when a UK-wide law is amended using powers conferred under the Retained EU Law Act 2023, so that parts of the law (or the whole law) are revoked, restated replaced or updated,[267] and where these changes cut across the

[263] Northern Ireland Act 1998, s. 6(2)(ca).
[264] The European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022, reg 3(3).
[265] Northern Ireland Act 1998, s. 24(aa).
[266] Chronologically, some of these are the Equal Pay Act (Northern Ireland) 1970, the Sex Discrimination (Northern Ireland) Order 1976, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Disability Discrimination Act 1995, the Employment Rights (Northern Ireland) Order 1996, the Race Relations (Northern Ireland) Order 1997, the Fair Employment and Treatment (Northern Ireland) Order 1998, the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 and the Employment Equality (Age) Regulations (Northern Ireland) 2006.
[267] REULA 2023, ss 11-15. See generally, Anurag Deb and Nicholas Kilford, *Devolution in a post Brexit landscape, Theme 2: The devolved governments' powers to change and replace assimilated law* (Human Rights Consortium, 2024) 62.

ability of this law to give effect to the non-diminution commitment and implement the Annex 1 Directives in Northern Ireland, whether in their existing form or any amended or replaced version. This may also happen when UK-wide laws are made outside specific powers of secondary lawmaking conferred by the Retained EU Law Act 2023. Such inadvertent changes may breach both the non-diminution guarantee in that the changes diminish the enjoyment of an EU right by cutting across its fullest realisation through domestic implementation, and the dynamic alignment obligation under Article 13(3). An example of a UK-wide law which could be argued to have breached the non-diminution guarantee is the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 (the 2019 Regulations), made under powers conferred by the Sanctions and Anti-Money Laundering Act 2018 (the 2018 Act). The 2019 Regulations revoke EU laws relating to counter-terrorism sanctions.[268] However, it is unclear the extent to which the 2018 Act or the 2019 Regulations replicate the rights-compliant interpretation of the EU law[269] which has since been revoked. If the 2019 Regulations (or indeed the 2018 Act) are interpreted more strictly than the revoked EU law, then this would mark a diminution within the scope of Article 2 WF. Consider, for example, that the 2018 Act directs that a court reviewing an array of decisions relating to the designation of persons under the 2018 Act (or regulations made under the 2018 Act, such as the 2019 Regulations) must apply standards of judicial review.[270] By contrast, the CJEU has set out a much more intensive standard of 'full review' when faced with a challenge against a designation decision, grounding such intensity in (*inter alia*) Article 47 of the CFR.[271] If designation decisions are scrutinised under the 2018 Act or the 2019 Regulations to a lower standard than that set out by the CJEU, the lower standard may breach Article 2 WF.

(iii) Judicial interpretation

The nature of Article 2 WF assumes singular importance for the question of remedies. Although the exploration of its text and the text of the provisions of the WA and WF above might appear to conclusively state that Article 2 has direct effect and primacy, so that the gamut of remedies under EU law would be available for any domestic breaches of Article 2, the question whether Article 2 has direct effect and primacy remains live

[268] See e.g. Regulation 60 of the 2019 Regulations.
[269] See e.g. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I)*, EU:C:2008:461, *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 4 All ER 829 and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi (Kadi II)*, EU:C:2013:518.
[270] Sanctions and Anti-Money Laundering Act 2018, s. 38(4).
[271] See Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi (Kadi II)*, EU:C:2013:518, para. 119.

at the time of writing. Specifically, though the Northern Ireland Court of Appeal has confirmed that Article 2 has direct effect, the question remains subject to ongoing proceedings.

The UK Government in the cases of *Dillon and others*[272] and *NIHRC & JR295*[273] expressly invited the Northern Ireland courts to conclude that Article 2 either does not have direct effect or has direct effect subject to conditions not set out in the text of either the WA or the WF.[274] This idea has been critically discussed and analysed in previous literature.[275] More relevantly, the idea has thus far been completely rejected by the courts.[276] However, at the time of writing, the UK Government has signalled its intention to appeal *Dillon* to the UK Supreme Court.[277] Consequently, it remains to be seen how the Supreme Court approaches this matter. Nevertheless, we approach this question by adopting the existing judicial understanding – that Article 2(1) has direct effect without any distinction between the non-diminution guarantee and the Annex 1 Directives.

Another key issue is the RSEO itself. Although the chapter contains a list of rights, the list is not exhaustive and is in any event prefaced by a commitment to (among other things) 'the civil rights and the religious liberties of everyone in the community'.[278] This passage has been read as a source of *substantive rights* by the Northern Ireland courts, with both *Dillon*[279] and *NIHRC & JR295*[280] being examples of the enforcement of 'civil rights' taken from this passage, rather than any of the specific enumerated rights in the RSEO. The High Court in *Dillon* went perhaps the furthest to date in attempting to parameterise the phrase 'civil rights', invoking its dictionary definition, 'the political, social and economic rights which are recognised as the entitlement of every member of a community, and which can be upheld by appeal to the law'.[281] The broad sweep of 'civil rights' therefore, has much substantive potential, even as the UK Government urges the courts to narrow it.[282] To like effect, the

[272] *In re Dillon* [2024] NICA 59.
[273] *In re NIHRC and JR295* [2024] NIKB 35.
[274] *In re Dillon* [2024] NICA 59, [83] and *In re NIHRC and JR295* [2024] NIKB 35, [47]-[49].
[275] Scholarly work on the issue includes Christopher McCrudden, 'Human Rights and Equality' in Christopher McCrudden (ed.) *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022), 154-155; Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 50; Anurag Deb and C.R.G. Murray, 'By their powers combined: The Two Article 2s at work in the *In re Dillon* challenge to the Legacy Act' [2025] *European Human Rights Law Review* 178; and Anurag Deb and C.R.G. Murray, 'Article 2 of the Windsor Framework, the Legacy Act and the Illegal Migration Act: Adjusting to Post-Brexit Realities' [2025] *Public Law* 477, 484-485, 497.
[276] *In re Dillon* [2024] NICA 59, [84]-[85] and *In re NIHRC and JR295* [2024] NIKB 35, [56]-[57].
[277] Hilary Benn MP (Secretary of State for Northern Ireland), HC Deb., vol. 758, col. 418 (4 December 2024).
[278] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para. 1.
[279] *In re Dillon* [2024] NICA 59, [114]-[115].
[280] *In re NIHRC and JR295* [2024] NIKB 35, [68].
[281] *In re Dillon* [2024] NIKB 11, [543]. This was affirmed by the Court of Appeal in *In re Dillon* [2024] NICA 59, [115].
[282] *In re Angesom* [2023] NIKB 102, [107].

phrase 'everyone in the community' has been consistently given a broad meaning. In *Angesom*[283] and *NIHRC & JR295*,[284] the High Court held that asylum seekers fell within the scope of 'the community' and thus had their rights protected under Article 2 WF.

Although the correctness of the judgments canvassed in this section are all contingent on higher authority (the appeal of *Dillon* in the UK Supreme Court), and some subject to active appeal, at the time of writing we can clearly derive two important points from them. First, Article 2 WF as a whole has direct effect and second, the RSEO rights (as underpinned by relevant EU law) which form the baseline from which to measure diminution are construed broadly in their scope and their application.

Domestic implications of breaching Article 2 WF

The implications of breaching Article 2 WF in or in relation to Northern Ireland can be broadly understood in two ways: the procedural implications and the substantive implications. Each of these is considered generally in this section, with specific examples covered in the next section.

(i) Procedural implications

Procedural implications in this chapter refer to the manner in which breaches of Article 2 WF can be brought to the attention of the courts, or to the manner in which the risk of such breaches can be addressed as part of the law-making process, both at Stormont and at Westminster.

As a preliminary point, individuals who are impacted by a breach of Article 2 WF can directly challenge such a breach in the courts. These challenges can be taken in respect of both devolved authorities in Northern Ireland, such as a devolved Minister or Department, and UK-wide authorities. The two most important Article 2 challenges to date – *Dillon* and *NIHRC & JR295* – are clear examples of challenges against primary legislation enacted by the UK Parliament, with the respondents in each case being the Secretary of State for Northern Ireland in *Dillon* and the Home Secretary in *NIHRC & JR295*. This follows from the fact that Article 2 WF binds 'the UK in respect of Northern Ireland', making no distinction between tiers of government in respect of its legal obligations. The upshot to this is the clear rule that any public authority, of any character, will be bound by Article 2 WF insofar as that public authority has a function or

[283] *In re Angesom* [2023] NIKB 102, [108].
[284] *In re NIHRC and JR295* [2024] NIKB 35, [68].

obligation in relation to Northern Ireland which falls within the scope of Article 2. This is explored in more detail further below.

However, aside from challenges taken by aggrieved people against public authorities for breaches of Article 2 WF, there exist three main avenues by which breaches can be challenged. The first, explored in more detail in the next section, involves horizontal challenges – that is, a challenge invoking Article 2 WF which arises in proceedings between two or more non-State parties. The second is via the NIHRC and/or the ECNI, under their respective statutory rights to bring or intervene in judicial review proceedings under Article 2 WF.[285] The third route, as detailed below, involves the prosecution and determination of devolution issues under the Northern Ireland Act.

Given that both the Northern Ireland Assembly devolved executive authorities (Ministers and Departments) are barred from breaching Article 2(1) WF (as explored above), the question whether such breaches have occurred or would occur falls within the scope of devolution issues and their extensive monitoring mechanisms under the Northern Ireland Act.[286] Of note is the prominent role played by the Law Officers, with the Attorney General for Northern Ireland and the Advocate General for Northern Ireland able to bring or defend proceedings in Northern Ireland for determining devolution issues.[287] Such issues must be referred to the Court of Appeal in Northern Ireland from tribunals from which no appeal lies,[288] and may be referred by other courts and tribunals,[289] with any appeal from the Court of Appeal lying in the Supreme Court.[290] The Court of Appeal may itself refer devolution issues to the Supreme Court,[291] and the Attorneys General for England and Wales and Northern Ireland and the Advocates General for Northern Ireland and Scotland may refer devolution issues directly to the Supreme Court.[292] The point of highlighting these provisions is to underline the importance of monitoring the domestic laws which apply to and in Northern Ireland by Law Officers – whether devolved (the Attorney General for Northern Ireland) or in the UK Government (the Advocate General for Northern Ireland) – in order to ensure that devolved Northern Ireland authorities (the Assembly and the Executive) do not breach Article 2(1) WF. This is a narrower remit than that of the NIHRC and ECNI, which monitor both devolved and central

[285] Northern Ireland Act 1998, s. 78C(1)(a).
[286] Northern Ireland Act 1998, sch. 10.
[287] Northern Ireland Act 1998, sch. 10, para. 4. The Attorney General for Northern Ireland is the chief legal adviser to the Northern Ireland Executive and has a range of statutory responsibilities relating to devolved matters in Northern Ireland. The Advocate General for Northern Ireland is the chief legal adviser to the UK Government on Northern Ireland matters, having a range of statutory functions in this context.
[288] Northern Ireland Act 1998, sch. 10, para. 8.
[289] Northern Ireland Act 1998, sch. 10, para. 7 and 8.
[290] Northern Ireland Act 1998, sch. 10, para. 10.
[291] Northern Ireland Act 1998, sch. 10, para. 9.
[292] Northern Ireland Act 1998, sch. 10, para. 33 and 34.

government implementation of Article 2(1) WF.[293] Nevertheless, the Law Officers also have responsibilities in this context.

(ii) Substantive implications

Article 4(1) WA mandates that the:

> provisions of [the WA] and the provisions of [EU law] made applicable by [the WA] … produce in respect of and in the United Kingdom the same legal effects as those which they produce within the [EU] and its Member States.[294]

Substantively, this provision, as given effect via section 7A of the EUWA, undergirds the domestic availability of EU law remedies for breaches of EU law which fall within the scope of Article 2 WF. This means that remedies such as *Francovich* damages, explored in detail in the previous chapters, remain available in domestic law. Significantly, although the EUWA extinguishes *Francovich* damages in domestic law on its face,[295] it does so in a limited manner. Most relevantly, the extinguishment of the *Francovich* rule does not apply to section 7A of the EUWA,[296] meaning that it remains explicitly preserved by the EUWA insofar as it applies to Article 2 WF.[297]

However, the availability of these EU law remedies within the UK's constitutional order does not preclude these remedies being enhanced by remedies of pure domestic law, particularly when it comes to obligations of keeping pace with evolving EU law under Article 13 WF. The recent UK Supreme Court judgment in *Imam* is of particular relevance in this context.[298] Factually, *Imam* had nothing to do with EU law or the WF, being concerned with a local housing authority in England having breached its statutory duties.[299] However, it is significant in that the UK Supreme Court clarified how a court should exercise its discretion to grant relief in judicial review proceedings, considerably circumscribing the discretion to refuse mandatory orders, or orders for *mandamus*, as they continue to be known in Northern Ireland.[300] The point here is that a breach of the dynamic alignment requirement under Article 13(3) as given effect by section 7A of the EUWA may, in appropriate cases, require the grant of *mandamus* if a future amendment or replacement of part or

[293] Northern Ireland Act 1998, ss. 78A(2) (for the NIHRC) and 78B(2) (for the ECNI).
[294] Article 4(1) WA, first subparagraph.
[295] EUWA 2018, sch 1 para 4.
[296] EUWA 2018, sch 1 para 5(1).
[297] See Chapter 2 above.
[298] *R (Imam) v London Borough of Croydon* [2023] UKSC 45, [2024] 2 All ER 93.
[299] *R (Imam) v London Borough of Croydon* [2023] UKSC 45, [2024] 2 All ER 93, [1].
[300] *R (Imam) v London Borough of Croydon* [2023] UKSC 45, [2024] 2 All ER 93, [67]-[71]. For the relevant terminology see the Judicature (Northern Ireland) Act 1978, s. 18(1)(a), *cf*. the Senior Courts Act 1981, s. 29(1).

all of an Annex 1 Directive is improperly or not at all transposed in Northern Ireland. How this might happen is considered in the next section, but it is important to set out why (beyond the clear requirement in the WF) this may generally be appropriate as a matter of domestic law.

The fact that *Imam* concerned a local authority is of no consequence to applying for mandatory relief against (for example) a Northern Ireland Minister.[301] The question would be whether the obligation of dynamic alignment was expressed in terms which lend themselves to *mandamus*. The relevant statutory duty in *Imam* was 'immediate, non-deferrable and unqualified',[302] terms which could fairly be applied to the obligation under Article 13(3) WF. Of course, while Article 13(3) merely says that any EU law referred to in the WF 'shall be read as referring to that [EU law] as amended or replaced', *reading* EU law as amended or replaced would create an automatic obligation on relevant domestic authorities to amend or replace the domestic laws used to implement the (amended or replaced) Annex 1 Directives, insofar as such amendments or replacements are necessary within domestic law. The practical implications of this obligation are covered in more detail with an example in the next section, but it is sufficient to observe at this point that *mandamus* may validly lie against a Northern Ireland authority in this context.

Remedies in specific scenarios

(i) The importance of direct effect for remedies

The scenarios covered in this section are all premised on Article 2 WF having direct effect in domestic law. At the time of writing, this question remains live, pending its determination by the UK Supreme Court in *Dillon*, notwithstanding the fact that Northern Ireland courts have affirmed the direct effect of Article 2 thus far (as explored above). In a previous report for the NIHRC, the textual basis in the WA for the direct effect of Article 2 WF was explored in detail.[303]

It may therefore be necessary to set out the consequences for remedies should Article 2 be taken not to have direct effect. To begin, we take as our starting point (covered earlier) the current judicial understanding of Article 2 WF – that it has direct effect. For Article 2 WF to talk of non-diminution of rights would make no sense if the supposed rights are not

[301] The historical position that *mandamus* could not lie against a Minister of the Crown (*R (Diamond and Fleming) v Warnock* [1946] NI 171, 175 (Andrews LCJ) (NIHC)) or servant of the Crown more generally (*The Queen v The Lords Commissioners of the Treasury* (1872) LR 7 QB 387, 394 (Cockburn CJ) (EWHC)), has long been displaced within the law of judicial review, see *In re M* [1994] 1 AC 377, 416A-C (Lord Woolf) (UKHL).
[302] *R (Imam) v London Borough of Croydon* [2023] UKSC 45, [2024] 2 All ER 93, [38].
[303] Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 50.

connected to related remedies, or even litigable, because of the lack of direct effect.[304] The UK Parliament, moreover, has recognised that the provision must generate litigable rights, in that it has made explicit provision for the NIHRC or ECNI to institute and intervene in litigation over Article 2 in general terms.[305] There is a further acknowledgment of the 'proceedings or proposed proceedings by a person in respect of an alleged breach (or potential future breach) of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement'.[306] These provisions would be nonsensical if Article 2 was meant to amount to mere guidance, therefore it must allow for the direct effect which generates litigable rights.

The inapplicability of direct effect to the non-diminution guarantee would be most keenly felt by aggrieved parties where the breach of the guarantee was contained in an Act of the UK Parliament. If direct effect is unavailable, so too is disapplication, because the unavailability of direct effect means the lack of enforceability of the primacy of EU law in the domestic legal order.[307] This leads us to the text of Article 4(2) WA, which mandates the availability of disapplication of inconsistent domestic law 'through domestic primary legislation', without distinction as to the character of the inconsistent domestic law being disapplied (in terms of whether that law is devolved or not).

Consequently, we reiterate that the suggestion that Article 2 WF does not possess direct effect – either wholly or partially – requires a convoluted and disjointed reading of the relevant provisions of the WF and the WA, and cannot be squared with some of those provisions. We therefore explore the examples in the rest of this chapter by adopting the position that Article 2 WF – in its entirety – has direct effect.

(ii) The role of Article 47 CFR

The importance of Article 47 CFR, and its direct effect in EU law, has already been highlighted in this report (Chapter 2) and earlier reports.[308] Through Article 2 WF, Article 47 CFR itself becomes an importance source of remedies for breaches of and indeed *by* EU law – both in terms of the non-diminution guarantee and the Annex 1 Directives. In Chapter 2 and more substantively in earlier research, the importance of the duty of consistent interpretation has been highlighted as a way of ensuring that

[304] See also *In re Dillon* [2024] NICA 59, [149].
[305] Northern Ireland Act 1998, s. 78C.
[306] Northern Ireland Act 1998, s. 78D.
[307] This does not apply to devolved primary legislation (i.e. Acts of the Northern Ireland Assembly), which is barred from breaching Article 2 WF as previously set out.
[308] See Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024).

EU law is read consistently with the requirements of, among other provisions, Article 47 CFR, so that this provision can assist an aggrieved party to 'bridge' any gaps left between either EU secondary law or the implementing legislation of Member States (and the UK), and EU primary law. The requirement of Article 47 CFR that there be an 'effective remedy' for breaches of rights under EU law also has the potential to refashion or create entirely new remedies within domestic legal orders. This has a particular salience in connection with primary legislation which applies to the whole of the UK, but which falls foul of the protections of Article 2 WF. This provision sets a higher base line of litigable rights protections in respect of Northern Ireland than exist in other parts of the UK, and it would undermine the purpose of this higher baseline if public bodies in the UK were able to circumvent these protections by removing cases from the Northern Ireland jurisdiction.

Consider the *Angesom* case.[309] In this case, an asylum seeker who arrived in and was originally accommodated in Northern Ireland, was subsequently moved to Scotland in order to increase the capacity for Northern Ireland to cater for an increase in the arrival of asylum seekers. Immigration and asylum are matters over which devolved authorities in Northern Ireland have no competence, these being matters which are in the exclusive domain of central government and the UK Parliament.[310] Following the enactment of the Illegal Migration Act 2023, the UK Government possesses the power to bring into effect provisions which disapply a range of legal protections for refugees and asylum seekers.[311] In *NIHRC & JR295*, many of these provisions were disapplied in Northern Ireland pursuant to Article 2 WF.[312] Suppose that the disapplied provisions of the Illegal Migration Act were brought into force in the rest of the UK and that an asylum seeker in circumstances similar to *Angesom* were moved out of Northern Ireland, where they had first arrived in the UK, to another part of the UK, and is there subject to the disapplied provisions of the Illegal Migration Act. The question here is whether there would be a breach of Article 2 WF in this scenario and if so, what remedy might lie against such a breach. Assuming a breach is found, this scenario is an important illustration of the capacity of Article 47 CFR (assuming the *SPUC* test is satisfied) not only because it is based on a real case, but also because EU secondary laws dealing with asylum are 'specific expressions'

[309] *In re Angesom* [2023] NIKB 102.
[310] Northern Ireland Act 1998, sch. 2 para. 8.
[311] Illegal Migration Act 2023, s. 5, which under s. 68(1) may only come into force on 'such day as the Secretary of State may by regulations appoint'. Note that the newly introduced (at the time of writing) Border Security, Asylum and Immigration Bill (HC Bill (2024-25) 173) at cl. 38(1) would if enacted repeal this provision of the Illegal Migration Act 2023.
[312] *In re NIHRC and JR295* [2024] NIKB 35, [178] and [260].

of Article 18 CFR (the right to asylum).[313] Article 47 may therefore be used to remedy a breach of CFR rights.

Superficially, it may be thought that removal from Northern Ireland places an individual outside the territorial reach of Article 2. However, as previously set out, the WF binds 'the United Kingdom in respect of Northern Ireland', phrasing which is not limited to the *territory of* Northern Ireland. Moreover, the RSEO rights – namely the 'civil rights of … everyone in the community' apply broadly in terms of the content of the rights, as well as to the scope of the 'community' in question. Consequently, as in *Angesom*, the asylum seeker who arrives in Northern Ireland forms part of its community and comes within the scope of Article 2 WF. If physically removing such a person were enough to take them out of the scope of Article 2, then the words 'in respect of' in the phrase 'the United Kingdom in respect of Northern Ireland' would be narrow enough to effectively comprise a territorial restriction. Put differently, if removing asylum seekers from Northern Ireland meant that they lose the protection of Article 2, then Article 2 must by that logic apply only within the territory of Northern Ireland, and that this territory is all that 'the United Kingdom in respect of Northern Ireland' means. It is doubtful that such a narrow meaning is the true construction of the phrase, considering that the phrase applies to the entire WF, and the EU-UK Joint Committee is authorised to specify (and has specified)[314] which goods may be authorised to be brought into Northern Ireland from elsewhere in the UK without being at risk of subsequently being moved into the EU.[315] If the WF or decisions taken thereunder bind businesses which are not established within the territory of Northern Ireland,[316] it stands to reason that the scope of the obligations under the WF generally is not limited to the territory of Northern Ireland *per se*. Thus, it is possible that Article 2 WF has effect in the UK beyond the territory of Northern Ireland, so long as the elements of the non-diminution guarantee are satisfied.

Article 2 rests on the RSEO which guarantees rights to 'everyone in the community', without defining the scope of 'community'. Moreover, it is for the very reason of the special rights context in Northern Ireland that Article 2 was devised. The obvious difficulty with the 'community' precondition is the extent to which an individual can be considered to be part of 'the community' in Northern Ireland if they are no longer *in* Northern Ireland. Christopher McCrudden theorises that 'the community' for the purposes of the RSEO includes everyone on the island of Ireland,

[313] See Case C-134/23, *Somateio and another v Ypourgos Exoterikon and another*, EU:C:2024:838, para. 55.
[314] See Decision No 4/2020 of the Joint Committee on the determination of goods not at risk [2020/2248], [2020] OJ L 443 6, Art 5, repealed and replaced by Decision No 1/2023 of the Joint Committee laying down arrangements relating to the Windsor Framework [2023/819], [2023] OJ L 102 61.
[315] WA, WF, Article 5(2), fourth subparagraph.
[316] Decision No 4/2020, Art 6(a)(ii) and Decision No 1/2023, Art 10(a)(ii).

because the RSEO also obliges the Irish Government to protect human rights within Ireland to 'ensure at least an equivalent protection of human rights as will pertain in Northern Ireland'.[317] Alison Harvey, looking specifically at the question whether Article 2 extends to refugees and asylum seekers in Northern Ireland, agrees.[318] But even this interpretation does not answer the question whether 'the community' includes persons in Great Britain. The RSEO obliges the UK Government to 'complete the incorporation into *Northern Ireland law* of the European Convention on Human Rights' without obliging any comparable steps in respect of Great Britain.[319] Consequently, whereas the Irish Government's human rights obligations in respect of the Republic of Ireland are linked to those in Northern Ireland, drawing an explicit equivalence between the two, the UK Government's obligations in this regard extend to Northern Ireland only. This may appear to suggest that persons in Great Britain with no connection to the island of Ireland (or Northern Ireland specifically) would lie outside the scope of Article 2 WF.

But if the above claim is correct, the refugee or asylum seeker who entered the UK via Northern Ireland would find themselves in a precarious position – being part of the community of Northern Ireland initially, they may be unable to claim the protections under Article 2 WF while in Great Britain, notwithstanding their clear connection to Northern Ireland. In any event, *Angesom* might be thought of as definitively providing a negative answer to this issue, with its insistence that an asylum seeker did not (and does not, for the purposes of Article 2) possess a right to choose where they are housed under longstanding immigration policy which predates Brexit.[320] But it must be remembered that *Angesom* predated the evaluation of the Illegal Migration Act 2023's implementation in *NIHRC & JR295*. The immigration policy that was then in place throughout the UK did not openly and by statutory mandate disregard so many of the protections under both EU law and the ECHR which triggered the application and enforcement of Article 2. Following *NIHRC & JR295*, immigration policy or law which is at least similar to the Illegal Migration Act will risk similar disapplication in Northern Ireland and to that extent pose a risk to an asylum seeker upon their dispersal beyond Northern Ireland which was not the case in *Angesom*. Put differently, *Angesom* was dealing with a largely similar legal landscape in immigration and asylum

[317] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para 9. See Christopher McCrudden, 'Human Rights and Equality' in Christopher McCrudden (ed.) *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022), 150-151.
[318] Alison Harvey, *Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum* (NIHRC 2023), 7.
[319] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (1998) 2114 UNTS 473, RSEO, para 2. Emphasis added.
[320] *In re Angesom* [2023] NIKB 102, [109].

as had existed in the UK prior to Brexit.[321] There was thus no breach of EU law by which to trigger Article 2 WF. The Illegal Migration Act presented an altogether different scenario – not only risking but openly disregarding protections under EU law. This disregard compounds the precarity of the refugee or asylum seeker, who risks losing the protection of the EU laws which apply in Northern Ireland as part of the non-diminution guarantee under Article 2 WF.

But what if any remedies would the asylum seeker have in this scenario? Two options may be considered. First, notwithstanding the likely inapplicability of the RSEO generally to Great Britain, the asylum seeker would in a limited sense 'carry' the protections under Article 2 WF with them no matter where they are in the UK, so that a public authority anywhere in the UK would be obligated to give effect to Article 2 WF in the same way as public authorities in Northern Ireland are obligated so to do. Second, the asylum seeker would be able to obligate the UK Government to return them to Northern Ireland, where their Article 2 rights are afforded more effective protection. Neither option can be put into practice without difficulty, but it is worth considering each in turn.

On the first option, an asylum seeker 'carries' the protection of Article 2 WF throughout the UK. This follows from three points. First, Article 2 WF – as indeed the rest of the WF – is addressed to the UK 'in respect of Northern Ireland' and not just the physical territory of Northern Ireland. Second, the asylum seeker entered the UK via and was initially accommodated in Northern Ireland, thus coming within 'the community' as contained in the RSEO,[322] and thereby enjoying the protection of Article 2. Third, to the extent that the dispersal of the asylum seeker (or the decision to disperse the asylum seeker) or refugee was ordered to bypass the protections under Article 2 (in other words, to take that person from Northern Ireland where a relevant EU right applies, to Great Britain, where such a right no longer applies),[323] Article 47 CFR could operate to compel courts throughout the UK to effectively 'reinstate' to the asylum seeker the EU law rights which would otherwise be inapplicable in respect of asylum in Great Britain. Any disregard of such rights by the UK Government would therefore have to be quashed or injuncted, with or without *Francovich* damages.

However, as previously set out, the devolved institutions – namely the Assembly, devolved Ministers and Departments – are barred from

[321] The relevant EU law in play in *Angesom* was Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31, see *In re Angesom* [2023] NIKB 102, [85]. At the time *Angesom* was decided, there was no definitive finding of the inapplicability of this Directive in Great Britain, though see the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, sch 1, para. 5 and 6 and *R (AAA and others) v Home Secretary* [2023] UKSC 42, [2024] 1 All ER 1, [148].
[322] See *In re Angesom* [2023] NIKB 102, [107]-[108] and *In re NIHRC and JR295* [2024] NIKB 35, [68]-69].
[323] See *In re NIHRC and JR295* [2024] NIKB 35, [76]-[86].

breaching Article 2 WF under the terms of the Northern Ireland Act. This bar does not extend to any other comparable devolved institutions in Great Britain, or to the UK Government, which are rather caught by the rights and obligations flowing from the WA as they arise under section 7A of the EUWA. There is a functional distinction, however, between the bar under the Northern Ireland Act and the obligations which arise under the EUWA. Under the Northern Ireland Act, devolved Northern Ireland institutions are stripped of any authority to breach Article 2 WF – meaning that these authorities are *prevented* from making any law or acting in breach of the provision (as set out earlier). Consequently, for example, any laws made in breach of Article 2 WF are not valid law and can be struck down by the courts. Once struck down, there is no risk of such laws being reactivated. By contrast, section 7A of the EUWA might operate to disapply laws made in breach of the WA, but disapplication does not invalidate the disapplied law; it remains valid and in the statute book. The bar under the Northern Ireland Act, in other words, is a more effective remedy in relation to Article 2 WF.

It might be considered that, in the context of immigration and asylum – matters in the exclusive competence of the UK Government and the UK Parliament – the more effective bar under the Northern Ireland Act would not matter in the context of a breach which could only come from central government. But immigration and asylum are not so cleanly circumscribed in practice, and devolved functions or duties may relate to immigration and asylum matters. Information sharing between the Police Service of Northern Ireland (PSNI) and the Home Office – like with other police forces throughout the UK – is a useful example of an interaction between a devolved authority and exclusive central government competences. The Northern Ireland Policing Board, which oversees and monitors the PSNI[324] and to which the Chief Constable of the PSNI reports,[325] has a duty to issue a Code of Ethics[326] which binds the PSNI in its operational capacity.[327] The revised Code of Ethics enjoins police officers to keep confidential 'information or data of a personal or confidential nature' unless 'the performance of duty, compliance with legislation or the needs of justice require otherwise'.[328] Among the range of authorities which the Policing Board is required to consult before issuing a Code of Ethics is the (devolved) Department of Justice.[329] The relevant bar under the Northern Ireland Act may operate to prevent the Department from agreeing a Code of Ethics which could or would effectively disregard the protections of Article 2 WF in immigration and

[324] Police (Northern Ireland) Act 2000, s. 3(1) and (2).
[325] Police (Northern Ireland) Act 2000, s. 33A(1).
[326] Police (Northern Ireland) Act 2000, s. 52(1).
[327] Police (Northern Ireland) Act 2000, s. 31A(2).
[328] PSNI Code of Ethics 2008, Article 3.3.
[329] Policing (Northern Ireland) Act 2000, s 52(5)(b).

asylum matters, by enabling the unrestricted sharing of information about (for example) victims of crime or complainants with irregular immigration status where such sharing risked these individuals being dispersed outside the protections of Article 2 WF. In 2023 the PSNI was revealed to have shared with the Home Office the details of 33 victims of crime with irregular immigration status between May 2020 and May 2022,[330] prompting questions at the Policing Board.[331] Moreover, it must be remembered that the Home Office and the Home Secretary themselves are required to act compatibly with Article 2 WF.[332] Consequently, it is also arguable that the *use* of personal data for the purposes of disregarding the protections of Article 2 WF is a breach of the relevant statutory duty.

The second option for a remedy in this context is for the asylum seeker to compel the UK Government to return them to Northern Ireland, where they would most clearly enjoy the protection of Article 2 WF. But such a remedy may face a difficulty in domestic law. The closest domestic law analogy to the remedy suggested here is the writ of habeas corpus, used to compel public authorities which detain an individual to produce that individual before a court which can scrutinise the individual's detention to determine its legality. In *Re Keenan and Another*,[333] Lord Denning MR held that the England and Wales courts had no authority to issue a writ of habeas corpus to the courts in Northern Ireland, as Ireland had been granted judicial independence of the English courts in 1782.[334] The reverse question (whether the courts in Northern Ireland had any authority to issue a writ of habeas corpus to the courts of England and Wales, so that Northern Ireland courts could scrutinise the legality of an individual detained in England and Wales) was not considered in *Re Keenan*, but it would be surprising if the reverse could be answered affirmatively, given the equivalence drawn by the Master of the Rolls between jurisdictions of the England and Wales courts and those in Northern Ireland.[335] Nevertheless, we suggest that Article 47 CFR could be used to resolve this difficulty and create a limited jurisdiction for Northern Ireland courts to compel the return of refugees and asylum seekers to Northern Ireland where they had been removed from Northern Ireland and the protection of Article 2 WF. Applying the *SPUC* test would, in this context, lead to much the same conclusion as in *NIHRC & JR295* (given this scenario is predicated on there being a statute similar to the Illegal Migration Act being enacted again). This means that the relevant

[330] Luke Butterly, 'Migrants risk being deported after reporting crimes to PSNI' (*The Detail,* 14 February 2023).
[331] Written Question by Les Allamby to the NI Policing Board, 6 April 2023.
[332] EUWA, s. 7A.
[333] *In re Keenan and Another* [1972] 1 QB 533.
[334] *In re Keenan and Another* [1972] 1 QB 533, 542A.
[335] *In re Keenan and Another* [1972] 1 QB 533, 541F. Note, although *In re Keenan* is not binding on the courts in Northern Ireland, we suggest it would be highly persuasive.

RSEO right can be found in the 'civil rights ... of everyone in the community' and the underpinning EU law would be 'the Procedures Directive, the Qualification Directive, the Trafficking Directive, the Dublin III Regulation and the CFR'.[336] Article 47 CFR is thus relevant to a question of an effective remedy - namely conferring on courts in England and Wales and Scotland the power to order that an asylum seeker moved from Northern Ireland be returned there.

Of course, given the conditions in which the refugee or asylum seeker is accommodated, it may be that habeas corpus has no relevance in this context if the accommodation in question is held not to fall within the scope of detention remediable by habeas corpus.[337] In this case, Article 47 CFR may still be used by a court in Northern Ireland to locate the authority to order the return of a refugee or asylum seeker to Northern Ireland for the benefit of the protections under Article 2 WF, as an effective remedy for their breach.

The authority to use Article 47 CFR in this way, whether or not habeas corpus applies, is not novel, given longstanding CJEU precedent for:

> … a national court [which] is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by [relevant EU law], to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of [relevant EU law] in order to achieve an outcome consistent with the objective pursued by [the relevant EU law] … must thus do whatever lies within its jurisdiction to [achieve that objective].[338]

The objective in this context would be to accommodate refugees and asylum seekers in accordance with the protections guaranteed under EU law via Article 2 WF. If the availability of those protections in Great Britain is at best questionable (as explored above), then refugees and asylum seekers must be brought back to Northern Ireland where those protections remain available. The point of a remedy in this context is to generate legal certainty for the refugee or asylum seeker whose rights under Article 2 WF are breached, and we are of the view that Northern Ireland pre-eminently remains the place where these rights may be most effectively realised, given effect and enforced.

[336] See *In re NIHRC and JR295* [2024] NIKB 35, [109], [115] and [175].
[337] See e.g. *The Father v Worcestershire County Council* [2025] UKSC 1, [2025] 2 WLR 155. For unlawful imprisonment at common law in an immigration context, see e.g. *R (Jalloh) v Home Secretary* [2020] UKSC 4, [2021] AC 262.
[338] Case C-397/01 *Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584 para. 119.

(iii) Breaches or failures in the implementation of EU law: remedies against public authorities

Under the non-diminution guarantee, the enjoyment of rights under EU law which underpins a relevant RSEO right cannot be diminished. Given the broad reading of the RSEO which the Northern Ireland courts have thus far adopted in this context (as above), there is a particular need for public authorities to consider their lawmaking powers in relation to domestic legislation used to implement EU law under the WF. The broad reading of the RSEO rights – especially as regards the 'civil rights ... of everyone in the community' – effectively broadens the scope of applicable EU law underpinning these rights. Most relevant here is the role played by CFR rights. In *Dillon*, the Court of Appeal was not attracted to the idea that the CJEU considered that the CFR contained freestanding rights which themselves could be enforced in domestic law (rather than acting as an interpretive aide to EU law).[339] Nevertheless, as has been pointed out in previous scholarship and a previous report for the NIHRC, as the CJEU's understanding of the CFR evolves, this evolution generally applies retrospectively,[340] so that if CFR rights are held to be freestanding in future, they will have been so for all time. Consequently, a freestanding CFR right could, at some point in the future, come to underpin a relevant RSEO right, whether listed or unlisted. Put differently, if a CFR right is interpreted to be freestanding, it would not need any other EU law 'hook' by which to fall within the scope of Article 2 WF. Article 47 CFR may thus rise in prominence.

As respects the dynamic alignment obligation, Article 13(3) WF mandates that any 'Union act' referred to in the WF be 'read as referring to that Union act as amended or replaced'. 'Union act' in this context refers to secondary EU law.[341] Thus, when applied to the six Annex 1 Directives, Article 13(3) requires these Directives to be given effect domestically as they are amended or replaced by the EU, so that these Directives (as amended or replaced) in Northern Ireland produce the same legal effects as they do throughout the EU on a continuing basis – a phenomenon known as dynamic alignment. However, 'amended' and 'replaced' are not defined in the WF, leaving their interpretation open. Although the WF contains a mechanism by which the EU informs the UK whether new EU secondary law amends or replaces any of the secondary law referred to in the WF,[342] the lack of such notification does not conclusively answer the question whether a new EU act amends or replaces a listed act within the

[339] *Dillon* (n 272), [143].
[340] Anurag Deb and C.R.G. Murray, 'By their powers combined: The Two Article 2s at work in the *In re Dillon* challenge to the Legacy Act' (2025) EHRLR 178, 181-182 and see Tobias Lock, Eleni Frantziou and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 63-64.
[341] WA, Article 2(a)(iii).
[342] WA, WF, Article 15(3)(b).

meaning of the WF.[343] In the context of the Annex 1 Directives, the NIHRC and ECNI have instead pointed to a non-exhaustive range of factors – including the legal basis for any new EU act, its purpose, the degree of overlap between the new act and an Annex 1 Directive, any relevant case law of the CJEU and the extent to which the new act 'facilitates the implementation and/or enforcement of' an Annex 1 Directive[344] – as relevant to the question whether a new EU act amends or replaces an Annex 1 Directive.

We note that, as the dynamic alignment requirement applies across all EU secondary law listed in the WF, the lack of the CJEU's preliminary reference jurisdiction over Article 2 and Annex 1 is no bar to a preliminary reference made to the CJEU arising, for example, out of Article 5 with respect to whether a new EU act amends or replaces a listed act under Annex 2.[345] Consequently, it is immanently possible for a domestic court to seek clarification from the CJEU as to the precise scope of the dynamic alignment requirement in Article 13(3) WF. In the absence of such clarification, we adopt the position of the NIHRC and ECNI in this regard.

Regardless of the scope of the dynamic alignment obligation, when an Annex 1 Directive is amended or replaced within the meaning of Article 13(3) WF, the Directive in question must be 'read' as referring to the Directive as amended or replaced. Depending on the content of the amendment or replacement, the corresponding implementing legislation in Northern Ireland may require amendment. An example is the Pay Transparency Directive (PTD).[346] The scope of this directive goes to (among other matters) information about pay prior to employment,[347] pay setting and progression during employment,[348] reporting on the gender pay gap in employment[349] and enhanced remedies for breaches of the principle of equal pay.[350] Of these, the Employment Act (Northern Ireland) 2016 covers only gender pay gap reporting,[351] and even this provision has not yet been commenced.[352] Moreover, it is far from clear that all provisions of the PTD are directly effective (in that they would pass the

[343] ECNI and NIHRC, *ECNI and NIHRC Briefing Paper: The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2* (ECNI and NIHRC 2024), para. 2.23.
[344] ECNI and NIHRC, *ECNI and NIHRC Briefing Paper: The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2* (ECNI and NIHRC 2024), para. 3.4.
[345] WA, WF, Article 12(4).
[346] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 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 [2023] OJ L 132/21.
[347] Directive (EU) 2023/970, Article 5.
[348] Directive (EU) 2023/970, Article 6.
[349] Directive (EU) 2023/970, Article 9.
[350] Directive (EU) 2023/970, Chapter III.
[351] Employment Act (Northern Ireland) 2016, s. 19.
[352] Employment Act (Northern Ireland) 2016, s. 29(2).

test of direct effect),[353] particularly those provisions which call for the introduction of measures in national law. Consequently, the implementation of the PTD in Northern Ireland law requires considerable legislative changes.

Domestically, an unimplemented or inadequately implemented obligation of EU law may trigger the award of *Francovich* damages to the aggrieved party. But this does not by itself remedy the implementation problems, nor guarantee that implementation in response to the award of such damages does not itself give rise to problems, whether intended or not. This might be considered to be an extreme scenario, but it is similar to the suspension of checks pursuant to EU law as applicable under the WF by the former Northern Ireland Minister for Agriculture, Environment and Rural Affairs in a charged political climate.[354] Moreover, although the UK Government has taken over the implementation of Articles 5-7 and Annex 2 of the WF,[355] the implementation of the obligations under Article 2, particularly the dynamic alignment of the Annex 1 Directives read with Article 13(3) WF remains under the purview of devolved authorities in Northern Ireland. In circumstances where the WF remains subject to political controversy in Northern Ireland,[356] the risk of incomplete transposition or a complete failure of transposition of amendments or replacements to Annex 1 Directives remain concerning.

The concerns of incomplete or failed transposition are exacerbated when considering that, in comparison to the monitoring and enforcement mechanisms in this regard via infringement proceedings against Member States,[357] dispute settlement under the Withdrawal Agreement is subject largely to arbitration (as covered in Chapter 5). This matters because infringement proceedings under EU law provide direct access to the CJEU[358] whereas arbitration proceedings under the Withdrawal Agreement only provide indirect access. In effect, this means that the only authoritative arbiter of issues of EU law – the CJEU – has a qualitatively lighter oversight as regards the operation and evolution of the domestic law transposing the Annex 1 Directives when compared to the rest of the WF, and indeed when compared to the oversight the Court has over Member State laws in similar situations (and had over UK laws in general when the UK was a Member State).[359] Consequently, the question whether an Annex 1 Directive is inappropriately transposed as that

[353] See Case C-41/74, *Van Duyn v Home Office,* EU:C:1974:133, para. 13.
[354] *In re Rooney and others* [2022] NIKB 34, [75]-[78].
[355] The Windsor Framework (Implementation) Regulations 2024, reg. 2(2) and 3(2).
[356] See Lord Dodds, 'Business identifying Windsor Framework problems and solutions' *MyDUP* (7 February 2025).
[357] TFEU, Article 258.
[358] TFEU, Article 260.
[359] Even considering the power of the Dedicated Mechanisms to bring Article 2 WF related matters to the attention of the Specialised Committee under Article 165 WA (see Article 14(c) WF).

Directive is amended or replaced may itself be left unanswered (or at least unanswered for some time) in the operation of Article 2 WF. The response to incomplete or failed domestic transposition at the international level, in other words, is slower and more cumbersome. This in turn would lengthen any rights breaches as a result of incomplete or failed transposition.

The question therefore is whether *Francovich* damages are sufficient for incomplete or failed transposition in circumstances where international enforcement of applicable EU law is more cumbersome than before, and – crucially – with only an indirect route to the CJEU to determine whether the transposition is incomplete or failed as a matter of EU law. We return here to the primacy of EU law, and the CJEU's insistence that this primacy be given a mandatory character in domestic law (as covered in Chapter 3). This is where domestic law remedies such as *mandamus* may play a role.

Doctrinally, the scope of *mandamus* does not necessarily encompass obligations arising out of EU law transposition. This is because *mandamus* is typically granted when a public authority fails to carry out an unqualified statutory duty, to compel the performance of that duty (as covered earlier). *Mandamus* in respect of an un-transposed or incompletely transposed Directive would instead compel a relevant public authority to legislatively amend relevant domestic law (or enact completely new domestic law) to carry out the transposition. Although there is no direct authority on the question whether *mandamus* would lie in this context, particularly when we are not aware of any court granting *mandamus* in such circumstances when the UK was a Member State, as explored earlier, the UK is no longer a Member State, and the oversight of the CJEU is consequently limited – especially in an Article 2 context. The requirement to keep pace with EU law developments in an Article 2 context may therefore validly require domestic courts to mandate the transposition of amended or replaced Annex 1 Directives as the latter evolve. This would be especially compelling in circumstances where the EU has notified the UK that a Directive amends or replaces one or more of the Annex 1 Directives, but the transposition of the amendment or replacement has been slow or incomplete owing to political issues or controversy (especially at the devolved level).

We stress however, that even if *mandamus* were seriously contemplated in this context, it would require a compelling argument (to the court considering the grant of *mandamus*) based on the provisions of the WF and the EUWA. On the international law side, a combination of Article 13(3) WF, the primacy of EU law and a notification by the EU under Article 15(3)(b) WF would anchor the need to mandate transposition at

the domestic level.[360] This obligation would then have effect in domestic law via section 7A of the EUWA. The EUWA also provides a wide-ranging power for devolved Ministers and Departments in Northern Ireland to change domestic law 'to implement' the WF[361] and 'for the purposes of dealing with matters arising out of, or related to' the WF,[362] so long as the domestic law concerned is within devolved competence.[363] Importantly, this devolved power to change domestic law can 'make any provision that could be made by an Act of [the UK] Parliament',[364] pointing to the breadth of this power as essentially the devolved equivalent to the powers of secondary lawmaking under section 8C, the considerable breadth of which was endorsed by the Supreme Court.[365] Consequently, in a situation where the EU has notified the UK under Article 15(3)(b) WF of an amendment or replacement of one or more Annex 1 Directives and the necessary domestic transposition has not occurred within the deadline set in the new Directive, Northern Ireland courts may consider granting an order of *mandamus* compelling the relevant devolved authority to exercise powers under the EUWA to faithfully and completely transpose the new Directive, by amending primary or secondary domestic law as needed. Where such transposition requires the enactment of primary legislation, however (because, for example, the new Directive would require fresh domestic law rather than changes to existing domestic law), *mandamus* is unlikely to be appropriate. This is because no court can guarantee the outcome of legislative proceedings in the Assembly, and courts are in any event barred from impugning or otherwise controlling such proceedings.[366] Instead of *mandamus*, the relevant court may however make a declaration to the effect that a new Directive has not, or has not effectively, been transposed, in breach of the WF. Declaratory relief may then spur devolved authorities to bring forward primary legislation as appropriate, but without the arguable inappropriateness of a court *ordering* a Bill be introduced into the Assembly.

(iv) Breaches or failures in the implementation of EU law: remedies against private parties

The failure to transpose a relevant Directive domestically does not leave an aggrieved party with no recourse to EU law even if the Directive in question (or certain provisions thereof) do not produce direct effect. As

[360] The lack of a notification under Article 15(3)(b) WF would not necessarily extinguish the obligation under Article 13(3) WF, but the lack of such notification may weigh against a grant of *mandamus*, on the basis that if the EU is itself not exercised enough about the implementation of a relevant EU law in Northern Ireland, neither should the court.
[361] EUWA 2018, sch. 2, para. 11M(1)(a).
[362] EUWA 2018, sch. 2 para. 11M(1)(c).
[363] EUWA 2018, sch. 2 para. 11N(1).
[364] EUWA 2018, sch. 2 para. 11M(3).
[365] *In re Allister and Peeples* [2023] UKSC 5, [2024] AC 1113, [109] (Lord Stephens).
[366] Northern Ireland Act 1998, s. 5(5).

covered in Chapter 3, if the relevant dispute between private parties (such as a dispute between an employee and their employer) falls within the scope of directly effective CFR right (assuming the *SPUC* test is satisfied), the lack of direct effect of a Directive providing a specific expression of the CFR right is immaterial. The aggrieved party may invoke the CFR right directly in litigation and, if successful, be entitled to the appropriate remedy (subject to the effectiveness requirement under Article 47 CFR).

Consequently, it is worth remembering that under EU law, the lack of direct effect of secondary EU law is no defence to a breach of directly effective primary EU law, even by private parties.[367] As non-discrimination is codified as a CFR right,[368] un-transposed or badly transposed amendments or replacements of one of more Annex 1 Directives may not preclude direct reliance on the CFR to achieve the ends sought by the un-transposed or badly transposed amendments or replacements. In this way, the objects, aims or purposes of new Directives may be domestically achieved, notwithstanding issues with their transposition.

Conclusion

This chapter delves into the domestic remedies available for addressing breaches of Article 2 WF – both in its non-diminution guarantee and in respect of the dynamic alignment of the Annex 1 Directives. An extensive range of remedies continue to apply in both circumstances because of the special nature of the rights protection contained in Article 2 WF, which is not constrained by the exclusions of the CFR or *Francovich* remedies provided in the general operation of the EUWA.

Recommendations

- **Considerable confusion attends the applicability of the *Francovich* rule, and the related remedies, in light of the general post-Brexit exclusion of its operation in UK domestic law under the EUWA. The Commissions should thus push the UK Government to acknowledge that this general position does not preclude its application under Article 2 WF and should support relevant litigation to establish this point in practice.**
- **This chapter has highlighted that there are elements of Article 2 which extend beyond static obligations, and**

[367] See Case C-144/04, *Mangold v Helm*, EU:C:2005:709, para. 76.
[368] Article 21 CFR.

requiring tracking of EU law developments, particularly under the Annex 1 directives. In this context, the cross-border work of the Joint Committee could prioritise shared issues in the tracking of relevant EU law developments.

Chapter 5: The Withdrawal Agreement's Remedial Mechanisms

Introduction

In the previous chapter this report addressed the remedies which are have hitherto been applied in Article 2 cases or which are directly required by this provision's terms. This built on our account of the operation of EU law remedies in the previous chapters. This chapter turns instead to what happens if the UK fails to take any required action to remedy an identified breach of its Withdrawal Agreement commitments. This reflects the dual nature of these commitments. They are both embedded within domestic legal order, through section 7A of the EUWA, with domestic remedies and continuation of the relevant EU remedies within domestic law, and international commitments with particular remedies under the Withdrawal Agreement.

Much of the content of this chapter is thus concerned with potential developments rather than live scenarios; if the UK respects its commitments towards rights and equality protections in Northern Ireland, and the outcome of domestic legal processes in this context, none of the specific Withdrawal Agreement remedies might ever have to be relied upon in the context of Article 2 WF. In circumstances in which the UK is acting in breach of Article 2, however, it is necessary to underline from the outset that there is no direct recourse to the CJEU through a European Commission enforcement action, or the preliminary reference procedure.

Both processes remain applicable to Articles 5 and 7-10 WF, covering 'customs and movements of goods (and exchange of information in that area), technical regulations, assessments, registrations, certificates, approvals and authorizations, value-added tax (VAT) and excise, the Single electricity market, and state aid'.[369] There is explicit recognition in the context of these provisions that 'the institutions, bodies, offices, and agencies of the Union shall, in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom, have the powers conferred upon them by Union law' and '[t]he second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect'.[370] The same provision is not made with regard to Article 2, even though it involves upholding EU law standards.

[369] Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume II, The Withdrawal Agreement* (OUP, 2020) 191, 202.
[370] WA, WF, Article 12(4).

The concept of EU law which is not subject to direct CJEU oversight is unusual, but not unique, as it reflects the position once in place with regard to the EU's Area of Freedom, Security and Justice.[371] The exceptional nature of the restriction on the CJEU's role, notwithstanding that the application of EU law is at issue, reflects the fact that Article 2 is an obligation only upon the UK under the Withdrawal Agreement. In the context of the prominent concerns over the CJEU's post-Brexit role expressed as part of the UK's Brexit negotiating position,[372] the restriction of its oversight of Article 2 reflects the fact that, unlike Articles 5 and 7-10, there is no danger to the EU Single Market (EUSM) should the UK fail to uphold Article 2. It must also be recognised that the potentially indefinite continuation of the CJEU's role with regard to Articles 5 and 7-10 WF has been characterised as 'unprecedented' and 'extraordinary',[373] and is explained only by the special nature of Northern Ireland's interlinkage with the EUSM for goods within the Withdrawal Agreement.

Any such neglect of Article 2 WF within the UK would, nonetheless amount to a breach of the UK's Withdrawal Agreement commitments, and this opens up the specific compliance mechanisms provided through the Withdrawal Agreement's committee system and arbitration processes. These are explained within this chapter as is the role of the CJEU within these processes. Notwithstanding the CJEU not having a formal role under Article 2, it may ultimately play a role in explaining the terms of EU law relevant to the Withdrawal Agreement within these processes. There might also be need for the domestic courts to develop responsive remedies to address particular aspects of the Article 2 commitments.

Withdrawal Agreement Compliance Mechanisms

(i) International Law Commitments and the UK's Constitution

As noted in the above chapters, breaches of the UK's Article 2 commitments could arise as result of acts or omissions of a range of public bodies with law making, application or interpretation functions within overarching UK governance or within Northern Ireland. As a matter of international law, however, the UK as a state owes obligations under the Withdrawal Agreement, and cannot use its internal constitutional arrangements to excuse the breach of its international obligations under the Agreement. That a breach results from the actions of a devolved

[371] See Tobias Lock, Eleni Frantziou, and Anurag Deb, *The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework* (NIHRC, 2024) 50.
[372] Niall O'Connor, Anastasia Karatzia, Theodore Konstadinides, 'Courting controversy? The constitutional implications of the Court of Justice of the European Union's involvement in the resolution of disputes after Brexit' (2024) 43 *Yearbook of European Law* 413, 414.
[373] Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume II, The Withdrawal Agreement* (OUP, 2020) 191, 203.

institution in Northern Ireland, or even a domestic court misinterpreting the Withdrawal Agreement's requirements, and is thus not within the direct control of the UK Government, cannot be used by the UK to escape its international commitments. This reflects the long-established position between states, and also applicable to agreements between states and supra-national national bodies such as the EU, that 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[374] The source of a breach does not affect the position of the UK in terms of its international commitments; the UK as the state making a commitment under Article 2 WF is ultimately responsible for fulfilling that commitment or rectifying any breach.[375]

(ii) Exhaustion of Remedies

In certain contexts, customary international law imposes a concept of exhaustion of domestic law remedies before international proceedings can be sought.[376] The aim of this rule is to protect state sovereignty by obliging legal persons to first pursue redress regarding alleged unlawful action by a state within its domestic law before instituting international proceedings – the state should have the first opportunity to resolve an issue and an international tribunal will benefit from being able to reflect upon how a case has been addressed before domestic institutions. The rule is reflected in international human rights law; under Article 35 of the ECHR the exhaustion of domestic remedies is a condition for the admissibility of applications to the European Court of Human Rights.

This raises the issue of whether a manifestation of this concept applies to the operation of the dispute resolution procedures under the Withdrawal Agreement. Nothing within the text of the Withdrawal Agreement indicates that domestic remedies must be pursued before an issue can be raised before the Withdrawal Agreement's committee structures. If a matter is sufficiently pressing, either the EU or the UK can raise it directly with the Joint Committee, without requiring that the issue be first considered by the relevant Specialised Committee.[377] On the other hand, the schedule and agenda of Specialised Committee meetings are agreed between the UK and the EU representatives by mutual consent.[378] This does not preclude items being added to the agenda of a meeting at the

[374] See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* 1932, P.C.I.J., Series A/B, No. 44, p. 24.
[375] See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) p. 86.
[376] See Theodor Meron, 'The incidence of the rule of exhaustion of local remedies' (1959) 35 *British Yearbook of International Law* 83.
[377] WA, Article 165(4).
[378] WA, Article 165(2).

request of the EU or the UK if either believes discussion to be necessary,[379] but practice to date suggests that the Committee's will ordinarily let domestic legal challenges run their course.

It will often therefore be the case that if legal processes are still ongoing within the UK's domestic courts that this will, in effect, become a reason by which to delay any consideration before the relevant Specialised Committee. It is notable that there is no suggestion from the published record of the activity of the Specialised Committee related to the WF that it has considered the adverse rulings, to date, of the Northern Ireland courts with regard to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023[380] and the Illegal Migration Act 2023[381] under Article 2 WF.[382] This reflects the fact that appeals remained ongoing before the domestic courts. The Withdrawal Agreement's Committees become more active components of the rights oversight architecture if there remain doubts over whether the Article 2 obligations have been fulfilled at the culmination of domestic legal processes.

(iii) The Withdrawal Agreement's Committee Structure

Under the Withdrawal Agreement a system of administrative bodies is put in place to oversee the implementation and application of the commitments made by the UK and EU. In overview, the WF first provides for a Joint Consultative Working Group (JCWG), to provide for information sharing, particularly around legal developments within the EU or UK legal orders which might have relevance to Withdrawal Agreement obligations. From that point, implementation issues are addressed by a number of dedicated Specialised Committees, including one covering the WF, from which issues can be referred to the Joint Committee and thereafter be subject to arbitration if disputes over the requirements of the Withdrawal Agreement persist. This element of the Withdrawal Agreement was not a controversial element of the negotiations, it follows a pattern established under other EU external agreements and was thus not unexpected in light of the UK's long experience as an EU Member State.[383]

For the purposes of the WF, a dedicated Specialised Committee is established 'on issues related to the implementation of the Protocol on Ireland/Northern Ireland'.[384] Although the Specialised Committee is,

[379] WA, Annex VIII, Rule 7(4).
[380] *In re Dillon* [2024] NIKB 11 and [2024] NICA 59.
[381] *In re NIHRC and JR295* [2024] NIKB 35.
[382] See UK Cabinet Office, 'Press Release: Specialised Committee on the Implementation of the Windsor Framework: Joint Statement' (6 March 2025).
[383] See Pieter Van Nuffel, 'The Withdrawal Agreement, Part Six', in Manuel Kellerbauer, Eugenia Dumitriu-Segnana and Thomas Liefländer (eds), *The UK-EU Withdrawal Agreement: A Commentary* (OUP, 2021) 355, 374.
[384] WA, Article 165(1)(c).

under the Withdrawal Agreement, made up of officials representing the EU and the UK, the EU Council Decision implementing the Withdrawal Agreement explicitly provided that a representative of Ireland as an EU Member State is able to accompany the European Commission representative where the issues to be addressed 'are specific to Ireland/Northern Ireland'.[385] The Irish Government can therefore play a major role in shaping European Commission priorities around the implementation of Article 2.[386] The tasks and functions of this Specialised Committee are in part determined by the Joint Committee.[387] Specific functions are, however, set out in Article 14 WF, and include the responsibility to:

> consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.[388]

This provides the Withdrawal Agreement's Dedicated Mechanism institutions with a means to raise concerns over Article 2's operation, but their involvement is not necessary for the initiation of Committee discussions over Article 2, because the Committee is generally enabled to 'discuss any point raised by the Union or the United Kingdom that is of relevance to this Protocol and gives rise to a difficulty'.[389] The Specialised Committee thus provides a body of experienced officials which can assess issues of dispute and provide detailed reports and, where possible to do so, draft recommendations and decisions for the Joint Committee to adopt.

The Joint Committee is the apex body in the Withdrawal Agreement's Committee system, co-chaired by UK and EU representatives of ministerial/commissioner level. With regard to any dispute over the fulfilment of the Withdrawal Agreement's obligations, including those under Article 2 WF, the role of the Joint Committee is to 'seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement'.[390] Under the Agreement, the EU and the UK made a commitment to 'make every

[385] Council Decision (EU) No. 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 1), Art.2(1)(a).
[386] Thomas Liefländer, '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, p. 478
[387] WA, Article 164(4)(b) and (5)(a) and (c).
[388] WA, WF, Article 14(c).
[389] WA, WF, Article 14(d).
[390] WA, Article 164(4)(c).

attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation'.[391] Negotiations within the confines of the Committee structure become the primary means by which this end is to be achieved under the Withdrawal Agreement.

The decisions of the Joint Committee are legally binding upon the UK and the EU and have the same legal effect as the provisions of the Agreement itself. This means that if the Committee adopts a decision relevant to the implementation of Article 2 WF, litigants 'will be able to rely directly before the national judge on a Joint Committee decision, in case[s where] its provisions are sufficiently clear and unconditional, and request, as the case may be, the disapplication of any conflicting national norm'.[392] The Joint Committee has made multiple decisions relating to the functioning of the WF, but none of these adjustments to how the Agreement is implemented have yet impinged on Article 2.

The Joint Committee may also agree recommendations over the implementation of the Withdrawal Agreement. These might be significant in the resolution of particular points of contention, for although they are not formally binding, they are agreed by mutual consent by the EU and UK within the Committee.[393] Unlike decisions, however, private parties cannot invoke them directly as having the legal force necessary to persuade domestic courts to set aside contrary statutory provisions (although they may have interpretative value). As such, in the resolution of disputes over the implementation of Article 2, Joint Committee recommendations might be used to signal that the UK Government has accepted a violation, but will adopt its own course in rectifying the issue.

The Joint Committee was granted a special power to make adjustments to the text of the Withdrawal Agreement.[394] Indeed, it used this power in the context of the special arrangements for Northern Ireland to insert new WF provisions into the Windsor Framework as agreed in 2020, particularly in relation to the so-called 'Stormont Brake'.[395] This is not, however, a power which could have been used to strip out rights and equality commitments under Article 2 if they were to be found to be inconvenient to the UK (even if the EU was somehow persuaded to agree); 'essential elements' of the Withdrawal Agreement are excluded from the operation of this power (a status which we would maintain applies to both parties'

[391] WA, Article 167.
[392] Pieter Van Nuffel, 'The Withdrawal Agreement, Part Six', in Manuel Kellerbauer, Eugenia Dumitriu-Segnana and Thomas Liefländer (eds), *The UK-EU Withdrawal Agreement: A Commentary* (OUP, 2021) 355, 376.
[393] WA, Article 166(3).
[394] WA, Article 164(5)(d).
[395] WA, WF, Article 13(3A).

commitments to protect the 1998 Agreement in all its parts).[396] In any event, this special power lapsed in December 2024.

Both the Joint Committee and the Specialised Committees ordinarily operate on the basis of confidentiality.[397] This means that, other than formal decisions or recommendations, the co-chairs of these meetings ordinarily release little more than an outline discussion of their deliberations in the form of a press release. This makes it difficult to assess how these bodies approach their responsibilities towards the rights and equality arrangements provided under Article 2 WF.

(iv) Arbitration

Where a dispute over the implementation of the Withdrawal Agreement arises, which cannot be resolved through the Joint Committee, the UK and EU are obliged to turn to the arbitration arrangements under the Withdrawal Agreement to address the dispute (unless the dispute relates to one of the areas of the Withdrawal Agreement where the CJEU retains jurisdiction).[398] The party wishing to initiate consultations over a dispute must first provide written notice of the issue to the Joint Committee.[399] Where no mutual resolution has been reached within the Joint Committee within three months of that written notice, the party raising the dispute is able to request the establishment of an arbitration panel.[400] Both parties, however, may agree to continue consultations over a dispute for longer than three months or, in the alternative, may agree to move to arbitration within this time frame if there is no indication that the issue can be resolved by mutual consent.

The decision to issue a request for arbitration marks the commencement of the second stage of the dispute procedure. This request must identify the subject matter of the dispute and legal arguments advanced to justify the assertion of a breach.[401] The Permanent Court of Arbitration administers the arbitration arrangements and ensures that a panel of five arbitrators, with a knowledge of EU and international law, and qualification for high judicial office, is appointed within, at most, three months and fifteen days of receiving a request.[402] This process is similar to the arrangements under Articles 739-746 of the post-Brexit UK-EU Trade and Cooperation Agreement, which led to the *Sand Eels* case.[403]

[396] WA, WF, Preamble, Recitals 4 and 6.
[397] WA, Annex VIII, Rule 10(1).
[398] WA, Article 168.
[399] WA, Article 169(1).
[400] WA, Article 170(1).
[401] WA, Article 170(1).
[402] WA, Article 171(9).
[403] *European Union v United Kingdom* (2025) PCA CASE No. 2024-45.

The arbitration processes, however, have yet to be tested in the context of the Withdrawal Agreement.

Once the arbitration is initiated, it is expected that the panel will come to a decision within 12 months or within six months where the issue is deemed to be urgent.[404] Hearings will ordinarily take place in public using Permanent Court of Arbitration facilities at The Hague. Under Article 175, the determinations of the arbitration panel are binding on both the EU and the UK. This means that, if the UK Government fails to fulfil its Article 2 obligations, for example by refusing to follow domestic court orders regarding incompatible domestic law, the binding arbitration process can be used to enforce the Withdrawal Agreement's requirements. As noted above, it does not matter, for the purpose of the application of the Withdrawal Agreement's obligations under Article 2 WF, and any resultant arbitration process, whether the source of the breach by the UK lies in the activity of the UK Government, the courts or the devolved institutions.

An essential feature of the arbitration process is that it involves a dispute between the UK and the EU as parties to the Withdrawal Agreement. Legal persons involved in domestic legal actions over the implementation of the Withdrawal Agreement might be aggrieved by the approach of either the UK or the EU to this issue, but this does not oblige the other Withdrawal Agreement party to issue arbitration proceedings to address the alleged breach. This means, with regard to the UK's Article 2 responsibilities, that the role of the statutory rights and equality bodies in raising issues before the Specialised Committee and of the Irish Government in being represented alongside the European Commission, could play a vital role in encouraging the EU to institute arbitration.

(v) The CJEU's continuing role

In relation to Article 2 WF, the arbitration panel might be asked to determine disputes over the nature of the non-diminution obligation and the extent of the obligations imposed by the RSEO chapter of the 1998 Agreement. On a broad range of issues relating to Article 2, however, including on the scope of EU measures and the applicability to them of direct effect, the CJEU will be drawn into arbitration proceedings. This is because, under Article 174 of the Withdrawal Agreement, the responsibility for determining the scope of EU law instruments and concepts rests with the CJEU, and if such issues are disputed, or raised in proceedings, the arbitration panel must make a preliminary reference to the CJEU. Where arbitrators are considering the necessary remedies to resolve a breach, and questions of the operation of EU law are live, the

[404] WA, Article 172 and 173(2).

panel is once again obliged to refer these issues to the CJEU.[405] The use of 'concept' within this provision is notably broad, extending the reach of the CJEU beyond specified EU measures and even general principles of EU law. It is likely to exert considerable influence on the arbitration panel to make a reference if there is any plausible suggestion that the interpretation of elements of EU law is arguable.

The rulings of the CJEU in response to such references 'will be binding on the arbitration panel and thus to the parties to the dispute'.[406] The ability of the CJEU to exert the final say on the meaning of aspects of EU law is essential to making the Withdrawal Agreement compatible with the requirements of the EU's legal order.[407] The CJEU may have no direct role with regard to Article 2, but this 'indirect' role, 'as the final interpreter in matters of EU law' remains particularly significant.[408]

This ultimately permits the CJEU to intervene in a broad range of cases, but in the context of Article 2, it has particular significance with regard to the handling of EU law rules and principles by the UK's domestic courts. As discussed above, the domestic courts do not have the ability to make preliminary references regarding the correct interpretation of the EU law applicable in Northern Ireland law under Article 2 WF. The European Commission also does not have the ability to launch enforcement actions. There is therefore the possibility that a divergent interpretation of relevant EU law will develop in Northern Ireland, unless this is addressed by the arbitration mechanism.

It must also be noted that the conclusion of the Withdrawal Agreement by the EU Council under Council Decision 2020/135 was an act of the EU, subject to EU law. This was recognised by the CJEU in *Préfet du Gers*.[409] This might be thought to open up a potential window for Article 2 rights to be litigated in the courts of an EU Member State, and subject to the preliminary reference procedure of the CJEU. The problem with this hypothetical means of engaging the CJEU is the lack of an effective cause of action in any Member State, where Article 2's obligations are only imposed upon the UK. As there are no enforcement duties upon any EU institutions with regard to Article 2, there is little scope for other institutions or Member States to challenge any inactivity with regard to the UK's obligations. As such, there is no obvious route to engaging the

[405] WA, Article 179(4).
[406] See Niall O'Connor, Anastasia Karatzia, Theodore Konstadinides, 'Courting controversy? The constitutional implications of the Court of Justice of the European Union's involvement in the resolution of disputes after Brexit' (2024) 43 *Yearbook of European Law* 413, 421.
[407] See Opinion 2/13, *Accession to the ECHR*, EU:C:2014:2454, para. 185. See C.R.G. Murray and Aoife O'Donoghue, 'A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order' (2017) 13 *International Journal of Law in Context* 225, 243-247.
[408] Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume II, The Withdrawal Agreement* (OUP, 2020) 191, 205.
[409] Case C-673/20 *EP v Préfet du Gers*, EU:C:2022:449, para. 89.

CJEU with regard to these questions other than through the Article 174 WA process.

The Powers of the Dedicated Mechanism and the Withdrawal Agreement

Northern Ireland remains but one aspect of a complex set of Withdrawal Agreement arrangements. Unless the Dedicated Mechanism bodies or the Irish Government, acting in its role as one of the state guarantors of the 1998 Agreement, are raising issues regarding the application of Article 2, these issues are apt to be overlooked, particularly if the issue results from flawed interpretation of EU law. This means that the privileged access of these parties to the Specialised Committee, as noted above, and in particular the ability of the Dedicated Mechanism bodies to raise issues regarding Article 2's implementation before this Withdrawal Agreement Committee, will be of considerable significance to the issue receiving attention.

The Withdrawal Agreement's recognition of the ability of the NIHRC and the ECNI to raise Article 2 issues with the Specialised Committee, under Article 14 WF, is reflected in domestic legislation. Provisions inserted under the Northern Ireland Act allow for the relevant power under domestic law, asserting that the Commissions may, 'for the purposes of Article 14(c) of the Protocol, bring any appropriate matters to the attention of the Specialised Committee referred to in that Article'.[410] It is significant that this is framed as a power, not a duty, but as a public power provided under statute the decision making of the Commissions in this regard would potentially be subject to judicial review.

As has been noted in existing academic commentary on Article 2,[411] the Northern Ireland Court of Appeal adopted a restricted, and contestable, account of the relevant EU law in the *Wilson* case.[412] In particular, this case considered the application of EU law protections to an individual who was not selected as an electoral candidate for the Alliance Party. With regard to Directive 2000/78, an Annex 1 directive, the Court of Appeal adopted a narrow view of the relevance of the CJEU decision in *HK* to the case at hand, even though that case had recognised that the scope of the rights protections under the directive extended beyond workers.[413] The Court of Appeal concluded, after a brief explanation of the relevant issues, concluded that 'we are not persuaded that the decision in *HK* lends

[410] Northern Ireland Act 1998, s. 78A(9) and s. 78B(9).
[411] Sarah Craig, Claire Lougarre and Rory O'Connell, *EU Developments in Equality and Human Rights: Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland: Update Paper on Developments post January 2022* (ECNI, 2024) 125-126.
[412] *Geoffrey Wilson v Alliance Party for Northern Ireland* [2024] NICA 12.
[413] Case C-587/20, *HK v Danmark and HK/Privat*, EU:C:2022:419, para. 29.

support to the appellant's fundamental contention, namely that Directive 2000/78 applied to the decision of the Alliance Party declining to nominate him as a party candidate in a forthcoming public election'.[414]

This assertion did not provide a workable account of why candidate selection should be considered to be outwith the scope of the Directive. There is, potentially, good reason to accept the outcome in the Court of Appeal; the CJEU paid considerable attention to the need for a 'real and genuine professional activity, in particular in so far as it concerns a full-time occupational activity which is remunerated by monthly salary' as the basis for someone coming within the scope of the Directive, despite not formally being classified as a worker.[415] There is clearly scope, within this reasoning, to exclude an electoral candidate from the ambit of a 'genuine professional activity', but the Court of Appeal's substantive engagement with the relevant CJEU case law was cursory, and scope clearly exists for a divergent interpretation of EU law to emerge in this context.

The judgment in the *Wilson* case is now final (in contrast, for example, to the *Dillon* case), and there was good reason for the Dedicated Mechanism institutions not referring the position adopted by the Court of Appeal to the Specialised Committee in this case. But there appears to be little general awareness of this reference power, and no public position on the factors which inform its use. Without being actively raised before the Specialised Committee, any restrictive position adopted by the Northern Ireland courts towards CJEU jurisprudence was never likely to be an issue which attracted the European Commission's attention.

Conclusion

The Withdrawal Agreement sets up a complex system of oversight processes to ensure that the obligations contained therein are fulfilled. These processes have particular significance when it comes to Article 2 WF. Although the terms of the WF, read outside the context of the Withdrawal Agreement as a whole, leave the Northern Ireland courts to interpret CJEU case law and EU law provisions relevant to Article 2 without the ability to make direct preliminary reference to the CJEU, the Withdrawal Agreement's dispute settlement processes provide an essential backdrop to these measures. As a result, if heterodox accounts of EU law relevant to Article 2 emerges, these processes ultimately allow for the Article 2 obligations to be applied in light of the CJEU's standards.

[414] *Geoffrey Wilson v Alliance Party for Northern Ireland* [2024] NICA 12, para. 33.
[415] Case C-587/20, *HK v Danmark and HK/Privat*, EU:C:2022:419, para. 35.

Recommendations

- **The Dedicated Mechanism institutions should develop a public policy on when they will feed issues connected to Article 2 into the Specialised Committee. This should include information for litigants on raising the possibility of the ECNI and NIHRC raising issues with the Specialised Committee, and which of these bodies to approach depending upon the subject matter of particular cases.**

Conclusion

Ongoing connections between Northern Ireland law and the EU legal order

The overall picture painted in this report is one in which an extensive range of EU law processes, and ultimately remedies, remain in place to tackle breaches of the UK's Withdrawal Agreement obligations as they arise out of Article 2 WF. As such, EU law remains very much part of the legal landscape in the jurisdiction of Northern Ireland, notwithstanding Brexit. And to safeguard that arrangement, given that it provides such an uncomfortable counterpoint to the discourse of 'taking back control', the Withdrawal Agreement augments these protections with its own set of arbitration arrangements.

It is worth noting that although this account has focused on remedies directly relevant to Article 2 of the Withdrawal Agreement's WF, this is not to say, especially in the context of employment and environmental rights, that the boundary between non-diminution under Article 2 and the continuing level playing field obligations under the Trade and Cooperation Agreement is an easy one to determine. The 'level playing field' provisions of this Agreement provide an additional outlet by which regressions of some rights can be addressed.[416] Where such overlap is at issue, however, the immediacy of the path to actionable remedies under Article 2 should always mean that it is the first line of response where it is potentially engaged.

To conclude this study, we draw together two case studies, detailing the operation of EU law and its associated remedies before and after Brexit. This is not intended to provide a full legal account of such scenarios; our analysis is focused on the specific potential for EU law issues and how breaches could be remedied.

Fictitious case study*:* EU Law in the Northern Ireland Courts, Pre-Brexit

To fully grasp domestic court enforcement of EU law, including what types of remedies may be granted on the basis of the EU remedial 'toolbox' and the operations of Article 47 CFR, a practical fictitious example may be helpful. This example covers all the material set out so far in Chapters 2 and 3, for completeness.

[416] David Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA)' (2021) 12 *Journal of International Dispute Settlement* 617.

The year is 2015. Irish national Daragh is applying for a job at a private children's nursery in Belfast – Busy Trees. He is shortlisted, but ultimately not hired – and when he requests feedback, the feedback effectively amounts to him being the only male applicant, and the centre preferring to have female staff as, in the experience of the nursery manager, women are better with children. Daragh suspects, correctly, that this is discrimination. He instructs a solicitor to investigate if anything can be done, and the solicitor discovers that there is an EU directive, the Equal Treatment Directive (Directive 2006/54/EC), that tackles 'equal opportunities and equal treatment of men and women in matters of employment and occupation'. The UK has implemented the Directive in the (fictional) Almost Equal Act 2010.

Key in this directive is Article 14, which reads:

> **Article 14**
>
> *Prohibition of discrimination*
>
> 1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:
>
> (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;…

Daragh's solicitor examines the (fictitious) implementing legislation, the Almost Equal Act 2010, and discovers that the UK legislator has only transcribed that 'there shall be no direct or indirect discrimination on grounds of sex in the *public sector*, including public bodies'. This is a clear breach of the relevant directive.

The European Commission has already taken action in relation to this aspect of UK implementation of Directive 2006/54. It issued a letter of formal notice in December 2014 highlighting that, in accordance with the case law of the CJEU in Case C-43/75 *Defrenne v SABENA*, the provision should apply to private as well as public employers. The UK government responded to the notice two months later, by saying that it was considering changing the implementing legislation to comply with the European Commission's recommendations. However, no action has been taken yet and, although the UK is under some EU-level pressure to address what Daragh rightly thinks is likely to be a breach of EU law, the negotiations between the UK and EU on this matter under Article 258 are at an early stage. As such, the UK has not yet been taken to Court under Article 260 TFEU for a final assessment of a violation.

With European Commission-driven enforcement being so slow, Daragh does not benefit from the certainty of an adverse finding, but the commencement of the Article 258 process gives him confidence that he is entitled to compensation for not getting the job. His solicitor, not new to EU law, points out to him that they have a problem: the rights that he holds are in an EU directive, but his grievance is with a private employer, as they are the ones who discriminated against him. Daragh does not really understand the difference, but his solicitor explains that he cannot rely *directly* on the directive – but they should go to court on the basis of the Almost Equal Act 2010, and ask that it is interpreted consistently *with* the directive.

The court case, 8 months later, is dealt with relatively swiftly: the judge in the case, Brown J, is well-versed in EU law and understands the duty upon the UK courts to read national law in light of EU obligations. The EU obligation in question clearly is to preclude discrimination in both the public *and* private sector: it is a clear provision, well-established in CJEU case law, and Brown J sees no need to ask the CJEU for an interpretation of the relevant provision. The matter is an *acte clair*.[417] Examining the wording of the Almost Equal Act 2010, however, Brown J hesitates: is it possible to read a sentence that explicitly *only* mentions the public sector as *also* meaning the private sector? Ultimately, the judge concludes that it is not as this would be a *contra legem* interpretation. He must, therefore, rule against Daragh on this point: even though the UK is in violation of the terms of the Directive, the Almost Equal Act is so clear that it cannot be read compatibly with the Directive and, since Busy Trees is a private employer, it is impossible for Daragh to rely directly on the Directive against them.

Daragh's solicitor at this point has two further ideas. She raises her second argument before the court, which is that the Directive is a specific expression of the general principle of non-discrimination between men and women, which is codified in Article 23 CFR. She argues that this provision is clear, precise and unconditional – and therefore directly effective. Brown J looks over her argument and agrees with it. However, when Brown J hears the case in 2015,[418] there is no CJEU case law that specifically applies this reasoning to Article 23 CFR. He therefore makes a preliminary reference request to the CJEU, asking whether the Directive is a specific expression of Article 23 CFR and, if so, if it meets the conditions for direct effect in its own right, so as to grant an individual in Daragh's case a direct right of action against a private employer. Nine months later, the CJEU finds that this is, indeed, the case and reverts the case to

[417] A point of EU law that is sufficiently certain that a national court can apply it without the need for reference to the CJEU; Case C-283/81, *CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* EU:C:1982:335.
[418] Note that Article 23 CFR was considered directly effective and was applied against a private employer in Case C-624/19, *K and others v Tesco Stores Ltd*, EU:C:2021:429.

the domestic court for final ruling. Brown J then disapplies the relevant provisions of the Almost Equal Act and awards Daragh damages of 150 GBP for the discrimination he experienced, plus legal costs. However, Daragh feels that these damages are not sufficient, as they are purely symbolic and do not account for his loss of earnings if he had been appointed to the post.

Daragh's solicitor appeals the case on the basis that the domestic compensatory scheme is incompatible with Article 18 of the Directive, which provides for effective financial reparation for breaches of the substantive provisions, read in the light of Article 47 CFR, and – in the alternative – with Article 47 CFR, which has direct effect in its own right. While, under domestic law, damages for loss of expectation of earning are extremely difficult to prove and highly unusual in purely domestic situations, the Court of Appeal is persuaded that the domestic remedial apparatus can be read in the light of Article 47 CFR in order to meet the EU principle of effectiveness. As such, the Court of Appeal awards a further 10,000 GBP in damages, which is roughly equivalent to the net earnings Daragh would have had in the four months during which he was still looking for a job as a result of the discrimination. Daragh is delighted with this outcome.

Busy Trees, however, is disappointed. They had relied on the Almost Equal Act and feel that they have suffered significant financial loss as a result of the UK's false implementation of the Directive. They therefore lodge a separate claim against the UK government for their wrong implementation of Directive 2006/54/EC. They point out that they suffered a significant loss of 10,150 GBP plus costs (paid in compensation to Daragh), which were incurred because of the UK's sufficiently serious breach of Directive 2006/54/EC. In 2018, this case is heard by Green J, who examines the claim for state liability and considers in detail if the failure to transpose 'and private sector' was 'sufficiently serious'. In the meantime, the UK has not only failed to comply with the letter of formal notice and a subsequent reasoned opinion issued by the European Commission in 2016, but it has also been condemned by the CJEU on the same issue. A fine of 1.5 million GBP has been issued to the UK and, if the UK fails to change the law before the end of 2018, it will also be made to pay a periodic penalty of 100,000 GBP per day for each additional day of non-compliance with the Directive. Green J considers these developments and concludes that the breach of the Directive was sufficiently serious. She therefore considers that Busy Trees is entitled to be put in the position it would have been in but for the UK's incorrect implementation. She therefore awards Busy Trees the £10,150 plus costs that it had paid to Daragh, as well as a further £3,000 for its own reasonable legal costs, all of which is to be paid by the UK government.

Fictitious case study*:* EU Law in the Northern Ireland Courts, Post-Brexit

Should the same scenario arise in 2025, much of the scenario presented above still pertains. Directive 2006/54/EC remains operative in Northern Ireland law under Article 2 WF. This is one of the six directives contained in Annex 1 of the WF, and this means that law in Northern Ireland is obliged to give full effect to its requirements and to track any changes in this law. The first major post-Brexit difference, however, is that there is no scope with regard to measures covered by Article 2 for an enforcement action by the European Commission or for the Northern Ireland courts to make a preliminary reference to the CJEU. This means that the interpretation of the Directive and the underpinning principles within the CFR is a matter for the Northern Ireland courts, and if they apply this law correctly, all of the remedies available prior to Brexit remain available, including damages and processes to require compliance with the relevant EU law (including, where necessary, disapplication of statutes which conflict with EU law).

A consequence of this arrangement is that there is no direct mechanism for course correcting if the domestic courts do not adopt the correct interpretation of EU law. Should the domestic courts fail to give adequate effect to EU law, or should the relevant public bodies in the UK (which might include the UK Government and the devolved institutions in Northern Ireland) fail to respond to requirements of the courts regarding post-Brexit EU law, then the Withdrawal Agreement, and the implementation legislation, provide for new remedial processes. The Dedicated Mechanism institutions are in a pivotal position, because they are given the ability, under Article 14(c) WF, to raise issues of inadequate implementation of the UK's Article 2 obligations with the Specialised Committee on the WF. This is not the only way in which these issues can be raised, they can be presented by the European Commission (including at the prompting of Member States such as Ireland), but where issues are specific and do not raise priority questions for the European Commission or Irish Government, this initiating function of the Dedicated Mechanism institutions is vital.

It is only once a potential breach is before the Specialised Committee that the Withdrawal Agreement processes for addressing such an issue are initiated. This can see a dispute elevated to the Joint Committee and thereafter to arbitration if no adequate resolution is reached. Only at that point, if issues of the interpretation of EU law are live within the dispute, will the CJEU become involved with the function of providing for an authoritative interpretation of the application of EU law. If there was not

facility for such ultimate CJEU oversight of the interpretation of EU law, this element of the Withdrawal Agreement would itself amount to a breach of EU law. With regard to Northern Ireland after Brexit, this is the mechanism by which heterodox applications of EU law can be prevented. But for this mechanism to operate the European Commission needs to accept it as a live issue with regard to the UK's Withdrawal Agreement obligations which needs to be addressed within the Withdrawal Agreement's Committee processes.

The Web of Remedies protecting Article 2 WF After Brexit

This report has highlighted that the legal arrangements around Article 2 WF impose a distinct set of obligations upon the UK, with implications for the remedies necessary to address breaches which have not been fully tested. For all these arrangements are distinct, however, this does not mean that the related legal tests are novel or unduly complex. The rules of Article 2 see the Northern Ireland courts continue to apply the remedies for breaches of EU law operative prior to Brexit. This, in particular, can include disapplication of domestic statutes insofar as they conflict with applicable EU law and the continued operation of *Francovich* damages. Even though the general operation of these aspects of EU law was curtailed by Brexit, the terms of the Withdrawal Agreement and implementing legislation demonstrate their continued relevance to the operation of Article 2 WF. This is familiar territory for these courts, with the only novelty being the lack of direct oversight of their activity by the EU institutions using the standard EU law procedures of enforcement action and preliminary reference.

This does not, however, mean that the domestic courts can ignore the workings of the CJEU. They are obliged to give effect to the CJEU's interpretation of EU law in the application of EU law measures covered by the WF. And, if there is any inadequacy in the application of the EU law covered by Article 2 WF, this can be subject to arbitration and ultimately to CJEU interpretation of the relevant EU law provisions. At this point, the protections for the integrity of the EU legal order, which operate as standard under international agreements which involve the EU as a party, are therefore operative. In this way, an interlocking web of remedies protects against breaches of Article 2 WF, provided that the bodies tasked with overseeing this measure remain attentive to potential breaches and trigger these processes.

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