



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

Equality Commission

FOR NORTHERN IRELAND



**Working Paper:  
The Scope of Article 2(1) of the Ireland/  
Northern Ireland Protocol**

December 2022

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## Table of contents

<b>1.0 Introduction</b>	<b>5</b>
<b>2.0 Overview of Article 2</b>	<b>6</b>
Background	6
Protocol Article 2	7
Rights, safeguards and equality of opportunity in the Belfast (Good Friday) Agreement	9
Annex 1 Equality Directives	10
Underpinning EU Measures	10
<b>3.0 Belfast (Good Friday) Agreement</b>	<b>12</b>
‘Civil Rights ... of everyone in the community’	12
‘Ensure at least an Equivalent Level of Protection’	16
Economic, social and cultural issues	17
<b>4.0 No diminution</b>	<b>17</b>
Non-Diminution	18
‘Keeping Pace’	18
‘As amended or replaced’	19
Obligation of result	20
Case law of CJEU	20
<b>5.0 ‘Results from’ UK Withdrawal from the EU</b>	<b>22</b>
Transposing EU measures into NI law	23
Retained EU law	26

<b>6.0 Oversight and Enforcement</b>	<b>27</b>
Protocol Article 2 in NI law	27
Oversight of Protocol Article 2	28
Individual Redress and Direct Effect	29
Commissions' Oversight and Enforcement Powers	31
When is Protocol Article 2 engaged?	32
<b>7.0 Context: EU Charter and UN CRPD</b>	<b>36</b>
EU Charter of Fundamental Rights	36
Disability and UN CRPD	37
<b>8.0 Annex 1 Equality Directives</b>	<b>40</b>
Race Equality Directive	40
Employment Equality (Framework) Directive	41
Gender Directives	42
<b>9.0 Concluding comments and next steps</b>	<b>44</b>
<b>Appendix 1</b>	<b>46</b>

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland (the Commissions) are mandated in relation to Article 2(1) (Protocol Article 2) of the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement<sup>1</sup> (the Protocol) to oversee the UK Government's commitment on rights and equality in Northern Ireland (NI) after EU withdrawal.
- 1.2 The Commissions' functions for this purpose, set out in Sections 78A-78E of the Northern Ireland Act 1998, are:
- monitoring the implementation of Protocol Article 2 (rights of individuals);
  - reporting to the Secretary of State for NI and the NI Executive Office on the implementation of Protocol Article 2;
  - advising the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to implement Protocol Article 2;
  - advising the NI Assembly (or a committee of the Assembly) whether a Bill is compatible with Protocol Article 2;
  - promoting understanding and awareness of the importance of Protocol Article 2, including undertaking, commissioning or providing financial or other assistance for research and educational activities;
  - bringing any appropriate matters of relevance to Protocol Article 2 to the attention of the Specialised Committee on the Protocol;
  - taking judicial review proceedings in respect of an alleged breach (or potential future breach) of Protocol Article 2; and
  - intervening in legal proceedings in so far as they relate to an alleged breach (or potential future breach) of Protocol Article 2.<sup>2</sup>
- 1.3 The UK Government's commitment in Protocol Article 2 is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, Section 6 of the NI Act 1998 prohibits the NI Assembly from making any law which is

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1 [Agreement](#) on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

2 Sections 78A-78E, Northern Ireland Act 1998 were incorporated by the EU (Withdrawal Agreement) Act 2020.

incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that NI Ministers and NI Departments have no power to make, confirm or approve subordinate legislation or to do any act insofar as that legislation or act is incompatible with Protocol Article 2. This means that the NI Assembly, NI Ministers and NI Departments cannot legislate or act in a way that is incompatible with Protocol Article 2. A similar restriction applies to UK Government actions in accordance with the EU (Withdrawal) Act 2018.

- 1.4 This working paper provides an initial assessment by the Commissions of Protocol Article 2, how it is engaged and what rights, safeguards and equality of opportunity protections fall within its scope. While the focus of this paper is on the scope of Protocol Article 2, this is one strand of the wider work of the NIHRC and the ECNI under their respective mandates relating to the protection of human rights and equality in NI following the UK's withdrawal from the EU. The purpose of this paper is to supplement the publications which have already been produced by the Commissions and to provide additional guidance on how the non-diminution commitment is applied and interpreted.<sup>3</sup> A definitive interpretation of Protocol Article 2 is not possible at this stage, as it will ultimately be subject to the determination of the courts and the oversight bodies established by the UK-EU Withdrawal Agreement. This paper is part of the process of scoping what Protocol Article 2 will mean in practice for the protection of human rights and equality in NI. This paper will be useful for anyone considering what Protocol Article 2 means in practice, including NI and UK Government officials, lawyers, public bodies, civil society organisations and anyone working on law and policy in NI.

## 2.0 Overview of Article 2

### Background

- 2.1 During the negotiations leading to the UK's withdrawal from the EU, the UK and the EU recognised that the Belfast (Good Friday) Agreement 1998 required consideration and protection. The 1998 Agreement did not anticipate any change in membership of the EU by the UK or Ireland.
- 2.2 During this period, the Commissions were concerned about the risk to human rights and equality protections underpinned by EU obligations. The

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3 [Equality Commission for NI and NI Human Rights Commission, 'A Short Guide – Equality and Human Rights after Brexit: The UK Government's commitment under the Ireland/Northern Ireland Protocol – Article 2\(1\) of the Protocol'](#) (ECNI and NIHRC, 2021); Equality Commission for NI and NI Human Rights Commission, ['Your Rights - Equality and Human Rights after Brexit: Challenging a breach of the UK Government's commitment under the Ireland/Northern Ireland Protocol – Article 2\(1\) of the Protocol'](#) (ECNI and NIHRC, 2021).

Commissions urged both parties to ensure there was no diminution of human rights and equality standards as the UK left the EU.<sup>4</sup>

- 2.3 Human rights and equality protections are at the heart of the Belfast (Good Friday) Agreement and are central to the peace process in NI. EU law has underpinned and contributed to many of those safeguards. In addition, EU free movement law had facilitated the open border between NI and Ireland. The importance of protecting the 1998 Agreement and its human rights and equality commitments was accepted in negotiations leading to the UK's withdrawal from the EU.
- 2.4 In December 2017, the UK and EU affirmed "that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation" and that the Belfast (Good Friday) Agreement must be protected in all its parts, including in its practical application and the totality of the relationships set out in the Agreement.<sup>5</sup> In this joint statement, the UK Government also made a commitment to ensuring "no diminution of rights" would be "caused by its departure from the EU, including in the area of protection against forms of discrimination enshrined in EU law".<sup>6</sup>

## Protocol Article 2

- 2.5 The commitment to safeguarding human rights and equality protections is reflected in Protocol Article 2. It states:

- 1 The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
- 2 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.

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4 Joint Committee of the Irish Human Rights and Equality Commission and the NI Human Rights Commission 'Policy statement on the United Kingdom withdrawal from the European Union' (NIHRC and IHREC, 2018); [Equality Commission for NI](#), 'Protecting and advancing Equality and Good Relations as the UK exits from the European Union', (ECNI, 2017).

5 [Joint report](#) from the Negotiators of the EU and UK Government on progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the EU, 8 December 2017, at para 42.

6 *Ibid*, at para 53.

- 2.6 The Protocol recognises that EU law has provided a ‘supporting framework’ for the rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement.<sup>7</sup> In Protocol Article 2 the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Protocol Article 2, the human right or equality protection being relied on must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law on or before 31 December 2020. In most cases, the relevant EU law will be that which was binding on the UK on 31 December 2020, by virtue of the UK-EU Withdrawal Agreement, as opposed to EU law which was not binding on that date but had been at a prior date. However, under Article 127(1) of the Withdrawal Agreement some provisions of EU law were not applicable to and in the UK during the transition period.
- 2.7 The Commissions’ approach to the interpretation of Protocol Article 2 and the Belfast (Good Friday) Agreement is informed by the Vienna Convention on the Law of Treaties, which provides that an international treaty should be interpreted in “good faith” and “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>8</sup> It goes on to state that for the purpose of the interpretation of a treaty, in addition to the text, preamble and annexes, the context shall comprise any agreement relating to the treaty which was made between the parties and any instrument made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as related to the treaty.<sup>9</sup> The Vienna Convention also provides that any subsequent agreement between the parties, or subsequent practice in the application of the treaty, or its provisions, shall be taken into account in relation to the interpretation of the treaty, along with “any relevant rules of international law applicable in the relations between the parties”.<sup>10</sup> Article 32 further provides supplementary means of interpretation including the “preparatory work of the treaty and the circumstances of its conclusion”.

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7 Preamble to the [Ireland/Northern Ireland Protocol](#).

8 Article 31(1), Vienna Convention on the Law of Treaties 1969.

9 Article 31(2), Vienna Convention on the Law of Treaties 1969.

10 Article 31(3), Vienna Convention on the Law of Treaties 1969.



## **Rights, safeguards and equality of opportunity in the Belfast (Good Friday) Agreement**

2.8 In the rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement, the parties affirmed their commitment to “the mutual respect, the civil rights and religious liberties of everyone in the community”, before affirming “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.<sup>11</sup>

2.9 Alongside these are other specific rights, safeguards and equality of opportunity protections in the relevant Chapter which the UK Government has recognised as forming a non-exhaustive list of rights:<sup>12</sup>

- the right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity; and
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.<sup>13</sup>

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11 [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

12 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 9.

13 [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Reconciliation and Victims of Violence; Economic and Social and Cultural Issues.

## Annex 1 Equality Directives

2.10 The commitment to no diminution in Protocol Article 2 includes the area of protection against discrimination, referencing Annex 1 which sets out six EU equality directives:

- Racial Equality Directive;<sup>14</sup>
- Employment Equality (Framework) Directive;<sup>15</sup>
- Gender Goods and Services Directive;<sup>16</sup>
- Equal Treatment (Employment) Directive;<sup>17</sup>
- Self-Employment Equal Treatment Directive;<sup>18</sup> and
- Equal Treatment in Social Security Directive.<sup>19</sup>

2.11 The UK Government has committed not only to ensuring there is no diminution of the rights contained in the Annex 1 equality directives but also that NI equality law must dynamically align, or ‘keep pace’, with any enhancements made by the EU to these rights, on or after 1 January 2021.<sup>20</sup> A brief outline of the Annex 1 equality directives can be found in Section 8 of this Working Paper.

## Underpinning EU Measures

2.12 In addition to the Annex 1 equality directives, there are a number of other EU legal obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement and are subject to the no diminution commitment. The UK Government has recognised a non-exhaustive list of

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14 [Directive 2000/43/EC](#), ‘Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

15 [Directive 2000/78/EC](#), ‘Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

16 [Directive 2004/113/EC](#), ‘Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004.

17 [Directive 2006/54/EC](#), ‘Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)’, 5 July 2006.

18 [Directive 2010/41/EU](#), ‘Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.

19 [Directive 79/7/EEC](#), ‘Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

20 Article 13 (3), Protocol on Ireland/Northern Ireland to the [UK-EU Withdrawal Agreement 2020](#).

relevant measures which fall within scope of the commitment in Protocol Article 2,<sup>21</sup> including:

- the Victim’s Directive;<sup>22</sup>
- the Parental Leave Directive;<sup>23</sup>
- the Pregnant Workers’ Directive;<sup>24</sup> and
- other specific measures which protect the rights of disabled people.<sup>25</sup>

2.13 The Commissions consider that there are additional EU measures that will also fall within the scope of Protocol Article 2 and have undertaken an extensive exercise to form a view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.<sup>26</sup> These measures include additional protections for victims<sup>27</sup> and employment protections for workers.<sup>28</sup> The Commissions have already identified a range of additional underpinning EU law which is set out in the table in Appendix 1. The range of underpinning EU law identified to date by the Commissions relates to the specific rights that the parties “affirm in particular” in the relevant chapter of the Belfast (Good Friday) Agreement. In the Commissions’ view, there is the potential for additional underpinning EU law to fall within the scope of Protocol Article 2 as we work to define the rights that are covered within the general commitment to the “civil rights and religious liberties of everyone in the community”. This table is a ‘living document’, as it may be subject to amendment by the Commissions, as and when appropriate; for example, in light of any judicial decisions and/or legal advices received by the Commissions on the scope of EU law underpinning Protocol Article 2.

21 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 13.

22 [Directive 2012/29/EU](#), ‘Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

23 [Directive 2010/18/EU](#), ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

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

25 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 13.

26 The Commissions are conscious that in defining EU obligations the CJEU has drawn on international human rights standards, including general comments of the international treaty monitoring bodies to elaborate on key concepts in EU law, including the EU Charter. See for example Ingeborg Odink, ‘[European Parliamentary Research Service - Children’s rights in the EU: Marking 30 years of the UN Convention on the Rights of the Child](#)’ (EPRS, 2019) on the best interests of the child test.

27 [Directive 2011/36/EU](#), ‘Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

28 [Directive 97/81/EC](#), ‘Council Directive concerning the Framework Agreement on part-time workers’, 15 December 1997; [Directive 2008/104/EC](#), ‘Directive of the European Parliament and of the Council on temporary agency work’, 19 November 2008.

## 3.0 Belfast (Good Friday) Agreement

- 3.1 One of the challenges of interpreting Protocol Article 2 is that the relevant chapter of the Belfast (Good Friday) Agreement was not drafted as a comprehensive statement of rights, safeguards and equality of opportunity protections.
- 3.2 In addition to the listed rights, safeguards and equality of opportunity protections, this chapter also commits the UK Government to the incorporation of the European Convention on Human Rights (the ECHR) and a public sector equality duty. It also anticipates further work on a Bill of Rights for NI to identify rights supplementary to the ECHR and draw on international instruments and experience.<sup>29</sup>

### ‘Civil Rights ... of everyone in the community’

- 3.3 As noted above, the rights, safeguards and equality of opportunity section includes a general commitment to the “civil rights and religious liberties of everyone in the community” and the rights set out in this chapter are “affirmed in particular”. The extent of that general commitment is important in determining the range of EU laws relevant to, and within scope of, Protocol Article 2. The first section of this chapter is entitled ‘Human Rights’ and is followed by a non-exhaustive list of rights.<sup>30</sup> Within this human rights section, and immediately following the rights ‘affirmed in particular’, is the UK Government’s commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach.
- 3.4 Read in the context of the additional pledges on rights within this chapter, the general commitment of the Belfast (Good Friday) Agreement signatories to the range of rights referenced within the chapter must be understood as embracing, as a minimum, those rights set out in the ECHR.<sup>31</sup> In its Explainer

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29 This commitment to a Bill of Rights for Northern Ireland was further elaborated in the Joint Declaration by the British and Irish Governments at Hillsborough Castle in April 2003, para 25-33 and Annex 3.

30 The UK Government has also recognised that the rights, safeguard and equality of opportunity protections in the Belfast (Good Friday) Agreement are not limited to the “affirmed in particular” rights. See paragraph 9 of the NI Office, [‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’](#) (NIO, 2020).

31 This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, [‘Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide’](#) (SCI, 2021); Christopher McCrudden, [‘Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee’](#) (ESC, 2020); and Sylvia De Mars, Aoife O’Donoghue, Colin Murray and Ben Warwick, [‘Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement’](#) (2018).

the UK Government has confirmed that the “key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR”. The Explainer further confirms that the UK Government acknowledges that “in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the [Belfast (Good Friday)] Agreement”.<sup>32</sup> The Commissions are adopting a working assumption that the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020. Put another way, the Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins an ECHR right falls within scope of the non-diminution commitment in Protocol Article 2.

### Example: Data Protection Rights

The European Court of Human Rights (ECtHR) has recognised that the protection of personal data is of fundamental importance to a person’s enjoyment of her or his right to respect for private and family life in Article 8 of the ECHR.<sup>33</sup>

The EU Charter of Fundamental Rights guarantees the right to respect for private and family life in Article 7 and the right to the protection of personal data in Article 8. Data protection rights are given effect in a number of EU measures, including the General Data Protection Regulation (EU GDPR). The EU GDPR is clear that “the protection of natural persons in relation to the processing of personal data is a fundamental right”.<sup>34</sup>

As a fundamental right, the Commissions consider that the right to personal data protection would fall within the scope of “civil rights” under the Belfast (Good Friday) Agreement. Further, as a fundamental part of the right to respect for private and family life in Article 8 of the ECHR, this would mean that any right to personal data protection afforded by EU GDPR, which the UK was bound by on 31 December 2020, falls within the scope of the non-diminution commitment in Protocol Article 2.

32 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 3.

33 *Z v Finland* (1997) ECHR 10, at para 96; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) ECHR 713, at para 137.

34 Recital 1, [Regulation 2016/679/EU](#), ‘Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data’, 27 April 2016.

- 3.5 In addition, the listed human rights and equality protections which the parties “affirm in particular”, in the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement, include “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.
- 3.6 The anticipated development of a Bill of Rights was also to include consideration of “a clear formulation of the rights not to be discriminated against and to equality of opportunity in both public and private sectors”. In addition, there is a commitment to create a public sector duty on public authorities in NI to have due regard to the need to promote equality of opportunity, and that duty lists a wider range of grounds than those listed in above mentioned right in the Belfast (Good Friday) Agreement, including age, disability and sexual orientation. Similarly, the non-discrimination guarantees in in the ECHR<sup>35</sup> and EU Charter on Fundamental Rights include an expansive range of grounds.<sup>36</sup>
- 3.7 It is arguable the general commitment to equality of opportunity, in the Rights, Safeguards and Equality of Opportunity chapter should be interpreted in the context of those non-discrimination and equality protections available through the international human rights standards ratified by the UK. The Commissions will adopt a broad interpretation of the right to equality of opportunity in all social and economic activity protected under Protocol Article 2.
- 3.8 The Rights, Safeguards and Equality of Opportunity chapter requires that advice on the anticipated Bill of Rights should draw on “international instruments and experience”. Human rights are indivisible, interdependent and interrelated and enjoyment of one human right relies on the realisation of other rights. This is recognised in international human rights law.<sup>37</sup> The context of the Belfast (Good Friday) Agreement also includes a reaffirmation of the parties’ commitment to the principles of equality and mutual respect and to

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35 Article 14, [European Convention of Human Rights](#).

36 Article 21, [EU Charter of Fundamental Rights](#).

37 For example, the [Vienna Declaration and Programme of Action 1993](#), adopted by the World Conference on Human Rights in Vienna, 25 June 1993 reaffirmed that “All human rights are universal, indivisible and interdependent and interrelated”; the preambles of the [UN International Covenant on Civil and Political Rights](#) (UN ICCPR) and the [UN International Covenant on Economic, Social and Cultural Rights](#) (UN ICESCR) recognise that the full enjoyment of human rights can only be achieved if conditions are created whereby everyone can enjoy the full range of rights in both Covenants.

the protection of civil, political, social, economic and cultural rights by both the UK Government and the Government of Ireland.<sup>38</sup>

- 3.9 It is therefore arguable that the signatories' general commitment to civil rights was made with reference to the full range of human rights standards ratified by the UK and that it should be read as an ambulatory or living reference capable of such an interpretation.
- 3.10 The Commissions note that further consideration is required to determine the meaning of "everyone in the community" for the purposes of Protocol Article 2 and that this is likely to be the subject of litigation and judicial interpretation. The UK Government Explainer notes that the commitment in Protocol Article 2 applies to NI, which it clarifies as meaning "everyone who is subject to NI law – irrespective of whether that law has been passed by the NI legislature or Westminster".<sup>39</sup> The Commissions are adopting a broad interpretation of the phrase "everyone in the community".<sup>40</sup> For example, the Commissions take the view that victims of trafficking in NI can fall within the scope of Protocol Article 2.<sup>41</sup> Further, the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement has a north-south dimension, which includes the commitment of the Government of Ireland to ensuring an equivalent level of protection of human rights in Ireland as in NI.<sup>42</sup> Cognisant of this context, the Commissions are giving consideration as to whether the meaning of "everyone in the community" encompasses individuals on the island of Ireland.

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38 Preamble, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 1998. This is reiterated in the Declaration of Support for the multi-party agreement which recognises the harms of the past and a dedication to work towards reconciliation, tolerance, mutual trust and to "the protection and vindication of human rights for all".

39 NI Office, '[UK Government Commitment](#) to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 8.

40 The understanding of "everyone in the community" in the Rights, Safeguards and Equality of Opportunity chapter is framed more broadly than the understanding of the "people of NI" as it relates to the birthright commitment in the Constitutional Issues chapter of the Belfast (Good Friday) Agreement.

41 This is explained further in paragraph 6.18 below. See also NIHRC and ECNI, '[Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)' (NIHRC and ECNI, 2021); NIHRC and ECNI, '[Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#)' (NIHRC and ECNI 2022), at para 4.131.

42 For example, the Joint Committee of the NIHRC and IHREC is established as a forum for the consideration of human rights issues on the island of Ireland that are of cross-jurisdictional relevance. This island of Ireland dimension is further reflected in Protocol Article 2(2), which recognises in particular the role of the Joint Committee of the two human rights commissions on the island of Ireland.

### **‘Ensure at least an Equivalent Level of Protection’**

- 3.11 The text of the Belfast (Good Friday) Agreement requires “at least an equivalent level of protection of human rights” in Ireland as in NI.<sup>43</sup> The object and purpose of the Belfast (Good Friday) Agreement was to set the framework for peace, reconciliation and the enjoyment of human rights in NI.<sup>44</sup> This encompassed the creation of new interlocking and interdependent institutional and constitutional arrangements and the Agreement recognised that North-South and East-West cooperation were essential for the success of the peace settlement.<sup>45</sup> In its Explainer on Protocol Article 2, the UK Government takes the view that the 1998 Agreement does not require North-South equivalence of rights and equality protections.<sup>46</sup> The Joint Committee of the NIHRC and Irish Human Rights and Equality Commission (IHREC) believes that it is clear from the context of the provisions and the establishment of the Joint Committee that long-term North-South equivalence was the intention.<sup>47</sup>
- 3.12 The Preamble to the Protocol affirms that the Belfast (Good Friday) Agreement should be “protected in all its parts” and recognises that “cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement”. The UK Government and EU were also determined that the Protocol, in its application, “should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland”.<sup>48</sup>
- 3.13 The Commissions consider that long-term North-South equivalence is important. Whilst the Protocol requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and human rights on the island of Ireland to diverge after 31 December 2020. It is essential that NI equality and human rights law keeps pace with changes to equality and human rights law in Ireland, including rights introduced in the Ireland as a result of EU laws that enhance protections introduced on or after 1 January 2021. The ECNI, NIHRC

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43 [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity: “The Irish Government will also take steps to further strengthen the protection of rights in its jurisdiction ... The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.

44 [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 1 - Declaration of Support.

45 Ibid.

46 NI Office, [‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’](#) (NIO, 2020), at para 23.

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

48 Preamble, Protocol on Ireland/Northern Ireland to the [UK-EU Withdrawal Agreement](#).



and IHREC will work together to provide oversight of, and report on, issues which engage Protocol Article 2 with an island of Ireland dimension.<sup>49</sup>

### **Economic, social and cultural issues**

- 3.14 In this part of the Rights, Safeguards and Equality of Opportunity chapter, the UK Government makes some general commitments pending the restoration of devolution and commits to making rapid progress on advancing a number of social and economic outcomes.
- 3.15 All parties to the Belfast (Good Friday) Agreement recognised the importance of respect, understanding and tolerance of linguistic diversity in NI, including Ulster Scots and the languages spoken in ethnic minority communities and on promoting the Irish language and facilitating its use. This part of the Rights, Safeguards and Equality of Opportunity chapter goes on to list a number of commitments of the UK Government, including its active consideration of signing the Council of Europe Charter for Regional and Minority Languages, which the UK subsequently ratified in 2001.
- 3.16 In summary, the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement represents wide-ranging acknowledgement of and commitment to civil, political, economic, social and cultural rights and equality of opportunity, anticipating further legislation to entrench and safeguard those rights.

## **4.0 No diminution**

- 4.1 Protocol Article 2 protects certain rights, safeguards and equality of opportunity protections, as discussed above, from diminution, measured against standards in place on or before 31 December 2020. In addition, the protections afforded under the six equality directives in Annex 1 are subject to dynamic alignment or a ‘keeping pace’ obligation. This section deals with what constitutes ‘diminution’ and ‘keeping pace’. The next section deals with identifying and interpreting relevant underpinning EU and domestic law for this purpose.

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49 Article 2(2) and Article 14(c) of the Ireland/Northern Ireland Protocol to the [UK-EU Withdrawal Agreement](#).

## Non-Diminution

4.2 In order to show that there has been a diminution of rights, safeguards or equality of opportunity protections, as set out in the relevant part of the Belfast (Good Friday) Agreement, resulting from the UK's withdrawal from the EU, there must be a right or safeguard which was underpinned by EU law and given effect in NI law on or before 31 December 2020. A diminution occurs where there is a change to this legal underpinning, either because the measure which secured it has been removed or amended and this has resulted in the right, safeguard or equality of opportunity protection being diminished on or after 1 January 2021.

## 'Keeping Pace'

4.3 Whereas EU law which underpins the non-diminution commitment in Protocol Article 2 is limited to that which was binding on the UK on or before 31 December 2020, the six equality directives set out in Annex 1 are subject to different arrangements. The UK Government has committed to 'keep pace' with any changes to the Annex 1 equality directives that enhance protections.

4.4 Article 13(3) of the Protocol provides that where the Protocol refers to an EU law measure, including the six equality directives in Annex 1, "that reference shall be read as referring to a Union act as amended or replaced". There is therefore an additional obligation on the UK Government to ensure that any amendment to, or replacement of, an Annex 1 Directive by the EU on or after 1 January 2021 which enhances rights and protections, is reflected in NI law. Article 13 might therefore be described as providing an evolving benchmark for the protection against certain forms of discrimination in NI.

4.5 The UK Government has confirmed that these standards in the Annex 1 equality directives represent the minimum standard of protection against discrimination in NI. It has confirmed its commitment to dynamic alignment with the Annex 1 equality directives to "provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI" and this will "ensure NI will not fall behind minimum European standards in anti-discrimination law".<sup>50</sup>

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50 NI Office, '[UK Government Commitment](#) to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 12.

### **‘As amended or replaced’**

- 4.6 It is important to understand what “as amended or replaced” means in the context of the obligation to keep pace with any improvements to the rights and safeguards in the Annex 1 equality directives. Where a proposed EU measure explicitly states that it is replacing or ‘recasting’ an Annex 1 Directive, it is relatively straightforward to identify what measures will need to be updated in NI law.
- 4.7 Where a new EU measure does not explicitly state that it is amending an Annex 1 equality directive, or where it is amending or updating part of such a directive, an assessment of the substance of the measure will be necessary to evaluate the extent to which it requires NI law to keep pace with this change. Such an assessment would have to consider, for example, the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the substance of the rights and safeguards between the new measure and the Annex 1 equality directive, and any relevant Court of Justice of the EU (CJEU) case law; and the extent to which the new measure facilitates the implementation and/or enforcement of an Annex 1 equality directive.

#### **What’s the difference between an Annex 1 Equality Directive and other EU measures falling within scope of Protocol Article 2?**

Where one of the Annex 1 equality directives is amended or replaced by the EU on or after 1 January 2021, NI law must be updated to reflect any enhancements to the rights or safeguards in those directives. Other EU measures which underpin the relevant rights, safeguards and equality of opportunity provisions in the Belfast (Good Friday) Agreement are fixed as of 31 December 2020. Therefore, there is no requirement under Protocol Article 2 to amend or update domestic law to take account of any subsequent changes to such EU measures.

For example, the EU Commission has proposed a Pay Transparency Directive.<sup>51</sup> In the recitals, it states that this proposed Directive should “strengthen the existing enforcement tools and procedures in regard to the rights and obligations laid down in this Directive and the equal pay provisions set out in Directive 2006/54/EC”. This Directive 2006/54/EC on equal treatment of men and women in matters of employment is listed in Annex 1 of the Protocol.

To the extent that the proposed Pay Transparency Directive updates or amends an Annex 1 Directive, there is a duty to update NI law to take account of this change.

### Obligation of result

- 4.8 Protocol Article 2 is an enduring commitment by the UK Government to achieve a specific result – namely that there is no diminution of those specified rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement as a result of the UK leaving the EU. It requires that substantive rights be protected against diminution rather than preventing amendment of existing provisions, including any underpinning EU obligation. However, any such change should not result in a reduction in the effectiveness of the existing protections, including how that right is claimed or enforced.

### Case law of CJEU

- 4.9 Article 4(4) of the UK-EU Withdrawal Agreement provides that any EU law concept or provision referred to in that Agreement shall, in its implementation and application, be interpreted in conformity with the relevant case law of the CJEU handed down on or before 31 December 2020.<sup>52</sup> In addition, Article 4(5) provides that judicial and administrative authorities shall have “due regard” to relevant CJEU case law handed down on or after 1 January 2021.<sup>53</sup>

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51 European Commission, [‘Press release: Pay Transparency: Commission proposes measures to ensure equal pay for equal work’](#), 4 March 2021.

52 Article 4(1) and (2) apply both to the provisions of the Withdrawal Agreement and EU law made applicable by it, whereas the provisions in Article 4 (3-5) apply only to provisions of the Withdrawal Agreement referring to EU Law. ‘Article 4 – Commentary’ in Manuel Kellerbauer, Eugenia Dumitriu-Segnana, and Thomas Liefänder (ed) ‘The UK-EU Withdrawal Agreement - A Commentary’, (OUP, 2021), at 38.

53 Article 4(4) and (5), [UK-EU Withdrawal Agreement 2020](#).

- 4.10 The protection of rights, safeguards and equality of opportunity in Protocol Article 2 includes an overarching non-diminution guarantee, which freezes the baseline of rights and safeguards to those that applied on or before 31 December 2020.<sup>54</sup> Therefore, in line with Article 4(4) and (5) of the Withdrawal Agreement, the interpretation and application of these rights must, as a minimum, conform with the body of CJEU jurisprudence, including insofar as it relates to general principles and the EU Charter of Fundamental Rights, on 31 December 2020. In relation to any subsequent CJEU decisions of relevance to Protocol Article 2, they should as a minimum be given due regard by judicial and administrative authorities.
- 4.11 In addition, Article 13(2) of the Protocol provides an important clarification requiring continued alignment with CJEU jurisprudence regarding EU measures listed in the Protocol:
- 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.**
- 4.12 This creates an additional obligation in respect of the Protocol, including Article 2. Annex 1 to the Protocol lists six equality directives, which as noted above, require dynamic alignment. The UK Government has accepted that “if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this”.<sup>55</sup>
- 4.13 The Commissions’ view is that, in line with Article 13 of the Protocol, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these

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54 With the exception of the six equality directives in Annex 1, Article 2 sets a standard for ‘no diminution’ defined by the relevant EU standards underpinning the rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement as they were on 31 December 2020.

55 NI Office, [‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’](#) (NIO, 2020), at para 12.

will continue to have relevance in NI.<sup>56</sup> In the NI High Court, Colton J noted that there is no temporal limitation on Article 13(2) of the Protocol.<sup>57</sup>

- 4.14 The Commissions are mindful that future case law of the CJEU which, for example, references established and longstanding general principles or rights under the EU Charter will continue to have relevance to Protocol Article 2 and its interpretation.
- 4.15 Under the UK-EU Withdrawal Agreement, there is no recourse to refer questions arising out of the commitment in Protocol Article 2 to the CJEU.<sup>58</sup> Nevertheless, CJEU case law will continue to play an important role in the application and interpretation of the rights and safeguards in Protocol Article 2, particularly as regards the rights underpinned by the Annex 1 equality directives.

## 5.0 ‘Results from’ UK Withdrawal from the EU

- 5.1 The UK is no longer a member of the EU and the terms of its departure are governed by the UK-EU Withdrawal Agreement. Unless there is specific commitment to do otherwise in the UK-EU Withdrawal Agreement, including Protocol Article 2, or the UK-EU Trade and Cooperation Agreement (or any future UK-EU Agreement), the UK is no longer bound by EU obligations.
- 5.2 On 31 December 2020, UK law was required to be fully compliant with the EU obligations of its membership. Protocol Article 2 links the diminution of rights standards to the UK leaving the EU, so it follows that for any potential breach to fall within scope of Protocol Article 2, it should be something that would have been incompatible with the UK’s membership of the EU.

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56 Article 13(2) and 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 93.

57 *Re Allister* [2021] NIQB 64, at para 234.

58 The CJEU will continue to have roles in relation to Articles 5 and 7-10 of the Protocol and Part 2 of the Withdrawal Agreement, which sets out the rules governing the rights of EU citizens in the UK and UK citizens in the EU.

5.3 For the purposes of the Withdrawal Agreement, any reference to EU law includes:

- the foundational treaties and the EU Charter of Fundamental Rights;
- the General Principles of EU law including fundamental rights,<sup>59</sup> proportionality,<sup>60</sup> legal certainty,<sup>61</sup> legitimate expectations,<sup>62</sup> equality and non-discrimination,<sup>63</sup> transparency<sup>64</sup> and the precautionary principle;<sup>65</sup>
- legislative acts adopted by the EU institutions, including directives, regulations and decisions; and
- international agreements to which the EU is party.<sup>66</sup>

5.4 The commitment in Protocol Article 2 is a unilateral commitment of the UK and does not impose any reciprocal obligation on the EU or on any EU Member State. Nevertheless, the UK and EU have a shared responsibility for the good faith implementation of the Agreement, including Protocol Article 2.<sup>67</sup>

5.5 As the UK moves to diverge from the shared rules which emanated from the EU, issues will arise over time as and when the Westminster Parliament or NI Assembly start to change laws applicable in NI in ways that might break with the EU obligations which bound UK action when it was a Member State.

### Transposing EU measures into NI law

5.6 When considering whether a diminution has occurred as a result of the UK withdrawal from the EU, it is necessary to see how the relevant underpinning EU law has been ‘transposed’ into NI law. This can be a complex exercise.

59 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 17 December 1970, at para 4.

60 *R v Secretary of State for Health (British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd)*, Case 491/01, 10 December 2002.

61 *R v Kent Kirk*, Case 63/83, 10 July 1984.

62 *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*, Cases 7/56, 3/57-7/57, 12 July 1957.

63 *Albert Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe*, Cases 117/76 and 16/77, 19 October 1977.

64 *R (Alliance for Natural Health and Nutri-Link Ltd) v Secretary of State for Health; R (National Association of Health Stores and Health Food Manufacturers Ltd) v Secretary of State for Health and the National Assembly of Wales*, Cases C-154/04 and 155/04, 12 July 2005.

65 *UK v Commission*, Case-180/96, 5 May 1998.

66 Article 2, [UK-EU Withdrawal Agreement 2020](#).

67 Article 5, [UK-EU Withdrawal Agreement 2020](#).

Where there is a specific implementing measure for a particular EU law, these can be easily identified. For example, when domestic legislation explicitly acknowledges that it is giving effect to an EU obligation. However, the UK could and did rely on a range of measures to give effect to its EU obligations, without always clarifying the link between the UK and the EU law. Therefore, it is not always easy to identify which UK-wide and NI-specific laws give effect to an underpinning EU law falling within scope of Protocol Article 2. Failure to acknowledge a relevant EU law in a UK implementing measure does not mean that a piece of domestic legislation is outside the scope of Protocol Article 2.<sup>68</sup>

- 5.7 When identifying EU obligations within the scope of Protocol Article 2, it is necessary to interpret any EU law in light of the Treaties, the Charter of Fundamental Rights, general principles of EU law and the relevant CJEU jurisprudence.

For example, the recitals of the (Recast) Equal Treatment (Employment) Directive include references to the CJEU case law recognising that the prohibition on sex discrimination encompasses transgender discrimination.<sup>69</sup>

The CJEU has made it clear in relation to the Equal Treatment (Employment) Directive that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.<sup>70</sup>

By contrast, the Equal Treatment (Goods and Services) Directive, which prohibits sex discrimination in access to goods and services does not include any such express reference to the case law recognising transgender discrimination in its recitals.<sup>71</sup>

Nevertheless, in its transposing law for the Equal Treatment (Goods and Services) Directive, the UK Government made it clear it was legislating to ensure compliance with its EU obligations, in the context of resistance by the then First Minister to legislating on the rights of trans people.<sup>72</sup>

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68 See *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 88-90.

69 [Directive 2006/54/EC](#), ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006, Recital 3.

70 *P v S and Cornwall County Council*, Case C-13/94, 30 April 1996, para 22.

71 [Directive 2004/113/EC](#), ‘Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004.

72 [Explanatory Memorandum](#) to the Sex Discrimination (Amendment of Legislation) Regulations SI 2008/963, para 7.3-7.5: “Although the NI Assembly has competence to legislate on this devolved matter, because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations, the First Minister and Deputy First Minister could not reach joint agreement on all of the policy proposals to implement the Gender Directive”.



Even though the Equal Treatment (Goods and Services) Directive makes no reference to the case law interpreting the prohibition on sex discrimination encompassing transgender discrimination, the UK recognised this broader EU legal obligation in the domestic transposing legislation.

This example demonstrates that when identifying relevant underpinning EU law, it is not sufficient to simply look to the text of the EU measure, which must be read in light of relevant case law.

- 5.8 In addition, a UK or NI law which transposes an EU legal obligation may go further than the original EU law required. Therefore, additional consideration is necessary to understand the extent to which that UK or NI law can be narrowed in scope before it undermines the core EU legal obligation, and results in a diminution of rights within scope of Protocol Article 2.
- 5.9 When the UK was a Member State of the EU, it was required to ensure that its domestic rules complied with the requirements of that membership. Where UK domestic laws did not align with EU obligations, then the EU Commission could have taken action to ensure compliance.<sup>73</sup> Similarly, individuals (natural and legal persons) were able to take legal action in UK courts to ensure that their rights under EU law were adequately protected. Where a UK court found that UK law conflicted with EU law, it could have taken the necessary steps to ensure EU law is given effect, which may have included disapplying the UK law to the extent of such a conflict.<sup>74</sup>
- 5.10 All EU law obligations which were binding on the UK on or before 31 December 2020 were part of domestic UK law, although how they were enforced and given effect in NI law depended on the nature of the EU measure.<sup>75</sup> Where an EU measure was directly applicable on or before 31 December 2020, it did not require any additional implementing legislation for it to apply in NI. Further, where an EU measure did require additional implementing legislation in NI, it may still be capable of having direct or

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73 Articles 258 and 260 [Treaty on the Functioning of the EU](#).

74 *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* (No 2) [1990] UKHL 13.

75 The concept of supremacy of EU and the relationship between EU law and national law is complex and for further discussion see Chapter 10 of Craig and de Búrca, 'EU Law: Texts, Cases and Materials – UK Version' (7<sup>th</sup> Edn)(OUP, 2020), at 314ff.

indirect effect, provided it met the necessary conditions.<sup>76</sup> Where UK and NI law was out of alignment with EU law on or before 31 December 2020, the absence of a ‘domestic implementing measure’ is not an insurmountable obstacle to demonstrating a diminution of Protocol Article 2, provided the EU legal obligation existed and was capable of having direct effect on that date.

## Retained EU law

- 5.11 The EU (Withdrawal) Act 2018 repealed the European Communities Act 1972, which gave effect to EU law within the UK domestic legal framework before 1 January 2021.<sup>77</sup> Notwithstanding that repeal, retained EU law continues to be recognised and available as UK law on and after 1 January 2021.<sup>78</sup>
- 5.12 The question of whether a piece of legislation falls within the category of ‘retained EU law’ is not material to whether it falls within the scope of Protocol Article 2. It is not necessary for EU-derived UK law underpinning the rights, safeguards and equality of opportunity protections in the relevant part of the Belfast (Good Friday) Agreement to be part of retained EU law. Nevertheless, particular care should be taken by the NI Executive and UK Government when repealing or amending retained EU law to ensure it does not result in a diminution of rights, safeguards or equality of opportunity protections contrary to Protocol Article 2.
- 5.13 The Commissions have recommended that amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to amending or repealing legislation that emanates either from the NI Assembly or from Westminster, as regards laws that impact on human rights and equality protections in NI.<sup>79</sup>

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76 This is discussed further below in Section 6 of this working paper on Individual Redress and Direct Effect. As noted by Craig and de Búrca, the distinction between horizontal and vertical application of directives has led the CJEU to develop a complex jurisprudence which allow for directives to impact on national law, even where they do not have direct effect, including a broad definition of the state, doctrine of indirect effect and incidental horizontal effects. In addition, the CJEU has found that general principles and rights in the EU Charter can have direct effect and the content of those rights can be informed by a directive (Craig and de Búrca, ‘EU Law: Texts, Cases and Materials – UK Version’ (7<sup>th</sup> Edn)(OUP, 2020), at 227-228).

77 Section 1, [EU \(Withdrawal\) Act 2018](#).

78 Sections 2-4, [EU \(Withdrawal\) Act 2018](#).

79 For further discussion of the relationship between Retained EU law and Article 2, see NIHRC and ECNI, ‘[Submission of the NIHRC and ECNI to the European Scrutiny Committee Inquiry on Retained EU Law](#)’ (NIHRC and ECNI, 2022).

5.14 As noted above, it is the Commissions' view that Protocol Article 2 imposes an obligation of result,<sup>80</sup> so while the form of the legislation can change, the no diminution requirement applies to the substance of the rights protected as well as to the procedural safeguards relevant to implementation and enforcement of rights. Changes to the status of EU-derived UK law which, for example, excluded specific EU general principles, changed how courts interpret that law, and/or reduced or limited the means by which rights can be asserted or enforced, could therefore potentially constitute a diminution of rights.<sup>81</sup>

## 6.0 Oversight and Enforcement

### Protocol Article 2 in NI law

6.1 The methods and principles relating to the effect, implementation and application of the UK-EU Withdrawal Agreement are set out in Article 4. Article 4(1) and (2)<sup>82</sup> apply both to the provisions of the Withdrawal Agreement and EU law made applicable by it, whereas the provisions in Article 4(3)-(5)<sup>83</sup> apply only to provisions of the Withdrawal Agreement referring to EU Law.<sup>84</sup> Article 4(1) provides that the provisions in the Agreement and any EU law made applicable by it:

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80 As noted in para 4.8 above.

81 See section 6 below for further discussion of how the UK-EU Withdrawal Agreement provides the architecture for Protocol Article 2, including supremacy, direct effect and the role of the courts and any impact upon EU law underpinning the rights, safeguards and equality of opportunity protections in the relevant part of the Belfast (Good Friday) Agreement.

82 Article 4(2) provides as follows: "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."

83 Article 4(3)-(5) provide as follows "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."

84 Manuel Kellerbauer, Eugenia Dumitriu-Segnana, and Thomas Liefänder (ed) 'The UK-EU Withdrawal Agreement - A Commentary' (OUP, 2021), at 38.

shall produce in respect of and in the UK the same legal effects as those which they produce within the [EU] 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 [EU] law.

- 6.2 The UK-EU Withdrawal Agreement requires that consideration of Protocol Article 2 is built into the ordinary policy making and legislative processes within the UK Government and Parliament, and at a devolved level, to ensure that there is no diminution of those rights and safeguards which fall within its scope.
- 6.3 The Northern Ireland Act 1998 has been amended to limit the legislative competence of the NI Assembly by prohibiting it from acting in a way that is incompatible with Protocol Article 2.<sup>85</sup> Similarly a Minister or NI department has no power to legislate or do any act insofar as it is incompatible with Protocol Article 2.<sup>86</sup>
- 6.4 In addition, Section 7A of the EU (Withdrawal) Act 2018 gives effect to all the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement in UK law without the need for further enactment.<sup>87</sup>

### Oversight of Protocol Article 2

- 6.5 Protocol Article 2 facilitates a degree of enforceability for the rights, safeguards and equality of opportunity protections in the relevant part of the Belfast (Good Friday) Agreement, to the extent that those rights and safeguards are underpinned by EU law. The Courts will consider and make a determination on the relevant provisions of the Belfast (Good Friday) Agreement, the extent to which the identified underpinning EU obligations fall within scope of the commitment in Protocol Article 2, and whether there has been a diminution of rights or protections as a result of the UK leaving the EU.

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85 Section 6(2)(ca), [Northern Ireland Act 1998](#).

86 Section 24(1)(aa), [Northern Ireland Act 1998](#).

87 Section 38, [EU \(Withdrawal Agreement\) Act 2020](#) reiterates that the UK Parliament is sovereign and its sovereignty subsists notwithstanding “directly applicable or directly effective EU law” and section 7A of the EU (Withdrawal) Act 2018. For example, the UK Government, in provisions that were later removed in the legislative process, sought to “breach international law in a specific and limited way” in the UK Internal Market Bill by introducing measures which would have contradicted the UK-EU Withdrawal Agreement.

- 6.6 In addition, the UK and EU, through the Joint Committee, will supervise and facilitate the implementation of the Withdrawal Agreement. The Joint Committee can adopt decisions and make appropriate recommendations to the UK and EU. Such decisions shall be agreed by mutual consent between the parties, have the same legal effect as the Withdrawal Agreement and be binding on both parties.<sup>88</sup> Where there is a dispute on the application and interpretation of the UK-EU Withdrawal Agreement that cannot be resolved through the Joint Committee, it will be subject to arbitration and any decision of the arbitration panel will be binding on both parties.<sup>89</sup>
- 6.7 The UK and EU have affirmed their commitment to a principle of good faith and sincere cooperation and to take all appropriate measures to ensure fulfilment of the obligations arising from the UK-EU Withdrawal Agreement.<sup>90</sup>

### Individual Redress and Direct Effect

- 6.8 Protocol Article 2 is also framed within the wider context of EU legal obligations, which are woven through the Withdrawal Agreement. The UK Government has recognised that it is “obliged to ensure that holders of relevant rights are able to bring challenges before domestic courts and ... that appropriate remedies are available”.<sup>91</sup>
- 6.9 The UK-EU Withdrawal Agreement requires that UK law provide for individual redress where a person feels that there has been a diminution of rights, safeguards and equality of opportunity protections in Protocol Article 2 and that this is given effect in UK law.<sup>92</sup> This includes the power of judicial and administrative authorities to “disapply inconsistent or incompatible domestic provisions”, which must be provided for in primary legislation.<sup>93</sup>

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88 Article 166, [UK-EU Withdrawal Agreement 2020](#). The Specialised Committee on the implementation of the Protocol can consider any matter of relevance to Article 2 brought to its attention by the Commissions and the Joint Committee of representatives of the NIHRC and IHREC (Article 14, Ireland/Northern Ireland Protocol). The Specialised Committee may draft decisions and recommendations and refer them to the Joint Committee for adoption (Article 165, [UK-EU Withdrawal Agreement 2020](#)).

89 Article 164-181, [UK-EU Withdrawal Agreement](#). Article 174 clarifies that where any question on the interpretation of an EU law concept is raised in arbitration, it shall be referred to CJEU to give a ruling on that question and that ruling will be binding on the arbitration panel.

90 Article 5, [UK-EU Withdrawal Agreement 2020](#).

91 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 6.

92 Article 4(1), [UK-EU Withdrawal Agreement](#).

93 Article 4(2), [UK-EU Withdrawal Agreement](#).

- 6.10 The principle of supremacy of EU law obligations over the domestic law provisions is closely linked to that of direct effect.<sup>94</sup> Direct effect enables individuals immediately to invoke an EU provision before a national court. Article 4 acknowledges that this principle applies to the provisions of the UK-EU Withdrawal Agreement, including Protocol Article 2, and any EU measure given effect by it, where such provisions meet the conditions for direct effect.<sup>95</sup> For a provision of EU law to have direct effect it must be set out in unconditional and unequivocal terms and be sufficiently clear and precise to be invoked by an individual.<sup>96</sup>
- 6.11 In its Explainer the UK Government acknowledges this wider legal context and framing of Protocol Article 2 confirming that “under Article 4 of the Withdrawal Agreement, incorporated into domestic law through the EU (Withdrawal Agreement) Act 2020, all provisions in the Withdrawal Agreement and the provisions of Union law that it makes applicable in the UK have the same legal effect in the UK as in the EU and its Member States”.<sup>97</sup>
- 6.12 In the EU legal order, directives and general principles of EU law can be considered as being capable of having direct effect. The rules governing direct effect are complex and, while directives are usually limited to vertical direct effect against the state, general principles are capable of being invoked in litigation between private individuals.<sup>98</sup>
- 6.13 The Annex 1 equality directives listed in the Protocol, together with the general principle of equality and non-discrimination, have generally been

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94 *Daniel Adam Popławski (European Arrest Warrant)*, C-573/17, 24 June 2019, at para 59-65; *Flaminio Costa v ENEL*, Case 6/64, 15 July 1964; *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 17 December 1970, at para 3; *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, 9 March 1978. The CJEU has adopted a number of tools to mitigate the impact of the decision to deny horizontal direct effect to Directives, including an expansive concept of the state, the principle of harmonious interpretation and through the use of general principles – see Craig and de Búrca, ‘EU Law: Texts, Cases and Materials – UK Version’ (7<sup>th</sup> Edn)(OUP, 2020), at 243ff.

95 Article 4(1), [UK-EU Withdrawal Agreement 2020](#): “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”.

96 *Gassmayr v Bundesminister für Wissenschaft und Forschung*, Case C-194/08, 1 July 2010, at para 44 and 45.

97 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 29; UK Parliament Hansard, ‘[Written Answer](#): Belfast Agreement – NI Minister, Lord Duncan of Springbank – HL404’, 28 January 2020; Letter from Robin Walker MP, Minister of State for NI to Professor Christopher McCrudden, 26 February 2020 attached to Christopher McCrudden, ‘Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – [Evidence](#) to the House of Commons European Scrutiny Committee’ (ESC, 2020).

98 *Dansk Industries (DI) v Estate of Karsten Eigel Rasmussen*, Case C-441/14, 19 April 2016, at para 43; *MH Marshall v Southampton and South-West Hampshire Area Health Authority*, Case 152/84, 26 February 1986; *Gabrielle Defrenne v Sabena*, Case 43/75, 8 April 1976; *Werner Mangold v Rüdiger Helm*, Case C-144/04, 22 November 2005, at para 72.

found to be capable of having direct effect within EU law and can be used to override conflicting domestic law.<sup>99</sup>

- 6.14 The Commissions welcome the UK Government’s recognition that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK Courts.<sup>100</sup> The NI High Court has also recognised that “Article 2 has direct effect and legal persons ... are able to rely on it in domestic courts”.<sup>101</sup>

### Commissions’ Oversight and Enforcement Powers

- 6.15 The Commissions have additional powers to oversee the UK Government’s commitment in Protocol Article 2. The Commissions are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment. They can carry out their powers and duties either jointly or separately.<sup>102</sup> The Commissions can provide advice to the UK Government and Parliament and the NI Executive and Assembly on compliance with Protocol Article 2.<sup>103</sup>
- 6.16 The Commissions can bring any matter of relevance to Protocol Article 2 to the attention of the Specialised Committee on the Implementation of the Protocol, for consideration.<sup>104</sup> In addition, the Joint Committee of representatives of the NIHRC and IHREC may also bring any matters of relevance to Protocol Article 2 to the attention of the Specialised Committee.<sup>105</sup> This gives the Commissions an important role and responsibility to identify and raise concerns about how the Withdrawal Agreement is operating in relation to the rights and safeguards in Protocol Article 2, including on an island of Ireland basis. The Specialised Committee can make recommendations for the UK-EU Withdrawal Agreement Joint Committee to address.<sup>106</sup>

99 “ *CHEZ Razpredelenie Bulgaria*” *AD v Komisija za zashtita ot diskriminatsia*, Case C-83/14, 16 July 2015; *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, C-385/11, 22 November 2012; *S Coleman v Attridge Law and Steve Law*, Case C-303/06, 17 July 2008.

100 NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 29.

101 *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77.

102 Section 78E, [Northern Ireland Act 1998](#).

103 Sections 78A-78B, [Northern Ireland Act 1998](#).

104 Section 78A(9), [Northern Ireland Act 1998](#) in respect of the NIHRC and Section 78B(9), Northern Ireland Act 1998 in respect of the ECNI; Article 14(c), [Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020](#).

105 Article 14(c), Ireland/Northern Ireland Protocol to the [UK-EU Withdrawal Agreement 2020](#).

106 Article 164-166, [UK-EU Withdrawal Agreement 2020](#).

6.17 The Commissions have powers to bring a legal action in relation to breach (or potential future breach) of Protocol Article 2 or intervene in other legal action that engages Protocol Article 2.<sup>107</sup> The Commissions can also assist persons in legal proceedings in respect of a breach (or potential future breach) of Protocol Article 2.<sup>108</sup>

### When is Protocol Article 2 engaged?

6.18 When assessing whether Protocol Article 2 is engaged, the following questions are relevant to establishing a potential breach:

- (i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?
- (ii) Was the right, safeguard or equality of opportunity protection:
  - (a) underpinned by EU law binding on the UK on or before 31 December 2020?
  - (b) given effect in NI law, in whole or in part, on or before 31 December 2020?<sup>109</sup>
- (iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?
- (iv) Would this diminution not have occurred had the UK remained in the EU?

6.19 This formulation is designed as a guide to key questions to be considered when identifying whether Protocol Article 2 is engaged and to help identify if there is a breach or a potential breach of the non-diminution obligation. If the answer to each of the questions is yes, then a breach of Protocol Article 2 has been identified.

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<sup>107</sup> For example, the Commissions have intervened in litigation where the applicants have raised issues relating to Protocol Article 2 to assist the court in its consideration of this provision.

<sup>108</sup> Sections 78C- 78D, [Northern Ireland Act 1998](#).

<sup>109</sup> See Paragraph 5.10 above, where UK and NI law was out of alignment with EU law on 31 December 2020, the absence of a 'domestic implementing measure' is not an insurmountable obstacle to demonstrating a diminution of Protocol Article 2, provided the EU legal obligation existed and was capable of having direct effect on that date. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 88-90 for further discussion of the relationship between EU underpinning law and Article 2.



For example, Section 68 of the Nationality and Borders Act seeks to disapply the EU Trafficking Directive, in so far as it is incompatible with a provision made in or under the Act.<sup>110</sup>

**(i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?**

**Yes.** The Commissions consider that the rights of victims of trafficking in NI can fall within the relevant chapter of the Belfast (Good Friday) Agreement for a number of reasons: firstly, the right of victims to remember and to contribute to a changed society is recognised in this chapter, and victims of trafficking are a subset of victims; secondly, as noted above, the Commissions are reading the commitment to civil rights as including ECHR rights which are underpinned by EU law,<sup>111</sup> and Article 4 of the ECHR on the prohibition of slavery and forced labour encompasses a prohibition on trafficking of human beings,<sup>112</sup> and thirdly, the rights of victims of trafficking can fall within the right relating to equal opportunity in all social and economic activity in the relevant chapter of the Belfast (Good Friday) Agreement.<sup>113</sup>

**(ii) Was the right, safeguard or equality of opportunity protection:**

**(a) underpinned by EU law binding on the UK on or before 31 December 2020?**

**Yes.** The EU Trafficking Directive provides for a number of rights and safeguards relating to trafficking victims.<sup>114</sup> The Directive recognises the “gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes” and includes a number of specific provisions focused on the rights and safeguards in respect of child victims.

110 NIHRC and ECNI, ‘[Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)’ (NIHRC and ECNI, 2021). The NI Department of Justice identifies in its Modern Slavery Strategy that, while immigration and asylum are reserved matters, there may be overlap with modern slavery and human trafficking, which remains mainly devolved. (Department of Justice, ‘Northern Ireland Organised Crime Task Force Modern Slavery Strategy 2021-2022’, at 1.31).

111 See paragraphs 3.3-3.4 above and related example. NIHRC and ECNI, ‘[Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#)’ (NIHRC and ECNI 2022), at para 4.131.

112 *Siliadin v France* (2005) ECHR 54; *Rantsev v Cyprus and Russia* (2010) ECHR 22; *SM v Croatia* (2008) ECHR 633.

113 NIHRC and ECNI, ‘[Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)’ (NIHRC and ECNI, 2021), at para 3.2.

114 [Directive 2011/36/EU](#), ‘Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

**(b) given effect in NI law, in whole or in part, on or before 31 December 2020?**

**Yes.** This Directive is given effect in NI law in various measures, including Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.<sup>115</sup>

**(iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?**

The Commissions' analysis of the Nationality and Borders Bill as it progressed through Parliament identified a number of provisions that may infringe obligations arising from the EU Trafficking Directive.<sup>116</sup> For example, the Commissions raised concerns in relation to Clause 58 of the Bill, now Section 59(2) of the Nationality and Borders Act, which requires that late compliance with a Trafficking Information Notice, without good reason, must be considered as a factor damaging a person's credibility. This mandatory consideration relating to credibility has the potential to engage and infringe Article 8 of the EU Trafficking Directive and may reverse the obligations on states to identify victims of trafficking in Article 9 of the Directive. Line by line analysis of the Nationality and Borders Act and subsequent measures, such as secondary legislation and guidance under the Act, is required to ensure that the disapplication of the EU Trafficking Directive does not in fact diminish the rights, safeguards and equality of opportunity protection of trafficking victims in NI.

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115 The UK measures giving effect to the EU Trafficking Directive are available on the [EU Commission website](#).

116 Further consideration of the Nationality and Borders Bill is available in NIHRC and ECNI, '[Joint NIHRC/ECNI Briefing Paper](#) on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill' (NIHRC and ECNI, 2022).

**(iv) Would this diminution not have occurred had the UK remained in the EU?**

As an EU Member State, the UK was required to give effect to the principle of supremacy of EU law, therefore any UK Act and subsequent secondary legislation and guidance would have to be read in light of the EU Trafficking Directive.

**Evaluation:** Section 68 of the Nationality and Borders Act engages rights, safeguards and equality of opportunity protections within the scope of Protocol Article 2. The Commissions recommended the Nationality and Borders Bill be amended to remove Northern Ireland from the extent of this section (and related sections), to avoid potential breach of the “no-diminution” commitment under Protocol Article 2.<sup>117</sup> The Commissions will continue to monitor and advise on the outworkings of the Act in terms of its compliance with Protocol Article 2 and its impact on the rights of trafficking victims in NI.

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117 Ibid.

## 7.0 Context: EU Charter and UN CRPD

7.1 As noted above any reference to EU law concepts or provisions in the UK-EU Withdrawal Agreement must be interpreted and applied in accordance with the methods and general principles of EU law.<sup>118</sup> Moreover, provisions of the UK-EU Withdrawal Agreement and EU law made applicable by it “shall produce ... the same legal effects as those which they produce within the EU and its Member States”.<sup>119</sup>

### EU Charter of Fundamental Rights

7.2 Where required by the UK-EU Withdrawal Agreement, including the Protocol and Article 2, the EU Charter of Fundamental Rights continues to have relevance in NI. This is an exception from the general provision of the EU (Withdrawal) Act 2018 which provides that the EU Charter is not carried over by the general rules on the retention of EU law and is not part of UK law on or after 1 January 2021.<sup>120</sup>

7.3 The definition of EU law within the UK-EU Withdrawal Agreement includes the EU Treaties, which encompasses the EU Charter of Fundamental Rights.<sup>121</sup>

7.4 When EU Member States are implementing EU law, they are required to “respect the rights, observe the principles and promote the application” of the EU Charter.<sup>122</sup> Therefore the EU Charter will continue to apply in the application and interpretation of any EU law and concepts referred to in the Withdrawal Agreement.<sup>123</sup> Where a relevant EU measure cannot be read to be compatible with the EU Charter, the Charter must be given precedence. The application of the EU Charter is confined to when Member States are implementing EU law and it does not extend the field of application of EU law.<sup>124</sup>

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118 Article 4(3), [UK-EU Withdrawal Agreement](#).

119 Article 4(1), [UK-EU Withdrawal Agreement](#).

120 Section 5, [EU \(Withdrawal\) Act 2018](#). See *Re SPUC Pro-Life Limited [2022] NIQB 9*, at paras 78 and 115.

121 Article 2(a)(i), [UK-EU Withdrawal Agreement](#).

122 Article 51(1) of the [EU Charter of Fundamental Rights](#); *Åklagaren v Hans Åkerberg Fransson, Case C-617/10, 26 February 2013*; *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV, Case C-414/16, 17 April 2018*, at para 76.

123 Article 4(3) provides that where the Withdrawal agreement refers to EU law or concepts, it should be interpreted and applied in accordance with the methods and general principles of EU law. As noted in Kellerbauer et al, “The obligation to apply these provisions in accordance with the general principles of [EU] law means for the UK that it is bound to observe the EU fundamental rights when implementing those provisions of the Agreement. Hence in substance, Article 4(3) has the same effect as article 51(1) if the EU Charter of Fundamental Rights.” Kellerbauer, Dumitriu-Segnana, Thomas Liefländer, ‘The UK-EU Withdrawal Agreement – A Commentary’ (OUP, 2021), at 39.

124 Article 51 of the [EU Charter of Fundamental Rights](#).

- 7.5 The EU Charter can be considered to have direct effect where it meets the test of being sufficiently precise and unconditional.<sup>125</sup> It places an obligation on the national courts to “guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law”.<sup>126</sup>
- 7.6 As noted above, pursuant to Article 4(1), the Withdrawal Agreement produces ‘the same legal effects’ on the UK as EU law on EU Member States, including compliance with the EU Charter on Fundamental Rights and the general principles of EU law.<sup>127</sup>

### Disability and UN CRPD

- 7.7 In 2009 the EU, by a Council decision, was authorised to accede to the UN CRPD<sup>128</sup> and it entered into force in the EU in 2011.<sup>129</sup> The EU has therefore committed to promoting, protecting and implementing the UN CRPD and mainstreaming it within the scope of its competences.<sup>130</sup> At the point of ratification, the EU Council Decision included an Annex setting out the competence of the EU in relation to the UN CRPD.<sup>131</sup>
- 7.8 The right to equality of opportunity in all social and economic activity, regardless of disability, is listed in the rights, safeguards and equality of opportunity part of the Belfast (Good Friday) Agreement. The UK Government

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

126 *Ibid*, at para 79.

127 For further discussion on the EU Charter and Protocol Article 2 see Bernard McCloskey, ‘Charter of Fundamental Rights’ in McCrudden (ed), ‘The Law and Practice of the Ireland-Northern Ireland Protocol’ (OUP, 2021), at 164-166.

128 [Council Decision 2010/48/EC](#) concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 26 November 2009.

129 EU Commission, ‘[Press Release](#): EU Ratifies UN Convention on Disability Rights’ (5 January 2011).

130 Annex II, [Council Decision 2010/48/EC](#) concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 26 November 2009 is a Declaration Concerning the Competence of the European Community with regard to matters governed by the UN CRPD. In the NI High Court, Colton J accepted that the UN CRPD is an integral part of the EU legal order and is “relevant for the purposes of determining whether subsequent actions by the UK constituted a diminution from rights protected that existed prior to UK Exit” (paras 105-106). Colton J also concluded that “since abortion is not an EU competence, and since disability discrimination in the abortion context does not feature in any existing EU primary or secondary law, the UNCRPD as EU law does not, and cannot apply to it” (para 131). *Re SPUC Pro-Life Limited* [2022] NIQB 9.

131 The Commission set out internal arrangements for the implementation UNCRPD, ([2010/C 340/08](#)), which committed EU institutions and member states to “close cooperation in the implementation of the Convention, bearing in mind ... the different competences of the [EU] institutions and the Member States ... and bearing in mind that the scope and exercise of the EU’s competence are, by their nature, subject to continuous development”. In its initial report to the UN CRPD Committee, the EU Commission stated that the Annex II list of competences “illustrates the extent of Union competence with respect to matters governed by the CRPD” (EU Commission, [Initial report](#) of the EU to the UN CRPD Committee, 5 June 2014).

has recognised as within the scope of Protocol Article 2 the supporting framework of EU law which protect the rights of disabled people.<sup>132</sup>

- 7.9 The Framework Equality Directive, which is listed in Annex 1, protects against discrimination on grounds of disability in employment and vocational training.<sup>133</sup> The EU's Disability Strategy 2021-30 notes that a gap exists in EU law to ensure equal treatment of persons with disabilities outside the field of employment.<sup>134</sup>
- 7.10 The CJEU has recognised that the UN CRPD is part of the EU legal order and therefore can be relied on for the interpretation of EU measures which impact on the lives of disabled people.<sup>135</sup> The UN CRPD is relevant to the interpretation of the Annex 1 equality directives. In addition, it is also relevant to the interpretation of any additional underpinning EU obligations of the rights, safeguards and equality of opportunity listed in the relevant part of the Belfast (Good Friday) Agreement. The EU's Disability Strategy highlights the complexity in identifying the range of measures in EU law which can have an impact on the rights of disabled people.<sup>136</sup>
- 7.11 The CJEU found that the provisions of the UN CRPD do not meet the criteria for direct effect as they are not sufficiently precise and unconditional.<sup>137</sup> However, the obligation to ensure that EU law is interpreted in line with the UN CRPD remains. The overriding obligation on EU institutions to mainstream UN CRPD implies that all EU institutions in the development of policy and legislation must take account of the UN CRPD.

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132 NI Office, '[UK Government Commitment](#) to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 13.

133 [Directive 2000/78/EC](#), 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

134 EU Commission, '[Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#)' (EU Commission, 2021), at para 5.2.

135 *HK Danmark (Jette Ring and Lone Skouboe Werge)*, Case 335/11 and Case 337/11, 11 April 2013, at paras 28-32; *Z v A Government Department*, Case C-363/12, 14 March 2014, at para 85.

136 EU Commission, '[Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#)' (EU Commission, 2021), at 5.

137 *Z v A Government Department*, Case C-363/12, 14 March 2014, at paras 84-91 and accepted by the NI High Court in *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 131.

### **UN CRPD and the Definition of Disability**

The Framework Equality Directive provides a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.<sup>138</sup> The concept of disability is not defined in the Directive.

In a 2006 judgment, the CJEU excluded sickness from the definition of disability in the context of the Framework Equality Directive.<sup>139</sup> However, following the EU ratification of the UN CRPD, the CJEU revisited that definition to take account of the UN CRPD, which recognises that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>140</sup>

The CJEU recognised that the UN CRPD states that persons with disabilities include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>141</sup>

The CJEU concluded that “if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78”.<sup>142</sup>

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138 [Directive 2000/78/EC](#), ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

139 *Sonia Chacón Navas v Euresst Colectividades SA*, Case C -13/05, 11 July 2006, at para 43-46.

140 Preamble to the [UN Convention on the Rights of People with Disabilities](#).

141 Article 1, [UN Convention on the Rights of People with Disabilities](#).

142 *HK Danmark (Jette Ring and Lone Skouboe Werge)*, Case 335/11 and Case 337/11, 11 April 2013, at para 41.

## 8.0 Annex 1 Equality Directives

- 8.1 The equality directives in Annex 1 are specific pieces of EU law covering a range of protected grounds including race, gender, religion and belief, disability, age and sexual orientation. The scope of what is covered by each of these Annex 1 directives differs. Protocol Article 2 requires that NI law must ensure that equivalent rights and obligations that arise from these directives are maintained, therefore these rights must not be diminished.
- 8.2 If the Annex 1 equality directives are amended or replaced, NI law must also keep pace with these enhancements of rights and safeguards and ensure there is no future diminution from these enhanced standards. The Annex 1 equality directives must be interpreted in NI law in line with relevant CJEU case law as it evolves on or after 1 January 2021.
- 8.3 As noted above, the CJEU, in interpreting these directives, has relied on the EU Treaties, the EU Charter of Fundamental Rights and the general principles of EU law on fundamental rights and equality and non-discrimination to interpret and elaborate on the scope and remit of these, and other, directives.
- 8.4 This section sets out a brief overview of the Annex 1 equality directives. The Commissions advise that close monitoring of the directives, including relevant case law of the CJEU and other EU law developments which amend, replace or further interpret these Directives will be necessary.

### Race Equality Directive

- 8.5 The **Race Equality Directive** requires that people be treated equally regardless of their racial and ethnic origin and creates a broad framework for protection against discrimination.<sup>143</sup> It covers the areas of employment and vocational training; education; social protection including social security; social advantages; access to and supply of goods and services. The prohibition of discrimination covers direct and indirect discrimination, harassment, an instruction to discriminate and victimisation.
- 8.6 The burden of proof for establishing that an impugned action was not discriminatory falls on the respondent. The Directive further provides that these measures are designed as a minimum standard of protection and that member states should introduce additional safeguards to protect

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143 [Council Directive 2000/43/EC](#) on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 29 June 2000.



individuals from adverse treatment in response to a complaint. In addition, states can adopt or maintain specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. The Commission must report to the European Parliament and Council on the application of the Directive every five years and that report covers recent developments including relevant case law of the CJEU.<sup>144</sup>

- 8.7 The Race Equality Directive does not include a definition of ‘racial or ethnic origin’, however it excludes ‘nationality’ from its interpretation of race or ethnicity.<sup>145</sup>

### Employment Equality (Framework) Directive

- 8.8 The **Framework Equality Directive** sets out a framework for combatting discrimination regardless of religion or belief, disability, age and sexual orientation.<sup>146</sup> This protection is limited to discrimination in the areas of employment and vocational training. The prohibition of discrimination covers direct and indirect discrimination, harassment, an instruction to discriminate and victimisation.
- 8.9 The burden of proof for establishing that an impugned action was not discriminatory falls on the respondent. The Directive further provides that these measures are designed as a minimum standard of protection and that member states should introduce additional safeguards to protect individuals from discrimination and victimisation. The Commission must report to the European Parliament and Council on the application of the Directive.
- 8.10 The Directive contains specific provisions in relation to NI. It excludes the recruitment of teachers in schools from discrimination on grounds of religion or belief, provided such measures are expressly authorised in national law.<sup>147</sup>

144 EU Commission, ‘[Report](#) to the European Parliament and the Council on the application of Directive 2000/43/EC (the Racial Equality Directive) and Directive 2000/78/EC (the Employment Equality Directive)’ COM(2021) 139, (EU Commission, 2021).

145 The CJEU has been guided by the interpretation by the ECtHR of ethnicity. The ECtHR states that “ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds”. (*Sejdic and Finci v Bosnia and Herzegovina* (2009) ECHR 2122, at para 43.) CJEU has found that where discrimination on the basis of a criterion which is “indissociable” from a person’s nationality it can fall within scope of the Race Directive. (*CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [GC], C-83/14, 16 July 2015, at para 46; *Bressol v Gouvernement de la Communauté Française*, Case C-73/08, 13 April 2010.)

146 [Council Directive 2000/78/EC](#) on Establishing a General Framework for Equal Treatment in Employment and Occupation, 27 November 2000.

147 In addition, the Directive permits action in the area of recruitment to tackle religious underrepresentation in the PSNI. These measures are no longer in operation.

8.11 There is no definition of disability in the Directive. The EU became a party to the UN CRPD in 2010 and since then it has been the interpretative model for the definition of disability in the Directive.<sup>148</sup> Employers are required to take such measures as are necessary to ensure the equal participation of disabled people through the provision of reasonable accommodation.<sup>149</sup>

## Gender Directives

8.12 Gender equality is considered a fundamental value and objective of the EU legal order.<sup>150</sup> It is protected in the EU Charter of Fundamental Rights, both in terms of the non-discrimination clause in Article 21 and in its own right in Article 23.<sup>151</sup>

8.13 The **Equal Treatment (Goods and Services) Directive** sets out a framework to combat discrimination based on sex in access to and the supply of goods and services and it is designed to give effect to the principle of equal treatment between men and women.<sup>152</sup> The prohibition of discrimination covers direct and indirect discrimination, harassment and sexual harassment, an instruction to discriminate and victimisation. The burden of proof for establishing that an impugned action was not discriminatory falls on the respondent.

8.14 The **Recast Equal Treatment (Employment) Directive** sets the framework for ensuring the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.<sup>153</sup> It includes a protection for women returning to the workplace after a period of maternity leave to return to her job or an equivalent post on terms and

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148 *HK Danmark (Jette Ring) v Dansk almennyttigt Boligselskab*, C-335/11 and *HK Danmark (Lone Skouboe Werge) v. Dansk Arbejdsgiverforening (Pro Display A/S)*, C-33711, 11 April 2013 at para 37-42.

149 Article 5, [Directive 2000/78/EC](#), 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000. The concept of reasonable accommodation has been interpreted broadly in line with the UN CRPD definition (*HK Danmark (Jette Ring) v Dansk almennyttigt Boligselskab*, C-335/11 and *HK Danmark (Lone Skouboe Werge) v. Dansk Arbejdsgiverforening (Pro Display A/S)*, C-33711, 11 April 2013 at para 53.)

150 Equal treatment between men and women has been enshrined as a principle in EU law dating from its originating treaties. It is now recognised in Article 157 of the Treaty on the Functioning of the European Union.

151 Article 33(2) of the [EU Charter](#) recognises rights connected with maternity, childbirth and adoption. In addition to the Annex 1 directives, other relevant EU measures include pregnant workers in the Pregnant Worker's Directive ([Directive 92/85/EEC](#), 'Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', 19 October 1992) and Parental Leave Directive ([Directive 2010/18/EU](#), 'Council Directive implementing the revised Framework Agreement on parental leave', 8 March 2010). While there is a commitment to dynamically align with the Annex 1 equality directives, these additional directives are subject to the no diminution commitment in Protocol Article 2.

152 [Directive 2004/113/EC](#), 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004.

153 [Directive 2006/54/EC](#), 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006.

conditions that are no less favourable than she would have been entitled to during her absence. The prohibition of discrimination covers direct and indirect discrimination, harassment and sexual harassment, an instruction to discriminate and victimisation. The burden of proof for establishing that an impugned action was not discriminatory falls on the respondent. The Commission must report to the European Parliament and Council on the application of the Recast Directive every four years.<sup>154</sup>

- 8.15 Similarly, the **Equal Treatment (Self-Employment) Directive** aims to provide for equal treatment for men and women engaged in any activity in a self-employed capacity and covers areas such as the establishment of a company, social protection and maternity benefits.<sup>155</sup> The prohibition of discrimination covers direct and indirect discrimination, harassment and sexual harassment, and victimisation.
- 8.16 The Directives further clarify that these measures are designed as a minimum standard of protection. In addition, there is a general clause requiring member states to take into account equality between men and women when formulating laws and policies in the areas covered by these directives.
- 8.17 The **Equal Treatment (Social Security) Directive** provides for the progressive implementation of the principle of equal treatment between men and women in the area of social security and social protection, including in the areas of illness, disability, old age, accidents at work and occupational disease, and unemployment.<sup>156</sup> The Directive provides that there should be no direct or indirect discrimination whatsoever on grounds of sex, including in relation to marital or family status in respect of the scope of and access to schemes, contributions and the calculation of benefits. It further clarifies that the principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.

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154 EU Commission, '[Report](#) to the European Parliament and the Council on the application of Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation (recast)' COM(2013) 861, (EU Commission, 2013).

155 [Directive 2010/41/EU](#), 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

156 [Directive 79/7/EEC](#), 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

## 9.0 Concluding comments and next steps

- 9.1 This working paper is designed to set out the current thinking of the Commissions on Protocol Article 2. The Commissions recognise the need for greater clarity on scope and limits of the rights and protections afforded by Protocol Article 2 and are working to achieve this. It is not possible at this stage to set out a definitive position on what Protocol Article 2 will mean in practice and much will depend on how the Courts will interpret this UK Government commitment.
- 9.2 It is important that there is no weakening of Protocol Article 2 or the oversight mechanisms. The Commissions are mindful that Protocol Article 2 does not exist in a vacuum and that any destabilisation of the architecture and institutions of the Withdrawal Agreement and the Ireland/NI Protocol could have ramifications for the enforceability of the rights and safeguards envisaged in Protocol Article 2.
- 9.3 The Commissions are heartened that the UK Government has consistently maintained its commitment to Protocol Article 2 noting that “the provisions that ensure there is no diminution of human rights in NI as a result of the UK’s withdrawal from the EU are not controversial”.<sup>157</sup>
- 9.4 The Commissions are undertaking further research exploring equality and human rights after Brexit and the impact of Protocol Article 2. In addition to published research on Parliamentary scrutiny;<sup>158</sup> human trafficking;<sup>159</sup> health;<sup>160</sup> and the impact of the loss of EU funding on equality groups in NI,<sup>161</sup> research is being undertaken on immigration; rights of frontier workers and their families on the island of Ireland; the environment; the EU Charter of Fundamental Rights; the impact of Brexit on women; and the impact of Brexit on minority ethnic and migrant people in NI. In partnership with the IHREC,

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157 UK Government, ‘[NI Protocol: the way forward](#)’ (UKG, 2021), para 37.

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

159 Alison Harvey, ‘[Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol](#)’ (NIHRC, 2022).

160 Tamara Hervey, ‘[Brexit, Health, and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol](#)’ (NIHRC, 2022).

161 Rory O’Connell and Dr Tim Cunningham, ‘[Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding](#)’ (ECNI, 2022).

the Commissions are also undertaking research examining divergence of rights and good practice on the island of Ireland.<sup>162</sup>

- 9.5 In addition to the work being undertaken by the Commissions, the UK Government has set out its understanding of Protocol Article 2 and how it is engaged in its Explainer.<sup>163</sup> While this does not have legal authority, it clarifies the UK Government's current position on Protocol Article 2 and is referenced throughout this working paper. Other human rights stakeholders and academics have also started mapping out what Protocol Article 2 means for human rights and equality in NI.<sup>164</sup>
- 9.6 This working paper provides an initial assessment by the Commissions of the UK Government's commitment in Protocol Article 2. It is designed to provide additional guidance on how the non-diminution commitment is applied and interpreted, and has been informed by the Commissions' engagement with a number of key stakeholders on the scope and content of this commitment; engagement which the Commissions have welcomed and found helpful.

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162 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, 'European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland' (ECNI, NIHRC & IHREC, forthcoming).

163 Neither the EU, as party to the Withdrawal Agreement, nor the Government of Ireland as co-guarantor of the Belfast (Good Friday) Agreement, have similarly set out an interpretation of Article 2.

164 Social Change Initiative, 'Human Rights and Equality in Northern Ireland under the Protocol – [A Practical Guide](#)' (SCI, 2021); Christopher McCrudden, 'Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – [Evidence](#) to the House of Commons European Scrutiny Committee' (ESC, 2020); Human Rights Consortium, 'The Northern Ireland/Ireland Protocol and Human Rights – [HRC Briefing](#)', (HRC, 2021).

# Appendix 1

## Table of Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast (Good Friday) Agreement of the same name and the underpinning EU law

### Introduction and notes on using this table

The table below sets out the EU law which the Commissions have identified to date as falling within the scope of the UK Government's commitment under Article 2(1) of the Ireland/Northern Ireland Protocol ('Protocol Article 2').

Specifically, it sets out EU law which the Commissions consider underpin the UK Government's commitment to 'non-diminution' of certain equality and human rights as a result of Brexit covered by the relevant section of the Belfast (Good Friday) Agreement. The table below includes the relevant EU law in force on or before the end of the Brexit transition period; namely 31 December 2020. It therefore does not include EU law relevant to equality and human rights which the UK had opted out of, or not agreed to, on or before 31 December 2020.

The first section of this document contains the six EU equality Directives listed in Annex 1 to the Ireland/Northern Ireland Protocol ('the Protocol'). As set out in the Commissions' working paper on the scope of Protocol Article 2 ('Article 2 scope paper'), and unlike in relation to the other EU Directives listed in the table below, in the event that the EU amends or replaces the minimum standards of protection from discrimination set out in the Annex 1 Directives, on or after 1 January 2021, there is an obligation on the UK Government to 'keep pace' with any enhancement to those protections and to amend Northern Ireland's equality law accordingly. These six EU Equality Directives underpin many of the rights set out in the chapter of the Belfast (Good Friday) Agreement on 'Rights, Safeguards and Equality of Opportunity' and are relevant to many areas of policy and legislation.

The remainder of the table below is structured under the specific list of rights 'affirmed in particular' in the relevant Chapter the Belfast (Good Friday) Agreement, in a non-exhaustive list. There is also a commitment in the relevant Chapter of the Belfast (Good Friday) Agreement to protect the 'civil rights and religious liberties' of 'everyone in the community'. The Commissions have identified in this table some of the first examples of EU measures that are non- Annex 1 Directives which they consider are within the scope of Protocol Article 2 on the basis that they fall within the scope of this commitment to protect the 'civil rights and religious liberties' of 'everyone in the community'. The Commissions are undertaking further work to

identify additional EU law which may underpin that commitment, as outlined in the text of the Protocol Article 2 scope paper.

The EU measures listed in the table below reflect those measures identified by the Commissions to date as falling within the scope of Protocol Article 2 and the list may be subject to change, not least in light of any judicial decisions on this matter.

This table is therefore a **‘living document’**, as it may be subject to amendment by the Commissions, as and when appropriate; for example, in light of any judicial decisions and/or legal advices received by the Commissions on the scope of EU law underpinning Protocol Article 2. Further, whether or not a specific measure of EU law underpins a relevant Belfast (Good Friday) Agreement right/s will be context and fact specific.

Care should also be taken to refer to the version of the listed EU measure that applied on 31 December 2020, rather than any version amended after that date.

The UK Government has made clear in its Explainer Document on Protocol Article 2<sup>1</sup> that, in addition to the Annex 1 Directives, there are a number of other EU laws that fall within the scope of Protocol Article 2 including the Victims Directive, the Parental Leave Directive and the Pregnant Workers’ Directive, as well as specific measures aimed at protecting the rights of disabled people. These three Directives, as well as EU measures which the Commission has identified as being aimed at protecting the rights of disabled people, are included in the table below.

Please note, that there is repeated reference to EU measures which are relevant to a number of rights in the relevant Chapter of the Belfast (Good Friday) Agreement.

Further, not all of the provisions of each EU measure will be within scope of Protocol Article 2 and consideration must therefore be given to which provisions underpin the relevant Belfast (Good Friday) Agreement right, which is explained in section 5 of the Protocol Article 2 scope paper.<sup>2</sup> The EU measures identified by the Commissions in this table has been informed by legal research and advice.

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1 [Explainer: UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?](#)

2 See section 5 paragraphs 5.6-5.10 thereof.

## Annex 1 Equality Directives

For ease of reference the Protocol Annex 1 Directives are listed below.

Please note, that particular caution is required with the following references to the Annex 1 Directives, since Protocol Article 2 requires Northern Ireland law to ‘keep pace’ with any enhancements to protections afforded under these Directives as they are amended or replaced by the EU.

The following references are correct as of December 2022.

1. [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**
2. [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of **equal treatment** between persons **irrespective of racial or ethnic origin**
3. [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for **equal treatment in employment and occupation**
4. [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**
5. [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of **equal opportunities and equal treatment of men and women in matters of employment and occupation** (Recast)
6. [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



**Table of Rights, Safeguards and Equality of Opportunity Provisions in the Belfast (Good Friday) Agreement and underpinning EU Law**

<b>Right of free political thought</b>
<b>Treaty Articles</b>
<p><b>Regulations</b></p> <p><a href="#">Regulation (EU) 2015/2120</a> of the Parliament and of the Council of 25 November 2015 laying down <b>measures concerning open internet access</b> and amending Directive 2002/22/EC on <b>universal service and users’ rights relating to electronic communications networks and services</b> and Regulation (EU) No 531/2012 on <b>roaming on public mobile communications networks within the Union</b></p>
<p><b>Directives</b></p> <p><b>Annex 1 Directives</b></p> <p><a href="#">Council Directive 2000/78/EC</a></p> <p><b>Non-Annex 1 Directives (None)</b></p>
<p><b>Charter of Fundamental Rights of the European Union</b></p> <p>Article 10 - Freedom of thought, conscience and religion</p> <p>Article 11 - Freedom of expression and information</p>
<b>Right to freedom and expression of religion</b>
<b>Treaty Articles</b>
<b>Regulations</b>
<p><b>Directives</b></p> <p><b>Annex 1 Directives</b></p> <p><a href="#">Council Directive 2000/78/EC</a></p> <p><b>Non-Annex 1 Directives (None)</b></p>

**Charter of Fundamental Rights of the European Union**

Article 10 - Freedom of thought, conscience and religion

Article 11 - Freedom of expression and information

Article 20 - Equality before the law

Article 21 - Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

**Right to pursue democratically national and political aspirations**

**Right to seek constitutional change by peaceful and legitimate means**

**Treaty Articles**

**Regulations**

**Directives**

**Annex 1 Directives (None)**

**Non-Annex 1 Directives**

[Council Directive 94/80/EC](#) of 19 December 1994 laying down detailed arrangements for the exercise of the **right to vote** and to **stand as a candidate in municipal elections** by citizens of the Union residing in a Member State of which they are not nationals

[Council Directive 2013/19/EU](#) of 13 May 2013 adapting Directive 94/80/EC laying down detailed arrangements for the exercise of the **right to vote** and to **stand as a candidate in municipal elections** by citizens of the Union residing in a Member State of which they are not nationals, by reason of the accession of the Republic of Croatia

**Charter of Fundamental Rights of the European Union**

Article 11 - Freedom of expression and information

Article 12 - Freedom of assembly and of association

Article 40 - Right to vote and to stand as a candidate at municipal elections

<b>Right to freely choose one’s place of residence</b>
<b>Treaty Articles</b>
<b>Regulations</b>
<b>Directives</b>
<b>Annex 1 Directives (None)</b>
<b>Non-Annex 1 Directives</b>
<a href="#">Council Directive 2003/9/EC</a> of 27 January 2003 laying down <b>minimum standards for the reception of asylum seekers</b>
<a href="#">Directive 2004/38/EC</a> of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members <b>to move and reside freely within the territory of the Member States</b> 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
<a href="#">Directive 2014/54/EU</a> of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of <b>freedom of movement for workers</b>
<b>Charter of Fundamental Rights of the European Union</b>
Article 45 - Freedom of movement and of residence
<b>Right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity</b>
<b>Treaty Articles</b>
Treaty on the Functioning of the European Union
Art 18 and Art 45: nationality discrimination is prohibited in the scope of EU law
Treaty on the Functioning of the European Union
Art 157(1): equal pay for equal work or work of equal value principle

## Regulations

[Regulation \(EC\) No 261/2004](#) of the European Parliament and of the Council of 11 February 2004 establishing **common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights**, and repealing Regulation (EEC) No 295/91

[Regulation \(EC\) No 1107/2006](#) of the European Parliament and of the Council of 5 July 2006 concerning the **rights of disabled persons and persons with reduced mobility when travelling by air**

[Regulation \(EC\) No 1899/2006](#) of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the **harmonisation of technical requirements and administrative procedures in the field of civil aviation**

[Regulation \(EC\) No 1371/2007](#) of the European Parliament and of the Council of 23 October 2007 on **rail passengers' rights and obligations**

[Regulation \(EC\) No 78/2009](#) of the European Parliament and of the Council of 14 January 2009 on the **type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users**, amending Directive 2007/46/EC and repealing Directives 2003/102/EC and 2005/66/EC

[Regulation \(EU\) No 1177/2010](#) of the European Parliament and of the Council of 24 November 2010 concerning the **rights of passengers when travelling by sea and inland waterway** and amending Regulation (EC) No 2006/2004

[Regulation \(EU\) No 181/2011](#) of the European Parliament and of the Council of 16 February 2011 concerning the **rights of passengers in bus and coach transport** and amending Regulation (EC) No 2006/2004

[Regulation \(EU\) No 305/2011](#) of the European Parliament and of the Council of 9 March 2011 laying down **harmonised conditions for the marketing of construction products** and repealing Council Directive 89/106/EEC

[Regulation No 910/2014](#) of the European Parliament and of the Council of 23 July 2014 on **electronic identification and trust services for electronic transactions in the internal market** and repealing Directive 1999/93/EC

[Commission Regulation \(EU\) No 1300/2014](#) of 18 November 2014 on the **technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility**

[Regulation \(EU\) 2016/399](#) of the European Parliament and of the Council of 9 March 2016 on a **Union Code on the rules governing the movement of persons across borders**, (as regards parts of the Regulation which relates to border checks)

[Regulation \(EU\) 2016/424](#) of the European Parliament and of the Council of 9 March 2016 on **cableway installations** and repealing Directive 2000/9/EC

[Regulation \(EU\) 2017/1563](#) of the European Parliament and of the Council of 13 September 2017 on the **cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright** and related rights for the benefit of **persons who are blind, visually impaired or otherwise print-disabled**

[Regulation \(EU\) 2017/2394](#) of the European Parliament and of the Council of 12 December 2017 on **cooperation between national authorities responsible for the enforcement of consumer protection laws** and repealing Regulation EC No 2006/2004

[Regulation \(EU\) 2019/772](#) of 16 May 2019 amending Regulation (EU) No 1300/2014 as regards **inventory of assets with a view to identifying barriers to accessibility, providing information to users and monitoring and evaluating progress on accessibility**

[Regulation \(EU\) 2019/1896](#) of the European Parliament and of the Council of 13 November 2019 on the **European Border and Coast Guard** and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624

## Directives

### Annex 1 Directives

[Council Directive 79/7/EEC](#)

[Council Directive 2000/43/EC](#)

[Council Directive 2000/78/EC](#)

[Council Directive 2004/113/EC](#)

[Directive 2006/54/EC](#)

[Directive 2010/41/EU](#)

### Non-Annex 1 Directives

[Council Directive 89/654/EEC](#) of 30 November 1989 concerning the **minimum safety and health requirements for the workplace** (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

[Council Directive 92/13/EEC](#) of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the **procurement procedures of entities operating in the water, energy, transport and telecommunications sectors**

[Council Directive 92/85/EEC](#) of 19 October 1992 on the introduction of measures to encourage improvements in the **safety and health of pregnant workers** and workers who have **recently given birth or are breastfeeding** (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

[Council Directive 97/81/EC](#) of 15 December 1997 concerning the Framework Agreement on **part-time work** concluded by UNICE, CEEP and the ETUC

[Council Directive 99/70/EC](#) of 28 June 1999 concerning the framework agreement on **fixed-term work** concluded by ETUC, UNICE and CEEP

[Directive 2001/29/EC](#) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of **copyright and related rights in the information society** ('Infosoc Directive')

[Council Directive 2003/9/EC](#) of 27 January 2003 laying down **minimum standards for the reception of asylum seekers**

[Directive 2003/59/EC](#) of the European Parliament and of the Council of 15 July 2003 on the initial **qualification** and periodic **training** of **drivers of certain road vehicles for the carriage of goods or passengers**, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC

[Directive 2004/27/EC](#) of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to **medicinal products for human use**

[Council Directive 2004/83/EC](#) of 29 April 2004 on **minimum standards** for the **qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection** and the content of the protection granted

[Directive 2006/42/EC](#) of the European Parliament and of the Council of 17 May 2006 on **machinery**, and amending Directive 95/16/EC (Recast)

[Directive 2006/126/EC](#) of the European Parliament and of the Council of 20 December 2006 on **driving licences** (Recast)

[Directive 2008/104/EC](#) of the European Parliament and of the Council of 19 November 2008 on **temporary agency work**

[Directive 2009/73/EC](#) of the European Parliament and of the Council of 13 July 2009 concerning **common rules for the internal market in natural gas** and repealing Directive 2003/55/EC ('The Gas Directive')

[Directive 2009/136/EC](#) Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on **universal service and users' rights relating to electronic communications networks and services**, Directive 2002/58/EC concerning the **processing of personal data** and the **protection of privacy in the electronic communications sector** and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws'

[Directive 2009/140/EC](#) of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a **common regulatory framework for electronic communications networks** and services, 2002/19/EC on **access to, and interconnection of, electronic communications networks and associated facilities**, and 2002/20/EC on the **authorisation of electronic communications networks and services**

[Directive 2010/13/EU](#) of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the **provision of audiovisual media services** ('Audiovisual Media Services Directive')

[Council Directive 2010/18/EU](#) of 8 March 2010 implementing the revised **Framework Agreement on parental leave** concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

[Directive 2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on **preventing and combating trafficking** in human beings and **protecting its victims**, and replacing Council Framework Decision 2002/629/JHA

[Directive 2011/93/EU](#) of the European Parliament and of the Council of 13 December 2011 on **combating the sexual abuse and sexual exploitation of children and child pornography**, and replacing Council Framework Decision 2004/68/JHA

[Directive 2012/13/EU](#) of the European Parliament and of the Council of 22 May 2012 on the **right to information in criminal proceedings**

[Directive 2012/29/EU](#) 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

[Directive 2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on **public procurement** and repealing Directive 2004/18/EC

[Directive 2014/25/EU](#) of the European Parliament and of the Council of 26 February 2014 on **procurement by entities operating in the water, energy, transport and postal services sectors** and repealing Directive 2004/17/EC ('Utilities Directive')

[Directive 2014/33/EU](#) of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to **lifts and safety components for lifts**

[Directive 2014/53/EU](#) of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the **making available on the market of radio equipment** and repealing Directive 1999/5/EC

[Directive \(EU\) 2015/2366](#) of the European Parliament and of the Council of 25 November 2015 on **payment services in the internal market**, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC ('Revised Payment Services Directive')



[Directive \(EU\) 2016/797](#) of the European Parliament and of the Council of 11 May 2016 on the **interoperability of the rail system** within the European Union

[Directive \(EU\) 2016/2102](#) of the European Parliament and of the Council of 26 October 2016 on the **accessibility of the websites and mobile applications of public sector bodies**

[Directive \(EU\) 2017/1564](#) of the European Parliament and of the Council of 13 September 2017 on certain **permitted uses of certain works** and other subject matter **protected by copyright and related rights for the benefit of persons who are blind, visually impaired** or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

[Directive \(EU\) 2017/2108](#) of the European Parliament and of the Council of 15 November 2017 amended Directive 2009/45/EC on **safety rules and standards for passenger ships**

[Directive \(EU\) 2017/2110](#) of the European Parliament and of the Council of 15 November 2017 on a **system of inspections for the safe operation of ro-ro passenger ships and high-speed passenger craft in regular service** and amending Directive 2009/16/EC and repealing Council Directive 1999/35/EC

[Directive \(EU\) 2018/1808](#) of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the **provision of audiovisual medial services** ('Audiovisual Media Services Directive') in view of changing market realities

[Directive \(EU\) 2018/1972](#) of the European Parliament and of the Council of 11 December 2018 **establishing the European Electronic Communications Code** (Recast)

### **Charter of Fundamental Rights of the European Union**

Article 20 - Equality before the law

Article 21 - Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

Article 23 - Equality between women and men

Article 26 - Integration of persons with disabilities

<b>Right to freedom from sectarian harassment</b>
<b>Treaty Articles</b>
<b>Regulations</b>
<b>Directives</b>
<b>Annex 1 Directives</b>
<a href="#">Council Directive 2000/78/EC</a>
<b>Non-Annex 1 Directives (None)</b>
<b>Charter of Fundamental Rights of the European Union</b>
CFR: Article 21 - Non-discrimination
<b>Right of women to full and equal political participation</b>
<b>Treaty Articles</b>
<b>Regulations</b>
<b>Directives</b>
<b>Annex 1 Directives (None)</b>
<b>Non-Annex 1 Directives (None)</b>
<b>Charter of Fundamental Rights of the European Union</b>
Article 23 - Equality between women and men
<b>Right of victims to remember as well as to contribute to a changed society</b>
<b>Treaty Articles</b>
<b>Regulations</b>

<p><b>Directives</b></p> <p><b>Annex 1 Directives (None)</b></p> <p><b>Non-Annex 1 Directives</b></p> <p><a href="#">Directive 2011/36/EU</a> of the European Parliament and of the Council of 5 April 2011 on <b>preventing and combating trafficking</b> in human beings and <b>protecting its victims</b>, and replacing Council Framework Decision 2002/629/JHA</p> <p><a href="#">Directive 2011/93/EU</a> of the European Parliament and of the Council of 13 December 2011 on <b>combating the sexual abuse and sexual exploitation of children and child pornography</b>, and replacing Council Framework Decision 2004/68/JHA</p> <p><a href="#">Directive 2012/29/EU</a> of the European Parliament and of the Council of 25 October 2012 establishing <b>minimum standards on the rights, support and protection of victims of crime</b>, and replacing Council Framework Decision 2001/220/JHA</p>
<p><b>Charter of Fundamental Rights of the European Union</b></p> <p>CFR: Article 1 - Human Dignity</p>
<p><b>Respect, understanding and tolerance in relation to linguistic diversity</b></p>
<p><b>Treaty Articles</b></p>
<p><b>Regulations</b></p>
<p><b>Directives (None)</b></p>
<p><b>Charter of Fundamental Rights of the European Union</b></p> <p>CFR: Article 21 - Non-discrimination on grounds of language</p> <p>CFR: Article 22 - Support of linguistic diversity</p>
<p><b>The need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division</b></p>
<p><b>Treaty Articles</b></p>
<p><b>Regulations</b></p>

<p><b>Directives (None)</b></p>
<p><b>Charter of Fundamental Rights of the European Union</b></p> <p>CFR: Article 52(3) - Scope of rights</p> <p>CFR: Article 54 - Prohibition on abuse of rights</p>
<p><b>Civil Rights and Religious Liberties of Everyone in the Community</b></p>
<p>There is a commitment in the relevant Chapter of the Belfast (Good Friday) Agreement to protect the ‘civil rights’ and ‘religious liberties’ of ‘everyone in the community’.</p> <p>This commitment remains under consideration by the Commissions in terms of its implications for the scope of Protocol Article 2, as outlined in Section 3 of the Protocol Article 2 scope paper.</p> <p>The Commissions are adopting a working assumption that the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the European Convention on Human Rights (‘ECHR’), to the extent that they are underpinned by EU obligations in force in Northern Ireland on or before 31 December 2020. The Commissions are undertaking ongoing research exploring the extent to which ECHR rights are underpinned by EU law.</p> <p>It is arguable that the signatories’ general commitment to rights in the Belfast (Good Friday) Agreement was made with reference to the full range of human rights standards ratified by the UK and that it should be read as an ambulatory or living reference capable of such an interpretation.</p> <p>It is also arguable that the general commitment to equality of opportunity, in the ‘Rights, Safeguards and Equality of Opportunity’ Chapter in the Belfast (Good Friday) Agreement also draws on those non-discrimination and equality protections available through the international human rights standards ratified by the UK. The Commissions will adopt a broad interpretation of the right to equality of opportunity in all social and economic activity protected under Protocol Article 2.</p> <p>The following are the first examples of EU measures that are non-Annex 1 Directives which the Commissions have identified as falling within the scope of Protocol Article 2 on the basis of the rationale above. As indicated in earlier sections of this table, a number of these Directives can also be considered to fall within some of the specific rights listed in relevant Chapter of the Belfast (Good Friday) Agreement.</p>

## Regulations

[Commission Regulation \(EC\) No 1560/2003](#) of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 **establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application** lodged in one of the Member States by a third-country national

[Regulation \(EU\) No 604/2013](#) of the European Parliament and of the Council of 6 June 2013 **establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection** lodged in one of the Member States by a third-country national or a stateless person

[Commission Implementing Regulation \(EU\) No 118/2014](#) of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 **establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application** lodged in one of the Member States by a third-country national

[Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the **processing of personal data** and on the **free movement of such data**, and repealing Directive 95/46/EC (General Data Protection Regulation)

## Directives

### Non-Annex 1 Directives

[Council Directive 2001/55/EC](#) of 20 July 2001 on **minimum standards for giving temporary protection** in the event of a **mass influx of displaced persons** and on measures promoting a **balance of efforts between Member States** in receiving such persons and bearing the consequences thereof

[Council Directive 2003/9/EC](#) of 27 January 2003 laying down **minimum standards for the reception of asylum seekers**

[Council Directive 2004/83/EC](#) of 29 April 2004 on **minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection** and the content of the protection granted

[Council Directive 2005/85/EC](#) of 1 December 2005 on **minimum standards on procedures** in Member States **for granting and withdrawing refugee status**

[Directive 2010/64/EU](#) of the European Parliament and of the Council of 20 October 2010 on the **right to interpretation and translation in criminal proceedings**

[Directive 2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on **preventing and combating trafficking** in human beings and **protecting its victims**, and replacing Council Framework Decision 2002/629/JHA

[Directive 2011/93/EU](#) of the European Parliament and of the Council of 13 December 2011 on **combating the sexual abuse and sexual exploitation of children and child pornography**, and replacing Council Framework Decision 2004/68/JHA

[Directive 2012/13/EU](#) of the European Parliament and of the Council of 22 May 2012 on the **right to information in criminal proceedings**

December 2022

Equality Commission for Northern Ireland

Northern Ireland Human Rights Commission





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