

What the Protocol means for employment and equality law in Northern Ireland



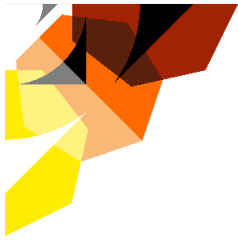
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Following Brexit, special arrangements were put in place to allow Northern Ireland (NI) to remain part of the European Union (EU) customs union and to protect certain “individual rights”. This was due to NI’s unique position as the only part of the UK to share a land border with an EU member state, as well as the key role EU laws have played in securing and ensuring peace in the region under the Belfast or “Good Friday” Agreement (GFA). The arrangements relating to individual rights are set out in Article 2 of the Protocol on Ireland/Northern Ireland (the Protocol). This Inbrief looks at the key employment aspects of Article 2 and its potential implications for employment and equality law in NI.

Equality and anti-discrimination protection

During the Brexit negotiations, the UK acknowledged that EU law, particularly anti-discrimination law, forms an important part of the framework for delivering guarantees on rights and equality set out in the GFA. As such, the UK committed to ensuring that certain rights and equality protections would continue to apply following Brexit, as follows:

- ▶ The UK Government committed in the Protocol to ensuring that specific rights and equality protections which appear in the Chapter of the GFA entitled “Rights, Safeguards and Equality of Opportunity” would continue to apply in NI following Brexit.
- ▶ The UK also committed to ensuring that no diminution of rights was caused by its departure from the EU, including in the area of protection against certain forms of discrimination enshrined in EU law.
- ▶ The UK committed to facilitating the related work of the institutions and bodies, established by the GFA, in upholding human rights and equality standards in NI.

These commitments are set out in Article 2, entitled “Rights of Individuals”, which provides as follows:

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

Article 2 is binding on the UK Government and Parliament, the NI Executive and the NI Assembly as a matter of international law and is also part of UK domestic law.

This means that the Court of Justice of the European Union (CJEU) will continue to have jurisdiction in the areas specified in the Protocol, the European Commission retains its powers of investigation and enforcement and the UK courts can make references to the CJEU in relation to same.

Which rights are in scope?

The commitment in the Protocol applies to the rights, safeguards and equality of opportunity provisions set out in the GFA. The relevant provisions include:

- ▶ 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;
- ▶ The right of women to full and equal political participation;

- ▶ 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.

Some of the rights listed above are underpinned by protections against discrimination enshrined in EU Directives, which are listed in Annex 1 to the Protocol. These deal with discrimination on grounds of protected characteristics (gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation) and promote equal treatment. Moreover, they set minimum standards of protection and provide a reassurance that the minimum standards required by the Directives will continue to apply in NI after exit day.

The Directives listed in Annex 1 are as follows:

- ▶ Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- ▶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;
- ▶ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- ▶ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- ▶ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between

men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; and

- ▶ 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.

If the EU decides to amend or replace the substantive rights in these Directives to improve the minimum levels of protection available, the corresponding substantive rights and protections in NI should also develop to take account of this, to ensure that NI will not fall behind minimum European standards in anti-discrimination law.

The Directives listed in Annex 1 represent only a subset of the protections in scope of the wider ‘no diminution’ commitment. There are other pieces of EU law that are relevant to the “Rights, Safeguards and Equality of Opportunity” chapter of the GFA. If the rights in question are relevant to the GFA, they should fall within the UK Government’s commitment that there will be no diminution of rights as a result of the UK leaving the EU.

What does “no diminution of rights, safeguards, equality of opportunity” mean?

The Protocol commitment requires the UK Government to ensure that protections currently in place in NI for the rights, safeguards and equality of opportunity set out in the relevant chapter of the GFA are not diminished as a result of the UK leaving the EU. The implications of this are three-fold:

- ▶ If such a diminution occurs, the UK Government will be legally obliged to ensure that rights holders are able to bring challenges before the domestic courts, and that appropriate remedies are available.
- ▶ If the EU updates or enhances the minimum standards of protection

listed in Annex 1 to the Protocol, then relevant domestic law in NI should be amended to reflect this.

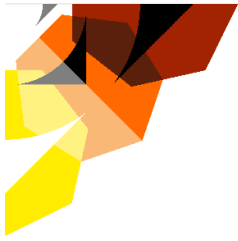
- ▶ It also appears to mean that future best practice developments in the area of human rights and equalities in the UK and EU must be taken into consideration as the commitment is implemented.

When a NI court is considering the interpretation of any of the Directives listed in Annex 1, this must be done in conformity with any relevant case law of the CJEU. When considering matters relating to the ‘no diminution’ commitment, the NI courts will, under the Withdrawal Act 2018, be free to have regard to judgments of the CJEU made after the end of the transition period, where relevant. In addition, where a domestic court is interpreting retained EU law there are enhanced provisions for the role of CJEU jurisprudence in NI.

Implementation - The “dedicated mechanism”

The UK Government agreed to implement its commitment to no diminution of rights, safeguards and equality of opportunity by establishing a “dedicated mechanism”. This is a framework for ensuring compliance with the commitment, comprising dedicated monitoring, advising, reporting and enforcement activities, and drawing on the existing human rights and equality bodies established under the GFA, namely the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI).

The Withdrawal Agreement Act 2020 conferred new statutory functions, and related powers, on NIHRC and ECNI to monitor, supervise, advise, report on and enforce the ‘no diminution’ commitment. These powers build on the existing statutory functions of NIHRC and ECNI and are designed to compliment, but not hinder, the exercise of those functions as envisioned by the GFA or their statutory independence as two distinct rights and equalities bodies.



In addition, as provided for in the GFA, the Joint Committee of NIHRC and the Irish Human Rights and Equality Commission (IHREC) continues to act as a forum for the consideration of human rights issues on the island of Ireland.

The ECNI, NIHRC and IHREC are to work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension. This is consistent with the core function of the Joint Committee as set out in the GFA, and any activities undertaken or reports produced jointly by the three bodies must respect existing reporting structures and statutory roles and responsibilities.

The UK Government is to provide each Commission with additional resources for their expanded functions as part of the dedicated mechanism to ensure proper scrutiny of its implementation of the Article 2 commitment and to also cover new policy, research functions, communications and education activities.

Functions of the Commissions under the dedicated mechanism

As part of the dedicated mechanism, NIHRC and ECNI will have separate statutory functions but will work together, as appropriate, to monitor and supervise the rights and equality landscape in NI to ensure that there is no diminution of relevant rights as a result of the UK leaving the EU. More specifically, and as set out in Schedule 3 of the Withdrawal Agreement Act 2020, each of the bodies will have the following statutory functions in relation to the Article 2 commitment:

- ▶ Monitoring the implementation of Article 2(1);
- ▶ Reporting on implementation to the Secretary of State for NI and the Executive Office in NI, upon request or on other occasions as they consider appropriate;
- ▶ Advising the Secretary of State and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to implement the commitment;
- ▶ Advising the NI Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1);
- ▶ Promoting understanding and awareness of the importance of Article 2(1);
- ▶ Powers to bring, or intervene in, legal proceedings in respect of an alleged breach (or potential future breach) of Article 2(1); and
- ▶ Powers to assist persons in relevant legal proceedings.

As well as this, the NIHRC and ECNI must provide regular reports to the UK Government and the NI Executive. This will allow any changes to the rights and equalities landscape to be identified and, where appropriate, further action taken. Similarly, NIHRC, ECNI and IHREC will be able to report separately to the UK and Irish Governments respectively on any issues with an island of Ireland rights and equalities dimension that they have jointly addressed in the context of monitoring the 'no diminution' commitment.

In order to ensure that any issues identified in their reports are adequately addressed, the UK Government and the Executive will be obliged, where the Commissions request a response, to respond to any recommendations contained in the reports, outlining what action the Government or Executive has taken, or proposes to take, to address the recommendations.

In addition, NIHRC, ECNI and the Joint Committee of NIHRC and IHREC will also be able to bring any matter of relevance to the attention of the Committee on issues related to the implementation of the Protocol established under Article 14(c) of the Protocol (Specialised Committee).

Enforcing rights under Article 2

The Article 2 commitment is binding on the UK Government and Parliament, as well as on the NI Executive and Assembly, as a matter of international law. The Northern Ireland Act 1998 has been amended so that the NI Assembly will be acting outside of its legislative competence, and the NI Executive acting outside its powers, if they act in breach of Article 2(1).

Remedies for individuals will include the existing routes to enforce substantive human rights and equality protections - including directly through the domestic courts as they relate to retained EU law. In addition, the amended provisions of the Northern Ireland Act 1998 will give rise to a route of judicial review for individuals to challenge the compatibility of NI Executive or Assembly actions or legislation with the Article 2(1) commitment.

The ECNI and NIHRC have powers to bring, or intervene in, legal proceedings in respect of an alleged breach (or potential future breach) of Article 2(1). They also have powers to assist persons in relevant legal proceedings.

To prove that a diminution of rights, safeguards or equality of opportunity has occurred, it will be necessary to show that:

- ▶ the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the GFA;
- ▶ it was enshrined or given effect to in domestic law in NI on or before exit day; and
- ▶ the alleged diminution occurred as a result of the UK's withdrawal from the EU.

Employment developments in the Republic of Ireland

Significant changes in NI equality laws are unlikely in the short term and changes in other employment laws will be subject to the usual consultations and legislative process.

However, what is less clear is how NI employment and equality law will depart from or indeed evolve in line with the Republic of Ireland as a result of the Protocol in the years to come.

The UK Government has expressed its view that the GFA does not require North South equivalence of rights and equality protections. However, it recognised that there was a role for the dedicated mechanism to consider best practice in the area of human rights and equalities issues insofar as they have an island of Ireland dimension. This suggests that NI will look to developments and best practice in Ireland in assessing compliance with Article 2, and perhaps more widely.

Workers who may be considering working in the Republic of Ireland are likely to view developments such as the new Gender Pay Gap Information Act 2021, the Protected Disclosures (Amendment) Bill 2021 (which will implement the EU Whistleblowing Directive), as well as progressive initiatives such as the new Code of Practice on the Right to Disconnect and the expected legislation on the right to request remote working, as well as a public campaign for a four-day working week, positively. It is not clear whether NI will keep pace with such developments or indeed whether or not this will be required to ensure compliance with Article 2.

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