WORKERS RIGHTS, EU LAW AND BREXIT

1. INTRODUCTION

1.1 I refer to the E-mail of 6 March 2019 from Jason Moyer-Lee of the Independent Workers Union of Great Britain (IWGB).

1.2 I am asked to advise on whether the latest UK Government proposals on the continued protection of workers'/employment rights after Brexit will be effective and sufficient, as a matter of law, to *ensure* not only that the current level of protection afforded to workers'/employment rights as a matter of EU law will be *maintained* but that any post-Brexit improvements in those rights as a matter of EU law will be *matched* once the UK leaves the EU.

1.3 The short and unequivocal answer to that question is, perhaps unsurprisingly, "no".

1.4 This is because, as the UK Supreme Court affirmed in its decision in *R (Miller) v Secretary of State* [2017] UKSC 5 [2018] AC 61 (24 January 2017) no Parliament can bind its successors. There is therefore simply no possibility of any entrenchment of rights, whether of workers or any other persons, under the UK constitution once the UK is no longer a Member of the European Union.

1.5 Further and in any event, the European Union (Withdrawal) Act 2018, if brought into force, essentially *eviscerates* the existing procedural protections currently afforded as a matter of EU law to EU law based rights. It does so as follows:

- Section 5(1) of the Act *abolishes* the principle of the *supremacy* of EU law over domestic laws made on or after exit day.

- Section 5(4) *strips out* from domestic law all fifty (50) of the civil, political, social and economic rights to be found in the EU Charter of Fundamental Rights.

- Paragraph 3(1) of Schedule 1 to the 2018 Act removes from exit day an individuals' rights to sue private employers or public authorities for their *failure to comply with any of the general principles of EU law, such as the principle of equal treatment.*

- Paragraph 3(2) of Schedule 1 to the 2018 Act *ends* the power of the courts to disapply laws or find conduct to be unlawful because *incompatible with any of these general principles of EU law*, whether the principle of proportionality or legal certainty or abuse of rights.

- Paragraph 4 of Schedule 1, does away with right of individuals to be able - in accordance with the rule in *Francovich* - to sue UK public authorities and claim damages where their actions in breach of EU law have caused those individuals loss.

1.6 Brexit involves, in effect a wholesale bonfire of the "vanities" which this Government evidently regards EU law rights to be. And even if it were proposed by the Government that it would seek to insert into any Withdrawal Agreement with the EU a legally binding commitment obliging the UK to match EU standards in terms of workers' rights and other social protection, this is *not* an obligation which could be directly enforced or insisted upon by individuals before our courts, as it would be a matter of international law only.

1.7 International law cannot be enforced before the UK domestic courts as such. International law obligation have to be incorporated into national law to be enforceable by and before the domestic courts. So should the Government fail to abide by any such international law commitment to match the levels of protection for workers' rights with those of the EU, workers in the UK would be left without any domestic legal means of enforcing it.

1.8 Without EU law, there is no possibility of laws being set aside to ensure that individuals rights are fully protected ("direct effect") and no general right of damages against the State. In sum are no longer any legal remedies which truly *bite* against public authorities, whether the Government or Parliament.

2. THE CHARACTERISTICS OF EU LAW

2.1 Although it has its origin in international Treaties concluded between independent sovereign States, EU law has characteristics which make it fundamentally different from classic public international law.

Direct effect

2.2 In the first place, while public international la simply imposes obligations upon countries and other bodies with recognised international personality, EU law not only impose obligations on individuals independently of Member States' legislation, but also directly confers *rights* upon them, both expressly and by implication.[1] It thus may have "direct effect" within the Member States. The doctrine of 'direct effect' allows provisions of EU law to be relied upon directly in national courts. National courts have a duty to protect those rights and enforce those obligations.

2.3 That individuals in the Member States are the bearers of rights and obligations under the EU legal order was confirmed and affirmed by the Member States' introduction, after the Maastricht Treaty, of the principle of EU citizenship now contained in Articles 20 to 24 TFEU. Article 9 TEU provides that every person holding the nationality of a Member State shall be a citizen of the European Union.[2] To be a citizen of the Union means that one enjoys the rights conferred by and is subject to the duties imposed on individuals by the Treaties.[3] European Union citizenship is said by the CJEU to be 'intended to be the

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[1] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 at 12:

> 'The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting States. ... [T]he Community constitutes a new legal order of international law for the benefit of which States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community.'

[2] Compare with the terms of the 14th Amendment to the US Constitution of 1868, § 1:

> 'All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

[3] As the Grand Chamber of the Court of Justice observed in Cases C-76/05, C-318/05 *Schwarz and another v Finanzamt Bergisch Gladbach; European Commission v Germany* [2007] ECR I-6849:

> 'The status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy the same treatment in law within the area of application *ratione materiae* of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard.'

fundamental status of nationals of the Member States',[4] In *Zambrano v. Office national de l'emploi (ONEm)* the Grand Chamber of the CJEU observed:

> "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". [5]

Primacy of EU law over other national and international law

2.4 This quote also highlights the second main way in which EU law differs from public international law. EU law has primacy over national law. If there is a conflict between EU law and the requirements of a Member State's national law or the requirements of general international law, then EU law wins. The Court of Justice stated in *Costa v ENEL*[6] that membership of the EU entailed a permanent limitation of the sovereign rights of the Member States to the extent that national laws passed after entry into the EU could not be given effect to if and in so far as contrary to EU law.[7] Later, the Court affirmed the primacy of EU law over the provisions of national constitutions, even those relating to the protection of fundamental rights or to the internal constitutional structure of the Member State.[8] Member States are said to have a duty under EU law to repeal national laws which are contrary to EU law.[9] Where this has not been done, the Court of Justice has repeatedly stressed that it is the duty of national courts to give full effect and precedence to EU law in situations of conflict with national law,[10] including fundamental constitutional norms.[11]

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[4] See, among others: Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82; and Case C-135/08 *Janko Rottmann v Bavaria*, 2 March, [2010] ECR I-nyr at para 43.

[5] Case C-34/09 *Zambrano v. Office national de l'emploi (ONEm)* 8 March [2011] ECR I-nyr, para 42

[6] Case 6/64 *Costa v ENEL* [1964] ECR 585 at 593–94.

[7] Compare with Art VI of the US Constitution, which states that

> 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.' See too *Missouri v Holland* 252 US 416 (1920).

[8] Case 11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr und Vorratstelle für Getriede und Futtermittel* [1970] ECR 1125.

[9] Case 167/73 *Commission v France* [1974] ECR 359.

[10] See, eg, Case C-381/89 *VASKO* [1992] ECR I-2111.

[11] See Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, 8 September, [2010] ECR I-nyr, where the Grand Chamber reiterated (at paras 54–57, 61):

> '[D]irectly applicable rules of law of the Union which are an immediate source of rights and obligations for all concerned, whether Member States or individuals who are parties to legal relationships under Union law, must deploy their full effects, in a uniform manner in all Member States, as from their entry into force and throughout the duration of their validity (see,

Purposive interpretation

2.5 The third main characteristic of EU law is in how it is interpreted and applied by the courts. It will be clear to any lawyer trained in any of the legal systems of the United Kingdom that the CJEU does not approach legal texts in the same way as common law judges.[12] The Court of Justice describes its task of interpreting the law as one of uncovering and furthering the purpose of the particular provision. In performing this task, the Court of Justice does not consider itself to be bound by the precise wording of Treaty provisions or of secondary legislation. The wording of any provision has to be read in context, including its preamble, albeit that the preamble to an EU act has of itself no binding legal force.[13] The context, which includes a consideration of the overall spirit and scheme of the foundation Treaties, will reveal the purpose of the provision. The wording then has to be re-read in such a way as to ensure the achievement of its purpose. This approach to the legislative text is known as 'teleological interpretation'.[14] In some ways this is akin to the common law purposive approach to statutory interpretation, or the 'mischief rule'. However, it differs from those techniques in that the Court of Justice sees teleological reasoning as the primary paradigm, rather than,

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> to that effect, *Simmenthal*, paragraphs 14 and 15, and *Factortame*, paragraph 18). ... It is also settled case-law that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation pursuant to the principle of cooperation set out in Article 10 EC, fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union (see to that effect, in particular, *Simmenthal*, paragraphs 16 and 21, and *Factortame*, paragraph 19). ... It follows from the above that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law (*Simmenthal*, paragraph 22, and *Factortame*, paragraph 20). ... The Court has stated that that would be the case if, in the event of a conflict between a provision of Union law and a subsequent national law, the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Union law, even if such an impediment to the full effectiveness of Union law were only temporary (*Simmenthal*, paragraph 23).... Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law ....'

[12] In *Customs and Excise Commissioners v Samex ApS* [1983] 3 CMLR 194 (QBD), Bingham J (as he then was) observed at 211:

> 'The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton.'

[13] See Case C-134/08 *Tyson Parketthandel* [2009] ECR I-2875, para 16; and Case C-562/08 *Müller Fleisch GmbH v Land Baden-Württemberg*, 25 February, [2010] ECR I-nyr at para 40.

[14] See J. Millett, 'Rules of Interpretation of EEC Legislation' (1989) 11 *Statute Law Review* 163.

as in the canons of common law statutory interpretation, a method which is resorted to only where there is ambiguity or lack of clarity in the authoritative text.[15]

3. THE GOVERNMENT'S PROPOSALS FOR RING-FENCING THE PROTECTION OF EU LAW DERIVED WORKERS' RIGHTS POST-BREXIT

3.1 On 6 March 2019 the Secretary of State for Business, Energy and Industrial Strategy, Greg Clark MP, advised Parliament that the Government had published new draft clauses for inclusion in the withdrawal agreement and implementation Bill intended to put The Prime Minister's commitment that Brexit will not be allowed to erode workers' rights".

The non-regression principle

3.2 The first clause would place a new statutory duty on Government Ministers when introducing a Bill before Parliament which affects employment or workplace health and safety to certify, before Second Reading of any such Bill, that it is compatible with this "principle of non-regression". Ministers will be required to provide explanatory information, , which will be drawn up following consultation with businesses and trade unions, to support and substantiate that claim before Parliament. In this way, Ministers say, Parliament can be assured that workers' rights will at least be maintained at current levels post-Brexit.

3.3 Currently as a matter of EU law once the EU legislature has acted to require at least partial harmonisation of Member States' law in the area of workers' rights - it is no longer open to Member States to harmonize the level of social protection afforded by national law *downwards* to that minimum level or base level required by the provision of EU secondary law. The national implementation of EU law cannot result in the *reduction* of workers'

[15] See also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, where the House of Lords interpreted s 3 of the Human Rights Act 1998 as mandating, even in the absence of ambiguity, a teleological approach similar to that used in an EU law context to the courts' interpretation and application of ordinary statutes to ensure their compatibility with Convention rights requirements. In *Smith v Scott*, 2007 SC 345, the Scottish Registration Appeal Court considered *Ghaidan* not be binding upon it (as a House of Lords appeal in an English case), and given the 'potentially significant difficulties in the consistent interpretation of legislation in the various courts which may have to apply it' expressly reserved its opinion as to the extent to which *Ghaidan* might (not) be followed in Scotland. These obiter remarks from the Court of Session judges must be considered to have been implicitly disapproved by the decision of the UK Supreme Court in a Scottish appeal *Principal Reporter v K* [2010] UKSC 56, where the UK Supreme Court in allowing an appeal against the decision of the First Division of the Court of Session, read a new clause into the text of a Westminster statute, the Children's (Scotland) Act 1995, so as to give rights to appear before a Children's Hearing to any persons 'who appear to have established family life with a child with which the decision of a children's hearing may interfere', in order to make this pre-Human Rights Act primary legislation Convention compatible.

rights in the Member State because the fact that the EU legislature has acted in accordance with the Treaty operates as a one way stand-still provisions, whereby member States are required to at least *maintain* their existing levels of workers' protection which exceeded the minimum requirements of EU law, and to bring up to at least the minimum standards of EU law any national protection which fell below it. In Case C-144/04 *Mangold* [2005] ECR I-9981 the Grand Chamber CJEU held (at para 51) that the non-regression principle applies not just when a Directive is *first* implemented by a Member State but also "covers all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted". In Joined Case C-378-380/07 *Angelidaki v Organismos Nomarkhiaki Aftodiikisi Rethimnis* [2009] ECR I-3071 the CJEU held (at para 140) that a reduction on a scale likely to the have an effect *overall* on national legislation relating to the workers otherwise covered by a specific directive would be likely to infringe the non-regression principle. Standstill clauses in other areas of EU law - notably within the context of free movement rights set out in Association agreements with the EU – have been found to be directly effective: Case C-228/06 *Soysal v. Germany* [2009] ECR I-1031. Standstill clauses of this sort can this be relied upon directly before the courts to challenge any attempt by a Member State to lowers its existing levels of social protection when implementing EU law: Case C-186/10 *Oguz v Secretary of State for the Home Department* [2012] ICR 335, CJEU.

3.4 By contrast, it is unlikely that the proposed new post-Brexit "non-regression" duty on Ministers to report to Parliament will be justiciable. Article 9 of the Bill of Rights 1688 – which prohibits "the freedom of speech, and debates or proceedings in Parliament" from being impeached or questioned before the courts - is likely to be prayed in aid against any attempt to enforce this duty, or to question the substance of Minister's claim that the non-regression principle has been respected, before the courts.

The matching of future EU law standards for workers' rights

3.5 The Government proposes that post-Brexit it will give Parliament the opportunity, at least every six months, to consider any changes to EU workers' rights, and health and safety standards in the workplace by formally reporting to it in a document on this issue prepared by the Government after consultation with employers and trade unions. The duty placed on the Government would be to for it to table an amendable motion before Parliament setting out whether, and how, the Government's might (not) implement these EU law developments in the UK.

3.6 It is unclear whether in terms of post-Brexit changes in relation to the protection of workers' rights in the EU the Government intends to also cover developments effected by decision of the Court of Justice of the European Union in cases brought before it. CJEU case law has in many cases significantly altered the scope and understanding of workers' rights legislation passed by the EU. If the Government does intend to report to Parliament on developments in the CJEU case law on workers' rights and whether it intends to match these in EU law, it would appear that one of the Government's supposed red-lines (escaping the influence of the Court of Justice over UK law) will have been breached. But if the Government does not propose to report on developments in the CJEU case law, then it will be unlikely to achieve it stated aim of "honouring the commitment the Prime Minister has made not to see workers' rights weakened" by and post-Brexit.

Why the Government's approach will not lead to the maintenance or matching of protection of worker's rights

3.7 EU law based rights workers' rights currently can be relied upon and fully enforced before the UK courts by virtue of the fact that they are derived from EU law and the duty of Member State authorities (including the national courts) to ensure the "effectiveness" of those EU law derived rights can be prayed in aid.

3.8 Thus, an individual may rely upon the EU principle of "direct effect" so that the EU law right can be recognised and protected by the courts, even where the right in question has not been (properly) implemented into UK law. That will not be an option under the Government's new proposals. A right will only be enforceable before the UK courts if and insofar as it has expressly been brought into force in national law.

3.9 Further currently an individual may rely upon the principle of the primacy of EU law to ensure that workers' EU law based rights will be respected and fully applied even in the face of contrary provisions of national law. This will no longer be an option under the Government's proposals for protecting workers rights, given that the primacy of EU law based rights is being abolished by the 2018 Act.

3.10 Finally an individual will no longer be able to rely on the dynamic purposive approach to interpretation of EU law based rights such as has been developed by the Court of Justice of the European Union since the direct jurisdiction of that court is being abolished and the

consequence is likely to be that the more textually focused, black letter approach to legal interpretation which characterised much of the approach to legal texts followed by the UK courts prior to entering the Common Market, now European Union, will revive. If a worker can no longer rely to the same degree upon the purpose of a provision intended for the greater protection of worker's rights, it is likely that the level of protection afforded these rights by purely national law will be diminished.

3.11 Against this background, any statement or assurances by the UK Government that it can and will ensure the continued protection of worker's rights at least the same levels as exist in the EU from time to time can be nothing more than claims "writ on water". They are wholly unenforceable as a matter of law and the post-Brexit constitution and therefore cannot be relied upon.

4. WORKERS' PROTECTION UNDER EU LAW

4.1 The fact that the United Kingdom's leaving the European Union represents a fundamental diminution both in the substance and in the effective enforcement of workers' rights becomes clearer when the situation which will exist in the post-Brexit UK constitution is contrasted with the current protection afforded to these rights while the UK remains a member of the European Union

The Treaty of Rome 1957 and workers' rights

4.2 The EU has always had competence to pass legislation governing employment protection, under what was formerly Article 118 of the Treaty of Rome. This referred to matters relating to:

> "employment, labour law and working conditions, the right of association and collective bargaining between employers and workers"

4.3 However, EU legislation pursuant to this Treaty provision required unanimous backing from the Member States, and in the face of consistent opposition particularly from the UK Government, notably during the 1980s and early 1990s, little progress was made. Thus only four directives were adopted in this way:

- the Collective Redundancies Directive 75/129/EEC[16]
- the Acquired Rights Directive 77/187/EEC[17]
- the Insolvency Protection Directive 80/987/EEC[18] and
- the Directive on Written Particulars of Employment Contracts 91/533/EEC[19].

4.4 During the negotiations prior to the Maastricht Treaty, it was proposed that the substance of the rights set out in the Community Social Charter [20] (which echoed many of those already contained in the 1961 European Social Charter [21]) should be fully incorporated into

[16] [1975] OJ L48/29. The original Collective Redundancies Directive was subsequently repealed and replaced by Council Directive 98/59/EC [1998] OJ L225/16.

[17] [1977] OJ L61/26. This Directive was subsequently repealed and replaced by Council Directive 2001/23/EC [2001] OJ L61/26.

[18] [1980] OJ L283/23. The original Acquired Rights Directive was subsequently repealed and replaced by the consolidating and codifying Employment Protection (Insolvency) Directive 2008/94/EC [2008] OJ L283/36.

[19] [1991] OJ L288/32.

[20] The Community Charter of Fundamental Social Rights of Workers 9 December 1989, COM(89) 471 final was a political declaration with no binding legal force or effect, which enumerated a series of social and labour rights for workers such as:

- the improvement of living and working conditions of all workers, including rights to paid annual leave and weekly breaks;
- the right to an adequate level of social security benefits;
- freedom of association in trade unions, and the rights to strike and to negotiate and conclude collective agreements;
- equal treatment between men and women;
- the right to information, consultation and participation in decisions involving major changes in the workplace and/or the workforce;
- and the protection of the young, the elderly and the disabled in the workplace.

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[21] The European Social Charter of 1961 was a document produced in the middle of the Cold War under the auspices of the Council of Europe (then made up of the non-Communist liberal social democratic states of primarily Western Europe). In an implicit counter to the claims of the Eastern bloc that it was only in countries under State socialism that workers' rights were protected, the European Social Charter of 1961 guaranteed, among other social and economic rights:

- employment protection rights, such as the right to work in a safe environment under just conditions for fair remuneration, and the right to organise and collectively bargain in trade unions;
- welfare rights, such as the protection of health, access to social and medical assistance, social security and social welfare services; and
- special social, legal and economic protection for the disadvantaged and potentially socially excluded, such as children, mothers and families, the disabled, the old, and migrant workers and their families.

The 1961 European Social Charter was very much understood to be a classic inter-state Treaty, which had implications for States from the point of view of imposing obligations under public international law, but not necessarily creating rights for individuals within those States. There was no procedure for individuals to make complaints of breach of its provisions by a Member State. A protocol was added to the Social Charter in 1995 allowing for the possibility of collective complaints being made by international and national organisations of employers and of trade unions to the Social Charter's Committee of Independent Experts. In May 1996 the Council of Europe produced a revised European

EU law by appropriate amendments to the Treaty of Rome (to be known as "the Social Chapter"). However, the UK again did not agree, and since Treaty amendments also have to be agreed unanimously, a compromise was reached whereby EU institutions and procedures could be used to implement social rights but the UK would be excluded from the EU decision-making procedures on these issues and any legislation adopted would not apply to the UK.[22]

4.5 The UK's opt-out from the Community Social Chapter meant that any EU social legislation which was to apply to all of the Member States had to be presented in another guise, for example as workplace health and safety, which permitted legislation to be adopted by majority vote. This was what happened with the original Working Time Directive[23] - which sought to regulate, among other things, the maximum length of the working week, night working and paid annual leave.[24] The UK subsequently pursued an unsuccessful legal challenge to the Council's decision to adopt the Directive under health and safety provisions.[25] Another employment law measure, Directive 96/71/EC[26] on the rights of workers posted to other Member States, was successfully adopted by the EU to apply to all Member States under the Treaty provisions governing free movement of services.

4.6 The Labour Government which was elected in the United Kingdom in May 1997 had pledged that it would reverse the UK's opt-out from the Social Chapter, and consequently it was agreed in the Amsterdam Treaty that the provisions of the Agreement on Social Policy should be incorporated within the main body of the EC Treaty and that any general EU legislative provisions which had been adopted by the other Member States under the Social Chapter during the UK opt-out would be extended to apply to the UK too.[27]

Social Charter, updating and altering some of the substantive provisions of the original 1961 Social Charter.

[22] Treaty on European Union, Agreement on Social Policy concluded between the Member States of the European Community with the exception of the UK (Protocol 14 to the Maastricht Treaty).

[23] Directive 93/104/EC [1993] OJ L307/18 was presented as a health and safety measure, in further implementation of the programme envisaged by the Framework Health and Safety Directive 89/391/EC, and under the legislative procedure contained in what was then Art 118A of the Treaty of Rome 1957 allowing for qualified majority voting.

[24] See also the Pregnant Workers Directive 92/85/EEC [1992] OJ L348/1

[25] Case C-84/94 *UK v Council* [1996] ECR I-5755.

[26] [1996] OJ L18/1.

[27] See, e.g., Directive 97/74/EC [1998] OJ L10/22 extending the European Works Council Directive to the UK; Directive 97/75/EC [1998] OJ L10/22 extending the Parental Leave Directive to the UK; Directive 98/23/EC [1998] OJ L131/10 extending the Part-time Workers Directive to the UK.

The current Treaty Basis for Workers' Social protection measures in the EU

4.7 Post-Lisbon, Article 151 TFEU provides as follows:

> "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

4.8 Article 151 TFEU goes on to provide for the implementation of measures (whether laws, regulations or administrative action) by the Union and the Member States which are aimed at "the approximation of provisions" in this area across the EU, while

> "tak[ing] account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy".

4.9 While expressly excluding "pay, the right of association, the right to strike or the right to impose lock-outs", and respecting "the right of Member States to define the fundamental principles of their social security systems", Article 153 TFEU specifies EU competence to make directives which set out minimum requirements (always allowing Member States to maintain or introduce more stringent protective measures compatible with the Treaties) in the following fields:

(a) improvement, in particular, of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including co-determination;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to any EU vocational training policy made under Article 166 TFEU;

(i) equality between men and women with regard to labour market opportunities and treatment at work.

4.10 Under Article 153 TFEU the European Parliament and the Council may also adopt non-harmonising measures designed simply to encourage cooperation between Member States in "the combating of social exclusion" and in "the modernisation of social protection systems". Further, Article 156 TFEU tasks the Commission with encouraging cooperation and coordination of social policy action among the Member States, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; and the right of association and collective bargaining between employers and workers.

4.11 Article 155 TFEU envisaged a special legislative procedure for Social Chapter measures, whereby legislation should, if possible, be agreed by negotiation between "the two sides of industry" or in Euro-speak as "the Social Partners". Currently, the Social Partners at EU level comprise the European Trade Union Congress (ETUC) on the employee side, and the Union of Industrial and Employers' Confederations of Europe (UNICE) and European Centre of Employers and Enterprises providing Public Services (CEEP) representing, respectively, private- and public-sector employers. Any resulting concluded contractual agreements between management and labour at the EU level might then be implemented as binding law either at the level of Member States or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.[28]

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[28] It should be noted, as reiterated in Joined Cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt* 8 September [2011] ECR I-7965 at paras 65-68 - that in order to be legally enforceable any collective agreement has to be compatible with the general principles of EU law, as well as with any relevant specific provisions of EU secondary law:

> "66. The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in

Secondary EU law in the field of employment protection

4.12 European Union directives now cover the following areas of general employment protection law:

(1) the employees' right to information as to their contractual terms of employment[29];

(2) the establishment of a European Works Council or other procedures for informing and consulting employees in EU-wide (groups of) undertakings[30];

(3) worker involvement in the European Company (*Societas Europaea*)[31];

(4) the information and consultation of employees to promote social dialogue between management and labour[32];

(5) the rights of workers to rest breaks, rest periods and paid annual leave,[33] with specific provision in relation to workers in the road transport sector[34];

(6) the protection of young people at work[35];

(7) the right to parental leave on the birth or adoption of a child[36];

(8) the rights of part-time workers[37];

Article 28 of the Charter, have taken care to strike a balance between their respective interests (see, to that effect, *Rosenbladt*, paragraph 67 and the case-law cited).

67 Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law (see, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).

68 Consequently, when they adopt measures falling within the scope of Directive 2000/78, which gives specific expression in the field of employment and occupation to the principle of non-discrimination on grounds of age, the social partners must comply with that directive (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 22)."

[29] Contracts of Employment Directive 91/533/EEC [1991] OJ L288/32.

[30] European Works Council Directive 94/45/EC [1998] OJ L254/64. This Directive has subsequently been repealed and replaced with effect from 6 June 2011 by European Parliament and Council Directive 2009/38/EC [2009] OJ L225/16.

[31] European Company Directive 2001/86/EC [2001] OJ L294/22.

[32] Information and Consultation of Employees (Social Dialogue) Directive 2002/14/EC [2002] OJ L80/29.

[33] Working Time Directive 2003/88/EC [2003] OJ L229/9.

[34] Road Transport Working Time Directive 2002/15/EC [2002] OJ L80/35.

[35] Young Workers Directive 94/33/EC [1994] OJ L216/12.

[36] Parental Leave Directive 96/34/EC [1996] OJ L145/4. This Directive has been repealed and replaced with effect from 8 March 2012 by Council Directive 2010/18/EU [2010] OJ L68/13.

[37] Part-time Workers Directive 97/81/EC [1998] OJ L14/9.

(9) the rights of fixed-term workers[38];

(10) the rights of temporary agency workers[39];

(11)the rights of posted workers[40];

(12) the rights of workers on business transfers to protection and preservation of their acquired employment rights[41];

(13) the rights of workers in the event of collective redundancies[42]; and

(14) the rights of workers on the insolvency of their employer.[43]

4.13 And the substantive equality law of the EU now covers the following areas of discrimination in the workplace:

(15) equality between men and women; [44]

(16) discrimination based on transgendered status; [45]

(17) discrimination based on racial or ethnic origin; [46]

(18) discrimination based on disability; [47]

(19) discrimination based on age; [48]

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[38] Fixed-term Workers Directive 99/70/EC [1999] OJ L175/43.

[39] Agency Workers Directive 2008/104/EC [2008] OJ L327/9.

[40] Posted Workers Directive 96/71/EC [1996] OJ L18/1.

[41] Acquired Rights Directive 2001/23/EC [2001] OJ L61/26.

[42] Collective Redundancies Directive 98/59/EC [1998] OJ L225/16.

[43] Insolvency Directive 2008/94/EC [2008] OJ L283/36.

[44] See: Equal Treatment (Employment) Directive 2006/54/EC; Pregnant Workers Directive 92/85/EEC; Equal Treatment (Self-employed) Directive 86/613/EEC; Equal Treatment (Social Security) Directive 79/7/EEC; and Equal Treatment (Goods and Services) Directive 2004/113/EC.

[45] See Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 paras 33–35 and Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585

[46] See Race Discrimination Directive 2000/43/EC and Case C-54/07 *Centre for Equal Opportunities and Combating Racism v Firma Feryn NV* [2008] ECR I-5187.

[47] See Employment Equality Directive 2000/78/EC and Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603 and Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467(Grand Chamber).

[48] See Employment Equality Directive 2000/78/EC and Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47; and Case C-555/07 *Seda Kucukdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

(20) discrimination based on sexual orientation; [49]

(21) discrimination based on religion or belief. [50]

Worker status in EU law

4.14 In Case 66/85 *Lawrie-Blum v Land Baden Württemberg* [1986] ECR 2121 relating to freedom of movement of workers under Article 45 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice (at para 17) defined a "worker" as someone who, for a certain period of time, performs services for and under the direction of another person, in return for which he or she receives remuneration.

4.15 In Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] ECR 1-873 the Court of Justice confirmed that the definition of "worker" in the *Lawrie-Blum* sense applies to equal pay claims under what is now Art 157 TFEU and (at para71) observed as follows:

> "68. Pursuant to the first paragraph of article 141(2)EC, for the purpose of that article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
>
> It is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of article 141(1)EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services. [51]
>
> 69. The question whether such a relationship exists must be answered in each particular case *having regard to all the factors and circumstances by which the relationship between the parties is characterised*.
>
> 70. Provided that a person is a worker within the meaning of article 141(1)EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article
>
> 71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1)EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article."

[49] Employment Equality Directive 2000/78/EC and Case C-267/06 *Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757 and C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* 10 May [2011] nyr (GC) at [53]-[64]

[50] Employment Equality Directive 2000/78/EC

[51] See also, in the context of free movement of workers, Case C-337/97 *Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, 3311, para 15

4.16 "Worker" in EU law generally has an autonomous meaning specific to EU law. [52]. The concept of "worker" is determined in accordance with objective criteria which identify a relevant working relationship by reference to the rights and duties of the persons concerned.

4.17 The objective criteria which define "worker status" resides in the fact that for a certain period of time a person performs services, *for and under the direction of another person*, in return for which he or she receives remuneration. [53] This implies the existence of a "hierarchical relationship" between the worker and the person giving directions. Whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties. [54]

4.18 It is for the national court to apply that EU law concept of a "worker" - rather than its own national laws on who is or is not an employee [55] - in any dispute over the applicability of EU law based worker/employment rights (such as the Working Time Directive). The national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved. Thus in Case C-147/17 *Sindicatul Familia Constanța* ECLI:EU:C:2018:926 the CJEU Grand Chamber applied the above tests and concluded that the foster carers in that case were "workers" for the purposes of the Working Time Directive. The CJEU observed as follows (at paras 43-8, internal footnote references to cases omitted):

> "43. In the present case, it is clear from the order for reference that the foster parents in question in the main proceedings must provide, in principle on a continuous basis, for the care and education of the children placed with them by a public authority, and in return for that work they receive remuneration.
>
> In addition, the foster parents must not merely be approved, but must also, in accordance with Article 8(1) of Government Decree No 679/2003, conclude a 'special employment contract' with the relevant specialist service for the protection of minors. That contract applies for the period of validity of the authorisation and its performance begins when the placement decision is made. It may be suspended or terminated according to national employment rules. The foster parents also appear to have a right to social security and to professional training.

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[52] Case C-518/15 *Matzak* EU:C:2018:82 (Fifth Chamber, 21 February 2018) at paragraph 28

[53] Case C-316/13 *Fenoll* EU:C:2015:200 (First Chamber, 26 March 2015) paragraph 27

[54] Case C-47/14 *Holterman Ferho Exploitatie and Others* EU:C:2015:574 (Third Chamber, 10 September 2015) paragraph 46

[55] Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 26 and case-law cited

44 Moreover, according to the national legislation at issue in the main proceedings, the foster parents must allow the specialist service for the protection of minors, with which they concluded a contract, to supervise their professional activity and to assess the development of the child placed with them.

45 It follows from all of these factors that the individual applicants in the main proceedings are, with respect to the public service to which they are contractually linked, in a hierarchical relationship, evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract, for the purpose of fulfilling the task of protecting the minor, which is conferred on that service by law.

46 Such an assessment is not called into question by the fact that foster parents, such as the individual applicants in the main proceedings, have broad discretion as to the daily performance of their duties or that the task conferred on them is a 'task of trust' or a task of public interest

47 In addition, the fact that the work performed by foster parents is largely comparable to the responsibilities taken on by parents with regard to their own children is not, in the light of what was noted in paragraphs 43 to 45 above, sufficient to prevent those foster parents from being qualified as 'workers' within the meaning of Directive 2003/88.

48 It follows that the foster parents in question in the main proceedings must be regarded as 'workers' within the meaning of Directive 2003/88."

4.19 Once classified as a "worker" for the purposes of EU law an individual will then be entitled to all the employment rights and statutory protections which are afforded under EU law derived national law to workers. [56]

5. EU LAW AND WORKPLACE HEALTH AND SAFETY

Treaty basis for health and safety regulation in the EU

5.1 The third preamble to the 1957 Treaty of Rome (now the TFEU) affirms:

> "as the essential objective of the [Member States'] efforts, the constant improvements of the living and working conditions of their peoples."

5.2 Article 151 of the Treaty on the Functioning of the European Union ("TFEU") provides, so far as relevant as follows

> "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, *improved living and working conditions, so as to make possible their harmonisation while the improvement is*

[56] See e.g. *Benkharbouche v Embassy of Sudan* [2017] UKSC 62 [2017] ICR 1327

being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

5.3 And Article 153(1)(a) TFEU notes that:

"1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety"

EU Secondary legislation in the field of health and safety

5.4 On the Commission's own estimation (in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee (ECOSOC) and the Committee of Regions COM(2007) 62 final (Brussels, 21.2.2007), *Improving quality and productivity at work: Community strategy 2007–2012 on health and safety at work*, at 2):

"Health and safety at work is now one of the most important and most highly developed aspects of EU policy on employment and social affairs. Thanks to the adoption and application in recent decades of a large body of Community laws, it has been possible to improve working conditions in the EU Member States and make considerable progress in reducing the incidence of work-related accidents and illnesses."

5.5 The Second Framework Directive 89/391/EEC ([1989] OJ L 183/1) was conceived as the bed-rock of a new EU-wide programme which was intended, in time, completely to replace the existing national legislation of Member States on safety and health at work with a common basic standards framework as regards the safety and health of workers throughout the territory of the EU. The rationale for this project was that the legislative provisions of the present Member States which covered safety and health in the workplace differed widely; and all, in any event, needed to be improved.

5.6 Framework Directive 89/391/EEC placed a general responsibility on employers for the safety and health of workers as regards their presence in the workplace and in all aspects of work done by them. The Framework Directive laid down minimum standards and requirements as regards safety and health. It required employers to inform, consult and involve their workers and their workplace representatives in the whole field of accident prevention and health protection. Employers were required to keep themselves informed of advances in workplace design, and to evaluate the risks to the safety and health of

employees in their choice of work equipment and the fitting out of workplaces. (Part-time and temporary workers and those working on fixed-term contracts were also included within EU safety and health protection: see Directive 91/383/EEC [1991] OJ L206/19).

5.7 Framework Directive 89/391 imposes a number of basic duties on employers throughout the EU and applies to all sectors of industrial activity. The Framework Directive requires the introduction of measures actively to encourage improvements in the safety and health of workers at work. The Framework Directive thus imposes a number of basic duties on employers throughout the EU and in principle applies to all sectors of activity. The operative provisions of the Directive 89/391 include the following

"*Article 1*

Object

1. The object of this Directive is to introduce measures to *encourage improvements* in the safety and health of workers at work.

2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/ or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.

3. This Directive shall be without prejudice to *existing or future national* and Community provisions which *are more favourable to protection of the safety and health of workers at work*.

…

Article 4

1. Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.

2. In particular, Member States shall ensure adequate controls and supervision.

…

Article 5

General provision

1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.

…

3.The workers' obligations in the field of safety and health at work *shall not affect the principle of the responsibility of the employer*.

> 4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to *unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care*.
>
> Member States need not exercise the option referred to in the first subparagraph."

5.8 In Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963 the Court of Justice examined the scope of Framework Directive 89/391 and noted (at paras 34, 35) that

> it is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope ...

and that

> it follows that the exceptions to the scope of the basic Directive, including that provided for in Article 2(2), must be interpreted restrictively.

Daughter health and safety directives

5.9 Under the auspices of the Second Framework Directive a significant number of specific directives have been adopted. These are intended to focus on specific aspects of safety and health at work, but the provisions of the Framework Directive continue to apply to all areas covered by the individual directives. Where individual directives contain more stringent and specific provisions, these special provisions prevail. Individual directives tailor the principles of the Framework Directive to:

a) specific tasks (e.g. manual handling of loads);

b) specific hazards at work (e.g. exposure to dangerous substances or physical agents);

c) specific workplaces and sectors (e.g. temporary work sites, extractive industries, fishing vessels).

5.10 The individual directives define how to assess these risks and, in some instances, set limit values for certain substances or agents. The standards set in these individual directives are minimum standards for the protection of workers, and Member States are

allowed to maintain or establish higher levels of protection. These daughter directives now set out minimum safety and health requirements in the following areas, among others:

a) The constitution of a safe working environment/safe place of work.[57]

b) The provision and use of safe work equipment.[58]

c) The provision and use of personal protective equipment.[59]

d) The manual handling of loads where there is a risk of back injury.[60]

e) The safe use of video display screen equipment at work.[61]

f) The implementation of minimum safety and health requirements at temporary or mobile construction sites.[62]

g) Minimum requirements for the provision of safety and health signs at work.[63]

h) Minimum requirements for improving the safety and health of workers in the onshore and off-shore drilling industries.[64]

i) Minimum safety and health requirements for workers engaged in surface and underground mineral extraction from mines and quarries.[65]

j) Minimum safety and health requirements for work on board fishing vessels.[66]

k) The protection of the health of workers[67] and the general public[68] against dangers arising from their exposure to ionising radiation. (A separate directive deals with medical exposure to radiation.[69])

l) The control of major accident hazards involving dangerous substances.[70]

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[57] Directive 89/654/EEC [1989] OJ L393/1.

[58] Directive 89/655/EEC [1989] OJ L393/13

[59] Directive 89/656/EEC [1989] OJ L393/18.

[60] Directive 90/269/EEC [1990] OJ L156/9.

[61] Directive 90/270/EEC [1990] OJ L156/14

[62] Directive 92/57/EEC [1992] OJ L245/6

[63] Directive 92/58/EEC [1992] OJ L245/23.

[64] Directive 92/91/EEC [1992] OJ L 348/9.

[65] Directive 92/104/EEC [1992] OJ L404/10.

[66] Directive 93/103/EC [1993] OJ L307/1.

[67] Directive 96/29/Euratom [1996] OJ L159/1

[68] See Case C-115/08 *Land Oberösterreich v ČEZ as* [2009] ECR I-10265 (Grand Chamber) at paras 99–103

[69] Directive 97/43/Euratom [1997] OJ L180/22.

[70] Directive 96/82/EC [1997] OJ L10/13.

m) The protection of workers from chemical agents at work.[71]

n) Minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres.[72]

o) The protection of workers from risks related to exposure to biological agents at work.[73]

p) Minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration).[74]

q) Minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise).[75]

r) The protection of workers from the risks related to exposure to carcinogens or mutagens at work.[76]

s) Minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields).[77]

t) Minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation).[78]

5.11 The measures which have been reported to the Commission by the UK as being in implementation of these directives are legion. The implementation of the second Safety and Health Framework Directive 89/391 in the UK alone referred to 25 measures, ranging from whole statutes to specific statutory instruments.[79] The Workplaces Health and Safety

[71] Directive 98/24/EC [1998] OJ L131/11.

[72] Directive 1999/92/EC [2000] OJ L23/57.

[73] Directive 2000/54/EC [2000] OJ L 262/21.

[74] Directive 2002/44/EC [2002] OJ L 177/13.

[75] Directive 2003/10/EC [2003] OJ L 42/38.

[76] Directive 2004/37/EC [2004] OJ L229/23.

[77] Directive 2004/40/EC [2004] OJ L184/1.

[78] Directive 2006/25/EC [2006] OJ L114/38.

[79] The listed implementing measures for the Health and Safety Framework Directive 89/391/EEC are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992); (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793/1992); (vi) The Safety Representatives and Safety Committees Regulations (Northern Ireland) 1979 (SR (NI) 437/1979); (vii) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992(SR (NI) 459/1979); (viii) The Health and Safety at Work Order (Northern Ireland) 1978 (SR (NI) 1039/1978); (ix) The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (Northern Ireland) 1986 (SR (NI) 247/1986); (x) The Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 (SR (NI) 20/1993); (xi) The Health and Safety (First-Aid) Regulations (Northern Ireland) 1982 (SR (NI) 429/1982); (xii) The Fire Service (Northern Ireland) Order 1984 (SR (NI)1821/1984); (xiii) The Industrial Relations (Northern Ireland) Order 1976 (SR (NI) 3043/1976); (xiv) The Health and Safety at Work etc. Act 1974; (xv) The Safety Representatives and

Directive 89/654 required some 27 instruments to implement it, some of which overlap with those listed in implementation of the Framework Directive.[80] The Work Equipment Directive 89/655 had a mere 21 implementing measures in the UK.[81] The Personal

Safety Committees Regulations 1977 (SI 500/1977); (xvi) The Employment Protection (Consolidated) Act 1978; (xvii) The Health and Safety (First-Aid) Regulations 1981 (SI 917/1981); (xviii) The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1985 (SI 2023/1985); (xix) The Trade Union Reform and Employment Rights Act 1993 (Commencement) (No 3) and Transitional Provisions Order 1993 (SI 2503/ 1993); (xx) The Management of Health and Safety at Work Regulations 1996, Legal Notice No 11 of 1996 ref: Gibraltar Gazette no 2894 of 25/01/1996; (xxi) The Health and Safety (Consultation with Employees) Regulations 1996 (SI 1513/1996); (xxii) The Employment (Maternity and Health and Safety) Regulations 1996, Legal Notice No 14 of 1996 ref: Gibraltar Gazette no 2894 of 25/01/1996; (xxiii) The Factories (Safety) Regulations 1996, Legal Notice No 10 of 1996 ref: Gibraltar Gazette no 2894 of 25/01/1996; (xxiv) The Fire Precautions (Workplace) Regulations 1997 (SI 1840/ 1997); (xxv) Police (Health and Safety) Act 1997.

[80] The listed implementing measures for the Workplaces (Health and Safety) Directive 89/654/EEC are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992; (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793 1992); (vi) The Noise at Work Regulations (Northern Ireland) 1990 (SR NI 147/1990); (vii) The Health and Safety (First-Aid) Regulations (Northern Ireland) 1982 (SR NI 429/1982); (viii) The Control of Substances Hazardous to Health Regulations (Northern Ireland) 1990 (SR NI 374/1990); (ix) The Electricity at Work Regulations (Northern Ireland) 1991 (SR NI 13/1991); (x) The Building (Amendment) Regulations (Northern Ireland) 1991 (SR NI 169/1991); (xi) The Building Regulations (Northern Ireland) 1990 (SR NI 59/1990); (xii) The Safety Representatives and Safety Committees Regulations (Northern Ireland) 1979 (SR NI 437/1979); (xiii) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (SR NI 459/1992); (xiv) The Health and Safety Order (Northern Ireland) 1978 (SR NI 1049/1978); (xv) The Fire Services (Northern Ireland) Order 1984 (SR NI 1821/1984); (xvi) The Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 (SR NI 37/1993); (xvii) The Noise at Work Regulations 1989 (SI 1790/1989); (xviii) The Health and Safety (First-Aid) Regulations 1981 (SI 917/1981); (xix) The Control of Substances Hazardous to Health Regulations 1988 (SI 1657/1988); (xx) The Electricity at Work Regulations 1989 (SI 635/1989); (xxi) The Building Standards (Scotland) Regulations 1990 (SSI 2179/1990); (xxii) The Building Regulations 1991 (SI 2768/1991); (xxiii) The Safety Representatives and Safety Committees Regulations 1977 (SI 500/1977); (xxiv) The Health and Safety at Work etc. Act 1974; (xxv) The Fire Precautions Act 1971; (xxvi) The Health, Safety and Welfare in the Workplace 2006, Legal Notice No 28 of 1996 ref: Gibraltar Gazette no 2901 of 29/02/1996; (xxvii) The Fire Precautions (Workplace) Regulations 1997 (SI 1840/1997).

[81] The listed implementing measures for the Work Equipment Directive 89/655 are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992; (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/ 1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793/1992); (vi) The Ionising Radiations Regulations 1985 (SI 1333/1985, as amended by SI 2966/1992); (vii) The Electricity at Work Regulations 1989 (SI 635/1989); (viii) The Health and Safety at Work etc. Act 1974; (ix) The Safety Representatives and Safety Committees Regulations 1977 (SI 500/1977); (x) The Control of Asbestos at Work Regulations 1987 (SI 2115/1987, as amended by SI 2966/1992 and SI 3068/1992); (xi) The Control of Lead at Work Regulations 1980 (SI 1248/1980, as amended by SI 2966/1992); (xii) The Control of Substances Hazardous to Health Regulations 1988 (SI 1657/1988, as amended by SI 2026/1990, SI 2431/1991, SI 2382/1992 and SI 2966/1992); (xiii) The Electricity at Work Regulations (Northern Ireland) 1991 (SR NI 13/1991); (xiv) The Ionising Radiations Regulations (Northern Ireland) 1985 (SR NI 273/1985); (xv) The Safety Representatives and Safety Committees Regulations (Northern Ireland) 1979 (SR NI 437/1979); (xvi) The Health and Safety Order (Northern Ireland) 1978 (SR NI 1049/1978); (xvii) The Control of Lead at Work Regulations (Northern Ireland) 1986 (SR NI 36/1986); (xviii) The Control of Asbestos at Work Regulations (Northern Ireland) 1988 (SR NI 74/1988); (xix) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (SR NI 459/1992); (xx) The Control of Substances Hazardous to Health Regulations

Protective Equipment Directive 89/656 is captured in UK law in 23 national measures.[82] The Manual Handling of Loads Directive 90/269 required some 13 regulations to implement it in the UK[83]; but only 11 measures were required for the UK implementation of the Display Screen Equipment Directive 90/270.[84]

(Northern Ireland) of 1990 (SR NI 374/1990, as amended by SR NI 61/1992); (xxi) The Provisions and Use of Work Equipment Regulations (Northern Ireland) 1993 (SR NI 19/1993).

[82] The listed implementing measures for the Personal Protective Equipment Directive 89/656 are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992); (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/ 1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793/1992); (vi) The Health and Safety at Work etc. Act 1974; (vii) The Construction (Head Protection) Regulations 1989 (SI 2209/1989); (viii) The Noise at Work Regulations 1989 (SI 1790/1989); (ix) The Control of Lead at Work Regulations 1980 (SI 1248/1980) (x) The Ionising Radiations Regulations 1985 (SI 1333/1985); (xi) The Control of Substances Hazardous to Health Regulations 1988 (SI 1657/1988); (xii) The Control of Asbestos at Work Regulations 1987 (SI 2115/1987); (xiii) The Health and Safety Order (Northern Ireland) 1978 (SR NI 1049/1978); (xiv) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (SR NI 459/1992); (xv) The Construction (Head Protection) Regulations (Northern Ireland) 1990 (SR NI 424/1990); (xvi) The Noise at Work Regulations (Northern Ireland) 1990 (SR NI 147/1990); (xvii) The Ionising Radiations Regulations (Northern Ireland) 1985 (SR NI 273/1985); (xviii) The Control of Lead at Work Regulations (Northern Ireland) 1986 (SR NI 36/1986); (xix) The Control of Substances Hazardous to Health Regulations (Northern Ireland) 1990 (SR NI 374/1990); (xx) The Control of Asbestos at Work Regulations (Northern Ireland) 1988 (SR NI 74/1988); (xxi) The Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 (SR NI 20/1993); (xxii) The Personal Protective Equipment at Work, Legal Notice No 31 of 1996 ref: Gibraltar Gazette of 29/02/1996; (xxiii) The Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999 (SI 2205/1999).

[83] The listed implementing measures for the Manual Handling of Loads Directive 90/269 are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992); (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793/1992); (vi) The Health and Safety at Work etc. Act 1974; (vii) The Safety Representatives and Safety Committees Regulations 1977 (SI 500/1977); (viii) The Manual Handling Operations Regulations (Northern Ireland) 1992 (SR NI 535/1992); (ix) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (SR NI 459/1992); (x) The Health and Safety Order (Northern Ireland) 1978 (SI 1049/1978); (xi) The Safety Representatives and Safety Committees Regulations (Northern Ireland) 1979 (SR NI 437/1979); (xii) The Manual Handling Operations, Legal Notice No 30 of 1996, ref: Gibraltar Gazette of 29/02/1996; (xiii) The Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998 (SI 2857/1998).

[84] The listed implementing measures for the Display Screen Equipment Directive 90/270 are as follows: (i) The Management of Health and Safety at Work Regulations 1992 (SI 2051/1992); (ii) The Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004/1992); (iii) The Provision and Use of Work Equipment Regulations 1992 (SI 2932/1992); (iv) The Personal Protective Equipment at Work Regulations 1992 (SI 2966/1992); (v) The Manual Handling Operations Regulations 1992 (SI 2793/1992); (vi) The Health and Safety (Display Screen Equipment) Regulations (Northern Ireland) 1992 (SR NI 513/1992); (vii) The Health and Safety at Work Order (Northern Ireland) 1978 (SR NI 1039/1978); (viii) The Safety Representatives and Safety Committees Regulations (Northern Ireland) 1979 (SR NI 437/1979); (ix) The Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (SR NI 459/1992); (x) The General Ophthalmic Services Regulations (Northern Ireland) 1986 (SR NI 163/1986); (xi) Display Screen Equipment Legal Notice No 26 of 1996: ref Gibraltar Gazette of 29/02/1996.

5.12 It is clear that Directive 89/391/EEC and its daughter directive are intended to confer enforceable rights upon workers to have a safe working environment in accordance with the standards laid down in these directives. It follows that national law must provide appropriate mechanisms to ensure that a worker who is exposed to working conditions which contravene the standards laid down in these directive to be able require the employer to comply with its obligations under the Directives and to obtain damages for loss and damage resulting to the individual workers by any such failure on the part of the employer.

5.13 It is clear that the CJEU considers that EU law regime on workplace health and safety setting down standards which are specifically intended to contribute to the protection of workers, the guarantee of real and effective judicial protection of those workers' rights is ensured by the possibility of civil actions being taken by and at the instance of the individual workers affected by the employer's breach of the EU minimum standards for health and safety. This is clear from the CJEU decision in *Barcenilla Fernández* [85] a case concerning the enforcement of the employers' obligations under the daughter Directive 2003/10 setting down minimum health and safety requirements regarding the exposure of workers to the risks arising from workplace noise. The CJEU observed at §§42-3 that national law must be interpreted "so as *to enable* <u>*workers*</u> to effectively require their employer to comply with the preventive obligations" and that national law must provide for "appropriate mechanisms" to ensure that a worker who is exposed to a noise level exceeding the limits set down by the Directive can require the employer to comply with the preventive obligations set therein. It is only where there is the possibility of such private civil enforcement (in addition to criminal enforcement) of the Directive health and safety standards that there can be proper realization of Directives' fundamental aim of contributing to the increased protection and safety of workers in the workplace. [86]

5.14 By contrast, the effect of Section 69 of the Enterprise and Regulatory Reform Act 2013 is to remove the possibility of workers themselves directly enforcing before the courts the EU law based standards specifically intended to contribute to the protection of those workers. It leaves as mechanisms of enforcement of these standards only administrative procedures or criminal proceedings taken at the instance or the discretion of the State,

[85] Joined Cases C-256/10 and C-261/10 *Barcenilla Fernández and Macedo Lozano v Gerardo García SL* [2011] ECR I-4083

[86] Joined Cases C-256/10 and C-261/10 *Barcenilla Fernández and Macedo Lozano v Gerardo García SL* [2011] ECR I-4083 at paragraph 42.

rather than of the worker intended to be protected by the Directive and actually harmed by the failure of his employer to comply with the EU law mandated standards.

5.15 This move is perhaps indicative of what may be said to be a "habit of hostility" within the Conservative Party when in Government in the UK, to any attempts by the EU's either to extend existing or to create new substantive workers' rights, or seek to ensure the more effective protection of those rights which have been introduced. The approach historically taken in the UK to the European innovation represented by the regulation of working time is also perhaps emblematic of this hostility.

The regulation of working time as a health and safety measure

5.16 The Second Safety and Health Framework Directive 89/391/EEC was conceived as the bed-rock of a new EU-wide programme which was intended, in time, completely to replace the existing national legislation of Member States on safety and health at work with a common basic standards framework as regards the safety and health of workers throughout the territory of the EU. The rationale for this project was that the legislative provisions of the present Member States which covered safety and health in the workplace differed widely; and all, in any event, needed to be improved.

5.17 The Second Safety and Health Framework Directive required the introduction of measures actively to encourage improvements in the safety and health of workers at work. The Directive in fact imposes a number of basic duties on employers throughout the EU and applies to all sectors of activity, both public and private. Article 2(2) of the Directive contains a carve-out from its provisions as follows:

> "This Directive shall *not* be applicable where *characteristics peculiar to certain specific public service activities*, *such as* the armed forces or the police, or to certain specific activities in the civil protection services *inevitably* conflict with it.
>
> In that event, the safety and health of workers *must be ensured as far as possible in the light of the objectives of this Directive*."

5.18 In Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963 the Court of Justice examined the scope of Framework Directive 89/391 and noted (at paras 34, 35) that

> "[I]t is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope ...

and that

> "[I]t follows that the exceptions to the scope of the basic Directive, including that provided for in Article 2(2), must be interpreted restrictively.

5.19 In Case C-147/17 *Sindicatul Familia Constanța* ECLI:EU:C:2018:926 the Grand Chamber CJEU also noted (at para 54) that the concept of "public service" for the purpose of the first subparagraph of Article 2(2) of Directive 89/391 is not otherwise defined in the Directive (albeit that, by way of examples, "reference is made to certain specific public service activities intended to uphold public order and security which are essential for the proper functioning of society" [87]):

> "[T]he need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given *an autonomous and uniform interpretation throughout the European Union*, which must take into account the context of that provision and the purpose of the legislation in question.
> ...
> [T]he expression 'public service' within the meaning of the first subparagraph of Article 2(2) of Directive 89/391 applies not only to the sectors in which workers are organically attached to the State or to a public authority, *but also to sectors in which workers carry out their work for a private person who performs, under the control of the public authorities, a task in the public interest which forms part of the essential functions of the State*.
> ....
> [A] functional interpretation of the term 'public service' is, moreover, justified by the need to ensure a uniform application of Directive 89/391 in those States.
>
> *The exception provided for in the first subparagraph of Article 2(2) of Directive 89/391 is thus applicable, in the same way, to workers who perform specific activities identical to the services of a public authority, whether their employer is a public authority or a private person charged with a task in the public interest that forms part of the essential functions of the State.*"

5.20 The Framework Directive places a general responsibility on employers for the safety and health of workers as regards their presence in the workplace and in all aspects of work done by them. Under the auspices of the Second Framework Directive a significant number of specific directives have been adopted. These are intended to focus on specific aspects of safety and health at work, but the provisions of the Framework Directive continue to apply to all areas covered by the individual directives. Where individual directives contain more stringent and specific provisions, these special provisions prevail. Individual directives tailor the principles of the Framework Directive to, among other

[87] Case C-428/09 *Union syndicale Solidaires Isère* EU:C:2010:612 (Second section, 14 October 2010) at paragraph 24

things, the protection of workers' health and safety by regulating and limiting working hours.

5.21 When it came to specifying a legal basis for its proposed Working Time Directive – which, in general, specifies that there should be a minimum rest period of 11 hours in every 24 hours; provision for breaks in any working day longer than six hours; a working week of six days; a 48-hour maximum working week (inclusive of overtime); a minimum of four weeks' paid annual leave; and a requirement that the normal hours of night workers should not average more than eight hours in any 24-hour period – the Commission chose as its preferred legal basis the then Article 118a of the EC Treaty on safety and health (which allowed for measures to be adopted on the basis of qualified majority voting in the Council), rather than the improvement in workers' rights provisions of the then Article 118 of the EC Treaty (which required unanimity from the Member States voting in the Council for the proposed measure to become law).

5.22 When the draft Working Time Directive came before the Council it was passed on 23 November 1993 under the qualified majority voting procedure, with the UK Minister abstaining rather than voting against the measure. The resulting Working Time Directive 93/104/EC laid down minimum safety and health requirements for the organisation of working time. Article 18 provided that Member States should adopt the laws, regulations and administrative provisions necessary to comply with the Directive by 23 November 1996.

5.23 There was no pre-existing general legislation in the UK regulating working time. Notwithstanding the fact that the UK had insisted on the various derogations in the draft Directive, there was no attempt made to implement the provisions of Working Time Directive into UK law by the specified date. Instead, in March 1994 the UK Government chose to mount a legal challenge before the Court of Justice under Article 173 of the EC Treaty (now Article 263 TFEU) as to the validity of the legal basis and legal procedure adopted by the Council of Ministers in passing the Working Time Directive. The UK claimed that the adoption of this Directive by the Council was unlawful on four grounds:

(1) the wrong Treaty article had been chosen as the basis for this Directive, and therefore the legal procedure followed in its adoption was defective;

(2) the adoption of the Directive was unnecessary, and therefore in breach of the principle of proportionality, since minimum safety and health conditions for

workers were already covered by Council Directive 89/391/EEC, the Workplace Safety and Health Framework Directive;

(3) the Directive covered matters other than safety and health issues, and was to that extent *ultra vires*;

(4) the Directive was not concerned with encouraging improvement in the "working environment".

5.24 The Court of Justice gave its judgment in Case C-84/94 *United Kingdom v Council of the European Union: re the working time directive* [1996] ECR I-5755 on 12 November 1996, only two weeks before the due date of the implementation of the Directive into national law. It rejected the UK's complaints as to the lawfulness of the Directive and held that, except for a provision in Article 5(2) that the weekly rest day should in principle include Sunday, the Directive had been validly adopted under the EC Treaty as a safety and health measure.

5.25 The Working Time Directive was eventually implemented in the UK under the new Labour Government by the Working Time Regulations 1998 (SI 1998/1883), which came into effect on 1 October 1998, almost two years later than the due date for implementation, thereby exposing the UK Government to *Francovich* damages claims from those workers who had suffered as a result of the State's failure to implement and protect their EU law rights.

5.26 Thus in *R v Attorney General for Northern Ireland, ex p Shirley Burns* [1999] IRLR 315 (QBD) a declaration that the UK was in breach of its obligations under EU law in failing timeously to implement the Working Time Directive was granted in the course of a Northern Irish judicial application, which also sought *Francovich* damages for the loss and damage caused to the applicant, who had been required by her private employer to work night shifts regularly and whose health, it was claimed, suffered as a result.

5.27 But because Paragraph 4 of Schedule 1 to the European Union (Withdrawal) Act 2018 does away with right of individuals to be able - in accordance with the rule in *Francovich* - to sue UK public authorities and claim damages where their actions in breach of EU law have caused those individuals loss, no such action would be able to be brought after Brexit day, and nothing in the Government's proposals for the continued protection of worker's rights makes up for that loss.

6. THE EU CHARTER OF FUNDAMENTAL RIGHTS

6.1 In *NS v. Home Office* the Grand Chamber CJEU confirmed that:

> "[T]he Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28)." [88]

6.2 In all of these specific areas of employment protection claimants can rely on the EU law general principles including those also now embodied in the Charter of Fundamental Rights to claim the full protection of the law and their rights. Since the coming into force of the Lisbon Treaty provisions according the Charter of Fundamental Rights of the European Union ("CFR") with "the same legal value as the Treaties" (Article 6 TEU), the CJEU now, as a matter of course, refers to provisions of the Charter in its judgments. It is now clear that any proper understanding of the intent and effect of EU law has now to be done against a background of an appreciation of the terms of the EU Charter of Fundamental Rights, as interpreted by the CJEU.

Provisions of the EU Charter of Fundamental Rights ("CFR") relevant to employment

Trade union freedoms

6.3 Article 12(1) CFR is in the following terms:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

6.4 This EU Charter provision corresponds to the terms of Article 11 ECHR (which is noted below) and therefore, in accordance with Article 52(3) CFR, it falls to be interpreted and applied in a manner which is consistent with the Convention provision, as understood in the jurisprudence of the European Court of Human Rights.[89]

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[88] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* 21 December [2011] ECR I-13905 at para 77

[89] See Case C-400/10 PPU *J McB v LE* [2010] ECR I-8965 at para 53

Freedom to choose and pursue and occupation or business

6.5 Separately, Article 15(1) CFR provides:

> "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation."

6.6 And Article 16 CFR states that:

> "The freedom to conduct a business in accordance with Union laws and national laws and practices is recognised."

6.7 In contrast to Article 12 CFR, Articles 15 CFR and 16 CFR are *not* rights which correspond to anything expressly set out in the European Convention on Human Rights. They are instead, derived from the aforementioned case law of the Court of Justice[90] (which, in turn, has taken the concept from the principle contained in the post-War German Constitution, the *Grundgesetz*, which, in the light of the history of the 1930s Nuremberg laws which began the persecution of Germany's Jews by prohibiting their access to certain professions, recognised the right to pursue the occupation of one's choice as a fundamental constitutional right). A recent example of the CJEU grappling with these rights is seen in *Deutsches Weintor eG v. Land Rheinland-Pfalz* [91]

Equal Treatment

6.8 Article 21(1) of the Charter provides as follows:

> **"Non-discrimination**
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

6.9 Article 23 of the Charter provides, so far as relevant:

> **Equality between women and men**

[90] See, eg, Case 4/73 *Nold* [1974] ECR 491 at paras 12-14; and Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[91] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September [2012] ECR I-nyr at paras 45, 52

> Equality between women and men must be ensured in all areas, including employment, work and pay.

6.10 The prohibition against discrimination on grounds such as sex, race, colour, ethnic origin, religion or belief, which is laid down in Article 21(1) of the Charter is a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law sufficient in itself to confer on individuals a right which they may directly rely on as such in disputes before the national court in a field covered by EU law: Case C-68/17 *IR v JQ* EU:C:2018:696 (Grand Chamber, 11 September 2018) [2019] 1 CMLR 16 at § 69

6.11 The appropriate remedy for a breach of the EU principle of equal treatment is *not* to level down by taking away the advantage to a privileged party but rather to level up, so that all parties were equally privileged. See Case C-187/15 *Popperl v. Land Nordrhein-Westfalen* ECLI:EU:C:2016:550 (First Chamber, 13 July 2016) [2017] CMLR 21 at § 47 and too Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43 (Grand Chamber, 22 January 2019) where the CJEU confirmed (at §§ 79-80) that:

> "79. … [W]here discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only *by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned.*
>
> 80 In such a situation, a national court must set aside any discriminatory provision of national law, *without having to request or await its prior removal by the legislature*, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category. *That obligation persists regardless of whether or not the national court has been granted competence under national law to do so*"

Employment protection rights

6.12 Article 35 CFR is one of the provisions contained in Title IV of the EU Charter of Fundamental Rights which is headed 'Solidarity' and sets a number of rights and principles in the area of socio-economic rights. These are derived from a variety of provisions, including the original 1961 and revised 1996 European Social Charter, and the 1989 Community Charter on the rights of workers. The following may be relevant to the area of general employment protection:

- Article 27 CFR: workers' right to information and consultation within their employment;

- Article 28 CFR: workers' and employers' right of collective bargaining and action, including strike action;

- Article 29 CFR: workers' right of access to placement services;

- Article 30 CFR: workers' right to protection in the event of unjustified dismissal[92];

- Article 31 CFR: workers' right to fair and just working conditions, having regard to their health, safety and dignity, including, specifically, the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave;

- Article 32 CFR: prohibition of child labour and the protection of young people at work;

- Article 33 CFR: the right to protection from dismissal from employment for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

- Article 53 CFR specifies the following (in terms of levels of protection to be afforded to the substantive rights set out in the Charter):

> "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

Judge Koen Lenaerts, now President of the CJEU, has written of this Charter provision in an extra-judicial capacity as follows:

> "*Article 53 of the Charter should be interpreted as a 'standstill' clause, according to which the Charter does not allow a reduction of the level of fundamental right protection currently attained by EU law*. A regressive interpretation of the Charter is thus prohibited. In that respect, the fact that the

[92] In Case C-361/07 *Polier* 16 January [2008] ECR I-6* (sum pub), a French court made a preliminary reference on the compatibility with Art 30 CFR and other International Labour Organisation ('ILO') and European Social Charter provisions of a new form of employment contract (*contrat nouvelle d'embauche)* in France under which the employee's normal statutory employment protection was suspended for the contract's first two years. The CJEU held that the dispute fell outside the scope of EU law and that it was therefore not competent to answer the reference.

> ECtHR may itself follow a regressive interpretation of the ECHR is irrelevant. In the realm of fundamental rights, it is precisely the prohibition of regression that crystallises the constitutional autonomy of the Union. However, *it follows from Article 53 of the Charter that such prohibition is limited to the provisions of the Charter*." [93]

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When does the EU Charter apply to Member State action ?

6.13 Article 51(1) CFR provides that the provisions of the Charter bind the Member States when they are implementing EU law. [94] When a provision of EU law (whether primary EU law in the Treaties or secondary provisions of EU law in directives or regulations) expressly allows for the exercise of a discretionary power by a Member State, the Member State must exercise that power in accordance with EU law. [95] Consequently, as the Grand Chamber of the CJEU confirmed in *NS v. Home Office*:

> "...a Member State which exercises that discretionary power must be considered as implementing EU law within the meaning of art.51(1) of the Charter." [96]

6.14 The fundamental rights guaranteed by the Charter must be complied with wherever national law falls within the scope of European Union law. Situations cannot exist which are covered by EU law without those fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter: Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 (Grand Chamber, 26 February 2013) [2013] 2 CMLR 46 at § 21.

6.15 In Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* ECLI:EU:C:2018:874 (Grand Chamber 6 November 2018) the CJEU ruled at § 74 that those provisions of the Charter which are expressed in mandatory and unconditional terms need not be given more concrete expression by the provisions of EU or national law in order to have direct effect. The CJEU further ruled in *Max-Planck-Gesellschaft* that such Charter provisions have direct effect in the same way as clear, precise and unconditional Treaty articles – i.e. they may be prayed in aid both "vertically"

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[93] See Koen Lenaerts "Exploring the limits of the EU Charter of Fundamental Rights"(2012) *European Constitutional Law Review* 375 at 402

[94] See orders in the following cases among others: Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-11465, paragraph 13; Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and order of 14 December 2011 in Joined Cases C-483/11 and C-484/11 *Boncea and Others*, paragraph 29

[95] See among other decisions C-5/88 *Wachauf v Germany* [1989] ECR 2609.

[96] Joined Cases C-411/10 and C-493/10 *NS v. Home Office* 21 December [2011] ECR I-nyr, [2012] 3 WLR 1374 at §68

against EU institutions and "emanations" of the Member State [97] and also, unlike directives, [98] "horizontally" in disputes exclusively between private persons. The CJEU in *Max-Planck-Gesellschaft* summarily disposes of the objections that the CFR was never intended to impose new obligations directly on private individuals thus (at para 76-7):

> "76. … [A]lthough Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, *Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility*.
>
> 77 … [T]he fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals …"

6.16 In Case C-176/*12 Association de Mediation Sociale (AMS)* [2014] ECR I-000 ("*AMS*") a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law,

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[97] In Case C-122/17 *Smith v. Meade* EU:C:2018:631 (Grand Chamber, 7 August 2017) the CJEU reiterated at para 45:

> "A national court is obliged to set aside a provision of national law that is contrary to a directive *only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest* and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals"

[98] In Case C-122/17 *Smith v. Meade* EU:C:2018:631 (Grand Chamber, 7 August 2017) the CJEU restated its position on this point at para 42-44 (case law references omitted):

> "42. … [A] directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.
>
> 43 Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons.
>
> 44 The Court has expressly held that *a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive*."

6.17 By contrast, the Grand Chamber in Case C-147/17 *Sindicatul Familia Constanţa, Ustinia Cvas and Others v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* ECLI:EU:C:2018:926 (Grand Chamber, 20 November 2018) affirmed/confirmed its own very recent case law [99] to the effect that workers can claim directly before national courts, the right to "fair and just working conditions" guaranteed by Article 31 CFR as the terms of this provision were sufficient clear and unconditional to have direct effect. And in its judgment in Case C-214/16 *King v Sash Window Workshop and another* EU:C:2017:914 (Fifth Chamber, 29 November 2017) [2018] ICR 693 the CJEU refers to and relies upon the terms of Article 31 of the Charter even in a case involving a private employer, thereby confirming that like Treaty provisions, clear and unconditional provisions of the Charter may have horizontal direct effect (i.e. they can be prayed in aid by individual directly against other individual even in the absence of specific implementing measures in national law). The CJEU noted as follows (at paras 33, 41, 56, 56):

> "33 … [I]t must be noted that the right to paid annual leave is expressly set out in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties: Case C-214/10 *KHS* EU:C:2011:761 (22 November 2011) paragraph 37).
> …
> "41 It is true that Directive 2003/88 contains n*o provisions on judicial remedies available to the worker, in the case of a dispute with his employer, to enforce his right to paid annual leave under that Directive. However, it is not disputed that the member states must, in such a context, ensure compliance with the right to an effective remedy, as enshrined in article 47 of the Charter*
> …
> 47 In the light of all the foregoing considerations, the answer to the first question is that article 7 of Directive 2003/88 and the right to an effective remedy set out in article 47 of the Charter must be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave in accordance with article 7 of the Directive, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that Leave
> …
> 56. … [I]t is necessary to consider …. whether circumstances such as those at issue in the main proceedings … justify an exception to the principle established in Article 7 of Directive 2003/88 *and Article 31(2) of the Charter*, according to which the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave.
> …
> 61. *…[T]he fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard.*
> …
> 64. … [I]n the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law (Case C-

[99] See judgments of 6 November 2018, *Bauer and Willmeroth*,C-569/16 and C-570/16, EU:C:2018:871, paragraph 59, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*,C-684/16, EU:C:2018:874, paragraph 54

214/10 *KHS AG v Schulte* [2011] ECR I-11757 [2012] ICR D19 and Case C-337/10 *Neidel v Stadt Frankfurt am Main* EU:C:2012:263 [2012] ICR 1201), the European Union system for the organisation of working time put in place by Directive 2003/88 may not be interpreted restrictively. *Indeed, if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that Directive, which is that there should be due regard for workers' health.*

...

65 It follows from all the foregoing considerations that .... article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave."

6.18 Because Section 5(4) *strips out* from domestic law *all* fifty (50) of the civil, political, social and economic rights to be found in the EU Charter of Fundamental Rights, it will no longer be open to individuals to seek to rely upon those rights to seek their better protection as workers in the workplace. Nothing in the Government's current proposals comes anywhere near to matching or reflecting or replacing these various social and economic rights already contained in the Charter and the loss of which represents a fundamental diminution in the social protection currently available to workers and their families in the UK as a result of EU law, and specifically the EU Charter of Fundamental Rights.

7. THE RIGHT TO EFFECTIVE PROTECTION OF EU LAW DERIVED RIGHTS

7.1 The decision of the CJEU in Case C-214/16 *King v Sash Window Workshop and another* EU:C:2017:914 (Fifth Chamber, 29 November 2017) [2018] ICR 693 may also be seen as an application as between private parties of the right of individuals to the full and effective protection of their EU law based rights.

7.2 EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the member states, and by the direct effect of a whole series of legal provisions which are applicable to their nationals and to the member states themselves. The autonomy of EU law with respect both to the law of the member states and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to

ensure consistency and uniformity in the interpretation of EU law: Case C-284/16 *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158 (Grand Chamber, 6 March 2018) [2018] 4 WLR 87 at §§ 33, 35 and case law cited

7.3 Article 2 of the Treaty on European Union (TEU) provides as follows (emphasis added):

> "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*.
>
> These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

7.4 At least while the United Kingdom remains a member State of the European Union, or otherwise subject to EU law, the UK authorities (executive, legislative and judicial) have an EU law Treaty obligation under Article 4(3) of the Treaty on European Union (TEU) to ensure the application of and respect for EU law in the UK, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU: Case C-284/16 *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158 (Grand Chamber, 6 March 2018) [2018] 4 WLR 87 at § 34

7.5 More particularly - and again while the United Kingdom remains a member State of the European Union or otherwise subject to EU law - the UK authorities (executive, legislative and judicial) have an EU law Treaty obligation under Article 19(1) TEU "to provide remedies sufficient to ensure effective legal protection in the fields covered by [European] Union law". This Article 19(1) TEU Treaty obligation "to provide remedies sufficient to ensure effective legal protection", applies to all "the fields covered by Union law", irrespective of whether the Member States are implementing EU law: Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 (Grand Chamber, 27 February 2018) [2018] 3 CMLR 16 at § 32. Article 19 TEU gives concrete expression to the value of the rule of law proclaimed in Article 2 TEU and entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice, but also to national courts and tribunals such as this Court: Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 (Grand Chamber, 27 February 2018) [2018] 3 CMLR 16 at § 32.

7.6 In accordance with Articles 4(3) and 19(1) (TEU), it is for this Court, in collaboration with the Court of Justice, to ensure the full application of EU law within it territorial

jurisdiction, and to ensure effective judicial protection in Scotland of the rights of individuals under that law: Case C-284/16 *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158 (Grand Chamber, 6 March 2018) [2018] 4 WLR 87 at § 36 and case law cited.

7.7 The EU law *obligation* on Member States authorities to ensure the effective judicial protection of individuals' rights under EU law has, as its corollary, the EU law fundamental *right* now reaffirmed in the terms of Article 47 of the EU Charter of Fundamental Rights ("the Charter") to the effect that ""everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal": Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 (Grand Chamber, 27 February 2018) [2018] 3 CMLR 16 at § 32.

7.8 Like Article 21(1) of the Charter, Article 47 of the Charter guaranteeing the right to effective judicial protection is sufficient in itself and does not need to be made more specific by any further provisions of EU or national law to confer on individuals a right which they may rely on as such: Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* ECLI:EU:C:2018:257 (Grand Chamber, 17 April 2018) [2019] 1 CMLR 9 at § 78.

7.9 Article 47(1) CFR means that, within the scope of EU law, an individual is *entitled* to *judicial protection* in so far as concerns respect for her EU law based rights. It is clear that Article 47(1) CFR is concerned simply with the relevant court determining whether or not the right to an effective remedy before a tribunal has been respected in the particular case before it. Article 47(1) CFR therefore guarantees individuals a base level of substantive protection for their EU law rights which is common across the EU. In Case 73-16 *Peter Puškár v. Slovakia* ECLI:EU:C:2017:725 (27 September 2017) the CJEU noted as follows (at paras 57-9):

> "57. …[A]ccording to settled case-law of the Court, under the principle of sincere cooperation laid down in Article 4(3) TEU *it is for the courts of the Member States to ensure judicial protection of a person's rights under EU law, in addition, Article 19(1) TEU requiring Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law.*
>
> 58. That requirement on the part of the Member States corresponds to the right enshrined in Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', which provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.
>
> 59 It follows that, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 95/46, *the Member*

States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.

7.10 In determining the question of whether the UK authorities have fully and properly complied with the requirements of EU law the courts are fulfilling their constitutional obligation to preserve and maintain the rule of law generally: cf *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2018 SLT 959 per Lord President Carloway at § 24 and per Lord Drummond Young at § 67. Because the principle of the rule of law is being applied by a national court in an area which falls within the scope of EU law, that principle must - as a principle *of EU law* - be applied in a manner which is consistent with the jurisprudence of the CJEU. The national judge is for these purposes acting also an EU law judge: cf *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 [2016] AC 697 per Lord Reed and Lord Toulson JJSC at § 31. This Court is therefore *not confined* to the task of ensuring the protection of the rights of the individual in the circumstances of this particular case but is instead being called upon to exercise a broader constitutional supervisory role to ensure that the UK authorities have fully and properly complied with their EU law duties.

7.11 From the perspective of EU law, it is undoubtedly the duty of the domestic courts under Article 4(3) TEU to mitigate the adverse effects on individuals' EU law rights of Member States' failure fully and properly to implement EU law in their national law. Thus, under the EU law doctrine of "indirect effect" national courts have an EU law obligation, wherever necessary and possible, to re-interpret and apply domestic law to conform to the requirements of the relevant EU law: qv *Litster v. Forth Dry Dock & Engineering Co.,* 1989 SC (HL) 96.

7.12 This duty of conforming interpretation reaches its limits only where such re-interpretation by the courts would be *contra legem*: *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557. Certainly, the national courts cannot validly claim that they are barred from re-interpreting national law consistently with EU law merely because this had not been done before, or would contradict previous interpretation of national law by the domestic courts in non-EU law contexts: Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* ECLI:EU:C:2018:874 (Grand Chamber, 6 November 2018) at § 60.

7.13 If it proved impossible or *contra legem* for the national courts so to re-interpret and apply applicable national law in an EU law compatible manner then the national courts are enjoined under EU law to consider whether the relevant EU law provision was in the case before it "directly effective". If so, then, incompatible provisions of national law might be "disapplied" in that particular case: Case C-378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission* ECLI:EU:C:2018:979 (Grand Chamber, 4 December 2018). But a national rule which is disapplied in the particular case in the face of a directly effective EU law is not "invalid" in the sense of being void *ab initio* or *erga omnes* or thenceforth deprived of legal effect. The disapplication is not general but is specific to, and only to, the facts and circumstances of the particular individual case: qv *Local Authorities Mutual Investment Trust v Commissioners for Customs and Excise* [2003] EWHC 2766 (Ch), [2004] STC 246 *per* Lawrence Collins J (subsequently Lord Collins of Mapesbury) at § 68 and the CJEU case law there cited.

7.14 These two EU law doctrines - of "direct effect" and "indirect effect" or "conforming interpretation" respectively - have been developed by the CJEU as a means of ensuring the protection, in the particular case, of an individual's EU law rights *notwithstanding* the Member State's default in failing fully and properly to implement the relevant individuals' EU law rights into national law. "Direct effect" and "indirect effect" function constitutionally as a *sword* for individuals to use to challenge and overcome in their particular case a Member State's default properly to implement EU law into national law. But neither "direct effect" nor "indirect effect" *cures* the default and neither can, as a matter of the constitutional law of the European Union, be used as a *shield* by the Member States authorities to defend themselves from a claim of a failure to implement the provisions of a directive: Case C-97/01 *Commission v Luxembourg* [2003] ECR I-5797 at § 32. Even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the EU law requirement of legal certainty which is relied upon in the present case: Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541 at § 21 endorsing the 23 January 2001 Opinion of AG Tizzano in the case at § 36.

7.15 Instead, each Member State remains bound as a matter of EU law to implement directives in a general manner that fully meets the requirements of clarity and certainty in legal situations imposed by the EU legislature, in the interests of *all* persons concerned. To that end, the provisions of a directive must be implemented with unquestionable

general binding force and with the requisite specificity, precision and clarity: Case C-177/04 *Commission v France* [2006] ECR I-2461 at § 48. Although the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable all parties to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts: Case C-456/08 *Commission v. Ireland* [2010] ECR I-859 at § 65. Accordingly, in order to prove that the transposition of a directive is insufficient or inadequate, it is *not* necessary to establish the actual effects of the legislation transposing it into national law. It is the wording of the legislation itself which harbours the insufficiencies or defects of transposition: Case C-392/96 *Commission v Ireland* [1999] ECR I-5901 at § 60.

7.16 An effective remedy for the purposes of EU law includes a right to effective interim protection of claims based on EU law, pending their final resolution on the merits by the competent national tribunal: *R v Secretary of State for Transport Ex parte Factortame Ltd (No.2)* [1991] 1 AC 603. This is *not* an area in which the Member States can claim to have "procedural autonomy" *not* to provide effective interim protection: Case C-432/05 *Unibet (London) Ltd v Justitiekanslern* EU:C:2007:163 (Grand Chamber, 13 March 2007) [2007] ECR I-2271 at §§ 75-6.

7.17 In *Benkharbouche v Embassy of the Republic of Sudan/Janah v. Libya* [2017] UKSC 62 [2017] ICR 1327 the principle of the primacy of the EU right to an effective remedy meant that a Moroccan national who had been recruited in Iraq as a domestic worker for the Sudanese Embassy in London and a Moroccan national who had been recruited in Libya to work as a member of the domestic staff at the Libyan embassy in London were able to sue their embassy employers for breach of the working time regulations, and race and sex discrimination notwithstanding that the State Immunity Act 1978 would otherwise have given their embassy employers immunity from suit. Because Section 5(1) of the Act *abolishes* the principle of the *supremacy* of EU law over domestic laws made on or after exit day, these individuals would no longer be able to rely upon the principle of effective remedy to overturn or disapply statutory provisions which prevented them from otherwise turning to the courts for the protection and vindication of their EU law based rights. Nothing in the Government proposals for protection of worker's rights after Brexit would otherwise give them a remedy.

8. GENERAL PRINCIPLES JURISPRUDENCE OF THE CJEU

8.1 In order to understand the full potential scope of fundamental rights arguments within the context of judicial protection it is important to have regard not simply to the express rights guaranteed under the Charter but also those fundamental rights expressed as general principles in the court's past case law. It may be noted that, for the most part, these rights have been developed and applied without distinction between natural and legal persons, individuals and corporations. [100] It is also to be noted that general principles of EU law have been applied by the court to all parties, regardless of whether they are emanations of the State. [101]

8.2 There is clearly life in the case law of the CJEU on fundamental rights as general principles even after the coming into force of the Charter. This has been given an express basis in the Treaties by Article 6(3) TEU which states that

> "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law."

8.3 As Advocate General Sharpston has noted:

> "Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a 'codification' of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect

[100] In Case C-396/11 *Radu* 29 January [2013] ECR I-nyr, Opinion of Advocate General Sharpston of 18 October 2012 at para 51

[101] In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle. Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination.

should be more visible in their expression. They do not represent a sea change of any kind" [102]

8.4 The CJEU has noted the following social rights as being fundamental rights implicit within the EU legal order and protected as general principles of EU law:

(1) the right to exercise one's chosen trade or profession[103];

(2) the right to join a trade union[104];

(3) the right to engage in collective bargaining[105];

(4) the right to strike or to pursue other industrial action, provided that where such action impacts upon any the "four freedoms"[106] of EU law (free movement of capital, of goods and of services[107] and of workers and establishment[108]) it will be licit only if it could be said to be *proportionate* in all the circumstances, which is to say, the industrial action:

(i) reasonably falls within the scope of a legitimate purpose recognised as such by the CJEU (such as the protection of jobs or conditions of employment);

(ii) "is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective"; and

(iii) the union does not have other means available to resolve the dispute;

[102] In Case C-396/11 *Radu* Opinion of Advocate General Sharpston of 18 October 2012 EU:C:2012:3964 at para 51

[103] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[104] See Joined Cases C-193/87 & C-194/87 *Maurissen and another v Court of Auditors* [1990] ECR I-95.

[105] See Case C-271/08 *Commission v Germany* [2010] ECR I–7091 at para 37:

> "[T]he right to bargain collectively … is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), an instrument to which Article 6 TEU accords the same legal value as the Treaties."

[106] See Case T-115/94 *Opel Austria GmbH v Council of the European Communities* [1997] ECR II-39 at para 108.

[107] See Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767.

[108] See Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

(5) the right to freedom of expression within employment,[109] against a background of duties relative to the maintenance of mutual[110] trust and confidence within that employment[111];

(6) the right not to be discriminated in employment on the basis of (other EU) nationality.[112]

8.5 Because Paragraph 3(1) of Schedule 1 to the European Union (Withdrawal) Act 2018 removes (as from exit day) the right of an individual to sue private employers or public authorities for their failure to comply with any of the above general principles of EU law, and Paragraph 3(2) of Schedule 1 to the 2018 Act ends the power of the courts to disapply laws or find conduct to be unlawful because incompatible with any of these general principles of EU law, there will be a significant loss in the levels of social protection currently available to workers as a matter of EU law. Nothing in the Governments current proposals for protection of worker's rights remedies this loss in general principles protection.

9. CONCLUSION

9.1 It is clear that social protection rights are now deeply embedded within the foundational texts both of the EU which have been interpreted and applied expansively by the Court of Justice of the European Union the better to secure the social protection of workers across Europe.

9.2 In the absence of any continuing jurisdiction of the CJEU on UK law after Brexit, and standing the fact that workers' rights can longer be entrenched against adverse decision of the national authorities, it seems inevitable that the level of protection for workers' rights

[109] Case C-150/98 P *Economic and Social Committee v E* [1999] ECR I-8877 at para 13.

[110] See Case T-203/95 R *Connolly v Commission* [1995] ECR II-2919 at para 35.

[111] See Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611 at paras 127–29; and *Commission v Edith Cresson* [2006] ECR I-6386.

[112] Case C-214/94 *Ingrid Boukhalfa v Germany* [1996] ECR I-2253, applying the EU prohibition against nationality discrimination to a Belgian national and permanent Algerian resident who was employed by the German authorities in their embassy in Algeria, to require her equal treatment with employees of German nationality.

in the UK will decline as compared to the level of protections which will be maintained in the EU.

9.3 I trust the foregoing is sufficient for those instructing me. I have nothing more to add at this stage.

10 March 2019

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