



# Could the UK Courts Disapply Domestic Legislation to Enforce the Protocol on Ireland and N.Ireland?

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If the Withdrawal Agreement is approved, then Parliament will be asked to legislate to give domestic legal effect to its content through the EU (Withdrawal Agreement) Bill. One of the most significant provisions of the Withdrawal Agreement, Article 4, purports to give the entire contents of the Withdrawal Agreement special status within the UK's constitutional order. Even though the UK would no longer be a Member State, the effect of Article 4 (if implemented) would be to give all of the laws within the Withdrawal Agreement the equivalent legal effect of EU law within a Member State. As a result, the Protocol on Ireland and Northern Ireland (the Protocol), which forms part of the Withdrawal Agreement, would be supreme over any other domestic legislative provisions, and any provisions of the agreement which meet the conditions for direct effect would have direct effect. How the UK courts would be able to enforce this status will be determined by how the UK Parliament decides to legislate to give effect to Article 4 in the EU (Withdrawal Agreement) Act. It is probable that the Government will propose to give the courts the power to disapply domestic legislation inconsistent with the Withdrawal Agreement by replicating the effect of the European Communities Act 1972 (ECA 1972). Article 4 of the WA, as explored below, already includes the obligation to disapply provisions that contravene EU law.

This post looks at the questions that might be raised if a UK court was ever asked to disapply domestic legislation on the basis that it was inconsistent with the Protocol. The potential constitutional effect of Article 4 is worth considering in view of the short time that Parliament is likely to have to consider the EU (Withdrawal Agreement) Bill. While the UK courts have been able to disapply domestic legislation since the European Communities Act 1972 (this power was more more fully explored in *Benkharbouche v Sec'y of State for Foreign and Commonwealth Affairs* in 2017 - see Alison Young's [helpful 2017 blog post on the outcome](#) ) was enacted, what is constitutionally novel about Article 4 is the proposal that the courts would be able to do so when the UK is no longer a Member State.

## Article 4 of the Withdrawal Agreement and the Northern Ireland Protocol

Article 4 of the Withdrawal Agreement sets out that any EU law applying to the UK under the Agreement and the Agreement itself shall have the same legal effects as Union law in other Member States of the EU. Article 4 can be read as essentially a 'supremacy clause', where the relevant Union law takes precedence over domestic law. To ensure compliance, judicial and administrative authorities will also have the power to disapply inconsistent or incompatible domestic provisions by way of domestic primary legislation (Art 4(2)).

The express inclusion of the language of disapplication in Article 4(2) appears to commit the UK to continuing to enable domestic courts to disapply inconsistent domestic legislation. Section 5(2) of the EU (Withdrawal) Act 2018 already preserves the courts' power to disapply legislation enacted prior to exit day which contravenes retained EU law, independently of the European Communities Act 1972. This means that whether we leave with a deal or not, the power to disapply domestic legislation remains

When the first draft of the Withdrawal Agreement was published in March 2018, Article 4 only applied to provisions relating to Citizens Rights (Part 2). When the final version of the Withdrawal Agreement was published in November 2018, Article 4 applied to the whole of the Withdrawal Agreement. The significance of this change in the scope of Article 4 is most evident in relation to the Protocol. Of all the elements of the Withdrawal Agreement, the Protocol provides potentially the most far-reaching legal arrangements in terms of both the breadth of the competences covered and their overall constitutional effect, as it could potentially provide either part or the entire legal basis for the UK's relationship with the EU after the end of the implementation period.

It is worth highlighting a number of the legally significant provisions in the Protocol. Article 4 (1) of the Protocol guarantees 'no diminution of rights, safeguards of equality and opportunity', as set out in the Good Friday Agreement. Article 4 (1) also provides that a number of employment and equality rights contained in certain EU legislative instruments, set out in Annex 1, would continue to apply. Article 6 of the Protocol sets out all the EU laws listed in Annex 2 that would provide the basis for a single customs territory between the UK and the EU. Annex 4 intends to set out the conditions that will maintain the 'level playing field' in order for Article 6 to properly function. For the purposes of this article, Article 4 of Annex 4 provides for the 'non-regression of labour and social standards.' A similar non-regression clause exists in Article 2 of Annex 4 with regards to environmental protection.

### **How would the courts decide whether to disapply?**

Given the significance and breadth of the EU legislation set out in the Protocol, it raises an important question: if the Protocol came into force and a future Parliament sought to legislate in such a way that was inconsistent with a legal obligation in the Protocol - how would the courts decide whether they were obliged to disapply relevant domestic legislation?

There are a number of considerations we can take into account to attempt to answer this question.

### **Does the fact that we are no longer an EU Member State make a difference?**

In previous cases that engaged the ECA 1972, the fact that the UK was an EU Member State was undoubtedly a consideration that courts had to take into account. Although Parliament was free to legislate contrary to EU law if it clearly intended to, in cases where this legislative intent wasn't sufficiently clear, courts still had to balance the primacy of EU law against Parliament's will. However, the UK will still retain a connection with the EU that will affect certain areas. For example, a relationship with the CJEU is retained insofar as the duty on the arbitration panel to request a binding ruling from the CJEU on disputes concerning EU law (Article 174).

While the legislation that implements the Withdrawal Agreement is domestic, there will still be significant links between UK and EU institutions. Similarly, the Protocol - as outlined in Annex 5 to the WA/Protocol - contains EU rules that are necessary for North-South cooperation and the avoidance of a hard border. Furthermore, the status of the Agreement and the Protocol as an international treaty means the UK is limited in how far it can deviate from upholding its aims. This will be a factor the courts must consider in cases where new domestic legislation may conflict with the Protocol, particularly where Parliament has not been explicit in the intended effect of such legislation. As a Member State, the UK was required to incorporate domestic legislation in order to ensure the UK fulfilled its obligations of EU membership. The same is true of the Withdrawal Agreement. Its requirements of supremacy and direct effect will be brought into domestic law by the EU (WA) Act. In short, the fact we are no longer an EU Member State will make little difference, given the domestic procedures that will take place to oversee and determine the implementation of the WA.

### **Is the proposed legislation constitutional in nature?**

In 2002, *Thoburn v Sunderland City Council* created the distinction between 'constitutional' legislation and 'ordinary' legislation. While there is no exhaustive list of the former, we have come to regard instruments such as the Magna Carta, the Bill of Rights 1689, the European Communities Act 1972, and the devolution settlements as constitutional. Given the overhaul of the constitutional landscape that the EU (Withdrawal Agreement) Act will bring, it will likely be considered a constitutional measure. This would insulate the EU (WA) Act from implied repeal if it came up against ordinary legislation. In this case, it is likely that the courts would find in favour of the preservation of the EU (WA) Act and disapply the domestic legislation.

Alternatively, if the proposed legislation was considered constitutional, judicial analysis in the 2014 Supreme Court case of *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* ('HS2') points to a 'constitutional hierarchy' of statutes. HS2 suggests the relationship between such statutes is complex, and a statute's place in this hierarchy is dependent on the fundamentality of the norms they uphold. Therefore if the potentially conflicting legislation is of significant constitutional character, in that it - for example - purported to diminish the scope of the EU (WA) Act, the courts could be faced with a delicate balancing act.

A follow-up question is necessary here:

### **Has the legislation in question attempted to expressly repeal sections of the Act giving effect to the Protocol (or parts of it)?**

This opens up another possible path. If the legislation called for express repeal of provisions of the Act which gave effect to the Protocol, there is a chance that this may be unchallengeable by a court. In *H v Lord Advocate* (2012, Supreme Court), Lord Hope (obiter, at paragraph 30) commented that Parliament would be unable to 'impliedly repeal' the Scotland Act 1998, it could only be expressly repealed because of its 'fundamental constitutional nature'. This suggests that no matter how fundamental a constitutional statute is, there is still scope for its express repeal if Parliament wishes. The suggestion of an express repeal is indicative of the will of Parliament, which, if made explicit enough, the courts will uphold. Lord Denning MR, dissenting in *McCarthy v Smith* (1979, Court of Appeal) observed that if Parliament deliberately passed an Act with the intention of repudiating a treaty or any provision in it (the Treaty in question here being the Treaty of the European Community), then indeed it is the duty of the courts to follow Parliament. He went on to say that if there is no express or intentional repudiation, the courts will give priority to the treaty.

For the courts then to stray from the Protocol, it seems highly likely that express and deliberate repeal of sections of the EU (WA) Act would be necessary.

### **Conclusion**

If Parliament is asked to legislate to implement Article 4, it will be important that the long-term constitutional implications are fully scrutinised. However Article 4 is implemented into the UK's constitutional framework, it seems likely that the relevant provision(s) will be central to the domestic constitutional effect of the entire Withdrawal Agreement, much in the same way that section 2(1) of the ECA provided a link to the entire *acquis communautaire*. Even if the Protocol is not brought into force, the constitutional status afforded to the Withdrawal Agreement by provision(s) on Article 4 could have long-term consequences. As Raphael Hogarth has noted in an IFG report, [Legislating Brexit: the Withdrawal Agreement Bill and parliamentary sovereignty](#), the EU (WA) Bill may set the tone for the way in which EU law operates in the UK's constitutional framework under any future relationship treaty that came into force at the end of the implementation period.

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