

LCEL INAUGURAL CONFERENCE: EUROPEAN UNION LAW AND VALUES
IN A CHANGING WORLD
10 OCTOBER 2025

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European Values post Brexit: the response of the UK courts

1. I am delighted and honoured to be involved in this inaugural conference of the Luxembourg Centre for European Law. The topic is certainly very timely both in the United Kingdom and across Europe.
2. The legal process that was necessary to bring about the UK's departure from the EU was extremely complicated and challenging. It was, of course, vital to ensure that there were no big gaps created in our law at the moment we left. That meant that all directly applicable EU law contained in the EU Treaty and in EU Regulations had to be carried forward and incorporated into our domestic law. This was largely achieved by the European Union (Withdrawal) Act 2018 which provided, very broadly, that all the EU law that had been directly applicable in the UK continued to form part of our domestic law after Brexit.¹ Further, the Act provides that any statutory instruments or other delegated legislation made in the UK which implemented EU directives also continues to have effect in our domestic law. By assimilating all that law into UK law, Parliament provided a breathing space for the different Government departments to go through all that law to work out what changes they wanted to make to those provisions and how that law should apply in the UK going forward.
3. Let me just mention a couple of particular points. First, the Charter of Fundamental Rights was dealt with separately by a provision that said that the Charter stopped being part of domestic law immediately on Brexit.² This was subject to provisions which allowed for the continuation of legal proceedings that were currently underway.
4. Secondly UK courts generally speaking can no longer refer questions to the CJEU for a preliminary ruling.³ There are two exceptions to this. One relates to the position in

¹ The moment of Brexit was 11 pm GMT 31 January 2020. That was the date on which the European Communities Act 1972 which brought about the accession of the UK to the EU was repealed. However there was a transitional 11 month implementation period agreed with the EU during which EU law in effect continued to apply until 11 pm on 31 December 2020: see section 1A of the Withdrawal Act 2018.

² See section 5(4) of the Withdrawal Act 2018.

³ See section 6(1)(b).

Northern Ireland and one arises under article 158 of the Withdrawal Agreement. The Withdrawal Agreement is the international treaty concluded between the UK and the EU on our future relationship. Article 158 of the Withdrawal Agreement was considered recently at a hearing before the Supreme Court concerning social security benefits and the proper interpretation of Regulation 883/2004 on the coordination of social security systems. The Court was invited to make a reference to the CJEU on the legal point in dispute. Judgment in that case is still pending and may contain some useful information about the circumstances in which a reference can still be made.⁴

5. Thirdly, the question of which judgments handed down by the CJEU are still binding on UK courts is addressed in section 6 of the 2018 Act.⁵ Generally speaking, judgments of the Court handed down before Brexit remain binding on UK courts. But the Supreme Court and the Courts of Appeal across the UK can decide not to follow such a judgment if some strict conditions are met. The test that is applied at the moment by the UK courts when they are asked to depart from a pre-Brexit CJEU judgment is the same test that the Supreme Court applies when it is asked to overturn one of its own previous judgments. The test makes clear that it is not sufficient to say that we think the previous judgment is wrong – the earlier judgment has to be causing some difficulties within the operation of the law.
6. The fact that it is possible but difficult to persuade a court to depart from a previous case reflects one of the core values of the rule of law. The law should be predictable and certain which is why the English legal system places a great deal of emphasis on following earlier precedent. But on the other hand, it is important that the law should be able to develop and change as the needs and circumstances of society change. Sometimes that development is best done by the courts rather than by waiting for Parliament to legislate to correct a problem that has arisen with case law.
7. Turning then to judgments of the CJEU handed down after Brexit, they are not binding on any court. But according to the Withdrawal Act, a court “may have regard” to such judgments after Brexit when deciding a case to which a post-Brexit judgment is relevant.
8. There was a detailed discussion of how the legislation bringing about Brexit works in the *Lipton* case decided by the Supreme Court in July 2024.⁶ That was typical of a case which

⁴ See *Simkova v Secretary of State for Work and Pensions* on appeal from [2024] EWCA Civ 419.

⁵ See section 6(1)(a) and 6(2).

⁶ *Lipton v BA Cityflyer Ltd* [2024] UKSC 24.

gives rise to a constitutionally important ruling. You will remember that the supremacy of EC law was established by the European Court in its landmark judgment in 1964 in a dispute between Flaminio Costa and the Italian Electricity Board over his electricity bill. The *Lipton* case arose from a cancelled flight from Milan to London and a claim for compensation amounting to €250 by Mr and Mrs Lipton because of the delay to their journey. Their compensation claim was based on the directly effective EU Regulation 261/2004. Their flight was cancelled in January 2018 before Brexit but the case came to the Supreme Court after Brexit. Everyone agreed that their claim could not simply have evaporated at midnight when we left the EU. That is certainly one of the European values that we share. But precisely how it was carried forward and how post Brexit EU law applied was a matter of dispute.

9. The answer that we gave to that question is rather technical and not of much interest to a wider audience. But I hope the case exemplifies another European value that the courts on our side of the Channel continue to share with you. That is the principle that the rule of law means that even a dispute over a few hundred euros can generate an important legal issue and the legal system has to be set up in a way which recognises that and enables the case to reach the highest court in the land.
10. Let me describe very briefly a couple of cases in which the courts of the UK have continued to address the values that are encapsulated in article 2 of the TEU. The two examples are dealing with very different topics.
11. The first is *Finch* decided by the Supreme Court in June 2024.⁷ An oil field has been discovered under the beautiful countryside in Surrey, a county in the south of England and an oil company applied to the local authority for permission to start drilling for that oil. Ms Finch was a local environmental activist who was very opposed to the project. When it applied for planning permission, the oil company had to prepare and submit an environmental impact assessment. The project was within the scope of the EIA Directive⁸ Directive 92/11. That states that an EIA must identify the likely direct and indirect effects of the project on the climate including the amount of any greenhouse gas emissions.
12. The dispute concerned what that phrase meant and which greenhouse gas emissions had to be identified, measured and taken into account by the local authority when deciding

⁷ *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20.

⁸ European Union Directive 92/11/EU.

whether to allow the project to go ahead. The developer argued that the only greenhouse gas emissions that had to be identified and assessed were those likely to be generated by the buildings and operation of the whole drilling project itself within the area of Surrey where the drilling and extraction of the oil would take place. Ms Finch argued that the indirect effects included the downstream greenhouse gas that would ultimately be emitted when the oil extracted was combusted, wherever in the world that happened.

13. The parties to the claim were Ms Finch and the local authority which was considering the application for planning. The hearing in *Finch* before the Supreme Court took place over two days last June. As often happens with a big case like this it is not only the parties directly concerned in the proceedings who are represented before the court. We also allow other bodies to intervene on one side or the other. They have to apply for permission and we decide some weeks in advance of the hearing whether to allow them. We will only allow people to intervene if we think they will bring a different perspective to the case. And we stress that they must liaise with each other in advance to make sure they do not repeat each other's submissions. In the *Finch* case we had interventions from two big environmental lobby groups, Greenpeace UK and Friends of the Earth and also on the other side from a mining company which was planning a similar project elsewhere in the country. This is one of the ways we ensure not only that everyone with a real interest in the dispute can put their case but also that the Court gets the full picture around the issue it is deciding.
14. The Court examined closely the wording of the EIA Directive and of the Aarhus Convention on which the Directive was partly based. The Court also considered the purpose of the requirement in the Directive that there should be an EIA and the case law of the CJEU and of other courts including the Norwegian Supreme Court.⁹ We held by a majority of 3:2 that the indirect effects of the project included the downstream emissions.
15. The other case I want to mention is coming before the Supreme Court next week, listed for a hearing lasting 2.5 days starting 14 October.¹⁰ It concerns an Act passed by the UK Parliament called the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. "The Troubles" is the phrase we use to refer to the decades of violence in Northern

⁹ See *Nature and Youth Norway v The State of Norway (represented by the Ministry of Petroleum and Energy)*, judgment dated 22 December 2020, HR-2020-2472-P (Case No 20-051052SIV-HRET).

¹⁰ *In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial review* Case UKSC/2025/ 0013 on appeal from [2024] NICA 59.

Ireland. The Troubles started in 1966 and ended with the Good Friday Agreement concluded in April 1998.¹¹ The aim of the Legacy Act was to bring to a halt all the many police investigations, civil court proceedings and coroner's inquests currently ongoing in Northern Ireland. Instead, the Legacy Act would set up an Independent Commission. People who had committed crimes during The Troubles could go before the Commission and if they give a full and honest account of what they had done, the Commission can grant them immunity from prosecution.

16. In proceedings coming before the Supreme Court, the claimants are members of the families of some of those who had suffered violence during the Troubles. One of their challenges to the legality of the Legacy Act is that it is incompatible with the Windsor Framework. The Windsor Framework is the part of the Withdrawal Agreement between the UK and the EU which deals with the special position of Northern Ireland. Article 2 of the Windsor Framework imposes an obligation on the UK Government to ensure that the UK's withdrawal from the EU does not result in any diminution in the rights, safeguards, or equality of opportunity conferred on citizens of Northern Ireland by the Good Friday Agreement.
17. The claimants rely in particular on the Victims' Rights Directive. Article 11 of that Directive provides that Member States shall ensure that victims have a right to ask a court to review a decision by the prosecuting authority not to prosecute - at least in a case concerning a serious crime. The claimants say that if the Independent Commission grants immunity to the person who confesses to having attacked their relative, that means there will be no prosecution for that attack and the Legacy Act does not provide for there to be any challenge to or involvement of the victims in that immunity decision. So they say that such a grant of immunity by the Independent Commission would be a breach of their rights under article 11 of the Victims' Rights Directive.¹²
18. Article 4 of the Withdrawal Agreement enables persons to rely directly on provisions that meet the conditions for direct effect under EU law. Article 4 is given effect in domestic law by section 7A of the European Union (Withdrawal) Act 2018. The Court of Appeal in Northern Ireland held first that Article 2 of the Windsor Framework met the test for direct effect in domestic law even though the Framework is by nature an international Treaty. That means that Article 2 of the Windsor Framework can potentially take priority over the

¹¹ As defined in section 1(1) of the Legacy Act.

¹² Directive 2012/29/EU

domestic law which is set out in primary legislation in the Legacy Act. The judges relied on Case 26/62 *Van Gend en Loos* [1963] ECR 1 on direct effect in general and Case 41/74 *Van Duyn* [1974] ECR 1337 on the direct effect of Directives in particular.

19. The Court of Appeal went on to hold that article 11 of the Victims' Rights Directive satisfied the conditions for direct effect. It therefore had formed part of national law prior to Brexit. And they went on to hold that the Legacy Act's removal of the possibility of prosecution for a defined category of cases was inconsistent with Article 11.
20. That in turn meant that the Legacy Act did therefore diminish the rights that EU law had conferred on citizens before Brexit by depriving them and their families of the right to ask a court to review the decision not to prosecute the perpetrator of the crime.
21. Further, the Northern Irish Court granted a remedy disapplying the provisions of the Legacy Act. The Act is currently being revised by the Government to take account of that and of the other decision that the Legacy Act was incompatible with the Human Rights Convention – a decision that the Government has accepted.
22. I will be interested to see what my colleagues on the Supreme Court decide in the Legacy Act case. The judgment under appeal had many other interesting things to say about the relationship between the European Convention, the Charter of Fundamental Rights and the Windsor Framework.
23. But I hope that I have given you some of the flavour of the various ways in which EU law and European values still arise in our courts post-Brexit and I hope that the UK will continue to learn from and contribute to the debates over those values into the future.