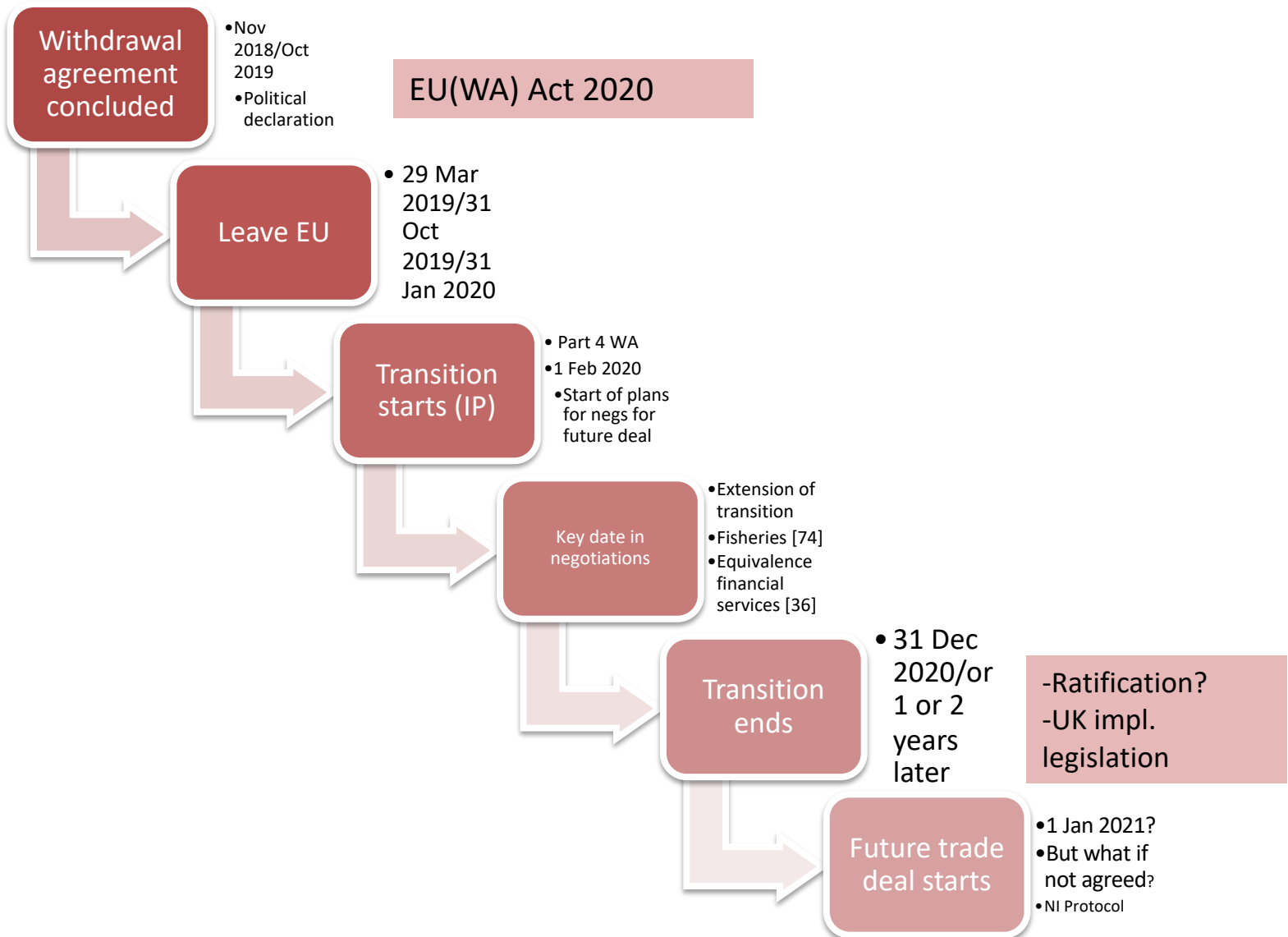


Aspects of the EU (Withdrawal) Act 2018 as amended by EU (Withdrawal Agreement) Act 2020

Catherine Barnard, Trinity College,
Cambridge

- Direct effect
- Charter

The Timetable and the Phases

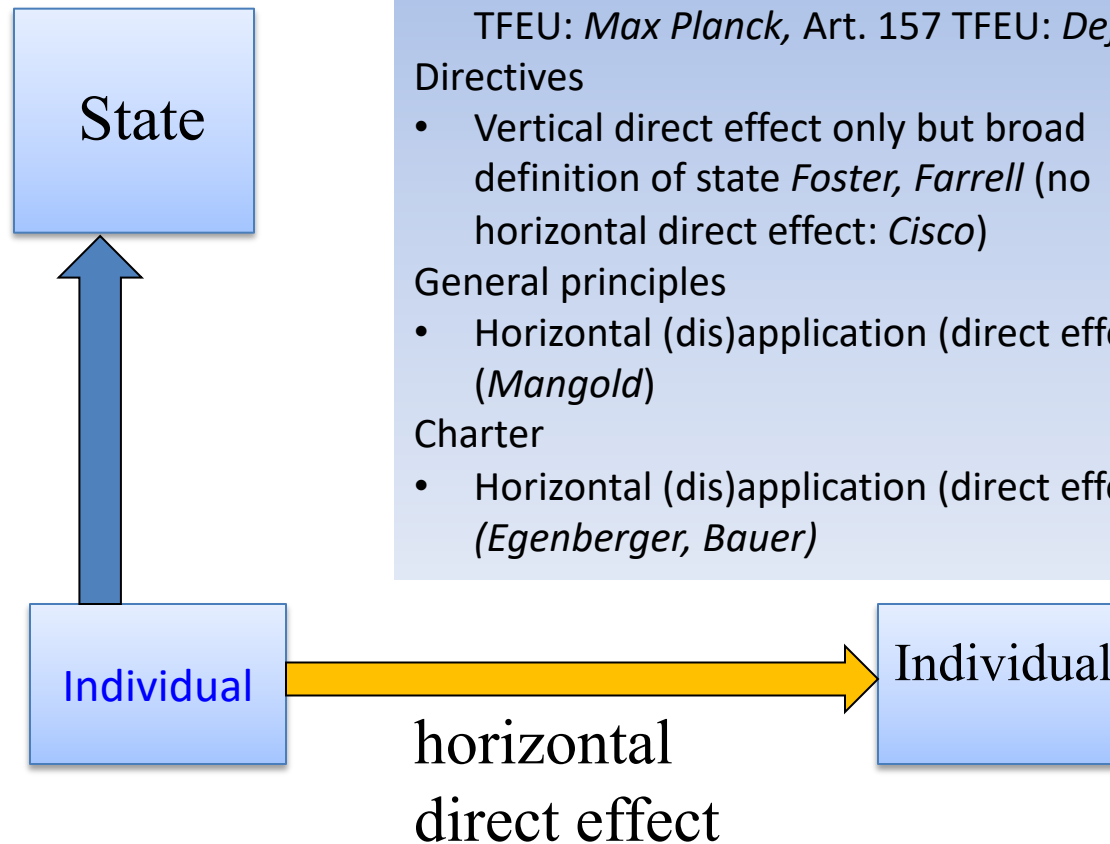


- What it is
- Its application during transition
- Its application in those areas covered by the WA 2020
- Its application post transition

DIRECT EFFECT

Direct effect of EU law provisions

Vertical
direct
effect



Treaty provisions

- mainly vertical direct effect (eg Arts. 34, 110 TFEU on goods);
- Some full horizontal direct effect (eg Art. 45 TFEU: *Max Planck*, Art. 157 TFEU: *Defrenne*)

Directives

- Vertical direct effect only but broad definition of state *Foster, Farrell* (no horizontal direct effect: *Cisco*)

General principles

- Horizontal (dis)application (direct effect?) (*Mangold*)

Charter

- Horizontal (dis)application (direct effect?) (*Egenberger, Bauer*)

Transition

s.2(1) ECA

- All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.

s.1A EU(W)A 2018 (introduced by s1 EU(WA)A 2020)

- ‘The European Communities Act 1972, as it has effect in domestic law or the law of a relevant territory immediately before exit day, continues to have effect in domestic law or the law of the relevant territory on and after exit day so far as provided by subsections (3) to (5)’

Art. 4 Withdrawal Agreement

ARTICLE 4 Methods and principles relating to the effect, the implementation and the application of this Agreement

1.The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for **direct effect** under Union law.

2.The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to **disapply inconsistent or incompatible domestic provisions**, through domestic primary legislation

7A General implementation of remainder of withdrawal agreement (1) Subsection (2) applies to—

- (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and**
- (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.**

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

- (a) recognised and available in domestic law, and**
- (b) enforced, allowed and followed accordingly.**

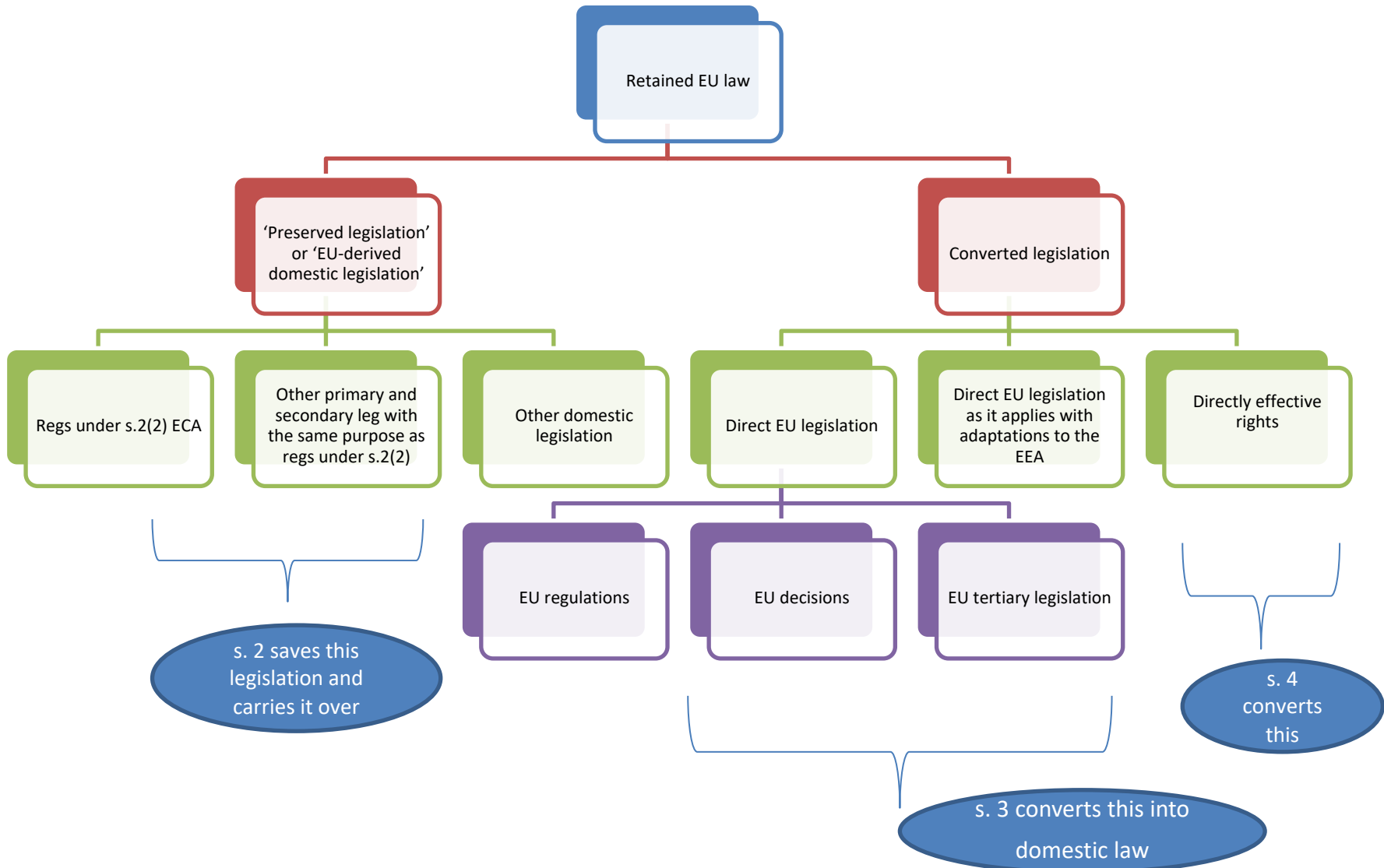
(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

(4) This section does not apply in relation to Part 4 of the withdrawal agreement so far as section 2(1) of the European Communities Act 1972 applies in relation to that Part.

(5) See also (among other things)–

- (a) Part 3 of the European Union (Withdrawal Agreement) Act 2020 (further provision about citizens' rights),**
- (b) section 20 of that Act (financial provision),**
- (c) section 7C of this Act (interpretation of law relating to withdrawal agreement etc.),**
- (d) section 8B of this Act (power in connection with certain other separation issues),**
- (e) section 8C of this Act (power in connection with the Protocol on Ireland/Northern Ireland in withdrawal agreement), and**
- (f) Parts 1B and 1C of Schedule 2 to this Act (powers involving devolved authorities in connection with certain other separation issues and the Ireland/Northern Ireland Protocol)."**

Retained EU law



s. 4(1) Primary EU law

Treaties

- ‘Any rights, powers, liabilities...recognised under s.2(1) ECA...continue on or after exit day to be recognised and available’
- Art. 5(2) supremacy continues
- Directly effective rights in Treaties that can be relied on directly in court by an individual will continue eg Art. 157 – but how?
 - Backstop?
 - Constitutional check? Possible re pre-Brexit law [p.18]
- But always subject to Section 7

Section 4: directly effective Treaty provisions

Treaty provision	substance	Treaty provision	substance
Art. 18	Non-discrimination	Art. 102	Abuse of dom position
Art. 20 (not 20(2)(c))	EU citizenship	Art. 106(1) and (2)	Public undertakings
Art. 21(1)	F.M of EU citizens	Art. 107(1)	State aid
Art. 28	Customs Union	Art. 108(3)	Comm consideration of plans
Art. 30	Prohibition of customs duties	Art. 110	Internal tax
Art. 34	F.m of goods (imports)	Art. 111-113	Non-discrim re internal taxes
Art. 35	F.m of goods (exports)	Arts. 120-6	Ec cooperation
Art. 36	exceptions	Art. 157	Equal pay
Art. 37(1) and (2)	Prohibition of discrimination re conditions under which goods procured	Art 308 (first and second sub paras)	EIB
Art. 45(1), (2) and (3)	f.m of workers	Art. 325 (1) and (2)	Combatting fraud on the EU
Art. 49	establishment	Art. 346	Disclosure of info and national security
Art. 56	Freedom to provide services	Various articles of Prot. 5	EIB
Art. 63	f.m of capital	Prot 7 – Art. 21	Privileges and immunities of the EIB
Art. 101(1)	competition		

But many are turned off...

Eg SI 2019/1401 The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019

- 3.—(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—
- (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
- (b) are derived (directly or indirectly) from—
 - (i) Articles 56 and 57 of the Treaty on the Functioning of the European Union;
 - ...
- cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
- (2) But the cessation of the rights, powers, liabilities, obligations, restrictions, remedies and procedures set out at paragraph (1)(b)(iii) and (iv) does not apply to any matter which falls within the interpretation, application or operation of the Immigration Acts.

Directives

S.2(1) and s.2(2) EU(W)A 2018

- Carries across preserved or EU derived legislation (eg Working Time Regs)

s. 4(2) EU(W)A 2018

- Incorrectly implemented/non-implemented Directives

Section 4(2)(b)

‘Subsection (1) does not apply to any rights...so far as they arise under an EU Directive ... and are *not of a kind* recognised by the European Court or any court or tribunal in the UK in a case decided before exit day (whether or not as an essential part of the decision in the case)’

- Directly effective provisions of Directives carried across (s.4(1)) but only if recognised as directly effective by Brexit day
- Serendipity?
- Does that specific provision need to have been recognised as DE?
- Vertical DE only?
- Two versions of norm – which trumps?

General principles of law

Schedule 1, Para. 3

- ‘There is no right of action in domestic law on or after exit day based on a failure to comply with any GP of EU law.’
- No court or tribunal may ... on or after Brexit day ... disapply or quash any enactment or rule of law...

So no Mangold, Kucuckdeveci, AMS, Ajos

Sched 1, para. 4: Rule in *Francovich*

What is the rule in *Francovich*?

- Largely a stepping stone case
- Why name the case – *Brasserie du Pêcheur/Factortame III* better

What is being removed?

- Horizontal situations? *Courage v Creehan*

CHARTER

Benkharbouche [2017] UKSC 62

The scope of article 47 of the Charter is not identical to that of article 6 of the Human Rights Convention, but the Secretary of State accepts that on the facts of this case if the Convention is violated, so is the Charter. .. It follows that there is no separate issue as to article 47 of the Charter. The only difference that it makes is that a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.

The Charter and EU (Withdrawal) Act 2018

S 5(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

s 5(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter.

- (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

The General Principles: Sched I

Para.2 Only GPs recognised before Brexit apply to the UK (GB)

Para.3(1) No right of action in domestic law on or after Brexit day based on failure to comply with GPs

- Demise of *Mangold*

Legacy of the Charter I: ECJ

- All pre-Brexit case law of the Court of Justice (retained EU case law) handed down prior to Brexit day will continue to be binding on UK (GB) courts and tribunals.
 - S. 6(7) of the EU (Withdrawal) Act provides that “retained EU case law” means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day’.
 - Binding like decision of the SCt/High Ct of Judiciary(s 6(4)(a) and (b))
- SCt/High Ct of Judiciary can depart from retained EU case law, applying same test used to depart from own case law (s6(5))

Role of the Court of Justice

Post Brexit

- UK (GB) cts not bound by any decisions of ECJ (s 6(1)(a))
- BUT 'may have regard to anything done on or after Brexit day by the European Court ... so far as is relevant to any matter before the court or tribunal' (Callanan amendment) (s 6(2))

Legacy effect of the Charter II: Quashing the validity of EU law

- Para 3(2) No court or tribunal or other public authority may, on or after exit day— (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.

Walker v Innospec

- He argued that the UK rules contravened the Framework Directive 2000/78.
- SCt interpreted the Framework Directive in line with the background case law (the case law which continues post exit since it was decided prior to exit day) and general principles of EU law.
- Under s.5(2) EU(W) Act 2018, EU-derived law has supremacy post exit day to and can be used to disapply legislation enacted prior to exit day (and legislation enacted prior to exit day that is modified post exit day if there is the intention that this legislation should still be subject to EU law).
 - EU-derived law has been interpreted in line with general principles. This re-interpreted law is then used to disapply some provisions in Acts of Parliament.