



The EU (Withdrawal Bill), the CJEU and the Withdrawal Agreement

The UK Government has stated that by “*leaving the European Union, we will bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU).*”¹ Clause 6 of the EU (Withdrawal) Bill (the “Bill”) addresses how “*retained EU law*” (incorporated into UK law through the operation of clauses 2 to 4) will be interpreted after Brexit. Such questions will be decided in accordance with “*any retained case law and any retained general principles of EU law,*” but the UK Supreme Court will not be bound by that law, and if departing from it will apply the same test as when deciding whether to depart from its own case law. A UK court or tribunal will not be bound by CJEU principles established after exit day and, after exit day, will no longer be able to refer a case to the CJEU. A UK court need not have regard to CJEU jurisprudence or EU law made after exit day, but it “*may do so if it considers it appropriate.*”

Effect on citizens’ rights and the withdrawal negotiations

These provisions reflect the UK Government’s position that “*in both the UK and the EU, individuals and businesses will be able to enforce rights and obligations within the internal legal orders of the UK and the EU respectively, including through access to the highest courts within those legal orders. This would be the case in respect of both the Withdrawal Agreement, including an agreement on citizens’ rights, and the future partnership.*”²

This position, as reflected in the Repeal Bill, forms the basis of disagreement with the EU Commission in the ongoing withdrawal negotiations. With respect to citizens’ rights, the Commission argues that the “*Commission should have full powers for the monitoring and the [CJEU] should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal agreement.*” Further, citizens should be able to enforce rights granted by the Withdrawal Agreement “*in accordance with the same ordinary rules as set out in the Union Treaties on cooperation between national courts and the [CJEU], i.e. including a*

¹ Enforcement and dispute resolution: a future partnership paper, HM Government, para 1.

² Id, para 23.

mechanism analogous to Article 267 TFEU for preliminary reference from UK courts to the [CJEU].”³

With respect to enforcement of other provisions of the Withdrawal Agreement, the Commission proposes the establishment of a Joint Committee empowered *inter alia* to adopt appropriate measures to implement solutions agreed between the EU27 and the UK. Where the Joint Committee is unable to reach a solution, the Commission foresees that the matter may be referred to the CJEU.⁴

To us, at this stage, it seems difficult to foresee a negotiated Withdrawal Agreement which will render all future jurisprudence of the CJEU mere persuasive authority in UK courts (akin, for example, to Commonwealth jurisprudence). For so long as UK nationals exercising rights conferred by the Withdrawal Agreement in EU27 states are able to enforce those rights at the CJEU, it appears that the Commission will argue that the same rights should be enjoyed by EU27 citizens living in the UK.

Abolition of *Francovich* damages as a remedy

Historically, under EU law, damages are available as a remedy in certain circumstances against Member States for failures properly to transcribe EU law into national law. These damages are known as *Francovich* damages after the guideline case. Schedule 1, para 4 of the Bill simply disappplies this rule: “*There is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich.*”

The rule in *Francovich* is not applicable in all cases where a Member State has failed to comply with its EU law obligations, and has some very substantial limitations on its applicability. The full requirements do not need to be rehearsed here, but it is undoubtedly true that this does indeed abolish a remedy which has been previously provided by the English courts.⁵

³ Position paper on "Essential Principles on Citizens' Rights", TF50 (2017) 1/2 - Commission to UK, 12 June 2017. See also Position paper on Governance, TF50 (2017) 4 – Commission to UK, 12 July 2017.

⁴ Position paper on "Essential Principles on Citizens' Rights", TF50 (2017) 1/2 - Commission to UK, 12 June 2017

⁵ See e.g. *Byrne v Sec. of State for Transport and the MIB* [2008] EWCA Civ 574

This may not be as significant a change as some have argued in the popular press⁶ as remedies under English law exist for serious breaches of citizens' legal rights, including private law actions parasitic upon the public law issue, non-financial remedies, as well as financial remedies available under s.8 of the HRA 1998 where appropriate. The rule in *Francovich's* primary purpose is to enable aggrieved individuals to recoup appropriate damages arising from a failure of the State to transpose EU law. Given there will be no further transposition of new EU law, this issue will likely wither over time. It would be incongruous with the purpose of the Bill, and indeed the apparent meaning of Brexit as a whole, to allow persons to sue the State for damages arising from a failure to transpose new EU laws after exit day.

Comment from senior members of the UK judiciary and House of Lords Constitutional Committee

The President of the Supreme Court, Lord Neuberger of Abbotsbury, has called for greater clarity about how UK law will be developed after Brexit. Professor Alison Young and Professor John Bell also gave evidence to the House of Lords Constitutional Committee arguing that greater clarity is needed, particularly with respect to the interpretation of clause 6.

The House of Lords Constitutional Committee has concluded that while the Bill “*provides some welcome clarity regarding judgments of the Court of Justice of the European Union, it is at least arguable that the Bill should provide more guidance to the courts.*” It is unclear whether UK courts are likely to take into account CJEU case law which overturns or clarifies pre-exit law, and the circumstances in which they might do so.⁷ The uncertainty is plainly unwelcome.

Joshua Kern and Richard Reynolds

9 Bedford Row and BiE ‘Repeal Bill Observatory’

13 September 2017



⁶ E.g. “Brexit repeal bill will remove UK citizens' right to sue Government over policies”, The Independent, 11 August 2017 available at <http://www.independent.co.uk/news/uk/home-news/brexit-bill-uk-citizens-right-government-break-law-sue-high-court-eu-human-a7887506.html>.

⁷ Select Committee on the Constitution European Union (Withdrawal) Bill: interim report 3rd Report of Session 2017-19, 7 September 2017, HL Paper 19.