

Equality Analysis

European Union (Withdrawal) Bill

Introduction

Consideration of equalities matters

1. This consideration of potential impacts on equalities is undertaken by the Department for Exiting the European Union (DExEU) in connection with the EU (Withdrawal) Bill (“the Bill”).
2. The Public Sector Equality Duty (“PSED”)¹ (as contained in section 149(1) of the Equality Act 2010) does not apply to the introduction of Bills in Parliament. There is therefore no legal obligation on the Government to conduct and publish an equalities analysis of the Bill under the Equality Act. Nevertheless, the Government has chosen at this early stage of EU exit to consider at a high level the potential impacts on equalities that may arise as a consequence of the provisions reflected in the Bill.

European Union (Withdrawal) Bill

3. In general, the Bill will preserve existing domestic legislation which implements EU obligations and convert EU law as it applies in the UK the moment before we leave the EU into domestic law. Collectively, this body of law is referred to as ‘retained EU law’. As detailed below, we have focussed in this analysis on those provisions in the Bill which relate to the exceptions to this approach and the interpretation of retained EU law. These provisions relate to the way in which certain cross-cutting aspects of retained EU law will operate in our legal system after exit and do not involve specific changes to particular policy areas. This document is not intended to be a detailed assessment of the Bill as a whole or any subsequent legislation, or the wider impacts of the decision to leave the EU.

¹ The Public Sector Equality Duty (“PSED”) is contained in section 149(1) of the Equality Act 2010. It requires public authorities when exercising their functions to have due regard to the need to:

- a. eliminate unlawful discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010,
- b. advance equality of opportunity between those who share protected characteristics and those who do not, and
- c. foster good relations between those who share protected characteristics and those who do not.

Policy context

4. The Government set out its intentions for the Bill in the White Paper "Legislating for the United Kingdom's withdrawal from the European Union" on 30 March 2017 ("the White Paper").
5. The principal purpose of the Bill is to ensure a functioning statute book on day one outside the EU. As such, the Bill aims to maximise certainty and continuity as the UK exits the EU and takes control of its own laws once more. It is not a vehicle for policy changes; the White Paper was clear that new legislation beyond the Bill will be required to implement new policies or institutional arrangements that go beyond replicating current EU arrangements in UK law.
6. In particular, the approach of the Bill is to ensure, as far as possible, that the same rules and laws will apply on the day after exit as on the day before. For business, workers and consumers across the UK this means that they can have confidence that they will not be subject to unexpected changes on the day we leave the EU. The Bill is therefore integral to the successful achievement of a smooth and orderly exit.
7. The principal means by which continuity is being provided are the provisions in the Bill which will: (i) convert existing EU law as it stands at the point of exit into UK law; and (ii) preserve existing domestic law which has been made to implement EU obligations.
8. The Equality Act 2010 consolidated decades of domestic legislation and transposed EU law. The Government is committed to ensuring that the protections in the Equality Act 2010 will continue to apply once we have left the EU. This will ensure the continued protection of people's rights not to be discriminated against, harassed or victimised in the provision of goods, services and public functions, housing, transport and education.
9. The Government is similarly committed to maintaining the continued role of the Equality and Human Rights Commission (EHRC), the Northern Ireland Human Rights Commission (NHRC) and the Equality Commission for Northern Ireland (ECNI), which all have important roles in enforcing and monitoring equalities and rights law within the UK.
10. The powers in the Bill will be available for the purposes of correcting any deficiencies in retained EU law which arise from our withdrawal from the EU. The principal purpose of those powers is to make sure that retained EU law

can still operate as intended once the UK has left the EU, and enable the withdrawal agreement to be implemented under Article 50.

11. In exercising these powers, the Government and Devolved Administrations will continue to be subject to the public sector equality duties in the Equality Act 2010 and the Northern Ireland Act 1998. During the process of EU exit, these duties will continue to apply to all relevant policy changes, as they do now. Public authorities will therefore need to give due regard to the potential equality implications of any changes that are being introduced as a result of the UK's exit from the EU, keeping equality at the heart of UK public policy.
12. Overall, therefore, the principal effect of the Bill will be to maintain continuity. However, as a consequence of the UK's decision to leave the EU and the necessary process of separating EU law from UK law, the Bill will make some changes. These changes relate to certain aspects of EU law which the Government considers are no longer appropriate or which will no longer make sense in the context of the UK's exit from the EU. For example, it removes certain causes of action or remedies available to individuals for specific purposes linked inextricably to EU membership, such as the ability to challenge the adequacy of transposition of an EU directive.
13. In summary, the Government's view is that where potential equalities impacts are identified in this document, these are likely to be limited. They are a natural consequence of the decision to leave the EU, whilst ensuring that Parliament is sovereign following the result of the referendum on EU membership.

Analysis

14. This equality analysis relates in particular to the provisions in the Bill which deal with some of the exceptions to retained EU law and how the body of retained law will be interpreted. This section considers the following areas within the Bill:
 - a. the Charter of Fundamental Rights (the Charter),
 - b. the general principles of EU law,
 - c. the direct effect of EU directives,
 - d. the ability to claim *Francovich* damages, and
 - e. pre-exit case law of the Court of Justice of the EU (CJEU).

a. The Charter of Fundamental Rights

(i) Policy

15. Respect for fundamental rights is a general principle of EU law and fundamental rights form part of the EU's legal order as general principles² of EU law which have been recognised and developed in the case law of the CJEU. Examples of relevant fundamental rights are equality before the law, non-discrimination and equality between men and women. Currently the CJEU may rely on fundamental rights to interpret or annul EU legislation. National courts are also required to take fundamental rights into account when considering national legislation that is 'within the scope' of EU law. If a national law breaches a directly applicable fundamental right, in circumstances where fundamental rights need to be taken into account as a matter of EU law, then national courts can disapply the national law.

16. The Charter collects in a single document the fundamental rights and principles protected in EU law. It does not create any new rights, freedoms or principles³. It merely catalogues the rights that already exist in EU law and makes them more visible. It confirms the circumstances in which courts may have regard to those rights, freedoms and principles but it does not extend their legal effect. The Charter applies to EU institutions all the time, but only applies to an EU member state when it is acting within the scope of EU law. Not all of the fundamental rights set out in the Charter constitute enforceable rights but are, rather, principles which guide the EU institutions when they legislate. The Charter itself will not be converted into domestic law by the Bill.

(ii) Potential impact

17. As mentioned above, the Government's view, which is reflected in Protocol 30 on the Charter, is that the Charter simply codifies rights and principles set out elsewhere in EU law and the Bill makes clear that the removal of the Charter from UK law does not affect the retention in UK law of fundamental rights or principles that exist irrespective of, and prior to, the Charter. This is

² Article 6(3) of the Treaty on European Union provides 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 the Union's law."

³ See *R. (on the application of NS) v Secretary of State for the Home Department (C-411/10)* in which the CJEU, on a reference from the Court of Appeal, in finding that Protocol (No.30) did not call into question the applicability of the Charter in the UK, held that the Charter did not create new rights or principles but rather reaffirmed the rights, freedoms and principles recognised in the Union and made those rights more visible.

acknowledged in recent evidence⁴ to the Women and Equalities Select Committee, which considered that the Charter would “fall away” once we have left the EU, as it only relates to EU law, and the Committee recognised that ‘it would be difficult to apply the Charter so that it would function in a domestic context alone’⁵.

18. In terms of the consideration of the impact of the removal of the Charter, it should be noted that it is only one element of the UK’s human rights architecture. Most of the rights protected in EU law are also found in other international instruments to which the UK is party, notably the European Convention on Human Rights (ECHR), but also United Nations and other international treaties too. The UK’s withdrawal from the EU will not change the UK’s participation in the ECHR and this Government has no plans to withdraw from the ECHR.

19. For this reason, we do not consider that there will be an impact on those with protected characteristics as defined by the Equality Act 2010⁶.

20. The Bill does, however, make changes to the way in which the general principles of EU Law, including those which constitute fundamental rights, operate in UK law after exit and this change is considered in section *b* below.

b. The general principles of EU Law

(i) Policy

21. The general principles of EU law are the key legal principles governing the way in which the EU operates. As explained above, they are part of the EU law with which the EU institutions and member states are bound to comply. General principles are applied by the CJEU and domestic courts when

⁴ In oral evidence to the Women and Equalities Select Committee of 16 November 2016, Professor Satvinder Juss noted: [...] *the obligation to apply the Charter only makes itself felt upon national parties and EU institutions when EU law is an issue and is being implemented. Once you take away EU law, the Charter falls.* See Seventh Report of Session 2016–17, “Ensuring strong equalities legislation after the EU exit”, Women and Equalities Select Committee, 22 February 2017, at p11, para 36.

⁵ Seventh Report of Session 2016–17, “Ensuring strong equalities legislation after the EU exit”, Women and Equalities Select Committee, 22 February 2017, p12, para 38.

⁶ Section 4, the protected characteristics are age; disability; race; religion or belief; sex; sexual orientation; pregnancy and maternity; and gender reassignment. Marriage and civil partnership is also a protected characteristic, but only insofar as the first aim of the equality duty (eliminating unlawful discrimination) is concerned.

determining the lawfulness of legislative and administrative measures within the scope of EU law, and are also an aid to interpretation of EU law. Examples of general principles include proportionality⁷ and non-retroactivity (i.e. that the retroactive effect of EU law is, in principle, prohibited). Fundamental rights are also general principles of EU law and a number of these are relevant to this assessment. Those of particular relevance here are the general principles of equality before the law, non-discrimination and equality between men and women.

22. Only EU general principles which have been recognised in CJEU cases decided *before exit* will form part of domestic law after exit. After exit therefore, any question as to the meaning of retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and retained general principles (subject to section e below and the Supreme Court's ability to depart from these). However, the Bill provides that, after exit, it will not be possible for individuals to bring a freestanding claim, or for our courts to quash an administrative action, or to disapply legislation on the grounds that it breaches one or more of the general principles of EU law. Examples of cases in which national courts (in these cases the German courts) have been required to disapply provisions in national legislation because they were found to breach the general principle of non-discrimination are *Mangold v Helm* (2005) and *Kücükdeveci* (2010) (both these cases involved age discrimination).

(ii) Potential impact

23. Although under the Bill's provisions it would not be open to the courts after exit day to disapply or quash legislation on the grounds that it breaches one or other of the general principles (for example the principle of equal treatment), the courts will continue to be required to interpret pre-exit legislation in a way which is consistent with relevant general principles (so far as it is possible to do so). In circumstances where, in a challenge to primary legislation, a claim is also brought under the Human Rights Act 1998 ("HRA 98"), it will be open to the courts, in the event of a successful challenge, to make a declaration of incompatibility⁸ with the relevant right under the ECHR. We recognise that the

⁷ Proportionality is a general principle of EU law that applies to both Union action and decisions at national level that fall within the scope of EU law. Proportionality is concerned with whether a proposed action exceeds what is appropriate and necessary to achieve its objective.

⁸ Under section 4 of the HRA 1998.

approach brought about by the Bill to the general principles, including fundamental rights, may affect the remedies available to our courts. As a consequence, there may be a limited impact on those with protected characteristics seeking to rely on the general principles of EU law on equality and discrimination grounds in cases where the courts are unable to interpret legislation in a way that is consistent with the general principles.

24. Under the Bill the general principles of EU law (including those which constitute fundamental rights) will nevertheless continue to be available and followed for interpretative purposes by the courts. Furthermore, the right to equal treatment and non-discrimination in the UK exists (and will continue to exist) irrespective of the general principles of EU law, via a combination of other sources of domestic laws, EU derived laws and international law. The UK Government is committed to continuing equal treatment and non-discrimination protections after exit.

25. The provisions in the Bill that deal with the way in which the general principles of EU law will operate in UK law in future will not affect any of these other sources of equality and non-discrimination rights. So, for example, where Article 14 of the ECHR (prohibition of discrimination) is engaged, individuals will continue to be able to challenge domestic legislation or the actions of public authorities which they consider to breach that right. Likewise, any claim available to an individual under the Equality Act 2010 (for example a discrimination claim against a public authority in exercising its functions) would in no way be impacted by the provisions in the Bill. Individuals will therefore still have recourse to the domestic courts in which there exist similar rights of action based in domestic law. Our equality legislation already provides the strong legal architecture to ensure that the UK is well-placed to continue driving equality forward.

26. Overall, therefore, the Government considers that the provisions in the Bill dealing with changes to the operation of the general principles are likely to have a limited impact on individuals with protected characteristics. We consider therefore that it is appropriate to remove the ability for the courts to disapply domestic legislation which is found to be incompatible with general principles of EU law. The Government considers this outcome to be a natural consequence of the decision to leave the EU. In future it will be for Parliament to exercise its sovereign power to decide whether and how to legislate in response to a finding that a particular statutory provision is incompatible with, for example, the right to equal treatment.

c. Direct effect of directives

(i) Policy

27. Directives set out a legal framework that the member states have to follow, but leave it up to the member state to choose exactly how to make it part of their law. So, once an EU directive has been agreed, all member states have an obligation to make domestic laws that give it effect, but they have a choice as to precisely how to do so.
28. The Bill expressly preserves all domestic legislation which implements EU directives. This includes all of the domestic legislation which implements the UK's obligations under the various EU equal treatment directives and other directives which are relevant to individuals with protected characteristics. In addition, the Bill preserves the requirement on our courts and tribunals to interpret domestic legislation, so far as possible, in light of relevant directives (this is often referred to as the duty of consistent interpretation).
29. Where the Bill will make a change is in relation to the principle of the direct effect of directives. This principle was developed by the CJEU. It means that, where provisions of EU law are sufficiently clear, precise and unconditional, citizens can rely on them 'directly' as against the state if the member state has not given proper effect to them. For example, when a member state has not properly implemented a directive, that directive may nevertheless confer certain rights on individuals that the national courts must protect. This can involve disapplication of (or member states having to amend) domestic provisions which are inconsistent with the directive. Individuals can only rely on rights within directives against the state, not against other individuals; however in these circumstances the individual may instead be able to seek damages against the state - see section *d.* below for further analysis.
30. The Bill sets out that, where directly effective provisions in directives have not been implemented in UK law as of exit day, they will nonetheless be converted into domestic law if they have been recognised by the CJEU or a UK court or tribunal before exit day. After exit day however, individuals will not be able to rely on the principle of direct effect in respect of an unimplemented provision of a directive unless it has been recognised by the CJEU, a domestic court or tribunal prior to EU exit.

(ii) Potential impact

31. The Government has considered whether the approach outlined above could lead to potential impacts on individuals with protected characteristics. Given the very large number of directives which exist across a wide range of policy areas, it is not possible to identify every directive which may be relevant to this assessment. In addition, until a dispute arises and comes to be decided by a court, the question of whether a directive has been properly implemented or whether a provision is directly effective is unlikely to arise.
32. The approach to the conversion and preservation of EU law maximises certainty and stability while ensuring Parliament is sovereign. As an overall approach, the Government believes that, as a consequence of the decision to leave the EU, where a decision has been made not to retain a particular element of EU law it should not, in general, be possible for claimants to continue to rely on that aspect of EU law in litigation after exit. The concept of direct effect of directives was developed to ensure the effective application of EU law across the EU, and to prevent member states obstructing that application by not fulfilling their obligations. The Government considers that it does not make sense to maintain this concept in the context of the UK's exit from the EU. Moreover, allowing pre-exit causes of action to continue to be initiated and litigated under previous arrangements long after the UK has left the EU risks a potentially lengthy tail of cases processing through the court system based on outdated elements of law and creating greater uncertainty for businesses and individuals over what the law is and means.
33. The Government's assessment at this early stage is that for the following reasons, any potential impact on individuals with protected characteristics resulting from the approach taken in the Bill to directives is likely to be limited.
34. First, the UK has a good record on transposing directives. For example, in the equality sphere the Equality Act 2010 is compatible with the EU equality Directives (the Race Directive 2000/43/EC, the Framework Directive 2000/78/EC, the Gender Directive 2004/113/EC and the Recast Gender Directive 2006/54/EC). The Maternity and Parental Leave Regulations 1999 (as amended); the Employment Rights Act 1996; and the Statutory Maternity Pay (General) Regulations 1996 (as amended) all implement the Pregnant Workers Directive 92/85/EEC and in so doing go beyond EU law requirements in affording more generous leave and pay entitlement to expectant and new mothers.

35. Secondly, cases in the area of equalities and discrimination which have come before the courts have largely been resolved through the application of the duty of consistent interpretation (see para 28 above) which requires that domestic law in the field of EU law must, so far as possible, be interpreted to achieve the result sought by EU law. For example, in the case of *Attridge LLP v Coleman [2010]* (a case about the compatibility of domestic legislation with the relevant EU directive) the court interpreted the Disability Discrimination Act 1995 in a way which was consistent with the directive in order to provide protection to carers against associative direct discrimination. Since this duty of consistent interpretation will be maintained under the Bill in relation to pre-exit legislation, the non-retention of direct effect of directives here would not prevent such claims from proceeding or prevent judges from coming to the same conclusions after exit.
36. Furthermore, many of the CJEU judgments in the equalities and discrimination sphere have been brought into subsequent domestic legislation. For example, the Equality Act 2010 now makes express provision for associative direct discrimination thereby enshrining the case mentioned above in domestic primary legislation. New primary legislation would therefore be required to reverse the effects of such cases.
37. We have considered the possibility that, after exit, there could be a provision in a directive in the equalities sphere on which a person with a protected characteristic could have sought to rely directly on grounds that it had not been properly implemented (or had not been implemented at all). We recognise that the proposed provisions in the Bill could potentially impact on those with protected characteristics. We nevertheless consider that, on the basis of the strong legal architecture on equalities already in place domestically, any such impacts would be limited.

d. Francovich damages

(i) Policy

38. In the *Francovich* case the CJEU established that in some circumstances states have to compensate individuals for damage that they suffer as a result of the State's breach of EU law. As a result of this case, EU law confers a right to reparation where □the rule of law infringed is intended to confer rights on individuals, the breach is 'sufficiently serious' (which means that the member state has manifestly and gravely disregarded the limits of its discretion) and where there is a direct causal link between the breach and the damage. *Francovich* claims may arise where, for example, a member state

has failed to properly transpose a directive and an individual or company has suffered damage as a result.

39. Subject to further transitional provision to reflect the outcome of negotiations, the Bill provides that, on or after exit day, there will be no right in domestic law to *Francovich* damages in the event of a breach of EU law. The Bill however provides that this rule does not apply in relation to claims for *Francovich* damages where proceedings began, but are not finally decided, before exit day.

(ii) Potential Impact

40. The Government has considered whether the removal of the ability to claim *Francovich* damages could lead to identifiable adverse impacts on individuals with protected characteristics.

41. *Francovich* damages are not specific to a particular policy area or type of claim since they are available for breaches of any EU laws (subject to the conditions for liability being met by the claimant). Indeed, a study looking at *Francovich* claims over a 20-year period from 1991 to 2011 found that in over half of those cases the claimants were pursuing commercial interests. Furthermore, as a result of the strict conditions which must be met in order for a claim to succeed, there have been very few successful *Francovich* cases.

42. Additionally, the majority of *Francovich* cases in the UK have been brought on the grounds of non-implementation or insufficient implementation of a directive. Since the UK will no longer be under an obligation to implement directives after exit and directives themselves will not form part of our domestic law as retained EU law, the ability to claim *Francovich* damages would, even without an express exclusion in the Bill, fall away in many cases. We therefore consider that where an impact on those with protected characteristics might arise as a consequence of the removal of the ability to claim *Francovich* damages, this will be limited.

43. As set out above, as a consequence of the UK's decision to leave the EU and the necessary process to separate EU law from UK law, the Bill makes some changes. These changes relate to certain aspects of EU law which the Government considers are no longer appropriate or which will no longer make sense in the context of the UK's exit from the EU. This includes the removal of the ability to claim *Francovich* damages. The Government considers this outcome to be a natural consequence of the decision to leave the EU, whilst ensuring Parliament is sovereign.

e. Pre-exit CJEU case law

(i) Policy

44. Domestic courts are presently required to follow the rulings of the CJEU. The Government has been clear however that in leaving the EU, the jurisdiction of the CJEU in the UK will come to an end. After EU exit, the UK Parliament (and, as appropriate, the devolved legislatures) will be free to pass its own legislation. The Bill will not provide any role for the CJEU in the interpretation of that new law, and the Bill will not require the domestic courts to consider the CJEU's jurisprudence on review of that law.

45. In line with the overriding aims of maximising certainty and ensuring continuity, the Bill provides that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day the UK leaves the EU. However, so as not to fossilise the past decisions of the CJEU in UK law, that historic CJEU case law is to be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court (and where appropriate, the High Court of Justiciary). This means that after exit the Supreme Court and High Court of Justiciary will be able to depart from the case law we inherit from the CJEU.

(ii) Potential impact

46. It is currently very rare for the Supreme Court to depart from one of its own decisions or that of its predecessor, the House of Lords. At present, the circumstances in which it will, exceptionally, do so derive from a Practice Statement made by the House of Lords in 1966, and adopted by the Supreme Court in 2010. That Statement set out, among other things, that while treating its former decisions as normally binding, it will depart from its previous decisions "*when it appears right to do so*"⁹.

47. We would expect the Supreme Court and High Court of Justiciary to take a similar approach to departing from retained CJEU case law as they do in departing from their own case law. It is not yet known what impact this will have on those with protected characteristics but we recognise that the proposed provision might create both beneficial and/or adverse impacts on those with protected characteristics where a court departs from retained CJEU case law, depending on the content of the courts' judgments and the

⁹ The High Court of Justiciary (HCJ) will apply its own tests in deciding whether or not to depart from inherited CJEU case law. The HCJ can sit with varying numbers of judges. A larger Full Bench of the HCJ can overrule a prior decision of a small Full Bench. It will generally do so where it is persuaded that a previous decision might be wrong.

extent to which they may diverge from the position set out by the CJEU.

48. As many of the CJEU's judgments in the equalities and discrimination sphere have been brought into subsequent legislation, now set out in the Equality Act 2010, new primary legislation would be required to reverse the effects of such cases.
49. The Government considers that providing for domestic courts to determine the meaning of EU-derived law by reference to the CJEU's case law will provide certainty and continuity as to the meaning of EU-retained law on EU exit for those with protected characteristics. Beyond EU exit, it will be for Parliament to exercise its sovereign power to decide when and how to legislate on equality matters in future. It is worth noting that Parliament could decide to legislate in future in such a way that in fact further benefits individuals with protected characteristics.

Conclusion

50. The UK has voted to leave the EU in a democratic referendum. The act of leaving the EU in itself means that it is inevitable that elements of the EU's supranational framework will not be retained. Nevertheless, whilst the Bill will convert into UK law much of the law accrued over decades of EU membership, the areas where it provides for a different approach are aspects that were adopted as a consequence of the UK's membership of the EU. The effect of this is that, as set out above, there may potentially be impacts, both adverse and positive, on those with protected characteristics as defined by the Equality Act 2010 when the UK leaves the EU. We do not however consider that anything in the Bill will prevent the UK, on EU exit, from continuing to protect and advance equalities when we cease to be EU members. Whilst EU legislation and case law over the years has contributed to and been reflected in the UK legal system, the UK does not need to be part of the EU, nor bound by EU legislation, to have strong equalities protections. For example, existing domestic law protections against discrimination, harassment or victimisation in the provision of goods and services to disabled people, and the public sector equality duty, both go beyond the minimum requirements of EU law.
51. This Government has made a firm commitment to maintaining the UK's long standing record of ensuring UK rights and traditional liberties are protected and is committed to ensuring that equalities are properly protected in UK

legislation once the UK has left the EU¹⁰. This will ensure the continued protection of people's rights not to be discriminated against, harassed or victimised in the provision of goods, services and public functions, housing, transport and education. The Government has also made a clear commitment to protect workers' rights that are enjoyed under EU law, and ensure that they keep pace with the changing labour market. The UK has some of the strongest equalities legislation in the world and the Government will continue to make sure that these rights are protected.

Department for Exiting the European Union

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¹⁰ The Equality Act 2010 is the primary vehicle for implementation of the EU equality directives and individuals can rely directly on rights set out in this legislation.