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End of Brexit transition: Workers' rights

By Daniel Ferguson

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Summary

The United Kingdom formally left the European Union on 31 January 2020. Under the terms of the UK-EU Withdrawal Agreement, the UK is currently in a transition period until 31 December 2020. During this time, EU law remains binding on the UK. Once the transition period has ended, the UK will no longer be bound by EU law.

The UK and the EU are currently negotiating a future relationship agreement. If an agreement is reached before the end of the transition period, the UK will be bound by the terms of that agreement, which will likely include provisions on employment standards. If an agreement is not reached, the UK will be able to amend or repeal EU-derived workers' rights without breaching international law.

Current position: EU and UK employment law

A significant portion of UK employment law is derived from and grounded in EU law. Most EU workers' rights are set out in directives and are implemented in the UK through primary or secondary legislation.

By virtue of the *European Communities Act 1972* (ECA), wider principles of EU law also have effect in the UK. This includes the 'principle of supremacy' which says domestic law must be disapplied if it conflicts with EU law that has direct effect. It also includes the 'interpretative obligation' which means that courts must interpret domestic law in a way that is compatible with EU law. UK courts are bound to follow the judgments of the European Court of Justice (ECJ) and can also refer to the ECJ questions relating to the interpretation of EU law.

In a number of cases, EU law has introduced new rights into UK law, such as the right to holiday pay or the protection for agency workers. In other cases, EU law has extended rights that already existed in UK law, such as the right to equal pay. In a number of areas, the UK has chosen to go further than what is required by EU law. For example, the UK provides 39 weeks of paid maternity leave compared to the 14 weeks required by EU law.

Retained EU law

The *European Union (Withdrawal) Act 2018* provides that most of EU law that has effect in the UK on 31 December 2020 will be saved as "retained EU law". This means that secondary legislation, like the *Working Time Regulations 1998*, will still have effect, as well as primary legislation that implemented EU law, like the *Equality Act 2010*.

The principle of supremacy and the interpretative obligation will continue to apply to UK legislation passed or made before the end of the transition period. UK courts will also be bound to follow judgments of the ECJ issued before the end of transition, although the Supreme Court, the Court of Appeal and other appellate courts have been given the power to depart from ECJ judgements by applying certain tests.

The EU Charter of Fundamental Rights will not be saved as retained EU law.

EU-derived domestic legislation keeps its status as either primary or secondary legislation. This means that the *Working Time Regulations 1998* can be amended by new secondary legislation but the *Equality Act 2010* can only be amended by primary legislation.

What will happen if there is no deal?

If the UK and EU do not reach a future relationship agreement by 31 December 2020, from 1 January 2021 the UK will no longer be bound to EU employment standards. There will be no immediate change as existing EU employment rights will be saved as retained

EU law. However, Parliament could amend or repeal retained EU workers' rights. The UK would be under no obligation to implement new EU employment directives.

Employment law is a reserved matter for Scotland and Wales. As such, decisions about amending or repealing retained EU workers' rights would be for the UK Parliament.

Employment law is devolved in Northern Ireland, meaning it will be for the Northern Ireland Assembly to legislate to amend or repeal retained EU workers' rights. However, Article 2(1) of the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement requires Northern Ireland to continue to apply EU equality law. The *European Union (Withdrawal Agreement) Act 2020* provides that the Northern Ireland Assembly does not have the competence to legislate incompatibly with Article 2(1).

What will happen if there is a deal?

The Political Declaration on the framework for the future relationship says that a future UK-EU agreement should contain a 'level playing field' (LPF) clause that ensures both parties uphold common employment standards in force at the end of transition.

The EU's draft text for the future UK-EU agreement contains a clause that would prevent both sides from reducing their employment standards below 'common standards' at the end of transition. It also contains a 'ratchet clause' that says that if both sides choose to raise their employment standards in the future, they cannot reduce their standards below the new common baseline.

The UK's draft text, which is heavily based on the EU-Canada trade agreement (CETA), contains a clause that prevent both sides from waiving or failing to enforce their own employment standards in order to gain a trade advantage. The parties would "recognise that it is inappropriate" to reduce standards but this is a soft, non-binding, obligation. The parties would "seek to ensure" high levels of protection in the future but, again, this would be aspirational and non-binding.

Reports in the media suggest that the level playing field is one of the key remaining issues to be settled in the negotiations. A key point of contention appears to be an EU demand that if one side raises their labour standards in the future but the other side doesn't, the side that has raised its standards can take reciprocal action. The reports suggest that the UK has agreed to such a provision in principle although discussions are ongoing about when a party would be allowed to take reciprocal action and what mechanisms there would be for determining what action they can take.

It is not possible to provide a concrete assessment of the impact of a deal until one is agreed and its text is published.

1. EU & UK employment law

A significant portion of UK employment law is derived from and grounded in EU law. To understand the impact of the UK's departure from the EU on workers' rights, it is necessary to understand how EU employment law works and how it has been implemented in the UK.

1.1 EU employment law

EU law covers a broad range of areas ranging from working time and maternity rights to equality law and agency working.

EU competence

The EU can only act when the Treaties give it the competence to do so.[1]

In the context of employment law, the key competence can be found in Article 153 of the Treaty on the Functioning of the European Union (TFEU), which forms part of the Social Chapter.[2]

Article 153 provides the EU the competence to adopt directives in the following areas:

> (a) improvement, in particular, of the working environment to protect workers' health and safety;
>
> (b) working conditions;
>
> (c) social security and social protection of workers;
>
> (d) protection of workers where their employment contract is terminated;
>
> (e) the information and consultation of workers;
>
> (f) representation and collective defence of the interests of workers and employers, including co-determination;
>
> (g) conditions of employment for third-country nationals legally residing in Union territory;
>
> (h) the integration of persons excluded from the labour market;
>
> (i) equality between men and women with regard to labour market opportunities and treatment at work.

The right to pay and the right to strike are explicitly excluded.[3]

In most cases, the EU can adopt directives using the ordinary legislative procedure, which allows qualified majority voting. However, on some issues, like termination of employment, directives must be subject to the special legislative procedure, which requires a unanimous vote.[4]

1 Article 5(2), Treaty on the European Union (TEU)
2 The Social Chapter was initially added in the Treaty of Maastricht in 1993 but only as a protocol as the UK objected to its inclusion. The UK agreed to formally include the Social Chapter in the main text of the Treaty in 1997 following the election of the New Labour Government. See Social Chapter, House of Commons Library Research Paper 97/102, 2 Sept 1997
3 Article 153(5), TFEU
4 Article 153(2), TFEU

EU employment laws

The vast majority of EU employment law takes the form of directives. Some of the better-known directives include the Working Time Directive (2003/88/EC) and the Equality Framework Directive (2000/78/EC).

A small number of EU employment laws, adopted under different competences, take the form of regulations. Examples include the General Data Protection Regulations (Regulation (EU) 2016/679) and the Free Movement of Worker Regulations (Regulation (EU) 492/2011).

Finally, a small number of EU employment rights are set out directly in the Treaties. One example is the right to equal pay (Article 157 TFEU).

Some of the important areas covered by EU employment law include:

- **Atypical working** (agency, part-time and fixed-term workers)
- **Equality** (discrimination; equal pay; maternity rights)
- **Health and safety** (occupational health and safety)
- **Information** (written statements; information and consultation)
- **Restructuring** (insolvency; collective redundancy; TUPE)
- **Working time** (annual leave; rest breaks; working time)

See the Annex to this paper for a list of EU employment rights legislation.

1.2 EU employment law in the UK

The *European Communities Act 1972* (ECA) is the legislation that gave effect to EU law in the UK. The ECA incorporated wholesale the EU Treaties and gave them domestic legal effect on an ongoing basis.

Legislation implementing EU directives

EU directives – which are the bulk of EU employment law – require Member States to pass domestic legislation to give effect to them.

In the UK, EU directives are given effect by either primary legislation or secondary legislation made under section 2 of the ECA. For example, the *Equality Act 2010* implements EU equality law. Meanwhile, the *Working Time Regulations 1998* give effect to EU working time law.

How EU directives are implemented will likely affect how they can be amended or repealed after 31 December 2020 (see below).

Supremacy of EU law

As noted above, the ECA incorporates the entirety of EU law into UK law, including not only the text of the Treaties but principles of EU law.

One of the fundamental principles of EU law is the supremacy of EU law. Put simply, this requires that all domestic law be compatible with EU law and, where it is not compatible, that EU law must prevail.[5]

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5 Case 6/64 *Costa v ENEL* [1964] ECR 585

In the UK, courts can disapply even primary legislation if it is found to be incompatible with directly effective EU law.[6]

Direct and indirect effect

"Direct effect" is a principle of EU law that certain EU law rights can be relied on directly by parties in proceedings before domestic courts.[7]

Direct effect can be either 'vertical' or 'horizontal'. Vertical direct effect means a person can rely directly on EU law in claims against the state (e.g. government departments or local authorities). Horizontal direct effect means a person can rely directly on EU law in claims against other private parties.

The EU Treaties, as well as EU regulations and decisions, are capable of having both vertical and horizontal direct effect. EU directives can have direct effect in some circumstances but only vertically.[8]

The principle of "indirect effect" requires courts in EU Member States to interpret their domestic law in a way that is compatible with EU law.[9] This principle has been particularly important in the implementation of EU employment rights in the UK.

Example: Indirect effect

Article 7 of the *Working Time Directive* provides that workers have a right to four weeks of "paid annual leave". In the UK this is implemented by the *Working Time Regulations 1998* (WTR). In order to calculate the rate of pay for a period of annual leave, the WTR uses domestic rules for calculating 'a week's pay' which, in some cases, excluded certain forms of pay such as commission and overtime.

In *Lock v British Gas Trading Ltd* the European Court of Justice (ECJ) held that pay for annual leave had to be calculated as including commission.[10] When the case returned to the UK, the Employment Tribunal effectively read a new provision into the WTR that required commission to be included when calculating pay for annual leave. The judgment was upheld by the Court of Appeal.[11]

Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (the Charter) binds the EU institutions and Member States when they apply EU law. The Charter has both vertical and horizontal direct effect, meaning it can be relied on directly in UK courts.

The Charter is not the same as the European Convention on Human Rights (ECHR) which is a separate treaty unrelated to the EU. Unlike the ECHR, which is implemented by the *Human Rights Act 1998*, if there are inconsistency between UK law and the Charter, courts can disapply UK law, including primary legislation. However, the Charter only applies when the UK is implementing EU law.

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6 *R (Factortame (No. 2)) v Secretary of State for Transport* [1991] 1 AC 603
7 Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337
8 Case152/84, *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ECR 723
9 Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-6363
10 Case 539/12 *Lock v British Gas Trading Ltd* [2014] ICR 813
11 *Lock v British Gas Trading Ltd* [2017] ICR 1

In the context of EU employment law, the Charter has been used both for interpreting the scope of EU employment rights and for challenging the effectiveness of remedies under UK law.

Example: Charter of Fundamental Rights

In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*, workers at two foreign embassies had sought to bring claims against them for breaches of the minimum wage, holiday pay, working time rules and for unfair dismissal.[12] The embassies argued that they were immune under the *State Immunity Act 1978*. The workers argued that this was a breach of the right to a fair hearing under Article 6 ECHR and Article 47 of the EU Charter.

The UK Supreme Court found that these ECHR and Charter rights had been violated. With respect to the domestic claims (minimum wage; unfair dismissal) the Court issued a declaration of incompatibility under the *Human Rights Act 1998* but the claims were still barred. With respect to the EU law claims (working time; holiday pay), the Court disapplied the 1978 Act, allowing the claims to proceed.

Case law of the European Court of Justice (ECJ)

ECJ case law has been a particularly important source in the interpretation and development of EU employment law. By virtue of the *ECA*, ECJ case law was binding on UK courts. In addition, UK courts could refer questions of EU law to the ECJ.[13]

In the field of holiday pay, for example, UK courts have referred a series of cases to the ECJ, leading to a number of important judgments. These have included the prohibition on rolled-up holiday pay;[14] requiring bonuses, commission and overtime payments to be included in holiday pay calculations;[15] allowing workers to carry over annual leave when they have been unable to take it because of a period of sick leave;[16] and allowing annual leave to carry over indefinitely where employers have told a worker that they were not entitled to paid annual leave.[17]

'Worker' status and EU law

In UK employment law, the rights that a person enjoys depends on their employment status. There are three broad categories: 'employees' enjoy the full range of employment rights; 'workers' enjoy a limited set of rights; and the genuinely self-employed are not covered by employment law.[18]

EU employment directives apply to 'workers'. The term worker has its own autonomous definition in EU law. A person is a worker in EU law if they perform services for or under the direction of another person in return for remuneration.[19] The ECJ has found, for example, that foster

12 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62
13 Article 267, TFEU
14 Case 131/04 *Robinson-Steele v RD Retail Service Ltd* [2006] ICR 932
15 Case 155/10 *Williams and Others v British Airways Plc* [2012] ICR 847; Case 539/12 *Lock v British Gas Trading Ltd* [2014] ICR 813
16 Case 520/06 *Stringer v Revenue and Customs Commissioners* [2009] ICR 932
17 Case 214/16 *King v Sash Window Workshop Ltd* [2018] ICR 693
18 Employment Status, Commons Library Briefing Paper CBP-8045, 18 March 2018
19 Case 256/01 *Allonby v Accrington & Rossendale College* [2004] ICR 1328

carers are workers within the meaning of EU law.[20] However, the ECJ has held that there is no single definition of 'worker' in EU law and that it can vary from one context to another.[21]

There have been a number of important challenges to the scope of UK employment law protections on the basis of the EU definition of worker. For example, in a recent case brought in the context of COVID-19, the High Court held that the UK had failed to properly implement EU law by restricting certain health and safety protections to employees, including the right to PPE and the protection from detriments for refusing to go to work for health and safety reasons.[22]

However, the ECJ has also held that the definition of 'worker' in EU law does not preclude Member States from excluding from the right to paid annual leave those who can send a substitute worker. The ECJ noted that it is ultimately for domestic courts to assess the facts and determine whether a person is a 'worker' within the meaning of the EU case law. It noted that a right of substitution suggests there is not a relationship of subordination.[23]

In the past, UK courts have found that a genuine right of substitution will often mean that a person is an 'independent contractor' rather than a 'worker'. This has a particular impact on those in the gig economy.[24]

1.3 Impact of EU employment law in the UK

It is not possible to provide a comprehensive overview of how EU law has impacted UK employment law. The following are some illustrative examples of the changes that have come about because of EU law.

Introducing new employment rights

In a number of cases, EU law has introduced entirely new rights into UK law. The Working Time Directive (93/104/EC) (now replaced) introduced the right to statutory paid annual leave, which did not previously exist. Similarly, the Temporary Agency Work Directive (2008/104/EC) created protections for agency workers that did not exist in UK law.

Extending existing UK employment rights

In a number of cases, EU directives introduced employment rights that already existed in UK law. Even in such cases, EU law has had an impact.

First and foremost, once an EU directive is introduced, Member States cannot reduce their employment protections below that level.

In addition, EU directives or ECJ case law relating to it may extend the rights that already exist in UK law. For example, in 1992 the EU adopted the Pregnant Workers Directive (92/85/EC), creating a right to 14 weeks of maternity leave. The UK already had a right to maternity leave but it

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20 Case 147/17 *Sindicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* [2019] ICR 211

21 Case 393/10 *O'Brien v Ministry of Justice* [2012] ICR 955

22 *R (Independent Workers Union of Great Britain) v Secretary of State for Work and Pensions* [2020] EWHC 3050 (Admin)

23 *B v Yodel Delivery Network Ltd* C-692/19

24 See e.g. *R (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 (Admin)

was limited to employees who had worked for their employer for two or more years.[25] The EU directive ultimately led to maternity leave being extended to all employees as a day-one right.

Another example is equal pay. When the UK joined the EEC in 1973, it had already passed the *Equal Pay Act 1970*. However, following a case brought by the European Commission in 1982, the UK had to amend the 1970 Act to ensure that equal pay claims could be brought when male and female employees did work of equal value.[26] Subsequent ECJ judgments have further extended the right to equal pay in the UK.[27]

UK 'gold-plating' EU employment rights

In a number of cases, the UK law has built on EU employment directives to provide greater rights. A well-known example is the fact that UK law provides for 5.6 weeks of paid annual leave, more than the minimum of 4 weeks that is required by EU law. Likewise, UK law provides 39 weeks of paid maternity leave, more than the 14 weeks required by EU law.

Scale of the impact of EU law on UK employment law

EU law has had a significant impact on UK employment law. This ranges from creating new rights, extending existing rights and strengthening the enforcement of rights in UK courts.

In a legal opinion for the Trades Union Congress, Michael Ford QC, an employment barrister and Professor of Law at the University of Bristol, summarised how powerful was the impact of EU employment law on UK law, especially when compared to other international agreements:

> The above rules illustrate how powerful are the duties to give effect to and protect rights conferred by EU law, including those rights conferred on workers in Directives. By various means the law circumscribes the powers of Parliament, the state and courts to act contrary to EU law. These rules are *much* stronger than the presumption that legislation should be construed in accordance with the UK's other international treaty obligations, such as UN and ILO Conventions, which do not limit the UK's freedom to legislate in a manner inconsistent with them.[28]

In a report on Brexit and workers' rights, the Institute for Employment Rights concluded that EU employment law has established a minimum floor of employment rights in the UK and created many rights that Governments may not otherwise have introduced.[29]

Nevertheless, the Johnson Government has emphasised how the UK has gone further than EU law in certain areas and has said that the UK will continue to enhance workers' rights. In a debate on Brexit and workers' rights in October 2019, Andrea Leadsom, then Business Secretary, said:

> I find it extraordinary that the hon. Lady thinks that the only valid protector of UK workers' rights can be the European Union. Why

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25 Sections 33 and 45, *Employment Protections (Consolidation) Act 1978*

26 *Commission of the European Communities v United Kingdom* C-40/82

27 See e.g. Case 127/92 *Enderby v Frenchay HA* [1994] ICR 112 where the ECJ held that equal pay claims could be brought where statistics showed a difference in pay between jobs of equal value, even if the discriminatory cause of that difference could not be identified.

28 Michael Ford QC, Workers' Rights from Europe: The impact of Brexit, 7 April 2016

29 Nicola Countouris and Keith Ewing, Brexit and Workers' Rights, IER, November 2019

> on earth does she think that her party, my party, the other Opposition parties and our strong trade union tradition in the UK are utterly incapable of building on the superb tradition we already have in the UK of exceeding workers' rights in the EU in so many areas? Once we have left the European Union, the United Kingdom will not be represented in EU institutions and nor will we have any direct influence on future EU legislation on workers' rights. Why then should the Government and this Parliament seek to engineer circumstances where we are required to implement legislation over which we have had no say?
>
> As we leave the European Union, we have a unique opportunity to enhance protections for the workforce and tailor them to best support UK workers. It will be for the United Kingdom to create and enhance UK employment rights and to take advantage of the superb opportunities for new UK-wide skills, jobs and prosperity that await us after we have left the European Union.[30]

[30] HC Deb 29 October 2019 c205

2. Retained EU law

The rules surrounding retained EU law, its continued application in the UK, its interpretation and how it can be amended are set out in the *European Union (Withdrawal) Act 2018* (EUWA) as amended by the *European Union (Withdrawal Agreement) Act 2020* (WAA).

This section provides a brief overview of the relevant rules and what this will mean for workers' rights. For further information, see the Library Briefing, The status of "retained EU law" (CBP-8375) and Constitutional implications of the Withdrawal Agreement legislation (CBP-8805).

2.1 Repealing the *European Communities Act 1972*

As noted above, EU law was incorporated into UK law through the *European Communities Act 1972* (ECA).

The *ECA* was technically repealed by *EUWA* on 31 January 2020. However, as the UK-EU Withdrawal Agreement provided that EU law would continue to be binding on the UK during the transition period, the *WAA* provided that the effects of the *ECA* would be saved until "IP Completion day", 31 December 2020.[31]

As such, from 1 January 2021, the *ECA* will cease to have effect.

2.2 Retained EU law

The repeal of the *ECA*, or the end of the saving provision, would normally have meant that EU law no longer had any domestic legal effect. Furthermore, any secondary legislation made under the *ECA*, including legislation like the *Working Time Regulations 1998*, would have no longer had a legal basis and would have ceased to have effect.

In order to avoid this situation, the *EUWA* provides that most EU law that has effect in the UK on 31 December 2020 will be saved and given new domestic legal footing as "retained EU law". The *EUWA* recognises three types of retained EU law. The type of retained EU law affects, among other things, how it can be amended or repealed:

- **EU-derived domestic legislation**
  This includes any domestic legislation which was passed, made or operated to give effect to EU law.[32] It includes not only secondary legislation which would have ceased to have effect but also primary legislation, like the *Equality Act 2010*, which would not have been affected by the repeal of the *ECA*.
- **Direct EU legislation**
  This includes EU regulations, decisions and tertiary legislation.[33] As such legislation had direct effect in the UK by virtue of the *ECA*, there will likely have been no domestic implementing legislation.

31 Section 1, *EUWA*; section 1, *WAA*
32 Section 2, *EUWA*
33 Section 3, *EUWA*

- **Otherwise retained EU law**
  This is a broad provision which captures "rights, powers, liabilities, obligations, restrictions, remedies and procedures" that had effect in UK law by virtue of the *ECA*.[34] Principally, it captures rights set out in the EU Treaties which had direct effect in the UK.

As discussed above, most EU employment laws are directives implemented in the UK through domestic legislation. As such, these will be saved as "EU-derived domestic legislation".

The effect of this is that the vast majority of EU employment laws that currently have effect in the UK will remain in force on 1 January 2021 and beyond, unless and until they are amended or repealed (see below).

EU laws that have been passed but which have not come into force by 31 December 2020 will not form part of retained EU law. EU workers' rights directives that have been passed but which have not yet come into force include the Directive on Transparent and Predictable Working Conditions ((EU) 2019/1552), the Directive on Work-Life Balance for Parents and Carers ((EU) 2019/1158) and the Whistleblowing Directive ((EU) 2019/1973). The UK will not be under an obligation to implement these directives, unless agreed otherwise in a future UK-EU treaty.

However, the UK has taken steps to introduce similar rights to some of those in these EU directives. In December 2018, the Government made legislation to extend the information that must be provided to workers by employers in a written statement of employment rights. This reflects changes that will be made to EU law when the Directive on Transparent and Predictable Working Conditions comes into effect in August 2022. The UK amending legislation was made under section 2 of the *ECA*.[35] The Johnson Government has argued that through the Good Work Plan the UK is moving faster than the EU in introducing these rights.[36]

Supremacy of retained EU law

The *EUWA* provides that the principle of supremacy of EU law continues to apply to the interpretation and disapplication of legislation passed or made before 31 December 2020.[37] The Explanatory Notes explains that UK legislation passed before the end of transition can be disapplied if it conflicts with direct EU legislation (i.e. EU law that had direct effect). In addition, it explains that when courts are interpreting pre-transition UK legislation, they should continue to interpret it so as to be compatible with the relevant EU directives.[38]

The principle of supremacy does not apply to legislation passed post-transition. However, supremacy will apply to pre-transition legislation that is modified after the end of transition if the application of the principle is consistent with the intention of the modification.

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34 Section 4, *EUWA*
35 *Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2018/1376)*
36 See Insecure work: the Taylor Review and the Good Work Plan, Commons Library Briefing Paper CBP-8817 (Sections 6, 14 and 15)
37 Section 5, *EUWA*
38 Explanatory Notes to the European Union (Withdrawal) Act 2018, paras. 103-104

Limits of retention: correcting deficiencies arising from EU exit

Section 8 of the *EUWA* provides Ministers with a power to make regulations to correct any deficiencies in retained EU law arising as a result of the UK's exit from the EU.

In March 2019, the Government made the *Employment Rights (Amendment) (EU Exit) Regulations 2019*. For the most part, these regulations make minor technical amendments to references in retained EU employment law.

However, the regulations do make a significant change to the rules on European Works Councils (EWCs). Under the European Works Council Directive (2009/38/EC), employees in companies with staff in two or more EU Member States can request to set up EWCs. These are bodies that represent employees and must be consulted on significant business decisions at the European level that could impact working conditions. The Directive applies to companies with more than 1,000 employees and 150 employees in at least two different EU Member States. In the UK, the Directive is implemented by the *Transnational Information and Consultation of Employee Regulations 1999* (TICE Regulations).

The 2019 EU Exit Regulations will remove the right of employees in the UK to request to set up a new EWC from 1 January 2021.[39]

The Government guidance on employment rights from 1 January 2021 explains that while it will not be possible to set up new EWCs, workers who are already in an EWC may be able to continue to participate:

> If you are employed in the UK you will no longer be able to ask your employer to set up an EWC from 1 January 2021. However, if a request to set up an EWC is submitted before 1 January 2021 it will be allowed to complete.
>
> If you're currently a representative, you may be able to be involved with your company's EWC from 1 January 2021 if your company agrees. We will make sure the enforcement framework, rights and protections for employees in UK EWCs are still available as far as possible.

Limits of retention: the Charter of Fundamental Rights

The *EUWA* specifically provides that the EU Charter of Fundamental Rights will not be saved as retained EU law. However, this does not prevent any fundamental principles or rights that were recognised independently of the Charter from forming part of retained EU law.[40]

The Joint Committee on Human Rights has published a right-by-right analysis of the impact of not retaining the Charter. Commenting on Article 31 of the Charter, the right to fair and just working conditions, the Committee explained that while the individual employment rights will be retained as EU-derived domestic legislation (above), removing the Charter could have an impact on the enforcement of those rights:

> Article 31 of the Charter sets out the right to fair and just working conditions. Although the ECJ has held that Article 31 does not confer an enforceable right upon individuals, the Government

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39 Para. 9 of Schedule 2, *Employment Rights (Amendment) (EU Exit) Regulations 2019*
40 Section 5, *EUWA*

> recognises that this right is based on EU directives which have been incorporated into domestic law in various health and safety regulations and employment Acts. This EU-derived legislation will be preserved by clause 2 of the Bill. However, as "retained EU law", they will not provide the same remedies as the Charter. Further, they may be subject to amendment by way of secondary legislation.[41]

Commenting on Article 47 of the Charter, the right to effective remedy, the Committee highlighted the *Benkharbouche* case (discussed above) where the Supreme Court disapplied the *State Immunity Act 1978* to allow workers are foreign embassies to bring claims against them for breaches of EU employment law. The Committee concluded that the absence of the Charter may have resulted in a different outcome.[42]

To the extent that the Charter contains rights that are more specific than those found elsewhere in EU law – in directives, general principles and so on – these rights will be lost on 1 January 2021.

2.3 Interpretation of retained EU law

As noted above, the case law of the ECJ has played a significant role in the interpretation and development of EU employment law. UK courts have been bound to follow ECJ judgments and have been able to refer to the ECJ questions about the compatibility of UK law with EU law.

Pre-transition ECJ case law

The *EUWA* provides that when UK courts are interpreting retained EU law, they will remain bound by ECJ judgments issued before the end of the transition period. However, this only applies so far as the retained EU law is unmodified. If retained EU law has been modified, courts may continue to follow ECJ jurisprudence but only if doing so would be consistent with the intention of the modification.[43] This is something that will need to be decided by the courts on a case-by-case basis.

The *EUWA* provides that the UK Supreme Court is not bound to follow pre-transition ECJ case law. Instead, the Supreme Court may depart from pre-transition case law by applying the same test that it would apply when deciding whether to depart from its own case law.

Under amendments made by the *WAA*, Ministers have a power to make regulations to give lower courts the right to depart from pre-transition ECJ case law.[44] The Government has made legislation which gives the Court of Appeal in England and Wales, the Inner House of the Court of Session in Scotland, the Court of Appeal of Northern Ireland and other appellate courts power to depart from pre-transition case law.[45] The Employment Tribunal, the Employment Appeal Tribunal, among other courts, will remain bound by pre-transition ECJ case law.

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41 Joint Committee on Human Rights, Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis, HC 774, 26 January 2018, para. 103
42 Ibid., para. 120
43 Section 6, *EUWA*
44 Section 6(5A), *EUWA*
45 *European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525)*

In response to a public consultation on this issue, the Government said that giving the Court of Appeal the power to depart from ECJ case law would "strike the appropriate balance between the need for legal certainty and for timely departure from retained EU law".[46]

However, the Employment Lawyers Association argued that extending the power to depart would create legal uncertainty, could lead to unnecessary litigation and could change settled law with far-reaching consequences. In particular, it argued that if retained EU law is to be changed, it should be done through Parliament, not the courts:

> ELA is apolitical and adopts no position on whether the law should be changed so as to depart from previous ECJ decisions. We are however concerned that extending the power to depart from retained EU law will have unintended consequences, and brings with it immense uncertainty for the reasons set out above. We do not believe that allowing what will still be appellate courts in the context of employment law to depart from retained EU law will necessarily lead to more rapid change than allowing Parliament to legislate as it sees fit. We do not believe it should be left to the courts to determine economic and social policy or labour market reform.[47]

Ultimately, courts and tribunals will need to consider on a case-by-case basis whether they are bound to follow pre-transition ECJ judgments. Ultimately this will depend on the type of court and modifications made to the retained EU law, among other things.

One legal issue that illustrates the difficulties that might face the courts in applying retained EU case law is historic liability for holiday pay.

In the UK, a worker who has not been paid holiday pay can bring a claim for unlawful deduction from wages.[48] Such claims must be brought within three months of the deduction or, if there have been a series of deductions, within three months of the last deduction.[49] UK legislation says that a claim for an unlawful deduction from wages can only go as far back as two years from the date of the complaint.[50] Furthermore, the Employment Appeal Tribunal has held that a series of deductions is broken if there is a period of more than three months between deductions.[51] The Court of Appeal in Northern Ireland rejected that position but its judgment is not binding in the rest of the UK.[52]

In *King v Sash Windows Workshop Ltd*, the ECJ held that if a worker does not take annual leave because their employer has told them that they are not entitled to paid annual leave, their unused leave carries over indefinitely and the they can claim payment in lieu of leave when their employment ends.[53]

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46 Ministry of Justice, Response to the consultation on the departure from retained EU case law by UK courts and tribunals, CP 303, October 2020, p36
47 Employment Lawyers Association, Retained EU Law Consultation: Response from the Employment Lawyers Association, 13 August 2020, para. 19
48 *HMRC v Stringer* [2009] ICR 985
49 Section 23, *Employment Rights Act 1996*
50 *Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322)*
51 *Bear Scotland v Fulton* [2015] ICR 211
52 *Chief Constable of Northern Ireland v Agnew* [2019] NICA 32
53 Case 214/16 *King v Sash Window Workshop Ltd* [2018] ICR 693

Caspar Glyn QC, an employment barrister, has argued that in light of the decision in *King*, both the statutory two year limit and the EAT judgment on breaking a series of deductions could likely be successfully challenged as being incompatible with EU law in cases involving workers who have not been paid for leave. He also questioned whether *King* could be used to challenge these rules more generally in cases involving underpayment of holiday pay.[54]

From 1 January 2021, the judgment in *King* will remain binding on the Employment Tribunal and the Employment Appeal Tribunal. However, the Court of Appeal could be asked to depart from it. It would also be open to Parliament to modify the relevant retained EU law or pass new legislation setting limits on back pay claims which would not be subject to the supremacy of EU law.

Post-transition ECJ case law

UK courts will not be bound to follow ECJ judgments that are issued after 31 December 2020, although they may have regard to them.[55] In addition, UK courts will no longer be able to refer questions about the interpretation of EU law to the ECJ.

2.4 Amending retained EU law

The *EUWA* sets out the rules on how retained EU law can be amended. The rules vary depending on the type of retained EU law.

'EU-derived domestic legislation' – the majority of EU employment law – retains the status that it had before the end of transition. For example, the *Working Time Regulations 1998* will stay as secondary legislation, meaning they can be amended by new secondary legislation. The *Equality Act 2010* will stay as primary legislation, meaning that it can only be amended by new primary legislation.[56]

A large portion of EU employment rights are implemented in the UK through secondary legislation made under the *ECA*. In theory, it would be easy to amend these rights as the Government would just need to make new secondary legislation. However, the Government can only make secondary legislation through a power in primary legislation. As the *ECA* will have been repealed, the Government would need to find a power in another piece of primary legislation or pass new legislation to give itself the power to amend EU-derived employment legislation.

The Institute for Public Policy Research (IPPR) argues that employment legislation 'least at risk' of being amended are those rights set out in primary legislation (e.g. *Equality Act 2010*). Secondary legislation made under the *ECA* is 'at risk' for the reasons above. Secondary legislation made under other powers (e.g. *Part-Time Workers Regulations 2002*) are 'most at risk' as they could be amended using that same power.[57]

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54 Caspar Glyn QC, The death of holiday pay has been greatly exaggerated, but has the King slain Bear Scotland?, Cloisters, 29 November 2017
55 Section 6(2), *EUWA*
56 Section 7, *EUWA*
57 Marley Morris, No-deal Brexit: The implications for labour and social rights, IPPR, October 2019, pp11-13

The *EUWA* contains separate rules on amending 'direct EU legislation' and 'otherwise retained EU law'. These rules are covered in detail in the Library Briefing, The status of "retained EU law" (CBP-8375).

Employment law is a devolved matter in Northern Ireland. Scotland and Wales are bound by UK employment law.

From 1 January 2021, the Northern Ireland Assembly and Executive will be able to amend any retained EU employment laws. Under the *EUWA* the UK Government has the power to make 'section 12 regulations' to prevent a devolved administration modifying retained EU law[58] To date, no such regulations have been made.

2.5 Protecting retained EU workers' rights

In March 2019, the May Government published draft clauses for protecting retained EU workers' rights which it said it would include in its forthcoming *Withdrawal Agreement Bill*.

Broadly speaking, the draft clauses would have done two things:

- A Minister in charge of a Government Bill would have to make a statement, before Second Reading in each House, saying whether, in their opinion, the Bill would reduce retained EU workers' rights (a statement of non-regression). Before making the statement, the Minister would need to have consulted with representatives of employers and employees (e.g. trade unions).
- The Secretary of State would have to regularly lay a report before Parliament saying whether, in the relevant reporting period, the EU had adopted any new employment rights legislation. Further, the Secretary of State would have to say whether, in their opinion, UK law already provided equivalent rights and, if not, what steps the Government intended to take. Both Houses would be given a vote on whether to approve or disapprove the statement.

The clauses would not have stopped the Government legislating to weaken retained EU workers' rights or required it to keep pace with EU employment law going forward.

The May Government never introduced its Bill but identical clauses were included in the *European Union (Withdrawal Agreement) Bill* introduced by the Johnson Government in October 2019.[59] However, following the General Election, the Johnson Government reintroduced the Bill in December 2019 and without the clauses protecting EU workers' rights. In the December 2019 Queen's Speech, the Johnson Government said that, instead, it would include the clauses in a forthcoming *Employment Bill*. This Bill has yet to be introduced.

As such, UK law does not provide any special protection to retained EU workers' rights. For more information, see the Commons Library Insight, Removal of workers' rights in the EU (Withdrawal Agreement) Bill.

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58 Section 12, *EUWA*

59 See Withdrawal Agreement Bill: Protection for workers' rights, House of Commons Library Insight, 22 October 2019

3. What happens if there is no deal?

During the UK's membership of the EU, workers' rights that were derived from EU law were described as "entrenched". This meant that even though many of the rights were implemented through domestic legislation, the UK could not reduce those rights below the levels set by EU law without breaching international law (the EU Treaties). During the transition period this entrenchment continued as the UK was still bound in international law (the Withdrawal Agreement) to EU standards.

If no deal is agreed by the end of the transition period, the UK will no longer be bound in international law to uphold EU workers' rights.

As such, the principal effect of a no-deal exit is that the UK will be free, subject to any domestic law constraints and other international treaties, to reduce workers' rights below the level currently set by EU law.

3.1 Retained EU law

As explained above, on 31 December 2020 the *EUWA* will convert most of EU law into "retained EU law", meaning it continues to have effect in UK law. Retained EU employment rights would need to be amended in accordance with the rules set out in the *EUWA*.

The UK Government has said that it intends to maintain high standards of workers' rights and continue to build on EU employment law. In a debate on the UK-EU negotiations, Michael Gove, the Chancellor of the Duchy of Lancaster, said:

> The hon. Lady asked about workers' rights, environmental rights and consumers' rights. The UK has a proud record in all those areas. Governments both Labour and Conservative, and politicians from Barbara Castle to Margaret Thatcher, have been in the van of ensuring that, whether it is equal pay or the fight against climate change, the UK has led and will continue to lead the world. In any trade or other agreements that we sign, our commitment to the rights of our citizens, to protection for workers and to putting the future of the planet first is absolutely non-negotiable.[60]

In contrast, the Trades Union Congress has argued that no-deal would allow the Government to reduce workers' rights without challenge:

> If the UK leaves the EU without a deal, workers in the UK will immediately lose the ability to take challenges to the European court and its vital judgments will no longer be binding in all UK courts. This means that it will be harder for workers to enforce their employment rights.
>
> Over the longer term, a no deal Brexit would mean that the UK government cannot be stopped from removing from UK law the hard fought for employment protections that working people benefit from.[61]

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60 HC Deb 16 June 2020
61 TUC, Consequences of 'no deal', 29 September 2019, p24

3.2 The Withdrawal Agreement

While the UK and EU failing to agree a future relationship by the end of the transition period is typically referred to as 'no deal', the Withdrawal Agreement (WA) has already been ratified and is a legally binding treaty in international law. Furthermore, the WA has been given domestic legal effect by the *European Union (Withdrawal Agreement) Act 2020*.

As such, even once the transition period has ended, the UK will not be able to reduce workers' rights if it is contrary to the terms of the WA.

The WA does not contain many provisions relating to workers' rights. However, there are two areas where it places restrictions on the UK.

EU citizens and non-discrimination

The WA provides that EU citizens who are resident in the UK before the end of the transition period have a right to continue to live and work in the UK. In particular, the WA says that such EU citizens will continue to enjoy the right to work guaranteed by Article 45 TFEU and the right to equal treatment with UK citizens set out in Regulation (EU) 492/2011.

For information on the rights of EU citizens and their families to remain in the UK, see the Library Briefing, EU Settlement Scheme (CBP-8584).

Protocol on Ireland/Northern Ireland

The Protocol on Ireland/Northern Ireland is part of the WA and sets out the relationship Northern Ireland will have with the UK and the EU.

Article 2(1) of the Protocol provides that Ireland and Northern Ireland must continue to uphold rights in the Belfast/Good Friday Agreement and in six EU equality directives. It provides that these rights must be protected through "dedicated mechanisms". Furthermore, not only must Northern Ireland continue to apply the six EU directives, they must apply them as amended or replaced. The directives must be interpreted in accordance with ECJ judgments, including post-transition case law. In effect, Northern Ireland will need to keep pace with EU equality law.

The *European Union (Withdrawal Agreement) Act 2020* amended the *Northern Ireland Act 1998* so that the devolved administration does not have the competence to legislate incompatible with Article 2(1).

For further information see the Library Briefing, Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland (CBP-8720).[62]

Under the Withdrawal Agreement agreed by the May Government in November 2018, the Protocol on Ireland/Northern Ireland contained a "non-regression clause" that would have prevented the UK and EU from reducing labour standards below the levels set by EU law at the end of the transition period. These provisions were removed in the WA that was ultimately agreed by the Johnson Government.[63]

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62 Section 2.3. This paper discusses the position under the *Withdrawal Agreement Bill* that was published in October 2019. However, the relevant provisions are similar in the *Withdrawal Agreement Bill* that was published in December 2019, which became the *European Union (Withdrawal Agreement) Act 2020*.

63 See The October 2019 EU UK Withdrawal Agreement, Commons Library Briefing Paper CBP-8713, 18 October 2019

3.3 Other international agreements

While the UK will no longer be bound by EU law from 1 January 2021, it will still be bound by other international agreements it has signed.

In the area of employment law, agreements that are particularly relevant are the International Labour Organisation (ILO) Conventions and the European Convention on Human Rights (ECHR).

The ILO Conventions commit the UK to a detailed range of workers' rights standards. However, the ILO Conventions do not place strict constraints on the UK Parliament. Michael Ford QC explains:

> Any international treaties, such as the UN Conventions and the ILO Conventions, ratified by the UK have some legal effect. There is a strong presumption in favour of interpreting English law in a way which does not place the UK in breach of its international treaty obligations, so that ambiguous words should be interpreted in accordance with the Treaty. But, quite apart from the power of the UK Government to denounce the relevant treaty and so put an end to any duty to comply with it, this rule poses no threat to Parliament's powers. A treaty signed by the UK Government of itself creates no rights enforceable by individuals. Where Parliament makes it plain by its language or otherwise that it intends to pass domestic legislation inconsistent with a provision in such an international treaty, that legislation will 'trump' its treaty obligations. The prime examples of this in the employment field are those ILO Conventions ratified by the UK, which have had little independent practical effect on UK labour laws.[64]

The ECHR, which is implemented through the *Human Rights Act 1998*, has had more of an impact. UK courts must interpret domestic law compatibly with the ECHR so far as is possible. They can also strike down secondary legislation and acts of public authorities that are incompatible with the ECHR.

The ECHR does not contain specific provisions on employment rights. However, workers in the UK have been able to use the ECHR to gain access to employment rights that they were denied because of their employment status. For example, in *Gilham v Ministry of Justice*, the UK Supreme Court held that the fact that a judge (an 'office holder') was excluded from whistleblowing protections was a violation of their rights under Article 14 (protection from discrimination) read with Article 10 (freedom of expression). The court interpreted the legislation so as to extend whistleblowing protections to judges.[65] Chris Milsom, an employment barrister, argued this case could have wide ramifications and allow a range of workers to claim access to employment rights from which they are currently excluded.[66] For example, in December 2020 the Court of Appeal heard arguments in a case where a union representing foster carers claims that the fact that they are excluded from the right to statutory recognition is a violation of Articles 11 and 14 of the ECHR.

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64 Michael Ford QC, Workers' Rights from Europe: The impact of Brexit, 7 April 2016
65 *Gilham v Ministry of Justice* [2019] UKSC 44
66 Chris Milsom, Gilham v Ministry of Justice: A New Chapter in Employment Protection?, Cloisters, 16 October 2019

4. What happens if there is a deal?

At the time of writing, the UK and EU are still negotiating their future relationship agreement. The level playing field (LPF) for labour and social standards has been reported to be one of the major unresolved issues. As such, it is not possible to give a concrete assessment of what will happen if there is a deal.

The information below is based on the published UK and EU negotiating positions and media reporting about the current state of the talks.

More detailed information can be found in the Library Briefing, The UK-EU future relationship negotiations: Level playing field (CBP-8852).

4.1 Political Declaration

Alongside the Withdrawal Agreement, the UK and EU agreed a Political Declaration on the framework for the future UK-EU relationship. Paragraph 77 of the Political Declaration states (emphasis added):

> Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, **the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period** in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters.

This appeared to refer to the non-regression clauses that had been in the Withdrawal Agreement agreed by the May Government but which had been removed in the WA agreed by the Johnson Government.

Speaking in the House of Commons in October 2019, Stephen Barclay, then Brexit Secretary, explained that the Political Declaration meant UK will continue to provide high levels of protection for workers' rights:

> Paragraph 77 sets out our commitment to high international standards and to their being reciprocal, as befits the relationship that we reach with the European Union. The hon. Gentleman really should have more confidence that we in this House will set regulation that is world leading and best in class, that reflects the Queen's Speech, with its world-leading regulation on the environment, and that reflects the commitments that many in the House have sought on workers' rights. We should also be mindful that, of course, it is this House that went ahead of the EU on paternity rights and parental leave. We can go further than the EU in protecting people's rights, rather than simply match the EU.[67]

[67] HC Deb 19 October 2019 c602

4.2 EU negotiating position

The EU negotiating mandate was published on 25 February 2020. It says that given the geographic proximity and economic interdependence between the UK and the EU, an agreement should contain level playing field (LPF) clauses to ensure fair competition. This has two elements:

- A provision to ensure that the UK and EU do not reduce their labour and social standards below common standards as at the end of the transition period; and
- A provision to ensure that parties uphold high standards over time with EU standards as the reference point.[68]

On 18 March 2020, the EU published a draft text for a new partnership agreement with the UK.

EU draft text: 'non-regression clause'

Article LPFS 2.27 of the EU draft text contains a non-regression clause on labour and social standards. It provides:

> 1. A Party shall not adopt or maintain any measure that weakens or reduces the level of labour and social protection provided by the Party's law and practices and by the enforcement thereof, below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period, and by their enforcement.

It goes on to define labour protections broadly, including fundamental rights at work, health and safety, fair working conditions, information and consultation rights and restructuring.

The wording of this clause is extremely similar to Article 4 of Annex 4 to the Protocol on Ireland/Northern Ireland in the May Government's WA. This provision was interpreted by the UK Government as preventing the UK from reducing its employment standards below the levels set by EU law at the end of the transition period.[69]

The Institute of Public Policy Research (IPPR) noted that these provisions were stronger than those typically found in EU trade agreements, albeit that they were weaker than the status quo of EU membership.[70]

EU draft text: 'ratchet clause'

Article LPFS 2.28 of the EU draft test contains a so-called ratchet clause. It provides:

> 1. Each Party shall seek to increase, through its relevant law and practices and through the enforcement thereof, the level of labour and social protection above the level of protection referred to in Article LPFS.2.27 [Non-regression of the level of protection].
>
> 2. Where both Parties have increased, through their relevant law and practices and through the enforcement thereof, the level of

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68 Council of the EU, Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland, 5870/20, 25 February 2020, paras. 94 and 101

69 HM Government, EU Exit: Legal position on the Withdrawal Agreement, Cm 9747, December 2018, para 54

70 Marley Morris and Tom Kibasi, The Brexit Withdrawal Agreement: A First Analysis, IPPR, November 2018

> labour and social protection above the level referred to in Article LPFS.2.27 [Non-regression of the level of protection], neither Party shall weaken or reduce its level of labour or social protection below a level of protection which is at least equivalent to that of the other Party's increased level of labour and social protection.

The effect of this provision is that if both parties raise their employment standards after the end of the transition period, this can create a new baseline of common standards below which regression is prohibited. The Partnership Council, a UK-EU body established by the agreement, would be able to agree what constitutes a new baseline.

Importantly, the provision as it appears in the EU draft text would not require either party to follow the other when it raises its standards. The new baseline would only come into effect if both sides voluntarily chose to raise their standards.

EU draft text: enforcement

EU trade agreements with third countries typically contain relatively weak dispute settlement provisions for labour and social standards. In an Oral Evidence session with the EU Internal Markets Sub-Committee, Dr Lorand Bartels, Reader in International Law at the University of Cambridge, explained:

> That is the weakness of the EU's typical environment and labour clauses. They are relatively strong in terms of the actual standards and in terms of what looks like a dispute settlement process, but the report in the end can be put in the bin. That is essentially what happens, which is controversial, as I said before, with the trade unions in the EU. That is different from the US-Canadian model, where the report is binding on the parties. They have to comply with it, and if they do not they are subject to trade sanctions, although those are defined a bit differently between the Canadians and the United States.[71]

However, the EU draft text for the UK-EU agreement provides that the LPF clauses, including those on labour standards, will be subject to ordinary dispute settlement, meaning that parties could be faced with sanctions if they breach the rules.

4.3 UK negotiating position

The UK negotiating mandate was published on 27 February 2020. It says that a UK-EU agreement should contain provision on labour standards that are similar to those in EU trade agreements with other countries, such as Japan and Canada. It says that this would involve a provision that prevents the parties from reducing their labour standards in order to encourage trade or investment.[72] However, as noted below, the EU trade agreement with Canada (CETA) does not prevent the parties reducing standards.

On 19 May 2020, the UK published its draft text for the future UK-EU Comprehensive Free Trade Agreement.

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71 House of Lords EU Committee, Internal Market Sub-Committee, Uncorrected oral evidence: The level playing field and state aid, 27 February 2020, Q7

72 HM Government, The Future Relationship with the EU: The UK's Approach to Negotiations, CP 211, 27 February 2020, para. 75

UK draft text: upholding levels of protection

Article 27.4 of the UK draft text contains a clause on upholding labour and social standards. It is a word-for-word copy of Article 23.4 of CETA and it provides:

> 1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.
>
> 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
>
> 3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.

The provision contains a mixture of hard and soft obligations.

The parties only "recognise that it is inappropriate" to reduce their domestic labour standards. This is a soft obligation that does not have any binding effect. By contrast, the parties "shall not" waive or fail to effectively enforce their labour standards in order to encourage trade or investment. This is a hard, binding obligation.

The effect of this provision would be that the UK is not prohibited from reducing its standards but must properly enforce the standards it has.

Commenting on similar provisions in EU trade agreements, Dr Bartels explained:

> […] usually you are not prohibited from lowering your standards; you are only prohibited from failing to implement the standards you already have. That is a significant difference.
>
> There is some ambiguity in two agreements that I know of, but my reading is that it is the same in those agreements; one is the EU-Japan agreement and the other is the CARIFORUM-EU agreement.

The EU-Japan Economic Partnership Agreement provides that the parties "shall not" lower their domestic labour standards, although there is some disagreement over whether this actually prohibits regression.[73]

UK draft text: right to regulate

Article 27.2 of the UK draft text says that both parties have the right to regulate their labour standards but should seek to ensure high levels of protection over time. Again, the wording is similar to CETA.

This provision is aspirational and would have no real binding effect.

UK draft text: enforcement

Articles 27.9 to 27.11 of the UK draft text contain specific rules for dispute resolution similar to those in CETA. This would involve consultation between the parties followed by arbitration before a Panel of Experts whose recommendations would be non-binding. A party could not be sanctioned for breaching rules on labour standards.

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73 EU-Japan Economic Partnership Agreement, Article 16.2

4.4 Current state of the negotiations

In December 2020, it was reported that the level playing field (LPF) for fair competition – labour and environmental standards and state aid – was one of the remaining sticking points in the UK-EU negotiations.

Reports suggest that the key remaining issue concerned what would happen if, in the future, either the UK or EU raised its labour standards but the other side did not, giving it a competitive advantage.

In a detailed summary of the negotiations relating to the LPF, the *RTE* explained that talks stalled early when the UK resisted the proposed 'ratchet clause' in the EU draft text, arguing that such clauses are not included in EU trade agreements with other countries. The *RTE* reported that after the publication of the *UK Internal Market Bill* in September, the EU proposed a new mechanism for ensuring that fair competition is not affected by regulatory divergence in the future:

> The European Commission was still looking for some way to ensure that there was a level playing field, that it remained level over time, and that there was a binding mechanism to ensure that was the case.
>
> Officials say that because the UK was still not engaging in the idea, the Commission on its own was forced to come up with suggestions. Combined with the impact of the IMB, and the whole question of trust, what it came up with appeared to toughen up the so-called "ratchet" clause, whereby if the EU raised its standards, the UK should as well.
>
> If they didn't, and British firms gained an edge over European ones competing within the same market, there should be the ability for the EU to retaliate with tariffs, or in another sphere.[74]

If correct, this would appear to be a departure from the EU draft text which, as noted above, would only create a new common baseline for labour standards if both sides chose to raise their standards.

On 9 December 2020, the *Guardian* reported that German Chancellor Angela Merkel had said that the UK-EU agreement should contain rules on an LPF for the future and set out rules for what would happen if one side raised its standards but the other did not.[75]

On 14 December 2020, the *Financial Times* reported that the UK and EU had reached an agreement in principle around the LPF. The report said that the UK has agreed that if one side raises its standards and the other does not and this creates unfair competition, the side that has raised its standards can take reciprocal action. The report said that discussions were ongoing about how to identify situations of unfair competition and the mechanisms for determining what reciprocal actions can be taken, including an independent arbitration mechanism.[76]

Ultimately, this issue will not be clarified until a deal is published.

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74 "The level playing field: Brexit for slow learners", *RTE* [online], 12 December 2020 (accessed 21 December 2020)

75 "Brexit 'evolution clause' is biggest issue to be resolved, says Merkel", *Guardian* [online], 9 December 2020 (accessed 21 December 2020)

76 "Optimism for shift on 'level playing field' in Brexit trade talks", *Financial Times* [online], 14 December 2020 (accessed 21 December 2020)

Annex: EU & UK employment legislation

	EU legislation	UK legislation
Atypical working		
Part-time workers	Part-Time Work Directive (90/71/EC)	Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
Fixed-term workers	Fixed-Term Work Directive (99/70/EC)	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
Agency workers	Temporary Agency Work Directive (2008/104/EC)	Agency Workers Regulations 2010
Data protection		
Data protection	General Data Protection Regulation (EU 2016/679)	Data Protection Act 2018
Equal treatment		
Discrimination	Equal Treatment Framework Directive (2000/78/EC)	Equality Act 2010
Race discrimination	Race Equality Directive (2006/43/EC)	Equality Act 2010
Sex discrimination	Equal Treatment of Men and Women Directive (Recast) (2006/54/EC)	Equality Act 2010
Equal pay	Article 157 TFEU	Equality Act 2010
Health and safety		
Health and safety	Health and Safety Framework Directive (89/391/EEC)	Health and Safety at Work etc. Act 1974
Information & Consultation		
Written statement	Written Statement Directive (91/535/EC)	Employment Rights Act 1996

Consultation	Information and Consultation Directive (2002/14/EC)	Information and Consultation of Employees Regulations 2004
European Works Council	European Works Council Directive (2009/38/EC)	Transnational Information and Consultation of Employees Regulations 1999 (relevant part repealed on 1 January 2021)
Parental rights		
Maternity leave	Pregnant Workers' Directive (92/85/EC)	Employment Rights Act 1996; and Social Security Contributions and Benefits Act 1992
Parental leave	Parental Leave Directive (2010/18/EU)	Employment Rights Act 1996
Posted workers		
Posted workers	Posted Workers Directive (96/71/EC)	Various
Posted workers	Posted Workers Enforcement Directive (2014/67/EC)	Posted Workers (Enforcement of Employment Rights) Regulations 2016
Posted workers	Posted Workers Amendment Directive (EU 2018/957)	Posted Workers (Agency Workers) Regulations 2020
Working time		
Holiday pay	Working Time Directive (2003/88/EC)	Working Time Regulations 1998
Working time	Working Time Directive (2003/88/EC)	Working Time Regulations 1998
Workplace restructuring		
Collective redundancy	Collective Redundancies Directive (98/59/EC)	Trade Union and Labour Relations (Consolidation) Act 1992
TUPE	Transfer of Undertakings Directive (2001/23/EC)	Transfer of Undertakings (Protection of Employment) Regulations 2006
Insolvency	Insolvency Protection Directive (2008/94/EC)	Employment Rights Act 1996

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