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Implications of Brexit for pensions law

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Summary

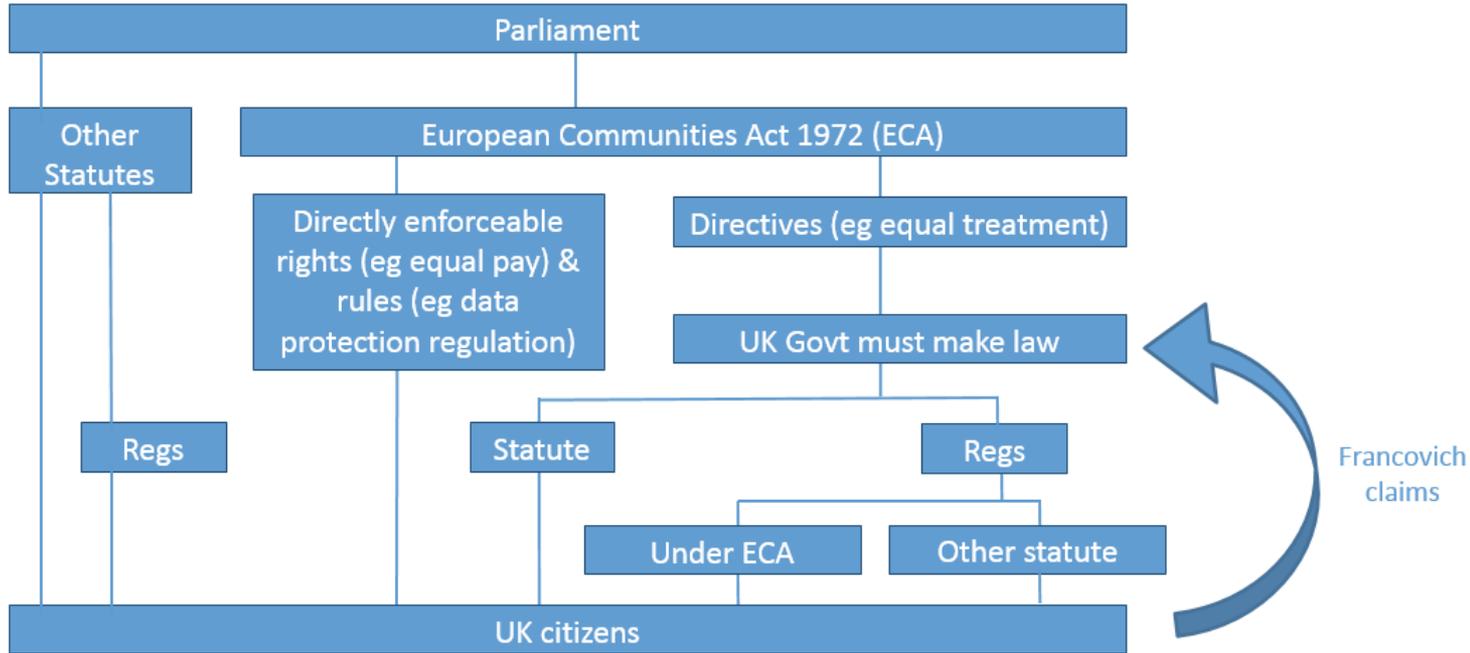
- Nothing much changes on exit, which means ...
- It's time to start planning to equalise impact of GMPs
- It's time to think about VAT reclaims under PPG
- Discrimination law could change but how far?
- Impact on case law may take decades to sort out

The withdrawal agreement and future relationship treaty

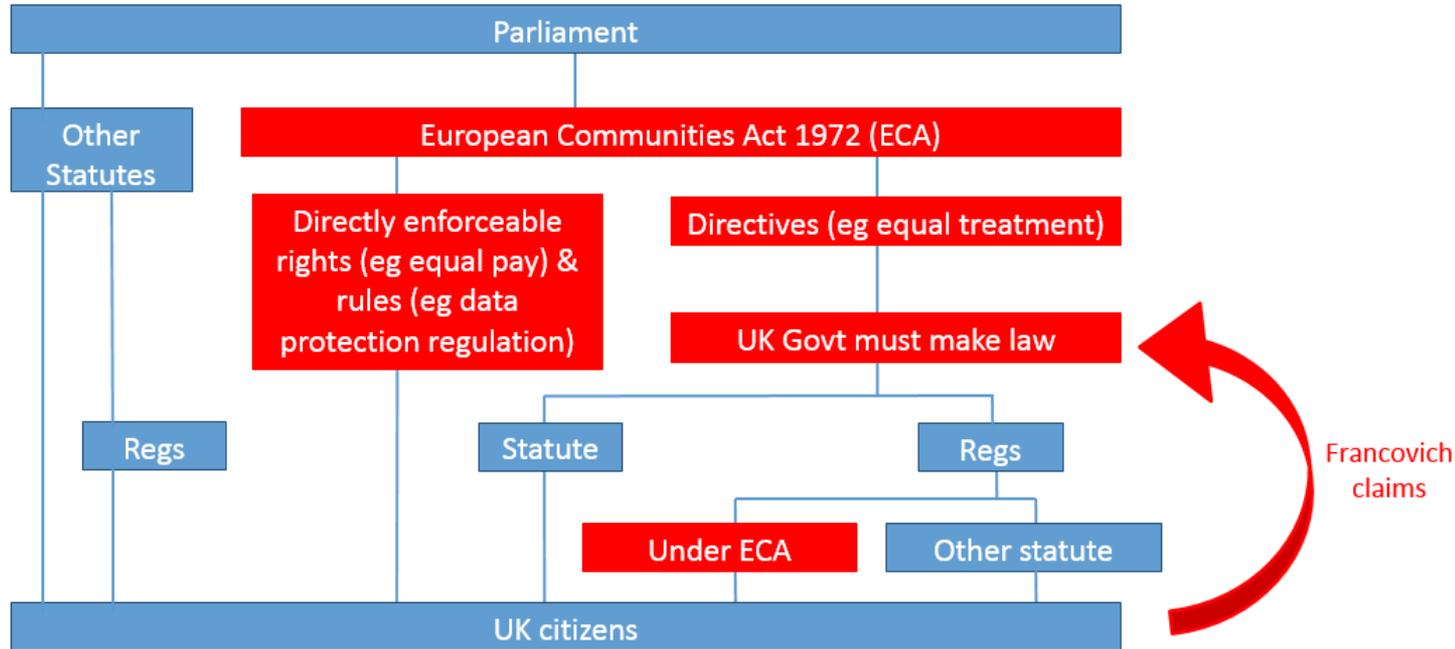
What does the EU Withdrawal Bill do?

- Abolishes ECA 1972
- “EDL”: EU-derived domestic legislation is “saved”
- “Direct EU legislation” is “incorporated”
- Other acquired rights and obligations are saved
 - excludes “unrecognised Directive rights”
- General principles of EU law incorporated
- Effectively, whole “acquis communautaire” is adopted

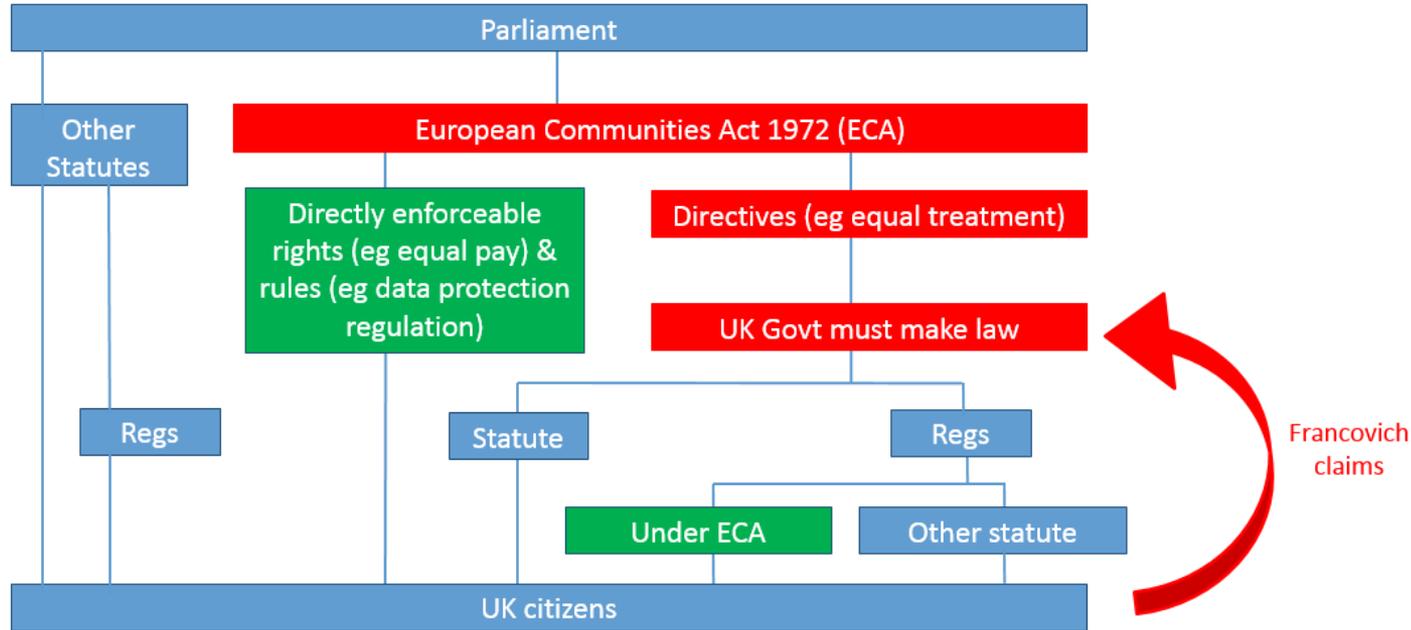
Current sources of UK law



... post exit, without Withdrawal Bill - red areas go



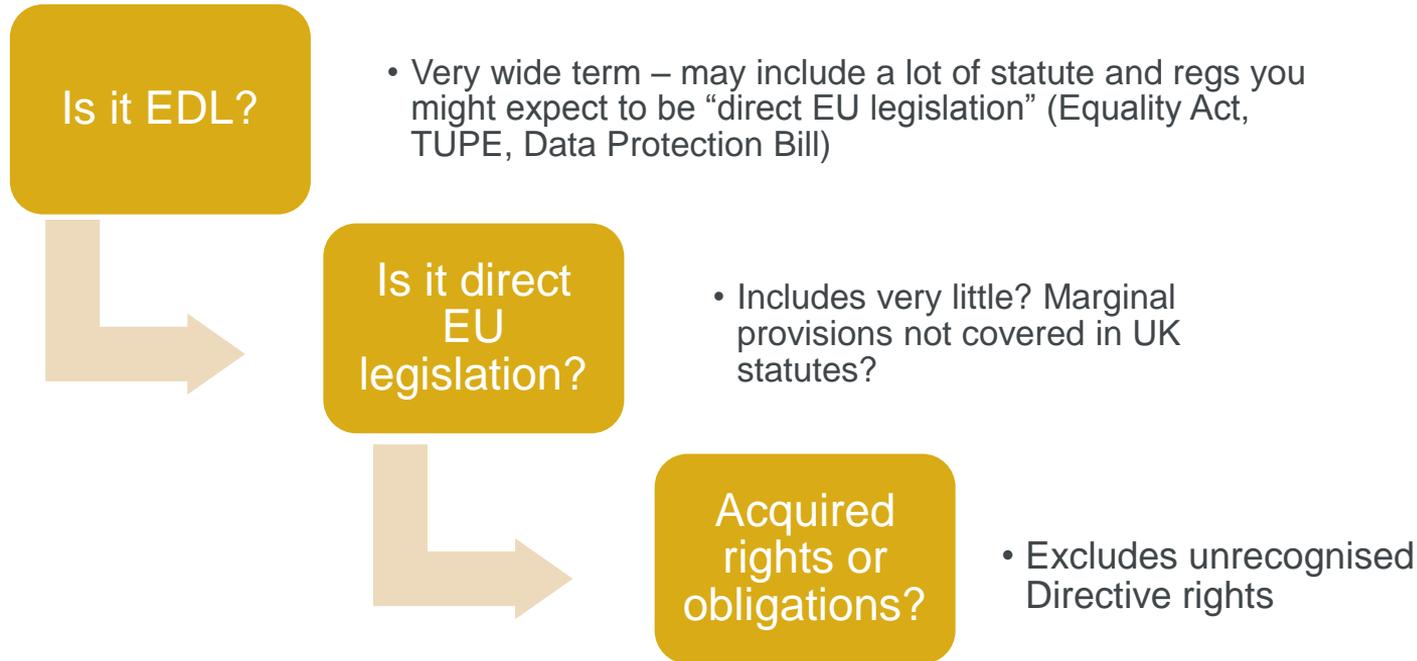
... post exit, under Withdrawal Bill – red goes, green is saved



Reclassifying laws: EU-derived domestic legislation

- “EDL” is preserved
- Enactment made under s2(2) ECA “so far as made under it”
- Or operating for a purpose in s2(2) ECA:
 - implementing UK’s EU obligations
 - matters arising from those obligations or directly enforceable rights under 2(1) (includes equal pay)
- Or relating otherwise to EU or EEA
- Very wide definition

Cascade of EU legacy law



Regulation-making powers

- Clause 7 – fixing deficiencies in retained EU law
- Clause 8 – complying with international obligations
- Clause 9 – implementing the withdrawal agreement
- Clause 17 – consequential power
- Current procedures for 2ndary legislation offer little scrutiny
- In some cases no procedure will be required

“Henry VIII” powers

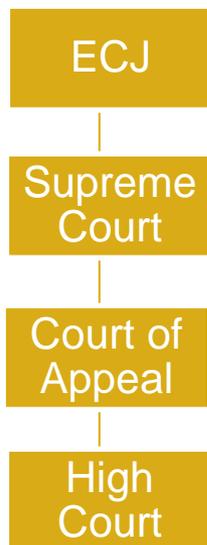
- Proclamation by the Crown Act 1539
- Govt will be able to make regs
 - “Such provision as the Minister considers appropriate in consequence of this Act” (Clause 17)
- Includes modifying statute
 - including the Withdrawal Act itself
- Not (explicitly) linked to or limited to retained EU law

What about case law?

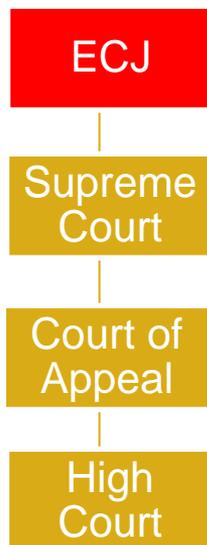
- All current case law is retained (Clause 6)
- ECJ rulings have Supreme Court status
- SC can depart from its precedent if it thinks it “right to do so”
- No new referrals to ECJ post exit
- But UK pipeline continues
- Courts can have regard to ECJ rulings after exit (UK or non-UK)
- UK alone can’t make a referral – probably?

Hierarchy of case law

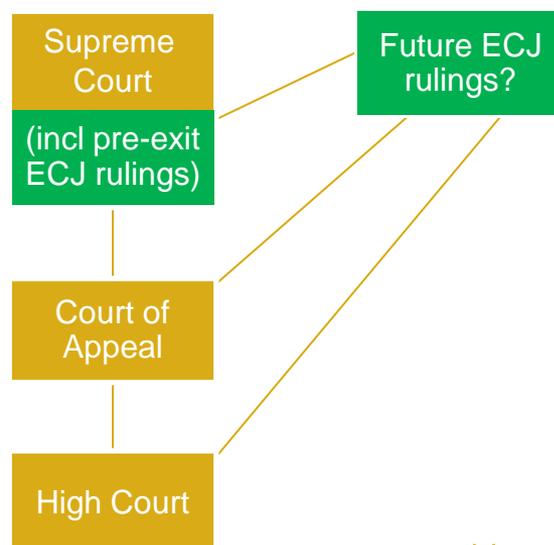
Pre exit



Post exit without Bill



Post exit under Bill



ECJ pipeline

- Hampshire (Turner & Newall) referred July 2016
 - PPF compensation cap means under 50% for some
- MB (referred August 2016) – claim for state pension at 60 but no formal gender reassignment to female
- Safeway – retrospective amendments where permitted under domestic law
- Men v women mostly sorted – marital status, gender reassignment not

Does EU supremacy continue for pre-exit law?

- Supremacy does continue for pre-exit law so far as relevant to interpretation or disapplication
- If pre-exit law is modified, supremacy “not prevented from applying” if “application of the principle is consistent with the intention of the modification”

Making sense of law post exit

- General principles (“GPs”) of EU law still relevant in deciding on validity or meaning of retained EU law if:
 - unmodified
 - modified and consistent with the intention
- GPs of EU law include proportionality, no retroactivity, fundamental rights
- UK courts will have a lot of scope/responsibility
- Lord Neuberger’s plea for guidance

What does all this mean in practice?

- Not a lot falls away
- Let's consider some examples of how it might work:
 - Barber
 - Equalising effects of GMP
 - Rights of recovery for VAT

Could Barber be reversed by the UK courts?

- No because Barber is in UK statute now
- Though closure of Barber window is for the Courts
 - Safeway referral to ECJ – reinterpreting the temporal limitation
 - ECJ will decide on this before or after exit

Could Barber be reversed by Parliament?

- Parliament is supreme and could abolish equal pay going forward
- Human Rights Act 1998 protects property rights
- A1P1 of HRA also relevant at least where pensions and discrimination combine – see Brewster case (judicial review)
- Ministers have to confirm HRA conformity (or otherwise)
- ECHR contains treaty obligations
- So not likely given politics and treaty obligations?

Could Barber be reversed by Government?

- Regulation-making powers in Withdrawal Bill
- Clause 17 – very broad but this would not be consequential
- Despite breadth, probably not

The requirement to equalise effect of GMPs

- S.67 Equality Act 2010 implies equality rules in schemes
- All “terms” must be equal but *Degnan v Redcar* (CA):
 - can look at a financial term as a whole
 - best of both worlds would give both sexes what neither had before
 - not what equality was designed to achieve
- Kenworthy case – Ombudsman says reasonable to wait
- Lloyds Banking Group case 2018

The arguments against GMP equalisation

- Cost burden
- Unfairness (State pensions could be unequal)
- Limitation defences
- Bridging pensions are allowed (but rebalance inequality)
- No comparator (Allonby) – might work in some situations
- Forward-only rulings like Barber a pragmatic EU doctrine

Could unequal GMPs be permitted after exit?

- Equality Act 2010 and, by 2019, High Court ruling too?
- EDL and retained domestic case law
- Affects benefits accrued 1990-97
- Parliament could legislate rights away?
- Government can't regulate rights away
- Explicit legislative requirement more likely, with prescribed methodology (safe harbour)

The PPG rules on VAT recovery

- PPG case will stay in UK law
- Post PPG, more recovery is allowed
- But HMRC interpretation imposes new conditions
 - even though UK schemes meet PPG requirements?
- Announcement expected offering 70/30 continuation option
- Are time limits running?
- Can we find another solution eg rule amendments?

Some speculation about changes post exit

- Age regs – challengeable elements safe after exit?
- Cross border schemes may return (Only 1 member State)
- IORP II falls away if unimplemented
- PPF compensation levels could reduce
- Sex-based actuarial factors could come back
- Scheme funding and section 75 could change
- TUPE tinkering, Beckmann could go

Conclusions

- New legal framework will give continuity and flexibility
- Most pensions issues have been dealt with
- Henry VIII powers have little relevance
- Discrimination law likely to continue to develop in line with EU
- Equal pay and no retrospection will remain key principles
- We need to start planning

Questions

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