

European Union (Withdrawal) Bill – ‘Francovich’ Claims

The European Union (Withdrawal) Bill excludes the right to claim damages under the rule in *Francovich* from being converted into UK law. Under the *Francovich* rule, a state may be liable for damages where it has failed to implement an EU directive within a specified time (and other conditions are met).

Will Francovich be relevant post-Brexit?

Francovich claims are only relevant where a Member State has failed to implement an EU directive within the time period for implementation. As such, its exclusion presumably will not be of great relevance post-Brexit when the UK will not be under any obligation to do so. However it may have the following residual relevance:

- The exclusion of it via the Bill may prevent retrospective claims for current noncompliance with EU law.
- The *Francovich* principle for damages is based on an ECJ case law concept. For instance a Government breach being “**sufficiently serious**” to warrant damages. “Sufficiently serious” is an ECJ concept and so may develop post Brexit. Removing it would unambiguously take the UK courts away from following the ECJ.

It may, however, be a general move to reduce EU law related litigation and bring EU law in line with UK law and remedies.

Provisions of European Union (Withdrawal) Bill 2017 (‘EUW Bill’)

In accordance with paragraph 4 of Schedule 1 of the EUW Bill:

- “There will be no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.”
- Schedule 1 of the EUW Bill has effect through s 5(6) (see ss 2(3), 3(5) and 4(3) of the EUW Bill, which state that the retention and conversion of EU law is subject to the exceptions in clause 5 and Schedule 1).

UK law rights to damages remain the same

The Explanatory Notes to the EUW Bill state that this will not affect any specific statutory rights in UK law to claim damages in respect of breaches of retained EU law (such as under the Public Contracts Regulation 2015).¹

What are Francovich claims?

A ‘Francovich’ claim is a cause of action in damages against a government for a failure to implement EU law (*Francovich v Italian Republic Joined cases C-6/90 and 9/90*).

¹ Explanatory Notes p. 35.

- As an extension of the principles of direct and indirect effect of EU law, the CJEU had developed the idea (in *Brasserie du Pecheur SA v Bundesrepublik Deutschland (Cases C-46/93 and C-48/93) [1996]*), that the state can be sued for breach of EU law where:
 - (i) The EU law confers **clearly identifiable rights** on individuals;
 - (ii) The state's breach is **sufficiently serious** to merit an award of damages against it;
 - (iii) There is a **direct causal link** between the breach and the loss.
- In *Francovich v Italy [1993]*, the CJEU extended this idea by holding that a **failure to implement an EU directive within a specified time** constituted a sufficiently serious breach, as it could be a failure to implement a directive properly.² As such, an individual could claim damaged from a state under *Brasserie du Pecheur* where this was the case (provided the other conditions were met).

UK Francovich litigation

- *Delaney v Secretary of State for Transport [2014] EWHC*:
 - Where an injured car passenger successfully claimed damages against the Government for failing to implement an EU directive properly through the Uninsured Drivers' Agreement 1999.
- *Nuclear Decommissioning Authority (Appellant) v Energy Solutions EU Ltd (now called ATK Energy EU Ltd) (Respondent) [2017]*:
 - Which dealt with the definition of '**sufficiently serious**' in the context of public procurement law.
- **There was another 2014 case when the Supreme Court decided to award Francovich damages:**

*"The High Court has held that the UK's current exceptions to the payment of compensation for passengers under the Uninsured Drivers' Agreement 1999 are contrary to EU law. The Agreement between the Secretary of State for Transport and the Motor Insurers' Bureau was intended to implement the UK's obligations under the Second Motor Insurance Directive. The Court also found that the UK's breach was sufficiently serious to warrant the payment of Francovich damages to the Claimant, who had sustained life-threatening injuries following a collision in 2006."*³

- *This was reinforced in a 2015 case.*⁴
- *A complete listing of Francovich caselaw in the UK can be found in this note.*⁵

² "EU Law and its Interpretation in the UK" *Practical Law Public Sector*.

³ Monckton Chambers; <https://www.monckton.com/high-court-finds-transport-secretary-liable-francovich-damages-claim/>

⁴ UKhumanrightsblog, <https://ukhumanrightsblog.com/tag/francovich/>

⁵ https://www.biicl.org/files/5812_delamare_17-11-11_biicl.pdf

- There appears to be a case in preparation regarding Air Pollution, which may be politically significant^{6, 7}

Criticisms of removing Francovich via the Bill:

- **A bid to immunise the Government from individual legal challenges?**
There's been some criticism that the exclusion is linked to a more general move to immunise the Government from individual legal challenge (e.g. by also excluding the European Charter of Fundamental Rights) - on the basis that the Bill incorporates EU law but then removes a right of action against the government.⁸
- **Removing retrospective claims?**
Although Francovich (presumably) won't be relevant in relation to new EU legislation after Brexit day, some people claim that the exclusion will stop people making claims in relation to breaches (of failure to implement EU law) prior to exit day (i.e. that the exclusion is retrospective). Furthermore, since the Bill does allow for actions to continue when they've been started before exit day, there is a possibility that lots of actions may be started before then.⁹
- **Ambiguous wording?**
Holly Bontoft, an associate at Field Fisher law firm has written that: "While this presumably relates to an EU member state's liability to pay damages to citizens who suffer loss due to a failure to transpose EU law, the lack of even a cross-reference to the ECJ decision, let alone a precise definition of the principle, will undoubtedly lead to challenge in the courts."¹⁰

Government position

The Government's position has consistently been: *"The right to Francovich damages is linked to EU membership – the government therefore considers that this will no longer be relevant after we leave. After exit, under UK law it will still be possible for individuals to receive damages or compensation for any losses caused by breach of the law."*¹¹

Context in Public Procurement

There has been some reporting on an impact on public procurement:

⁶ Thirdforcenews; <http://thirdforcenews.org.uk/tfn-news/brexit-could-stop-groups-from-suing-the-government>

⁷ Shropshire Star, 11 August 2017; <https://www.shropshirestar.com/news/uk-news/2017/08/11/ministers-urged-to-preserve-right-to-sue-government-after-brexit/>

⁸ LSE blog: <http://blogs.lse.ac.uk/brexit/2017/07/17/legislation-that-is-and-is-not-the-deeply-problematic-repeal-bill/>. See also: <https://legalresearch.blogs.bris.ac.uk/2017/07/european-union-withdrawal-bill-paving-the-way-towards-a-very-uncertain-future/>

⁹ UKhumanrights blog 15 July 2017: <https://ukhumanrightsblog.com/2017/07/15/on-first-looking-into-the-brexit-bill/>

¹⁰ Publicregulatoryblog; <http://publicregulatoryblog.fieldfisher.com/2017/european-union-withdrawal-bill-does-it-do-what-it-says-on-the-tin/>

¹¹ Publicfinance, August 2017; <http://www.publicfinance.co.uk/news/2017/08/citizens-rights-redress-threatened-brexit-bill>

“In the short to medium term (for at least the next couple of years), we now have the definitive position in the UK that breaches of procurement law must be “**sufficiently serious**” to merit damages. But, looking a little further ahead, how will the judgement be dealt with in the Great Repeal Bill and what will be the ultimate position post Brexit; particularly when the requirement for a breach to be “**sufficiently serious**” stems from principles of EU law and the jurisprudence of the European Court of Justice? Will the position ultimately be governed by ordinary English law rules for breaches of statutory duty where there is no **sufficiently serious requirement**? It would certainly seem odd for the UK to single out procurement law for different treatment but at this stage it is too early to say.”¹²

¹² Mills Reeve; <http://www.mills-reeve.com/supreme-court-makes-claiming-for-damages-that-bit-harder-05-08-2017/>