

# 11KBW

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## REMOVAL OF FRANCOVICH DAMAGES

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# Removal

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- Position is summarised in House of Lords Select Committee on the Constitution Report on the European Union (Withdrawal Bill), paragraph 121
  - The Francovich rule will no longer apply in domestic law after exit day
  - The rule allows individuals to claim compensation if they are affected by a Government's failure to comply with EU law
  - The effect of the Bill is that there will be no right of redress against the Government for breach of an EU Directive after exit day

## Francovich (1)

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- Cases C-6/90 and C-9/90, Francovich, [1991] ECR 1-5357, CJEU, employer insolvency
- State's obligation to compensate individuals for damage suffered as result of State's breach of EU law
- Individual's right to reparation where –
  - law infringed was intended to confer rights on individuals
  - breach is sufficiently serious
  - direct causal link between breach and damage
- Unlike Judicial Review, Francovich gives a right to damages: that is precisely what it is about, damages where sufficiently serious breach can be proved but not necessarily misfeasance

## Francovich (2)

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- The Francovich principle of State liability for damage caused to individuals by State breaches of EU law was clarified in 1996 by –
  - Brasserie du Pêcheur
  - Factortame (No. 3), the Spanish fishermen case
  - Cases C-46/93 and C-48/93
  - Hedley Lomas and Dillenkofer
- Francovich extended beyond failure to implement a Directive to any State action/ omission incompatible with -
  - EU Treaty provisions, or
  - other EU laws which grant rights to individuals

## Francovich (3)

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- The EU Francovich principle takes effect in UK domestic law pursuant to ECA 1972
- Once ECA repealed, Francovich claims (that had accrued, even if unquantified) extinguished, except as to matters past and closed
- Unless contrary intention appears in repeal legislation

# European Union (Withdrawal) Bill

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- Contrary intention does not appear (as regards extinguishing Francovich claims prospectively)
- Clause 1: ECA 1972 repealed on exit day
- Clause 2: Saving for EU-derived domestic legislation
- Clause 3: Incorporation of direct EU legislation
- Clause 4: Saving for rights etc under s2(1) ECA 1972
- Clauses 2, 3 and 4 all subject to –
  - Clause 5, and
  - Schedule 1

# Exceptions

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- Clause 5 of and Schedule 1 to Bill: exceptions to savings and incorporation
- Clause 5(4) provides that “the Charter of Fundamental Rights is not part of domestic law on or after exit day” (the Charter can be used to disapply domestic law: Benkharbouche v SoS for FCA (2017) UKSC 62)
- Paragraph 4 of Schedule 1:-

“There is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich”

# The Transition (1)

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- Clause 17 of the Bill contains consequential and transitional provisions
- Incorporates Schedules 7 and 8 to the Bill
- Part 4 of Schedule 8 applies to paragraph 4 of Schedule 1
- Paragraph 27(1) of Schedule 8 provides that the exclusion of Francovich damages will (subject to exceptions) apply in relation to the Francovich claims which had accrued before as well as after exit day

## The Transition (2)

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- Paragraph 27(3) of Schedule 8 to the Bill: annulment of right to Francovich damages will not apply in relation to any proceedings begun (but not decided) by a Court or Tribunal in the UK before “exit day”
- Contradictory? Or a contrast between “proceedings begun” (preserved) and “cause of action accrued” (proceedings can no longer be brought)

## Explanatory Notes (1)

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- Paragraph 156: right to claim damages against the State for breaches of EU law (Francovich damages) will not be available after exit
- But this provision does not affect (1) any specific statutory rights to claim damages in respect of breaches of retained EU law or (2) the case law which applies to the interpretation of any such provisions
- Example given is the Public Contracts Regulations 2015

## Explanatory Notes (2)

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- Paragraph 157: references in Clause 5 and Schedule 1 to the rule in Francovich are to be read –
  - as it stands at exit day
  - not as it will operate in EU law in the future

# Adverse Impact

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- Employment protection and workers' rights
  - e.g. Case C-244/13, Ogierakhi v Minister for Justice and Equality (No. 2) (2014) 1 EHC 582: Free Movement Directive: right to work in Ireland
- Environmental law, e.g. air pollution
  - no UK Government proposals for filling enforcement gap after removal of current system of Commission enforcement
- Etc
  - e.g. Delaney v SoS for Transport (2015) EWCA Civ 172: Second Motor Insurance Directive
- Even if breach has been occurring for some years (unless proceedings issued before Brexit day), notwithstanding Section 16 of Interpretation Act 1978
- Judicial review unlikely to be a saviour

## What to do

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- Get Francovich claim in before Exit Day
- Invoke the interpretative principle
- Look for a transition provision
- Challenge the exclusion!?

## What is preserved

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- The Marleasing principle, Case C-106/89, (1990) ECR 1 – 4135: Courts should interpret all domestic legislation if at all possible to comply with EU law
- Francovich damages for any transition or implementation period?

## Is the exclusion effective?

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- Probably
- But common law, ECHR and EU law attach great importance to the preservation and protection of “accrued rights”
- Causes of action are “possessions”, protected by Article 1 of Protocol 1 of ECHR and HRA 1998
- However, ECHR remedy limited to declaration of incompatibility
- Thence the importance of the Charter

## What about Judicial Review?

- Increased discrimination and equality challenges
- Increased common law conspicuous unfairness/abuse of power challenges
- Less exclusion on basis of alternative remedy
- CHALLENGES to Statutory Instruments: especially SIs pursuant to HENRY VIII CLAUSES in the Withdrawal Bill

## **Where are we at?**

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- House of Lords Committee Stage of European Union (Withdrawal Bill) concluded after 11 days on 28 March 2018
- House of Lords Report Stage begins today 18 April 2018

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