The impact of Brexit on pensions law

Anna Rogers, Senior Partner
anna.rogers@arcpensionslaw.com 020 7653 8961

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Outline

- The future integration of EU law
- Little real scope for change in practice
- Equal pay and GMPs
- The IORP II Directive
- Debate about sustainability and affordability may raise similar issues about reducing rights

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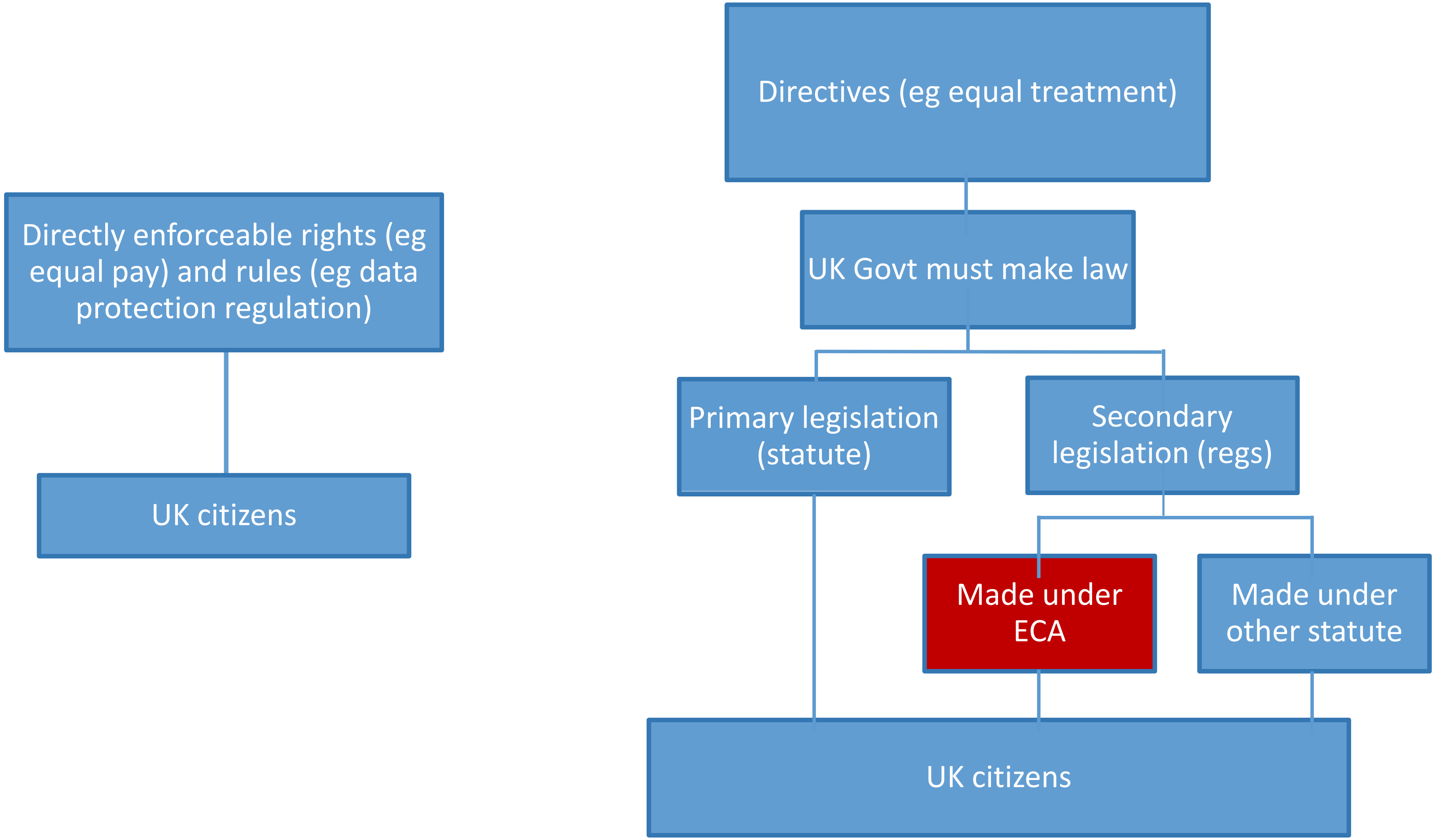
Structure of legal rights deriving from EU



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Disentangling UK and EU law

- UK and EU law have been spliced together over 40+ years and are not easily severable
- European Union (Withdrawal) Act will preserve the “aquis communautaire”
- All EU-driven laws continue to be UK law
- CJEU case law will be like Supreme Court case law
- Parliament can then take its time in amending or abolishing the content
- Courts will evolve case law over time
- Everything from the EU era remains UK law until and unless validly changed – nothing falls away

Could Barber be reversed?

- Equal Pay Act 1970 predated EU
- EU decided that pensions are pay – Bilka-Kaufhaus 1986, Barber 1990
- This is now in UK primary legislation
- Maybe UK Govt could change it for the future
- Past pension rights have accrued
- Barber windows during the 1990s
- Accrued rights protected under section 67, amendment powers, human rights

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Equalising the effect of GMP

- GMP is an underpin in legal terms, not a separate tranche of benefit (Williamson case)
- Though admin practice treats it as a tranche, even before SPA
- Accrued faster for women, but the 5 year gap between GMP age with different rates of revaluation v increase in payment means it isn't obvious whether male or female version is better
- Lloyds Bank case will raise the issue directly in 2018 – presented as discrimination against women
- Disputed period is 1990 to 1997
- GMP conversion can't happen without equalising first

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GMP equalisation – what is the law?

- Section 67(2) Equality Act 2010

  "A sex equality rule is a provision that has the following effect:

  (a) If a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable"

- Degnan v Redcar (Court of Appeal) – financial benefit can be looked at as a single term, facilitating what was intended:

  "... equalisation, rather than the upward movement of one gender's pay to a level higher than that of any comparator."

- Does there have to be a comparator when the provision is discriminatory on its face?

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The arguments against GMP equalisation

- EU Directives allowed State pensions to be unequal
- GMPs replaced State pensions so should be treated same way
- Lack of an actual comparator in some cases
- Bridging pensions are allowed to be unequal
    - Though these make up for the difference, don’t perpetuate it
- It is fair to give people what they expected
- Members haven’t complained – time limits?
- Schemes can’t afford extra cost at this point (+ GMP rec)
- CJEU might have made a forward only ruling

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Section 67

- Section 67 originated from the Goode Committee's report following high profile insolvencies
- Previously trust law was more flexible
  - trustees could make detrimental amendments if amendment power unrestricted
- Section 67 unaffected by Brexit
- If members have rights arising from GMPs they can't be amended away (amendments voidable)
- There could be a section 68 carve-out like for protected rights?

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Removing or reducing legal rights

- There would need to be a carve-out added to UK law for GMPs
- Maastricht Protocol adopting 17 May 1990 cut-off for Barber claims was a pragmatic policy-led act
- The GMPs in question accrued 1990-1997
- Removing rights now would have retrospective effect
- Can Parliament do this, if the Govt wants to?
- Is any kind of pension reduction political suicide, or is this so obscure that no-one would notice?

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Constraints on Parliamentary sovereignty

- European Convention on Human Rights will continue to apply post Brexit – declarations of incompatibility
- Implemented in the UK by Human Rights Act 1998
- Proposed British Bill of Rights now shelved until after Brexit
  - Govt position is to revert to more traditional formulations
  - not to withdraw from ECHR, though there has been some wobbling
  - not to water down property rights
- Protection for property rights is a feature of international law

Human rights law protects property

- Article 1 of the First Protocol to the European Convention
- Set out in HRA 1998
- Carve-outs are allowed
  - compulsory purchase eg for building HS2
  - fines and taxes
- Expropriation is tightly controlled
- Query political will or the legitimate aim to be achieved by extending this to reducing accrued pension rights

"Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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The IORP II Directive may be defunct

- Govt required to implement it by 13 Jan 2019
- Final content watered down to avoid solvency requirements, but still has onerous governance requirements
  - Risk management and “key functions” - internal audit, triennial risk assessment – fit and proper trustees
  - Requirements of pension benefit statement watered down
- Status of unimplemented Directive?
- Citizens can claim damages against Govts that don’t properly implement (Francovitch claims)
- EUW Act says no Francovitch claims post exit
- Might compliance be required for future relationship?

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Employment law largely unchanged

- Unfair dismissal is not driven by EU
- Minimum wage is not driven by EU
- Health and safety
- Consultation and information
- Working time requirements are and may well change
- Holiday pay to include bonus etc
- English common law respects freedom of contract and therefore reflects unequal bargaining power
- Statute law has grown up to supplement this

Politics

"The great British industrial working classes voted overwhelmingly for Brexit. I am not at all attracted by the idea of rewarding them by cutting their rights."

David Davies, Secretary of State for Exiting the EU, July 2016

"Let me be absolutely clear: existing workers' legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister."

Theresa May at Conservative Party Conference, Oct 2016

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TUPE will continue

- Transfer of Undertakings (Protection of Employment) Regs
- These exist to stop workers losing employment protection on asset sales (as opposed to sale of employing business)
- Govt unlikely to do this politically?
- Protection of acquired rights may come into play if it did
- Unintended extension to early retirement rights (Beckmann claims) might be cut back
- Pension provisions following corporate transactions likely to remain?

Discrimination law will continue

- Driven by ECHR as well as EU
- Political consensus on most protected characteristics
- Sex discrimination application to pensions driven by CJEU cases but now hard-coded
- Age discrimination rules unlikely to change under UK law
  - carve-outs already reflect UK preferences
  - but default retirement age could be reintroduced
- Carve-outs to equality law have been upheld eg partial benefits for same sex partners (Walker v Innospec case)

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Unisex actuarial factors

- Declared illegal for insurance sector by CJEU in Test-Achats
- Occupational schemes governed by different Directive
  - but the writing was on the wall
- Gender-based rates should survive Brexit
- Will insurers press to reinstate them?
- Mismatch on annuitisation

Scheme funding and solvency

- UK DB scheme funding driven by EU solvency requirements; principles set by UK statute, details by TPR
- Pressure to ease requirements in light of economic conditions
- BHS – pressure to protect members better
- Tata Steel – pressure to reduce funding burden
- Unlikely that statutory regime will be weakened? TPR funding requirements not affected by Brexit
- Section 75 could change if a political will
- Anglo-Irish and other cross-border DB schemes possible again as long as only 1 EU State – no full funding requirement

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PPF will continue; levels uncertain

- Existence of a compensation scheme was driven by EU Insolvency Directive
- PPF is UK interpretation, incorporated into UK statute
- Some question whether it meets EU minimum in all cases
- Very unlikely that UK would abolish PPF
- Future compensation levels to be set by UK alone – though challenge before CJEU may succeed pre Brexit
- Compliance with Insolvency Directive required for future relationship?

Data protection changes will come anyway

- EU Regs will fall away on Brexit
- EU General Data Protection Regulation - effective mid 2018
- The UK has to be within the perimeter
- Data Protection Bill will do what is required to comply
- Working with EU businesses post Brexit, regardless of trade deals – contractual terms may be required by them

VAT recovery may require tripartite contracts or other solution

- PPG means more VAT recoverable for DB schemes
- HMRC have imposed conditions which are hard to meet:
  - Tripartite contracts – corporation tax deductibility an issue
  - Trustees contract to provide services to sponsor
  - VAT grouping
- Temp extension current position until end 2017
- PPG basis is going to apply unless statute or SC say otherwise after Brexit
- HMRC concern is that there be forward claims only

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CPI/RPI issues likely to remain

- CPI driven by Europe to harmonise consumer price inflation measures but preferred for technical reasons
- Govt unlikely to drop CPI?
- RPI remains a contractual right in financial instruments and benefits
- Contracts could possibly be overwritten but again property rights would come into play
- Brexit unlikely to change anything?

Things that will change

- Trade, investments and financial markets
  - ability to trade with single market
  - nature and intensity of regulation of firms
- Citizenship rights, travel, access to healthcare in other member states
- Enforcement of court orders in other member states
- New terms may be agreed under trade deals

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Future authority of CJEU will end

- Case law continues to apply as if Supreme Court
- Any change will be only by Supreme Court - slow, ad hoc process
- When will UK courts will stop referring questions to CJEU?
- Will they refer for interpretation of law applying at the relevant past time?
- Future CJEU rulings will be relevant to interpretation
- So this will change, but effect gradual and unpredictable

Current references in CJEU pipeline

- *Hampshire (Turner & Newall scheme)* referred July 2016 – whether PPF compensation cap is fair if it means less than 50% cover
- *MB* case referred Aug 2016 – claim for state pension at 60 but no formal gender reassignment as would dissolve marriage
- Will cases get timed out?
  - *Parris* – about death benefits for Irish same sex couple unable to marry before 60 (they lost) – claim started 2010 - CJEU ruled Nov 2016

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Financial regulation governed by trade

- Alternative Investment Fund Managers Directive
  - Hedge funds will need passport or sell via private placement in EU
- European Markets Infrastructure Regulation (EMIR) - G20 commitment on derivatives trading will still bind UK
- UCITS Directive - may have to relocate to a member State
- MiFID II 2018 and MiFIR
- Foreign banks can no longer access EU through UK subsids?
- Insurers – could Solvency II be relaxed?
- Equivalence or passporting will tie us to EU standards?

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Brits abroad and migrant workers here

- UK business employees seconded to EU branches may come back
- Pensioners living overseas likely to stay
- What happens about State pensions paid to UK retirees in EU?
- EU citizens in UK less likely to stay?
- If rights are to be protected, what rights? How enforced?

Conclusions

- Brexit is a massive constitutional and legal change
- In pensions context, EU law led or drove UK law but it will remain UK law
- The EUW Act will only cut off future changes – very little falls away
- Future evolution will be gradual
- UK legal framework protects property rights
- Brexit issues will overlap with affordability/sustainability

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