



# Brexit and Modern Slavery: impacts on the UK's legal frameworks for workers in supply chains

June 2020

# Contents

Acknowledgements	4
Foreword	5
Executive summary	6
Recommendations	7
Introduction	8
Influence of EU Directives	10
Table I: Overview of key EU Directives and UK Implementation	12
Impact of Brexit on Domestic Legal Framework	20
Conclusion	23

# Acknowledgements

This report was authored by Arianne Griffith, Senior Research and Policy Fellow at the Rights Lab, University of Nottingham.

Special thanks to Baroness Lola Young, Member of the House of Lords, Dr Justine Stefanelli, Director of Publications and Research at the American Society for International Law, Professor Robert McCorquodale, Professor of International Law and Human Rights at the University of Nottingham and Vicky Brotherton, Policy Engagement Lead at the Rights Lab, for your assistance and support.

# Foreword

Modern slavery in its many and varied forms – for example, trafficking, abusive and exploitative labour practices, debt bondage, etc – still persists both in the UK and around the world. The UK has taken a number of steps to tackle modern slavery amongst the most important of which is the Modern Slavery Act (2015). Since then we have seen considerable progress and engagement on these issues, including from the private sector. However, with increasing numbers of people identified as victims of modern slavery each year in the UK, we must re-examine and redouble our efforts to reduce the vulnerability of people in our society to exploitation and increase the resilience of our communities to modern slavery.

In the UK and around the world, the socio-economic impact of the Coronavirus pandemic, including a sharp rise in unemployment, will exacerbate existing vulnerabilities in at-risk communities and may lead to a further increase in the number of victims of modern slavery.

Strong legal frameworks to protect human rights in general, and labour rights in particular, are vital in the struggle to provide effective safeguards against modern slavery.

This report provides key insights into the impact of the UK's withdrawal from the European Union on the UK's broader anti-slavery legal framework. Outlining nine EU directives that aim to prevent labour exploitation, protect the most vulnerable groups of workers and support corporate accountability, the Report considers the extent to which these provisions have been incorporated in the UK and how they will be affected as we leave the EU.

Parliament has a key role to play in ensuring that our existing protections are not eroded but rather, are strengthened over time. It is through the continued development, review and strengthening of our standards on workers' rights and corporate accountability and transparency in supply chains, that we can contribute to the elimination of modern slavery.

Baroness Young of Hornsey

# Executive summary

In the context of the UK's withdrawal from the European Union (Brexit), this report examines the European Union (EU) directives that protect against labour exploitation, the extent to which they have been incorporated into UK law and the impact of Brexit on these measures.

The UK has taken a number of important steps in the global fight against modern slavery, including through the passage of the Modern Slavery Act 2015. In addition, EU law has had a tangible, positive effect on the UK's legal frameworks for tackling modern slavery in supply chains in two key respects. Firstly, through the domestic implementation of EU directives that help protect labour rights and guard against the exploitation of workers, and secondly, through the Court of Justice of the European Union's (CJEU) approach to interpreting EU laws from which these domestic provisions derive.

This report identifies nine EU directives that are central to efforts to guard against labour exploitation in Member States:

- |                                       |   |
|---------------------------------------|---|
| 1. Working Time Directive             | 6. Directive on Transparent and Predictable Working Conditions                  |
| 2. Part-Time Work Directive           | 7. Non-Financial Reporting Directive  |
| 3. Directive on Temporary Agency Work | 8. Directive on Unfair Trading Practices in Agricultural and Food Supply Chains |
| 4. Seasonal Workers Directive         | 9. Public Procurement Directive   |
| 5. Employers Sanctions Directive      |   |

Certain directives such as the Working Time Directive, offer protection to all employees by imposing minimum standards for employment. Others provide additional protection for the most vulnerable groups of workers including migrant, seasonal, part-time, casual and agency workers.

The UK has implemented five of these directives through domestic law and regulations. This has added a layer of legal protection in domestic law for certain groups of workers. To date, the UK has implemented the Part-Time Work Directive, Working Time Directive, Directive on Temporary Agency Work, Non-Financial Reporting Directive and Public Procurement Directive. Although they provide important protections against exploitation for vulnerable groups of workers, the UK has opted out of the Seasonal Workers Directive and the Employers Sanctions Directive. The Directives on Unfair Trading Practices in Agricultural and Food Supply Chains and Transparent and Predictable Working Conditions are not yet in force for Member States as the deadlines for transposition into domestic law are in 2021 and 2022, respectively.

The CJEU's purposive approach to interpretation has also facilitated better protection of human rights at the national level precisely because of its focus on the purpose of the provision. This approach is in turn adopted by domestic courts when interpreting domestic provisions that derive from EU law and also through the preliminary rulings procedure whereby domestic courts refer questions on the interpretation of EU law to the CJEU.

Having left the EU, the UK's legal framework will change, however, most changes will not take effect until the Implementation Period or 'transition period' has ended. At this stage, EU law requirements for the UK to maintain the current protections for workers' rights will lapse, and Parliament will have the power to amend, repeal and replace the existing provisions. In addition, the UK's future relationship with the CJEU will not guarantee the same influence on legal interpretation and the protection of rights in national courts.

To ensure that there is a robust legal framework to support future anti-slavery efforts, the UK should maintain and strengthen legal protections that guard against the exploitation of workers. These measures are of even greater importance in the context of the Coronavirus pandemic (COVID-19) which has disproportionately affected the most vulnerable populations.

# Recommendations

1. **Maintain and strengthen the UK's provisions to protect workers' rights that derive from the relevant EU Directives.**
2. **Maintain and strengthen all additional protections for the most vulnerable groups of workers including migrant, seasonal, casual and part-time workers.**
3. **Adopt the recommendations from the Independent Review of the Modern Slavery Act 2015 to strengthen the domestic legal framework for ensuring corporate accountability for modern slavery in supply chains.**
4. **Introduce mandatory human rights due diligence requirements for companies to improve corporate action and accountability on modern slavery and other negative human rights impacts in their operations and supply chains.**
5. **Integrate and enforce human rights and labour rights standards in public procurement.**



# Introduction

Data on the number of people referred to the National Referral Mechanism (NRM)<sup>1</sup> as potential victims of modern slavery in the UK has increased year-on-year. The number of referrals rose by 36% from 2017 to 2018 and by a further 52% in 2019.<sup>2</sup> The second and third quarters of 2019 showed a 40% and 61% increase, respectively, from the number of referrals in the corresponding periods in 2018.<sup>3</sup> While figures from the first quarter of 2020 show a decrease in the number of NRM referrals for the first time in four years,<sup>4</sup> this has been attributed to the measures imposed to limit the spread of Coronavirus.

COVID-19 has quickly evolved from a global health crisis into a socio-economic crisis which requires a human-rights based response.<sup>5</sup> Data shows that the socio-economic impacts of COVID-19 disproportionately affect populations with existing vulnerabilities including those in situations of poverty and insecure employment. In particular, a contracting economy, widespread job losses, the risk of oversupply of labour, changing demands in the labour market and serious health risks and limitations on movement as a result of the pandemic may lead to higher levels of vulnerability, creating additional risks in the labour market. The pandemic has added a further layer of complexity to efforts to combat modern slavery, labour exploitation and other abuses.

It is crucial therefore that the UK's efforts to tackle modern slavery include implementing and enforcing effective legal protections against exploitation, particularly for some of the most vulnerable people in the workforce, such as migrant, seasonal, part-time, casual and agency workers.

At the core of the UK's legislative efforts to tackle modern slavery is the Modern Slavery Act 2015 which among other things, consolidated existing legal provisions on the constituent offences, namely, slavery, forced labour, servitude and human trafficking. In addition to this Act, other aspects of the UK's legal frameworks for the protection of human rights and, in particular, labour rights, form an important part of the UK's wider anti-slavery efforts.

The development and enforcement of a robust legal framework for labour rights is critical for reducing vulnerability to modern slavery. Legal provisions that help to reduce the risk of labour exploitation, by protecting workers' rights and requiring businesses and other employers to take appropriate action to respect those rights, form important safeguards against the worst forms of abuse. While the corporate reporting requirements introduced under section 54 of the Modern Slavery Act 2015 and the efforts made as part of the NRM further complement formal labour rights protections, a detailed examination of these is beyond the scope of this report.

The UK has introduced a number of legal protections to guard against labour exploitation which form part of this wider domestic anti-slavery framework. This evolution of the UK's domestic legal framework has benefited from the influence of EU law.

**This report outlines the key EU directives that protect against labour exploitation, the extent to which they have been incorporated into UK law and the impact of Brexit on these measures.<sup>6</sup>**

Under the terms of the Withdrawal Agreement between the UK and the EU<sup>7</sup>, an Implementation Period, also referred to as the 'transition period', began immediately following the UK's withdrawal from the EU on 31 January 2020.<sup>8</sup> During this period, EU law will generally continue to apply in the UK and therefore, most key changes to the UK's legislative framework as considered in this report will occur after the end of the Implementation Period.

<sup>1</sup> The National Referral Mechanism is the UK's framework for the identification and support of victims of modern slavery.

<sup>2</sup> National Crime Agency, National Referral Mechanism Statistics – End of Year Summary 2018 (20 March 2019); Home Office, National Referral Mechanism Statistics – End of Year Summary 2019 (2 April 2020).

<sup>3</sup> Home Office, National Referral Mechanism Statistics: Quarter 2 2019 - April to June. Statistical Bulletin 16/19 (August 2019); Home Office, National Referral Mechanism Statistics: Quarter 3 2019 - July to September. Statistical Bulletin 29/19 (November 2019).

<sup>4</sup> Home Office, National Referral Mechanism Statistics UK: Quarter 1 2020 – January to March. Statistical Bulletin 14/20 (June 2020).

<sup>5</sup> A UN framework for the immediate socio-economic response to COVID-19 (April 2020).

<sup>6</sup> References to post-Brexit changes should be taken to include those that occurred since 31 January 2020 or those that will occur after the end of the Implementation Period, as applicable.

<sup>7</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020 ('Withdrawal Agreement').

<sup>8</sup> The Implementation Period will end by default on 31 December 2020 unless an extension is agreed by the parties to the Withdrawal Agreement.

# Influence of EU Directives

Directives, a form of EU secondary legislation, have been widely used to ensure the protection of workers' rights in EU Member States. **Directives are binding on all EU Member States only as to the result. States therefore have some discretion as to the form and method of implementation.**<sup>9</sup> Member States are required to bring into force the necessary legislation, regulations and or administrative provisions within the prescribed period (usually 2 years).<sup>10</sup> In contrast to regulations (another form of EU secondary legislation), directives are generally not directly applicable in Member States and must be implemented at the national level.<sup>11</sup>

This section provides an overview of the key EU directives that guard against labour exploitation and how these have been implemented in the UK through domestic regulations. As a form of secondary legislation at the national level, such domestic regulations become law and can be amended by a much simpler procedure than Acts of parliament.

As seen below, it is possible for Member States to opt out of certain aspects of EU policy. However, where the State is bound by the directive, a failure to implement it or the withdrawal of implementing regulations constitutes a breach of EU law.

## Protecting against exploitation

Nine EU directives provide the core legal protections against labour exploitation and modern slavery in Member States (see **Table I** below).<sup>12</sup> As of February 2020, seven of these had entered into force for Member States while the other two, the Directive on Unfair Trading Practices in Agriculture and the Directive on Transparent and Predictable Working Conditions enter into force after the end of the Implementation Period. The UK has implemented five of the seven directives that are currently in force for Member States. **Many of these domestic regulations predate the UK's Modern Slavery Act 2015 and form part of the UK's domestic anti-slavery legal framework.**

The directives outlined below may be divided into two groups: those that guard against the exploitation of workers; and those that support responsible business practice.

The first group of directives affords protection to workers' rights and guards against labour exploitation by stipulating minimum standards for their terms of employment and working conditions. A number of these directives also provide added safeguards for migrant, seasonal, casual, agency and part-time workers who are at a higher risk of being exploited.

The second group generally seeks to manage the risks associated with large companies. For example, the Non-Financial Reporting Directive aims to increase corporate accountability through a reporting requirement, while the Directive on Unfair Trading Practices in Agricultural and Food Supply Chains aims to reduce some of the unpredictability in buyer-supplier relationships which can lead to precarious employment arrangements and increase the risk of the exploitation of workers in supply chains.

A notable exception is the Employers Sanctions Directive which requires those who employ persons who are in the country illegally, to pay them for any work undertaken and to pay social security contributions for these workers. The UK, Denmark and Ireland have opted out of this Directive.<sup>13</sup>

<sup>9</sup> TFEU Article 288 and 258.

<sup>10</sup> Where there is no date prescribed in the directive, States must implement within 20 days from the publication of the directive in the Official Journal (Article 297, TFEU).

<sup>11</sup> In rare instances, directives have been found to have direct effect. See for example: *Case 9/70 Grad v Finanzamt Traunstein* (1970); Particularly where the date for implementation has passed and the State has failed to implement the directive once the provisions are imperative and sufficiently precise, see *Case 148/78 Pubblico Ministero v Ratti* (1979).

<sup>12</sup> This is not an exhaustive list. Other directives such as the Anti-Trafficking Directive (2011/36/EU) and directives protecting the health and safety of workers also help to reduce the vulnerability of workers to exploitation.

<sup>13</sup> UK Parliamentary Statement on opt out of Employers Sanctions Directive, see: <https://www.gov.uk/government/speeches/eu-directive-on-sanctions-against-employers-of-illegally-staying-third-country-nationals>.

**Table I: Overview of key EU Directives and UK Implementation**

Directive	Relevant protections	UK implementation
<b>1. Working Time Directive<sup>14</sup></b> 2003 <b>Prescribes standards for working conditions that protect the health and safety of workers</b>	<p>Provides a safeguard against employees being compelled to work excessive hours.</p> <p>It limits the working week to 48 hours for people over the age of 18 and provides minimum rest periods for workers. These include:</p> <ul style="list-style-type: none"> <li>■ breaks during the workday as well as prescribed daily and weekly rest; and</li> <li>■ additional protections for night-time working.</li> </ul> <p>It also permits a number of derogations for prescribed sectors and jobs.</p>	 <p><b>Working Time Regulations</b></p> <p>The UK has included an option for employees to opt out of the cap on working hours.</p> <p>Protections for employees who wish to exercise the option to opt out include:</p> <ul style="list-style-type: none"> <li>■ it must be voluntary and indicated in writing; and</li> <li>■ a refusal to opt out must not be detrimental to the employee and does not create grounds for the termination of employment or unfair treatment.</li> </ul>
<b>2. Part-time Work Directive<sup>15</sup></b> 1997 <b>Prevents less favourable treatment of part-time workers than full-time counterparts working for the same employer under the same type of employment contract</b>	<p>The Directive implements the Framework Agreement concluded between cross-industry organisations which aims to remove unjustified discrimination of part-time workers, improve the quality of part-time work and organise working time to suit employer and employee needs.</p> <p>The Framework Agreement aims to protect part-time workers against the imposition of discriminatory or exploitative terms.</p> <p>This reduces the vulnerability of part-time workers by preventing them from being given less favourable terms to full time workers or otherwise being treated differently solely on the basis that they work part-time.</p> <p>This is achieved through affirming that the principle of non-discrimination (on the basis of part-time work) and the application of the pro-rata principle. It also seeks to protect workers who wish to transition into or out of part-time work, including by excluding this as grounds for dismissal.</p>	 <p><b>Part-time Workers (Prevention of Less Favourable Treatment) Regulations</b></p> <p>Protections for part-time workers include:</p> <ul style="list-style-type: none"> <li>■ the same basic rate of pay as comparable full-time workers;</li> <li>■ a minimum of statutory annual leave, maternity and parental leave and time off for dependents on a pro-rata basis; and</li> <li>■ a legal right to overtime pay at the same rate as full time workers once they have worked up to the full-time hours.</li> </ul> <p><b>Delayed application in UK:</b></p> <p>Initially, the Directive did not apply to the UK which had opted out of Protocol No.14 to the EC Treaty on Social Policy. However, this was reversed by the Amsterdam Treaty in 1997 and the UK's indication in 1998 of its willingness to accept the Directive.<sup>16</sup></p>
<b>3. Directive on Temporary Agency Work<sup>17</sup></b> 2008 <b>Protects temporary workers with respect to the terms of their employment</b>	<p>Establishes that temporary agency workers are entitled to treatment equal to that of workers who have been recruited by the hiring company for the same job.</p> <p>This includes:</p> <ul style="list-style-type: none"> <li>■ use of and access to facilities including toilets, car parking, staff rooms etc; and</li> <li>■ terms of employment such as pay, working time, overtime, breaks, rest, night work, leave entitlements and public holidays.</li> </ul>	 <p><b>Agency Workers Regulations</b></p> <p>In the UK, the qualifying period is set at 12 weeks for the matters that constitute 'terms and conditions' of employment.</p> <p>These are pay, duration of working time, night work, rest periods, rest breaks and annual leave.</p>

<sup>14</sup> Directive 2003/88/EC, 4 November 2003. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0088>

<sup>15</sup> Directive 97/81/EC, 15 December 1997. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0081&from=EN>

<sup>16</sup> Directive 98/23/EC, 7 April 1998. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0023&from=EN>

<sup>17</sup> Directive 2008/104/EC, 19 November 2008. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008L0104>

#### 4. Seasonal Workers Directive<sup>18</sup>

2014

**Regulates the entry and stay of third country nationals as seasonal workers**

Provides safeguards for third country nationals against unfair charges, contract terms and working conditions to reduce the vulnerability of migrant and seasonal workers to labour exploitation.

The Directive offers a number of protections for the rights of third country nationals who are legally working in the country. These include:

1. **Prerequisites for the issuance of appropriate work permits.**
  - In the case of minimum requirements for the terms of employment, this covers the duration of employment, remuneration, number of working hours and other working conditions.
2. **The rights of authorised seasonal workers to,**
  - enter, stay and work in the authorising country for the prescribed period;
  - equality of treatment with nationals doing the same job. This includes the terms of their employment and working conditions;
  - access effective mechanisms for complaints; and
  - protection against dismissal or adverse treatment as a reaction to complaints.
3. **Sanctions for employers who do not fulfil the obligations.**

Issues remain as to the enforcement of provisions and avenues for access to remedy under these provisions.



#### The UK has opted out of this Directive

The UK operated a Seasonal Agricultural Workers Scheme up until 2013.<sup>19</sup>

In April 2019, the government announced a new pilot scheme for seasonal workers to work in the agricultural sector.<sup>20</sup>



#### 5. Employers Sanctions Directive<sup>21</sup>

2009

**Establishes sanctions against employers of illegally staying third country nationals**

Affords a measure of protection to migrant workers and victims of human trafficking who are especially vulnerable to exploitation.

The Directive prohibits the employment of third country nationals who are in the country illegally. It does not create a right of entry, stay and access to the labour market.

However, it requires employers to pay any such workers for the work undertaken which prevents employers from benefiting at the expense of the workers. Employers are also required to pay outstanding taxes social security contributions as appropriate.

The prescribed civil and criminal penalties include:

- fines and requirements for employers to make back payments for completed work; and
- criminal sanctions for 'serious infringements'. This includes persistently repeated infringements, illegal employment of a significant number of third country nationals, illegal employment of a minor, having employees working in particularly exploitative conditions or persons who are known to be victims of human trafficking.



#### The UK has opted out of this Directive

The UK government stated its reasons in a written ministerial statement which was laid in the House of Commons on 24 May 2011.<sup>22</sup> These include that the Directive imposed additional administrative burdens on employers and the public sector, extended the definition of employment that created further costs and liabilities for employers and authorities, and 'guaranteed additional rights to illegally-staying employees'.

In the UK, earnings from a person who is employed whilst in the country illegally can be seized as proceeds of crime under the Proceeds of Crime Act.

<sup>18</sup> Directive 2014/36/EU, 26 February 2014. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036>

<sup>19</sup> Written Statement to Parliament on the Seasonal Agricultural Workers Scheme and the Food Processing Sectors Based Scheme, 12 September 2013. Available at: <https://www.gov.uk/government/speeches/seasonal-agricultural-workers-scheme-and-the-food-processing-sectors-based-scheme>; See also Migration Advisory Committee, Migrant Seasonal Workers: The impact on the horticulture and food processing sectors of closing the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme (May 2013). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257242/migrant-seasonal-workers.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257242/migrant-seasonal-workers.pdf)

<sup>20</sup> Written Statement to Parliament on the Seasonal Workers Pilot, 6 March 2019. Available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-06/HCWS1380/>

<sup>21</sup> Directive 2009/52/EC, 18 June 2009. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009L0052-20090720>

<sup>22</sup> Written Statement to Parliament on EU directive on sanctions against employers of illegally staying third-country nationals, 24 May 2011. Available at: <https://www.gov.uk/government/speeches/eu-directive-on-sanctions-against-employers-of-illegally-staying-third-country-nationals>

## 6. Directive on Transparent and Predictable Working Conditions<sup>23</sup>

2019

### Affords protections to workers in 'atypical' employment relationships

Affords certain minimum protections for people working in more flexible or 'atypical' employment relationships. These include domestic workers and workers with no guaranteed working time, such as those on zero-hour contracts and on-demand or casual workers.

The Directive seeks to increase the transparency and predictability of working conditions, and to prevent abusive practices with respect to on-demand contracts.

It provides for a number of material rights, including:

- the right to work for other employers. This is protected through the prohibition of exclusivity clauses that tie workers to a single employer and prevent them from taking up parallel employment;
- the right to predictability of work. The directive requires that workers with variable working schedules are given advance notice of when they can be requested to work;
- the right to compensation for cancellation of work assignments after a specific deadline; and
- the right to receive working terms and conditions in writing within seven days of starting the assignment.



### To Note:

This Directive will enter into force in EU Member States after the UK has left the EU and after the end of the Implementation Period.

The date for transposition into domestic legislation and entry into force at the domestic level is 1 August 2022.

The UK government therefore will not be under a legal obligation to give effect to this Directive.



## 7. Non-Financial Reporting Directive<sup>24</sup>

2014

### Requires disclosure of non-financial and diversity information by certain large companies and groups

Requires large public-interest companies including listed companies, insurance companies and banks to publish disclosures on environmental, social and governance issues.

This includes reporting on the policies implemented in relation to:

- social responsibility and the treatment of employees; and
- respect for human rights.

Companies are permitted to use established guidelines to reduce the burden associated with compliance.



### Companies, Partnership and Groups (Accounts and Non-Financial Reporting) Regulations

The Regulations amend the Strategic Reporting requirement under the Companies Act 2006. In keeping with the requirements of the Directive, the UK provisions stipulate that companies that do not have policies in place must provide a clear and reasoned explanation.

This therefore extends beyond the reporting requirements of the UK Modern Slavery Act 2015 which:

- only relates to reporting on modern slavery rather than a broader set of human rights issues;
- allows companies to report that they have not taken any steps (to tackle modern slavery); and
- does not impose mandatory criteria for reporting.

The Independent Review of the Modern Slavery Act 2015 was completed in 2019.<sup>25</sup> Implementation of the reviewers' recommendations on section 54 would strengthen the existing provision and address points two and three above.

<sup>23</sup> Directive 2019/1152/EU, 20 June 2019. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1152&from=en>

<sup>24</sup> Directive 2014/95/EU, 22 October 2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>

<sup>25</sup> Independent Review of the Modern Slavery Act 2015: Final Report (May 2019). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803406/Independent\\_review\\_of\\_the\\_Modern\\_Slavery\\_Act\\_-\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf)

## 8. Directive on Unfair Trading Practices in Agricultural and Food Supply Chains<sup>26</sup>

2019

### Preventing unfair trading practices in business-to-business relationships in the agricultural and food supply chain

Helps to reduce power imbalances in buyer-supplier relationships in agri-food supply chains, and volatility and unpredictability in the supply chain.

These measures help to support more sustainable, longer-term supplier relationships, and reduce the precariousness of employment for some workers.

The Directive prohibits unfair trading practices including:

- cancellation of orders at short notice;
- unilateral changes to supply agreements; and
- refusal of requests to provide a written supply agreement.

It also provides for the creation of a designated enforcement authority.

## 9. Public Procurement Directive<sup>27</sup>

2014

### Ensuring that the award of public contracts follows core principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency

Provides a number of principles to inform public procurement processes. These include some efforts to incorporate social considerations into procurement processes.

Efforts to include social and human rights considerations include:

- exclusion criteria for public contracts, which refer to human rights considerations. However, these only apply in the most extreme cases such as convictions for child labour or human trafficking;
- the ‘overarching social clause’ provides a limited opportunity to exclude bids that appear ‘abnormally low’ due to non-compliance with environmental, social or labour laws; and
- a non-exhaustive list of considerations for making the award to the “most economically advantageous tender”. These incorporate “social... characteristics and trading and its conditions”.

Notably, the listed selection criteria in the directive do not explicitly refer to human rights considerations though Member States have some discretion to consider including them.

The Directive only applies to public contracts that meet the designated value threshold and creates exceptions including certain service contracts and other specified subject matter areas.

### To Note:

*The Directive enters into force after the UK's withdrawal from the EU.*

The date for transposition into domestic legislation is 1 May 2021. Domestic provisions must enter into force no later than 1 November 2021.



## Public Contracts Regulations

The Regulations permit the inclusion of social, labour law and environmental criteria in procurement and contracting phases.

Violations of social or labour laws under the Regulations include complaints upheld by the Equality and Human Rights Commission, findings against the bidder by the employment tribunal and breaches of the National Minimum Wage Act.

### To note:

In March 2019, the UK Cabinet Office agreed to include environmental and social issues in considering the award of public contracts.<sup>28</sup>

Government expenditure on procurement was estimated at £284bn in 2017/18.<sup>29</sup>

<sup>26</sup> Directive 2019/633/EU, 17 April 2019. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1563886335287&uri=CELEX:32019L0633>

<sup>27</sup> Directive 2014/24/EU, 26 February 2014. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

<sup>28</sup> Cabinet Office and Department of Digital, Culture, Media & Sport, Press Release ‘Businesses urged to do more to help society’, 11 March 2019. Available at: <https://www.gov.uk/government/news/businesses-urged-to-do-more-to-help-improve-society>

<sup>29</sup> Institute for Government and Gowling WLG, Government Procurement: the scale and nature of contracting in the UK (December 2018) includes Institute for Government analysis of Public Expenditure Statistical Analyses 2018. This is calculated as the sum of Government’s gross current procurement and own capital procurement.

# Impact of Brexit on Domestic Legal Framework

The European Union (Withdrawal) Act 2018 repealed the European Communities Act (ECA),<sup>30</sup> which formed the legal basis for the application of EU law in the UK. However, the EU (Withdrawal Agreement) Act 2020<sup>31</sup> which implements the EU-UK Withdrawal Agreement, provides for some continuity in the UK's domestic law during the Implementation Period.<sup>32</sup> Specifically, the Withdrawal Agreement Act 2020 provides that the ECA and EU-derived domestic legislation will generally continue to have effect in domestic law until the end of the Implementation Period.

The legislation also transposes all directly applicable EU law<sup>33</sup> into UK law at the end of the Implementation Period and simultaneously establishes a legal basis for all existing EU-derived domestic legislation in UK law.<sup>34</sup> Notably, EU-derived domestic legislation includes the UK's domestic regulations included in **Table I** above.<sup>35</sup>

Domestic legal protection of labour rights, including those protections that guard against labour exploitation have improved considerably in the UK as a result of the implementation of EU directives. This section considers the impact of Brexit on these legal protections and the UK's existing legal framework.

## (A) Implementation of EU Law

In future, as a non-EU Member State, the UK will no longer be required under the EU Treaties to implement (or maintain) the standards prescribed in EU law, such as EU directives.

These standards are usually passed on through EU secondary legislation, which include regulations, directives and decisions. While **regulations** are binding on all Member States and generally have direct effect at the national level, **directives** are binding on Member States only as to the objective to be achieved. In contrast, **decisions** (of EU Institutions)<sup>36</sup> are only binding on the parties to whom they are addressed.

There are limits to the EU's power to make laws. In areas such as employment and social policy, and human rights, where the EU does not have exclusive competence to act, the EU is guided by the principles of subsidiarity and proportionality in the exercise of its legislative power.<sup>37</sup>

## (B) Supremacy of EU Law

The principle of supremacy of EU law makes it an 'overriding force' in the domestic legal systems of Member States. Therefore, in situations of conflict, EU law has primacy over national law.<sup>38</sup>

This principle has been applied in the UK by domestic courts. The House of Lords' judgment in *Factortame* proved a watershed moment for the application of EU law in the UK, although it had been clear and widely understood in the UK before this.<sup>39</sup> The House of Lords held that "under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a

United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."<sup>40</sup>

The application of this principle allows UK courts to ensure respect for the rights protections prescribed by the directives detailed above. The end of the Implementation Period will signal an end to the supremacy of EU law in the UK, for any laws passed or made on or after that date.<sup>41</sup>

## (C) Status of Domestic Regulations

Post-Brexit, the UK Parliament would have the power to amend, repeal and replace existing provisions. Under the EU Withdrawal Act 2018, EU-derived domestic legislation can be altered by means of an Act of Parliament, other primary legislation or the appropriate secondary legislation.<sup>42</sup>

This applies to the directives included in **Table I** (on page 12) which have been incorporated into UK law through domestic regulations. Weakening the UK's existing labour law protections would make workers more vulnerable to exploitation and modern slavery.

In this regard, the UK's withdrawal from the EU removes a layer of protection of these rights within the UK's domestic legal framework.

## (D) Rules of Interpretation and Influence of the CJEU

As noted above, the UK's relationship to EU law has had an impact on the interpretation of domestic law by UK courts. In particular, the **CJEU's purposive approach to interpretation has had a direct, positive impact on the protection of rights under EU law and by extension, the protection of rights in Member States**. Domestic courts have adopted a purposive, rather than a literal approach to give effect to EU law and the rights protected under it, mirroring the approach of the CJEU.

In the UK, where statutory instruments have been specifically introduced to give effect to EU directives, the courts have been decisive. This has in turn afforded better protection for rights at the national level. For example, in the case of *Litster v Forth Dry Dock and Engineering*,<sup>43</sup> the House of Lords took a purposive approach, interpreting the domestic regulations in a way that ensured compliance with the Directive which it was intended to implement. The Court found that although the appellant's actions did not *prima facie* breach the requirements of the regulations, they defeated the objective of the relevant Directive and were therefore prohibited.

However, UK courts have been more reluctant to use broad interpretations to ensure compliance with EU law where the relevant domestic provision was not introduced for the purpose of implementing a directive.<sup>44</sup> However, when a provision is capable of multiple interpretations, the Courts have interpreted it in the way that best reflects the objectives of EU law.<sup>45</sup>

<sup>30</sup> section 1 European Union (Withdrawal) Act 2018 (EUWA)

<sup>31</sup> The EU (Withdrawal Agreement) Act 2020 (EUWAA) gives effect to the Withdrawal Agreement in the UK's domestic law.

<sup>32</sup> The Implementation Period began upon the UK's withdrawal from the EU on 31 January 2020 and will end by default on 31 December 2020 unless otherwise agreed by the parties.

<sup>33</sup> section 3 EUWA 2018; section 25(2) EUWAA 2020

<sup>34</sup> section 2 EUWA 2018; section 25(1) EUWAA 2020

<sup>35</sup> section 2(2) European Communities Act (ECA)

<sup>36</sup> Under Part Six of the Treaty on the Functioning of the European Union (TFEU), the EU Institutions are the European Parliament, European Council, Council of the European Union, Commission, CJEU, European Central Bank (ECB) and Court of Auditors.

<sup>37</sup> Under the principle of subsidiarity, the EU will only take action when an objective cannot be sufficiently achieved by Member States and can therefore be better achieved by the Community due to the scale or effects. The principle of proportionality provides that when taking action, the EU will not exceed what is necessary to achieve the desired objective. See Treaty on European Union (TEU) Article 5(3) and 5(4).

<sup>38</sup> Case 6/64 *Costa v ENEL* (1964); Treaty of Lisbon, Declaration No. 17.

<sup>39</sup> *R v Secretary of State for Transport ex parte Factortame Ltd and ors* [1991] 1 All ER 70

<sup>40</sup> *R v Secretary of State for Transport ex parte Factortame Ltd and ors* [1991] 1 All ER 70

<sup>41</sup> section 5 EUWA 2018; section 25(4) EUWAA 2020

<sup>42</sup> section 7 EUWA 2018

<sup>43</sup> *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134

<sup>44</sup> *Duke v GEC Reliance Systems* [1988] 1 All ER 626

<sup>45</sup> *Pickstone v Freemans plc* [1988] 2 All ER 803

## CJEU Influence Through ‘Preliminary Rulings’

One way in which the CJEU influences the interpretation and protection of rights at the national level is through its preliminary rulings procedure. Under Article 267 of the TFEU, the CJEU has jurisdiction to give ‘preliminary rulings’ concerning the interpretation of the Treaties as well as ‘the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union’. This includes questions on the interpretation of regulations, directives and decisions that may be referred to it by national courts during the course of proceedings which involve an issue of EU law.<sup>46</sup>

Such a ruling by the CJEU is only binding on the referring domestic court. However, it operates as a precedent for other national courts in respect of the interpretation of the relevant provision(s) of EU law. For example, the House of Lords decision in *Litster* referred to above, notes that the obligations of the State under the Directive,<sup>47</sup>

**“... are to be ascertained not only from the wording of the relevant directive but from the interpretation placed on it by the Court of Justice of the European Communities [now, CJEU]”<sup>48</sup>**

EU Member States have benefited from the approach to interpretation taken by the CJEU with respect to the protection of rights, in a similar way to that described above.<sup>49</sup>

However, there are limits to the impact of the CJEU’s preliminary rulings. The CJEU does not rule on the issue of the validity of national law itself and it cannot strike down national law, as this would be a question for domestic courts and legislatures. Rather, based on its interpretation of EU law, the CJEU can assist domestic courts in determining whether domestic legislation is compatible with EU law.

While UK courts will have some limited reference to relevant jurisprudence of the CJEU,<sup>50</sup> retained case law and retained general principles of EU law, UK courts will not generally be bound by retained EU case law.<sup>51</sup> Further, UK courts will not be bound by any principles laid down or decisions made by the CJEU after the Implementation Period ends, nor will they be able to refer cases to the CJEU.<sup>52</sup>

# Conclusion

The Modern Slavery Act 2015 was the first of its kind in the world. Among other things, it consolidated the offences of slavery, servitude, forced labour and human trafficking, created the Office of the Independent Anti-Slavery Commissioner, provided for a system for the identification and support of victims of modern slavery and introduced a corporate reporting requirement for certain large companies. The Act remains central to the UK’s anti-slavery domestic legal framework.

However, the UK’s implementation of various EU directives that aim to reduce the vulnerability of workers to exploitative labour practices forms another important part of this framework. These include legal protections for seasonal, part-time, casual and agency workers who are particularly vulnerable to exploitation as well as protections with a wider scope of application, such as the Working Time Directive which limits the number of hours in a working week and guarantees periods of rest for all workers.

Post-Brexit changes to the UK’s domestic legal framework will alter the UK’s relationship with the CJEU and untether existing labour rights protections from the EU directives from which they derived. However, these form an integral part of the UK’s broader anti-slavery legal framework and any weakening of existing legal protections will leave workers more vulnerable to modern slavery.

In December 2019, the provisions in EU (Withdrawal Agreement) Bill which sought to protect workers’ rights through certain procedural safeguards, were removed.<sup>53</sup> It is now incumbent on all Parliamentarians to ensure that existing labour rights protections and above-mentioned provisions that guard against labour exploitation are preserved and strengthened. COVID-19 has added to the urgency of this situation, creating an even stronger imperative to ensure that effective rights protections are in place. This will be important for limiting the potential negative impact of the pandemic and demonstrating the UK’s continued commitment to tackling modern slavery in supply chains.

<sup>46</sup>National courts are not obliged to refer questions to the CJEU in all instances. There is a duty to refer under TFEU Article 267(3) “where [a question on the interpretation of EU law] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.” Key exceptions to the duty to refer are where the correct application is so clear that there should be no reasonable doubt about the interpretation of the provision, known as the *Acte Clair Doctrine* and where the identical question has already been determined in a similar case, known as the *Acte Eclair Doctrine*.

<sup>47</sup>Directive 77/187/E.E.C. ‘relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses’, 14 February 1977 (no longer in force).

<sup>48</sup>*Litster v Forth Dry Dock and Engineering*, [1990] 1 AC 546.

<sup>49</sup>C. O’Cinneide, *Brexit and Human Rights* in O. Fitzgerald and E. Lein (eds) *Complexity’s Embrace: The International Law Implications of Brexit* (McGill-Queen’s University Press, 2018), p. 299.

<sup>50</sup>section 6(2) EUWA 2018.

<sup>51</sup>section 6(4) EUWA 2018 ; section 26 (1) EUWAA 2020.

<sup>52</sup>section 6(1) EUWA 2018; section 26 EUWAA 2020.

<sup>53</sup>See House of Commons Library Insight, ‘Removal of workers’ rights in the new EU (Withdrawal Agreement) Bill, 20 December 2019. Available at: <https://commonslibrary.parliament.uk/brexit/legislation/workers-rights-and-the-new-eu-withdrawal-agreement-bill/>



## Discover more about our world-class research

[nottingham.ac.uk/rights-lab](http://nottingham.ac.uk/rights-lab)

 [rightslab@nottingham.ac.uk](mailto:rightslab@nottingham.ac.uk)  
 [@rightsbeacon](https://twitter.com/rightsbeacon)

This publication is available  
in alternative formats.  
+44 (0)115 951 5559