



# Law Derived from the European Union (Wales) Act 2018

**2018 anaw 3**

*EU derived Welsh law*

## **2 EU derived Welsh law**

In this Act, “EU derived Welsh law” means—

- (a) the provisions made in regulations under section 3 (retained direct EU law),
- (b) the provisions made in regulations under section 4 or continuing in effect under or by virtue of regulations under that section (enactments derived from EU law),
- (c) the provisions made in statutory instruments specified under section 5 (provision made under EU related powers and continuing in effect under section 5), so far as they have effect under that section,

as that body of law is added to or otherwise modified by or under this Act or by other enactments from time to time.

## **3 Power to retain direct EU law**

- (1) The Welsh Ministers may by regulations make provision within devolved competence corresponding to direct EU law for the purpose of continuing its operation, so far as the Welsh Ministers consider appropriate, after the United Kingdom withdraws from the European Union.
- (2) In making regulations under this section, the Welsh Ministers must seek to continue the rights, powers, liabilities, obligations, restrictions, remedies and procedures that are recognised and available in the law of England and Wales by virtue of section 2(1) of the European Communities Act 1972 at the time the regulations are made.
- (3) In this section, “direct EU law” means—
  - (a) provision in the EU Treaties that has direct effect in the law of England and Wales by virtue of section 2(1) of the European Communities Act 1972 so far as its effect is not reproduced in an enactment that applies in relation to

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*Status: This is the original version (as it was originally enacted).*

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- Wales on the day this section comes into force (whether or not the enactment extends or applies to other territories);
- (b) provision in any EU regulation, EU decision or EU tertiary legislation so far as its effect is not reproduced in an enactment that applies in relation to Wales on the day this section comes into force (whether or not the enactment extends or applies to other territories);
  - (c) any Annex to the EEA agreement, so far as—
    - (i) it refers to, or contains adaptations of, anything falling within paragraph (b), and
    - (ii) its effect is not reproduced in an enactment that applies in relation to Wales on the day this section comes into force (whether or not the enactment extends or applies to other territories);
  - (d) Protocol 1 to the EEA agreement (which contains horizontal adaptations that apply in relation to EU instruments referred to in the Annexes to that agreement).
- (4) In making provision corresponding to direct EU law, the Welsh Ministers have the power (among other things)—
- (a) to not include anything in direct EU law that will have no practical application in relation to Wales or any part of Wales or will be otherwise redundant or substantially redundant;
  - (b) to not include functions in direct EU law of, or in relation to, EU entities that will no longer have functions in that respect under EU law in relation to the United Kingdom or any part of the United Kingdom;
  - (c) to not include provision for, or in connection with, reciprocal arrangements between—
    - (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
    - (ii) the EU, an EU entity, a member State or a public authority in a member State,
 that will no longer exist or will no longer be appropriate;
  - (d) to not include provision for, or in connection with, other arrangements that—
    - (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
    - (ii) are otherwise dependent upon the United Kingdom's membership of the EU,
 and that will no longer exist or will no longer be appropriate;
  - (e) to not include provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) that will no longer exist, or will no longer be appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties;
  - (f) to remove EU references in direct EU law that will no longer be appropriate;
  - (g) to provide for functions in direct EU law of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—
    - (i) exercisable by a public authority (whether or not newly established or established for the purpose), or
    - (ii) absent or different in provision made by the regulations;

- (h) to provide for the establishment of public authorities to carry out functions provided for by regulations under this section;
  - (i) to modify an enactment.
- (5) But regulations under this section may not—
- (a) impose or increase taxation;
  - (b) make retrospective provision;
  - (c) create a relevant criminal offence;
  - (d) confer or impose a function on a Minister of the Crown;
  - (e) remove or modify a pre-commencement function of a Minister of the Crown unless doing so is incidental to, or consequential on, another provision contained in the regulations.
- (6) Regulations under this section—
- (a) must be made before exit day, and
  - (b) must not come into force before exit day.

#### **4 Restatement and continuation of EU derived enactments**

- (1) The power in subsection (2) applies to an enactment if—
- (a) it was passed or made, or operates, entirely or to some extent for a purpose mentioned in section 2(2)(a) or (b) of the European Communities Act 1972 (whether or not made under section 2(2) of, or paragraph 1A of Schedule 2 to, that Act), or
  - (b) it relates otherwise to the EU or the EEA for all or some purposes.
- (2) The Welsh Ministers may by regulations—
- (a) repeal or revoke an enactment that is wholly within devolved competence;
  - (b) disapply an enactment that is wholly or partly within devolved competence, so far as it is within devolved competence;
  - (c) restate an enactment repealed or revoked under paragraph (a) with or without modifications within devolved competence;
  - (d) restate an enactment disapplied under paragraph (b), so far as it is disapplied, with or without modifications within devolved competence;
  - (e) make further provision within devolved competence in connection with restatement of an enactment under paragraph (c) or (d).
- (3) The Welsh Ministers may by regulations—
- (a) provide for provision in subordinate legislation made under, or by virtue of, a provision repealed or revoked by regulations under subsection (2)(a) to continue in effect as if made under or by virtue of provision in regulations under subsection (2)(c) (including provision in subordinate legislation made under, or by virtue of, functions that are not restated in the regulations under subsection (2)(c));
  - (b) provide for provision in subordinate legislation made under, or by virtue of, a provision so far as it is disapplied by regulations under subsection (2)(b) to continue in effect as if made under or by virtue of provision in regulations under subsection (2)(d) (including provision in subordinate legislation made under, or by virtue of, functions that are not restated in the regulations under subsection (2)(d));

- (c) modify provision in subordinate legislation that continues in effect under this subsection and make further provision in connection with its continued effect, if the modification or further provision is within devolved competence.
- (4) Regulations under this section may not make modifications of an enactment or further provision in connection with its restatement or continued effect unless the Welsh Ministers consider the modification or further provision necessary to ensure the effective operation of the enactment after the withdrawal of the United Kingdom from the European Union.
- (5) Regulations under this section may include (but are not limited to) provision—
- (a) removing anything that has no practical application in relation to Wales or any part of it or is otherwise redundant or substantially redundant;
  - (b) removing functions of, or in relation to, EU entities that no longer have functions in that respect under EU law in relation to the United Kingdom or any part of the United Kingdom;
  - (c) removing provision for, or in connection with, reciprocal arrangements between—
    - (i) the United Kingdom or any part of it or a public authority exercising functions in relation to Wales, and
    - (ii) the EU, an EU entity, a member State or a public authority in a member State,
 that no longer exist or are no longer appropriate;
  - (d) removing provision for, or in connection with, other arrangements that—
    - (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
    - (ii) are otherwise dependent upon the United Kingdom’s membership of the EU,
 and that no longer exist or are no longer appropriate;
  - (e) removing provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) that no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties;
  - (f) conferring functions or imposing restrictions that—
    - (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
    - (ii) it is appropriate to retain;
  - (g) removing EU references that are no longer appropriate.
- (6) Regulations under this section may (among other things)—
- (a) provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—
    - (i) exercisable instead by a public authority (whether or not newly established or established for the purpose), or
    - (ii) replaced, abolished or otherwise modified;
  - (b) provide for the establishment of public authorities to carry out functions provided for by regulations under this section.
- (7) But regulations under this section may not—

- (a) impose or increase taxation;
  - (b) make retrospective provision;
  - (c) create a relevant criminal offence;
  - (d) confer or impose a function on a Minister of the Crown, unless the regulations restate the law;
  - (e) remove or modify a pre-commencement function of a Minister of the Crown unless doing so is incidental to, or consequential on, another provision contained in the regulations.
- (8) Regulations under this section—
- (a) must be made before exit day, and
  - (b) must not come into force before exit day.

## **5 Provision made under EU related powers to continue to have effect**

- (1) Provision made in a statutory instrument made under one or more of the EU related powers set out in subsection (2) that is specified by the Welsh Ministers in regulations has effect under this section instead of under those powers and is to be treated as having been made under this section.
- (2) The EU related powers are—
- (a) section 2(2) of the European Communities Act 1972;
  - (b) paragraph 1A of Schedule 2 to the European Communities Act 1972;
  - (c) section 56 of the Finance Act 1973 in so far as the provision was made in connection with any EU obligation.
- (3) Provision made in a statutory instrument made under an enactment other than the EU related powers set out in subsection (2) may also be specified under subsection (1) if—
- (a) the statutory instrument is also made under one or more of the EU related powers, and
  - (b) the provision is made for a purpose mentioned in section 2(2)(a) or (b) of the European Communities Act 1972 or relates otherwise to the EU or the EEA.
- (4) A provision specified under subsection (1) has effect under this section, and is to be treated as having been made under this section, only so far as the provision would be within the legislative competence of the National Assembly for Wales if it were contained in an Act of the Assembly (including any provision that could only be made with the consent of a Minister of the Crown).
- (5) Regulations may modify the provisions specified under subsection (1) or make further provision in connection with them if—
- (a) the Welsh Ministers consider the modification or further provision necessary to ensure the effective operation of provisions specified under subsection (1) after the withdrawal of the United Kingdom from the European Union, and
  - (b) the modification or further provision is within devolved competence.
- (6) Regulations under subsection (5) may—
- (a) include (among other things) the kinds of provision mentioned in subsections (5) and (6) of section 4;
  - (b) modify an enactment.
- (7) But regulations under this section may not—

- (a) impose or increase taxation;
  - (b) make retrospective provision;
  - (c) create a relevant criminal offence;
  - (d) confer or impose a function on a Minister of the Crown;
  - (e) remove or modify a pre-commencement function of a Minister of the Crown unless doing so is incidental to, or consequential on, another provision contained in the regulations.
- (8) Regulations under this section—
- (a) must be made before exit day, and
  - (b) must not come into force before exit day.

## **6 Challenges to EU derived Welsh law arising from invalidity of EU instruments**

- (1) There is no right in the law of England and Wales on or after exit day to challenge any EU derived Welsh law on the basis that, immediately before exit day, an EU instrument was invalid.
- (2) Subsection (1) does not apply so far as—
- (a) the European Court has decided before exit day that the instrument is invalid,
  - (b) it relates to any conduct that occurred before exit day that gives rise to any criminal liability, or
  - (c) the challenge is of a kind described, or provided for, in regulations made by the Welsh Ministers.
- (3) Regulations under subsection (2)(c) may (among other things) provide for a challenge that would otherwise have been against an EU institution to be against a public authority exercising functions within devolved competence (other than a Minister of the Crown).

## **7 Interpretation of EU derived Welsh law**

- (1) This section applies to the interpretation of EU derived Welsh law.
- (2) Any question as to the validity, meaning or effect of any EU derived Welsh law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—
- (a) in accordance with any retained case law, any retained general principles of EU law and the Charter of Fundamental Rights, and
  - (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.
- (3) But—
- (a) the Supreme Court of the United Kingdom is not bound by any retained EU case law,
  - (b) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by, and
  - (c) no general principle of EU law is to be taken into account unless it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case).

- (4) In deciding whether to depart from any retained EU case law, the Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law.
- (5) Subsection (2) does not prevent the validity, meaning or effect of any EU derived Welsh law that has been modified on or after exit day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.
- (6) In this section—
- “retained case law” (“*cyfraith achosion a ddargedwir*”) means—
- (a) retained domestic case law, and
  - (b) retained EU case law;
- “retained domestic case law” (“*cyfraith achosion ddomestig a ddargedwir*”) means any principles laid down by, and any decisions of, a court or tribunal in England and Wales or the Supreme Court of the United Kingdom, as they have effect immediately before exit day and so far as they—
- (a) relate to anything in respect of which regulations may be made under section 3, 4 or 5, and
  - (b) are not excluded by section 6 or any other enactment in primary legislation (except an enactment to which subsection (7) applies),
- (as those principles and decisions are modified by or under this Act or by other law of England and Wales from time to time);
- “retained EU case law” (“*cyfraith achosion yr UE a ddargedwir*”) means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day and so far as they—
- (a) relate to anything in respect of which regulations may be made under section 3, 4 or 5, and
  - (b) are not excluded by section 6 or any other enactment in primary legislation (except an enactment to which subsection (7) applies),
- (as those principles and decisions are modified by or under this Act or by other law of England and Wales from time to time);
- “retained general principles of EU law” (“*egwyddorion cyffredinol cyfraith yr UE a ddargedwir*”) means the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they—
- (a) relate to anything in respect of which regulations may be made under which section 3, 4 or 5, and
  - (b) are not excluded by section 6 or any other enactment in primary legislation (except an enactment to which subsection (7) applies),
- (as those principles are modified by or under this Act or by other law of England and Wales from time to time).
- (7) This subsection applies to an enactment (other than an enactment contained in an Act of the National Assembly for Wales) that would exclude the Charter of Fundamental Rights from law that applies in relation to Wales (whether or not the exclusion extends or applies to other territories) were it not for this section.
- (8) An enactment to which subsection (7) applies has no effect for the purposes of this section.

## 8 Rules of evidence etc.

- (1) Where it is necessary, for the purpose of interpreting EU derived Welsh law in legal proceedings, to decide a question as to—
  - (a) the meaning or effect in EU law of any of the EU Treaties or any other treaty relating to the EU, or
  - (b) the validity, meaning or effect in EU law of any EU instrument,the question is to be treated for that purpose as a question of law.
- (2) In this section—

“interpreting EU derived Welsh law” (*“dehongli cyfraith Cymru sy’n deillio o’r UE”*) means deciding any question as to the validity, meaning or effect of any EU derived Welsh law;

“treaty” (*“cytuniad”*) includes—

  - (a) any international agreement, and
  - (b) any protocol or annex to a treaty or international agreement.
- (3) The Welsh Ministers may by regulations—
  - (a) make provision enabling or requiring judicial notice to be taken of a relevant matter, or
  - (b) provide for the admissibility in any legal proceedings of specified evidence of—
    - (i) a relevant matter, or
    - (ii) instruments or documents issued by or in the custody of an EU entity, for the purpose of interpreting EU derived Welsh law.
- (4) Regulations under subsection (3)(b) may provide that evidence is admissible only where specified conditions are met (for example, conditions as to certification of documents).
- (5) Regulations under this section may modify any provision made by or under an enactment.
- (6) For the purposes of this section, each of the following is a “relevant matter”—
  - (a) EU law,
  - (b) the EEA agreement, and
  - (c) anything that is specified in the regulations and that relates to a matter mentioned in paragraph (a) or (b).