

LAW DERIVED FROM THE EUROPEAN UNION (WALES) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS OF THE ACT

Section 5 – Provision made under EU related powers to continue to have effect

68. The EU Withdrawal Bill currently before the UK Parliament will, if passed, repeal the ECA 1972. Generally, secondary legislation lapses automatically when the primary legislation under which it is made ceases to have effect unless saved expressly. Any provision made under section 2(2) of, or paragraph 1A of Schedule 2 to, the ECA 1972 would therefore cease to have effect on repeal of that Act. Section 5 operates to preserve statutory instruments made under these provisions.
69. An additional category of statutory instrument is also captured under section 5 – those made under section 56 of the Finance Act 1973 (“the FA 1973”). Section 56 of the FA 1973 provides a power to the Welsh Ministers to require the payment of fees and charges for the provision of any services, facilities, authorisations, certificates or documents they provide in pursuance of any EU obligation. The majority of EU obligations are implemented under section 2(2) of the ECA 1972, while provision made under section 56 of the FA 1973 is often contained in the same instrument as provision made under section 2(2) of the ECA 1972. As a result, section 5 enables such instruments in their entirety to be treated as having been made under section 5. This avoids any attempt to separate provision made under the different powers within the same instrument. In recognition that some statutory instruments may also contain provisions under other powers, subsection (3) enables the Welsh Ministers to provide that the entire instrument is to be treated as having effect under section 5.
70. [Section 5\(4\)](#) confirms that only provision within the Assembly’s legislative competence can be specified in regulations made by the Welsh Ministers under subsection (1).
71. There is a degree of overlap between the scope of the powers in sections 4 and 5. For example, a provision made under section 2(2) of the ECA 1972 can be specified under section 5(1), but would also be an enactment made entirely for a purpose mentioned in section 2(2)(a) or (b) and therefore could be restated under the power in section 4. The powers of the Welsh Ministers in sections 4 and 5 are both discretionary and the Welsh Ministers will have the choice to use either power in respect of the provisions.
72. In addition to preserving the provisions made under EU related powers, specifying the provisions will also make it possible for the Welsh Ministers to use the ‘correcting power’ in section 5(5). The power is aimed, similarly to the powers in sections 3 and 4, to enable the necessary modifications to be made to the provisions identified, in light of the withdrawal of the UK from the EU. Any modification or further provision must be within devolved competence and necessary to ensure the effective operation of the provision in question. The same provision as the kind made under section 4(5) and (6) can be made under section 5(5). Subsection (6)(b) makes it clear that the power

*These notes refer to the Law Derived from the European Union
(Wales) Act 2018 (c.3) which received Royal Assent on 6 June 2018*

includes a power to modify primary legislation (which is also available under section 4, but achieved by a different approach).

73. The same restrictions apply to the exercise of the power as apply to sections 3 and 4, except that section 5(7)(d) does not refer to restatement of Minister of the Crown functions (as is the case in section 4(5)(d)) as the powers in section 5(1) and (5) do not concern restatement as is the case in section 4.