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

LAW DERIVED FROM THE EUROPEAN UNION (WALES) ACT 2018

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes are for the Law Derived from the European Union (Wales) Act 2018 ("*the Act*") which was passed by the National Assembly for Wales on 21 March 2018 and received Royal Assent on 6 June 2018.

2. They have been prepared by the Office of the First Minister and Cabinet Office of the Welsh Government to assist the reader of the Act. The Explanatory Notes should be read in conjunction with the Act but are not part of it.

BACKGROUND

3. On 17 December 2015 the European Union Referendum Act 2015 received Royal Assent. The Act made provision for the holding of a referendum in the UK and Gibraltar on whether the UK should remain a member of the European Union ("the EU"). The referendum was held on 23 June 2016 and resulted in a 52% vote to leave the EU.

4. The European Union (Notification of Withdrawal) Act 2017 received Royal Assent on 16 March 2017. Section 1 of that Act gave the Prime Minister of the UK the power to notify the European Council of the UK's intention to withdraw from the EU under Article 50(2) of the Treaty on European Union ("the TEU"). This notification was given on 29 March 2017. At the same time, the UK notified its withdrawal from the European Atomic Energy Community ('Euratom'), in accordance with the same Article 50(2) as applied by Article 106a of the Treaty Establishing the European Atomic Energy Community ("the Euratom Treaty").

5. On 23 January 2017 the Welsh Government and Plaid Cymru jointly published a White Paper entitled *Securing Wales' Future*. The paper sets out the main issues identified by the Welsh Government and Plaid Cymru as vital for Wales as the UK moves to leave the EU. It includes the broad aims of the Welsh Government for the negotiations between the UK Government and the EU with emphasis on preserving and promoting prosperity while recognising the majority wish to leave the EU. The paper also contained ideas about the future constitutional and governance structures of the UK following withdrawal.

6. On 15 June 2017 the Welsh Government published a further policy paper entitled *Brexit and Devolution* which developed the ideas on constitutional and governance structures in *Securing Wales' Future*.

7. On 13 July 2017, the European Union (Withdrawal) Bill ("the EU Withdrawal Bill")[1] was introduced in the House of Commons. It contains provision for the repeal of the European Communities Act 1972 ("the ECA 1972") and other provision in connection with the withdrawal of the UK from the EU. The ECA 1972 was enacted in anticipation

1 https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html

of the UK joining the European Economic Community on 1 January 1973 (the European Economic Community has since evolved to become the EU). A condition of membership of the EU is for EU law to be given effect in domestic law. The treaties ratified by the UK Government to achieve membership of the European Economic Community did not alter the law of the UK. It was necessary for each treaty to be incorporated into domestic law by legislation. The ECA 1972 provided that law arising from the various treaties of what were then the European Communities became part of domestic law and it continues to provide that EU law is part of domestic law.

8. The incorporation of EU law into domestic law is achieved by the ECA 1972 in two ways:

- Section 2(1) of the ECA 1972 provides that rights, powers, liabilities, obligations, restrictions, remedies and procedures provided in some types of EU law are directly applicable in the UK legal system. This means that they are directly applicable without the need for further domestic legislation. For example, a provision of an EU Treaty, such as the Treaty on the Functioning of the European Union ("the TFEU"), which creates a directly applicable right, is enforceable in the UK courts without further action domestically.

- Section 2(2) of the ECA 1972 authorises the implementation of EU obligations of the UK by subordinate legislation. For example, obligations in an EU Directive may be implemented by way of subordinate legislation. This does not prevent an EU obligation being implemented domestically by primary legislation (for example Part 5 of the Environment (Wales) Act 2016) or using powers contained in other primary legislation (for example section 2 of the Pollution Prevention and Control Act 1999).

9. The repeal of the ECA 1972 will mean that these provisions will cease to have effect.

10. In Miller[2], the Supreme Court stated that although the ECA 1972 gives effect to EU law it is not itself the originating source of that law. The Act was described in arguments on behalf of the Secretary of State as a 'conduit pipe' by which EU law is introduced into the law of the UK. The Supreme Court agreed with this analogy. Removing the 'conduit pipe' would therefore stop the flow of EU law into domestic law. Any EU law which applies in domestic law by virtue of section 2(1) of the ECA 1972 would therefore cease to have effect unless provision is made to preserve the effect of that law.

11. On repeal of section 2(2) of the ECA 1972, all subordinate legislation made under that power will lapse automatically unless provision is made to preserve it. The EU Withdrawal Bill makes provision in clause 2 for such legislation to be saved on repeal of the 1972 Act.

12. On 12 September 2017, the Welsh Government laid a Legislative Consent Memorandum ("the LCM") before the Assembly in respect of the EU Withdrawal Bill as introduced on 13 July 2017. The full list of clauses which are within or modify the legislative competence of the Assembly are set out in a table at annex A to the LCM. The LCM stated that the Welsh Government would not be able to recommend to the Assembly that it gives consent to the Bill as drafted on introduction.

13. On 19 September 2017, the First Minister of Wales and the First Minister of Scotland sent a joint letter to the Prime Minister of the UK with a set of proposed amendments to the EU Withdrawal Bill. The letter explained that if the amendments were made to the Bill, both the Welsh Government and the Scottish Government could consider recommending to the Assembly and the Scottish Parliament that consent be given to the EU Withdrawal Bill. The amendments were subsequently tabled in Parliament but the amendments were not agreed by the House of Commons Committee.

---

2 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, at paragraph 65.

14. Amendments were tabled by the UK Government to clause 11 of the EU Withdrawal Bill at House of Lords Committee stage in response to concerns raised regarding the impact of that Bill on devolution. These were debated, along with other amendments relating to devolution, on 21 March 2018. All amendments were withdrawn at House of Lords Committee stage with further consideration of these clauses to take place at House of Lords Report stage.

15. References below to the provisions of the EU Withdrawal Bill are references to the Bill as introduced in the House of Lords on 18 January 2018[3], which is the version of the Bill as it stood when the Bill of this Act was passed by the National Assembly for Wales on 21 March 2018.

SUMMARY OF THE ACT

16. The purpose of the Act is to ensure that the legislation covering subjects devolved to Wales works effectively after the ECA 1972 is repealed by the EU Withdrawal Bill, assuming the Bill is passed and the UK leaves the EU.

17. The Act gives regulation making powers to the Welsh Ministers to restate and demarcate EU derived legislation on subjects that are devolved to Wales, with any modifications that are necessary to make the legislation work following the withdrawal of the UK from the EU. This body of law to be set out in regulations is described in the Act as 'EU derived Welsh law'. As a general rule, the Act will operate so that the same law in subjects devolved to Wales will apply after the UK exits the EU as before, subject to any necessary modifications of the law to deal with the fact that the UK will no longer be part of the institutional and functional arrangements provided under EU law.

18. The powers to restate and demarcate EU derived Welsh law include a power to make any amendments to that body of law in consequence of the UK's withdrawal from the EU.

19. The Act is intended to operate alongside the EU Withdrawal Bill[4]. The EU Withdrawal Bill—

- repeals the ECA 1972 from "exit day";
- converts the body of EU law that applies directly in the UK (e.g. EU regulations that apply directly in the UK through the operation of the ECA 1972) into the domestic law of the UK jurisdictions ("UK law");
- preserves all of the laws that have been made in the UK to implement EU obligations (e.g. regulations made under section 2(2) of the ECA 1972 that implement EU directives);
- incorporates any other rights that are available in domestic law by virtue of the 1972 Act, including the rights contained in the EU Treaties, that can currently be relied on directly in UK law without the need for specific implementing measures; and
- provides that pre-exit case law of the Court of Justice of the European Union ("CJEU") be given the same binding, or precedent, status in UK courts as decisions of the Supreme Court.

20. At the time of the passing of the Bill for this Act, "exit day" under the EU Withdrawal Bill, once enacted, will be 29 March 2019 at 11.00pm, unless the day or time on or at which the TEU and the TFEU cease to apply to the UK in accordance with Article 50(3) of the TEU is different and the EU Withdrawal Bill is amended by regulations made by a Minister of the Crown to change the definition of "exit day" accordingly.

---

3 https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/lbill_2017-20190079_en_1.htm

4 For a detailed explanation of the provisions of the EU (Withdrawal) Bill see the explanatory notes prepared by the UK Government.

21. The law that is converted or preserved by the EU Withdrawal Bill is "retained EU law". Retained EU law is defined in clause 6(7) of the EU Withdrawal Bill as anything which, on or after exit day, continues to be, or forms part of domestic law by virtue of the provisions of the Act that convert or preserve EU law and UK law related to EU law. Retained EU law will also include any modifications of the law converted or preserved by or under the EU Withdrawal Bill or by other UK law from time to time; and it may include law on subjects that are devolved to the National Assembly for Wales as well as law on subjects that are not devolved.

22. At the time of the passing of the Bill for the Act, the EU Withdrawal Bill contained restrictions on the ability of the National Assembly for Wales to modify law converted or preserved by the EU Withdrawal Bill. Section 108A of the Government of Wales Act 2006 ("the GoWA 2006"), which provides for the legislative competence of the National Assembly for Wales, is amended by clause 11(2) of the EU Withdrawal Bill. The amendment prevents an Act of the Assembly from modifying, or conferring power to modify, retained EU law unless—

- the modification would have been within the legislative competence of the Assembly immediately before exit day; or
- the modification is authorised by provision made by Her Majesty in an Order in Council approved by both Houses of Parliament and the National Assembly for Wales.

23. The law restated and demarcated before exit day as EU derived Welsh law under the Act will not form part of retained EU law converted or preserved from exit day under the EU Withdrawal Bill. EU derived Welsh law will continue to be, or form part of, domestic law in relation to Wales by virtue of the provisions of the Act, rather than by virtue of any provision of the EU Withdrawal Bill. This means that EU derived Welsh law will fall outside the definition of "retained EU law" in clause 6(7) of the EU Withdrawal Bill and will not be subject to the restrictions on the Assembly's power to modify retained EU law imposed by clause 11(2) of that Bill.

24. The Act provides further powers to the Welsh Ministers to make provision:

- in relation to ensuring compliance with international obligations,
- in relation to implementing the withdrawal agreement, and
- to keep pace with EU law after the UK has withdrawn from the EU.

25. The Act establishes a default position in law that the Welsh Ministers' consent is required before any person can make, confirm or approve subordinate legislation covering devolved subjects that are made under Acts of Parliament passed after the Act comes into force (and which meet other conditions). This default position can be changed by Parliament if it wishes when it creates new functions to make, confirm or approve subordinate legislation..

COMMENTARY ON SECTIONS OF THE ACT

26. Where an individual section of the Act does not require any explanation or comment, none is given.

Section 2 – EU derived Welsh law

27. Section 2 of the Act defines EU derived Welsh law for the purpose of the Act as provision made by the Welsh Ministers in regulations under sections 3 and 4 of the Act, provision continuing in effect under or by virtue of regulations made under section 4 or provision specified by the Welsh Ministers in regulations under section 5. The majority of EU derived Welsh law will be based on the body of EU law and domestic implementing legislation that will cease to have effect in domestic law by virtue of the

repeal of section 2(1) and (2) of the ECA 1972. EU derived Welsh law also includes a further category of domestic law which is not dependent on the ECA 1972 for its continued effect in domestic law; that is provision made in or under primary legislation other than the ECA 1972.

28. EU derived Welsh law is also to include any additions or modifications made to that body of law at any point in the future. 'Modify' is defined in section 20(1) of the Act and includes amend, repeal or revoke. Even if a provision of EU derived Welsh law is repealed or revoked and replaced with new provision, section 2, read alongside section 20(1), makes clear that the new provision could still form part of EU derived Welsh law. Whether such new provision does indeed form part of EU derived Welsh law will depend on the circumstances and the intention behind the modification.

Section 3 – Power to retain direct EU law

29. Section 3 provides for the first limb of EU derived Welsh law listed in the definition in section 2. The section does not provide for the automatic incorporation of direct EU law into domestic law in the manner of clause 3 of the EU Withdrawal Bill. Rather, it enables the Welsh Ministers, by regulations, to make provision within devolved competence corresponding to direct EU law.

30. Direct EU law is defined in section 3(3). It captures all EU laws which are directly applicable in the UK.

31. One category of EU law is EU Treaties that have direct effect in the law of England and Wales by virtue of section 2(1) of the ECA 1972 (section 3(3)(a)). The term "EU Treaties" is defined in Schedule 1 to the Interpretation Act 1978 ("the IA 1978") by reference to section 1 of, and Schedule 1 to, the ECA 1972. The UK Government has committed to repealing the ECA 1972 and provision is contained to that effect in clause 1 of the EU Withdrawal Bill. The EU Withdrawal Bill (at paragraph 11 of Schedule 8) amends the definition of EU Treaties contained in Schedule 1 to the IA 1978 so that it will continue to refer back to the definition in the ECA 1972 as it had effect immediately before its repeal.

32. EU Treaties are binding agreements between EU member States. They set out EU objectives and rules for EU institutions, how decisions are made and the relationship between the EU and member States. Every action taken by the EU is founded on the EU Treaties. The EU Treaties also contain substantive rights, such as equal pay for men and women under Article 157 of the TFEU.

33. The two main EU Treaties are the TEU and the TFEU. Section 3(3)(a) provides that only EU Treaty provision that has direct effect is to fall within the scope of the Welsh Ministers' power in section 3(1).

34. The principle of direct effect attaches to certain provisions of EU law which result in rights being conferred on individuals that are enforceable in national courts. The rights are conferred directly and do not require any legislative action on the part of the member State. Direct effect only applies to provisions of EU law that are sufficiently clear, precise and unconditional[5].

35. Section 3(3)(a) only captures those rights under EU Treaties that are directly effective and are not already reproduced in an enactment that applies in relation to Wales.

36. The "EU Treaties" for the purpose of section 3(3)(a) is defined in the IA 1978 by reference to section 1 of the ECA 1972. Section 1 of the European Economic Area Act 1993 made the European Economic Area ("the EEA") agreement one of the "EU Treaties" for the purposes of the ECA 1972. Any directly effective rights under the EEA agreement are therefore within the scope of the power in section 3(1).

---

5 Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen.

37. Where provision in an EU Treaty is already reproduced in an enactment in relation to Wales, the enactment in question would fall within the scope of section 4 or 5, not section 3. The question of whether a provision in an EU Treaty is already reproduced in an enactment in relation to Wales is to be decided by reference to the law on the day section 3 comes into force. If an enactment is passed or made after section 3 comes into force which reproduces provision in an EU Treaty, it would not prevent the Welsh Ministers from exercising the power in section 3(1) in respect of the provision in the EU Treaty.

38. The second category of direct EU law is set out in section 3(3)(b). EU regulation is defined in section 20(1) as a regulation within the meaning of Article 288 of the TFEU. EU regulations contain detailed legal rules and are directly applicable in all member States. It is necessary for the UK to adopt arrangements at domestic level for directly applicable EU law to have effect. This is achieved by section 2(1) of the ECA 1972. Section 2(1) provides the conduit through which EU regulations flow into domestic law. As a general rule, the result is that no further action is required within the UK to ensure an EU regulation has the desired legal effect. However, in some instances some domestic action is necessary to modify domestic law in order to ensure compliance with an EU regulation (for example, it may be necessary to create a criminal offence in domestic law to enforce the EU regulation) or where consequential provision is required at domestic level in order to give full effect to the requirements contained in an EU regulation.

39. EU decisions are also captured by section 3(3)(b), and are defined in section 20(1) as a decision within the meaning of Article 288 of the TFEU or a decision under former Article 34(2)(c) of the TEU. EU decisions are binding legal acts that apply to one or more member States, companies or individuals[6]. Some decisions are generally and directly applicable and are available in domestic law without the need for specific implementing legislation[7]. However, where a decision is addressed to a member State, implementation in domestic law may be necessary to give effect to the decision[8]. The reference to former Article 34(2)(c) of the TEU is a reflection that some EU decisions made prior to the TFEU, and therefore under Article 34(2)(c) of the TEU, remain in force.

40. EU tertiary legislation is the third category of EU law captured by section 3(3)(b), and is defined in section 20(1). There are two types of EU tertiary legislation: delegated acts and implementing acts. Delegated acts are legally binding acts that enable the European Commission ("the Commission") to supplement or amend non-essential parts of EU legislative acts[9], for example, in order to define detailed measures. Implementing acts are also legally binding and enable the Commission, under the supervision of committees consisting of representatives from member States, to set conditions that ensure that EU laws are applied uniformly[10]. EU tertiary legislation may take the same form as an EU regulation, EU directive, EU decision, EU recommendation or EU opinion.

41. Section 3(3)(c) and (d) capture provision in any EU regulation, EU decision and EU tertiary legislation as they apply to the EEA. The European Economic Area Act 1993 makes the EEA agreement one of the "EU treaties" for the purposes of the ECA 1972. In consequence, section 2(1) and (2) of the ECA 1972 applies to provisions of the EEA agreement. In essence, EU regulations, EU decisions and EU tertiary legislation apply

---

6 Article 288 of the TFEU.

7 For example Commission Decision 2011/753/EU, establishing the rules and methods for calculating targets for re-use and recycling set out in the Waste Framework Directive, has not been implemented via specific UK legislation, but is available in domestic law via section 2(1) of the ECA 1972.

8 For example the Transmissible Spongiform Encephalopathies (Wales) Regulations 2008 (S.I. 2008/3154 (W. 282)) implements Commission Decision 2007/411/EC of 14 June 2007 prohibiting the placing on the market of products derived from bovine animals born or reared within the United Kingdom before 1 August 1996 for any purpose and exempting such animals from certain control and eradication measures laid down in Regulation (EC) No 999/2001 and repealing Decision 2005/598/EC.

9 Article 290(1) of the TFEU.

10 Article 291(2) of the TFEU.

to the EEA by virtue of their inclusion in the Annexes to the EEA agreement, with any adaptations that are necessary for them to operate effectively in the EEA context. EU regulations, EU decisions and EU tertiary legislation, as adapted, then flow into UK domestic legislation as a result of section 2(1) of the ECA 1972. Protocol 1 to the EEA agreement contains horizontal adaptations which set out general interpretive provisions that apply throughout the Annexes to the EEA agreement. For example, whenever EU instruments refer to nationals of an EU member State, the references, for the purposes of the EEA agreement, are to be understood as references also to nationals of European Free Trade Association states[11].

42. Section 3(3)(c)(i) provides a link between paragraphs (c) and (b). Any annex to the EEA agreement would only be relevant where the Welsh Ministers make regulations under section 3 to make provision corresponding to EU regulations, EU decisions or EU tertiary legislation. The combination of section 3(3)(b), (c) and (d) would therefore enable the Welsh Ministers to make provision corresponding to EU regulations, EU decisions or EU tertiary legislation as they apply to, and are adapted for, the EEA context.

43. As with paragraphs (a) and (b), the Welsh Ministers cannot use the power to make regulations where the effect of the EU instrument (as adapted for the EEA) are already reproduced in an enactment.

44. Section 3(1) provides a power to make corresponding provision rather than a power to restate. This is a reflection of the nature of direct EU law. Direct EU law was designed, drafted and adopted to apply on a supranational basis. Direct EU law therefore contains provision which cannot operate effectively in relation to Wales alone. The power to make corresponding provision will therefore enable the Welsh Ministers to take a piece of direct EU law and re-mould it into Welsh regulations which operate effectively in a domestic context. This process will involve modifications to the direct EU law. Section 3(4) gives examples of the kind of modifications envisaged as part of the regulations. The list of examples in section 3(4) is not an exhaustive list.

45. The power to make such modifications does not enable the Welsh Ministers to remove rights etc. currently being enjoyed under direct EU law by individuals in Wales. Subsections (1) and (2) operate to require any provision in regulations to be for the purpose of continuing the operation of direct EU law and to require the Welsh Ministers to seek to continue the rights etc. currently being enjoyed. However, the powers of the Welsh Ministers are limited to provision within devolved competence. Any rights etc. in direct EU law which do not fall within devolved competence will be a matter for the UK Parliament, and specifically, if passed, the EU Withdrawal Bill which is currently progressing through the UK Parliament.

46. Subsection (4)(a) reflects that certain provisions in direct EU law are not capable of operating effectively in a domestic context in Wales. This could include certain provisions that apply to a particular member State, area or region of the EU other than Wales. As an example, Article 1 of Council Regulation (EC) No 1100/2007 establishing measures for the recovery of the stock of European eel makes reference to the protection and sustainable use of the stock of European eel in Community waters, in coastal lagoons, estuaries and rivers which flow into seas, such as the Mediterranean Sea. Provision corresponding to Article 1 of Council Regulation 1100/2007 made under section 3 of the Act would only make provision for the protection of stock in waters, coastal lagoons, estuaries and rivers which flow into the sea around Wales. Any reference, for example to the Mediterranean Sea, would be redundant. In making the changes to provision in direct EU law, in most cases it would involve some degree of modification rather than a simple omission. In the example of Council Regulation 1100/2007, rather than simply omitting the irrelevant seas listed, it may be better to

11 Article 2(b) of the EEA Agreement defines EFTA states as Iceland, the Principality of Liechtenstein and the Kingdom of Norway.

omit all of the references to the seas and replace with a new formulation which reflects the seas around Wales.

47. There could be a degree of overlap between section 3(4)(a) and the first filter applied by section 3(1) – provision within devolved competence. Where a provision in direct EU law applies otherwise than in relation to Wales or extends otherwise than only to England and Wales, it would not overcome the test in section 3(1) (the exception being that a provision that applied otherwise than in relation to Wales could be within the Assembly's legislative competence if it fell within section 108(5) of the GoWA 2006). In such circumstances, the Welsh Ministers in making corresponding provision under section 3(1) would need to omit the provisions that fell outside the Assembly's competence.

48. Subsection (4)(b) reflects that direct EU law establishes a number of EU entities and confers functions on, or in relation to, these entities. For example, Regulation (EC) No 1831/2003 of the European Parliament and of the Council on additives for use in animal nutrition provides a central role to the European Food Safety Authority in authorising feed additives (in addition to the Commission). Subject to the negotiations between the UK and the EU and any agreements for a future relationship, the European Food Safety Authority would no longer play a role in authorising the use of feed additives in Wales. Regulations made under section 3 which made corresponding provision to Regulation 1831/2003 could omit the functions conferred on the European Food Safety Authority. However, in order to continue in operation the system for the authorisation of feed additives, the Welsh Ministers could make provision to establish a new public authority in Wales (subsection (4)(h)) and confer the functions on that authority, or confer the functions on an existing public authority (subsection (4)(g)). Where such functions are conferred on an existing public authority, it may be necessary to make changes to the legislative framework governing that body. This could include making amendments to primary legislation which subsection (4)(i) expressly provides for.

49. Subsection (4)(c), (d) and (e) highlights the possibility that any reciprocal arrangements, or other arrangements which involve the EU, in direct EU law, may need to be addressed as part of making provision under section 3. This will be heavily dependent on the outcome of negotiations between the UK and the EU on any future relationship. However, to note, section 11 would be the relevant power where any withdrawal agreement includes provision for future reciprocal arrangements between the UK and the EU. An example of where subsection (4)(c) could be relevant is in relation to the sharing of information. For example, Article 19(1) of Regulation (EU) 2016/429 of the European Parliament and of the Council on transmissible animal diseases and amending and repealing certain acts in the area of animal health requires member States to notify the Commission and other member States of any outbreaks of any listed diseases. As the UK leaves the EU, the duty on member States other than the UK to inform the UK under this provision would cease to apply. It would therefore be inappropriate to maintain a requirement in domestic law for the Welsh Ministers to inform the Commission and the member States if there were to be an outbreak of any listed diseases in Wales. However, once again, reciprocal arrangements such as these are likely to be the subject of discussions as part of the negotiations of any future relationship between the UK and the EU.

50. Subsection (4)(f) reflects the extensive EU references (which includes EEA references) contained in direct EU law which will no longer be appropriate as the provisions are adapted to apply purely in a domestic context. For example, a large proportion of direct EU laws set out the subject matter of the instrument in the opening Article(s). Often they refer to the aims and purposes of the Regulation and are usually drafted by reference to objectives at a European level, or the support of cooperation and coordination between member States (see for example Article 1(2) of Decision No 1082/2013/EU of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 2119/98/EC). Addressing such deficiencies could include omitting the references or adapting the reference so that it operates

effectively in a domestic context. A reference to contributing to a high level of public health protection in the Union could be replaced with contributing to such protection in Wales if appropriate.

51. The power to make regulations under section 3 is restricted. The restrictions broadly reflect the restrictions applicable to the power in section 2(2) of the ECA 1972. The restriction on imposing or increasing taxation derives from paragraph 1(1)(a) of Schedule 2 to the ECA 1972, the restriction on making retrospective provision derives from paragraph 1(1)(b) of Schedule 2 and the restriction on creating relevant criminal offences derives from paragraph 1(1)(d) of Schedule 2. A relevant criminal offence is defined in section 20.

52. The restrictions in section 3(5)(d) and (e) reflect the limits on the Assembly's competence in respect of legislating in relation to functions of a Minister of the Crown. Paragraph (d) reflects the restriction contained in paragraph 1(2) of Part 2 of Schedule 7 to the GoWA 2006. Paragraph (e) reflects the restriction contained in paragraph 1(1) of Part 2 of Schedule 7, but also reflects the exception to that restriction which is contained in paragraph 6(1)(b) of Part 3 of Schedule 7. Paragraph (d) does not make reference to any restatement of Minister of the Crown functions (which would be within the Assembly's legislative competence by virtue of paragraph 8 of Part 3 of Schedule 7 to the GoWA 2006) as direct EU law does not contain any Minister of the Crown functions.

53. Section 108(6)(c) of the GoWA 2006 provides that the Assembly cannot legislate incompatibly with EU law. In the majority of cases, provision made under section 3 would be incompatible with EU law if it were to come into force whilst the UK remained a member of the EU and subject to EU law. For example, a provision under section 3 which omitted a requirement to inform the Commission of an outbreak of specific diseases would be contrary to EU law and therefore not within the Assembly's legislative competence. The restriction in section 3(6)(b) is therefore to prevent the power being used in a manner that is outside the Assembly's legislative competence. To note, the Welsh Ministers are subject to a restriction in making, confirming, approving any subordinate legislation, or doing any other act, which is incompatible with EU law by virtue of section 80(8) of the GoWA 2006. The Welsh Ministers could only therefore make regulations under section 3 which came into force on or after exit day.

54. The recitals contained in direct EU law are provided in compliance with Article 296 of the TFEU. These can be used to assist interpretation but case law of the CJEU makes clear that they do not have any binding legal force[12]. Regulations made under section 3 will therefore only contain provision corresponding to the legal rules contained in direct EU law and not the recitals.

Section 4 – Restatement and continuation of EU derived enactments

55. This section gives the Welsh Ministers the power to restate and continue in effect the domestic legislation applicable in Wales in devolved subjects that is derived from EU law or relates to the EU or EEA for some or all purposes.

56. Section 4(1) specifies that the power in section 4(2) applies to enactments, as defined in section 20(1), which in some way operate to implement EU law obligations or relate otherwise to the EU or the EEA. On leaving the EU there could be doubt over whether enactments which presupposed membership of the EU would continue to work effectively. The same doubts could also apply to enactments which relate or refer to the EU or EEA.

57. The power in section 4(2) addresses this doubt. It does so by enabling the Welsh Ministers, by regulations, to

- repeal or revoke such enactments and to restate them (subsection (2)(a)), and

12 Casa Fleischhandels, Case 215/88.

- disapply enactments and subsequently restate them (subsection (2)(b)).

58. Repeal or revocation of an enactment occurs when the enactment ceases to be part of the law of a jurisdiction. Wales remains part of the unified jurisdiction of England and Wales, despite devolution. This means that laws which apply only in relation to Wales technically form a part of the law recognised by the courts of England and Wales. Enactments that apply only to Wales, either in or under Acts of Parliament or in or under Acts of the National Assembly for Wales, and which include subject matter wholly within devolved competence are the kinds of enactments that can be repealed or revoked under subsection (2)(a).

59. Where an enactment applying to Wales also applies to England or it contains severable subject-matter that is not devolved to the National Assembly for Wales, it cannot be repealed or revoked under the power in subsection (2)(a). Subsection (2)(b) is intended to cover this type of enactment, which, given the limitations of devolved competence, will need to be disapplied in relation to Wales or in relation to devolved subject-matter (the disapplication being given effect by amendments to the enactment).

60. Many of the enactments covered by section 4 will require corrections to ensure that they can continue to operate effectively after the withdrawal of the UK from the EU. The powers in paragraphs (c) and (d) of subsection (2) enable the Welsh Ministers to restate the enactments with the modifications necessary to achieve this aim.

61. Section 4(2)(e) enables the Welsh Ministers to make further provision in connection with restatement. For example, this could include provision in relation to powers contained in EU directives to make EU tertiary legislation (see subsection (5)(f)). In such circumstances the EU directive will have been implemented in domestic legislation, but the power to make EU tertiary legislation will not form part of domestic law. The power to make EU tertiary legislation is needed to ensure the EU directive can be implemented effectively. This could include powers to update technical aspects of an EU directive to reflect practical, scientific or technological developments. Section 4(2)(e) therefore enables the Welsh Ministers to recreate those powers domestically so as to ensure the full legislative scheme can operate effectively after the UK withdraws from the EU.

62. Section 4(3) enables the Welsh Ministers to make regulations so that subordinate legislation made under enactments which are repealed, revoked or disapplied in relation to Wales by virtue of section 4(2) continues to have effect. Alternatively, section 4(2) could be used to restate the subordinate legislation in question. The Welsh Ministers will be able to decide whether to deal with such subordinate legislation under the powers in section 4(2) or (3). Subordinate legislation which continues to have effect in this way may also be modified to ensure it operates effectively.

63. As with section 3, section 4 sets out a non-exhaustive list of the type of modifications envisaged as being necessary to ensure the effective operation of the restated enactment. Specific examples include:

- **References to the EU**: domestic enactments contain numerous references to "EU law", "EU obligations", "member States other than the UK" and "EEA states". These will require modification to reflect the withdrawal of the UK from the EU. For example, regulation 2(1) of the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017[13] defines "Union legislation". The term is defined by reference to enactments which apply in relation to Wales which give effect to an "EU obligation". These will require revision as there will be no provision in enactments which give effect to EU obligations following the withdrawal of the UK from the EU (unless the withdrawal agreement contains such provision – to be addressed by the power in section 10).

13 S.I. 2017/567 (W. 136)

- **EU institutions**: provisions in domestic enactments operate on the basis of EU membership, including the role played by various EU institutions and the provision of funding through EU-operated schemes. Regulation 3 of the School Milk (Wales) Regulations 2017[14] makes provision for the provision of "national aid" to applicants who are also in receipt of "Union aid". Union aid is aid provided under Article 23 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007. As "Union aid" will no longer be payable, an eligibility criteria based on receipt of such aid will no longer be operable. The amendment to the School Milk (Wales) Regulations 2017 will depend on the corresponding provision made to Regulation (EU) No 1308/2013 in regulations made under section 3.

- **Reciprocal arrangements**: various arrangements and EU obligations directly or indirectly result in, or require, varying degrees of reciprocity across member States. One example is the principle of the mutual recognition of qualifications. The School Teachers' Qualifications (Wales) Regulations 2012[15] make provision relating to individuals who are entitled to teach in the UK by virtue of Council Directive 2005/36/EC on the recognition of professional qualifications (although indirectly by reference to other domestic legislation). In restating the School Teachers' Qualifications (Wales) Regulations 2012, modification could be made to address changes to the principle of mutual recognition of qualifications.

64. Subsection (5) also includes the example of conferring functions or imposing restrictions which were in an EU directive and in force immediately before exit day and which it is appropriate to retain. This reflects the possibility that the Welsh Ministers have implemented an EU directive but have not implemented the provisions in the directive which provide for the European Commission or an EU agency to carry out a function. In such an example, the domestic enactment could operate on the basis of a particular function being exercised by the European Commission or EU agency. Subsection (5)(f) confirms that the power to restate with modifications under subsection (2) or make further provision includes the power to recreate the function and confer it, for example, on the Welsh Ministers or an appropriate public authority.

65. No reference is made in subsection (5) to the power to modify an enactment as it is clear from subsection (1) and (2) and the definition of an enactment in section 20(2) that the power can be used to modify any enactment that is wholly or partly within devolved competence.

66. The restrictions on the exercise of the power in section 4(2) match those that apply in section 3, other than a minor difference in section 4(7)(d). Section 4(7)(d) reflects the limits on the Assembly's legislative competence in relation to functions of a Minister of the Crown, specifically the restriction in paragraph 1(2) of Part 2 of Schedule 7 to the GoWA 2006 on conferring or imposing functions on a Minister of the Crown. However, as the power in section 4 is about restating the law, subsection (7)(d) confirms that regulations made under subsection (2) can restate a Minister of the Crown function due to the exception in paragraph 8 of Part 3 of Schedule 7 to the GoWA 2006.

67. The same timing restrictions also apply to regulations made under section 4 by virtue of subsection (8).

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

14 S.I. 2017/724 (W. 174)
15 S.I. 2012/724 (W. 96)

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 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.

Section 6 – Challenges to EU derived Welsh law arising from invalidity of EU instruments

74. All EU derived Welsh law is connected in some way to an EU instrument. The CJEU has jurisdiction over any challenge of an EU instrument. An EU instrument could be challenged on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application or misuse of powers[16]. A successful challenge to an EU instrument could cast doubt on any related EU derived Welsh law. Section 6(1) sets a default position that a decision of the CJEU that an EU instrument is invalid does not create a right in law to challenge any EU derived Welsh law. This does not affect any challenge on other public law grounds.

---

16 Article 263 of the TFEU.

75. Section 6(2) provides three exceptions to the default position. The third exception, in paragraph (c) is a power for the Welsh Ministers to add further exceptions. This could include instances where the CJEU has determined an EU instrument is invalid after the withdrawal of the UK from the EU. Section 6(3) is a confirmation that the power in section 6(2)(c) includes the power to provide for a challenge to be made against a domestic public authority (but not a Minister of the Crown – reflecting the limits on the Assembly's legislative competence and specifically the restriction in paragraph 1(2) of Part 2 of Schedule 7 to the GoWA 2006) instead of an EU institution.

Section 7 – Interpretation of EU derived Welsh law

76. The withdrawal of the UK from the EU will mean that the CJEU will no longer have jurisdiction in relation to the UK. Domestic courts will therefore be unable to refer cases to the CJEU on or after exit day.

77. Section 7(2) provides that any question as to the validity, meaning or effect of EU derived Welsh law will be determined in UK courts in accordance with relevant pre-exit CJEU case law, retained general principles of EU law and the Charter of Fundamental Rights. This includes, amongst other matters, taking a purposive approach to interpretation where the meaning of the measures is unclear. A purposive approach means considering the purpose of the law from looking at other relevant documents such as the treaty legal base for a measure and, where relevant, the 'travaux preparatoires' (the working papers) leading to the adoption of the measure, applying the interpretation that renders the provision of EU law compatible with the treaties, general principles of EU law and the Charter of Fundamental Rights.

78. The general principles of EU law (such as proportionality, fundamental rights, the precautionary principle and non-retroactivity) are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and are also an aid to interpretation of EU law.

79. Where EU derived Welsh law has not been amended on or after exit day then it will be interpreted in accordance with pre-exit CJEU case law, retained general principles of EU law and the Charter of Fundamental Rights (so far as they are relevant).

80. Subsection (2)(b) requires UK courts and tribunals to interpret EU derived Welsh law by reference to (among other things) the limits of EU competence, as it exists on the day the UK leaves the EU. A matter could not fall within EU derived Welsh law if the EU had no competence in that area. Article 5(2) of the TEU confirms that the Union could only act within the limits of the competences conferred upon it by the member States. Competences not conferred upon the Union remain with the member States.

81. Section 7(2) only applies to EU derived Welsh law as that law is unmodified on or after exit day. Making corresponding provision to direct EU law under the power in section 3 will often include making modifications to the provision in direct EU law on or after exit day. Similarly, modifications to EU derived Welsh law under sections 4 and 5 will be made on or after exit day. In these cases, the principle in section 7(2) will not apply and therefore there is no requirement to decide questions of validity, meaning or effect of those regulations in accordance with that subsection. However, section 7(5) makes clear that subsection (2) does not operate to prevent a court from determining a question as to the validity, meaning or effect of EU derived Welsh law which has been modified on or after exit day as provided for in subsection (2) if doing so is consistent with the intention of the modifications.

82. Section 7(3) enables the Supreme Court, but no other domestic court, to depart from pre-exit CJEU case law. Subsections (2) and (3) combine to provide that pre-exit CJEU case law will have the same binding, or precedent, status in domestic courts and tribunals as existing decisions of the Supreme Court. Subsection (4) reflects the current practice employed by the Supreme Court when deciding whether to depart from its own previous decision. The test the UK Supreme Court uses is set out in an existing practice statement

made by the House of Lords in 1966 and adopted by the Supreme Court in 2010. That statement set out, among other things, that while treating its former decisions as normally binding, it will depart from its previous decisions "when it appears right to do so".

83. Section 7(6) provides definitions for the purposes of section 7. The definitions of retained domestic case law, retained EU case law and retained general principles of EU law are limited to such matters as are relevant to anything in respect of which regulations may be made under section 3, 4 or 5. The effect of section 7 is therefore limited to the scope of EU derived Welsh law.

Section 8 - Rules of evidence etc.

84. Generally, the meaning or effect of the law in other jurisdictions is treated as a question of fact, to be proved in legal proceedings by evidence, rather than determined by a judge as a question of law. Section 3 of the ECA 1972 clarified that, when the UK joined the EU, UK judges were to determine the meaning or effect of the EU Treaties, or the validity, meaning or effect of any EU instrument, as a question of law, in accordance with the principles laid down by and relevant decisions of the CJEU. The EU law which is being preserved by the Act will become domestic law, and so fall to be interpreted by judges in the courts of England and Wales. Some EU law will not become EU derived Welsh law, but may still be relevant to the interpretation of the EU derived Welsh law (for example, a court may have to consider the meaning of an EU directive when interpreting domestic regulations made to implement that directive). Section 8(1) provides that, to the extent that determining the meaning or effect of EU law is necessary for a court to interpret EU derived Welsh law, judges will continue to determine that meaning or effect themselves as a question of law, rather than treat it as a question of fact.

85. Matters which are 'judicially noticed' are deemed to be already within the knowledge of the court, and so are not required to be 'proved' to the court. For example, Acts of the Assembly are required to be judicially noticed[17]. Section 8(3) provides that the Welsh Ministers can make regulations which provide for judicial notice to be taken of a relevant matter, and for the admissibility in legal proceedings of evidence of both a relevant matter and instruments and documents issued by or in the custody of an EU entity, to ensure that appropriate evidential rules can be put in place to reflect the new legal landscape after exit. Regulations under section 8 can amend primary legislation (subsection (5)).

Section 9 – Complying with international obligations

86. The withdrawal of the UK from the EU could automatically result in the UK being in breach of the international obligations of the UK. This could occur for example by virtue of compliance with international obligations being linked to or dependent on continued compliance with EU law. The power in section 9 will enable the Welsh Ministers to make appropriate provision to prevent or remedy any such breach. This could include making provision to implement an international convention which was previously implemented by virtue of membership of the EU.

87. The power to make regulations is restricted to provision within devolved competence, as defined in section 17. As the power in section 9 may be used to make regulations to come into force prior to exit, the restriction in section 108(6)(c) of the GoWA 2006 on legislating incompatibly with EU law will continue to be relevant to regulations coming into force before exit.

88. The power includes the power to modify primary legislation, but is subject to similar restrictions as those that applied to sections 3 and 5. The only differences are there is no restriction on imposing or increasing taxation (although the limits on the Assembly's

17 See section 107(4) of the GoWA 2006.

legislative competence will provide a degree of restriction in terms of taxation) and section 9 cannot be made to implement the withdrawal agreement. The prohibition on using the power to implement the withdrawal agreement reflects the likelihood that any withdrawal agreement between the UK and the EU would form international obligations on the part of the UK. Implementation of the withdrawal agreement would fall under the power in section 10.

Section 10 – Implementing the withdrawal agreement

89. Section 10 gives the Welsh Ministers a power to make regulations to implement a withdrawal agreement concluded between the UK and the EU under Article 50(2) of the TEU (or that Article as applied by the Euratom Treaty).

90. The power can only be used to make provision that should be in force on or before exit day. Where any provision is needed to come into force after exit day, the power cannot be used. Any post-exit modifications would need to be the subject of further legislation.

91. The power can only be used to make provision within the devolved competence of the Assembly which is defined in section 17. Regulations made under this section may come into force before and on exit day. Where the regulations under section 10 are to come into force prior to exit, the restriction on legislating incompatibly with EU law in section 108(6)(c) of the GoWA 2006 will be relevant. Where regulations under section 10 are to come into force on exit day (to note the regulations cannot include provision to come into force after exit day – see subsection (1)), the restriction in section 108(6)(c) relating to legislating incompatibly with EU law will not be relevant as the UK will no longer be a member of the EU and therefore not subject to EU law.

92. The power can be used to modify primary legislation, including the Act. 'Modify' is defined in section 20(1) and includes amending, repealing or revoking legislation.

93. The power is subject to the same restrictions as apply to the power in section 3. Devolution provides further restriction on the scope of the power, not only in terms of the subject matter that could be contained in the regulations, but also in terms of the restrictions in Part 2 of Schedule 7 to the GoWA 2006 which includes prohibition on modifying specified provisions in the GoWA 2006, the GoWA 1998 and the Public Audit (Wales) Act 2013 and the entirety of the ECA 1972, the Data Protection Act 1998, the Human Rights Act 1998, the Civil Contingencies Act 2004 and the Re-Use of Public Sector Information Regulations 2005[18].

94. Section 18 confirms that the expiry of this power (and others in the Act) on exit day does not affect the continuation in force of the regulations made on or before exit day.

Section 11 – Power to make provision corresponding to EU law after exit day

95. Section 11 creates a discretionary power for the Welsh Ministers to keep pace with EU law following the withdrawal of the UK from the EU. The EU Withdrawal Bill would, if passed, repeal the ECA 1972, including section 2(2). Any developments in EU law following the withdrawal of the UK could not be reflected domestically in the absence of any other existing relevant powers. Section 11 continues the power to implement EU law, although, as the UK will no longer be a member of the EU, there would not be an obligation to implement EU law.

96. As with section 2(2) of the ECA 1972, the power can modify primary legislation and is subject to restrictions relating to imposing or increasing taxation, retrospective provision and criminal offences. Subsection (3) reflects that EU law will require varying degrees of modification before it can apply effectively in a domestic context.

97. The restriction in paragraph 1(1)(c) of Schedule 2 to the ECA 1972 on conferring powers to legislate does not apply to the power in section 11. As the definition of

18 S.I. 2005/1505

devolved competence is framed by reference to provision that could be included in an Act of the Assembly, the power does include the power to delegate the power under section 11. This reflects that an EU regulation, EU decision or EU directive could contain a power to make EU tertiary legislation. If the Welsh Ministers decide to exercise the power in section 11 to make corresponding provision to the EU instrument in question, the Welsh Ministers could consider whether to confer the power to make EU tertiary legislation on themselves or on another public authority.

Section 12 – Review and sunset of the power in section 11(1)

98. Section 12 limits the life of the power of the Welsh Ministers under section 11(1) to make provision corresponding to EU law after exit day. Specifically, it means that the power will cease to have effect 5 years after exit day. The power can be extended, but only if regulations are made by the Welsh Ministers. The period can be extended for subsequent periods which do not individually exceed 5 years. For example, if exit day is specified as 29 March 2019, the power would expire in 2024. In 2024, the Welsh Ministers may decide to extend the power for another 5 years until 2029. Similarly, the Welsh Ministers may decide in 2029 to extend the power for another 5 years until 2034.

99. Prior to the exercise of the power to extend the effect of the power in section 11(1), the Welsh Ministers must table a report on the operation and effect of the power in section 11(1) and whether it continues to be needed (having consulted relevant stakeholders). This is to give the Assembly the basis on which to decide whether the power continues to be needed before extending its effect.

Section 13 and Schedule 1 – Fees and charges

100. The powers to make regulations contained in the sections listed in paragraph 1(1)(a) to (f) of Schedule 1 are either time limited, restricted in terms of imposing or increasing taxation or both. This power enables the Welsh Ministers to make provision for, or in connection with, the charging of fees or other charges in connection with the exercise of a function conferred on a public authority under the sections specified in paragraph 1(1) on an ongoing basis.

101. Section 2(2) of the ECA 1972 and section 56 of the FA 1973 enable 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 power in paragraph 1 of Schedule 1 will replace these powers.

102. Paragraph 1(2)(c) enables the power to set fees and charges to be delegated to a public authority. Any powers delegated under this provision will be subject to the same limitations, restrictions and scrutiny applicable to the Welsh Ministers' exercise of the power.

103. Section 2(2) of the ECA 1972 and section 56 of the FA 1973 have been used on a number of occasions during the UK's membership of the EU to set fees and charges in connection with EU obligations. Section 5 enables the Welsh Ministers to identify and preserve the statutory instruments made under these powers which make provision for fees and charges along with the provisions relating to the accompanying service. Regulations could also be made under section 4 to restate and therefore preserve such charges or fees. However, the EU Withdrawal Bill currently before the UK Parliament, if passed, will mean that the powers in the ECA 1972 and the FA 1973 in relation to fees and charges for EU obligations will no longer be available. Paragraph 2 of Schedule 1 ensures that the Welsh Ministers are able to modify the fees and charges preserved by virtue of regulations made under section 4 or 5.

104. The power in paragraph 2 of Schedule 1 is subject to limitations, notably that the power cannot be used for new charges or fees. The power could for example be used to uprate fees in line with inflation to ensure that the costs of providing a relevant service, such

as animal health inspections, can continue to be met by the public authority tasked with providing the service.

105. Paragraph 3 of Schedule 1 ensures that any fees or charges which had been set by regulations made under section 2(2) of the ECA 1972 continue to be subject to the same restrictions under that Act – that they cannot impose or increase taxation (see paragraph 1(1)(a) of Schedule 2 to the ECA 1972).

106. Paragraph 4 reflects that provision for fees and charges could be made under sections 3, 4, 5, 9, 10 and 11. For example, provision about fees and charges in regulations made under section 56 of the FA 1973 could be specified in regulations made under section 5(1). However, the provision may require modification to ensure that it can continue to operate effectively following the withdrawal of the UK from the EU. Paragraph 4 confirms that such provision can be made under section 5(5) and would not need to be made under Schedule 1.

Sections 14 and 15 – Welsh Ministers' consent to making subordinate legislation and Welsh Ministers' consent to approval or confirmation of subordinate legislation

107. These sections establish the default position in law that the Welsh Ministers' consent is required before any person can make, confirm or approve subordinate legislation covering devolved subjects that are made under Acts of Parliament passed after the Act comes into force (and which meet other conditions). This default position can be changed by the UK Parliament if it wishes when it creates new functions to make, confirm or approve subordinate legislation.

108. There are five conditions for the application of the consent requirement in similar terms in each section, with the differences relating to the type of legislation covered by each section. Section 14 covers subordinate legislation made by a Minister of the Crown and section 15 covers subordinate legislation approved or confirmed by a Minister of the Crown.

109. Sections 14 and 15 apply where all of conditions 1, 2 and 3 are met and condition 4 or 5 is met. The requirement to seek Welsh Ministers' consent would not arise where the subordinate legislation is being made, confirmed or approved by the Welsh Ministers.

110. Condition 1 is linked to the limits of the Assembly's legislative competence. It is not met where the subordinate legislation does not contain provision within devolved competence as defined in section 17. A requirement for Welsh Ministers' consent could therefore not arise for provisions in subordinate legislation that are outside the legislative competence of the Assembly. For example, provision in a subject that is not devolved, such as banking, would not be within the Assembly's legislative competence and could therefore not meet condition 1.

111. Condition 2 limits the effect of sections 14 and 15 to the scope of EU law as defined in section 20(1) of the Act. The definition of EU law in section 20(1) is consistent with the definition of EU law in section 158(1) of the GoWA 2006.

112. Condition 3 limits sections 14 and 15 to subordinate legislation made by statutory instrument. In section 15 (which applies to approval and confirmation of subordinate legislation) it is also a condition that the legislation to which approval or confirmation is given is to be made by a person other than the Welsh Ministers.

113. Condition 4 covers situations where subordinate legislation is made, approved or confirmed under new functions to make, confirm or approve subordinate legislation conferred by or under an Act of Parliament. For condition 4 to be met, the Act of Parliament conferring the function must be enacted after the day on which the section comes into force. Where the function has been conferred in an Act of Parliament that has been enacted before the section comes into force, condition 4 is not met. Even where a function is exercised after the section has come into force, if the Act of Parliament

conferring the function was enacted before the section came into force, condition 4 is not met.

114. Condition 5 covers situations where subordinate legislation is made, approved or confirmed under existing functions that are modified by an Act of Parliament which is enacted after the sections have come into force. For condition 5 to be met the modification must result in the function being exercisable so that subordinate legislation made, confirmed or approved contains devolved provision that it could not previously contain.

115. Section 15(9) confirms that a function of giving consent to subordinate legislation is included within the scope of section 15.

Section 16 – Duty to report on exercise of functions under sections 14(1) and 15(1)

116. Provision made in subordinate legislation which needs Welsh Ministers' consent under sections 14(1) and 15(1) must be within the Assembly's legislative competence and could be contained in an Act of the Assembly. Section 16 provides a reporting mechanism to ensure the Assembly is kept informed of the exercise by the Welsh Ministers of their consent functions under sections 14(1) and 15(1) of the Act.

117. The reporting mechanism does not require an individual report in relation to each individual consent. A report laid before the National Assembly for Wales could include details of more than one consent, provided that the report is laid within 60 days of the consent being given and the report includes the details required in section 16(2) in relation to each consent.

118. Section 16(3) ensures that any days where the National Assembly for Wales is dissolved or in recess for more than four days are discounted for the purposes of calculating the 60-day period within which a report must be laid following the giving of consent. This ensures that the 60-day period does not expire while the Assembly is not sitting for an extended period of time that would prevent the Welsh Ministers from laying a report.

Section 17 – Meaning of devolved competence

119. Section 17 defines devolved competence by reference to provision that would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly enacted on the day this section comes into force. This confirms the limits in terms of legislative competence, but also means that regulations under the specified sections can also make provision that an Act of the Assembly could make, including modifying primary legislation and delegation of the power to make regulations. The fact that the powers can be used to modify primary legislation is confirmed in the relevant sections.

120. In assessing devolved competence under section 17(1), this would include consideration of the restriction on legislating incompatibly with EU law contained in section 108(6)(c) of the GoWA 2006. However, the restriction in section 108(6)(c) would not be relevant to any provision in regulations that are to have effect on or after exit day as the Treaties (as defined in section 20(5)) would have ceased to apply. For example, regulations made under section 3 cannot come into force before exit day and therefore at a point where the Treaties apply to the UK. The regulations could not therefore engage the restriction in section 108(6)(c). The situation is different for regulations under sections 9 and 10 as such regulations can come into force before exit day. However, any provision in regulations made under sections 9 and 10 to come into force before exit day would be subject to the restriction in section 108(6)(c).

121. Subsection (2) provides a different definition of devolved competence for the purpose of sections 11, 14 and 15, which was intended to operate in the event that the section came into force before 1 April 2018. The definition reflects the amendments made to the legislative powers of the Assembly by the Wales Act 2017 ("WA 2017"). Prior to 1

April 2018 the devolution settlement provided for under section 108 of, and Schedule 7 to, the GoWA 2006 is to apply. On and after 1 April 2018, a provision is within devolved competence for the purpose of sections 11, 14 and 15 if the provision could be included in an Act of the Assembly under both the current devolution settlement and the new devolution settlement provided for under the WA 2017. The intended effect of this was that any reductions in the legislative competence of the Assembly as a result of the WA 2017 would apply to sections 11, 14 and 15 and any increases in the legislative competence of the Assembly by virtue of WA 2017 would not apply.

Section 18 – Continuing effect of regulations

122. The powers to make regulations under sections 3, 4, 5, 9, 10 and 11 are all time limited. However, section 16 clarifies that although the powers in the Act expire, any regulations made under them do not expire.

Section 19 and Schedule 2 - Regulations

123. Section 19(2) provides that the powers to make regulations under the Act may make different provision for different purposes, different cases or different areas. This could include for example specifying a different exit day for different purposes, if that was considered appropriate.

124. All regulations made under the Act are subject to the same scrutiny framework set out under Schedule 2. Schedule 2 provides for three different procedures for scrutiny of regulations made under the Act. The standard procedure is the affirmative procedure, as laid out in paragraph 3. This applies to all regulations made under the Act, other than those which are subject to the urgent procedure or the enhanced procedure.

125. The urgent procedure is laid out in paragraph 4 and requires regulations subject to the procedure to be made and then laid before the Assembly. The regulations will cease to have effect after a period of 30 days after being made unless the regulations are approved by a resolution of the Assembly during the 30-day period. On laying the instrument (following its making) the Welsh Ministers must also lay a statement explaining the circumstances of the urgency and why it is necessary for the regulations to be subject to the urgent procedure.

126. The urgent procedure applies to regulations which contain a declaration that the Welsh Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being laid and approved. Regulations made under sections 11, 12 and 22 cannot be subject to the urgent procedure and must in all cases fall to be scrutinised in accordance with the enhanced procedure set out in paragraph 1.

127. The procedure with the potential for the greatest level of scrutiny is the enhanced procedure as laid out in paragraph 1. Apart from regulations made under sections 11, 12 or 22, the scrutiny procedure to be applied is informed by the contents of the regulations rather than the power under which the regulations are made. All regulations made under sections 11, 12 or 22 of the Act are subject to the enhanced procedure set out in paragraph 1. Paragraph 1(1) lists the regulations that are subject to the enhanced procedure.

128. Under the enhanced procedure the Assembly may apply the standard affirmative procedure to any regulations that fall within paragraph 1(1) apart from those made under sections 12 or 22. The Assembly may choose this procedure by approving a draft of the regulations by resolution after 40 days have expired since the draft regulations were laid by the Welsh Ministers. The full enhanced procedure as set out in paragraph 1(6) to (14) applies to any regulations made under sections 12 or 22.

129. The Assembly may decide to apply the enhanced procedure to draft regulations falling within paragraph 1(1) by resolving within the 30-day period following laying that the procedure should apply. A committee of the Assembly charged with reporting on the

draft regulations may recommend within the same 30-day period that the enhanced procedure should apply. In the event of such a recommendation, the enhanced procedure is to apply unless the Assembly rejects the recommendation by resolution within the same 30-day period.

130. Where the enhanced procedure applies, paragraph 1(6) to (14) sets out the applicable procedure. This is a two-stage procedure during which the Welsh Ministers may revise the draft regulations. The initial stage is a 60-day period after laying of the draft regulations where representations may be made, the Assembly may pass resolutions and a committee of the Assembly charged with reporting on the draft regulations may make recommendations. All such representations, resolutions and recommendations must be taken into account by the Welsh Minsters. Having laid a statement under paragraph 1(7), the Welsh Ministers may make regulations in the terms of the draft regulations if they are approved by a resolution of the Assembly. Where the Welsh Ministers wish to make material changes to the draft regulations, they must lay before the Assembly the revised draft regulations and a statement in accordance with paragraph 1(11)(b). The Welsh Ministers can make the revised draft regulations if they are approved by a resolution of the Assembly.

131. Paragraph 1(9) and (13) enables a committee of the Assembly to recommend that no further proceedings are taken in respect of the draft regulations or revised draft regulations. Where such a recommendation is made, no further proceedings can take place in respect of the draft regulations or revised draft regulations unless the recommendation is rejected by resolution of the Assembly. This means that without the Assembly rejecting the recommendation, the draft regulations or revised draft regulations cannot be made by the Welsh Ministers.

132. Paragraph 2(1) and (2) makes provision for when the Welsh Ministers must not and need not disclose representations made about draft regulations or revised draft regulations under paragraph 1. However, the provision in paragraph 2(1) and (2) does not operate to prevent the Welsh Ministers from disclosing to a committee of the Assembly charged with reporting on the draft regulations or revised draft regulations.

133. Section 14 of the IA 1978 provides that where an Act confers power to make subordinate legislation it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power. This provides that any revoking, amending or re-enacting instrument is subject to the same scrutiny requirements applicable to the original instrument. Paragraph 5 provides a contrary intention for the purposes of section 14 of the IA 1978. This reflects the fact that the scrutiny arrangements applicable under Schedule 2 are governed by the contents of the regulations (other than regulations made under section 11). Therefore an original instrument made under the standard procedure may later require to be amended under the urgent procedure. Paragraph 5 enables this to take place.

134. Paragraph 6 reflects the possibility that a statutory instrument containing regulations made under the Act may also contain regulations made under a different power which is subject to the negative resolution procedure. Paragraph 6 provides that in such circumstances the applicable scrutiny arrangements are those set out under the Act.

Section 20 – General interpretation

135. The explanatory notes have already highlighted a number of the terms defined in section 20 by reference to the provisions to which they are relevant.

136. ‘Exit day’ is a key term in the Act and is defined in section 20(1). It is to be appointed in regulations made by the Welsh Ministers. Article 50(3) of the TEU provides that the Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification under Article 50(2). Article

50(3) goes on to provide that the European Council may, in agreement with the UK, unanimously decide to extend this period.

137. The UK notified the European Council of its intention to withdraw from the EU on 29 March 2017. In the absence of a withdrawal agreement being agreed first or an extension being agreed between the UK and the European Council, the Treaties will cease to apply at 11:00p.m. on 29 March 2019. 'Treaties' is defined in Article 1 of the TEU as the TEU and TFEU.

138. Leaving the appointing of exit day to regulations reflects the possibilities catered for under Article 50(2) of the TEU. In making regulations that specify exit day the Welsh Ministers must adhere to the requirements laid out in section 20(4).

139. First, the Welsh Ministers must have regard to the day appointed for the same or similar purposes in or under an Act of Parliament of the UK to give effect to the withdrawal of the UK from the EU. If passed, the exit day specified in the EU Withdrawal Bill currently before Parliament, will become relevant to the exercise of the power of the Welsh Ministers to appoint exit day for the purposes of the Act. However, this would not require the Welsh Ministers to adopt the same exit day.

140. The second requirement in section 20(4) provides that the Welsh Ministers cannot specify exit day at a point in time where the Treaties still apply to the UK. Article 50 of the TEU provides for the withdrawal of Member States from the EU with Article 50(3) providing for the moment at which the Treaties are to cease to apply to a Member State. Section 20(4)(b) therefore ensures that exit day can only be a point in time after the Treaties have ceased to apply to the UK in accordance with Article 50(3). The Welsh Ministers would be unable to specify a date at which the Treaties still apply due to the restriction on legislating incompatibly with EU law contained in section 80(8) of the GoWA 2006, but section 20(4)(b) confirms this position. The Treaties for the purposes of section 20(4)(b), consistent with the TEU, are the TEU and the TFEU, but by virtue of section 20(7) it also captures the Euratom Treaty.

141. Section 20(2) contains further provision relevant to the definition of exit day. A number of the provisions in the Act operate by reference to before, after or on exit day. Section 20(2) clarifies the exact point in time to which such references are to be read. Where the Welsh Ministers appoint a time as well as day as exit day, references are to be read in accordance with the time specified. For example, if the Welsh Ministers appoint 11:00p.m. on 29 March 2019, a reference in the Act to regulations coming into force on exit day is to be read as a reference to those regulations coming into force at 11:00p.m. on 29 March 2019. Where the Welsh Ministers do not appoint a time as well as a day as exit day, any reference to exit day in the Act is to be read as a reference to the beginning of that day.

Section 22 – Repeal of this Act

142. The power in section 22 may be used to repeal the Act in its entirety or any provision contained in the Act. Regulations made under section 22 are subject to the enhanced procedure as set out in paragraph 1(6) to (14).

Section 23 – Short title

143. The short title of the Act is the 'Law Derived from the European Union (Wales) Act 2018

RECORD OF PROCEEDINGS IN THE NATIONAL ASSEMBLY FOR WALES

144. The following table sets out the dates for each stage of the Act's passage through the National Assembly for Wales. The Record of Proceedings and further information on the passage of this Act can be found on the National Assembly for Wales' website at:

http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=21280

Stage	***Date***
Introduced	7 March 2018
Stage 1 - Debate	13 March 2018
Stage 2 Scrutiny Committee – consideration of amendments	20 March 2018
Stage 3 Plenary - consideration of amendments	21 March 2018
Stage 4 Approved by the Assembly	21 March 2018
Royal Assent	6 June 2018