

LAW DERIVED FROM THE EUROPEAN UNION (WALES) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS OF THE ACT

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 unconditional¹.
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.

¹ Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen.

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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).
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 individuals². Some decisions are generally and directly applicable and are available in domestic law without the need for specific implementing legislation³. However, where a decision is addressed to a member State, implementation in domestic law may be necessary to give effect to the decision⁴. 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 acts⁵, 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 uniformly⁶. EU tertiary legislation may take the same form as an EU regulation, EU directive, EU decision, EU recommendation or EU opinion.

² Article 288 of the TFEU.

³ 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.

⁴ 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.

⁵ Article 290(1) of the TFEU.

⁶ Article 291(2) of the TFEU.

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 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 states⁷.
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

⁷ Article 2(b) of the EEA Agreement defines EFTA states as Iceland, the Principality of Liechtenstein and the Kingdom of Norway.

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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 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 force⁸. Regulations made under section 3 will therefore only contain provision corresponding to the legal rules contained in direct EU law and not the recitals.

8 Casa Fleischhandels, Case 215/88.