



Llywodraeth Cymru
Welsh Government

***LAW DERIVED FROM THE
EUROPEAN UNION
(WALES) BILL***

Explanatory Memorandum
incorporating the
Regulatory Impact Assessment and
Explanatory Notes

March 2018

Law Derived from the European Union (Wales) Bill

Explanatory Memorandum to the Law Derived from the European Union (Wales) Bill

This Explanatory Memorandum has been prepared by the Office of the First Minister and Cabinet Office of the Welsh Government and is laid before the National Assembly for Wales.

Member's Declaration

In my view the provisions of the *Law Derived from the European Union (Wales) Bill*, introduced by me on the 7 March 2018, would be within the legislative competence of the National Assembly for Wales.

Mark Drakeford, AM
Cabinet Secretary for Finance
Member in charge of the Bill

7 March 2018

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PART 1 – EXPLANATORY MEMORANDUM

1. Description

1. The **Law Derived from the European Union (Wales) Bill** (“the LDEU Bill”) is intended to preserve EU law covering subjects devolved to Wales on the withdrawal of the UK from the EU. Further, it will enable the Welsh Ministers to ensure that legislation covering these subjects works effectively after the UK leaves the EU and the European Communities Act 1972 (“the ECA 1972”) is repealed by the European Union (Withdrawal) Bill (“the EU (Withdrawal) Bill”).
2. The LDEU Bill also enables the Welsh Ministers to legislate to maintain regulatory alignment with the EU in order to facilitate continued access to the EU market for Welsh Businesses.
3. The LDEU Bill creates a default position in law so that unless the UK Parliament legislates to the contrary, Ministers of the Crown will have to obtain the consent from the Welsh Ministers before making subordinate legislation within the scope of EU law which make changes to devolved legislation.

2. Legislative Competence

4. The National Assembly for Wales ("the Assembly") has the legislative competence to make the provisions in the LDEU Bill pursuant to Part 4 of the Government of Wales Act 2006 ("GoWA 2006"). The relevant provisions of GoWA 2006 are set out in section 108 and Schedule 7.
5. Provisions in the Bill relate to the following subjects in Part 1 of Schedule 7 to GoWA 2006.

Agriculture, forestry, animals, plants and rural development

1. *Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development. In this Part of this Schedule "animal" means -*

all mammals apart from humans, and

all animals other than mammals;

and related expressions are to be construed accordingly.

Ancient monuments and historic buildings

2. *Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks.*

Culture

3. *Arts and crafts. Museums and galleries. Libraries. Archives and historical records. Cultural activities and projects.*

Economic development

4. *Economic regeneration and development, including social development of communities, reclamation of derelict land and improvement of the environment. Promotion of business and competitiveness.*

Education and training

5. *Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge.*

Environment

6. *Environmental protection, including pollution, nuisances and hazardous substances. Prevention, reduction, collection, management, treatment and disposal of waste. Land drainage and land improvement. Countryside and open spaces (including the designation and regulation of national parks and areas of outstanding natural beauty). Nature*

conservation and sites of special scientific interest. Protection of natural habitats, coast and marine environment (including seabed). Biodiversity. Genetically modified organisms. Smallholdings and allotments. Common land. Town and village greens. Burial and cremation, except coroners' functions.

Fire and rescue services and fire safety

- 7. Fire and rescue services. Provision of automatic fire suppression systems in newly constructed and newly converted residential premises. Promotion of fire safety otherwise than by prohibition or regulations.*

Food

- 8. Food and food products. Food safety (including packaging and other materials which come into contact with food). Protection of interests of consumers in relation to food.*

“Food” includes drink.

Health and health services

- 9. Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.*

Highways and transport

- 10. Highways, including bridges and tunnels. Streetworks. Traffic management and regulation. Transport facilities and services.*

Housing

- 11. Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.*

Local government

- 12. Constitution, structure and areas of local authorities. Electoral arrangements for local authorities. Powers and duties of local authorities and their members and officers. Local government finance.*

“Local authorities” does not include police and crime commissioners.

Public administration

14. Public Services Ombudsman for Wales. Auditor General for Wales. Audit, examination, regulation and inspection of auditable public authorities. Inquiries in respect of matters in relation to which the Welsh Ministers, the First Minister or the Counsel General exercise functions. Equal opportunities in relation to equal opportunity public authorities. Access to information held by open access public authorities.

The following are “auditable public authorities” and “equal opportunity public authorities”-

- (a) the Assembly,*
- (b) the Assembly Commission,*
- (c) the Welsh Government,*
- (d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,*
- (e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and*
- (f) persons established by enactment and having power to issue a precept or levy.*

The following are “open access public authorities”-

- (a) the Assembly,*
- (b) the Assembly Commission,*
- (c) the Welsh Government, and*
- (d) authorities which are Welsh public authorities, within the meaning of the Freedom of Information Act 2000 (c. 36).*

Social welfare

15. Social welfare including social services. Protection and well-being of children (including adoption and fostering) and of young adults. Care of children, young adults, vulnerable persons and older persons, including care standards. Badges for display on motor vehicles used by disabled persons.

Town and country planning

18. Town and country planning, including listed buildings and conservation areas. Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.

Water and flood defence

19. Water supply, water resources management (including reservoirs), water quality and representation of consumers of water and sewerage services. Flood risk management and coastal protection.

6. None of the exceptions in Part 1 of Schedule 7 or the restrictions contained in Part 2 of Schedule 7 are applicable

3. Purpose and intended effect of the legislation

Background

7. In light of the outcome of the EU referendum of June 2016, the Welsh Government and Plaid Cymru jointly published, on 23 January 2017, a White Paper entitled “*Securing Wales’ Future*”¹. 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 contains ideas about the future constitutional and governance structures of the UK following withdrawal. This was followed on 15 June 2017 by the Welsh Government’s further policy paper entitled *Brexit and Devolution*², which developed the ideas on constitutional and governance structures first referenced in *Securing Wales’ Future*.
8. Under section 1 of the European Union (Notification of Withdrawal) Act 2017 the Prime Minister notified 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”)³. On 13 July 2017, the EU (Withdrawal) Bill was introduced in the House of Commons⁴. It contained provision for the repeal of the ECA 1972 and other provision in connection with the withdrawal of the UK from the EU.
9. On 12 September 2017, the Welsh Government laid a Legislative Consent Memorandum before the National Assembly for Wales in respect of the EU (Withdrawal) Bill as introduced on 13 July 2017⁵. It included a full list of clauses that are within, or modify, the legislative competence of the National Assembly for Wales. The Legislative Consent Memorandum stated that the Welsh Government would not be able to recommend to the Assembly that it gives consent to the EU (Withdrawal) Bill as drafted on introduction.
10. On 19 September 2017, the First Minister of Wales and the First Minister of Scotland sent a joint letter to the Prime Minister with a set of proposed amendments to the EU (Withdrawal) Bill⁶. The letter explained that if the amendments were made to that Bill, the Welsh Government and the Scottish Government could consider recommending that consent be given

¹ https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf

² <https://beta.gov.wales/sites/default/files/2017-06/170615-brexiteand%20devolution%20%28en%29.pdf>

³ <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

⁴ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

⁵ <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf>

⁶ <http://gov.wales/docs/cabinetstatements/2017/170919-joint-letter-en.pdf>

to the EU (Withdrawal) Bill by the National Assembly for Wales and the Scottish Parliament.

11. The amendments were subsequently debated in the House of Commons on 4 and 12 December but were not agreed. On 6 December 2017, the Secretary of State for Scotland, in response to Scotland questions in the House of Commons, indicated that the UK Government would be bringing forward amendments to clause 11 of the EU (Withdrawal) Bill at Commons Report stage⁷. No amendments to clause 11 and Schedule 3 to the EU (Withdrawal) Bill were tabled by the UK Government at Report stage.
12. On 15 December 2017, the National Assembly's External Affairs and Additional Legislation Committee published its interim report on the EU (Withdrawal) Bill: Legislative Consent Memorandum⁸. This was followed on 18 December 2017 by the publication of the report by the Constitutional and Legislative Affairs Committee entitled "The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill"⁹. Both reports recommended that the Assembly withhold its consent for the EU (Withdrawal) Bill in its current form.

Legislative consequences of EU withdrawal

13. It was made clear in *Securing Wales' Future* that the Welsh Government respects the referendum result.
14. The Welsh Government also recognises the need for legislation to maintain the effective operation of the law at the point of the UK's exit from the EU.
15. Legislating for EU withdrawal will require the repeal and modification of domestic legislation including the repeal of the ECA 1972. In accordance with the constitutional arrangements in the UK, the ECA 1972 was enacted in anticipation of the UK joining the European Economic Community on 1 January 1973. Its purpose was to incorporate EU law into domestic law in order to fulfil the condition of membership of the EU whereby EU law is given effect in domestic law.
16. 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 directly applicable rights, powers, liabilities, obligations, restrictions, remedies and procedures provided in some types of EU law are effective in the UK legal system without the need for further domestic legislation. For example, a provision of an EU treaty, such as the Treaty on the Functioning of the

⁷ <https://hansard.parliament.uk/Commons/2017-12-06/debates/0DD4DB7D-67F0-4F8B-87B5-BA3DD7371463/LeavingTheEUDevolution#contribution-AAA5B7DF-1245-4D8A-B129-9236D37EE2C3>

⁸ <http://www.assembly.wales/laid%20documents/cr-ld11332/cr-ld11332-e.pdf>

⁹ <http://www.assembly.wales/laid%20documents/cr-ld11335/cr-ld11335-e.pdf>

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 (e.g. regulations). 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).

17. The repeal of the ECA 1972 will mean that these provisions will cease to have effect. As a result, all EU law which is currently directly applicable in the UK under section 2(1) of the ECA 1972 will cease to apply and all subordinate legislation made under section 2(2) of the ECA 1972 will lapse automatically unless provision is made to preserve it.

18. The repeal of the ECA 1972 could also cast doubt on the continued operation of other domestic law, in other pieces of primary legislation or secondary legislation which derives from the EU or in any way related to or dependent on the UK’s membership of the EU.

19. The Welsh Government does not wish to see the UK’s withdrawal from the EU result in an upheaval in the laws applicable in Wales and therefore recognises that legislative action is required to ensure that, as far as possible, the same laws and rules apply after exit that applied immediately before exit.

20. To achieve this aim, legislation is required to retain the laws and rules that derive from the EU and are applicable in the UK under the ECA 1972 and other domestic legislation. The EU (Withdrawal) Bill is the legislative vehicle prepared by the UK Government to deliver this objective.

The EU (Withdrawal) Bill

21. As noted above, the EU (Withdrawal) Bill was introduced in the House of Commons on 13 July 2017. The EU (Withdrawal) Bill—

- repeals the ECA 1972 from “exit day”;
- preserves all of the domestic legislation that has 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);
- 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”);
- incorporates any other rights etc. that are available in domestic law by virtue of the ECA 1972, 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.

22. “Exit day” under the EU (Withdrawal) Bill is 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.

23. 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 EU (Withdrawal) Bill. 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.

24. The EU (Withdrawal) Bill places restrictions on the ability of the National Assembly for Wales to modify law converted or preserved by that Bill. Section 108A of the Government of Wales Act 2006, which will provide for the legislative competence of the National Assembly from 1 April 2018, 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.

25. The EU (Withdrawal) Bill also places the same restriction on the powers of the Welsh Ministers to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law. This is achieved by paragraph 2 of Schedule 3 to the EU (Withdrawal) Bill which amends section 80 of the Government of Wales Act 2006.

26. Further details regarding the EU (Withdrawal) Bill can be found in the explanatory material published by the UK Government.

Welsh Government concerns with the EU (Withdrawal) Bill

27. The Legislative Consent Memorandum laid before the Assembly by the First Minister on 12 September 2017 set out clearly the Welsh Government’s position that the legislative framework for dealing with the

legislative consequences of the UK's withdrawal from the EU should be made by Parliament, for the UK as a whole. This would offer the greatest degree of consistency and certainty for citizens, businesses and other organisations.

28. However, the legislative framework must respect devolution. The Welsh Government fully respects the result of the referendum on the UK's membership of the EU, but the devolution was also the result of referendums and the will of the people of Wales must be reflected in the legislative consequences of withdrawal from the EU.
29. The EU (Withdrawal) Bill does not reflect the devolution settlement and, as a result the Welsh Government stated that it is unable to recommend to the Assembly that it gives consent to the EU (Withdrawal) Bill as drafted on leaving the House of Commons.
30. The reasons why the Welsh Government cannot currently recommend to the Assembly that it gives consent are detailed in the joint letter sent by the First Minister for Wales and the First Minister for Scotland to the Prime Minister with a set of proposed amendments to the EU (Withdrawal) Bill. Those amendments provided the changes necessary to the EU (Withdrawal) Bill so that the Welsh Government and Scottish Government could consider recommending that consent be given. Those amendments were debated and voted on by the House of Commons at Committee stage but were not passed.
31. As things stand, there is no guarantee that an agreement can be reached on amendments that would deliver the legislation needed in a manner that respects devolution. In consequence, the Welsh Government has no option but to prepare responsibly for the possibility of consent to the EU (Withdrawal) Bill being withheld by the Assembly. This is to ensure that, in any eventuality, there is a legislative framework in place to enable the Assembly and the Welsh Ministers to make the necessary legislative changes in consequence of the UK's withdrawal from the EU.
32. Discussions with the UK Government continue on possible amendments to the EU (Withdrawal) Bill with the intention of securing an agreement that would enable the Welsh Ministers to recommend to the Assembly that consent be given. The preparation of a Welsh legislative solution to the Welsh Government's concerns regarding the EU (Withdrawal) Bill has been, and continues to be, without prejudice to those discussions.

The Law Derived from the European Union (Wales) Bill

General approach

33. The decision to introduce this Bill does not frustrate, delay or complicate the UK's exit from the EU. Further, it does not dispute the need for legislation. Rather, the main policy objective of the Law Derived from the European Union (Wales) Bill is to ensure that the legislation covering

subjects devolved to Wales works effectively after the UK leaves the EU and the ECA 1972 is repealed by the EU (Withdrawal) Bill.

34. The Welsh Government agrees with the UK Government that it is imperative to avoid the cliff-edge scenario where individuals and businesses that currently enjoy rights and are subject to obligations under EU law suddenly, on exit, see those rights and obligations disappear. The Welsh Government therefore wishes to seek, as far as possible, to provide that the same rules and laws that apply immediately before exit also apply immediately after exit.

35. In developing the LDEU Bill the Welsh Government considered what viable legislative models were available to implement the changes required to achieve the policy objectives. The EU (Withdrawal) Bill provided an obvious template from which to work. However, consideration was given to alternative models, in particular, whether the necessary consequential changes required could be set out in an Assembly Bill, possibly by way of schedules of amendments in different subject areas. This alternative has been ruled out for the following reasons:

- Some of the legislative changes resulting from the withdrawal of the UK from the EU will be dependent on the terms of the withdrawal agreement. These cannot be known in advance and there is unlikely to be sufficient time, after a withdrawal agreement is reached and before exit day, to make all the necessary changes in an Assembly Act. Article 50 of the TEU provides for a two year time period to conclude negotiations on the withdrawal of the UK from the EU. Evidently, any transition period agreed between the UK and the EU as part of a withdrawal agreement could potentially result in more time to make the necessary domestic legislative changes, but no such transition period has yet been negotiated or agreed and it is unknown what changes to domestic law, if any, would be required in the event of a transition period. Therefore no reliance can be placed on this happening.
- The EU (Withdrawal) Bill contains provisions which could, once enacted, be used to prevent the Assembly from passing the LDEU Bill. As a result, the Welsh Government considers it necessary for the LDEU Bill to be treated as an emergency Bill under the Assembly's Standing Orders and scrutinised in sufficient time so that it is passed and receives Royal Assent prior to the enactment of the EU (Withdrawal) Bill. This further curtails the time available to identify and draft the necessary legislative changes, meaning that it would be impossible for the LDEU Bill to include those changes.
- The approach taken in the EU (Withdrawal) Bill is also relevant. Adopting the same approach of making the necessary legislative changes in subordinate legislation will enable the Welsh Government to work with the UK Government to create a coherent

legislative framework. Further detail regarding the LDEU Bill's relationship with the EU (Withdrawal) Bill is outlined below.

36. For those reasons, the possibility of making the legislative changes on the face of an Assembly Bill was discounted. Rather, conferring powers on the Welsh Ministers to make regulations to make the necessary changes was considered the only appropriate option.

Contents of the LDEU Bill

EU derived Welsh law (sections 3-5)

37. The LDEU Bill gives regulation-making powers to the Welsh Ministers to restate and demarcate EU derived legislation on subjects that are devolved in 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 LDEU Bill as 'EU derived Welsh law'. As a general rule, the LDEU Bill will operate so that the same law in subjects devolved to Wales will apply after the UK exits the EU as it did before, subject to any necessary modifications of the law to deal with the fact that the United Kingdom will no longer be part of the institutional and functional arrangements provided under European Union law.

38. Sections 3, 4 and 5 provide the mechanism to ensure that the laws and rules in devolved areas which derive from EU law continue to apply in Wales on exit day. The method of achieving this policy objective is somewhat different to the approach taken in the EU (Withdrawal) Bill. The EU (Withdrawal) Bill provides for a general incorporation and preservation of the entire body of EU law into domestic law and describes it as 'retained EU law'. The Welsh Government considered adopting a similar approach in the development of the LDEU Bill but concluded that the challenges this provides in terms of complexity and accessibility of Welsh law would be too great. Specifically:

- i. Adopting the same approach as the EU (Withdrawal) Bill would mean a general provision that incorporated EU law but only insofar as the EU law applied in relation to Wales and related to devolved subjects. The nature of the Welsh devolution settlement, in particular the interdependencies between laws made in Wales and those made in Parliament and that England and Wales are part of the same single jurisdiction, would make it difficult for individuals and businesses to identify the rights and obligations provided for in EU derived Welsh law.
- ii. The EU (Withdrawal) Bill goes some way to addressing these issues by requiring the publication of directly applicable EU law being incorporated into domestic law under that Bill. However, the added complexity caused by the nature of devolution of powers to Wales means that even the publication of directly applicable EU law

would not enable individuals and businesses to identify the law that would be applicable in Wales by virtue of the LDEU Bill.

39. The Welsh Government has therefore concluded that in order to ensure that EU derived Welsh law is easily identifiable by the people of Wales, it should be identified by the Welsh Ministers, subject to appropriate Assembly scrutiny.
40. EU derived Welsh law is made up of domestic legislation made by the Welsh Ministers which seeks to continue the substantive effect of the following kinds of EU derived legislation:
 - i. Direct EU law (section 3),
 - ii. EU derived enactments (section 4), and
 - iii. Provision made under EU related powers (section 5).

Direct EU Law (section 3)

41. Direct EU law is defined in section 3 of the LDEU Bill, and covers directly applicable EU law that applied in Wales by virtue of section 2(1) of the ECA 1972. This includes, for example, EU regulations, EU decisions and EU tertiary legislation.
42. Section 3 provides a power for the Welsh Ministers to make provision in domestic regulations that corresponds to provision in direct EU law. The power is limited by reference to the Assembly's legislative competence and therefore only provisions in direct EU law that relate to devolved subjects can be the subject of regulations made by the Welsh Ministers.
43. The power in section 3 is intentionally formulated to reflect the nature of direct EU law. Direct EU law is adopted at EU level and therefore designed to apply across 28 Member States. Consequently, the content of direct EU law was not designed to apply in a devolved domestic context. A power to make provision corresponding to direct EU law offers the flexibility to make the necessary changes to recast or remould it into legislation that operates successfully in relation to Wales. This would include making changes to reflect that the UK was no longer a member of the EU, including references to geographic areas in Member States, but would also include necessary omissions due to the boundaries of the Assembly's legislative competence. Restatement would not provide the necessary flexibility and was therefore rejected as an alternative to the power contained in section 3.

EU derived enactments (section 4)

44. EU derived enactments falling within section 4 are those enactments in domestic law which have been made in the UK and implement EU obligations. This could include both primary legislation, such as Part 5 of the Environment (Wales) Act 2015, and secondary legislation.

45. As these enactments already exist in a domestic context, i.e. they are domestic Acts of the Assembly or Parliament, Measures of the Assembly and Welsh and UK subordinate legislation, it is not necessary to adopt the same approach as that taken in section 3 for direct EU law. Restatement of this category of law ensures that the category of law is clearly identified. This serves two purposes:

- i. it identifies the legislation to which the rules relating to interpretation laid out in the LDEU Bill apply, and
- ii. removes any doubt that the legislation would lapse on the UK withdrawing from the EU.

Provision made under EU related powers (section 5)

46. Section 5 identifies three 'EU related powers' which govern the scope of the power contained in that section. These are

- i. Section 2(2) of the ECA 1972
- ii. Paragraph 1A of Schedule 2 to the ECA 1972; and
- iii. Section 56 of the Finance Act 1973

Description of specified powers (section 5)

47. The main powers for implementation of EU obligations are contained in section 2(2) of and paragraph 1A of Schedule 2 to the ECA 1972. As noted above, the subordinate legislation made under these powers would automatically lapse on the repeal of the ECA 1972 by the EU (Withdrawal) Bill. To avoid the lapse of the subordinate legislation in order to ensure that the laws and rules continue to apply, the LDEU Bill provides that the subordinate legislation is to be treated as having been made under the LDEU Bill rather than under the European Communities Act 1972.

48. Section 56 of the Finance Act 1973 provides a power to make subordinate legislation to require the payment of fees or other charges in connection with the provision of any services by the Welsh Ministers in pursuance of any EU obligation or any international agreement. The EU (Withdrawal) Bill amends section 56 so that the power will only apply to any international obligations. As a result, any subordinate legislation made under section 56 in pursuance of any EU obligation would lapse. Section 5 enables the Welsh Ministers to specify any such subordinate legislation to ensure any provision for fees or charges are preserved.

Justification for powers specified (section 5)

49. Section 2(2) of and paragraph 1A of Schedule 2 to the ECA 1972 are specified in section 5 as they are the main powers for implementing EU obligations. Section 56 of the Finance Act 1973 is specified as provisions made under section 56 are contained in statutory instruments which also contain provisions made under section 2(2). Section 5 also captures provision made in a statutory instrument to implement EU obligations if the

statutory instrument also contains provisions made under section 2(2) of and paragraph 1A to Schedule 2 to the ECA 1972 or section 56 of the Finance Act 1972.

50. The approach taken in section 5 was not considered appropriate to all enactments which implement EU obligations or relates otherwise to the EU or the European Economic Area. It would not be appropriate for provisions in primary legislation to be treated as having been made under another piece of primary legislation. Such enactments will fall within the scope of section 4 and therefore be restated in regulations made by the Welsh Ministers.

Modification of EU derived law

51. As with EU derived enactments, the subordinate legislation captured by section 5 also already operates in a domestic context. Specifying the provision in subordinate legislation to have effect under section 5 ensures that this category of law does not lapse as the UK withdraws from the EU. It also promotes clarity, as the provisions in subordinate legislation falling within this category will be clearly identifiable in regulations made by the Welsh Ministers.

52. In each of the three categories of law set out above, there are examples where the law will not operate effectively following exit. The LDEU Bill therefore provides the Welsh Ministers with powers to modify EU derived Welsh law to address any problems arising from withdrawal that would prevent the law from operating effectively. However, the Welsh Government's policy is to ensure that the rules and laws that apply on exit day are the same as those that applied before exit day. As a result, the intention is that any modifications only do what is necessary to ensure the effective operation of the law and remain consistent, where that is possible, to the purpose and effect of the original legislation.

53. In terms of direct EU law, that body of law was designed to apply across numerous Member States and was therefore never intended to work effectively in a purely domestic context, particularly a devolved domestic context. The power to make provision in regulations that corresponds to direct EU law therefore includes the power to exclude and, where necessary, substitute certain provision. For example, direct EU law may contain references to areas within other Member States. The power would enable the Welsh Ministers to omit such references when making corresponding provision. However, any such exclusions or substitutions must be consistent with the aim of preserving the status quo. Without this power to modify direct EU law, the law being incorporated under regulations would be incapable of operating successfully in a devolved Welsh context.

54. The enactments which were made in the UK to implement EU obligations already operate in a domestic setting. As a result, the extent and nature of the modifications needed to ensure they operate successfully in a

devolved Welsh context after the UK's withdrawal from the EU will be different from the modifications needed to direct EU law. However, some modifications will still be necessary and therefore a power is provided to enable the Welsh Ministers to restate the enactments with the necessary modifications to ensure they function effectively. For example, section 39 of the Historic Environment (Wales) Act 2016¹⁰ makes provision about the constitution of the Advisory Panel for the Welsh Historic Environment including the disqualification of Members of the European Parliament from the membership of the Panel. The power will enable the Welsh Ministers to restate this provision but with a modification to omit the redundant provision relating to Members of the European Parliament.

55. Subordinate legislation made under the relevant provisions of the ECA 1972 or the Finance Act 1973 are not created anew or restated. As a result, the necessary modifications will not take place as part of that process as is the case for direct EU law and other domestic enactments implementing EU law. The relevant subordinate legislation will first be specified in regulations made by the Welsh Ministers, ensuring that they are clearly identifiable. The Welsh Ministers would then be able to make any necessary modifications to the subordinate legislation for their continued effective operation. This will operate in a similar manner to the power in clause 7 and Schedule 2 to the EU (Withdrawal) Bill. For example, the application of the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017¹¹ is determined by reference to both the Environmental Impacts Directive¹² and the Habitats Directive¹³. The power to make modifications would enable the Welsh Ministers to make such amendments as are necessary to ensure the effective operation of the Regulations.

Challenges to EU derived Welsh law, interpretation of EU derived Welsh law and rules of evidence (sections 6, 7 and 8)

56. The LDEU Bill provides rules in relation to the interpretation of EU derived Welsh law (made in regulations under section 3, 4 and 5). Case law of the Court of Justice of the EU ("the CJEU") is afforded the same status in UK courts as decisions of the Supreme Court. This means that EU derived Welsh law is to be interpreted in accordance with the pre-exit case law of the CJEU. EU derived Welsh law is also to be interpreted in accordance with the general principles of EU law. However, the Supreme Court is not bound by this retained EU case law and may depart from it in the same way that it may depart from its own case law. Subject to the LDEU Bill being passed by the Assembly, and the EU (Withdrawal) Bill being passed by Parliament, the interpretation of EU derived Welsh law and retained EU law by the courts will broadly be subject to the same rules. However, the

¹⁰ 2016 anaw 4.

¹¹ S.I. 2017/565 (W. 134).

¹² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

¹³ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

LDEU Bill does differ from the EU (Withdrawal) Bill in relation to interpretation in one respect. The LDEU Bill provides that EU derived Welsh law is also to be interpreted in accordance with the Charter of Fundamental Rights. However, consistent with current EU law, retained general principles and the Charter of Fundamental Rights are only relevant to questions arising regarding EU derived Welsh law. They do not have any wider application. The LDEU Bill also contains provisions in relation to challenges to EU Derived Welsh law arising from invalidity of EU instruments and provision relating to rules of evidence. In both cases the provisions are consistent with the corresponding provision in the EU (Withdrawal) Bill.

Power to ensure compliance with international obligations (section 9)

57. The LDEU Bill provides powers for the Welsh Ministers to make regulations to ensure compliance with international obligations but only in areas within the Assembly's legislative competence. The power is consistent with the power set out in clause 8 of the EU (Withdrawal) Bill.

Power to implement the withdrawal agreement (section 10)

58. The power in section 10 of the LDEU Bill enables the Welsh Ministers to make provision within devolved competence to implement the withdrawal agreement. The power is consistent with the power in clause 9 of the EU (Withdrawal) Bill as amended at Commons Committee stage. The power in clause 9 of the UK Bill was amended so that the power cannot be exercised before prior enactment of a statute by the UK Parliament approving the final terms of withdrawal of the UK from the EU.

59. The UK Government has indicated its intention to bring forward a Withdrawal Agreement and Implementation Bill. The content of such a Bill is not yet known and will be informed by the terms of the withdrawal agreement reached between the UK and the EU. However, in principle, the Welsh Government considers it appropriate that a UK Parliament Bill would be best placed to implement the withdrawal agreement. As a result, section 10 of the LDEU Bill is dependent on the passing of an Act of Parliament rather than an Act of the Assembly. However, if appropriate or necessary, the Welsh Government could consider whether the terms of the withdrawal agreement as it applies in relation to Wales in devolved areas would be better implemented by an Act of the Assembly. If this is the case, an Assembly Bill could be developed and include provision to amend section 10 of the LDEU Bill.

Power to keep pace with EU law (section 11)

60. The LDEU Bill provides a power for the Welsh Ministers to make provision corresponding to EU law after exit day. After exit, where new legislation is adopted at an EU level, the Welsh Ministers will be able to implement similar legislative changes in Wales. This will operate in a similar manner to the current operation of section 2(2) of the ECA 1972, but will also

extend to EU regulations and EU decisions. Currently, EU regulations and EU decisions apply automatically in the UK by virtue of section 2(1) of the ECA 1972. As section 2(1) and (2) will be repealed by the ECA 1972 this power will operate to enable the Welsh Ministers to make corresponding provision to developments in EU law.

61. The power in section 11 is subject to certain specified restrictions. These are consistent with the restrictions laid out in Schedule 2 of the ECA 1972 which apply to subordinate legislation made under section 2(2) of the ECA 1972.
62. One major difference between section 2 of the ECA 1972 and the power in section 11 is that, under EU law, Member States must implement EU obligations and adhere to EU law, whereas section 11 will be a discretionary power. It will enable the Welsh Ministers to consider every development in EU law on a case by case basis and having consulted relevant persons they will be able to make the provision they consider appropriate.
63. This power is intended to enable the Welsh Ministers to maintain regulatory alignment with the EU where that is desirable. The EU is, and will continue to be, an important market for Welsh goods and services. Providing regulatory alignment will facilitate access to the EU internal market for Welsh businesses therefore mitigating any potential economic impact the withdrawal of the UK from the EU has on the Welsh economy.

Welsh Ministers' consent (section 13 & 14)

64. The LDEU Bill also provides for a default position in law so that, unless the UK Parliament legislates to the contrary, the consent of the Welsh Ministers is needed before a Minister of the Crown makes, confirms or approves certain subordinate legislation. The default position would only apply to any power to make subordinate legislation conferred on a Minister of the Crown (by way of new powers, or the modification of existing powers) after the LDEU Bill receives Royal Assent. The default position would also only apply where the subordinate legislation contains provision within the Assembly's legislative competence and within the scope of EU law.
65. The LDEU Bill provides that EU derived law in devolved areas will be retained by and under Assembly legislation. In order to preserve the integrity of the rules being retained by and under the LDEU Bill, sections 13 and 14 ensure that the Welsh Ministers will retain control over any amendments to EU derived Welsh law. The Assembly and the Welsh Ministers have been responsible for implementing EU law in Wales in devolved areas since devolution began, resulting in 20 years of experience in these areas. They are therefore best placed to understand the unique issues that affect Wales and how best to legislate. Where the UK Parliament decides that any future Minister of the Crown functions should only be exercised in devolved areas with the consent of the Welsh

Ministers, this will ensure that the UK Government works with the Welsh Ministers to ensure that any legislative changes are in fact in the best interests of Wales and its people.

Relationship with the UK Bill

66. The LDEU Bill is intended to operate alongside the EU (Withdrawal) Bill. It therefore recognises the existence of the EU (Withdrawal) Bill and is drafted on the assumption that the EU (Withdrawal) Bill is passed by the UK Parliament.
67. The law restated and demarcated before exit day as EU derived Welsh law under the LDEU Bill 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 LDEU Bill, 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.
68. Falling outside the definition of retained EU law means that EU derived Welsh law will not be subject to the restrictions on the Assembly’s power to modify retained EU law imposed by clause 11(2) of the EU (Withdrawal) Bill or the restriction on the Welsh Ministers’ powers to make subordinate legislation that modifies retained EU law imposed by Schedule 3. It also means that the rules set out in the EU (Withdrawal) Bill regarding the interpretation of retained EU law will not apply to EU derived Welsh law. Rather, the rules on interpretation laid out in the LDEU Bill will apply to EU derived Welsh law.
69. The powers contained in the LDEU Bill for the Welsh Ministers to restate and demarcate EU derived Welsh law will be exercised in parallel with the powers conferred on a Minister of the Crown in the EU (Withdrawal) Bill to correct deficiencies in retained EU law. The Welsh Government intends to work closely with the UK Government to ensure a coherent legislative framework exists on exit day. This will include sharing information on how each government intends on exercising the powers to enable consistency where appropriate or necessary. However, the powers will enable a degree of divergence, and due to competence restraints there will be limits on the extent to which the Welsh Ministers will be able to make regulations. Working closely with the UK Government will enable any inter-dependencies in EU derived Welsh law and retained EU law to be identified and taken into account. This could include ensuring that appropriate cross-references are provided for but more particularly, ensuring the respective approaches under both Bills can successfully operate alongside each other.
70. The scope of EU derived Welsh law will be determined by the regulations made by the Welsh Ministers under sections 3, 4 and 5. Therefore, any direct EU law or domestic EU derived enactment which is not subject of

regulations made by the Welsh Ministers under the LDEU Bill will not form part of EU derived Welsh law. Any EU law or domestic EU derived enactment not the subject of regulations under the LDEU Bill, for example due to the provisions in question falling outside the Assembly's legislative competence, will automatically fall within the scope of the EU (Withdrawal) Bill and therefore be incorporated or preserved and form part of retained EU law.

71. A number of the provisions in the EU (Withdrawal) Bill apply generally and are not restricted to retained EU law. For example, the provisions in paragraphs 2 to 4 of Schedule 1 which provide for exceptions to incorporation will apply in relation to Wales despite EU derived Welsh law standing apart from retained EU law. A specific example is the provision in paragraph 3(1) of Schedule 1 which provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any general principles of EU law (subject to the transitional provision inserted into Schedule 8 by way of a UK Government amendment at Commons Report stage). This will apply across the UK and therefore the LDEU Bill does not need to make similar provision, but neither could it make different provision. The LDEU Bill, subject to it being passed by the Assembly, will receive Royal Assent before the EU (Withdrawal) Bill. As a result, any provision of general application in the EU (Withdrawal) Bill will apply to the LDEU Bill. A provision in the LDEU Bill which made different provision in relation to the rights of action associated with compliance with general principles of EU law would therefore be subject to the provision in the EU (Withdrawal) Bill and would essentially be rendered ineffective.

4. Consultation

72. The Welsh Government's preferred option remains to see the UK's EU (Withdrawal) Bill amended so that it provides the necessary legislative framework in consequence of the decision to leave the EU. However, the LDEU Bill provides an alternative legal mechanism in the event that appropriate amendments are not secured to the EU (Withdrawal) Bill to ensure that the devolution settlement is respected.
73. Given the short timescale available for bringing forward this legislation, demonstrated by its treatment as an emergency Bill, no consultation has been possible on a draft Bill. However, the Welsh Government has issued a number of policy documents, including *Securing Wales' Future* and *Brexit and Devolution*, in addition to taking steps to secure stakeholder engagement, for example through the European Advisory Group. The feedback from stakeholders has been, and continues to be, taken into account by the Welsh Government as it formulates and implements its response to the UK's decision to leave the EU. However, the limited time available has meant that no specific consultation on this Bill has been possible.
74. The nature of the LDEU Bill means that regulations will be made by the Welsh Ministers for the LDEU Bill to have any practical effect. As a result, the LDEU Bill itself will not effect any changes to EU law. The regulations will impact on EU law and its application in Wales and therefore the Welsh Government will consider the need for any consultation, in accordance with its legal obligations, on formulating any regulations made under the LDEU Bill. However, the policy objective of the LDEU Bill is to preserve the status quo as far as that is possible. Legislating to ensure the same rules continue to apply is aimed at minimising any disruptions caused by the UK leaving the EU. It is therefore the intention that the regulations would provide for a continuation of the existing law, rather than substantial changes in the law which could suggest that consultation would not be appropriate in most cases.

5. Power to make subordinate legislation

75. The LDEU Bill contains provisions to make subordinate legislation. Table 5.1 sets out in relation to these:

- i. the person upon whom, or the body upon which, the power is conferred;
- ii. the form in which the power is to be exercised;
- iii. the appropriateness of the delegated power;
- iv. the applied procedure; that is, whether it is “affirmative”, “negative”, or “no procedure”, together with reasons why it is considered appropriate.

76. The Welsh Government will consult on the content of the subordinate legislation where it is considered appropriate to do so. The precise nature of consultation will be decided when the proposals have been formalised.

Table 5.1: Summary of powers to make subordinate legislation in the provisions of the Law Derived from the European Union (Wales) Bill

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
Section 3	Welsh Ministers	Regulations	The alternative approach would be to restate the provision in direct EU law on the face of the LDEU Bill. This was not considered practical as the content of some of the regulations to be made under section 3 would be dependent on the outcome of negotiations between the UK Government and the EU. The power must be used for the purpose of continuing the rights, powers liabilities, obligations, restrictions, remedies and procedures that are recognised and available in the law of England and Wales. Any major changes to policy	<p>The affirmative resolution procedure will apply unless the regulations – (1) are urgent and therefore the urgent procedure would apply (paragraph 4 of Schedule 2), or (2) contain provision of the type specified in paragraph 1(1) of Schedule 2 to the LDEU Bill, in which case the enhanced procedure applies.</p> <p>The urgent procedure is a non-standard procedure and is similar to the procedure set out in section 25 of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 is described as a provisional affirmative procedure. The urgent procedure reflects the procedure provided for in paragraph 3 of</p>	In recognition of the importance of the rights being preserved under the LDEU Bill, it was considered that the affirmative resolution procedure provides an appropriate degree of scrutiny for the majority of the regulations to be made under section 3. However, the power could be used in certain circumstances to establish new public authorities, create a criminal offence, create powers to legislate or make consequential amendments to primary legislation, which were considered, in this

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>will be the subject of separate primary legislation.</p>	<p>Schedule 7 to the EU (Withdrawal) Bill. This procedure would see the regulations being made by the Welsh Ministers without prior scrutiny by the Assembly, reflecting the urgent nature of the regulations. However, the regulations would cease to have effect 30 days after they were made unless the Assembly have approved the regulations by resolution.</p> <p>The enhanced procedure is set out fully in paragraph 1 of Schedule 2 to the LDEU Bill and incorporates further scrutiny above and beyond that provided under the affirmative procedure for regulations as determined by the Assembly. If the Assembly determines for the enhanced procedure to apply, the Welsh Ministers must have regard to any representations, resolutions made by the Assembly and any</p>	<p>unique case, to merit an enhanced level of scrutiny provided for under the LDEU Bill. The LDEU Bill lastly reflects that the uncertainty of the process of the UK withdrawing from the EU could result in regulations under section 3 being required to be made urgently as negotiations conclude. In which case the urgent procedure is to apply.</p>

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
				<p>recommendations made by an Assembly committee charged with reporting on the draft regulations. The Welsh Ministers may make the regulations as originally drafted, or make changes in light of the representations received. In both cases, the Assembly must approve the draft regulations by resolution. There is also scope for the committee charged with reporting on the draft regulations to recommend no further proceedings be taken in relation to the draft regulations. Where such a recommendation is made, no further proceedings may be taken in relation to the draft unless the recommendation is rejected by resolution of the Assembly.</p>	
Section 4	Welsh Ministers	Regulations	As in the case of regulations made under section 3, the content of some of the regulations to be made under section 4 is likely to be informed by the	The same procedures will apply to regulations made under section 4 as apply to regulations made under section 3.	The rationale for the different procedures for regulations made under section 4 is consistent with that set out above for regulations made

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>outcome of negotiations between the UK and the EU. It would therefore be impractical to make the necessary provision on the face of the LDEU Bill.</p> <p>Any modifications made by the Welsh Ministers to enactments re-stated under section 4 must be necessary to ensure the effective operation of the restated enactment after withdrawal. Any major policy changes to the restated enactments will be subject to further primary legislation.</p> <p>In some cases, the enactments being re-enacted will themselves be subordinate legislation. Therefore providing for powers in subordinate</p>		under section 3.

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			legislation to make the necessary modifications is consistent with current practice.		
Section 5	Welsh Ministers	Regulations	<p>The full extent of the provision to be made under section 5(1) is not yet known. The provision is likely to be informed by the negotiations between the UK and EU. In addition, there is likely to be further subordinate legislation made under the EU related powers to implement EU law adopted before the UK withdraws from the EU. It would therefore be impractical to make the necessary provision on the face of the LDEU Bill.</p> <p>Any modification of, or further provision to, the provision in subordinate legislation made under the</p>	The same procedures will apply to regulations made under section 5 as apply to regulations made under section 3.	The rationale for the different procedures for regulations made under section 5 is consistent with that set out above for regulations made under section 3.

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>EU related powers must be necessary to ensure the effective operation of the provision in question. Any major policy changes to subordinate legislation made under the EU related powers will be subject of further legislation. In most cases the further legislation will be primary legislation as the EU related powers are being repealed.</p> <p>As the provisions being modified under section 5(5) are currently set out in subordinate legislation, the delegation of powers to amend such subordinate legislation is also consistent with existing practice.</p>		

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
Section 6(2)(c)	Welsh Ministers	Regulations	Currently the ECJ can declare an EU instrument invalid. Domestic courts will have no jurisdiction to declare an EU instrument invalid. The power in section 6(2)(c) provides flexibility to the Welsh Ministers to specify challenges that could be brought. This could include reacting to decisions made at EU level regarding EU instruments that have been incorporated into domestic law by regulations made under section 3.	The same procedures will apply to regulations made under section 6(2)(c) as apply to regulations made under section 3.	The rationale for the different procedures for regulations made under section 6 is consistent with that set out above for regulations made under section 3.
Section 8(3)	Welsh Ministers	Regulations	The ECA 1972 contains provisions requiring that judicial notice be taken of certain aspects of EU law (such as the EU Treaties), and determining how evidence of EU instruments may be given in domestic courts. The	The same procedures will apply to regulations made under section 8(3) as apply to regulations made under section 3. Regulations under this power could, for example, require consequential changes to primary legislation which would engage the enhanced procedure.	The rationale for the different procedures for regulations made under section 8 is consistent with that set out above for regulations made under section 3.

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>ECA 1972 will be repealed but there may be instances as the LDEU Bill creates a new legal framework where it is necessary for provision to be made which provide for judicial notice to be taken of a relevant matter and instruments and documents issued by or in the custody of an EU entity. Whether such provision is required will be dependent on the regulations made under section 3, 4 and 5 and therefore it is not currently known what provision, if any, would be required.</p>		
Section 9	Welsh Ministers	Regulations	<p>This power is aimed at enabling the Welsh Ministers to address any unintentional breaches of international obligations</p>	<p>The exact nature of the legislative changes under this power cannot yet be identified. The LDEU Bill therefore provides different procedures based on the content</p>	<p>The rationale for the different procedures for regulations made under section 9 is consistent with that set out above</p>

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>which arise as a result of withdrawal. The terms of withdrawal remain subject to negotiations and therefore it remains unclear to what extent, if at all, the UK's withdrawal could lead to breaches of international law. It is therefore not possible to include provision in the LDEU Bill and rather a power to make subordinate legislation is needed.</p>	<p>of the regulations and the circumstances consistent with the approach taken with other powers to make regulations in the LDEU Bill such as section 3.</p>	<p>for regulations made under section 3.</p>
Section 10	Welsh Ministers	Regulations	<p>This power is intended to enable the Welsh Ministers to make any legislative changes necessary to implement the withdrawal agreement agreed between the UK and the EU. The negotiations for the withdrawal agreement continue and therefore the terms of any withdrawal agreement are not yet</p>	<p>The exact nature of the legislative changes under this power cannot yet be identified. The LDEU Bill therefore provides different procedures based on the content of the regulations and the circumstances consistent with the approach taken with other powers to make regulations in the LDEU Bill such as section 3.</p>	<p>The rationale for the different procedures for regulations made under section 10 is consistent with that set out above for regulations made under section 3.</p>

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			known and therefore could not be contained on the face of the LDEU Bill. The negotiations could possibly continue until very late in the process therefore leaving very little time to make any appropriate legislative changes to implement the withdrawal agreement.		
Section 11(1)	Welsh Ministers	Regulations	This power is similar to section 2(2) of the ECA 1972 as it will essentially grant the Welsh Ministers the power to implement EU law after exit. Delegating this power is therefore consistent with current practice.	<p>All regulations made under section 11 will be subject to the enhanced procedure unless the Welsh Ministers consider the regulations to be urgent, where the urgent procedure will apply. It is not envisaged that urgent regulations would be required under this power in many cases as the power is not linked to withdrawal and will only be exercised after withdrawal.</p> <p>The power is also subject to a requirement to consult such</p>	The UK will no longer be a member of the EU and therefore will have no influence over developments in EU law. The enhanced procedure will therefore ensure any regulations are subjected to sufficient scrutiny.

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
				persons as the Welsh Ministers consider appropriate prior to the making of regulations.	
Section 11(6)	Welsh Ministers	Regulations	This power reflects the provision in section 1(3) of the ECA 1972. The EU Treaties may change from time to time and this power ensures that the power to keep make corresponding provision to EU law after exit day is able to reflect the most recent EU Treaties.	Regulations made under this power are subject to the three possible scrutiny arrangements provided for under the Bill. However, it is not envisaged that the power would be used for any of the purposes listed in paragraph 1 of Schedule 1, and therefore the regulations will be subject to the affirmative procedure. The urgent procedure could apply but it is not envisaged that any regulations made under this power would be urgent. The power is also subject to a requirement to consult such persons as the Welsh Ministers consider appropriate prior to the making of regulations.	This power will alter the scope of the power in section 11. However, it is limited to specifying new EU Treaties entered into at EU level. As the power in section 11 will always be subject to the enhanced procedure the affirmative procedure is sufficient scrutiny for regulations made under this power.
Section 18(1)	Welsh Ministers	Regulations	The EU (Withdrawal) Bill has been amended to	Regulations made under this power will be subject to the	The time and date that the EU Treaties cease to

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			<p>specify 11:00pm on 29 March 2019 as exit day but with a power to amend exit day if the date the EU Treaties cease to apply to the UK is different. There remains uncertainty regarding when the EU Treaties will cease to apply, and could be impacted by the terms of any transition period. The power therefore is necessary to provide the flexibility to enable the Welsh Ministers to react to the latest position with regards the UK's withdrawal from the EU.</p>	<p>affirmative procedure as the regulations will not contain any of the matters specified in paragraph 1 of Schedule 2. However, it is possible that regulations to specify exit day could need to be made urgently, particularly if negotiations continue until a very late stage. The Welsh Ministers may therefore make regulations under this power under the urgent procedure.</p>	<p>apply to the UK are beyond the control of the Welsh Ministers. Therefore it is not considered necessary to subject the regulations to scrutiny above that provided under the affirmative procedure.</p>
<p>Schedule 1 Paragraph 1</p>	<p>Welsh Ministers</p>	<p>Regulations</p>	<p>Whether any charge or fees are required are dependent on regulations made under section 3, 4 and 5 and therefore cannot be included in the LDEU Bill. The power to specify</p>	<p>Regulations made under this power will result in an imposition of a fee in respect of a function exercisable by a public authority and would therefore be subject to the enhanced procedure.</p>	<p>Regulations under this power would result in the charging of fees or charges on individuals and businesses and therefore it is appropriate to afford a greater level</p>

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
			these in subordinate legislation is therefore necessary to adapt any fees or charges required in respect of EU derived Welsh law.	The urgent procedure would also be available where the Welsh Ministers consider appropriate.	of scrutiny. This coupled with the unique nature of the UK's exit from the EU merit an enhanced scrutiny procedure.
Schedule 1 Paragraph 2	Welsh Ministers	Regulations	Again, any regulations made under this power are dependent on regulations made under section 3, 4 and 5 and therefore cannot be included in the LDEU Bill. The power to specify these in subordinate legislation is therefore necessary to adapt any fees or charges required in respect of EU derived Welsh law.	<p>Regulations under this power could result in an increase in fees or charges which would result in the regulations being subject to the enhanced procedure. However, it is possible that the power would be used to revoke charges, reduce fees or charges or amend the methodology of calculating fees and charges. Therefore regulations under this power would not always be subject to the enhanced procedure and could otherwise be subject to the affirmative procedure.</p> <p>Where the methodology for calculating fees or charges resulted in an increase, or the</p>	As with regulations made under paragraph 1 of Schedule 2, in the event of increases in fees and charges it is appropriate to provide for a greater level of scrutiny. However, where the regulations result in a reduction in fees and charges or the revocation of fees or charges the burden on individuals and businesses would decrease and therefore a reduced level of scrutiny, in this case the affirmative procedure is appropriate.

Section:	Power conferred on	Form	Appropriateness of delegated power	Procedure	Reason for procedure
				<p>imposition of a new or separate fee or charge, the enhanced procedure would apply as it would involve the increase or imposition of a fee or charge and therefore fall within paragraph 1(1)(c) of Schedule 2.</p> <p>The urgent procedure would also be available where the Welsh Ministers consider appropriate.</p>	

There are no powers to make directions or issue codes and guidance in the provisions of the Bill

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has been completed for the LDEU Bill and it follows below.

There are no specific provisions in the LDEU Bill which charge expenditure on the Welsh Consolidated Fund.

PART 2 – REGULATORY IMPACT ASSESSMENT

SUMMARY – REGULATORY IMPACT ASSESSMENT (RIA)

Law Derived from the European Union (Wales) Bill		
<p>Preferred option (in the event of the EU (Withdrawal) Bill not being amended to the satisfaction of the Welsh Government): To introduce legislation to preserve EU law, as it applies in relation to devolved subjects, as the United Kingdom withdraws from the European Union. The legislation will also include a power to enable the law to be modified to keep pace with changes to EU law following withdrawal. It will also create a default position in law so that the consent of the Welsh Ministers is needed before a Minister of the Crown makes, confirms or approves subordinate legislation under powers conferred under future enactments on subjects within the scope of EU law that are also devolved. Details of this option are set out in full on pages 13-23.</p> <p>The appraisal period below was specified as the timeframe during which EU law would have to be preserved, with modifications, in order to come into effect on exit day, which would account for the overwhelming majority of the administrative costs associated with secondary legislation to be made under the Bill. This timeframe may change, for example because of an agreement between the UK Government and the EU about a transition/implementation period, but this would not affect the ability to estimate costs at this stage. The Bill also contains powers to make secondary legislation for the longer term (see for example section 11) which would mean administrative costs arising after the transition/implementation period. However, the administrative costs, and the timeframe, of these categories of subordinate legislation are not known at this stage.</p>		
Stage: Draft Bill	Appraisal period: 2017/18 - 2018/19	Price base year:
Total Cost Total: Not known Present value:	Total Benefits Total: Not known Present value:	Net Present Value (NPV):

Administrative cost

Costs: The Bill operates to preserve EU law by way of regulations made by Welsh Ministers. These regulations, which would result in administrative costs, are not on the face of the Bill. While the development of this body of secondary legislation will incur an administrative cost for the Welsh Government, there is, currently, uncertainty regarding this cost, principally because the UK's exit from the EU – and the need for legal certainty and continuity – is a unique circumstance. Consequently, there is no precedent on which to draw for an estimation of the costs of the secondary legislation.

The volume of the consequential secondary legislation is not known at this stage. In addition, the nature of the individual deficiencies, and importantly the costs associated with the corrections of the deficiencies in the EU law to be preserved, are not known at this stage. For example, while many deficiencies could be corrected by minor textual amendments, others could require the creation of new agencies to undertake the functions of existing EU bodies. Furthermore, the implementation of UK legislation, such as the forthcoming fisheries and agriculture Bills, could also have a significant impact on the secondary legislation under the LDEU (Wales) Bill.

Given the combination of these unknowns, namely the volume of the secondary legislation, the costs of the corrections of the deficiencies and the nature and impact of new UK legislation and frameworks, the administrative costs are not known at this stage. The level of uncertainty is such that attempting to provide costs will generate figures that are potentially misleading and/or a range of costs that is too wide to add any real value.

The degree of this uncertainty will diminish over time, as the work progresses and as the outcome of the negotiations and the nature of the future relationship with the EU and of the arrangements for Wales and the wider UK become clearer. However, given this uncertainty, and coupled with the limited time available, the administrative costs for the consequential secondary legislation are not known at this stage. As the situation develops over time, it will enable a detailed analysis of the costings to be undertaken.

It should also be noted that the Regulatory Impact Assessment for the UK Government's EU (Withdrawal) Bill does not address the issue of administrative costs for government. This is even though the UK Government should have a greater degree of certainty about these costs than does the Welsh Government because, for example, it is conducting the negotiations relating to the withdrawal agreement and is preparing the UK legislation that will have a significant role in determining future UK arrangements and frameworks.

Transitional: Not known	Recurrent: Not known	Total: Not known	PV:
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Cost-savings: There are no anticipated transitional cost-savings. The Bill will preserve the status quo as far as is possible. However, subject to the outcome of the UK's negotiation with the EU and the arrangements within Wales and the wider UK post-withdrawal, there may be opportunities for recurrent cost savings in consequence of future legislation as the regulatory regimes in existence under EU law are reviewed. These savings are not in direct consequence of this Bill and it is not, therefore, appropriate to include them in this assessment and, in any event, not currently possible to quantify them.

Transitional: Not known	Recurrent: Not known	Total: Not known	PV:
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Net administrative cost: Not known

Compliance costs

It is anticipated that there will be some transitional compliance costs. The regulations made under the Bill will include technical modifications to existing regulatory regimes which could see compliance costs incurred by stakeholders including private businesses, public and voluntary sector organisations and by individuals in terms of the adjustment to new arrangements post-withdrawal. These might entail, for example, adjusting to new institutions that will replace existing EU entities in administering regulatory frameworks. However, these costs will be contingent on the outcome of the UK's negotiation with the EU and the arrangements within Wales and the wider UK post-withdrawal and it is not, therefore, currently possible to quantify them and the cost estimates are not known.

Transitional: Not known	Recurrent: Not known	Total: Not known	PV:
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Other costs

There are no other anticipated costs.

Transitional:	Recurrent:	Total:	PV:
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Unquantified costs and disbenefits

The regulations causing any impacts are not on the face of the Bill, but the regulations made under the Bill may produce costs, for example compliance costs, in addition to the administrative costs. However, it is not possible to quantify these additional costs at this time and the cost estimates are not known. The nature of the instruments will depend on the outcome of the negotiations between the UK and the EU and the arrangements within Wales and the wider UK post-withdrawal and due consideration regarding Regulatory Impact Assessments will be given for each instrument. Also, given that the purpose of the Bill is to preserve EU law, as it applies in relation to devolved subjects, as the United Kingdom withdraws from the European Union, it is not anticipated that there will be environmental benefits or disbenefits.

Benefits

The Bill's objective is to ensure, as a general rule, that the rules and laws that apply in devolved areas prior to exit continue to apply on exit. The principal benefit of the Bill will therefore be that it provides legal certainty and continuity for businesses and citizens. It is not possible to quantify this benefit, but the costs of legal uncertainty and a lack of continuity would likely be considerable. However, the cost estimates are not known at this time.

The Bill would also ensure that decisions on how to modify EU law are made by the Welsh Ministers and scrutinised by the Assembly, reflecting the devolution settlement for Wales and enabling the utilisation of the knowledge and expertise that have been developed during the history of devolution. The consequential legislation that will be produced under the Bill would result in a significant increase in legislation available in the Welsh language.

Total: Not known	PV:
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Key evidence, assumptions and uncertainties

There are several areas of uncertainty at this stage, including the outcome of the UK's negotiations with the EU and the arrangements in Wales and the wider UK post-withdrawal, which will influence the nature and the amount of work required in relation to the regulations to be made under the Bill. However, the uncertainty should diminish over time as the outcome of the negotiations and the future arrangements become clearer.

7. Options

Option 1 – Do nothing and, as a consequence, use the powers provided in the UK Government’s European Union (Withdrawal) Bill, which is currently before Parliament.

Option 2 – Continue to seek to work with the UK Government to amend the EU (Withdrawal) Bill, the better to reflect the devolution settlement.

Option 3 – Introduce the Law Derived from the European Union (Wales) Bill to preserve EU law, as it applies in relation to devolved subjects, as the United Kingdom withdraws from the European Union and further associated provision.

The preferred option would be Option 2, a UK Bill that works with, not against, devolution. However, were the EU (Withdrawal) Bill not to be amended to the satisfaction of the Welsh Government, Option 3 – the Law Derived from the European Union (Wales) Bill – would become the preferred option.

Option 1 – Do nothing and, as consequence, use the powers provided in the UK Government’s EU (Withdrawal) Bill.

(This relates to the Bill as introduced on 13 July 2017)

7.1 The UK Government states the objectives of the EU (Withdrawal) Bill as being principally to:

- repeal the European Communities Act 1972 (ECA), which, amongst other things, gives primacy to EU law;
- convert EU law, as it stands at the moment of exit, into UK law, and preserve the laws made in the UK to implement EU obligations;
- create temporary powers to make secondary legislation, which will enable corrections to be made to the laws that would otherwise no longer operate appropriately post-exit, so that the legal system continues to function correctly outside the EU;
- create temporary powers to implement the withdrawal agreement agreed between the UK Government and the EU; and
- maintain the current scope of devolved decision making powers in areas currently governed by EU law.

7.2 The Welsh Government agrees that legislation is necessary to provide clarity and certainty for citizens and businesses as we leave the EU. We accept the need for legislation to ensure that, as a general rule, the same laws and rules will apply after exit as applied before exit. To enable those laws and rules to operate effectively, it is necessary to provide for temporary powers to enable corrections to be made to those laws. The Welsh Government recognises the benefit of such legislation being made by Parliament, for the UK as a whole, as this would offer the greatest degree of consistency and certainty for citizens and businesses.

- 7.3 However, the Welsh Government has several concerns about the Bill, as it was introduced.
- 7.4 The principal objection relates to the new constraints proposed in clause 11 and Schedule 3 on the Assembly's legislative competence and the Welsh Ministers' executive competence. The Welsh Government also objects to clauses 7-9 (which give Ministers of the Crown regulation-making powers that include the ability to amend devolved law and the devolution settlement without consent), Schedule 2 (due to the unreasonable restrictions placed on the Welsh Ministers' exercise of the correcting powers).

New constraints on the legislative competence of the Assembly

- 7.5 Clause 11 and Schedule 3 replace the current EU law restrictions on the Assembly's legislative competence and the Welsh Minister's executive competence. The current EU law restrictions prevent the Assembly and the Welsh Ministers from legislating incompatibly with EU law. Following withdrawal, the UK will no longer be subject to EU law and therefore it would no longer be appropriate to restrict the powers of the Assembly and Welsh Ministers in this way.
- 7.6 However, the UK Bill introduces new restrictions which would prevent the Assembly and Welsh Ministers from modifying retained EU law (except where to do so would have been compatible with EU law immediately before exit).

Powers for UK and Welsh Ministers to amend the law in devolved areas

- 7.7 The Bill gives powers to Ministers of the Crown in clause 7 (to deal with deficiencies arising from withdrawal), in clause 8 (to enable continued compliance with the UK's international obligations), and clause 9 (to implement the withdrawal agreement). These powers would allow a Minister of the Crown unilaterally to amend legislation that is within the legislative competence of the Assembly, and amend legislation in respect of which the Welsh Ministers may also exercise functions (under Schedule 2 to the UK Bill or under existing powers).
- 7.8 In terms of scrutiny, any regulations made by a Minister of the Crown would be scrutinised by the UK Parliament rather than the Assembly even though the law in question contained provision relating to devolved subjects. Those powers could also be used to amend the Government of Wales Act 2006, without any requirement for the Assembly's consent. This could include changes to the Assembly's legislative competence, meaning a departure from the current mechanisms for amending Assembly's legislative competence either in accordance with the Sewel Convention (for primary legislation) or under section 109 of the Government of Wales Act 2006.

7.9 Schedule 2 to the UK Bill provides Welsh Ministers with powers corresponding to those provided to Ministers of the Crown in clauses 7-9. But the corresponding powers for devolved administrations' Ministers are subject to extensive restrictions. First, the powers do not extend to direct EU legislation (as defined in the UK Bill, but essentially directly applicable EU law, other than the EU Treaties) meaning that the Welsh Ministers will not be responsible for making the appropriate changes to direct EU legislation that relate to devolved subjects. This also means that such regulations would fall to be scrutinised by Parliament.

Option 2 – Continue to seek to work with the UK Government to amend the EU (Withdrawal) Bill, the better to reflect the devolution settlement

7.10 In response to the UK Bill, on 19 September the Welsh and Scottish Governments jointly published 38 amendments that address the concerns of both Governments on the devolution aspect of the Bill. All these amendments were subsequently tabled by MPs from a variety of political parties.

7.11 The amendments sought to achieve four objectives.

7.12 Firstly, they would remove the new restriction, in clause 11, which prevents the devolved legislatures and executives from legislating to modify retained EU law. This provision cuts across the principles of the devolution settlement. The amendments present a constructive alternative to the restriction, which also recognises the ongoing work between the devolved administrations and the UK Government to identify areas where common frameworks across the UK are necessary and beneficial to the UK as a whole.

7.13 Secondly, the amendments would prevent the powers given to UK Ministers of the Crown under clause 7, 8 and 9 from being used to amend the Government of Wales Act 2006 or the Scotland Act 1998. The amendments do recognise the possibility of amendments being required to those enactments at a very late stage to implement the withdrawal agreement. The amendments therefore enable the Minister of the Crown to use section 9 to amend the Government of Wales Act 2006 and the Scotland Act 1998 but require the consent of the devolved administration(s) to be obtained in advance.

7.14 Thirdly, they would require UK Ministers to obtain the consent of the devolved administrations before exercising their powers under sections 7, 8 and 9 where the provisions in question fall in areas of devolved responsibility. The Welsh Government recognises that there may be circumstances where, for practical reasons, it may make sense for UK Ministers to use their powers in this way, but they should not be able to do so without consent.

7.15 Finally, the amendments would remove restrictions on the powers granted in Schedule 2 to the devolved administrations to make

appropriate amendments to retained EU law. Removing the restrictions would bring those powers into line with those granted to UK Ministers of the Crown. There is no basis for placing limitations on the powers of devolved administrations that do not also apply to UK Ministers of the Crown.

- 7.16 The Welsh Government has been, and remains, ready to work closely with the UK Government and the other devolved administrations to achieve an outcome in the interests of the UK as a whole.

Option 3 – Introduce the Law Derived from the European Union (Wales) Bill to preserve EU law, as it applies in relation to devolved subjects, as the United Kingdom withdraws from the European Union and further associated provision

- 7.17 The Welsh Government has been clear that it respects the result of the referendum on European Union membership but has been committed to ensuring that, throughout the process of exit, Wales is in no way disadvantaged. This includes ensuring that the devolution settlement is respected. The response to the UK Bill is about resisting an attempt to re-centralise power back to Westminster and Whitehall at the expense of the devolution settlements. The preferred option is to have a UK Bill that works with, not against devolution.

- 7.18 The Welsh Government has taken all reasonable steps to work with the UK Government to develop a UK Bill that respects devolution and now has no other option than to introduce a Bill before the Assembly to ensure the law in devolved areas continues to function effectively on exit in a way which accurately reflects the devolution settlement.

- 7.19 The **Law Derived from the European Union (Wales) Bill (“the Bill”)** has been specifically designed for this purpose.

- 7.20 The provisions of the Bill have been described above in Section 3 of the Explanatory Memorandum, on the “Purpose and Intended Effect of the Legislation”.

8. Costs and benefits

- 8.1 The principal costs arising from each of the options are the administrative costs to the Welsh Government in terms of developing and implementing the secondary legislation and there would also be compliance costs for businesses and citizens. However, these costs are not known at this stage. The Regulatory Impact Assessment for the UK Bill does not attempt to provide information about the costs of the secondary legislation, or indeed about the compliance/familiarisation costs for businesses and citizens, stating that the regulations causing any impacts are not on the face of the (UK) Bill. Similarly, the regulations that would result in administrative costs are not on the face of the Bills in any of the options below.
- 8.2 However, there are several areas of uncertainty at this stage, including the outcome of the UK's negotiations with the EU and the arrangements in Wales and the wider UK post-withdrawal, which will influence the nature and the amount of work required to implement the secondary legislation to incorporate EU law into devolved domestic law and correct the deficiencies. While this uncertainty should diminish over time as the outcome of the negotiations and the future arrangements become clearer and the work on the secondary legislation progresses, the uncertainty – coupled with the limited time available – has meant that the administrative costs are not known at this stage. As the situation develops over time, it will enable a detailed analysis of the costings to be undertaken. The administrative costs are therefore not known at this stage.
- 8.3 While it has not been possible to produce a reliable estimate of the cost of each option at this stage, it would appear reasonable to assume that the administrative cost to the Welsh Government would be lowest under Option 1 and greatest under Option 3.

Costs

- 8.4 **Option 1 – the UK Bill unamended** (in which case the Welsh Government would introduce secondary legislation to correct some of the domestic legislation but would have no responsibility for dealing with directly applicable EU law)
- 8.5 **Option 2 – the UK Bill as amended** (in which case the Welsh Government would, in addition to responsibilities under Option 1, have responsibility for the secondary legislation dealing with directly applicable EU law but *could* agree with the UK Government for some of this to be dealt with as part of UK-wide (or, for example, England and Wales) legislation);
- 8.6 **Option 3 – The Law Derived from the European Union (Wales) Bill** (in which case the Welsh Government would, in addition to Option 1, be responsible for making provision in regulations that corresponded to

directly applicable EU law that contained devolved provisions; restating enactments (other than those made under the European Communities Act 1972 and the Finance Act 1973) that operated for the purpose of fulfilling EU obligations or related otherwise to the EU or EEA; and identifying and correcting relevant secondary legislation made under the European Communities Act 1972 and the Finance Act 1973.

8.7 The costs of each of these options are not known at this stage.

Benefits

8.8 All three options would have the benefit of providing legal certainty and continuity for businesses and citizens at the moment of exiting the EU but, as indicated above, the preferred option would be Option 2, a UK Bill that works with, not against, devolution. However, were the EU (Withdrawal) Bill not to be amended to the satisfaction of the Welsh Government, Option 3 – the Law Derived from the European Union (Wales) Bill – would become the preferred option and, in that event, it would have the additional benefit of reflecting the devolution settlement in Wales as voted for by the people of Wales in two referendums. The Bill would ensure that decisions on how to modify EU law are made by the Welsh Ministers and scrutinised by the Assembly reflecting the devolution settlement for Wales and the knowledge and expertise that have been developed during the history of devolution. Subject to the outcome of the UK's negotiation with the EU and the arrangements within Wales and the wider UK post-withdrawal, there may be opportunities for recurrent cost savings in consequence of future legislation as the regulatory regimes in existence under EU law are reviewed. The consequential legislation that will be produced under the Bill would result in a significant increase in legislation available in the Welsh language.

8.9 It has not been possible to quantify these benefits at this stage.

9. Competition Assessment

9.1 The Bill itself is not expected to change the fundamental requirements on businesses. Its objective is to provide legal certainty, and continuity, for businesses and other stakeholders at the time of the UK's withdrawal from the EU. Due consideration will be given to competition assessments for the consequential secondary legislation.

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

10. Post-implementation review

- 10.1 There is no implementation on the face of the Bill that could be reviewed. While the Bill provides for implementation through secondary legislation, the objective of that secondary legislation is to provide legal continuity and certainty at the point of the UK's withdrawal from the EU and therefore to minimise any impact and any implementation that could be reviewed. These powers, with exceptions, will also cease to exist at the moment of exit from the EU, at the point at which they could be reviewed. The Welsh Government therefore considers that post-implementation reviews of the majority of the regulations made under the Bill would be of limited value and largely redundant. However, as this pertains to a unique circumstance, namely the UK leaving the EU and the need for legal certainty and continuity, this should not be seen as setting a precedent for other pieces of legislation and the need to review and improve them.

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

Annex 1 - Explanatory Notes

LAW DERIVED FROM THE EUROPEAN UNION (WALES) BILL 2018

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes are for the Law Derived from the European Union (Wales) Bill introduced into the National Assembly for Wales (“the Assembly”) on 7 March 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 Bill and to help inform the debate on it. They do not form part of the Bill and have not been endorsed by the National Assembly for Wales. The Explanatory Notes should be read in conjunction with the Bill 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.
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

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

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")¹⁴ was introduced in the House of Commons. It contained 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 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 the 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 create 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.

¹⁴ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

10. In *Miller*¹⁵, 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.
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 will 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.

SUMMARY OF THE BILL

14. The purpose of the Law Derived from the European Union (Wales) Bill is to ensure that the legislation covering subjects devolved to Wales works effectively after the United Kingdom leaves the European Union and the ECA 1972 is repealed by the EU Withdrawal Bill.
15. The Bill 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 Bill as ‘EU derived Welsh law’. As a general rule, the Bill 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 United Kingdom will no

¹⁵ R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, at paragraph 65.

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

longer be part of the institutional and functional arrangements provided under European Union law.

16. The powers to create 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. Such amendments may only be made if they are necessary to ensure the effective operation of EU derived Welsh law.
17. The Law Derived from the European Union (Wales) Bill is intended to operate alongside the EU Withdrawal Bill¹⁶. 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.
18. “Exit day” under the EU Withdrawal Bill is 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 Bill is amended by regulations made by a Minister of the Crown to change the definition of “exit day” accordingly.
19. 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.
20. The EU Withdrawal Bill places restrictions of the ability of the National Assembly for Wales to modify law converted or preserved by the Bill. Section 108A of the Government of Wales Act 2006 (“the GoWA 2006”), which provides for the legislative competence of the National Assembly, is amended

¹⁶ For a detailed explanation of the provisions of the EU (Withdrawal) Bill see the explanatory notes prepared by the UK Government.

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

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.
21. The law restated and demarcated before exit day as EU derived Welsh law under the Law Derived from the European Union (Wales) Bill 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 Law Derived from the European Union (Wales) Bill, 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.
22. The Bill 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.
23. The Bill establishes a default position in law so that unless the UK Parliament legislates to the contrary, the Welsh Ministers’ consent will be required before any person can make, confirm or approve subordinate legislation which meets the conditions specified in the Bill.

COMMENTARY ON SECTIONS OF THE BILL

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

Section 2 – EU derived Welsh law

25. Section 2 of the Bill defines EU derived Welsh law for the purpose of the Bill as provision made by the Welsh Ministers in regulations under sections 3 and 4 of the Bill or 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.

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

26. 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 18(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 18(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

27. 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.
28. Direct EU law is defined in section 3(3). It captures all EU laws which are directly applicable in the UK.
29. 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 section 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.
30. 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.
31. 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).
32. 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

These notes refer to the Law Derived from the European Union (Wales) Bill which was introduced into the National Assembly for Wales on 7 March 2018

action on the part of the member State. Direct effect only applies to provisions of EU law that are sufficiently clear, precise and unconditional¹⁷.

33. 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.
34. 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).
35. 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 power.
36. The second category of direct EU law is set out in section 3(3)(b). EU regulation is defined in section 18(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. As a dualist state, 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.
37. EU decisions are also captured by section 3(3)(b), and is defined in section 18(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 individuals¹⁸. Some decisions are generally and directly applicable and are available in domestic

¹⁷ Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen.

¹⁸ Article 288 of the TFEU.

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law without the need for specific implementing legislation¹⁹. However, where a decision is addressed to a member State, implementation in domestic law may be necessary to give effect to the decision²⁰. 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.

38. EU tertiary legislation is the third category of EU law captured by section 3(3)(b), and is defined in section 18(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 acts²¹, 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 uniformly²². EU tertiary legislation may take the same form as an EU regulation, EU directive, EU decision, EU recommendation or EU opinion.
39. 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 to nationals of EFTA states.
40. 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 regulation,

¹⁹ 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.

²⁰ 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.

²¹ Article 290(1) of the TFEU.

²² Article 291(2) of the TFEU.

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EU decision 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.

41. 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.
42. 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 has no practical application in relation to Wales. 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.
43. 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.
44. 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 Bill 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 omit all of the references to the seas and replace with a new formulation which reflects the seas around Wales.

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45. 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.
46. 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.
47. 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 agreements 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 is an outbreak of any listed diseases in Wales. However,

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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.

48. 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.
49. 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 18.
50. The restrictions in section 4(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.
51. Regulations made under section 3 cannot come into force before exit day due to the limits on the Assembly's legislative competence. 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)

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confirms that the power cannot be used in a manner that is outside the Assembly's legislative competence. To note, the Welsh Ministers are subject to the same 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.

52. The recitals of direct EU law are for the purpose of complying 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 force²³. 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 of EU derived enactments

53. The power in section 4(1) relates to enactments, as defined in section 18(1), which satisfy a two stage test laid out in that subsection. The first condition is that the enactment is within devolved competence. The second condition is that the enactment in some way operates to implement EU law obligations or relates 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.
54. Capturing these EU derived enactments in regulations made under section 4(1) also operates to enable modifications to those enactments. These enactments will require corrections to ensure that they can continue to operate effectively after the withdrawal of the UK from the EU. The power in subsection (1) therefore enables the Welsh Ministers to restate the enactments with the modifications necessary to achieve this aim.
55. 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 2017²⁴ 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).

²³ Casa Fleischhandels, Case 215/88.

²⁴ S.I. 2017/567 (W. 136).

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- **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 2017²⁵ 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 2012²⁶ 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.
56. Subsection (3) also includes the example of conferring functions or imposing restrictions which were in an EU directive and in force immediately before exit day and 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 EU 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 EU Commission or EU agency. Subsection (3)(f) confirms that the power to restate with modifications under subsection (1) includes the power to recreate the function and confer it, for example, on the Welsh Ministers or an appropriate public authority.
57. No reference is made in subsection (3) to the power to modify an enactment as this is made clear by subsection (1) and (2) and the definition of an enactment in section 18(2).
58. The restrictions on exercise of the power in section 4(1) match those that apply in section 3, other than a minor difference in section 4(5)(d). Section 4(5)(d) reflects the limits on the Assembly’s legislative competence in relation to

²⁵ S.I. 2017/724 (W. 174).

²⁶ S.I. 2012/724 (W. 96).

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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 (5)(d) confirms that regulations made under subsection (1) 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.

59. The same timing restrictions also apply to regulations made under section 4 by virtue of subsection (6).

Section 5 - provision made under EU related powers to continue to have effect

60. The EU Withdrawal Bill currently before the UK Parliament will, if passed, repeal the ECA 1972. Generally, secondary legislation lapses automatically when the primary legislation under which it is made ceases to have effect unless saved expressly. Any provision made under section 2(2) of, or paragraph 1A of Schedule 2 to, the ECA 1972 would therefore cease to have effect on repeal of that Act. Section 5 operates to preserve statutory instruments made under these provisions.
61. 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, 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.
62. 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).
63. 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.

64. 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(3) and (4) 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).
65. 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

66. EU derived Welsh law will all be based on EU instruments. 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 powers²⁷. 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 impact any challenge on any other public law grounds.
67. Section 6(2) provides three exceptions to the default position. The third exception, in section 6(2)(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).

²⁷ Article 263 of the TFEU.

Section 7 – interpretation of EU derived Welsh law

68. 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.
69. Section 7(2) provides that any question as to the meaning of EU derived Welsh law will be determined in UK courts in accordance with relevant pre-exit CJEU case law, general principles 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 préparatoires’ (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.
70. The general principles (such as proportionality, fundamental rights 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.
71. 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).
72. 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 remains with the member States.
73. 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.

74. 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 effectively 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”.
75. 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

76. 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 Bill will become domestic law, and so fall to be interpreted by judges in 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.
77. Matters which are ‘judicially noted’ are deemed to already be within the knowledge of the court, and so are not required to be ‘proved’ to the court. For examples, Acts of the Assembly are judicially noted²⁸. 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).

²⁸ See section 107(4) of the GoWA 2006.

Section 9 – complying with international obligations

78. 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.
79. The power to make regulations is restricted to provision within devolved competence, as defined in section 15. 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) on legislating incompatibly with EU law will continue to be relevant to regulations coming into force before exit.
80. 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 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

81. 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).
82. 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.
83. The power can only be used to make provision within the devolved competence of the Assembly which is defined in section 15. 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

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legislating incompatibly with EU law will not be relevant as the UK will no longer be members of the EU and therefore not subject to EU law.

84. The power can be used to modify primary legislation, including the Bill. 'Modify' is defined in section 18(1) and includes amending, repealing or revoking legislation.
85. 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 2005²⁹.
86. Section 16 confirms that the expiry of this power (and others in the Bill) 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

87. 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 which is currently before the UK Parliament 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.
88. 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.
89. 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 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

²⁹ S.I. 2005/1505.

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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 and Schedule 1 – fees and charges

90. The powers to make regulations contained in the sections listed in paragraph 1(1)(a) to (f) 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. However, as the functions that could be conferred under sections 3, 4, 5, 9 and 10 are time limited, the power in paragraph 1(1) will also be limited.
91. 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.
92. 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.
93. 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 ensures that the Welsh Ministers are able to modify the fees and charges preserved by virtue of regulations made under section 5.
94. The power in paragraph 2 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.
95. Paragraph 3 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

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restrictions under that Act – that they cannot impose or increase taxation (see paragraph 1(1)(a) of Schedule 2 to the ECA 1972.

96. 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 13 and 14 –Welsh Ministers’ consent to making subordinate legislation and Welsh Ministers’ consent to approval or confirmation of subordinate legislation

97. Sections 13 and 14 apply where all 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.
98. 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 15 (see paragraphs 104 to 107 below). The requirement for Welsh Ministers’ consent could therefore not apply to provisions in subordinate legislation that were outside the legislative competence of the Assembly. For example, it would not apply to provision in subordinate legislation that took effect prior to exit day that was incompatible with EU law.
99. Condition 2 limits the effect of sections 13 and 14 to the scope of EU law as defined in section 18(1) of the Bill. The definition of EU law in section 18(1) is consistent with the definition of EU law in section 158(1) of the GoWA 2006.
100. Condition 3 limits sections 13 and 14 to subordinate legislation made by statutory instrument.
101. Condition 4 deals with 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.
102. Condition 5 deals with existing functions that are modified by an Act of Parliament which is enacted after the sections have come into force. For

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condition 5 to be met the modification must result in the function being exercisable so that subordinate legislation made, confirmed or approved could contain devolved provision that it could not previously contain. Condition 5 is not met, and therefore the requirement to seek consent is not engaged, where:

- the modification does not enable devolved provision to be contained in the subordinate legislation,
- the modification does not enable devolved provision to be contained in the subordinate legislation that could not previously be contained, or
- the devolved provision contained in the subordinate legislation is devolved provision that it could have previously contained under the unmodified function.

103. Section 14(9) confirms that a function of giving consent to subordinate legislation is included within the scope of section 14.

Section 15 – meaning of devolved competence

104. The Wales Act 2017 (“the WA 2017”) received Royal Assent on 31 January 2017 and made provision modifying the, legislative powers of the Assembly. Section 3 of that Act included provision to insert a new section 108A and Schedules 7A and 7B into the GoWA 2006 (see Schedules 1 and 2 to the WA 2017 for the new Schedules 7A and 7B). These provisions are to come into force on the day appointed by the Secretary of State in regulations under section 71(3) of the WA 2017 (‘the principal appointed day’). Section 71(6) of the WA 2017 provides that the principal appointed day must be after the end of the period of four months beginning with the day on which the regulations appointing the day are made. The WA 2017 (Commencement No. 4) Regulations 2017³⁰ were made by the Secretary of State on 29 November 2017 and appointed 1 April 2018 as the principal appointed day. Paragraph 2 of Schedule 7 to the WA 2017 makes associated transitional provision. It provides that the amendments made by section 3 and Schedules 1 and 2 apply to an Act of the Assembly only if the vote by the Assembly agreeing to the general principles of the Bill for the Act took place on or after the principal appointed day. The vote of the Assembly on the general principles of this Bill is scheduled to take place before the principal appointed day, 1 April 2018. As a result, the Bill is subject to the legislative powers granted to the Assembly under section 108 of, and Schedule 7 to, the GoWA 2006. This informs the definitions of devolved competence for the purposes of the Bill.

105. Section 15 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

³⁰ S.I. 2017/1179.

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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.

106. In assessing devolved competence under section 15(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 18(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).
107. Subsection (2) provides a different definition of devolved competence for the purpose of sections 11, 13 and 14. The definition reflects the amendments made to the legislative powers of the Assembly by the WA 2017. Prior to 1 April 2017 the devolution settlement provided for under section 108 of, and Schedule 7 to, the GoWA 2006 is to apply. On and after 1 April 2017, a provision is within devolved competence for the purpose of sections 11, 13 and 14 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 effect of this is that any reductions in the legislative competence of the Assembly as a result of the WA 2017 will apply to sections 11, 13 and 14. However, any increases in the legislative competence of the Assembly by virtue of WA 2017 will not apply.

Section 16 – continuing effect of regulations

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

Section 17 and Schedule 2 - regulations

109. Section 17(2) provides that the powers to make regulations under the Bill 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.
110. All regulations made under the Bill 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 Bill. The standard procedure is the affirmative procedure, as laid out in paragraph 3. This applies to all regulations made under the Bill, other than those which are subject to the urgent procedure or the enhanced procedure.

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111. 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 laying unless the regulations are approved by a resolution of the Assembly during the 30-day period. 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.
112. 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 section 11, 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 section 11 of the Bill are subject to the enhanced procedure set out in paragraph 1. Paragraph 1(1) lists the regulations that are subject to the enhanced procedure.
113. Under the enhanced procedure the Assembly may apply the standard affirmative procedure. 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.
114. 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.
115. Where the enhanced procedure applies, paragraph 1(5) to (13) 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 the 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 Ministers. Having laid a statement under paragraph 1(6), 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(10)(b). The Welsh Ministers can make the revised draft regulations if they are approved by a resolution of the Assembly.

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116. Paragraph 1(8) and (12) 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.
117. 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 paragraphs 2(1) and (2) do 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.
118. 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 is 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.
119. Paragraph 6 reflects the possibility that a statutory instrument containing regulations made under the Bill 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 Bill.

Section 18 – general interpretation

120. The explanatory notes have already highlighted a number of the terms defined in section 18 by reference to the provisions to which they are relevant.
121. ‘Exit day’ is a key term in the Bill and is defined in section 18(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.

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122. The UK notified the European Council of their intention to withdraw from the EU on 29 March 2017. In the absence of a withdrawal agreement being agreed first or an extension 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.
123. 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 18(4).
124. 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 Bill. However, this would not require the Welsh Ministers to adopt the same exit day.
125. The second requirement in section 18(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 18(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 18(4)(b) confirms this position. The Treaties for the purposes of section 18(4)(b), consistent with the TEU, are the TEU and the TFEU, but by virtue of section 18(7) it also captures the Euratom Treaty.
126. Section 18(2) contains further provision relevant to the definition of exit day. A number of the provisions in the Bill operate by reference to before, after or on exit day. Section 18(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 Bill 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 Bill is to be read as a reference to the beginning of that day.

Annex 2 - Index of Standing Order requirements

Table: Index of Standing Order requirements

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26.6(i)	Statement the provisions of the Bill would be within the legislative competence of the Assembly	Member's declaration	2
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26.6(iv)	Set out the consultation, if any, which was undertaken on: <ul style="list-style-type: none"> (a) the policy objectives of the Bill and the ways of meeting them; (b) the detail of the Bill, and (c) a draft Bill, either in full or in part (and if in part, which parts) 	Part 1, Chapter 4 – Consultation	24

Standing order		Section	pages
26.6(v)	Set out a summary of the outcome of that consultation, including how and why any draft Bill has been amended	Part 1, Chapter 4 – Consultation	24
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26.6(viii)	Set out the best estimates of: <ul style="list-style-type: none"> (a) the gross administrative, compliance and other costs to which the provisions of the Bill would give rise; (b) the administrative savings arising from the Bill; (c) net administrative costs of the Bill’s provisions; (d) the timescales over which such costs and savings would be expected to arise; and (e) on whom the costs would fall 	Part 2 – impact assessment	40-50
26.6(ix)	Any environmental and social benefits and dis-benefits arising from the Bill that cannot be quantified financially	Part 2 – impact assessment	40-50

Standing order		Section	pages
26.6(x)	<p>Where the Bill contains any provision conferring power to make subordinate legislation, set out, in relation to each such provision:</p> <p>(a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;</p> <p>(b) why it is considered appropriate to delegate the power; and</p> <p>(c) the Assembly procedure (if any) to which the subordinate legislation made or to be made in the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (and not to make it subject to any other procedure);</p>	Part 1, Chapter 5 - Power to make subordinate legislation	25-39
26.6(xi)	Where the Bill contains any provision charging expenditure on the Welsh Consolidated Fund, incorporate a report of the Auditor General setting out his or her views on whether the charge is appropriate	The requirement of Standing Order 26.6(xi) does not apply to this Bill	N/A
26.6B	Where provisions of the Bill are derived from existing primary legislation, whether for the purposes of amendment or consolidation, the Explanatory Memorandum must be	The requirement in Standing Order 26.6B for a Table of Derivations is not applicable to this Bill as the Bill is a standalone piece of legislation and	N/A

Standing order		Section	pages
	accompanied by a table of derivations that explain clearly how the Bill relates to the existing legal framework.	does not derive from existing primary legislation for the purposes of amendment or consolidation.	
26.6C	Where the Bill proposes to significantly amend existing primary legislation, the Explanatory Memorandum must be accompanied by a schedule setting out the wording of existing legislation amended by the Bill, and setting out clearly how that wording is amended by the Bill.	The requirement is Standing Order 26.6C for a Schedule of Amendments is not applicable to this Bill as the Bill does not propose to significantly amend existing primary legislation.	N/A

