

Explanatory Memorandum to the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018

This Explanatory Memorandum has been prepared by the Office of the First Minister Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018.

Mark Drakeford AM
Cabinet Secretary for Finance

13 November 2018

1. Description

The **Law Derived from the European Union (Wales) Act 2018** (“the LDEU Act”) provides powers for the Welsh Ministers to preserve EU law covering subjects devolved to Wales on the withdrawal of the UK from the EU. It also provides powers for 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these subjects works effectively after the UK leaves the EU and the European Communities Act 1972 (“the ECA 1972”) is repealed by the European Union (Withdrawal) Act 2018.

The draft **Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018** (“the Regulations”) have been brought forward under section 22 of the LDEU Act. They repeal that Act in its entirety following the Intergovernmental Agreement (“the IGA”) between the Welsh Government and the UK Government on the EU (Withdrawal) Bill¹, as well as the agreement of the National Assembly for Wales (“the Assembly”), on 15 May 2018, to the Legislative Consent Motion on that Bill².

¹ <https://www.gov.uk/government/publications/intergovernmental-agreement-on-the-european-union-withdrawal-bill>

² The EU (Withdrawal) Bill was enacted on 26 June 2018

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

Paragraph 1(1)(g) of Schedule 2 to the LDEU Act provides that the enhanced procedure, laid out in paragraph 1 of Schedule 2, is to apply to regulations to be made under section 22. Paragraph 1(5) further provides that the procedure in sub-paragraphs (6) to (14) applies to draft regulations to be made under section 22.

In accordance with sub-paragraphs (6) to (14) of paragraph 1 of Schedule 2, the draft regulations were laid before the Assembly on 8 June and the 60-day period for representations expired on 1 October. Having had regard to the representations received, the Welsh Ministers wish to make the regulations in the terms of the draft, and, in accordance with sub-paragraph (7) of paragraph 1 of Schedule 2, have laid before the Assembly a statement stating what representations have been made, and giving details of them.

The Welsh Ministers may make regulations in the terms of the draft if it is approved by a resolution of the Assembly.

3. Legislative background

The LDEU Act was passed by the Assembly on 21 March and received Royal Assent on 6 June 2018. Section 22 of the LDEU Act empowers the Welsh Ministers to repeal, by regulations, the LDEU Act or any provision of the LDEU Act.

As noted above, paragraph 1(1)(g) of Schedule 2 to the LDEU Act provides that the enhanced procedure, laid out in paragraph 1 of Schedule 2, is to apply to regulations made under section 22. Moreover, sub-paragraph (2) of paragraph 1 of Schedule 2 to the LDEU Act requires the Welsh Ministers to lay a draft of such regulations before the Assembly along with a statement setting out their view on whether the procedure in sub-paragraphs (6) to (14) of paragraph 1 should apply.

Consequently, in accordance with sub-paragraph (2) of Schedule 2 to the LDEU Act, the Welsh Ministers are of the view that the enhanced procedure contained in sub-paragraphs (6) to (14) of paragraph 1 in Schedule 2 to the LDEU Act should apply to the Regulations. This view reflects the provision contained in sub-paragraph (5) of paragraph 1 of Schedule 2 to the LDEU Act which requires that regulations to be made under section 22 are subject to sub-paragraphs (6) to (14).

Sub-paragraph (3) of paragraph 1 of Schedule 2 to the LDEU Act requires that if draft regulations contain provision that modifies primary legislation, the Welsh Ministers lay a statement before the Assembly explaining why the provision is needed. By repealing the LDEU Act, the Regulations are modifying primary legislation and, in accordance with the requirement to explain why the provision to modify primary legislation is needed, the Welsh Ministers state that this is in order to fulfil the terms of the IGA between the

Welsh Government and the UK Government on the EU (Withdrawal) Bill. For reference, paragraph 10 of the IGA states:

‘As part of the implementation of this agreement, the governments agree that steps will be initiated to secure the repeal of Bills passed by the devolved legislatures as possible alternatives to the Withdrawal Bill, before the Withdrawal Bill receives Royal Assent.’

In accordance with sub-paragraph (7) of paragraph 1 of Schedule 2, the Welsh Ministers have separately laid a statement before the Assembly stating whether any representations have been made and, if so, giving details of them.

4. Purpose & intended effect of the legislation

In its White Paper, *Securing Wales’ Future*, the Welsh Government was clear it respects the result of the referendum on the UK’s membership of the EU held on 23 June 2016.

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.

The EU (Withdrawal) Act 2018 includes provision that repeals the European Communities Act 1972 (“the ECA 1972”) and other provision in connection with the withdrawal of the UK from the EU. Specifically it:

- repeals the ECA 1972 from “exit day”;
- preserves all of the domestic legislation that has been made in the UK to implement EU obligations (for example 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 (for example 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.

The law that will be converted or preserved by the EU (Withdrawal) Act is to be known as “retained EU law”. Retained EU law is defined in section 6(7) of the EU (Withdrawal) Act as anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of sections 2, 3 or 4 or sub-section (3) or (6) of section 6 of the EU (Withdrawal) Act (as that body of law is added to or otherwise modified by or under the EU (Withdrawal) Act or by other domestic law from time to time). Retained EU law will therefore include law on

subjects that are devolved to the Assembly as well as law on subjects that are reserved.

The Bill that became the EU (Withdrawal) Act 2018, was introduced in the House of Commons on 17 July 2017³.

On 12 September 2017, the Welsh Government laid a Legislative Consent Memorandum before the Assembly in respect of the EU (Withdrawal) Bill as introduced on 13 July 2017⁴. It included a full list of the clauses that were within, or would modify, the legislative competence of the Assembly. The Legislative Consent Memorandum stated that the Welsh Government would not be able to recommend to the Assembly that it give consent to the EU (Withdrawal) Bill as drafted on introduction.

The Welsh Government's objective from the outset was an amended EU (Withdrawal) Bill that delivered stability and certainty for businesses and citizens about the rights, obligations and responsibilities that will exist at the point at which the UK leaves the EU, while also respecting the existing devolution settlement.

Consequently, 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) Bill. 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 to the EU (Withdrawal) Bill by the National Assembly for Wales and the Scottish Parliament. The amendments were subsequently debated in the House of Commons on 4 and 12 December at Committee stage, but were not agreed. No significant amendments to the relevant parts of the EU (Withdrawal) Bill were tabled by the UK Government at Report stage.

On 29 January, again working jointly with the Scottish Government, the Welsh Government arranged a briefing session for members of the House of Lords on the interaction of the EU (Withdrawal) Bill and devolution.

The Joint Ministerial Committee met a number of times between February and May 2018 – in the formats of both JMC (Plenary) and JMC (EU Negotiations). Those meetings included discussion of proposals put forward by the Welsh Government, Scottish Government and UK Government on the EU (Withdrawal) Bill and agreement that all three governments shared the objective of reaching an agreement on the issues. Intensive work took place outside of those meetings, at both official and Ministerial level, to negotiate a position where such an agreement could be reached and a compromise could be achieved.

The Law Derived from the European Union (Wales) Bill ("the LDEU Bill"), also known as the Continuity Bill, was introduced in the Assembly on 7 March

³ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

⁴ <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf>

2018, following the Assembly's agreement to treat it as an Emergency Bill. The introduction of the Bill was to provide a fallback option, both to provide legal continuity of EU legislation about devolved matters in Wales and to safeguard devolution in the scenario where no agreement was reached with the UK Government on the EU (Withdrawal) Bill.

Stage 1 of the LDEU Bill was completed on 13 March, Stage 2 on 20 March and Stages 3 and 4 on 21 March. The Bill was passed with 39 votes in favour and 13 against (with one abstention).

At the end of the four week intimation period, the Attorney General referred the LDEU Bill to the Supreme Court to consider whether the Bill was within the Assembly's legislative competence. The Attorney General and the Advocate General for Scotland similarly referred the Scottish Continuity Bill.

The Welsh Government's preference throughout the process was for an amended EU (Withdrawal) Bill that respected devolution. The negotiations between the Governments continued and produced the IGA, with the UK Government putting forward amendments to the EU (Withdrawal) Bill as part of the IGA. Those amendments were subsequently agreed by Parliament. This represented substantial progress from the initial position, and soundly defends the interests of the National Assembly for Wales. This enabled the Welsh Government to recommend to the Assembly that it give its consent to the Bill.

The amendments and the IGA resulted in the following being agreed:

- all devolved powers and policy that apply to Wales now rest in Wales, unless specified to be temporarily reserved. These will be areas where the Governments agree that future common UK-wide frameworks with a legislative underpinning may be necessary.
- a process for seeking the consent of the devolved legislatures as to which areas of current EU law in devolved policy areas will be 'frozen' while these common UK-wide frameworks are agreed. In these, limited, areas the Assembly and the Welsh Ministers will not then be able to make any legislative changes until the frameworks are agreed.
- if the Assembly does not give consent to the 'freezing' of specific areas of EU law, the UK Government will be able, exceptionally, to ask the UK Parliament to do so but it will need to explain to Parliament why this is necessary and provide the view of Welsh Ministers as to why the proposal was not acceptable to the Assembly. Parliament will then make a decision on the issue.
- an unequivocal commitment that the UK Government will not ask Parliament to make legislative changes to these areas of law in respect of England while they are in the 'freezer'.

- a ‘sunset’ clause that guarantees that the ‘freezing’ of any powers will be temporary.
- the Sewel convention (by which the UK Government would not normally legislate with regard to devolved matters without the consent of the devolved legislatures) will apply to any primary legislation to put new frameworks in place.

The EU (Withdrawal) Bill received Royal Assent on 26 June 2018.

The Regulations repeal the LDEU Act in line with the agreement reached with the UK Government in the IGA.

5. Consultation

The Welsh Government’s preferred option was to see the UK’s EU (Withdrawal) Bill amended so that it provided the necessary legislative framework in consequence of the decision to leave the EU. The LDEU Act provided an alternative legal mechanism in the event that appropriate amendments were not made to the EU (Withdrawal) Bill. Those appropriate amendments were made before the Bill was enacted. Those, amendments along with the accompanying commitments contained in the IGA, mean that the fallback option of the LDEU Act is no longer needed and the decision has been taken to seek to repeal the LDEU Act.

Given the short timescale available for bringing forward this legislation, no consultation was possible on the Regulations. However, reaching the IGA between the Welsh Government and UK Government was as a result of in-depth discussion and negotiation.

In addition, the Welsh Government has published a number of policy documents, including *Securing Wales’ Future* and *Brexit and Devolution*, and has taken steps to secure stakeholder engagement, for example through the European Advisory Group set up to advise the Welsh Government. 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.

Consultation will be taken as appropriate on regulations made under the EU (Withdrawal) Act, which will provide the legislative framework following repeal of the LDEU Act.

6. Regulatory Impact Assessment

The Regulatory Impact Assessment (RIA) conducted for the LDEU Act⁵ contained three options:

⁵ <http://www.assembly.wales/laid%20documents/pri-ld11449-em/pri-ld11449-em-e.pdf>

Option 1 – Do nothing and, as a consequence, use the powers provided in the UK Government’s EU (Withdrawal) Bill (as it was at the time of the introduction of the LDEU Bill prior to the amendments to the EU (Withdrawal) Bill being made).

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 LDEU 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.

Option 2, which was the Welsh Government’s preferred option, has been realised via the IGA reached between the Welsh Government and the UK Government on the EU (Withdrawal) Bill. The Regulatory Impact Assessment for the LDEU Act included a statement on the costings for this option and a further RIA has not been conducted in relation to the Regulations as the information on these costings has not changed since the RIA on the Act was carried out.

However, as stated in the RIA for the Act, 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.

Consequently, it can be reasonably assumed that the administrative cost to the Welsh Government associated with bringing forward the subordinate legislation under the amended EU (Withdrawal) Act (Option 2) would be lower than that associated with the subordinate legislation under the LDEU Act (Option 3).

7. Impact Assessments

Equality / Children and Young People

Impact Assessments for Equality⁶ and for Children and Young People⁷ were conducted for the LDEU Act.

Those impact assessments highlighted the fact that EU derived Welsh law was to be created by regulations made under the Act and therefore that the Act itself would not directly lead to changes in the EU law that is currently applicable in Wales. These Regulations repeal the Act in its entirety and no regulations are intended to be made under the LDEU Act before its repeal. The repeal will not have any direct impact on individuals as it will not be removing any rights currently being enjoyed by individuals.

Those impact assessments did consider that the LDEU Act included a requirement to interpret EU derived Welsh law in accordance with the EU Charter of Fundamental Rights compared to the EU (Withdrawal) Bill as it

⁶ <https://gov.wales/docs/caecd/publications/180308-equality-impact-assessment-en.pdf>

⁷ <https://gov.wales/docs/caecd/publications/180308-children-impact-assessment-en.pdf>

stood at that time which provided that the Charter did not form part of retained EU law. The assessments analysed the possibility that, to the extent that the powers under the LDEU Act were exercised to create EU derived Welsh law, the requirement to interpret that law in accordance with the Charter could mitigate any potential loss of rights as a result of the approach taken in the EU (Withdrawal) Bill to the Charter.

Human Rights

The draft regulations do not raise any issues in respect of the rights set out in the European Convention on Human Rights (“the ECHR”). The enactment and subsequent repeal of the Act will see no direct impact on the rights of individuals. However, the repeal of the Act will mean that the legislative action required to make the legislative changes to devolved law will be under the EU (Withdrawal) Act. Each set of regulations made by the Welsh Ministers (and UK Ministers) under that Act will have to be considered individually to ensure that they are compatible with the ECHR.

The Welsh Language

A Welsh Language Impact Assessment⁸ was conducted for the LDEU Act. This stated that there would be some positive impacts on the Welsh language from two of the three options considered (Option 2 – an amended EU (Withdrawal) Bill – and Option 3 – the LDEU Act). The subordinate legislation made under the LDEU Act would have provided the greatest potential for an increase in the amount of legislation available in the Welsh language, for example as directly applicable EU law would have been available bilingually. However, the scenario where the EU (Withdrawal) Bill was amended was also expected to offer a potential positive impact from a greater proportion of regulations being available bilingually as the powers of the Welsh Ministers would be expanded. This would offer greater scope for law to be made bilingually. In particular, a choice could be made to restate directly applicable EU law to provide clarity and accessibility which would mean that a Welsh language version of the law would be provided⁹.

Although repeal of the LDEU Act may not provide the greatest positive impact for the Welsh language, it is considered to be the best overall solution and in line with the Welsh Government’s preferred outcome from the outset – an amended EU (Withdrawal) Bill respecting devolution and providing certainty for businesses and the people of Wales, as achieved under the IGA and which also confirmed that steps would be taken to repeal the LDEU Act.

The impact of the Regulations on the Welsh Ministers’ statutory duties set out under sections 77- 79 of the Government of Wales Act 2006 or the local government, voluntary sector and business schemes made under sections 73, 74 and 75 of the Government of Wales Act 2006 respectively was considered in the RIA for the LDEU Act and the associated Impact Assessments.

⁸ <https://gov.wales/docs/caecd/publications/180308-language-impact-assessment-en.pdf>

⁹ See paragraph 20(b) of Schedule 7 to the EU (Withdrawal) Bill.

