



Research and Legal Briefing **Bill Summary: Law Derived from the European Union (Wales) Bill**

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National Assembly for Wales
Research Service

The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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Research and Legal Briefing

Bill Summary: Law Derived from the European Union (Wales) Bill

This paper provides a summary of the Welsh Government's law Derived from the European (Union) Wales Bill. It includes a summary of the background and provisions of the Bill, considers potential financial impacts and highlights key aspects of the Bill.



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1. Background

European Union (Withdrawal) Bill

The UK Government's **European Union (Withdrawal) Bill** (hereafter, the Withdrawal Bill) was introduced to the House of Commons on 13 July 2017. The Bill in its simplest form repeals the **European Communities Act 1972**, retains the vast majority of EU law currently in force in the UK and gives UK Ministers and Devolved Ministers the powers to make changes to that body of retained EU law. The powers given to Devolved Ministers to make changes are more restricted than the powers given to UK Ministers. The Bill also makes changes to the devolution settlement and the Assembly's competence. These are mentioned below but further details on the Bill and how it will affect the Assembly is provided in **the introductory** and **visual guides** to the Bill published jointly by the Research and Legal Services.

Following the introduction of the Withdrawal Bill to the Parliament the First Minister published a **statement on 13 July 2017** in which he said that there had been minimal attempts by Whitehall to work co-operatively with devolved Governments and that parts of the Bill were completely unacceptable to the Welsh Government. He stated:

Despite the very clear and repeated warnings that any attempt by Westminster and Whitehall to take the powers currently vested in the EU to themselves would be wholly unacceptable, this is precisely what Clause 11 of the EU (Withdrawal) Bill seeks to do.

This part of the bill would amend the devolution legislation to put in place – with no limitations or qualifications - new constraints on the Assembly's ability to legislate effectively on matters where we currently operate within legislative frameworks developed by the EU, even after we leave the EU. Existing EU law would be frozen, and only the UK Parliament would, it appears, be allowed to unfreeze it.

In practice, this would provide a window for the UK government to seek Parliamentary approval to impose new UK-wide frameworks for such policies. It is an attempt to take back control over devolved policies such as the environment, agriculture and fisheries not just from Brussels, but from Cardiff, Edinburgh and Belfast.

The First Minister said that the Welsh Government agreed with the aim of the Bill and was not trying to frustrate the Brexit process if the Bill was not amended:

...there is no prospect that the Welsh Government will recommend that the National Assembly should give legislative consent to it. We will also continue to investigate ways in which we can use our existing legislative powers to help defend our devolution settlement

Clause 11 of the Withdrawal Bill freezes the competence of the Assembly to legislate for Wales in policy areas covered by EU law. Assembly Acts must currently be compatible with EU law. That restriction would automatically end when the UK left the EU. However, the Withdrawal Bill replaces that restriction with a new one. It says that, after exit, the Assembly will have to legislate compatibly with retained EU law, including compatibility with any changes to that retained EU law made by Welsh or UK Ministers. Alternatively, the Assembly would still be able to legislate compatibly with pre-Brexit

EU law (where that was still a practical option). The Bill also allows for the possibility of these restrictions being lifted, in individual policy areas, by agreement between the UK and respective devolved government. The Welsh and Scottish Governments oppose clause 11 and want it amended.

The Bill is currently proceeding through Parliament. The House of Commons stages of the Withdrawal Bill concluded on 17 January. The Bill was approved by the House Commons on Third Reading and received its first reading in the House of Lords the following day. The Lords Committee Stage of the Bill began on 21 February and is scheduled to sit for 10 days with the final day on 26 March. The Bill will then move to Report Stage for further scrutiny, which normally takes place 14 days after the end of Committee Stage. The Bill will go to Third Reading for a final reading before returning to the Commons for consideration of amendments made by the Lords.

On 12 September the Welsh Government laid a **Legislative Consent Memorandum** on the Withdrawal Bill before the Assembly. The Memorandum stated that the Welsh Government was not able to recommend to the Assembly that it gave its consent to the Bill as drafted.

On 19 September the Welsh and Scottish Governments **sent a joint letter** to the Prime Minister setting out their objections to the Withdrawal Bill and suggested a series of joint amendments. To date these amendments have not been made to the Bill.

The Assembly's Constitutional and Legislative Affairs Committee and External Affairs and Additional Legislation Committee undertook work to consider the Bill. The External Affairs and Additional Legislation Committee **wrote to all MP's** seeking amendments to the Bill in line with **six objectives, including the removal of the clause 11 restrictions from the Bill**. The **Constitutional and Legislative Affairs Committee wrote** to the Secretary of State for Exiting the EU outlining the Committee's views on the Bill.

In November 2017 the First Minister gave **evidence to a joint session** of the External Affairs and Additional Legislation Committee (EAAL) and Constitutional and Legislative Affairs Committee (CLA) where he confirmed that a Continuity Bill had been drafted to protect Welsh devolution should the Withdrawal Bill not be amended. When pressed by the Chair of EAAL about when the decision to introduce such a Bill would be made he replied:

It's not an exact science, but, clearly, the continuity Bill would need to have gone through the Assembly and have received Royal Assent before the withdrawal Bill had gone through both Houses of Parliament. As I say, our preferred option is to see the amendments supported in the House of Commons. If that's not the case, then, of course, that'll be the time to consider when and if a continuity Bill should be introduced.

On Tuesday 12 December 2017 the Joint Ministerial Committee (EU Negotiations) (JMC (EN)) met. This is the Committee established as the forum for discussions between the UK and Devolved Ministers on the EU negotiations. It had previously **met on 16 October** when the UK Government and devolved governments agreed the principles that should underpin the approach to common policy frameworks after the UK leaves the EU. The Cabinet Secretary for Finance, Mark Drakeford AM, who attended on behalf of the Welsh Government, subsequently issued **a statement**. He concluded:

[...] I was clear that the Welsh Government cannot recommend that the National Assembly gives legislative consent to the EU (Withdrawal) Bill unless issues surrounding the devolved powers of the Welsh Government and National Assembly for Wales are resolved in amendments which should be agreed before the Bill leaves the House of Commons. The UK Government agreed there should be further specific discussion at official level around potential solutions.

The Assembly's **External Affairs and Additional Legislation** and **Constitutional and Legislative Affairs** Committees published reports on the Withdrawal Bill LCM on 15 and 18 December 2017. Both Committees concluded, that the Assembly should withhold its consent for the Bill in its current form.

On **17 January 2018** the Assembly debated a Legislative Proposal by Steffan Lewis AM. The motion said:

To propose that the National Assembly for Wales:

- 1. Notes a proposal for a Welsh Continuation Bill.*
 - 2. Notes that the purpose of this Bill would be to affirm the continuation in Welsh law of all areas previously a matter of EU law that fall within the legislative competence of the National Assembly for Wales in accordance with the Wales Act 2017.*
-

Steffan Lewis opened the debate by stating that:

Whether you are unionist or nationalist, are irrelevant to the question of the continuity Bill. Whether to support a continuity Bill or not comes down to how you answer one simple question: do you believe that the referendum of 2016 provides a mandate to the UK Government to remove powers from this National Assembly?

He also questioned why the Welsh Government was leaving the introduction of a Continuity Bill “until the last minute” given that none of its amendments had been accepted during the Withdrawal Bill’s passage through the House of Commons. He concluded:

We have a window to act in the interests of our citizens and the rights and standards that they hold dear, in addition to the democratic structures that they have endorsed in two referenda. Let's take this opportunity with both hands.

All parties voted in favour of the motion tabled by Steffan Lewis AM.

On Thursday 22 February 2018 the Joint Ministerial Committee (EU Negotiations) (JMC (EN)) met again. **Proposed changes to Clause 11 of the EU Withdrawal Bill**, intended to ensure all devolved EU powers transfer directly from Brussels to Belfast, Cardiff and Edinburgh, were shared by the Cabinet Office with the devolved administrations ahead of the JMC (EN).

The Chancellor of the Duchy of Lancaster, David Lidington MP, who chairs the JMC (EN) meetings, said the new proposals represented a considerable “offer” from the UK Government that he hoped the devolved governments would engage with constructively. He said:

The changes would mean that the vast majority of powers will automatically flow from the EU to the devolved administrations. As the UK government has made clear, we always expected that the process would result in a significant increase in their

decision making abilities. The changes would also ensure the UK Government would have the ability to protect the internal UK market where necessary, in a small number of areas.

A **summary and Communique** were issued after the meeting. It stated:

The Committee discussed the EU (Withdrawal) Bill, including the proposal to amend clause 11. It was noted that progress had been made, but agreement had not yet been reached between the UK Government, Scottish Government and Welsh Government on the form of an amendment. Discussions on further detail would continue in the coming weeks.

The Cabinet Secretary for Finance, Mark Drakeford AM, who attended on behalf of the Welsh Government, **said** following the meeting:

There is progress – there are ideas we were able to discuss today. They didn't go far enough. They don't meet all the things that we think are necessary to persuade the National Assembly for Wales to support the bill. But we'll meet again and hope that we'll be able to conclude agreement in advance of amendments being put down in the House of Lords.

On 26 February, David Lidington, gave a **speech** at Airbus in Broughton in which he spoke about the progress made at the JMC (EN) and expanded on the UK Government's "offer":

So our proposal is to amend the Bill before Parliament to make clear that while frameworks are being agreed, the presumption would now be that powers returning from the EU should sit at a devolved level.

Westminster would only be involved where, to protect the UK common market or to meet our international obligations, we needed a pause – I stress pause - to give the governments time to design and put in place a UK-wide framework.

As I have said before, we expect to be able to secure agreement with the devolved governments about what frameworks should - or should not - apply to each power.

And where powers do need to be returned to a UK-wide framework, we will maintain the ability for the UK Parliament to legislate to do so.

Just as the current provisions within the EU Withdrawal Bill on releasing powers to devolved governments are intended to be by consensus and agreement with the devolved governments themselves, so we should expect this new, inverted power to operate in the same way - by consensus and by agreement.

A "Continuity Bill"

On 27 February the Cabinet Secretary for Finance, Mark Drakeford AM, made a **statement on the JMC (EU Negotiations) Meeting** held on 22 February 2018 in Plenary. He reported that the meeting had been "constructive", with all three Governments agreeing that they shared the objective of reaching an agreement on these issues, but the UK proposals still fell some way short of what would be acceptable to the Welsh Government or to the Scottish Government. The Cabinet Secretary continued:

[...] we have today also taken steps towards the introduction of our own continuity legislation. One of the reasons why there has been such frustration at the slow pace with which the UK Government has taken forward discussions on amending the EU withdrawal Bill is the implications of this slow progress on our own plans. We have been absolutely clear, and remain completely clear, that our preference is for a workable UK-level Bill. But, as is well known, and with strong support across this Chamber, very regularly articulated, for example, by Steffan Lewis, we have been working hard on a fallback option, both to provide legal continuity of EU legislation about devolved matters in Wales, and to safeguard devolution. We have come to the point where we cannot delay any longer if this legislation, even as an emergency Bill, is to have a reasonable opportunity of getting onto the statute book in time for us to be able to take the steps necessary to secure legislative continuity.

The Welsh Government issued a **press release on the same day**, which explained why it was proceeding with the Bill:

The Welsh Government's preference remains for the UK government to amend their proposed EU Withdrawal Bill. But, as so much time has passed without any agreement between the governments on the amendments required, they need to proceed with the Continuity Bill as a fall-back option to protect Welsh devolution.

The Welsh Government also published a copy of its proposals for a continuity bill, the **Law Derived from the European Union (Wales) Bill** on its website. The Assembly's Presiding Officer **issued her determination** stating that in her view the Bill was in competence. The Presiding Officer also **published a statement** setting out the issues she had considered in reaching her determination.

The Welsh Government's position

It is not the Welsh Government's preference to pursue a 'Continuity Bill'. In the **Legislative Consent Memorandum** on the Withdrawal Bill laid in September 2017 the Welsh Government stated that it would not be able to recommend to the Assembly that it gives consent to the Bill as currently drafted. Given that none of the joint amendments proposed by the Welsh and Scottish Government have been accepted to date the Welsh Government has decided to proceed with the introduction of the **Law Derived from the European Union (Wales) Bill**.

In the **Explanatory Memorandum to the Bill** the Welsh Government states:

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 position of other parties and the UK Government

During the Plenary discussion on 27 February, that followed the Cabinet Secretary for Finance's statement on the JMC (EN) meeting of the 22 February, a number of Assembly Members spoke and outlined their initial reactions to the statement.

Plaid Cymru welcomed the Bill. Simon Thomas AM said the group was "very pleased to see that this is now a firm part of the Government's armoury".

Neil Hamilton AM, UKIP, said:

I support the proposal to introduce an emergency Bill into this Assembly. I think that this is necessary as a tactic, at least, to force the UK Government to recognise the reality of the situation, that the Welsh Assembly is a legitimate expression of the views of the Welsh people and our purpose here is to ensure that the devolution settlement is respected by the UK Government and that the Brexit process should not be used to undermine it.

David Melding AM, Conservative, welcomed "in general the Cabinet Minister's tone" and that he envisaged that agreement will be reached and, therefore "the Continuity Bill will become redundant." He added:

Obviously, on this side of the house—let's be frank—we're uncomfortable about this emergency legislation, both here and in Scotland, but it's part of a wider landscape and I don't want to be distracted by the reasons for that. We need an effective settlement here and the EU withdrawal Bill is the best way to do that.

On 28 February, responding to a question from Ian Blackford MP during Prime Ministers' Questions, the Prime Minister, Theresa May, **said**:

The right hon. Gentleman talks about the continuity Bills. The proposals being put forward are unnecessary, and it would be rather more helpful if he concentrated on reaching an agreement in relation to the withdrawal agreement. We want to ensure that more powers are devolved to the devolved Administrations, and that is what we are going to deliver.

The Emergency Bill Procedure

On 27 February 2018 the **Business Statement** for the Assembly for 6 March was changed to include two motions:

- Motion under Standing Order 26.95 that a Bill to be known as the Law Derived from the European Union (Wales) Bill be treated as a Government Emergency Bill;
- Motion under Standing Order 26.98(ii) to agree a timetable for the Bill to be known as the Law Derived from the European Union (Wales) Bill

Standing Orders make provision for the passing of emergency legislation if approved by a motion in the Assembly. An Emergency Bill is a Government Bill that needs to be enacted more quickly than the Assembly's usual legislative process allows. Standing Order 26.95 states that:

If it appears to a member of the government that an Emergency Bill is required, he or she may by motion propose that a government Bill, to be introduced in the Assembly, be treated as a government Emergency Bill.

As the purpose of introducing an Emergency Bill is to enable the quick enactment of urgent legal provisions, the Assembly's Standing Orders set out a streamlined version of the Assembly's usual legislative processes to avoid any time delays. The Research Service has published a separate **Guide on the Emergency Bill** procedure which sets out the process that will be followed. The Welsh Government's Explanatory Memorandum states:

The EU (Withdrawal Bill) contains provisions which could, once enacted, be used to prevent the Assembly from passing the Law Derived from the European Union (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.

Developments in Scotland

The Welsh Government has been working closely with the Scottish Government on their approach to the Withdrawal Bill. The Scottish Government published the **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill** on 27 February.

The **Policy Memorandum** accompanying the Scottish Bill states that its purpose is to ensure that Scotland's devolved laws can be prepared for the effects of UK withdrawal even if it is not possible to rely on the Withdrawal Bill. It said that the introduction of the Bill does not mean that the Scottish Government has resolved to reject the Withdrawal Bill and rely instead on this Bill. If the necessary changes are made to the Withdrawal Bill, then the Bill will be withdrawn and a legislative consent motion will be lodged by the Scottish Ministers. The Scottish Government has stated that until those changes are made, the Legal Continuity Bill will be progressed through the Scottish Parliament so that on any scenario there is a legislative framework in place for protecting Scotland's system of laws in the event of UK withdrawal from the EU.

Speaking in the Scottish Parliament, Mike Russell MSP, the **Minister for UK Negotiations on Scotland's Place in Europe**, said:

It is simply not acceptable for Westminster unilaterally to rewrite the devolution settlement and to impose UK-wide frameworks in devolved areas without our consent. That is why we and the Welsh Government have been working so hard to ensure that the European Union (Withdrawal) Bill both protects devolution and does the job that it is supposed to do.

The Presiding Officer of the Scottish Parliament, Ken McIntosh MSP, does not consider the Scottish Bill, as drafted, to be within competence. He said the Bill "anticipates the impact of the withdrawal of the United Kingdom from the European Union", and as such "assumes that the parliament can make provision now for the exercise of powers which it is possible the parliament will acquire in the future". However, a contrary view is taken by the Lord Advocate James Wolffe, the Scottish Government's top legal adviser. He **stated**:

It is not incompatible with EU law to make provision to deal with the inevitable consequences in domestic law of withdrawal from the EU in that way. Indeed, that appears to be the basis on which the UK Government's own European Union (Withdrawal) Bill, on which the continuity bill has been modelled, proceeds. If that is right, and if, contrary to the view of the Scottish Government, the continuity bill is incompatible with EU law, the same reasoning would apply equally to the UK Government's bill.

It is important to note that there are drafting differences between the Scottish Government's Bill and the Welsh Government's Law Derived from the European Union (Wales) Bill.

2. Provisions of the Law Derived from the European Union (Wales) Bill

The Welsh Government's Bill is drafted differently to the Withdrawal Bill.

The Withdrawal Bill provides for a general transposition into, and preservation of the entire body of EU law in, UK domestic law and describes it as 'retained EU law'. The Welsh Government's Bill does not provide for this general transposition. Rather, the Bill gives regulation-making powers to the Welsh Ministers to ensure that EU law covering subjects within the Assembly's legislative competence is preserved as part of the law in Wales after Brexit. In addition, the Bill empowers Welsh Ministers to modify EU law within devolved competence; but subject to a range of limitations intended to confine the changes to what is necessary in the light of Brexit.

The new body of EU law transposed by this Bill will fall outside the definition of 'retained EU law' in the Withdrawal Bill. As a result, the restrictions on the Assembly and Welsh Ministers in relation to modifying retained EU law – including the restrictions in clause 11 of the Withdrawal Bill, described above - would no longer apply.

The Welsh Government's Bill does not replace the Withdrawal Bill. Rather, the Bill will operate alongside the UK Government's Bill. Any EU law which is not retained or restated in regulations made by Welsh Ministers, for example provisions that fall outside the Assembly's legislative competence, will be captured by the Withdrawal Bill and transposed into domestic law as retained EU law.

The Bill is mainly a framework Bill which delegates powers for Welsh Ministers to make subordinate legislation at a later date. It contains 20 sections and 2 Schedules. These are summarised below.

Provisions

- **Section 1 (Overview)** provides a brief overview of the Bill, and is not intended to have any legal effect.
- **Section 2 (EU derived Welsh law)** defines 'EU derived Welsh law' for the purpose of the Bill as the body of domestic legislation made by Welsh Ministers under the regulation-making powers in sections 3, 4 and 5 of the Bill which seeks to preserve EU law in devolved areas as part of the law of Wales.
- **Section 3 (Power to retain direct EU law)** enables Welsh Ministers to make regulations, as they consider appropriate, to retain direct EU law that falls within the Assembly's legislative competence as part of the law of Wales after Brexit. 'Direct EU law' includes all EU law that is currently directly applicable in the UK, for example EU Treaties that have direct effect in the law of England and Wales

by virtue of section 2(1) of the European Communities Act 1972 as well as EU regulations, decisions and tertiary legislation. In making the regulations, Welsh Ministers are under a duty to seek to continue all rights, powers, liabilities, obligations, restrictions, remedies and procedures that exist in the law of Wales as a result of the UK's membership of the EU.

- **Section 4 (Restatement of EU derived enactments)** enables Welsh Ministers, by regulations, to repeal or revoke any EU-derived enactment within devolved competence and restate it with modifications so that it can continue to operate effectively as part of the law of Wales after Brexit. Modifications can only be made if they are necessary for the continued operation of the restated enactment after Brexit. 'EU derived enactments' captures enactments which already exist in domestic law, for example Acts of the UK Parliament, Assembly Acts and Measures and subordinate legislation made under these Acts. An example of an Assembly Act which implements EU law in Wales would be the [Environment \(Wales\) Act 2016](#).
- **Section 5 (Provision made under EU related powers to continue to have effect)** enables Welsh Ministers, by regulations, to specify that provisions of existing subordinate legislation within devolved competence, made under EU-related powers, are to continue to operate as part of the law of Wales after Brexit. 'EU related powers' captures section 2(2) of the ECA 1972; paragraph 1A of Schedule 2 to the ECA 1972; and section 56 of the Finance Act 1973.
- As of the result of the Withdrawal Bill repealing the ECA 1972 and also amending section 56 of the Finance Act, any subordinate legislation made under these powers will lapse after Brexit unless something is done to save them. The Bill does this, in relation to subordinate legislation within devolved competence, by providing a mechanism whereby that subordinate legislation is to be treated as having been made under section 5 of the Bill rather than under the ECA 1972 or section 56 of the Finance Act 1973. This means that the repeal of the ECA 1972 and the amendment of section 56 of the 1973 Act by the Withdrawal Bill will not affect that subordinate legislation, as far as provision relating to Wales with the Assembly's competence is concerned.
- **Section 6 (Challenges to EU derived Welsh law arising from invalidity of EU instruments)** provides, subject to exceptions, that it will no longer be possible, after the UK leaves the EU, to challenge any EU derived Welsh law on the basis of a decision by the European Court of Justice (CJEU) that the underlying EU instrument is invalid.
- **Section 7 (Interpretation of EU derived Welsh law)** provides that EU derived Welsh law is to be interpreted in accordance with the pre-exit case law of the CJEU, the general principles of EU law and the Charter of Fundamental Rights. However, the Supreme Court is not bound by the pre-exit CJEU case-law and may depart from it in the same way that it may depart from its own case-law.
- **Section 8 (Rules of evidence etc.)** provides that, to the extent that it is necessary to interpret EU derived Welsh law in legal proceedings, judges will continue to determine the validity, meaning or effect of EU law as a question of law, rather than treat it as a question of fact that needs to be proved. Section 8 also enables Welsh Ministers to make regulations to ensure that appropriate evidential rules can be put in place for interpreting EU Welsh derived law.
- **Section 9 (Complying with international obligations)** enables Welsh Ministers to make regulations, as they consider appropriate, to prevent or remedy any breach of international obligations as a result of Brexit, provided that the provision is within devolved competence and subject to some restrictions.

- **Section 10 (Implementing the withdrawal agreement)** enables Welsh Ministers, by regulations, to make provision within devolved competence, to implement the withdrawal agreement, subject to the UK Parliament passing an Act approving the final terms of the withdrawal (and to some other restrictions).
- **Section 11 (Power to make provision corresponding to EU law after exit day)** enables Welsh Ministers, by regulations, to make provision within devolved competence to maintain regulatory alignment with the EU after Brexit.
- **Section 12 and Schedule 1 (Fees and charges)** enables the Welsh Ministers, by regulations, 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 various sections of the Bill.
- **Sections 13 and 14 (Welsh Ministers’ consent to making, confirming or approving subordinate legislation)** provide that the consent of the Welsh Ministers is needed before a UK Government Minister makes, confirms or approves certain kinds of subordinate legislation. The subordinate legislation will be captured if it contains provision that would currently be within the scope of EU law and is also within the Assembly’s legislative competence; but only, where the power to make that subordinate legislation is conferred by or under a future UK Parliamentary Act (including by expanding an existing power). For example, this would mean that UK Government Ministers would have to seek the consent of Welsh Ministers before making regulations within devolved competence under new powers conferred on them in the Withdrawal Bill and other Brexit-related primary legislation of the UK Parliament, as these will become Acts after the Bill receives Royal Assent.
- **Section 15 (Meaning of devolved competence)** defines devolved competence for most of the provisions of the Bill by reference to provision that would be within the Assembly’s legislative competence if it were contained in an Assembly Act enacted on the day on which section 15 comes into force. By virtue of section 19, that will be the day after the Bill receives Royal Assent. This appears intended to define devolved competence by reference to the current devolution settlement, not the forthcoming reserved-powers settlement introduced by the Wales Act 2017.

However, for certain sections of the Bill, “devolved competence” is defined by reference to whichever of the two settlements is in force at the time that the provision under those sections of the Bill is made. In both cases, only provision that could be made without the consent of a UK Minister, under those settlements, is regarded as being within devolved competence.
- **Section 16 (Continuing effect of regulations)** specifies that the regulation-making powers under sections 3-5 and 9-10 of the Bill are all time limited. However, any regulations made under these sections do not expire when the time-limit for making them expires.
- **Section 17 and Schedule 2 (Regulations)** provides that the powers to make regulations under the Bill are wide enough to allow different provision to be made for different purposes, different cases or different areas. Schedule 2 sets out the scrutiny framework for all regulations made under the Bill. It provides for three different scrutiny procedures: the standard procedure, the urgent procedure and the enhanced procedure.
- **Section 18 (General Interpretation)** provides (along with section 2) the meaning of key terms in the Bill, including the definition of ‘exit day’. Exit day means a day or a time on a day appointed in regulations made by Welsh Ministers. The Welsh Ministers must have regard to any provision for the same or similar purpose in or under an Act of the UK Parliament giving effect to the UK’s withdrawal

from the EU (as the Withdrawal Bill does). And, crucially, section 18(4) prevents them from appointing a day or time before EU law ceases to apply to the UK.

- **Section 19 (Coming into force)** provides that the Bill will come into force on the day after the day on which it receives Royal Assent.
- **Section 20 (Short title)** provides that the short title of the Bill, once passed, will be the Law Derived from the European Union (Wales) Act.

Direct EU law, EU derived enactments and provision made under EU related powers

EU derived Welsh law will be made up of regulations made by the Welsh Ministers which seek to continue the effect of the following types of EU law as part of the law in Wales:

1. Direct EU law
2. EU derived enactments
3. Provision made under EU related powers

These categories of law are summarised below.

Direct EU law (Section 3)

Section 3 of the Bill enables the Welsh Ministers to make regulations to retain direct EU law, as it exists when the Bill comes into force, in domestic law. Direct EU law covers directly applicable EU law that applies in Wales by virtue of section 2(1) of the ECA 1972, including, for example, EU regulations, EU decisions and EU tertiary legislation. Direct EU law is adopted at EU level and applies across the Member States.

EU derived enactments (Section 4)

Section 4 of the Bill enables the Welsh Ministers to make regulations to repeal or revoke an EU derived enactment and restate it with any modifications that are necessary to enable it to operate effectively after Brexit. EU derived enactments are enactments that already exist in UK domestic law to implement EU obligations or which otherwise relate to the EU or EEA. This includes both primary and secondary legislation passed by the Assembly or the UK Parliament.

According to the Explanatory Memorandum:

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:

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

Provision made under EU related powers (Section 5)

Section 5 of the Bill enables Welsh Ministers to specify in regulations that subordinate legislation made under EU related powers is to be treated as having been made under the Bill and to continue to have effect in domestic law. The EU related powers are:

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

Retain, restate and specify

Retain Direct EU Law (Section 3)

Section 3 enables Welsh Ministers to retain, in regulations, direct EU law in areas of devolved competence. This includes the power to leave out, and where necessary, substitute certain provisions of current direct EU law to enable it to operate effectively in a devolved Welsh context. For example, provisions in direct EU law could apply to a particular Member State, area or region of the EU other than Wales and would not make sense on a Wales-only basis. According to the Bill's Explanatory Notes:

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.

Restatement of EU derived enactments (Section 4)

As stated in the Bill's Explanatory Memorandum, enactments made in the UK implementing EU obligations already operate in a domestic setting; therefore 'the extent and nature of the modifications needed to ensure that they operate successfully in a devolved Welsh context after Brexit will be different from the modifications needed to direct EU law.' However, it is recognised that some of these enactments will require corrections. As a result, the Bill enables Welsh Ministers to restate the enactments with the 'necessary' modifications to ensure they can continue to function effectively after Brexit. The Bill sets out a list of the type of modifications that might be necessary. The Explanatory Memorandum references the [Historic Environment \(Wales\) Act 2016](#) as an example:

...section 39 of the Historic Environment (Wales) Act 2016 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.

EU related powers specified in regulations (Section 5)

As stated in the Bill's Explanatory Memorandum, subordinate legislation made under section 2(2) of and paragraph 1A of Schedule 2 to the ECA 1972 and section 56 of the Finance Act 1973 will not, normally, be created anew or restated. The Bill provides that subordinate legislation made under these powers can first be specified in regulations by Welsh Ministers who will then be able to make any necessary modification to the subordinate legislation for their continued effective operation. The Explanatory Memorandum provides an example:

...the application of the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017 is determined by reference to both the Environmental Impacts Directive (2011/92/EU) and the Habitats Directive (92/43/EEC). 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.

Scrutiny Procedures

All regulations made under the Bill are subject to the scrutiny framework set out in Schedule 2. Schedule 2 provides for three different scrutiny procedures.

The standard procedure is the affirmative procedure and applies to all regulations made under the Bill, other than those subject to the urgent or the enhanced procedure. In calculating the number of days available for scrutiny under both procedures recesses would not count.

The urgent procedure applies to any regulations made under the Bill except for those made under section 11. This procedure applies when Welsh Ministers consider it necessary to make regulations without a draft being laid and approved because of urgency. Regulations made under the urgent procedure would lapse at the end of 30 days, unless the Assembly approved them before that deadline; i.e. this is a “made affirmative” procedure

The Bill also makes provision for an enhanced scrutiny procedure. The decision as to whether the enhanced procedure, rather than the standard affirmative procedure, should apply lies with the Assembly, or a committee of the Assembly, in relation to draft regulations making provision of a kind listed in Schedule 2 section 1(1). These include regulations under section 11 of the Bill (regulations mirroring post-Brexit EU law), regulations establishing a new public authority and regulations creating or amending a power to legislate. The enhanced procedure means that for a 60-day period after laying the draft regulations, anyone can make representations about them to the Welsh Government, the Assembly can pass resolutions on them, and a committee of the Assembly with responsibility for reporting on them can make recommendations concerning them. All these must be taken into account by the Welsh Ministers. If the Welsh Ministers wish to persist with their original draft, they must inform the Assembly of the details of any representations made. If the Welsh Ministers lay a revised draft, they must inform the Assembly of the changes made and, again, give details of any representations made on the original draft. A committee of the Assembly can recommend that the draft regulations should not be taken further, and this will block the regulations from being made, unless the Assembly in Plenary overrides that recommendation. This applies both to where the Welsh Ministers keep to their original draft, and where they lay a revised draft. Finally the regulations will need the approval of the Assembly.

Sunset clauses and exit day

The regulation-making powers in the Bill are time-limited. Regulations under sections 3-5 enabling the modification of EU law must be made before ‘exit day’ but must not come into force before this day. Regulations made under section 9, relating to complying with international obligations, can be made for a period starting on the day after Royal Assent and ending two years from exit day. But no regulations under section 10, implementing the withdrawal agreement, can be made after exit day.

Unlike the other sections conferring powers on Welsh Ministers, the power in section 11 of the Bill to make regulations to maintain regulatory alignment with the EU in devolved policy areas after Brexit is not time-limited.

The definition of “devolved competence” in the Bill means that regulations made by the Welsh Ministers under the Bill will have to be compatible with EU law if they are brought into force before the UK leaves the EU.

The Bill enables Welsh Ministers by regulations to appoint ‘exit day’ (but only for the purposes of the Bill itself; Welsh Ministers cannot affect the date on which the UK leaves the EU). In doing so, Welsh Ministers are required to have regard to the day appointed for the same or similar purposes in or under an Act of the UK Parliament to give effect to the UK’s withdrawal from the EU, although they are not under a duty to appoint the same ‘exit day’. But, crucially, the Bill prevents the Welsh Ministers from appointing a date or time before the EU Treaties - and therefore the whole of EU law - cease to apply in the UK.

The Withdrawal Bill specifies that, ‘exit day’, for its purposes, is the 29 March 2019 at 11.00pm, two years after the triggering of Article 50. However the Bill could be amended by regulations to change the definition of ‘exit day’ if a withdrawal agreement specifies a different date or if an extension of the negotiation period is agreed between the UK and the European Council. Therefore, the definition of ‘exit day’ under the two Bills can be aligned, despite the different ways in which they are defined. Moreover, if ‘exit day’ under the Withdrawal Bill fell before the EU Treaties ceased to apply to the UK, the UK would be in breach of international law. Therefore, the intention of the concept of ‘exit day’ in both Bills is also consistent.

Legislative competence

The Llywydd has stated that, in her view, the Assembly has the legislative competence to pass the Law Derived from the European Union (Wales) Bill. The competence derives from Part 4 of the Government of Wales Act 2006.

Legislative competence for the Bill was assessed under the current conferred-powers devolution settlement. The reserved-powers model will come into force on 1 April 2018 and any Bills where the vote on general principles at the end of Stage 1 takes place on or after 1 April will be subject to the new legislative competence tests. As long as Stage 1 of this Bill is completed before 1 April 2018, the Bill will fall under the current conferred powers settlement rather than the new settlement.

In addition, in order to have practical effect, the Bill must receive Royal Assent before the Withdrawal Bill does so. The restrictions on the competence of the Assembly proposed in clause 11 of the Withdrawal Bill (see above) could prevent the Assembly from being able to pass the Law Derived from the European Union (Wales) Bill.

3. Costs and benefits

The Regulatory Impact Assessment (RIA) does not include a monetary estimate of the costs and benefits. The RIA is focused on the administration of the Bill and compliance. It does not consider wider economic impacts. There is little in terms of which option would result in lower costs or benefits, apart from a statement that “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”.

A summary of how the cost impacts of the Bill are described in the RIA is set out below.

Administrative and compliance costs and savings

There will be administrative costs for the Welsh Government developing secondary legislation. The RIA notes that many deficiencies could be corrected by minor textural amendments, however, it also suggests there may also be a need to set up new agencies to undertake the functions of existing EU bodies.

The regulations made under the Bill will modify existing regulatory regimes so businesses, public, voluntary sector and individuals will incur transitional compliance costs adjusting to the new arrangements.

Whilst there are no transitional savings anticipated, depending on the outcome of the UK's negotiation with the EU, there could be recurrent savings, or costs, from future legislation as regulatory regimes are reviewed. This would not be a direct consequence of this Bill, so are not included in this RIA.

Unquantified costs and disbenefits

The regulations made under the Bill will be where the costs and benefits of this Bill are incurred rather than by the Bill itself. While these regulations have an impact in terms of costs and benefits, the costs and benefits are not quantified.

The **reasons given for not quantifying costs and benefits** in the RIA are as follows:

- There is too much uncertainty because the transition timing and terms of leaving the EU and nature of future relationship with the EU are unknown.
- There is no precedent to draw on for estimates, this is a unique circumstance.
- The volume of secondary legislation is unknown.
- The scale of corrections of deficiencies in existing EU law is unknown.
- The nature and impact of new UK legislation and frameworks is unknown.

The RIA concludes that while this uncertainty will diminish over time, any estimates produced in the time available would risk being misleading and/or with a too wide range to be meaningful.¹

It is important that there are detailed analyses of costings provided with secondary legislation and there is time and capacity for both the Welsh Government to produce and the Assembly to scrutinise these costings. As highlighted in the Finance Committee [Inquiry into the financial estimates accompanying legislation](#).

4. Key provisions in the Bill

This section of the paper identifies some of the key aspects or provisions in the Bill to which Members may wish to give consideration to during the passage of the Bill through the Assembly.

Structure of the Bill

As noted in section 2 of this paper, this Bill is drafted differently to the Withdrawal Bill. The Withdrawal Bill automatically imports all EU law, with a few exceptions, into UK law, and then gives powers to

¹ The RIA notes that the UK Government's EU (Withdrawal) Bill does not address the issue of administrative costs for government.

Ministers to modify that law so that it functions after the UK leaves the EU. This Bill does not automatically save all EU law falling under the categories described in Sections 3, 4 & 5 of the Bill. Instead it gives Welsh Ministers the power to decide which elements of current EU law in devolved policy areas it wishes to retain (by making domestic legislation corresponding to it, restating it or specifying it). Once the Welsh Ministers have made regulations retaining it, by one of these methods, that law becomes 'EU derived Welsh law'.

This Bill does not amend or directly change the text of the Withdrawal Bill itself. Rather, its effect is that any EU derived Welsh law, created by Welsh Ministers under their powers in Sections 3, 4 & 5, would not be counted as 'retained EU law' under the Withdrawal Bill – and so would not be subject to any of the restrictions which that Bill places on the Assembly and the Welsh Ministers. Any EU legislation Welsh Ministers do not chose to retain under their powers in this Bill would fall under the remit of the Withdrawal Bill and be subject to its restrictions. Therefore whether or not the Assembly has competence to modify a piece of EU-derived law after Brexit will depend on whether or not Welsh Ministers decide to retain it.

Section 3

Section 3 of the Bill provides Welsh Ministers with the power to retain current direct EU law in areas of devolved competence by making regulations that, effectively, reproduce that EU direct law into domestic law in Wales. EU direct law, as set out in section 2 of this paper, means provisions in the EU Treaties, EU regulations and other EU legislation that is not currently on the UK statute book because it automatically or 'directly' applies in UK law, once adopted by the EU's institutions.

Section 3(4) of the Bill gives Welsh Ministers the powers to leave out some elements of direct EU law that will not make sense once the UK leaves the EU. It also allows the Welsh Ministers to change direct EU law in some ways. All of these are listed in sections 3(4)(a) to 3(4)(i) of the Bill. Whilst the list of things Welsh Ministers don't have to include, or can change, is detailed, it is not exhaustive: section 3(4) states that Welsh Ministers can do anything in the list 'among other things'. The use of a non-exhaustive list of changes that Ministers can make, in clause 7 of the Withdrawal Bill, was criticised by the UK Parliament. As a result, an amendment was passed during the House of Commons proceedings, which appears to make the list in clause 7(2) exhaustive. However, a new subsection 7(3) was inserted at the same time, which allowed Ministers (i) also to do anything 'similar' to things in the list, and (ii) to add to the list by subordinate legislation.

The first item in the list is contained in section 3(4)(a) of the Bill. This states that, in making regulations to reproduce a piece of direct EU law, Welsh Ministers can leave out anything that they would not have 'practical application' in relation to Wales or they consider to be 'otherwise redundant or substantially redundant'. This mirrors the criterion in clause 7(2)(a) of the Withdrawal Bill, in its current form; except that, in the Withdrawal Bill, the test is whether Ministers 'consider' that the EU law provision has no 'practical application' or is 'redundant'. By contrast, the Welsh Ministers can make the changes allowed by section 3(4) only if the conditions described in the list objectively apply. Thus, Welsh Ministers' powers under the Assembly Bill are more limited than under the Withdrawal Bill, although the difference, in this case, is subtle, because Ministers are always required, under general UK public law, to be "reasonable" in their considerations.

More generally, the powers proposed for the Welsh Ministers under section 3 of the Assembly Bill are more limited than those available to UK Ministers under clause 7 of the Withdrawal Bill. The Welsh Ministers' powers to make the changes listed in section 3(4) are limited by the conditions in subsections 3(1) and (2). Subsection (1) lays down the general limitation that the Welsh Ministers' power is to make regulations 'corresponding' to EU law and for the purpose of 'continuing its

operation'. And when they use that power, subsection (2) obliges them 'to seek to continue the rights ... obligations, restrictions, remedies' and procedures which, currently, apply directly in the law of Wales as a result of EU law.

However, section 3 provides Welsh Ministers with discretion as to how much of direct EU law it reproduces for Wales. Section 3 gives the Welsh Ministers a power to do so, not a duty; and it allows them to decide how much of it they 'consider appropriate' to continue. These elements of section 3 mirror elements of clause 7 of the Withdrawal Bill which have proved controversial both in the UK Parliament and amongst external commentators.

There is no requirement in the Bill as drafted for Welsh Ministers to set out, when making regulations under section 3, which parts of EU direct law it is leaving out or changing, and why. Members may in the vast majority of instances agree with Welsh Ministers about what they are leaving out but might not in all cases. For example Welsh Ministers could choose to omit a requirement in an EU regulation which required Member States to report to the European Commission on what action it had taken to deliver the objective of that regulation. Whilst the reference to the European Commission would be redundant after Wales leaves the EU, Welsh Ministers could also choose to replace it with a duty on Welsh Ministers to report to the Assembly on delivery of the objective, rather than for the duty to report to be omitted altogether. The Withdrawal Bill was amended in the House of Commons to require UK Ministers to provide an explanatory statement before laying subordinate legislation under the Bill before Parliament. Amongst other things, the statement must explain the reasons for making the subordinate legislation and its effect, if any, on 'retained EU law' (which includes law corresponding to 'direct EU law' in the Assembly Bill).

Sections 3(4)(g) of the Bill and section 3(4)(h) provide Welsh Ministers with the power to allocate a function currently carried out by an EU body, under direct EU law, to an existing public body in Wales, or to create a new public body for that purpose. Similar powers are provided to Ministers by clause 7(6) of the Withdrawal Bill.

Section 4

Section 4 of the Bill provides Welsh Ministers with the power to repeal or revoke an enactment and restate it with modifications if the enactment is within devolved competence and either seeks to implement an EU obligation or 'relates otherwise to the EU or EEA for all or some purposes'.

As set out in section 2 of this paper, an enactment means existing domestic legislation, and could include an Assembly Act/Measure, a UK Parliament Act or a piece of subordinate legislation made under either. An example of this would Part 5 of the Environment (Wales) Act 2016. Part 5 of this Act passed by the Assembly sets out actions the Welsh Government can take to protect the marine environment when granting shellfisheries orders. It includes references to European marine sites and European directives that may not make sense after the UK leaves the EU. The Welsh Government could repeal or revoke Part 5 of that Act and restate it modifying these references. If it did so, then what was previously part of an Act of the Assembly would become a piece of subordinate legislation. However, the Welsh Ministers would not be able to change that subordinate legislation in future, other than in ways allowed by section 4. The terms of section 4 mean that this would, effectively, be limited to rectifying mistakes or oversights in the original regulations restating Part 5.

Section 4(2) of the Bill places a restriction on the modifications that Welsh Ministers can make to an enactment when restating it. Welsh Ministers can only make a modification in so far as they 'consider [it] ... necessary to ensure the effective operation of the restated enactment after the withdrawal of the United Kingdom from the European Union'. The use of the term 'necessary' is more restrictive

than the term 'Ministers consider appropriate' used in the Withdrawal Bill, but is not as restrictive as the term 'essential' that the Assembly's **External Affairs and Additional Legislation Committee** **has suggested** should be used to frame Welsh Ministers' powers in the Withdrawal Bill.

As with section 3(4) of the Bill, Welsh Ministers can use their powers under section 4 to remove provisions from existing law when restating it. The list of things that can be removed is contained in sections 4(3)(a) to 4(3)(g). As with section 3(4), the list is not exhaustive, as is made clear by the words, 'are not limited to' in the introductory line of section 4(3). Section 4(3)(a) is also similar to section 3(4)(a) in that Welsh Ministers may remove from an enactment 'anything that has no practical application', or where any part of it is 'redundant or substantially redundant', as a result of the UK's withdrawal from the EU. These powers are still subject to the overall test that the Welsh Ministers must consider the changes 'necessary'; but an element of discretion is provided by the term 'consider' – albeit limited by the public-law requirement of reasonableness.

Section 4(4) of the Bill enables Welsh Ministers, in restating an enactment, to provide that a function currently carried out by an EU body is allocated to a Welsh public body or is replaced, abolished or otherwise modified. Welsh Ministers can also create new public bodies to carry out any functions listed in the regulations. These powers are similar to powers in section 3(4)(g) and (h).

Section 5

Section 5 of the Bill provides Welsh Ministers with an alternative to section 4 as a means of ensuring that certain categories of existing domestic legislation continue to apply in the law of Wales after Brexit, and to modify that law in so far as the Welsh Ministers 'consider necessary' to ensure its 'effective operation' at that time. It applies only to existing subordinate legislation made under certain EU-related powers and only to provisions within the Assembly's competence. It would empower Welsh Ministers to make regulations specifying provisions of that subordinate legislation. The effect of this would be that those provisions would not be captured by the Withdrawal Bill and would not automatically cease to have effect when that Bill's repeal of the ECA 1972 and amendment of section 56 of the Finance Act 1973 come into force. Thus the provisions would continue in effect in the law of Wales after Brexit. Section 5 also gives the Welsh Ministers the power to modify the specified provisions. Like the power in section 4, this is limited to making changes that the Welsh Ministers 'consider necessary' for the 'effective operation' of the provisions after Brexit. The modifications that can be made include those that could be made under section 4 and are, again, not exhaustive.

There is overlap between the powers in sections 4 and 5. An enactment made under section 2(2) of the ECA 1972 could be revoked and restated under section 4, but it could also be specified under section 5. However, section 4 goes wider, as it covers primary legislation and more categories of subordinate legislation than section 5. The Welsh Ministers will have the discretion to use either power where both apply, but, as noted above, the Explanatory Memorandum states that section 5 will normally be used in this case. This may be for practical reasons, given the high level of legislation that is likely to be needed in a short time to avoid gaps in the law: it may be quicker to specify a list of provisions under section 5 than to revoke and restate them with modifications. The provisions specified under section 5 could be modified at a later date, as 'necessary'.

Section 7

Section 7 of the Bill sets out how the body of 'EU derived Welsh law' created by the Bill should be interpreted by the Courts. It makes similar provisions to the European Union (Withdrawal) Bill, but with one notable difference. Section 7(2)(a) of the Bill allows for 'EU derived Welsh law' to be interpreted in line with the Charter of Fundamental Rights. The Charter is not being transposed into UK law by the Withdrawal Bill. The Bill does not purport to transpose the rights contained in the Charter into Welsh

law as free-standing rights, either. But it would ensure that, where the courts in England and Wales are considering provisions of EU derived Welsh law, they continue, after Brexit, to interpret those provisions in line with the rights and principles set out in the Charter.

Section 9

Section 9 of the Bill provides Welsh Ministers with the powers to make regulations within devolved competence that 'they consider appropriate' to prevent or remedy any breach to the UK's international obligations caused by the UK's exit from the EU. A very similar power is provided to Welsh Ministers under clause 8 of the Withdrawal Bill but Welsh Ministers would be subject to fewer restrictions under this Bill than when using the powers proposed for them by clause 8 of the Withdrawal Bill.

The use of the term Ministers 'considers appropriate' within the Withdrawal Bill has been criticised for being too broad in scope. The Assembly's **External Affairs and Additional Legislation Committee** has recommended that the term 'considers appropriate' should be replaced with the term 'essential' in the Withdrawal Bill.

Section 10

Section 10 of this Bill provides Welsh Ministers with powers similar to those they would have under Clause 9 of the Withdrawal Bill. Welsh Ministers may by regulations make provision within devolved competence that 'they consider appropriate' for implementing the UK's withdrawal agreement with the EU27.

Clause 9 of the Withdrawal Bill had been criticised in debate in the Houses of Parliament for allowing UK Ministers to implement the withdrawal agreement via regulations rather than providing both Houses with the opportunity to consider and vote on amendments through a piece of primary legislation. The UK Government therefore announced during the Withdrawal Bill's passage through the House of Commons that it would introduce a Withdrawal Agreement and Implementation Bill. Clause 9 of the Withdrawal Bill was therefore amended so that Ministers can only use the powers it contains after an Act implementing the Withdrawal Agreement has been passed. Section 10 of this Bill acknowledges this change and places an equivalent restriction on Welsh Ministers.

Like section 9, section 10 would give Welsh Ministers less restricted powers to make regulations compared to the powers proposed for them under clause 9 of the Withdrawal Bill.

Welsh Ministers can only make regulations in areas of devolved competence. As the section 10 powers can only be used before exit day, then, in using these powers, Welsh Ministers will have to comply with the restriction in section 108(6)(c) of the Government of Wales Act 2006 which prevents the Assembly from passing laws that are incompatible with EU law.

As with section 9, the terms used to limit the Welsh Ministers' powers are broader than those used in section 4, as they may make regulations 'they consider appropriate' rather than regulations they consider 'necessary'. As noted above, even the term 'necessary' does not limit the powers to the extent called for, in relation to the Withdrawal Bill, by the Assembly's External Affairs and Additional Legislation Committee, which has advocated the use of the term 'essential'.

Section 11

Section 11 of the Bill would allow Welsh Ministers to make regulations introducing new legislation or modifying existing legislation so that Wales can keep pace with new EU legislation passed after the UK exits the EU. Welsh Ministers can modify any 'enactment', including Acts of the Assembly or Acts of

Parliament in areas of devolved competence, using these regulation-making powers. The Explanatory Memorandum states that the purpose of this power is to:

...enable 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.

The Bill provides for different scrutiny procedures for regulations made under different sections of the Bill (see section 2 of this paper). Regulations under section 11 would be subject to the enhanced procedure, which may allow Members to influence their contents, as well as simply to reject or approve them. However, as with all types of subordinate legislation, Assembly Members would not be able to amend draft regulations under this section as they would be able to if the provisions were made in an Act of the Assembly. Given that this power relates to EU law not currently in place, it is not possible to say what the powers under this section might be used to implement in future.

If this Bill is not enacted, and the Withdrawal Bill is, with clause 11 in its current form, the Assembly would not be able to pass Acts that mirrored future EU law in devolved policy areas, nor to give the Welsh Ministers the power to do so, as that would could entail modifying 'retained EU law', which clause 11 currently prevents the Assembly from doing.

Sections 13 & 14

Section 13 of the Bill requires UK Ministers (or any other body that has been given legislation-making powers) to obtain the consent of Welsh Ministers before making subordinate legislation that meets a series of conditions. These are that the legislation is within devolved competence, that it falls or would have fallen within the scope of EU law before Brexit, and that it is made under a new power conferred by an Act of Parliament that obtains Royal Assent after the date on which sections 13 and 14 come into force (which will be on the day after this Bill gets Royal Assent), or under an existing power that is modified, at that same future time, in a way that would allow UK Ministers to make the relevant provision, which they would not have been able to make before.

Section 14 of the Bill requires UK Ministers or another body that has been given legislation making powers to obtain the consent of Welsh Ministers before they confirm any subordinate legislation that meets equivalent conditions as to those set out in Section 13. This would be relevant, for example, to the power to confirm byelaws.

Under the Withdrawal Bill UK Ministers are given concurrent powers with Welsh Ministers. This means they would be able to use their powers under the Withdrawal Bill to make subordinate legislation to modify the EU Law retained by that Bill in areas of devolved competence. They would not be required by the Bill to seek the consent of Welsh Ministers before doing so. The Welsh and Scottish Governments in their joint suggested amendments to the Bill, have sought to change this so that their consent is required. Similar issues have been raised by both devolved governments in relation to powers proposed for UK Ministers under the Trade Bill currently going through Parliament. These sections of the present Bill would ensure that UK Ministers were required to seek Welsh Ministers' consent even if the Withdrawal Bill and Trade Bill remain unmodified or if similar provisions are made in any other pieces of Brexit primary legislation.

The use of Henry VIII powers

Sections 3, 4, 5, 9, 10 & 11 of this Act contain what are known as Henry VIII powers. That is, they would enable Welsh Ministers to amend primary legislation using only secondary legislation powers, and to make other significant changes – like setting up a new public body – that would normally require primary legislation.

Powers of the same nature have been given to UK Ministers and Devolved Ministers under the Withdrawal Bill. Given the scale of the legislative task, the need for Ministers to have these powers under the Withdrawal Bill has been broadly accepted but Committees in both the Assembly and the Houses of Parliament have emphasised the need for these powers to be tightly controlled and restricted. In its report on the **Legislative Consent Motion of the Withdrawal Bill** the Assembly's Constitutional and Legislative Affairs Committee stated that the use of Henry VIII powers in the Withdrawal Bill would need to be 'clearly justified'. In its **Explanatory Notes** to its proposed amendments on the Withdrawal Bill the Welsh Government stated:

“We are aware that there are significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed in the Bill, and would be supportive of amendments which sought to define these more narrowly.”

Paragraph 22 of Schedule 7 of the **Withdrawal Bill** was amended during the Bill's passage through the House of Commons to require Ministers to make a statement when laying regulations to state that the regulations:

- Do no more than is appropriate;
- Explain the purpose of regulations and the reasons for it;
- State which law before exit day it is relevant to; and
- The effect (if any) it has on the EU law retained by the Bill.

The House of Lords Constitution Select Committee has also recommended **in its report** on the Withdrawal Bill that the Minister in Explanatory Memoranda:

... include a statement from the minister setting out the 'good reasons' for the regulations and explaining that this constitutes a 'reasonable course of action'. We further recommend that explanatory memoranda should include a certification from the minister that the regulation does no more than make technical changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made. Such certification would assist Parliament to identify which instruments need greater scrutiny.
