EUROPEAN UNION (WITHDRAWAL) ACT 2018

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the European Union (Withdrawal) Act 2018 which received Royal Assent on 26 June 2018 (c. 16).

- These Explanatory Notes have been prepared by the Department for Exiting the European Union to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

1 The European Union (Withdrawal) Act repeals the European Communities Act 1972 (ECA) on the day the United Kingdom leaves the European Union.

2 The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal.

Policy background

3 On 1 January 1973 the UK joined the European Economic Community, which has since evolved to become today's European Union. A condition of EU membership is that community law, which is now EU law, be given effect in domestic law. The ECA is the principal piece of domestic legislation passed by the UK Parliament that gives effect to EU law in the UK, and gives EU law supremacy over UK domestic law.

4 On 23 January 2013 the then Prime Minister announced his intention to negotiate a new settlement on the terms of the UK's membership of the EU, followed by a pledge to subsequently hold an in-out referendum on the UK's membership of the EU.

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

6 The European Union (Notification of Withdrawal) Act 2017 was passed into law on 16 March 2017. This gave the Prime Minister the power to notify the European Council of the UK's intention to withdraw from the European Union under Article 50(2) of the Treaty on European Union. This notification was then 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.

7 Withdrawing from the EU means the UK will also cease to participate in the European Economic Area (EEA) Agreement as the UK will fall outside the geographic scope of the Agreement and will therefore no longer be a member of the EEA.

8 On 2 February 2017 the Government published a White Paper entitled *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417) which set out the Government's vision of what it is seeking to achieve in negotiating the exit from, and new partnership with, the European Union. It set out the twelve principles guiding how the Government will approach the negotiations on the UK's withdrawal from the EU.

9 The Government then published a White Paper on 30 March 2017 entitled *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446). The White Paper set out the approach to the European Union (Withdrawal) Act and how the domestic legal system will work once the UK leaves the EU.

Approach of the European Union (Withdrawal) Act

10 The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes.

11 The Act performs four main functions. It:

- repeals the ECA;
- converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserves laws made in the UK to implement EU obligations;
- creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement (subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal); and
- removes the existing restrictions on devolved competence in relation to acting incompatibly with EU law so that decision making powers in areas currently governed by EU law will pass to the devolved institutions, except where specified in secondary legislation under this Act.

12 In determining this approach, the Government considered whether there were alternative viable legislative models available to deliver the changes required to ensure a functioning

statute book on exit from the EU. These included using a single piece of legislation to repeal the ECA and setting out in schedules the necessary consequential changes required to ensure a functioning statute book. However, given that the two year time period to conclude negotiations provided for by Article 50 will be running in parallel with this legislation, there may not be time to make all the necessary legislative changes in a single piece of legislation (as in some cases the content of that legislation could not be known until after the negotiations had concluded).

13 For that reason, the approach of taking delegated powers to make the necessary changes by secondary legislation was agreed by the Government as being the only appropriate solution. This was acknowledged by the Lords Constitution Committee in its report into *The 'Great Repeal Bill' and delegated powers*:

> *"The degree of uncertainty as to what exactly the process of converting EU law into UK law will involve—and, in particular, the need to take account of the UK's ongoing Article 50 negotiations with the EU—will almost certainly necessitate granting the Government relatively wide delegated powers under the 'Great Repeal Bill', both to amend existing EU law in preparation for the day of Brexit and to legislate for new arrangements following Brexit where necessary."*[1]

14 The Act does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are appropriate to ensure the law continues to function properly from exit day. The Government will introduce separate primary legislation to make such policy changes which will establish new legal frameworks.

15 In addition to the power in section 9 of the Act, the Government has announced that a separate Bill, the Withdrawal Agreement and Implementation Bill, will be used to implement in domestic legislation the major elements of the withdrawal agreement between the UK and the EU that will need to be reflected in domestic legislation (see paragraph 30 of these notes for further detail).

Repeal of the European Communities Act 1972

16 The UK is a 'dualist' state, meaning that a treaty ratified by the Government does not alter the laws of the state unless and until it is incorporated into domestic law by legislation. This means that the UK Parliament has to pass legislation before the rights and obligations in the treaty can have effect domestically.[2]

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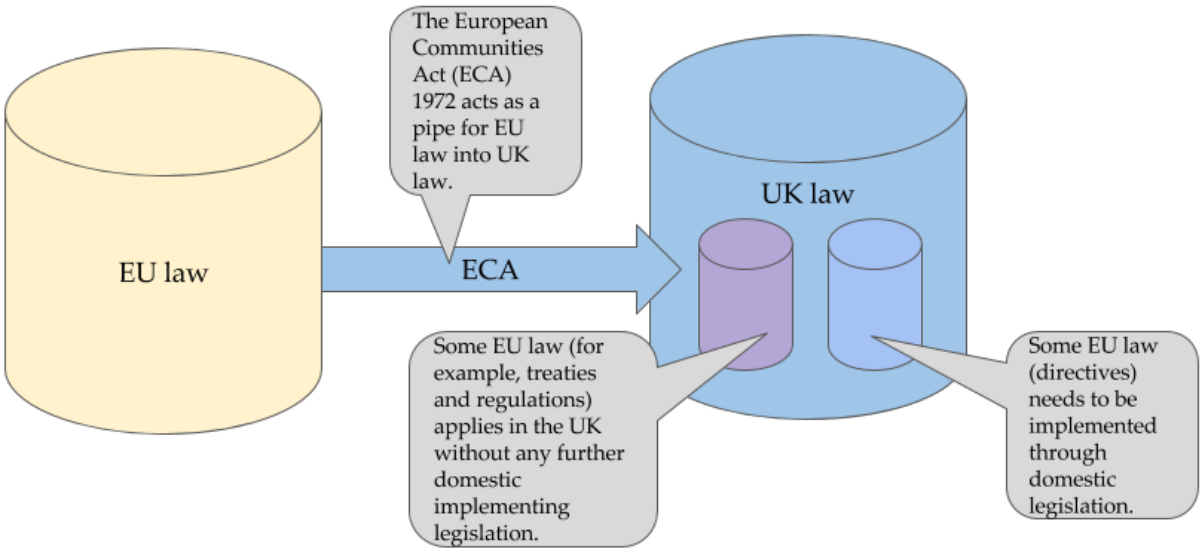
[1] House of Lords Select Committee on the Constitution, 9th Report of Session 2016–17

[2] In some cases, it may be that domestic legislation is already sufficient to ensure compliance with the international agreement or that compliance can be delivered without legislation.

17 The ECA effectively confirmed the UK's membership of the European Economic Community (as then was) and gave EU law supremacy over UK domestic law. Without it, EU law could not become part of national law. The *legal background* section of these notes provides a detailed explanation of how EU law currently operates in the UK legal system.

18 The two main provisions in the ECA are:

- Section 2(1), which ensures that rights and obligations in some types of EU law, such as the EU treaties and regulations, are directly applicable in the UK legal system. This means that they apply directly without the need for the UK Parliament to pass specific domestic implementing legislation.
- By contrast, section 2(2) provides a delegated power to allow for the implementation of EU obligations, for example obligations in directives, by way of secondary legislation (through statutory instrument).[3]



(The relationship between EU law and UK law is subject to the principle of supremacy - see paragraph 56)

19 The European Union (Withdrawal) Act repeals the ECA on the day the UK leaves the EU (defined in section 20 as 11.00pm on 29 March 2019[4]). This will have the effect of removing the

[3] EU obligations can also be implemented domestically by primary legislation or using powers in other Acts.
[4] Though see also section 20(2) to (5) which enable an alteration of the date and time of exit day in certain circumstances.

mechanism for the automatic flow of EU law into UK law (through section 2(1) of the ECA) and removing the power to implement EU obligations (under section 2(2) ECA). This reflects the fact that the UK will no longer be a member of the EU and will therefore cease to have obligations under EU law.

Preserving and converting EU law

20 By only repealing the ECA, some EU law that currently applies in UK law by virtue of the ECA would cease to have effect. As outlined by the Supreme Court in *Miller*[5], the ECA is not itself an originating source of EU law, but is rather the 'conduit pipe' through which EU law flows into UK domestic law.

21 As set out above, section 2(1) ECA provides that directly applicable EU law (such as EU regulations) has effect in UK law without the need to pass specific UK implementing legislation. If the ECA were repealed and no further action was taken, this directly applicable EU law would cease to apply in UK law, leaving gaps on the statute book.

22 Other types of EU law (such as EU directives) have to be given effect in the UK through domestic laws. As set out above, this has frequently been done using section 2(2) of the ECA, which provides ministers, including ministers in the devolved administrations, with powers to make secondary legislation to implement EU obligations. If the ECA were repealed and no further action was taken, all of the secondary legislation which has been made under it would fall away and cease to be part of the UK statute book, leaving significant gaps.

23 To avoid such gaps, the Act converts the body of existing EU law into domestic law and preserves[6] the laws we have made in the UK to implement our EU obligations. After this, because the supremacy of EU law will not operate on new, post-exit legislation, Parliament (and, within devolved competence, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU. This body of converted EU law and preserved domestic law is referred to in the Act and these notes collectively as 'retained EU law'.

[5] R (on the application of Miller and another) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5

[6] It should be noted that the term 'preserved legislation' does not mean that everything which falls within the scope of section 2 would be subject to implied repeal as a result of the repeal of the ECA or the repeal of that Act taken together with the UK's exit from the EU. For example, some EU related legislation which falls within the scope of section 2 is not dependent for its existence on the ECA (for example an Act which relates or refers to the EU). For this category of legislation, section 2 is operating so as to enable the powers in the Bill to be used to modify it, or for the purposes of devolution or future legislation.

Retained EU law (includes both categories below)	

Preserved legislation
• Regulations made under section 2(2) or paragraph 1A of Schedule 2 to the ECA
• Other primary and secondary legislation with the same purpose as regulations under section 2(2) ECA
• Other domestic legislation which relates to the above, or to converted legislation, or otherwise relates to the EU or EEA
 	
The Act will preserve this legislation as it exists immediately before exit day. This is referred to in these notes as 'preserved legislation'.
	Converted legislation
	• Direct EU legislation:
	  ○ EU regulations
	  ○ EU decisions
	  ○ EU tertiary legislation
	• Direct EU legislation as it applies with adaptations for the EEA
	• Any other rights which are recognised and available in domestic law through section 2(1) ECA (for example, directly effective rights contained in EU treaties)
	
	The Act will convert and incorporate this law as it exists immediately before exit day into domestic law.

24 This approach means that, as a general rule, the same rules and laws will apply on the day after the UK leaves the EU as before:

- the Act converts directly applicable EU law (e.g. EU regulations) into UK law;
- it preserves all the laws which have been made in the UK to implement EU obligations (e.g. in EU directives);
- it incorporates any other rights which are available in domestic law by virtue of section 2(1) of the ECA, including the rights contained in the EU treaties, that can currently be relied on directly in national law without the need for specific implementing measures; and
- the Act 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 or the High Court of Justiciary in Scotland.

Delegated powers

25 A large amount of EU law currently applies in the UK. A proportion of this will continue to operate properly once the UK leaves the EU simply by preserving it or converting it into UK law. However, a significant proportion of retained EU law for which Government departments and devolved administrations are responsible contains some provisions that will not function effectively or be otherwise deficient once the UK leaves the EU.

26 There are a variety of reasons why some areas of retained EU law will be unable to operate because the UK is no longer a member of the EU. There will also be cases where retained EU law will cease to operate as intended or will be redundant once the UK leaves the EU. For this reason, the Act includes **a power to enable ministers to correct problems arising from withdrawal** by way of making regulations by statutory instruments. Some examples are in the text box below, while further examples can be found in the delegated powers memorandums which were published during the Act's parliamentary passage.[7]

Possible uses of the power to correct problems arising from withdrawal

Throughout the statute book, there are references which will no longer be accurate once the UK leaves the EU, such as references to "member states other than the United Kingdom", to "EU law", or to providing for the UK's "EU obligations". Such references will need to be repealed or amended to ensure the UK has a functioning statute book post-exit.

For example, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 require an environmental impact assessment of certain applications for planning permission. They refer to "other EEA States" in a number of places, mainly in the context of development likely to have significant transboundary environmental effects. A correction amending the references to "other EEA States" to "EEA States", would allow the requirement on transboundary consultation to continue to function on exit as it does now, reflecting the fact that the UK will have left the EEA. This would enable an important piece of environmental protection law to continue to operate effectively.

In addition to this, there will be law which will, upon leaving the EU, no longer works properly and which will need to be corrected to continue to work; for example, where law requires the UK to obtain an opinion from the European Commission on a given issue. Upon exit, the Commission will no longer provide such opinions to the UK. Such requirements in existing law would prevent certain projects from taking place unless corrective action was taken. In this instance the power to correct the law would allow the Government to amend UK domestic legislation to either replace the reference to the Commission with a UK body or remove this requirement completely.

There are many important functions carried out at EU level, such as the evaluation and authorisation of chemicals, air safety regulation and genetically modified food and feed regulation. Depending on what is agreed with the EU, many functions may need to be transferred to appropriate bodies in the UK for them to continue and the power to deal with deficiencies would enable this.

[7] See section 'Delegated Powers Memoranda' at https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html

Once the UK leaves the EU, there will also be areas of law where policy no longer operates as intended. One element of EU law is the reciprocal arrangements between states including reciprocal rights of citizens. As a matter of international law, those obligations will fall away at the point where the UK leaves the EU. At the same point, EU states' obligations under EU law to the UK and its citizens will also fall away. Any such obligations beyond that time will only exist if they are covered in the withdrawal agreement. However, without a correction, the UK's law would still include recognition of EU citizens' rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement and EU member states are providing no such rights to UK nationals.

27 Similar issues also exist in legislation that is the responsibility of the devolved administrations, such as that made under the ECA. The Act therefore also gives devolved ministers a **power to amend devolved legislation to correct any problems in retained EU law**, in line with the power held by UK ministers.

28 The power to correct problems arising from withdrawal is capable of being used to transfer to public authorities in the UK functions that are currently exercised by EU authorities. These powers will be available from Royal Assent until the end of the period of two years beginning with exit day.[8]

29 To enable UK public authorities to exercise inherited EU functions effectively, the Act also contains **powers enabling the UK authority to raise fees or other charges for services** that have been transferred from the EU to an authority in the UK or otherwise created as a result of the UK leaving the EU. This could include a fee for issuing a licence or approving a product. The Act also provides for modification of existing fees or charges which were created pre-exit using powers in the ECA or the Finance Act 1973.

30 Finally, the Act provides the Government with a **limited power to implement a withdrawal agreement** reached with the EU into UK law, in preparation for that agreement coming into force on the day the UK leaves the EU. This is a separate process from that by which the Government will ask Parliament to approve the agreement and from the ratification of that agreement. The use of the power is subject to the enactment of a statute approving the final terms of withdrawal of the UK from the EU. This power will expire on exit day and is therefore restricted to implementation of things required for day one. For example, if there

[8] Although the expiry of the power does not affect the continuation in force of any regulations already made, see paragraph 40 of Schedule 8 to the Act.

was relevant provision in the withdrawal agreement, the power could be used to clarify the situation in relation to regulatory approvals for UK products that were pending at the point of exit.

31 The powers outlined in paragraphs 26, 29 and 30 of these notes are also available to the devolved administrations, subject to the detailed provisions set out in the commentary below. The Government can use these powers to amend retained EU law in areas of devolved competence, but will not normally do so without the agreement of the devolved administrations. The Government will use the powers in sections 8 and 9 to amend retained direct EU legislation in areas where devolved competence is limited by section 12 'freezing' regulations but which would otherwise be devolved. In those areas where section 12 regulations apply, the Government will not use the correcting or withdrawal agreement powers to amend such legislation without first consulting the relevant devolved administration(s).

32 Paragraph 28 of Schedule 7 sets out that UK ministers will be required to make explanatory statements in relation to the exercise of certain powers (those in sections 8(1), 9(1) and 23(1)). This requirement is in addition to the commitment in the first delegated powers memorandum published when the Act began its parliamentary passage, which provides that UK ministers will include alongside statutory instruments made under the other powers in the Act a statement that the minister considers that the instrument does no more than what is appropriate. As stated in the delegated powers memorandum, the intention is that these statements will usually be published in explanatory memoranda accompanying statutory instruments in addition to the usual requirements.

33 Paragraphs 3 and 17 of Schedule 7 require ministers of the Crown to submit statutory instruments which they are proposing to make under the negative procedure under three powers in the Act (those in sections 8(1), 9(1) and 23(1)) to a committee of each House. These sifting committees will have ten sitting days to accept the recommended procedure or propose upgrading to the affirmative procedure. If the Minister disagrees with a recommendation of a committee they will be required to make a statement in writing explaining why they disagree. The detail of how this committee will operate in the Commons is currently included in draft Standing Orders (published on a House of Commons' Order Paper).

34 Further delegated powers contained in the Act are set out in the *commentary on provisions of the Act* section of these notes.

Devolution

35 The current devolution settlements were agreed after the UK became a member of what is now the EU and reflect that context. In areas where powers have been devolved, each of the current settlements specifies that the relevant devolved institution cannot legislate or otherwise act in a way that is incompatible with EU law.

36 The Act amends each of the devolution statutes (the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006) so as to remove the requirements that the devolved legislatures and the devolved administrations can only legislate or otherwise act in ways that are compatible with EU law. It then inserts powers into each of those Acts to apply, by regulations, a temporary 'freeze' on devolved legislative or executive competence in specified areas, so that in those areas the current parameters of devolved competence are maintained.

37 The use of the 'freezing' powers is a transitional arrangement while decisions are taken on where common policy approaches are or are not needed, with both the powers themselves and any regulations made under them being subject to sunset provisions. The powers will expire two years after exit day (although they can be repealed earlier under the power in section 12(9)) and the regulations themselves will expire five years after they come into force (if not revoked earlier).

38 In areas specified under the powers the devolved legislatures or administrations may only modify retained EU law to the extent that they had the competence to do so immediately before exit. This means that devolved institutions will still be able to act after exit in these areas as they could prior to exit. For instance, where they currently have discretion over how to implement an EU directive, after exit they will have the ability to modify retained EU law in ways that remain consistent with the underlying directive, rather than being constrained by their existing implementing legislation. By contrast, for example, devolved legislation which would amend or otherwise be incompatible with retained direct EU legislation (such as EU regulations) would, as now, remain outside competence where section 12 regulations are in force.

39 Where a UK minister is proposing to lay 'freezing' regulations before Parliament for consideration, the minister must first send a copy of the draft regulations to the relevant devolved administration, and inform the presiding officer of the devolved legislature that the draft has been provided. The devolved administration will then, in practice, be responsible for putting any question of consent to the devolved legislature. The draft regulations cannot be laid before the UK Parliament unless a decision on consent has been made by the devolved legislature, or a 40 day period has elapsed in which no decision has been made. The regulations will then be subject to the affirmative procedure before the UK Parliament.

40 The minister must also publish a written statement explaining the effect of the draft regulations before they are laid. If a decision is made to proceed in the absence of the devolved legislature's consent, the minister must publish a further statement explaining why the minister has invited Parliament to approve the regulations without that consent and the minister must provide to Parliament any explanation received from the relevant devolved administration that sets out the reasons for the devolved legislature not giving its consent.

41 The UK Government and the Welsh Government have agreed an Intergovernmental Agreement (IGA) and a Memorandum of Understanding (MoU), which set out, among other things, how the 'freezing' powers will be used. As part of the IGA the Government has committed that the UK Parliament will not normally be asked to approve 'freezing' regulations without the consent of the devolved legislatures.

42 This is linked to the ongoing work on designing and implementing common frameworks, which is led by the Chancellor of the Duchy of Lancaster and supported by the relevant territorial Secretary of State and began immediately following the Bill's introduction. The discussions are guided by the principles agreed at the Joint Ministerial Committee (EU negotiations) on 16 October.

43 The political commitments made by the UK Government to the Welsh Government in the IGA and the MoU also apply to the Scottish Government and to the Northern Ireland Executive, although they were not parties to the Agreement at the time this Act received Royal Assent.

44 The Act imposes a reporting duty on the UK Government in relation to the 'freezing' powers and regulations. At the end of every three months following the day on which the Act received Royal Assent, UK ministers must lay a report before both Houses of Parliament on progress toward removing the arrangements for 'freezing' devolved competence. The report must contain details of any steps towards replacing temporary 'freezing' regulations with ongoing frameworks; explain how the principles agreed at the Joint Ministerial Committee in October 2017 have been taken into account; specify any 'freezing' regulations made or 'freezing' powers repealed during the reporting period; provide the minister's assessment of progress required in order to revoke remaining 'freezing' regulations or repeal remaining 'freezing' powers; and contain any other information the minister considers to be appropriate.

45 The reporting duties are supported by an additional duty for UK ministers to consider, at the end of each three month reporting period, whether to repeal the 'freezing' powers (where they have not yet expired or been repealed) and whether to revoke any 'freezing' regulations (where they have not been revoked). In undertaking their consideration of whether to repeal the 'freezing' powers, ministers must have regard to the fact these arrangements are temporary and to any progress made towards the implementation of future frameworks.

46 The Act provides exceptions to the limit on modifying retained EU law in areas specified in regulations in order to allow the devolved administrations, where appropriate, to use the power to correct deficiencies in domestic legislation within devolved competence and the power to implement the withdrawal agreement. However, in areas that have been specified in 'freezing' regulations, those powers are not able to modify retained direct EU legislation, anything that is retained EU law by virtue of section 4, or confer functions that correspond to powers to make EU tertiary legislation.

47 The IGA and the MoU also set out how the UK Government and the Welsh Government will work together using their respective delegated powers in preparation for exit day. The UK Government has committed in the IGA that it will not normally use its delegated powers in areas of devolved competence without the agreement of the devolved administrations. Where the UK Government is proposing to amend retained direct EU law which relates to areas that are otherwise devolved, but which cannot be amended by the devolved administrations because 'freezing' regulations have been made, the UK Government has committed that it will first consult the relevant devolved administration(s).

Legal background

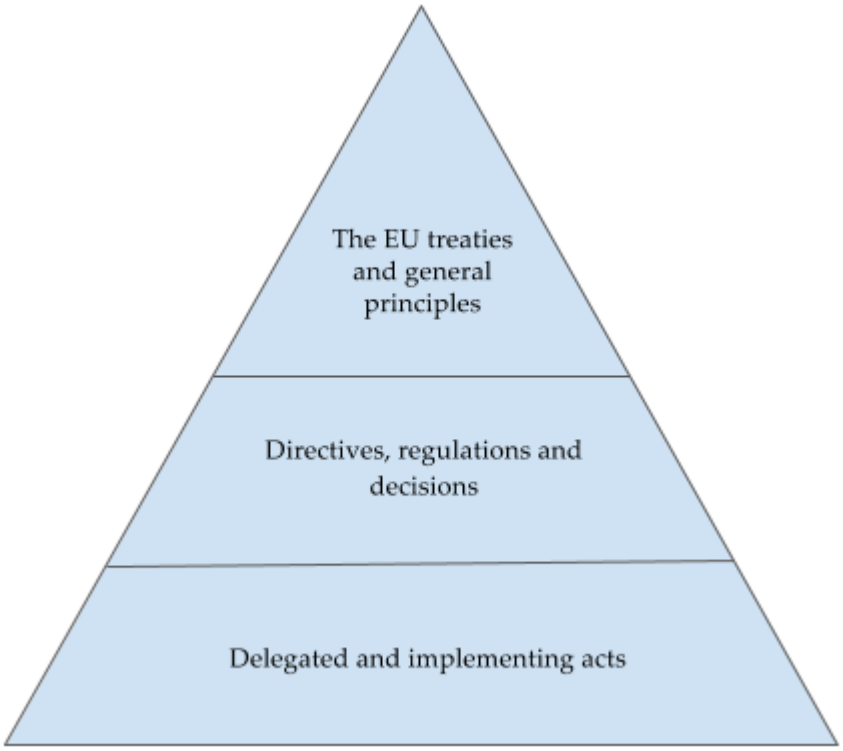
48 The approach in the Act to preserving EU law is to ensure that all EU laws which are directly applicable in the UK and all laws which have been made in the UK in order to implement our obligations as a member of the EU are converted into domestic law on the day the UK leaves the EU, subject to some limited exceptions. The paragraphs below set out the different aspects of EU law which operate currently in the UK. The *commentary on the provisions of the Act* set out where changes to this will occur.

EU laws and legislation

49 The EU treaties are the highest level of EU law. They set out where the EU is permitted to act, to what extent and how. They contain a mixture of procedural rules for how the EU operates and substantive rules, such as free movement rights for EU citizens. The EU treaties also set out subject areas in which the EU can act and make more specific laws. This is known as the EU's *competence*.

50 The two main treaties are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Some provisions of the TFEU in particular have been found to be sufficiently clear, precise and unconditional as to confer rights directly on individuals. These are referred to as 'directly applicable' or 'directly effective' treaty provisions. Not all treaty provisions confer directly effective rights: they may, for example, provide for the EU to adopt legislation to give effect to the treaties' provisions.

51 Below the treaties, the EU adopts directives, regulations and decisions using the powers, and following the procedures provided for, in the EU treaties.



52 EU regulations contain detailed legal rules. Regulations have the force of law in the UK and throughout the EU. It is therefore not necessary in principle for member states to create their own legal rules in order to ensure the regulation has the desired legal effect.[9]

53 EU directives set out a legal framework which member states have to follow but, subject to certain constraints set out in case law and the terms of the directive itself, leave discretion to the member state as to how to make it part of their law and administrative arrangements. So, once an EU directive has been agreed, all member states have an obligation to make domestic laws that give it effect, but they have a choice as to precisely how to do so. Some provisions in directives have however been found – in certain circumstances when a member state has not properly implemented a directive – to confer directly effective rights which may therefore be relied on in domestic law without further transposition.

[9] Examples of exceptions to this general rule include Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species and Regulation (EC) No 726/2004 laying down procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

54 The EU can also adopt binding decisions. Decisions may be addressed to a particular party or parties, which could be individuals (including companies) or member states. For example, the Commission has powers to issue decisions that are binding in order to enforce competition rules.[10] Where a decision is addressed to a member state, implementation in domestic law may be necessary to give effect to the decision.[11] Some decisions are generally and directly applicable and are available in domestic law without the need for specific implementing legislation.[12]

55 Below regulations, decisions and directives which are made using one of the EU legislative procedures, the EU also adopts measures in order to supplement and amend, or to implement, the rules set out in directives, regulations or decisions. Such measures are referred to respectively as 'delegated' and 'implementing' acts, and are sometimes referred to as 'tertiary' legislation.[13] For example, under Article 4 of Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species, the European Commission adopts implementing acts in order to list plant species which are assessed as invasive alien species for the purposes of the regulation.

56 The EU institutions can also adopt recommendations and opinions. These are not legally binding. However, recommendations can have legal effects, in that national courts are under a duty to take them into account in interpreting domestic legislation designed to implement them or where they are designed to supplement binding Union provisions.[14] There are various forms of 'soft law' which are not strictly legally binding but may have legal effects in the interpretation of legally binding instruments. They include resolutions, conclusions, communications, codes of conduct, guidelines and notices.

57 The TFEU distinguishes between legislative and non-legislative acts. This is a reference to the procedure used for the adoption of an act, rather than whether an act is legally binding or not. Legislative acts are defined in Article 289(3) TFEU as those adopted by legislative procedure,

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[10] See, for example, decisions adopted by the Commission in 2007 in relation to certain car manufacturers – http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0788&from=EN.

[11] For example the case of Hansa Fleisch V Landrat des Kreises Schleswig-Holstein (ECLI:EU:C:1992:423, C - 156/191) concerned provisions of a decision which had been implemented in national law.

[12] 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) ECA.

[13] EU tertiary legislation consists of delegated acts and implementing acts made under powers contained in EU legislation (such as regulations or directives). It can be used to supplement or amend certain elements of the parent legislation. It is also used where uniform conditions are needed to implement a legally binding act. Powers to make tertiary legislation are conferred on the Commission (and in certain limited cases the Council).

[14] See for example Grimaldi v Fonds de Maladies Professionnelles, Case 322/88, EU:C:1989:646, paragraph 18

that is the ordinary legislative procedure or the special legislative procedure. They may take the form of regulations, directives or decisions. Non-legislative acts are adopted other than by the ordinary or special legislative procedures and may also take the form of regulations, directives or decisions.

58 EU legislation of general application (such as EU regulations, or directives which are addressed to all member states) will come into force on the date stated within it; however, if the legislation does not state such a date, it will come into force on the twentieth day following its publication in the Official Journal. EU legislation can also provide for 'staggered application' where, although the instrument is in force, parts of it only apply from a specified date. Legislation of narrower application (such as decisions addressed to particular member states) will come into effect when they are notified to the relevant parties.

The general principles of EU law

59 The general principles are the fundamental legal principles governing the way in which the EU operates. They are a part of EU law which the EU institutions and member states must comply with. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality[15], non-retroactivity (i.e. that the retroactive effect of EU law is, in principle, prohibited), fundamental rights[16], equivalence[17] and effectiveness.[18]

60 UK laws that are within the scope of EU law and EU legislation (such as directives) that do not comply with the general principles can be challenged and disapplied. Administrative actions within the scope of EU law must also comply with the general principles.

The Charter of Fundamental Rights

61 The Charter of Fundamental Rights sets out various rights and principles. It includes 'EU fundamental rights', which have been recognised as a general principle of EU law by the CJEU. In 2009 the Charter was given the same legal status as the EU Treaties. The Charter sets out fifty rights and principles, many of which replicate guarantees in the European

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[15] Whether the proposed action exceeds what is appropriate and necessary to achieve its objective. See for example cases ABNA C-453/03, C-11/04, C-12/04 and C-194/04 EU:C:2005:741, paragraphs 76-85.

[16] See for example Hauer case 44/79, EU:C:1979:290 paragraph 15.

[17] Under this principle, Union law based claims must be treated in an equivalent way to claims based solely on domestic law. They cannot be treated less favourably. This principle is essentially a prohibition against discrimination.

[18] Under the principle of effectiveness, it must be neither practically impossible nor excessively difficult to enforce a Union law based claim. See Impact Case C-268/06, EU:C:2008:223, paragraphs 44-46 for an exposition of both the principle of equivalence and the principle of effectiveness.

Convention on Human Rights and other international treaties.

The principle of supremacy of EU law

62 A key principle of EU law is that EU law is supreme, which means that it has the status of a superior source of law within the EU's member states. Domestic laws must give way and be disapplied by domestic courts if they are found to be inconsistent with EU law. Sometimes referred to as the principle of the primacy of EU law, this core rule of EU law was established in the case law of the CJEU before the accession of the UK to the European Communities. This is made clear, for example, in the judgment of the CJEU in *Costa*[19]:

> *"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.*
>
> *By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."*

The interpretation of EU law

63 When interpreting EU legislation, the starting point, as with domestic law, is the meaning of the words used. If the legislation is clearly drafted it is usually not necessary to look beyond its wording. If the legislation is ambiguous other methods of interpretation are used. These include establishing the purpose of the legislation by looking at its recitals[20], looking at the legal basis of secondary legislation to understand its aim and content[21], or considering other

[19] Costa v ENEL [1964] ECR 585 (Case 6/64).

[20] EU legislation, unlike domestic legislation, includes recitals at the beginning that explain the reasons why the legislation is being made, but which are not themselves substantive provisions of law. For instance, in Ziolkowski and others v Land Berlin, Case C-424/10 and C-425/10, EU:C:2011:866, paragraphs 37, 42 and 43, the Court relied on recitals to ascertain the purpose of the Citizenship Directive, and the structured nature of the rights contained in it.

[21] See for example the case of BECTU Case C-173/99, paragraph 36-38, where the Court said that it was necessary to have regard to the context and purpose of the Working Time Directive in order to interpret the provision relating to annual leave entitlement. The Court had regard amongst other matters to the legal basis to conclude that the purpose of the Directive was to lay down minimum requirements to improve the living and working conditions of workers and that harmonisation was intended to guarantee better protection of the health and safety of workers.

language versions of the text.[22]

EU law in the UK legal system

64 The ECA is the main legislation which gives effect to EU law in the UK and is the legislation which makes EU law supreme over UK law. This reflects the dualist nature of the UK's constitutional model under which no special status is accorded to treaties, such as the EU treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU treaties and judgments of the EU courts provide that certain provisions of the treaties, legal instruments made under them, and judgments of the EU courts have direct application or effect in the domestic law of all of the member states (see above), such EU law is enforceable in the UK only because domestic legislation, and in particular the ECA, makes express provision for this. Thus, the ECA gives effect to the primacy of EU law and Parliament accepted this principle in approving the Act.

65 This has been recognised by the courts of the UK. As Lord Bridge noted in his judgment in *Factortame*[23]:

> *"Under the terms of the Act of 1972 it has always been clear that it was the duty of the United Kingdom court, when delivering final judgment, to override any rule of domestic law found to be in conflict with any directly enforceable rule of Community law."*

66 The ECA has been recognised by our courts as being a 'constitutional statute' that cannot be repealed by implication (see most recently, paragraph 67 of the Supreme Court's decision in *Miller*). Express provision is required to repeal it.

67 In addition to section 2(1) and section 2(2) mentioned in paragraph 18 above, the key provisions of the ECA are:

Section 1	Provides that certain treaties are 'EU treaties', which means that the later provisions of the Act (such as section 2(1) and (2)) apply to the rights and obligations in them. Such treaties include those establishing the EU itself, instruments amending those treaties (such as the Lisbon Treaty in 2007), and accession instruments. The Euratom Treaty is also a treaty which has effect in this way through the provisions of the ECA.
Section 2(3)	Provides that expenditure to meet an obligation to make payments to the EU or to member states under such a treaty can be charged on public funds.

[22] See for example X, Case 228/87, EU:C:1988:442, paragraph 14.
[23] R v. Secretary of State for Transport, ex p. Factortame (No. 2) [1991] 1 All ER 70

	Money received under such a treaty must be paid into public funds.
Section 2(4)	Section 2(4) contains two significant elements. Firstly, that the power under section 2(2) includes the power to make such provision as might be made by Act of Parliament. Secondly it also sets out that any enactment passed or to be passed is to be construed and has effect subject to the foregoing provisions of section 2, including section 2(1). This reflects the fact that EU law takes precedence over the laws of member states, as explained in paragraph 62 of these notes.
Section 3(1)	Provides that for the purposes of all UK legal proceedings, the meaning or effect of any of the EU Treaties, or the validity, meaning or effect of EU instruments are to be interpreted in accordance with the principles laid down by, and any relevant decisions of the CJEU.
Section 5	Provides for the charging, etc. of EU customs duty, which is also now the subject of a directly applicable EU Regulation (the Union Customs Code).
Section 6	Concerns the Common Agricultural Policy (CAP) developed under EU law to support the creation of a common market for agricultural products.
Part 2 of Schedule 1	Provides for several defined terms, which by virtue of the Interpretation Act 1978 apply, unless the contrary intention appears, to all domestic legislation, and not just to the ECA.
Paragraph 1A of Schedule 2[24]	Allows secondary legislation to be made that makes ambulatory cross-references to EU instruments - that is, a reference to that instrument as it may be amended from time to time in the future.

68 Since 1973 the UK has passed various other pieces of legislation to give effect to the UK's relationship with the EU. This included primary legislation amending the definition of EU treaties in section 1(2) of the ECA in the light of revisions to the EU Treaties (for example, the European Communities (Amendment) Act 2002 (regarding the Nice Treaty) and the European Union (Amendment) Act 2008) (regarding the Lisbon Treaty). Other primary legislation further amended the definition of EU treaties in section 1(2) of the ECA to include various Acts of Accession (for example, the European Union (Croatian Accession and Irish Protocol) Act 2013).

69 The UK is a member of the EEA by virtue of its membership of the EU. Therefore on exit day the UK ceases to participate in the EEA Agreement. The European Economic Area Act 1993

[24] Which came into effect on 8 January 2007.

(EEA Act) makes the EEA Agreement one of the "EU treaties" for the purposes of the ECA, which implements the EEA Agreement in UK legislation. Therefore the provisions of the ECA apply to the rights and obligations in the EEA Agreement, so long as the UK is a member of the EU. The EEA Agreement is also implemented domestically through the EEA Act 1993 and other secondary legislation.

70 The European Union Act 2011 required that a referendum be held on certain amendments of the TEU or the TFEU. In short, a referendum would be triggered by amendments if these would transfer power or competence from the UK to the EU. The European Union Act 2011 also provides that an Act of Parliament would be required before the UK could agree to a number of other specified decisions provided for in TEU and TFEU.

71 The European Union Act 2011 also contains provisions relating to the approval of the transitional protocol on Members of the European Parliament. As the UK withdraws from the EU, this and other legislation governing participation in European Parliamentary elections (namely the European Parliamentary Elections Act 2002 and the European Parliament (Representation) Act 2003) will be redundant and will be repealed, in line with the overall repeal of these Acts (see Schedule 9). Further provision for participation in European parliamentary elections (contained in other legal sources) will be repealed through secondary legislation made using the delegated powers in the Act.

72 The European Union Referendum Act 2015 is the legislation that made provision for holding a referendum in the UK and Gibraltar on whether the UK should remain a member of the EU.

73 The European Union (Notification of Withdrawal) Act 2017 gave the Prime Minister the legal authority to notify under Article 50 of the TEU.

Commentary on provisions of Act

Section 1: Repeal of the European Communities Act 1972

74 Section 1 repeals the ECA on exit day. As set out above, this Act is the principal piece of domestic legislation passed by the UK Parliament which gives effect to EU law in the UK and gives EU law supremacy over UK domestic law. The main effects of repealing the Act are to reflect the end of supremacy of EU law in domestic law and to remove the mechanism which enabled the flow of new EU law into UK law.

Section 2: Saving for EU-derived domestic legislation

75 Section 2 provides that existing domestic legislation which implements EU law obligations (EU-derived domestic legislation, also referred to in these notes as 'preserved legislation')

remains on the domestic statute book after the UK leaves the EU. Generally, secondary legislation lapses automatically when the primary legislation under which it is made (for instance, section 2(2) ECA) ceases to have effect, unless saved expressly). More widely, there would be doubt as to whether legislation which presupposes membership of the EU would work if the UK is not a member of the EU. The same applies for legislation which relates or refers to the EU or the EEA. This section makes it clear that these categories of legislation fall within retained EU law, so that the powers in the Act can be used to ensure that they still function properly after exit from the EU. See also section 20(6).

76 Subsection (1) provides that EU-derived domestic legislation will remain in place and continue to have effect on and after exit day, as it has effect before exit day. This will include legislation that has been passed or made but is not yet in force. This will also include amendments to EU-derived domestic legislation made under the ECA. This is in contrast to section 3 where it is only direct EU legislation that is "operative" immediately before exit day that is converted (see paragraph 87 of these notes).

77 Subsection (2) describes the types of legislation which will form part of this 'EU-derived domestic legislation', or preserved legislation:

- Subsection (2)(a) preserves secondary legislation which has been made under the dedicated power in section 2(2) of the ECA to implement the UK's obligations under EU law, and under paragraph 1A of Schedule 2 to the ECA. Paragraph 1A of Schedule 2 allows for ambulatory cross-references to EU instruments "as amended from time to time", which means the references to the EU instruments will automatically update when that EU instrument is amended. Paragraph 1 of Schedule 8 to the Act, however, makes further provision about such ambulatory references to EU legislation, so that modifications made by the EU on or after exit day do not form part of UK domestic law. Further effects of paragraph 1 are explained below.

- Subsection (2)(b) is designed to cover legislation which, while not made under section 2(2) of the ECA, was either specifically passed (e.g. by an Act of Parliament) or made under other secondary legislation making powers for the purpose of implementing EU obligations.[25] For example, domestic health and safety law is often made to implement EU obligations but is normally made under the powers in the Health and Safety at Work etc. Act 1974 rather than the ECA. The reference to 'operating' is designed to include legislation which was not specifically passed or made to

[25] Section 2(2)(a) of the ECA is used for the purposes of implementing (or enabling the implementation of) any EU obligation of the UK or enabling rights to be enjoyed under the EU treaties. Section 2(2)(b) is used for dealing with matters which arise out of or are related to those obligations or rights.

implement our EU obligations (for example, because the EU had not legislated in that area at the time the legislation was made) but has since become part of the way in which we demonstrate compliance with EU requirements.

- Subsection (2)(c) covers enactments which are connected to, but do not fall within, the definitions of domestic legislation preserved by subsection (2)(a) or (2)(b) or converted EU law. It is designed to ensure that provisions which are tied in some way to EU law, or to domestic law which implements EU law, can continue to operate properly post exit. For example, it will ensure that a provision which goes beyond the minimum needed to comply with requirements under EU law (a so-called 'gold-plated' provision) is not considered to be excluded from scope of 'EU derived domestic legislation'. This will allow such a provision to be amended by the powers in the Act, so that it still works effectively once the UK has left the EU.
- Subsection (2)(d) is a residual category designed to cover provisions which relate in some way to the EU or EEA. For example, if an Act of Parliament contained cross-references to a definition contained in an EU instrument, those provisions would fall within the definition and would be preserved.
- The definition of preserved legislation does not include the ECA itself. Amendments made under the ECA are preserved (see paragraph 76).

78 The category of domestic legislation that is preserved is widely drawn. However, under this section, domestic legislation is only preserved so far as it is operating for any of the purposes set out at subsections (2)(a) to (d). If it is not operating for those purposes, it will not fall within the ambit of this section. For example, where an Act of Parliament contains cross-references to an EU instrument this does not mean that the Act as a whole becomes EU-derived domestic legislation (and by extension retained EU law), rather that only those parts of the Act which operate for any of the purposes set out above do. In the same way, only those parts of domestic legislation which implement EU rules (or fall within the other limbs of the definition) form part of retained EU law (whichever power or powers the instrument was made under).

79 Any domestic legislation which falls within this section will be preserved subject to the effect of relevant existing case law (see section 6 for further details).

80 Subsection (3) provides that the preservation of retained EU legislation is subject to the exceptions in section 5 and Schedule 1 (see below).

Section 3: Incorporation of direct EU legislation

81 EU legislation does not form part of our legal system in the same way as domestic legislation -

it is given legal effect in the UK via section 2(1) of the ECA, which describes how such legislation is to have effect "in accordance with the EU Treaties". It is this which ensures that, for example, EU regulations are directly applicable and fully binding in all member states.[26]

82 This legal order is possible because the UK is a member of the EU and subject to the treaties. Upon exit, the UK will no longer be bound by the treaties and so EU legislation can no longer have effect in accordance with them. The Act ensures that, where appropriate, EU legislation continues to have effect in our legal system post-exit. Section 3 addresses this, by converting 'direct EU legislation' into domestic legislation at the point of exit.

83 Subsection (1) therefore provides for the conversion into domestic law of this direct EU legislation. Where legislation is converted under this section, it is the text of the legislation itself which will form part of domestic legislation. This will include the full text of any EU instrument (including its recitals[27]). Subsection (2) describes the types of legislation which form part of this 'direct EU legislation' (see also paragraph 23 of these notes).

84 Subsection (2)(a) converts EU regulations, certain EU decisions and EU tertiary legislation (now known as delegated and implementing acts), as they have effect immediately before exit day. These terms are defined at section 20. Section 20 and Schedule 6 provide that certain instruments are exempt EU instruments. These exemptions reflect that certain EU instruments did not apply to the UK because the UK did not adopt the Euro, or because the UK did not participate in certain aspects of the EU *acquis*, in the area of freedom, security and justice. EU decisions which are addressed only to a member state other than the UK are also not converted into domestic law. Additionally, so far as EU-derived domestic legislation under section 2 reproduces the effect of an EU regulation, decision or tertiary legislation, these instruments are not converted under this section. This is to avoid duplication on the statute book after exit.

85 Subsection (2)(b) and 2(c) ensure the conversion into domestic law of any relevant EU regulations, decisions and tertiary legislation as they apply to the EEA. As set out in the *legal background* of these notes, the European Economic Area Act 1993 makes the EEA Agreement one of the 'EU treaties' for the purposes of the ECA. Because of this, section 2(1) and (2) of the ECA applies to provisions of the EEA Agreement. In essence, direct EU legislation applies to the EEA by virtue of its inclusion in the Annexes to the EEA Agreement, with any adaptations

[26] See Article 288 TFEU.

[27] Recitals will continue to be interpreted as they were prior to the UK's exit from the EU. They will, as before, be capable of casting light on the interpretation to be given to a legal rule, but they will not themselves have the status of a legal rule. See Casa Fleischhandels, Case 215/88, paragraph 31. See also paragraph 63 and the discussion of section 6(3) of the Act at paragraph 111.

that are necessary for it to apply in the EEA context. This direct legislation, as adapted, then flows into UK domestic legislation as a result of section 2(1) of the ECA. Protocol 1 to the EEA Agreement contains horizontal adaptations which set out general interpretative provisions that apply throughout the Annexes to the Agreement. For instance, whenever EU acts refer to nationals of an EU member state, the references shall, for the purposes of the EEA Agreement, also be understood as references to nationals of EFTA states.

86 Subsection (2)(b) therefore converts any Annex to the EEA Agreement to the extent that it relates to those EU instruments which are converted by subsection (2)(a). The effect of this is to bring into domestic law EU regulations, decisions and tertiary legislation as they apply to, and are adapted for, the EEA context. As with the EU version of instruments, where domestic enactments saved under section 2 reproduce the effect of an EU instrument (as adapted for the EEA) those adapted instruments are not converted under this section. Again, this is to avoid duplication on the statute book after exit. Subsection 2(c) converts Protocol 1 to the EEA agreement as it was immediately before exit.

87 Under section 3, direct EU legislation is only converted and incorporated into domestic law "so far as operative immediately before exit day". Subsection (3) clarifies what this means. The default position in section 3(3)(c) is that direct EU legislation is operative if it is in force immediately before exit day. However, some EU legislation applies in a staggered way over time, and the Act ensures that, so far as a relevant instrument has entered into force and applies before exit day, it will be converted into domestic legislation. It is only if the provision is "stated to apply" from a later time (see section 3(3)(a)), and that time falls on or after exit day, that the provision would not fall within the ambit of the section. So, where there is a stated date of application, and this date falls after exit day, the provision is not converted. This means that, provided it is not expressly stated to apply from a date falling on or after exit day, EU legislation which is in force before exit day will be converted even if it has some effect which crystallises after exit day.

88 For example the EU fluorinated greenhouse gases regulation [No. 517/2014], the whole of which is in force and – by virtue of its Article 27 – is stated to apply from 1 January 2015, prohibits the supply of equipment containing certain substances from specified dates, several of which fall after exit day. These future prohibitions apply now, even though they do not take effect until after exit day. They are therefore converted under the Act and will take effect on the specified dates.

89 In the case of EU decisions which specify to whom it is addressed, if the date of notification to the addressee (for example the UK or a person in the UK) falls before exit day then that decision is converted (see section 3(3)(b)).

90 Subsection (4) clarifies that section 3 will only convert the English language version of existing direct EU legislation into domestic legislation. However, other language versions can continue to be considered as aids to interpretation by the courts.

91 Subsection (5) provides that the saving of direct EU legislation is subject to the exceptions in section 5 and Schedule 1.

Section 4: Saving for rights etc. under section 2(1) of the ECA

92 Section 4 ensures that any remaining EU rights and obligations which do not fall within sections 2 and 3 continue to be recognised and available in domestic law after exit. This includes, for example, directly effective rights contained within EU treaties.

93 Directly effective rights are those provisions of EU treaties which are sufficiently clear, precise and unconditional as to confer rights directly on individuals and which can be relied on in national law without the need for implementing measures. Where directly effective rights are retained under this section, it is the right which is retained, not the text of the Article itself.

94 For example, the Government considers that the following TFEU articles contain directly effective rights which would be converted into domestic law as a result of this section (this is an illustrative list and is not intended to be exhaustive).

Article 18	Non-discrimination on ground of nationality
Article 20 (except Article 20(2)(c))	Citizenship rights
Article 21(1)	Rights of movement and residence deriving from EU citizenship
Article 28	Establishes customs union, prohibition of customs duties, common external tariff
Article 30	Prohibition on customs duties
Article 34	Prohibition on quantitative restrictions on imports
Article 35	Prohibition on quantitative restrictions on exports
Article 36	Exception to quantitative restrictions
Article 37(1) and (2)	Prohibition on discrimination regarding the conditions under which goods are procured

Article 45(1), (2) and (3)	Free movement of workers
Article 49	Freedom of establishment
Article 56	Freedom to provide services
Article 57	Services
Article 63	Free movement of capital
Article 101(1)	Competition
Article 102	Abuse of a dominant position
Article 106(1) and (2)	Public undertakings
Article 107(1)	State aid
Article 108(3)	Commission consideration of plans regarding state aid
Article 110	Internal taxation
Article 112	Non-discrimination in indirect taxes
Article 157	Equal pay
Protocol 5 - Articles 13, 20(2), 23(1) and (4), 26, 27 (second and third sub-paragraphs), 28(4)	EIB
Protocol 7 - Article 21	Privileges and immunities of the EIB

95 In addition, directly effective rights may also arise under other treaties which are brought into domestic law by virtue of the ECA, such as the EEA Agreement and Euratom. These include international agreements made by the EU with third countries, as well as certain multilateral agreements to which either or both of the EU and UK are a party. For example, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children contains a number of directly effective provisions in relation to cross-border children cases, such as jurisdiction rules and rules for cross-border recognition and enforcement of

judgments affecting children. Section 4 also retains things other than rights, to the extent they have direct effect by virtue of section 2(1) ECA. For example, Article 346 of TFEU may be regarded as containing a restriction whose effect is retained by section 4; and Article 123 as imposing certain restrictions on what national central banks may do.

96 Any directly effective rights retained in domestic law as a result of this section would be subject to amendment or repeal via statutory instrument made under section 8. For example, where the resulting provision has no practical application, or makes provision for reciprocal arrangements or rights which no longer exist or are no longer appropriate once the UK has left the EU, statutory instruments can be brought forward to repeal or amend the provisions. This of itself does not affect whether the treaty right or other thing is retained under section 4 in the first place.

97 Subsection (2) sets out exceptions to the conversion under subsection (1). First, it provides that the section does not bring in any rights, powers etc. if they already form part of domestic law by virtue of section 3. Secondly, the section excludes directly effective rights arising under an EU directive (including as extended to the EEA by the EEA agreement). The CJEU has however held that in certain circumstances, when a member state has not properly implemented a directive, that directive can confer rights on individuals that the national courts must protect. Where rights arising under directly effective provisions of directives have been recognised by a UK or EU court or tribunal before exit day, rights of that kind will be retained in domestic law.

98 The reference in subsection (2)(b) to rights 'of a kind' is intended to ensure that rights are retained if they are of a similar kind to those so recognised. So rights arising under a particular directive that have been recognised by a court before exit day as having direct effect, could be relied upon by other individuals who are not parties to that case, in circumstances which the directive is intended to address. Rights arising from any directly effective provisions of directives that have not been recognised prior to exit day (to the extent these might exist) will not be converted by this section (subject to the transitional etc provision in Schedule 8, Paragraph 38).

99 Subsection (3) clarifies that this section is also subject to the exceptions in section 5 and Schedule 1.

Section 5: Exceptions to savings and incorporation

100 Section 5 sets out two exceptions to the saving and incorporation (referred to as preservation and conversion in these notes) of EU law provided for under sections 2, 3 and 4.

101 The first exception is the principle of supremacy of EU law (see paragraph 62 of these notes).

The principle of supremacy means that domestic law must give way if it is inconsistent with EU law. In the UK this can mean that a court must disapply an Act of Parliament, or a rule of the common law, or strike down UK secondary legislation even if the domestic law was made after the relevant EU law.

102 The effect of subsections (1) and (2) is that this principle will not apply in respect of the disapplication of legislation which is passed or made on or after exit day (an Act is passed when it receives Royal Assent). So, for example, if an Act of Parliament is passed on or after exit day which is inconsistent with EU law which is preserved or converted by the Act (for example, a retained EU regulation), that new Act of Parliament will take precedence.

103 Where, however, a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it. The principle would not, however, be relevant to provisions made by or under this Act or to other legislation which is made in preparation for the UK's exit from the EU.

104 The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.

105 Finally, subsection (3) sets out that the principle of supremacy can continue to apply to pre-exit law which is amended on or after exit day where that accords with the intention of the modifications.

106 The second exception is the Charter of Fundamental Rights. The Charter did not create new rights, but rather reaffirmed rights and principles which already existed in EU law. By converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Act. References to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights.

107 Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.

108 Subsection (6) provides that further limited exceptions to the preservation and conversion of

EU law have effect, as set out in Schedule 1.

Section 6: Interpretation of retained EU law

109 Section 6 sets out how retained EU law is to be read and interpreted on and after exit day.

110 Subsections (1) and (2) set out the relationship between the CJEU and domestic courts and tribunals after exit. These subsections provide that:

- decisions of the CJEU made after exit day will not be binding on domestic (UK) courts and tribunals;
- domestic courts cannot refer cases to the CJEU on or after exit day; and
- domestic courts and tribunals are able to have regard to actions of the EU taken post-exit, including CJEU decisions, where they are relevant to any matter the court or tribunal is considering . This ability is, however, limited by the other provisions in this section - so, for example, although a court may have regard to post-exit CJEU decisions, it cannot have regard to such an extent it considers itself bound by them (as this is ruled out by subsection (1)).

111 Subsection (3) provides that any question as to the meaning of unmodified retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and general principles. This means, for example, taking a purposive approach to interpretation where the meaning of the measure is unclear (i.e. considering the purpose of the law from looking at other relevant materials such as the treaty legal base for a measure, its recitals and preambles, and the *travaux preparatoires* (working papers) leading to the adoption of the measure). It also means applying an interpretation that renders the provision of EU law compatible with the treaties and general principles of EU law. Non-binding instruments, such as recommendations and opinions, would still be available to a court to assist with interpretation of retained EU law after exit.

112 UK courts will also be required to interpret retained EU law by reference to (among other things) the limits of EU competence, as it exists on the day the UK leaves the EU. Article 5(2) TEU confirms that the Union could only act within the limits of the competences conferred upon it by the member states. Competences not conferred upon the Union remain with the member states. For example, Article 4(2) TEU provides that, amongst other matters, the maintenance of law and order and safeguarding national security matters have not been conferred on the EU and remain with member states.[28]

113 Subsections (4) and (5) set out that, unlike other courts, the UK Supreme Court (UKSC) and

[28] See for example the case of Redmondis Case C-51/15 ECLI:EU:C:2016:985 at paragraphs 40 - 41.

the High Court of Justiciary (HCJ) are not bound by either retained general principles or retained CJEU case law. The HCJ is the highest criminal court in Scotland from which there is no right of further appeal to the UKSC, except in respect of certain matters set out in subsection (4)(b)(i). After exit day, retained CJEU case law will have the same binding, or precedent, status in domestic courts and tribunals as existing decisions of the UKSC or HCJ. This means that the UKSC (and, except where there is a further appeal to the UKSC, the HCJ) will be able to choose to depart from previous CJEU case law.

114 Subsection (2) is subject to the rest of section 6. This means that, although all courts can have regard to post-exit CJEU decisions, unless and until the UKSC or HCJ have departed from pre-exit CJEU case law, the latter remains binding on lower courts even if the CJEU has departed from it after exit day.

115 In choosing whether to depart, the UKSC and the HCJ are required to apply the same tests as they would when considering whether to depart from their own previous decisions. The test the UKSC applies is set out in an existing practice statement which sets out that it may depart from previous decisions 'where it appears right to do so'. The HCJ will apply its own tests in deciding whether or not to depart from inherited CJEU case law.

116 Subsection (6) sets out that retained EU law which has been amended on or after exit day can be determined in accordance with CJEU case law and the general principles where that accords with the intention of the amendments.

117 Subsection (7) provides definitions of the terminology relevant to this section.

Section 7: Status of retained EU law

118 Section 7 makes provision about the status of retained EU law.

119 Subsection (1) clarifies that EU-derived domestic legislation which is saved by section 2 will continue as legislation of the same type as it was before exit day.

120 Subsections (2) to (4) restrict the way in which retained EU law brought in by sections 3 and 4 can be amended by primary and subordinate legislation. In summary, it broadly provides that such law can be amended by:

- Acts or other primary legislation (such as an Act of the National Assembly for Wales);
- powers to make subordinate legislation which explicitly or implicitly provide that they may amend such law (which includes the powers in sections 8, 9 and 23(1) and (6) of this Act); and
- powers to make subordinate legislation which may amend such law by virtue of the

glosses in paragraphs 3 to 8 (existing powers) or 10 to 12 (future powers) of Schedule 8.

121 Subsection (5) signposts provisions about the status of retained EU law in other provisions of the Act.

122 Subsection (6) provides the following definitions, which divide retained direct EU legislation brought in by sections 3 and 4 into two categories for the purposes of amendability:

- "Retained direct minor EU legislation" is defined as any retained direct EU legislation which is not a retained direct principal EU legislation. This broadly covers EU tertiary legislation and EU decisions; and,
- "Retained direct principal EU legislation" is defined as any EU Regulation which is converted into UK law on or after exit day in accordance with section 3 and which is not EU tertiary legislation. This broadly covers EU Regulations (which are not also EU tertiary legislation). This definition also includes any Annex to the EEA agreement so far as it refers to or amends EU Regulations.

Section 8: Dealing with deficiencies arising from withdrawal

123 Section 8(1) gives ministers of the Crown a power to make secondary legislation to deal with deficiencies that would arise on exit in retained EU law. This includes the law which is preserved and converted by sections 2, 3 and 4 (i.e. both domestic law and directly applicable EU law). These problems, or deficiencies, must arise from the UK's withdrawal from the EU (which includes the consequence that the UK will cease to participate in the EEA Agreement).

124 The law is not deficient merely because a minister considers that EU law was flawed prior to exit. A minister is able to take action before exit in order to prevent the deficiency from arising. For the purposes of section 8(1), a failure of retained EU law is a type of deficiency: a *failure* means the law doesn't operate effectively whereas *deficiency* covers a wider range of cases where it does not function appropriately or sensibly.

125 Subsection (2) explains the sorts of deficiencies that the power can deal with. These include:

- provisions that have no practical application after the UK has left the EU;
- provisions on functions that are currently being carried out in the EU on the UK's behalf, for example by an EU agency;
- provisions on reciprocal arrangements or rights between the UK and other EU member states that are no longer in place or are no longer appropriate;
- any other arrangements or rights, including through EU treaties, that are no longer in place or no longer appropriate;

- EU references that are no longer appropriate.

126 Subsection (2) also provides that if a function or restriction is contained in a directive and has not been transposed into domestic law, and therefore is not retained by the Act, this can be a deficiency. For example, if the UK has implemented a directive but has not implemented the provisions in the directive which provide for the Commission or EU agency to carry out a function, the absence of this function in retained EU law could be a deficiency in the implementing legislation after the UK leaves the EU. The correcting power could be used to recreate the function.

127 Subsection (3) also provides that deficiencies not on the list but which are "of a similar kind" to those on the list in subsection (2) are within the scope of the correcting power. For example, section 8(2)(c)(ii) refers to the public authorities of EU member states; deficiencies related to public authorities of EEA-EFTA states will be of a similar kind to those related to public authorities of EU member states, so they benefit from the sweeper provision in subsection (3).

128 There are more detailed examples of possible deficiencies and corrections in the Government White Paper *Legislating for the United Kingdom's Withdrawal from the European Union* (pages 20 - 21) and a further example in the *policy background* section of these notes.

129 Subsection (3) also contains a delegated power for ministers of the Crown to provide for additional sorts of deficiencies. This power will be exercisable by statutory instrument subject to the affirmative procedure (see Schedule 7, paragraph 1(5)).

130 Subsection (4) provides that the retained EU law in the UK is not deficient just because the EU subsequently makes changes to the law in the EU after the UK has left, or planned changes come into effect after exit. The law is being preserved and converted as it was immediately before exit day. The EU might go on to make changes to its law but those subsequent changes and the consequent divergence between UK and EU law do not by themselves automatically make the UK law deficient.

131 Subsection (5) provides that secondary legislation made under the power in this section can do anything an Act of Parliament might to deal with deficiencies. This could include altering Acts of Parliament where appropriate and sub-delegating the power to a public authority where they are best placed to deal with the deficiencies. However, the power is subject to the restrictions set out in subsection (7). The power cannot be used to impose or increase taxation or fees, make retrospective provision, create a relevant criminal offence, establish a public authority, amend the Human Rights Act 1998 or any subordinate legislation made under it, amend the devolution Acts (except in certain specific and limited ways), or for the purposes of implementing the withdrawal agreement (separate provision is made for implementation of

the withdrawal agreement in section 9).

132 Subsection (6) provides, non-exhaustively, for what the secondary legislation made under this power can do. For example, it can transfer the functions of EU authorities to UK public authorities. These functions might include the ability to set rules or create standards, which are currently made by the EU as non-legislative acts (delegated and implementing acts). The power can be used to repeal, amend or replace parts of the retained law. There will be other uses of the power necessary to correct deficiencies. The power could be used to amend law which is not retained EU law where that is an appropriate way of dealing with a deficiency in retained EU law.

133 Subsection (8) makes clear that the temporary power in this section can only be used for up to two years after exit day, as it expires at that point. Paragraph 40 of Schedule 8 provides that it is the power and not the regulations which expires.

134 Subsection (9) provides that the meaning of deficiency can cover a deficiency that arises out of withdrawal taken together with the operation of, or interaction between, provisions of the Act or provisions made under the Act.

135 The parliamentary scrutiny procedures for the exercise of the power in subsection (1) are set out in Part 1 of Schedule 7.

Section 9: Implementing the withdrawal agreement

136 Section 9 gives ministers of the Crown a power to make secondary legislation to implement the withdrawal agreement (as defined in section 20(1)) agreed between the UK and the EU under Article 50(2) of the TEU (or that Article as applied by the Euratom Treaty).

137 Subsection (1) provides ministers with the power to make legislative changes which they consider appropriate for the purposes of implementing the withdrawal agreement. Regulations made using this power are restricted to implementing only those measures that should be in place for exit day and this power is not intended to be used for post-exit modifications. The use of the power is subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.

138 Subsection (2) provides that secondary legislation made under the power in this section is capable of doing anything an Act of Parliament can do, subject to the restrictions specified in subsection (3). As set out in Paragraph 15 of Schedule 7, regulations made under powers in the Act can modify retained EU law and the definition of "modify" in section 20 provides that it includes amending, repealing or revoking legislation.

139 Subsection (3) places a series of restrictions on the power stating what it cannot do. The power cannot be used to impose or increase taxation, make retrospective provision, create a relevant criminal offence, establish a public authority or amend, repeal or revoke the Human Rights Act 1998 (nor legislation made under it).

140 The power expires on exit day meaning that no regulations can be made after this time. Paragraph 40 of Schedule 8 provides that it is the power and not the regulations made under it which expires.

141 The scrutiny procedures for this power are set out in Part 2 of Schedule 7.

Section 10: North-South co-operation and the prevention of new border arrangements

142 This section requires ministers and any devolved authority, when exercising any of the powers in the Act, to act compatibly with the Northern Ireland Act 1998 and have due regard to the joint report of 8 December 2017 from the negotiators of the EU and the UK on progress during phase 1 of negotiations under Article 50 of the Treaty on EU.

143 The section also prevents the powers in sections 8, 9, 23(1) or 23(6) from being used to diminish any form of North-South cooperation (as provided for by the Belfast Agreement) or which would introduce any border arrangements (including physical infrastructure or checks and controls) on the land border between the United Kingdom and the Republic of Ireland, where such arrangements did not exist before exit day and are not in accordance with an agreement between the UK and the EU.

Section 11: Corresponding powers involving devolved authorities

144 This section provides that devolved authorities can exercise the power to deal with deficiencies arising from withdrawal and the power to implement the withdrawal agreement as defined in Schedule 2.

Section 12: Retaining EU restrictions in devolution legislation etc.

145 The Scotland Act 1998, Northern Ireland Act 1998, and Government of Wales Act 2006 currently require the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales respectively to legislate in a way that is compatible with EU law.

146 Subsections (1), (3) and (5) remove this requirement from each of these Acts for after exit day. Subsections (2), (4) and (6) instead provide that the devolved legislatures cannot legislate contrary to restrictions specified by a Minister of the Crown in regulations.

147 Subsection (2) inserts a new section 30A into the Scotland Act 1998:

- New subsection (1) of section 30A creates a power for a Minister of the Crown to specify by regulations areas in which the Scottish Parliament may not modify, or confer powers to modify, retained EU law. This power could also be used to revoke such regulations.
- New subsection (2) provides that any restriction applied using the power in subsection (1) does not affect the competence of the Scottish Parliament to make any provision that it could have made immediately before exit day.
- New subsection (3) requires that before regulations under subsection (1) can be put to the UK Parliament for approval, a decision on consent must have been made by the Scottish Parliament, or a 40 day period must have elapsed in which no consent decision has been made.
- New subsection (4) defines what constitutes a decision on consent. It sets out the different ways in which the Scottish Parliament could signify whether it agrees, or does not agree, to the laying of draft regulations before the UK Parliament.
- New subsection (5) requires that a Minister of the Crown proposing to lay draft regulations under subsection (1) must provide a copy to the Scottish Ministers and inform the Presiding Officer of the Scottish Parliament.
- New subsections (7) and (9) provide that the power in subsection (1) will expire two years after exit day and the regulations made under the power will expire five years after they come into force.
- New subsection (10) sets out that the provisions in subsections (3) to (8) do not apply (i.e. the consent process does not apply) for the purposes of revoking regulations made under the power in subsection (1).
- New subsection (11) provides that the 40 day period in subsection (3) begins when the draft regulations are provided to the Scottish Ministers and does not include any period where the Scottish Parliament is dissolved, or in recess for more than four days.

148 Subsections (4) and (6) insert equivalent provisions into the Government of Wales Act 2006 and the Northern Ireland Act 1998 respectively.

149 Subsection (9) provides a power for a Minister of the Crown by regulations to repeal any of the new powers that 'freeze' devolved competence in relation to retained EU law.

150 Subsections (10) and (11) place a duty on a Minister of the Crown to consider, every three months, whether to repeal the new powers or to revoke regulations made under those powers, and specify matters to which the minister must have regard in undertaking the

consideration of whether to exercise the power to repeal in subsection (9).

Section 13: Parliamentary approval of the outcome of negotiations with the European Union

151 Section 13 sets out Parliament's oversight of the outcome of the UK Government's negotiations with the EU under Article 50(2) of the TEU.

152 Subsection (1) provides that the withdrawal agreement may only be ratified if a number of conditions are met. These are as follows:

- a Minister of the Crown has laid before each House of Parliament a statement that political agreement has been reached, a copy of negotiated withdrawal agreement, and a copy of the framework for the future relationship (these terms are defined in subsections (15) and (16));
- the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons;
- a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and:
    - i. the House of Lords has debated the motion, or
    - ii. the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days (defined in subsection (16)) beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in subsection in paragraph (b) of this subsection (outlined in the bullet point above); and,
- an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

153 Subsection (2) provides that, so far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1)(b) (on a resolution to approve the negotiated withdrawal agreement and the framework for the future relationship) to be debated and voted on by the House of Commons before the European Parliament decides whether it consents to the withdrawal agreement being concluded on behalf of the EU in accordance with Article 50(2) of the TEU.

154 Subsection (3) sets out the circumstance in which subsection (4) applies, which is that the House of Commons decides not to pass the resolution mentioned in subsection (1)(b) (which

is the resolution to approve the negotiated withdrawal agreement and the framework for the future relationship).

155 Subsection (4) provides that a Minister of the Crown must, within the period of 21 days beginning with the day on which the House of Commons decides not to pass the resolution mentioned in subsection (1)(b), make a statement setting out how Her Majesty's Government proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the TEU.

156 Subsection (5) sets out the format of a statement made under subsection (4), saying that it must be made in writing and be published in such manner as the Minister making it considers appropriate.

157 Subsection (6) provides that a minister of the Crown must make arrangements for:

- a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in subsection (4) (on how the Government proposes to proceed in relation to negotiations), to be moved in that House by a Minister of the Crown within the period of seven Commons sitting days beginning with the day on which the statement is made; and
- a motion for the House of Lords to take note of the statement to be moved in that House by a Minister of the Crown within the period of seven Lords sitting days beginning with the day on which the statement is made.

158 Subsection (7) sets out the condition on which subsection (8) is predicated, which is that the Prime Minister makes a statement before the end of 21st January 2019 that no agreement in principle can be reached in negotiations under Article 50(2) of the TEU on the substance of:

- the arrangements for the UK's withdrawal from the EU; and
- the framework for the future relationship between the EU and the UK after withdrawal.

159 Subsection (8) provides that, if the condition in subsection (7) is met, a Minister of the Crown must, within the period of 14 days beginning with the day on which the statement mentioned in subsection (7) is made:

- make a statement setting out how Her Majesty's Government proposes to proceed; and
- make arrangements for:

    i. a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in paragraph (a) of this

subsection (on how the Government proposes to proceed), to be moved in the Commons by a Minister of the Crown within the period of 7 Commons sitting days beginning with the day on which the statement is made, and

ii. a motion for the House of Lords to take note of the statement mentioned in paragraph (a) of this subsection (on how the Government proposes to proceed) to be moved in the Lords by a Minister of the Crown within the period of 7 Lords sitting days beginning with the day on which the statement is made.

160 Subsection (9) sets out the format of a statement made under subsection (7) or (8)(a), providing that it must be made in writing and be published in such manner as the Minister making it considers appropriate.

161 Subsection (10) sets out the condition on which subsection (11) applies, which is if by the end of 21st January 2019 there is no agreement in principle in negotiations under Article 50(2) of the TEU on the substance of:

- the arrangements for the UK's withdrawal from the EU; and,
- the framework for the future relationship between the EU and the UK after withdrawal.

162 Subsection (11) provides that, if the condition in subsection (10) is met, a Minister of the Crown must, within the period of 5 days beginning with the end of 21st January 2019:

- make a statement setting out how Her Majesty's Government proposes to proceed; and,
- make arrangements for:

    i. a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in paragraph (a) of this subsection (on how the Government proposes to proceed), to be moved in the Commons by a Minister of the Crown within the period of 5 Commons sitting days beginning with the end of 21st January 2019, and

    ii. a motion for the House of Lords to take note of the statement mentioned in paragraph (a) of this subsection (on how the Government proposes to proceed) to be moved in the Lords by a Minister of the Crown within the period of 5 Lords sitting days beginning with the end of 21st January 2019.

163 Subsection (12) sets out the format of a statement made under subsection (11)(a), providing that it must be made in writing and be published in such manner as the Minister making it considers appropriate.

164 Subsection (13) sets out that the statements under subsections (4), (8)(a) or (11)(a) may be combined with one another, as can the corresponding Commons motions (6)(a), (8)(b)(i) and (11)(b)(i), and the corresponding Lords motions (6)(b), (8)(b)(ii) and (11)(b)(ii).

165 Subsection (14) sets out that this section does not affect the operation of Part 2 of the Constitutional Reform and Governance Act 2010 (ratification of treaties) in relation to the withdrawal agreement, which sets out the method by which international treaties are ratified in the UK.

166 Subsections (15) and (16) contain a number of definitions for terms used in this section.

Section 14: Financial provision

167 Subsection (1) gives effect to Schedule 4 which provides powers in connection with fees and charges.

168 Subsection (2) provides that ministers of the Crown, government departments and devolved authorities may incur expenditure in preparation for the making of statutory instruments under this Act (or under existing powers to make subordinate legislation as modified by or under the Act) from Royal Assent.

169 Subsections (3) and (4) deal with the further financial provision necessary as a result of the Act.

Section 15: Publication and rules of evidence

170 Section 15 gives effect to Schedule 5 on the publication of, and rules of evidence for, retained EU law and other relevant documents and instruments.

Section 16: Maintenance of environmental principles etc.

171 This section requires that, six months after Royal Assent of this Act, the Secretary of State must publish draft legislation which sets out a list of environmental principles (which are listed in subsection (2)). The draft legislation must place a duty on the Secretary of State to publish a policy statement in relation to the application and interpretation of those principles which, when circumstances to be set out under the legislation apply, ministers of the Crown must have regard to in making and developing policy.

172 The draft legislation must also define environmental law and make provision for the establishment of a public authority with functions for taking proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a minister of the Crown is not complying with that environmental law.

173 The duty on the Secretary of State to publish a draft Bill applies in relation to England, and to

reserved matters across the rest of the UK.

Section 17: Family unity for those seeking asylum or other protection in Europe

174 This section makes it an objective of the UK Government to seek to negotiate an agreement with the EU under which, subject to the terms of the agreement, unaccompanied asylum-seeking children in the EU will be able to join parents, grandparents, siblings, spouses and aunts and uncles lawfully resident in the UK, and vice versa.

175 This section does not in itself confer leave to enter or remain in the UK.

Section 18: Customs arrangement as part of the framework for the future relationship

176 This section requires a minister of the Crown to lay before each House of Parliament a written statement outlining the steps taken by the Government, in the negotiations to withdraw from the EU, to seek to negotiate an agreement to participate in a customs arrangement as part of the framework for the UK's future relationship with the EU.

177 The statement must be laid before both Houses of Parliament before the end of 31 October 2018.

Section 19: Future interaction with the law and agencies of the EU

178 Section 19 makes clear that nothing in this Act prevents the UK from replicating in domestic law any EU law made on or after exit day, or continuing to participate in, or have a formal relationship with, the agencies of the EU after exit day.

179 The Act does nothing to restrict the UK in relation to its future relationship with EU law or EU agencies. That means that this section does not affect how this Act or any other law operates.

Section 20: Interpretation

180 Subsection (1) defines certain terms used throughout the Act.

181 In the definition of enactment, paragraph (a) does not cross-refer to the definition of subordinate legislation in the Interpretation Act 1978 as the Act amends that definition to take account of retained direct EU legislation. Paragraph (h) provides that retained direct EU legislation is included within the definition of enactment save for in sections 2 (as retained direct EU legislation is not saved by section 2) and 7 (which makes reference to enactments before exit day).

182 Subsection (1) also defines exit day as 11.00pm on 29 March 2019. This is in line with the calculation of time in EU law, as well as the EU's negotiating directives, which indicate that the UK will leave the EU at 00.00 on 30 March Brussels time, corresponding to 11.00pm on 29

March UK time.

183 Subsection (2) makes further provision about the meaning of references to exit day. References in the Act to before, after or on exit day, or to beginning with exit day, are to be read as references to before, after or at 11.00pm on 29 March 2019 or (as the case may be) to beginning with 11.00pm on that day.

184 Subsections (3) and (4) provide that if the date and time at which the EU Treaties cease to apply to the UK is not the date and time specified in subsection (1), a minister may make regulations to amend the definition of exit day in this Act to ensure that they are aligned. A change in the date is possible under Article 50(3) of the TEU. Regulations made under subsection (4) would be subject to the affirmative procedure (see Schedule 7, paragraph 14).

185 Subsection (6) provides that references in the Act to things which continue to be domestic law, include things which would have continued to exist regardless of the saving in section 2. This makes clear that it is not necessary to consider whether an enactment might have been subject to implied repeal as a result of repeal of the ECA, in order to bring it within the ambit of section 2 and therefore the definition of "retained EU law".

186 Subsection (7) provides that references to the retained EU law brought in by section 4 include any modifications which may be made to that law from time to time.

187 Subsection (8) is self-explanatory.

188 Subsection (9) provides that any reference in the Act to the former Article 34(2)(c) of the TEU (which concerned decisions in the field of police and judicial cooperation in criminal matters) is a reference to that Article as it applied before the Lisbon Treaty. It is necessary to include these references in the Act to ensure that it accurately reflects the legal basis for these measures.

189 Subsection (10) provides that references in the Act to certain provisions of the TEU and TFEU include references to those provisions as they apply to the Euratom Treaty.

Section 21: Index of defined expressions

190 Section 21 lists various expressions used throughout the Act and the corresponding provision at which their meaning is located. For ease of reference, the index also includes pointers to certain provisions in the Interpretation Act 1978 (i.e. those which are restated by the Act); the Interpretation Act 1978 contains other definitions which are also relevant to the Act.

Section 22: Regulations

191 Section 22 gives effect to Schedule 7 on how the powers to make regulations in the Act are exercisable.

Section 23: Consequential and transitional provision

192 Subsection (1) allows a minister of the Crown to make regulations which are appropriate as a consequence of the Act.

193 Subsection (2) clarifies that consequential provision might include modifying (such as amending, repealing or revoking) both primary and secondary legislation.

194 Subsection (3) provides that ministers cannot make consequential provision which amends Acts (or secondary legislation made under those Acts) passed after the end of the parliamentary session in which this Act is passed.

195 Subsection (4) makes clear that the temporary power in subsection (1) can only be used for up to ten years after exit day as it expires at that point. See also paragraph 40 of Schedule 8 which makes clear that any such regulations do not expire.

196 Subsection (5) gives effect to parts 1 and 2 of Schedule 8, containing further consequential provision.

197 Subsection (6) allows a minister of the Crown to make transitional, transitory or saving provision by regulations. For example, this power could be used to save section 2(3) of the ECA (which authorises payments to the European Union) in respect of liabilities incurred whilst the UK was a member state. This could include outstanding transfers of customs duties and sugar levy payments collected by the UK on behalf of the EU.

198 Subsection (7) gives effect to parts 3 and 4 of Schedule 8, which contains transitional, transitory and saving provisions.

199 Subsection (8) gives effect to Schedule 9, which sets out repeals of certain enactments under the Act.

200 The parliamentary scrutiny procedures for the exercise of the powers in subsections (1) and (6) are set out in Part 2 of Schedule 7.

Section 24: Extent

201 This section provides that the Act extends to the legal jurisdictions of England and Wales, Scotland and Northern Ireland, except that any repeal or amendment of an enactment has the same extent as the enactment being amended or repealed.

202 The Act repeals some Acts that extend beyond the UK. The ECA has limited application to Gibraltar and the Crown Dependencies so its repeal in section 1 will also extend to them. The European Union Act 2011, the European Parliamentary Elections Act 2002 and the European Parliament (Representation) Act 2003 also extend to Gibraltar. These Acts will be repealed in

respect of Gibraltar as well as the UK, and the powers in sections 8 and 23 will be capable of making provision for Gibraltar in relation to European Parliamentary Elections and connected matters.

Section 25: Commencement and short title

203 Subsection (1) sets out the provisions of the Act that will commence on Royal Assent.

204 Subsections (2) and (3) set out the provisions of the Act that will, for certain purposes, commence on Royal Assent.

205 Subsection (4) sets out that the remaining provisions will come into force on the day or days appointed by regulations, and different days may be appointed for different purposes.

206 Subsection (5) establishes that the short title of the Act is the European Union (Withdrawal) Act 2018.

Schedule 1: Further provision about exceptions to savings and incorporation

207 This Schedule sets out some further exceptions to the preservation and conversion of EU law provided for under sections 2, 3 and 4. This Schedule should be read together with Part 4 of Schedule 8, which makes specific transitional, transitory and saving provision.

Challenges to validity of retained EU law

208 Paragraph 1 provides that, on or after exit day, no challenge can be brought in the UK courts to retained EU law on the basis that immediately before exit day, an EU instrument (for example, an EU regulation or decision) was invalid. This restriction is, however, subject to the exceptions in sub-paragraph (2). First, any decisions of the CJEU which pre-date exit day about the validity of the instrument will not be affected. Secondly, a Minister of the Crown has the power to describe in regulations types of challenge to validity which will be capable of being brought in domestic courts on or after exit day. Sub-paragraph (3) provides that any such regulations may enable challenges which, prior to exit, would have proceeded against an EU institution to proceed against a UK public authority following exit.

General principles of EU law

209 Paragraph 2 provides that only the EU general principles which have been recognised in CJEU cases decided before exit, will form part of domestic law after exit. These include, for example, some fundamental rights, non-retroactivity, and proportionality. More detail on the general principles is set out at paragraph 59 of these notes.

210 Paragraph 3 provides that there is no right of action in domestic law post-exit based on failure to comply with the EU general principles. Courts cannot disapply domestic laws post-exit on

the basis that they are incompatible with the EU general principles. Further, domestic courts will not be able to rule that a particular act was unlawful or quash any action taken on the basis that it was not compatible with the general principles. Courts will, however, be required under section 6 to interpret retained EU law in accordance with the retained general principles.

211 Paragraph 3 is subject to the transitional provisions set out under paragraph 39 of Schedule 8. Sub-paragraph (5) of that paragraph sets out that the restriction on challenges based on incompatibility with any of the general principles of EU law (set out in paragraph 3 of Schedule 1) does not apply in respect of certain proceedings begun within three years of exit day. In order to fall within the scope of this sub-paragraph, any challenge must relate to something that occurred before exit day and may be made against either administrative action or domestic legislation other than Acts of Parliament or the common law. Courts, tribunals and other public authorities will be able to disapply legislation or quash conduct in the event of a successful challenge.

212 The right of challenge cannot be used in relation to anything which gives effect to or enforces an Act of Parliament or the common law, or anything which could not have been different as a result of any Act of Parliament or rule of law. Paragraph 3 should also be read in conjunction with sub-paragraphs (1) and (2) of paragraph 39 of Schedule 8, which set out how questions arising under the devolution statutes about the validity of devolved legislation (including questions about the compatibility of devolved legislation with general principles) are affected by the amendments made by section 12 and Part 1 of Schedule 3 to the Act.

Rule in Francovich

213 In *Francovich*[29] the CJEU established that in some circumstances states have to compensate individuals for damage that they suffer as a result of the state's breach of EU law. EU law confers a right to reparation where the rule of law individuals, the breach is 'sufficiently serious', which means that the member state has manifestly and gravely disregarded the limits of its discretion, and where there is a direct causal link between the breach and the damage.

214 Paragraph 4 provides that the right to claim damages against the state for breaches of EU law (*Francovich* damages) will not be available after exit. This provision does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions.

[29] Cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357

215 Paragraph 4 is subject to the transitional provisions set out under paragraph 39 of Schedule 8. In particular, sub-paragraph (7) delays the prohibition in the Bill on seeking *Francovich* damages in domestic law for two years after exit day. This ensures that the Bill will not prevent individuals from continuing to seek such damages in domestic law where a breach of EU law occured before exit day.

Interpretation

216 Paragraph 5 clarifies that references in section 6 and this Schedule to the principle of supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to be read as references to that principle, Charter or rule as they stand at exit day, not as they will operate in EU law in the future.

Schedule 2: Corresponding powers involving devolved authorities

Part 1: Dealing with deficiencies arising from withdrawal

217 Part 1 provides powers for the devolved authorities (defined in section 20 as the Scottish Ministers, the Welsh Ministers and Northern Ireland departments) to deal with deficiencies arising from withdrawal.

Power to deal with deficiencies

218 Paragraph 1 provides that the power to deal with deficiencies arising from withdrawal can be used by devolved authorities acting alone, or by ministers of the Crown and devolved authorities acting jointly. The same restrictions on UK ministers' power in section 8 also apply to devolved authorities' power in this Part. Changes made using the power conferred on ministers of the Crown in section 8(3) will also apply to the devolved authorities' power in this Part.

No power to make provision outside devolved competence

219 Paragraph 2 provides that the power to deal with deficiencies arising from withdrawal cannot be used outside of devolved competence, as defined in paragraphs 8 to 11 of this Schedule, where exercised by devolved authorities acting alone.

No power to modify retained direct EU legislation or confer certain functions

220 Sub-paragraph (1) of paragraph 3 provides that, in areas specified in regulations under the new powers to limit Scottish legislative or executive competence in section 12 of and Schedule 3 to this Act, the Scottish Ministers, acting alone, cannot use the power to deal with deficiencies to modify direct retained EU legislation, modify retained EU law under section 4, or confer functions that correspond to functions to make EU tertiary legislation.

221 Sub-paragraphs (2) and (3) make corresponding provision for the Welsh Ministers and Northern Ireland departments respectively.

222 Sub-paragraph (4) prohibits the devolved authorities, when acting alone, from using the power in ways that would create inconsistencies with any modifications to retained direct EU legislation or retained EU law under section 4 which the UK Government has made under the Act, that could not have been made by the devolved authority by virtue of the restrictions in sub-paragraphs (1) to (3). For example, where the UK Government has modified an EU regulation, in way which the devolved authority could not, and a devolved authority is correcting domestic legislation which sets out enforcement provisions for that EU regulation, the domestic legislation will need to be corrected in a way that is consistent with the modified EU regulation.

Requirement for consultation in certain circumstances

223 Paragraph 4 sets out the requirement for the devolved authorities to consult the UK Government prior to using the power in certain circumstances where acting alone. These circumstances are where either the legislation is being commenced prior to exit day, or where the legislation relates to the unwinding of reciprocal arrangements.

Requirement for consent where it would otherwise be required

224 Paragraph 5 sets out that if a devolved authority is making a provision using the power to deal with deficiencies arising from withdrawal that would require consent if it were a provision in legislation of the relevant devolved legislature or where the devolved administration would normally require consent to make such a provision via secondary legislation, then that consent will still be required. This will not apply if the devolved authority already has power to make such provision using secondary legislation without needing the consent of the minister of the Crown.

Requirement for joint exercise where it would otherwise be required

225 Paragraph 6 sets out that where a devolved authority would normally only be able to make legislation jointly with the UK Government, the devolved authority will still have to make such legislation jointly when exercising the power to deal with deficiencies.

Requirement for consultation where it would otherwise be required

226 Paragraph 7 requires consultation with the UK Government on legislation made by a devolved authority in the exercise of the power to deal with deficiencies, where the devolved authority would normally be required to consult with the UK Government when making those kind of changes in legislation.

Meaning of devolved competence: Part 1

227 Paragraphs 8 to 11 clarify the extent of devolved competence in relation to the exercise of the power to deal with deficiencies arising from withdrawal.

228 Paragraph 8 relates to the competence of the Scottish Ministers. Sub-paragraph (1)(a) relates to legislative competence, and sets out that the Scottish Ministers may exercise the power to deal with deficiencies where the Scottish Parliament has legislative competence. The definition of 'legislative competence' for the purposes of exercising this power disapplies the normal restriction on the Scottish Parliament's competence which prevents the Scottish Parliament from legislating in a way that is incompatible with EU law. This disapplication is necessary to enable the Scottish Ministers to make all necessary regulations under this power to correct deficiencies in devolved areas. This is because correcting deficiencies in retained EU law will inevitably require some changes that would be incompatible with EU law and therefore would be outside the normal legislative competence of the Scottish Parliament.

229 Sub-paragraph (2) relates to those secondary legislation making powers which are not within legislative competence but are within executive competence of the Scottish Ministers (these would include, for example, secondary legislation making functions transferred to the Scottish Ministers under section 63 of the Scotland Act 1998). This sets out that the Scottish Ministers may act to correct secondary legislation which has been made under their executive competence, even where those corrections would not be within the legislative competence as described in sub-paragraph (1). This is subject to certain restrictions described in sub-paragraph (2) around application, extent and subject matter of those corrections.

230 Paragraph 9 relates to the competence of the Welsh Ministers and makes the same provision for the Welsh Ministers as for the Scottish Ministers as set out in paragraph 8. The Welsh Ministers will be able to exercise the power to deal with deficiencies in areas within the National Assembly for Wales' legislative competence (disapplying the normal restrictions preventing the National Assembly for Wales from legislating in a way that is incompatible with EU law) and to correct deficiencies in legislation which has been made under their executive competence.

231 Paragraph 10 relates to the competence of Northern Ireland departments. Sub-paragraph (1)(a) deals with transferred matters, providing that Northern Ireland devolved authorities may make regulations using the power to deal with deficiencies in any areas which would be within the Northern Ireland Assembly's legislative competence, and which would not require consent of the Secretary of State for Northern Ireland. Sub-paragraph (1)(b) deals with reserved matters, providing that where Northern Ireland legislation has previously been made in relation to reserved matters, Northern Ireland departments and ministers will be able

to use the power to deal with deficiencies to amend this legislation.

232 In both sub-paragraphs (1)(a) and (1)(b) the existing restriction on legislative competence that would make it outside of legislative competence to act in a way that is incompatible with EU law is disapplied in defining legislative competence for the purpose of this power. Sub-paragraph (2) makes the same provision as for Scottish and Welsh ministers so that Northern Ireland departments can exercise the power to deal with deficiencies to correct legislation which has been made under their executive competence.

Part 2: Implementing the withdrawal agreement

233 Part 2 provides powers for devolved authorities to implement the withdrawal agreement.

Power to implement withdrawal agreement

234 Paragraph 12 provides that the power to implement the withdrawal agreement can be used by devolved authorities, or by ministers of the Crown and devolved authorities acting jointly. It sets out that the same restrictions on UK ministers' power in section 9, other than the requirement for the prior enactment of primary legislation in order to use the power, also apply to devolved authorities' power under this Part, along with an additional restriction preventing the power from modifying secondary legislation made under the Act (except where that legislation was made by the devolved authority or the power is being exercised jointly with a minister of the Crown).

No power to make provision outside devolved competence

235 Paragraph 13 provides that the power to implement the withdrawal agreement cannot be used outside of devolved competence, as defined in paragraphs 17 to 19 of this Schedule, where exercised by devolved authorities acting alone.

No power to modify retained direct EU legislation etc.

236 Sub-paragraph (1) of paragraph 14 provides that, in areas specified in regulations under the new powers to limit Scottish legislative or executive competence in section 12 of and Schedule 3 to this Act, the Scottish Ministers, acting alone, cannot use the power to implement the Withdrawal Agreement to amend direct retained EU legislation, amend retained EU law under section 4, or confer functions that correspond to functions to make EU tertiary legislation.

237 Sub-paragraph (2) and (3) make corresponding provision for the Welsh Ministers and Northern Ireland departments respectively.

238 Sub-paragraph (4) prohibits the devolved authorities, where acting alone, from using the

withdrawal agreement power in ways that would create inconsistencies with any modifications to retained direct EU legislation or retained EU law under section 4 which the UK Government has made under the Act, that could not have been made by the devolved authority by virtue of the restrictions in sub-paragraphs (1) to (3).

Requirement for consultation in certain circumstances

239 Paragraph 15 sets out the requirement for the devolved authorities to consult the UK Government prior to using the power to make certain provision relating to a quota.

Certain requirements for consent, joint exercise or consultation

240 Paragraph 16 applies the rules set out in paragraphs 5 to 7 of Schedule 2 to the use of the withdrawal agreement power so that, where a devolved authority would normally only be able to make a particular provision in legislation with the UK Government's consent, after consulting with the UK Government or jointly with the UK Government, the devolved authority will still have to obtain consent, consult or make such legislation jointly (as applicable) when exercising the withdrawal agreement power to make such a provision.

Meaning of devolved competence: Part 2

241 Paragraphs 17 to 19 define devolved competence for the purposes of exercising the power.

242 Paragraph 17 provides that something is within the devolved competence of the Scottish Ministers for the purposes of this power if it is either within the legislative competence of the Scottish Parliament (if the EU law restriction on legislative competence were disapplied) or is otherwise an area in which the Scottish Ministers could have made the relevant provision by secondary legislation (if there were not a general restriction on making secondary legislation incompatible with EU law). The disapplication of the EU law restrictions for the purposes of defining the Scottish Ministers' ability to use this power is necessary to enable the Scottish Ministers to make all necessary changes under this power in devolved areas. This is because any changes needed under this power are likely to involve a change that would be incompatible with EU law prior to exit.

243 Paragraph 18 makes the same provision for the devolved competence of the Welsh Ministers as for the Scottish Ministers. Welsh ministers have competence if something is within the legislative competence of the National Assembly for Wales or is otherwise an area in which the Welsh Ministers could make the relevant provision by secondary legislation (disapplying the normal restrictions that would otherwise prevent the the National Assembly for Wales or the Welsh Ministers from legislating incompatibly with EU law).

244 Paragraph 19 makes provision for the competence of a Northern Ireland department. Sub-

paragraph (a) deals with transferred matters, providing that Northern Ireland departments may make regulations in any areas which would be within the Assembly's legislative competence and that would not require the consent of the Secretary of State. Sub-paragraph (b) deals with reserved matters, providing that where the Northern Ireland legislation has previously been made in relation to reserved matters that legislation can be amended using the international obligations power. Sub-paragraph (c) provides that Northern Ireland departments can also use the power in areas where they would otherwise have been able to make secondary legislation. As with Scotland and Wales, the normal restrictions on making legislation which is incompatible with EU law are disapplied for the purposes of defining devolved competence to use this power.

Schedule 3: Further amendments of devolution legislation and reporting requirement

Part 1: Corresponding provision in relation to executive competence

245 Part 1 makes changes to devolved executive competence, which correspond to the changes made to legislative competence by section 12.

Scotland Act 1998

246 Paragraph 1 makes provision in relation to the existing limit in section 57(2) Scotland Act 1998 on a member of the Scottish Government making secondary legislation or otherwise acting incompatibly with EU law. Sub-paragraph (a) amends this to remove the limit on legislating or acting incompatibly with EU law.

247 Sub-paragraph (b) then inserts provisions into the Scotland Act 1998 to confer a new power. New subsections 57(4) and (5) of that Act provide that that a Minister of the Crown may specify by regulations areas in which a member of the Scottish Government may not modify, by subordinate legislation, retained EU law except where the modification would either be within the Scottish Parliament's legislative competence, or is made in exercise of the powers in Schedule 2 or 4 to this Act.

248 This power is subject to the same conditions (set out in new subsections 57(6) to 57(15) of the Scotland Act 1998) as the corresponding power relating to the Scottish Parliament's legislative competence in subsection 12(2) of this Act, including the requirement to send draft regulations to the relevant devolved administration, the provision relating to devolved 'consent decisions' and the sunset provisions.

Government of Wales Act 2006, Northern Ireland Act 1998

249 Paragraphs 2 and 3 make equivalent provision in respect of the Government of Wales Act

2006 and the Northern Ireland Act 1998 to give effect to the new power to temporarily freeze executive competence in specified areas.

Part 2: Reports in connection with retained EU law restrictions

250 Part 2 imposes reporting duties on ministers of the Crown regarding the powers conferred by section 12 and Schedule 3 and matters related to common UK frameworks.

251 Paragraph 4 requires a Minister of the Crown to lay a report before Parliament every three months from Royal Assent of the Act on:

- steps taken towards replacing the powers to limit devolved competence in relation to retained EU law, and any regulations made under them, with future arrangements;
- how the principles agreed by the UK, Scottish, and Welsh Governments (including at the Joint Ministerial Committee on EU Negotiations in October 2017) have been taken into account;
- regulations made under the powers to limit devolved competence in relation to retained EU law, or regulations made to repeal those powers;
- progress that needs to be made before the remaining powers and regulations can be repealed or revoked; and
- any other information that the Minister considers to be appropriate to report.

252 Sub-paragraph (4) requires that a copy of the report must be provided to each of the devolved administrations.

253 Sub-paragraph (5) provides that this duty ends when no regulations under section 12 and Part 1 of Schedule 3 remain in force and the powers have been repealed.

Part: 3 Other amendments of devolution legislation

254 Part 3 (paragraphs 6 to 62) contains a series of amendments to the devolution legislation resulting from the UK leaving the EU. Specifically, it amends the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006.

255 The amendments deal with a variety of issues and how these need to be reflected in the devolution legislation, including the repeal of the ECA by section 1, the preservation and conversion of existing EU law into UK domestic law on and after exit day by sections 2, 3 and 4 and the approach to legislative and executive competence taken by section 12 and Part 1 of Schedule 3. For example, the specific mechanism under section 106(7) Scotland Act 1998 for enforcement of certain EU obligations has been removed on the basis that EU obligations forming part of retained EU law will continue to bind devolved ministers as a matter of

domestic law. Provision is also made in respect of the cessation of European Parliamentary elections in the UK, the protection of this Act (but not secondary legislation made under the Act) from modification, and to deal with other deficiencies arising in the devolution legislation which will result from the UK leaving the EU.

256 Paragraphs 25, 43 and 58 amend the Scotland Act 1998 , the Government of Wales 2006, and the Northern Ireland Act 1998 respectively to insert duties for a Minister of the Crown to make certain statements when exercising the powers inserted into those Acts by section 12 of, and Part 1 of Schedule 3 to, this Act. They provide that a Minister of the Crown must publish a written statement explaining the effect of any instrument made under these powers before it can be laid before Parliament. Additionally, if the relevant devolved legislature has not given its consent to the draft, a Minister of the Crown must publish a written statement explaining why the draft is to be laid in the absence of consent and must provide to Parliament any statement from the relevant devolved administration explaining, in their opinion, why the legislature has not provided its consent, before the draft can be laid before Parliament. .

257 Not all changes to the devolution legislation have been included in the Act. For example, changes to the list of reserved matters in Part 2 of Schedule 5 to the Scotland Act 1998 and in Schedule 7A to the Government of Wales Act 2006 to correct deficiencies arising as a consequence of EU exit are, with the exception on an amendment to the reservation of technical standards in both Acts, not included because these can be made using the existing powers in section 30 of the Scotland and section 109 of the Government of Wales Act and further discussion with the devolved administrations is needed to agree these changes.

258 Paragraphs 22, 47 and 61 amend the reservation of '*technical standards and requirements in relation to products in pursuance of an obligation under EU law*' in section C8 of Schedule 3 to Scotland Act 1998, section C7 of Schedule 7A to the Government of Wales Act 2006 (as amended by the Wales Act 2017) and paragraph 38 of Schedule 3 to the Northern Ireland Act respectively. These amendments ensure that the reservation will continue to operate correctly when EU law ceases to apply in the UK and in doing so preserve the current scope of the reservation. Those standards subject to the current reservations will continue to be a reserved matter, including as they may be modified from time to time, but technical standards that do not relate to the reservation (or other reservations in the settlement) will remain within devolved competence. This includes the exemptions to the reservations listed in the devolution statutes, for example food, and agricultural and horticultural produce.

Schedule 4: Powers in connection with fees and charges

Part 1: Charging in connection with certain new functions

259 Part 1 of Schedule 4 gives ministers of the Crown and devolved authorities a power to make

secondary legislation to enable public authorities to charge fees and other charges, such as levies.

Power to provide for fees or charges

260 Paragraph 1 provides that where a public authority has a new function under the powers in sections 8 or 9 or the equivalent powers in Schedule 2, an appropriate authority may make regulations enabling the public authority to charge fees or other charges, such as levies, in connection with carrying out that function. Sub-paragraph (3) mentions some of the things that this power may do. In particular it may set the amounts of fees or charges or say how they are to be determined, for example by a formula. It may also provide for how the money is collected and spent. Sub-paragraph (3)(c) provides that regulations made under this power can sub-delegate this power to the public authority that has the function. The parliamentary scrutiny procedures for the exercise of the power are set out in Part 2 of Schedule 7 .

Meaning of "appropriate authority"

261 Paragraph 2 sets out the meaning of 'appropriate authority' for the use of this power. This includes ministers of the Crown. It also includes devolved authorities in circumstances where the function has been conferred by them, the function has been conferred on them, or the provision to confer the function would have been within the competence of the relevant devolved legislature (ignoring the requirements not to act incompatibly with EU law or any restrictions on modifying retained EU law).

Requirements for consent

262 Paragraph 3 provides that a Minister of the Crown can only set fees or charges under this power with the consent of the Treasury. A devolved authority can only set fees or charges for functions of a Minister of the Crown or a body with cross-border functions with the consent of a Minister of the Crown.

Minister of the Crown power in relation to devolved authorities

263 Paragraph 4 gives a Minister of the Crown the power to establish additional circumstances where a devolved authority can use the power and to disapply consent requirements for a devolved authority to use the power where it is appropriate to do so.

Time limit for making certain provision

264 Paragraph 5(1) makes clear that the temporary power in Part 1 can only be used for up to two years after exit day as it expires at that point. Paragraph 5(2) makes clear that, after the powers cease to apply, they can be used to revoke provisions made under the power and to alter them

in limited ways such as the amounts of the fees or charges or how they are to be determined. Paragraph 5(3) makes clear that it is the power and not the regulations which expires.

Relationship to other powers

265 Paragraph 6 clarifies that this power does not affect any other power in the Act or elsewhere that might make provision for fees or other charges.

Part 2: Modifying pre-exit fees or charges

Power to modify pre-exit fees or charges

266 Paragraph 7 gives a power to modify secondary legislation about fees or other charges which was created pre-exit using powers in the ECA or section 56 of the Finance Act 1973. Pre-exit, section 56 of the Finance Act 1973 provided a specific power for fees or other charges, such as levies, connected to EU obligations.

267 Sub-paragraph (2) explains what may be done with the power, for example altering the amount of the fees or charges.

Meaning of "appropriate authority"

268 Paragraph 8 explains who may use the power; the devolved authorities will be able to use this power insofar as they could have used the ECA power or the Finance Act 1973 power prior to exit day.

Restriction on exercise of power and requirement for consent

269 This power is modelled on these two pre-exit powers. Paragraph 9 sets out that where it is used to modify legislation created through the ECA, it cannot impose or increase taxation, in line with the constraint at paragraph 1(1)(a) of Schedule 2 to the ECA. Paragraph 10 sets out that a Minister of the Crown needs Treasury consent to make certain kinds of provision, in line with section 56 of the Finance Act.

Relationship to other powers

270 Paragraph 11 clarifies that this power does not affect the other power in the Act or elsewhere that might make provision for fees or charges.

Schedule 5: Publication and rules of evidence

Part 1: Publication of retained direct EU legislation etc.

Things that must or may be published

271 To ensure that retained EU law is accessible after exit day, the Act confers various duties and

powers on the Queen's Printer. The Queen's Printer is an office within The National Archives, responsible for the publication of legislation.

272 Sub-paragraph (1) of paragraph 1 therefore provides that the Queen's Printer is required to make arrangements to ensure each 'relevant instrument' which has been published before exit day, and 'relevant international agreements', are published in the UK.

273 Sub-paragraph (2) defines which instruments and international agreements are classified as 'relevant'. This covers the EU instruments which could (subject to the application of the Act) have effect in our law after exit day as retained direct EU legislation, and four of the main EU treaties. It is important to note that something being published by the Queen's Printer does not mean it is part of our law after exit day (though see below and paragraph 2 of Schedule 5 for exceptions from the duty to publish).

274 Sub-paragraph (3) allows, but does not require, the Queen's Printer to publish any decision of or expression of opinion by the European Court, and any other document published by an EU entity.

275 Sub-paragraph (4) provides that the Queen's Printer may publish anything else that the Queen's Printer considers useful in relation to the other documents published under this section, for example 'as amended' versions of retained direct EU legislation which reflect changes made using the deficiencies powers in the Act, or guidance documents.

276 Sub-paragraph (5) provides that the Queen's Printer is not required to publish anything which has been repealed before exit day, or to publish any modifications made on or after exit day.

Exceptions from duty to publish

277 Paragraph 2 provides that the Queen's Printer does not have to publish instruments (including categories or specific parts of instruments) in respect of which they have received a direction from a Minister of the Crown stating that, in the opinion of that Minister, the instrument has not become (or will not become on exit day) retained direct EU legislation. Any direction must be published.

Part 2: Rules of evidence

Questions as to meaning of EU instruments

278 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 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 retained by the Act will become domestic law, and so fall to be interpreted by judges in this country.

279 Some EU law will not become part of domestic law, but may still be relevant to the interpretation of the retained EU law (for example, a court may have to consider the meaning of an EU directive when interpreting domestic regulations made to implement that directive). Paragraph 3 therefore makes clear that, to the extent that determining the meaning or effect of EU law is necessary for a court to interpret retained EU 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. Paragraph 3 does not make provision as to the consideration of EU law for purposes other than the interpretation of retained EU law. This will be a matter for the courts.

Power to make provision about judicial notice and admissibility

280 Matters which are 'judicially noticed' are deemed to already be within the knowledge of the court, and so are not required to be 'proved' to the court. For example, public Acts of Parliament and the EU Treaties are judicially noticed.[30] Paragraph 4 provides that a Minister of the Crown 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.

281 Sub-paragraph (2) of paragraph 4 provides that regulations made under sub-paragraph (1) may require that certain conditions must be fulfilled (such as conditions regarding certification) before any evidential rules are satisfied.

282 Sub-paragraphs (3) and (4) enable regulations providing for evidential rules to modify legislation which is passed or made before the end of the Session in which this Act is passed. This is to ensure that any new rules can properly sit alongside existing evidential provisions in other enactments.

283 Sub-paragraph (5) defines what the 'relevant matters' are in respect of which regulations can be made under this paragraph, being retained EU law, EU law, the EEA Agreement, or anything specified in the regulations which relates to those matters.

284 Under paragraph 13 of Schedule 7, a statutory instrument containing regulations made under this power will be subject to the affirmative procedure.

Schedule 6: Instruments which are exempt EU instruments

285 Schedule 6 sets out which EU instruments are to be regarded as 'exempt' and therefore

[30] See section 3 of the Interpretation Act 1978 and section 3(2) of the European Communities Act 1972.

excluded under section 3 from the saving and incorporation of direct EU legislation prior to exit day.

EU decisions

286 Paragraph 1 provides that "exempt EU instruments" includes a number of categories of EU decision which do not apply to the UK. These include:

- existing EU decisions which do not apply to the UK under relevant Protocols; and
- decisions relating to common foreign and security policy under Title V of the pre-Lisbon TEU and under the current Title V of the TEU (post-Lisbon).

EU regulations

287 Paragraph 2 provides that "exempt EU instruments" includes those EU regulations which do not apply under relevant Protocols, as detailed in paragraph 4.

EU tertiary legislation

288 Paragraph 3 provides that "exempt EU instruments" includes EU tertiary legislation which has been made under an exempt EU decision, regulation or a directive which does not apply to the UK under relevant Protocols, as detailed in paragraph 4.

Interpretation

289 Paragraph 4 defines the "relevant Protocols" with reference to a list.

Schedule 7: Regulations

Part 1: Scrutiny of power to deal with deficiencies

290 Paragraphs 1, 2 and 5 set out the three parliamentary scrutiny procedures by which regulations can be made under the power to deal with deficiencies arising from withdrawal in section 8(1) and the circumstances in which each will apply. The main procedures are the draft affirmative (generally referred to as the affirmative), the negative (subject to a sifting procedure, except in urgent cases) and, for urgent cases, the made affirmative.

291 *Draft* affirmative resolution procedure (paragraph 1(1) of Schedule 7): These instruments cannot be made unless a draft has been laid before and approved by both Houses.

292 Negative resolution procedure (paragraph 1(3) of Schedule 7): These instruments become law when they are made (they may come into force on a later date) and remain law unless there is an objection from either House. The instrument is laid after making, subject to annulment if a motion to annul (known as a 'prayer') is passed within forty days.

293 Instruments to be made under the negative resolution procedure must (unless the Minister makes a declaration of urgency (see paragraph 5(8) of Schedule 7)) first be laid in draft before each House of Parliament for sifting (see paragraph 3 of Schedule 7).

294 *Made* affirmative resolution procedure (paragraph 5 of Schedule 7): These instruments can be made and come into force before they are debated, but cannot remain in force unless approved by both Houses within 28 days. The Government believes that the exceptional circumstances of withdrawing from the EU *might* necessitate the use of the made affirmative procedure so the Act allows for this as a contingency.

Scrutiny of regulations made by Minister of the Crown or devolved authority acting alone

295 Paragraph 1 provides that the affirmative must be used if an instrument made under section 8(1) does one or more of the things listed at sub-paragraph (2):

- transfers an EU legislative function (i.e. a power to make delegated or implementing acts) to a UK body,
- relates to fees,
- creates or widens the scope of a criminal offence (although the power cannot be used to create certain criminal offences), or
- creates or amends a power to legislate (this does not include repealing or revoking.

296 Sub-paragraph (3) provides that the negative procedure can be used in other cases, though, as sub-paragraph (4) flags, that is subject to the "sifting" procedure at paragraph 3 for ministers of the Crown.

297 Sub-paragraph (5) provides that the affirmative procedure must be used if an instrument is made under section 8(3)(b) (the **power to provide for additional types of deficiencies**).

298 Sub-paragraphs (6) to (11) provide for equivalent affirmative and negative procedures in each of the devolved legislatures, and flag, in sub-paragraph (10), that Welsh Statutory Instruments under the negative procedure are subject to the "sifting" procedure at paragraph 4 for the Welsh Ministers.

Scrutiny of regulations made by Minister of the Crown and devolved authority acting jointly

299 Paragraph 2 deals with scrutiny by the UK Parliament and the devolved legislatures for instruments made jointly by a Minister of the Crown and a devolved authority.

Parliamentary committee to sift certain deficiencies regulations of a Minister of the Crown

300 Paragraph 3 requires, before instruments under section 8(1) being proposed for the negative

procedure may be made, that the minister lays a draft of the instrument before both Houses of Parliament, along with a memorandum explaining the choice of procedure. This committee has 10 sitting days (beginning on the first day both Houses are sitting, and where Commons sitting days are different to Lords sitting days, whichever period ends later) to make a recommendation as to the appropriate procedure for the instrument. After receiving the recommendation, or after 10 sitting days without a recommendation, a Minister may either proceed with making a negative instrument, or proceed with an affirmative instrument instead. In either circumstance, the minister need not proceed immediately, but may proceed with the instrument at a later date. If the Minister disagrees with a recommendation of a committee for the affirmative procedure, they will be required to make a statement in writing explaining why they disagree before they can proceed with the negative procedure.

Committee of the National Assembly for Wales to sift certain regulation involving Welsh Ministers

301 Paragraph 4 provides for a committee, similar to that provided for in paragraph 3, in the National Assembly for Wales to sift Welsh statutory instruments under Part 1 of Schedule 2 that are proposed for the negative procedure before the National Assembly for Wales by the Welsh Ministers.

302 There is no concept of 'sitting days' for the National Assembly for Wales and so instead of 10 sitting days, this committee in the National Assembly for Wales will have a period of 14 days to make a recommendation to the Welsh Ministers.

303 The requirement to make statements where a Minister disagrees with the recommendation of a sifting committee does not apply to the Welsh Ministers in relation to the recommendations of the National Assembly for Wales' sifting committee in paragraph 4.

Scrutiny procedure in certain urgent deficiencies cases

304 Paragraph 5 allows the made affirmative procedure to be used instead of the draft affirmative, for regulations under section 8 made by a minister of the Crown in urgent cases.

305 Paragraph 5(8) enables Ministers to make negative regulations without going through the procedure at paragraph 3 in urgent cases (in cases which do not trigger the affirmative procedure). Urgent cases could include, for example, where a statutory instrument needs to come into force because of a lead-in time required to allow systems to be changed or put in place before exit or, where, due to the progress of negotiations, statutory instruments are made close to exit day.

Scrutiny procedure in certain urgent deficiencies cases: devolved authorities

306 Paragraphs 6, 7 and 8 provide for an equivalent 'urgent' procedure to that set out in

paragraph 5 for regulations laid before each of devolved legislatures.

Part 2: Scrutiny of other powers under Act

Power to enable challenges to validity of retained EU law

307 Paragraph 9 provides that the affirmative (or made affirmative, see paragraph 19 of Schedule 7) procedure must be used for an instrument under paragraph 1(2)(b) of Schedule 1 (the power to enable challenges to retained EU law, based on validity).

Power to implement withdrawal agreement

308 Paragraph 10 sets out the scrutiny procedures that apply to secondary legislation made under the **power to implement the withdrawal agreem**ent in section 9 which mirror, as appropriate, the scrutiny procedures for the power to deal with deficiencies.

Power to repeal provisions relating to retained EU law restrictions

309 Paragraph 11 provides that the affirmative procedure must be used for an instrument under section 12(9) (power to repeal provisions relating to retained EU law restrictions).

Powers in connection with fees and charges

310 Paragraph 12 sets out the scrutiny procedures that apply to secondary legislation made under the powers in connection with fees and charges in Schedule 4.

311 Sub-paragraphs (1) and (2) provide that the draft affirmative procedure (or the made affirmative, see paragraph 19 of Schedule 7) must be used for all regulations made under Schedule 4 by a Minister of the Crown, except for changing the amounts of fees or charges in response to inflation. For regulations relating to changes in the value of money the minister may choose the negative or affirmative procedure.

312 Sub-paragraph (3) makes the same provision for regulations made under Schedule 4 by a devolved authority. The affirmative procedure as set out in paragraphs 1(6), 1(8), and 1(11) (or the made affirmative, see paragraphs 6, 7 and 8 of Schedule 7) must be used for all regulations made under Schedule 4 by devolved authorities, except for changing the amounts of fees or charges in response to changes in the value of money. For regulations relating to changes in the value of money the devolved authority may choose the negative procedure (as set out in paragraphs 1(7), 1(9), and 1(12)) or the affirmative procedure and, as with the Minister of the Crown power, negative procedure instruments are not subject to any 'sifting' procedure.

Power to make provision about judicial notice and admissibility

313 Paragraph 13 provides that regulations under the power in Schedule 5 to make provision

about judicial notice and admissibility are subject to the affirmative procedure.

Power to amend the definition of "exit day"

314 Paragraph 14 provides that the affirmative procedure must be used for regulations made under the power in section 20 to change the definition of "exit day".

Power to make consequential provision

315 Paragraph 15 provides that regulations under **the power to make consequential provision** at section 23(1) may be subject to either the negative or affirmative procedure. If they are proposed for the negative procedure they are subject to sifting as set out in paragraph 17 of Schedule 7.

Power to make transitional, transitory or saving provision

316 Paragraph 16 provides that regulations under the power to make transitional, transitory or savings provision at section 23(6) may be subject to either the negative, affirmative or no procedure.

Parliamentary committee to sift certain implementation or consequential regulations of a Minister of the Crown

317 Paragraph 17 requires, before instruments under sections 8(1), 9 or section 23(1) being proposed for the negative procedure may be made, that the minister lays a draft of the instrument before both Houses of Parliament, along with a memorandum explaining the choice of procedure. This committee has 10 sitting days (beginning on the first day both Houses are sitting, and where Commons sitting days are different to Lords sitting days, whichever period ends later) to make a recommendation as to the appropriate procedure for the instrument.

318 After receiving the recommendation, or after 10 sitting days without a recommendation, a minister may either proceed with making a negative instrument, or proceed with an affirmative instrument instead. If the Minister disagrees with a recommendation of a committee for the affirmative procedure, they will be required to make a statement in writing explaining why they disagree before they can proceed with the negative procedure.

Committee of the National Assembly for Wales to sift certain implementation regulations of Welsh Ministers

319 Paragraph 18 applies the National Assembly for Wales' sifting committee process under paragraph 4 to the powers in Part 2 of Schedule 2 with certain adaptations.

Scrutiny procedure for certain powers to which this Part applies in urgent cases

320 Paragraph 19(1) to (6) allows the made affirmative procedure to be used for regulations made

by a Minister of the Crown under the power in part 1 of Schedule 5 to enable challenges to validity of retained EU law, the power in section 9 to implement the withdrawal agreement, the power in section 23(1) to make consequential provision and the powers in Schedule 4 to provide for fees or charges, in urgent cases. The urgent procedure is subject to the statement requirements in paragraph 34 of Schedule 7.

321 Paragraph 19(7) and (8) enables Ministers to make negative regulations under the power in section 9 to implement the withdrawal agreement, the power in section 23(1) to make consequential provision without going through the sifting procedure at paragraph 17 in urgent cases. Urgent cases could include, for example, where a statutory instrument needs to come into force because of a lead-in time required to allow systems to be changed or put in place before exit or, where, due to the progress of negotiations, statutory instruments are made close to exit day.

Part 3: General provision about powers under Act

Scope and nature of powers: general

322 Paragraph 20 sets out how the powers to make regulations in the Act are exercisable by statutory instrument (where exercised by a Minister of the Crown, by the Welsh Ministers or by a Minister of the Crown acting jointly with a devolved authority) and by statutory rule (where the powers are exercised by a Northern Ireland department). As provided for by section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010, regulations made by the Scottish Ministers acting alone will be made by Scottish statutory instrument.

323 Paragraph 21 applies to all powers in the Act. It provides that that all the powers in the Act can be used to modify retained EU law and can make provisions in different ways for different cases or descriptions of case, in different circumstances, areas or for different purposes and that they include the power to make supplementary etc provision and to restate retained EU law, even though this may change the status of the provisions for other purposes, such as amendability.

324 Paragraph 22 provides that powers in the Act may overlap without that overlap impacting on the scope of each of the powers.

Scope of consequential and transitional powers

325 Sub-paragraph (1) of paragraph 23 provides that the law preserved and converted by sections 2 to 6 may be modified by the power to make consequential provision.

326 Sub-paragraph (2) therefore clarifies that the consequential power in the Act can, for example, be used to modify retained EU law if the changes are consequential on repeal of the ECA.

327 Sub-paragraph (3) clarifies that the power to make transitional, transitory and savings provisions can be used to do things in connection with the repeal of the ECA and generally in connection with withdrawal of the UK from the EU. The power can be used for these purposes in a way which is additional to the changes made by the sections in the Act that deal with the preservation, conversion and interpretation of EU law, or to produce different effects for particular cases.

328 Sub-paragraph (4) clarifies that the consequential power can do things in connection with repeals made by the Act, or which are additional to the provisions covered in the sections of the Act that deal with the preservation, conversion and interpretation of EU law, including in a way that might alter their effect for particular cases. Provisions of this kind can be treated as retained EU law, as sub-paragraph (5) provides.

Anticipatory exercise of powers

329 Paragraph 24 allows for the anticipatory use of delegated powers in this Act in relation to retained EU law. This means that these powers can be exercised before exit day to amend retained EU law if they come into force on or after exit day.

Scope of appointed day powers

330 Paragraph 25 provides that a Minister of the Crown can specify the time of day when specifying a day under any power in the Act to appoint a day.

Effect of certain provisions in Schedule 8 on scope of powers

331 Paragraph 26 provides that the powers in the Act may be used to make different provision, in particular cases, from the changes made by Part 1 of Schedule 8 and amendments to the Interpretation Act 1978 made by paragraphs 18 to 22. For example, although the Act amends the definition of 'enactment' in the Interpretation Act so as to include retained direct EU legislation, the powers in the Act could, where appropriate, be used to amend references to 'enactment' in other legislation so as to exclude some or all retained direct EU legislation from the definition.

Disapplication of certain review provisions

332 Paragraph 27 disapplies the requirement in the Small Business, Enterprise and Employment Act 2015 to conduct and publish a post-implementation review for any secondary legislation made under any of the powers in the Act. Post-implementation reviews assess the impact of new legislation on business.

Explanatory statements for certain powers: appropriateness, equalities

333 Paragraph 28 sets out that certain explanatory statements must accompany statutory instruments made by ministers of the Crown under the delegated powers in sections 8(1), 9 or 23(1) or (jointly exercising) the equivalent powers in Schedule 2. These will require the minister to make statements:

- that in the minister's opinion the instrument does no more than is appropriate;
- that there are good reasons for the instrument or draft, and that the provision made by the instrument or draft is a reasonable course of action;
- where the regulations create a criminal offence, that there are good reasons for creating the criminal offence and for the penalty provided in respect of it;
- indicating whether the draft legislation amends/repeals/revokes equalities legislation (the Equality Act 2010, the Equality Act 2006 or any secondary legislation made under either of those Acts) – and if so, what the effect is;
- indicating that the minister has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010, so far as required by equalities legislation;
- explaining the instrument or draft and its purpose; and,
- explaining what any relevant law did before exit day and how the retained EU law is being changed.

334 Sub-paragraph (1) specifies that these statements must be made before an instrument or a draft of it is is laid before each House of Parliament. This means laid before each House for consideration by the sifting committees (for those proposed for the negative procedure), laid in draft (for those following the draft affirmative procedure), or laid after making (for those following the made affirmative procedure, or the negative procedure in urgent cases).

335 Sub-paragraph (8) sets out the consequence where a minister has failed to make the necessary statements. In such a scenario a minister must make a statement to Parliament explaining why the relevant minister failed to comply with the obligation in this paragraph.

336 Sub-paragraph (9) requires these statements to be made in writing and published in an appropriate manner. The Government expects that these statements should normally be published in the Explanatory Memoranda accompanying statutory instruments.

337 Sub-paragraph (10) provides that an instrument or draft to be laid before both Houses is to be considered as laid when it is first laid before either House. This might occur on different days where, for example one House is sitting and the other is not.

338 Sub-paragraph (11) avoids repeating the requirement to make statements where an equivalent draft or instrument has already been laid before both Houses. This avoids duplicate statements when, for example, an instrument has been laid for sifting and an equivalent instrument is then laid again after making (to follow the negative procedure) or in draft (to follow the affirmative procedure).

339 Paragraph 29 provides for equivalent explanatory statements to those in paragraph 28 to be made by the Scottish Ministers when making Scottish statutory instruments before the Scottish Parliament.

Further explanatory statements in certain sub-delegation cases

340 Paragraph 30 sets out that where a Minister of the Crown makes regulations under the delegated powers in section 8(1) to correct deficiencies, in section 9 to implement the withdrawal agreement or paragraph 1 of Schedule 4 to provide for fees and charges which create a relevant sub-delegated power a Minister must make a statement explaining why it is appropriate to do so.

341 Sub-paragraph (7) makes it clear that a relevant sub-delegated power means a power to legislate which is either not exercisable by a statutory instrument, (or Scottish statutory instrument or statutory rule); or a power which is exercisable by someone other than a ministers of the Crown or devolved administration.

342 Paragraph 31 provides for equivalent explanatory statements to those in paragraph 30 to be made by the Scottish Ministers when making Scottish statutory instruments before the Scottish Parliament.

Annual reports in certain sub-delegation cases

343 Paragraph 32 provides that any person by whom a relevant sub-delegated power (with the same meaning as in paragraph 30) is exercisable must, if they have exercised the power during a relevant year (either the year of any annual report or the calendar year), prepare, as soon as practicable, a report on the exercise of the power. The person must then lay the report before Parliament among other things.

344 Paragraph 33 provides for equivalent annual reports to be laid before the Scottish parliament where a relevant sub-delegate power is exercisable by virtue of a Scottish statutory instrument made by the Scottish Ministers.

Further explanatory statements in urgency cases

345 Paragraph 34 sets out that where a Minister of the Crown is using the urgent procedure set

out in paragraphs 5 or 18 the Minister must make a statement explaining the reasons for using the urgency procedure.

346 Paragraph 35 provides for equivalent explanatory statements to those in paragraph 35 to be made by the Scottish Ministers when making urgent Scottish statutory instruments before the Scottish Parliament.

Hybrid instruments

347 Paragraph 36 sets out that regulations brought forward under the powers in this Act are never to be treated as hybrid instruments.[31]

Procedure on re-exercise of certain powers

348 Paragraph 37 provides that where an instrument modifies earlier regulations made under the Act, the rules for choosing the scrutiny procedure apply afresh.

Combinations of instruments

349 Paragraph 38 allows affirmative regulations under this Act to be combined with negative regulations under other powers.

Schedule 8: Consequential, transitional, transitory and saving provision

Part 1: General consequential provision

Existing ambulatory references to retained direct EU legislation

350 Paragraphs 1 and 2 of Schedule 8 set out what happens with existing ambulatory references after exit. As described above, these are cross-references to EU instruments as they may be amended from time to time in the future. Paragraph 1A of Schedule 2 to the ECA provided a power to make such references, and some have also been made in primary legislation and using other powers.

351 The effect of paragraph 1(1) is that existing ambulatory references to EU regulations, decisions, tertiary legislation or provisions of the EEA agreement which are to be incorporated into domestic law under section 3 will, on exit day, become references to the retained versions of those instruments as they are modified from time to time by domestic law (unless the contrary intention appears). This approach ensures that modifications of EU law made by the EU on or after exit day do not form part of UK domestic law. The provision applies to

[31] Some statutory instruments which need to be approved by both Houses (affirmative instruments) are ruled to be hybrid instruments because they affect some members of a group (be it individuals or bodies) in a manner different from others in the same group. This question might otherwise arise in relation to regulations amending converted EU decisions addressed to individuals in an affirmative instrument.

ambulatory references which exist immediately before exit day, within (i) any enactment; (ii) any direct EU legislation retained by section 3 of the Act; and (iii) any document relating to anything falling within the former categories.

352 As set out in paragraph 1(2), however, this does not affect ambulatory references contained in powers in other domestic legislation (i.e. other than the power contained in the ECA) which will be preserved under section 2 of the Act and are subject to a procedure before Parliament or in the devolved legislatures. Paragraph 1(3) provides that paragraph 1(1) is also subject to other provision made by or under this Act, including the powers in sections 8 and 9.

Other existing ambulatory references

353 Paragraph 2 provides that any other existing ambulatory references (which are not dealt with by paragraph 1) to any of the EU treaties, other EU instruments (such as directives) or any other document of an EU entity do not continue to update after exit day. So, for example, where there is a reference in domestic legislation to an 'EU Directive as amended from time to time', this paragraph ensures that the reference to the directive should be read as a reference to the version that had effect immediately before exit day. Any updates to that directive which occur after exit day would not be brought into domestic law. Regulations made under section 7 will be capable of correcting any deficiencies which arise as a result. The provision applies to ambulatory references which exist immediately before exit day, within (i) any enactment; (ii) any direct EU legislation retained by section 3 of the Act; and (iii) any document relating to anything falling within the former categories.

354 As set out in paragraph 2(2), however, paragraph 2(1) does not affect ambulatory references contained in powers in other domestic legislation (i.e. other than the power contained in the ECA) which will be preserved under section 2 of the Act and which are subject to a procedure before Parliament or in the devolved legislatures. Paragraph 2(3) provides that paragraph 2(1) is also subject to other provision made by or under this Act, including the powers in sections 8 and 9.

Existing powers to make subordinate legislation etc

355 Paragraphs 3 to 8 set out how existing (pre-Royal Assent of this Bill) powers to make, confirm or approve subordinate legislation may operate on retained direct EU legislation and anything which is retained EU law by virtue of section 4.

356 Paragraph 3 provides that existing powers which can amend primary legislation, can amend retained direct principal EU legislation (which broadly covers EU Regulations), retained direct minor EU legislation (which broadly covers EU Tertiary legislation and EU decisions) and anything which is retained EU law by virtue of section 4.

357 Paragraph 4(1) and (2) sets out that when a power is exercised by virtue of paragraph 3 and amends retained direct principal EU legislation or anything which is retained EU law by virtue of section 4 it is subject to the same scrutiny procedure before Parliament or the devolved assemblies as for amending primary legislation. Paragraph 4(3) and (4) provides that when a power is exercised by virtue of paragraph 3 and amends retained direct minor EU legislation it is subject to the same scrutiny procedure before Parliament or the devolved assemblies as for amending subordinate legislation. This is subject to the amendment being a connected modification.

358 Paragraph 4(5) provides that when a power is exercised by virtue of paragraph 3 and amends retained direct principal EU legislation, retained direct minor EU legislation or anything which is retained EU law by virtue of section 4 as a connected modification, it is subject to the same scrutiny procedure before Parliament or the devolved assemblies as for the main modification to which it connects. A connected modification is defined in paragraph 4(10) as supplementary, incidental, consequential, transitional, or transitory or saving to another modification of retained direct EU legislation or anything which is retained EU law by virtue of section 4 or anything else done under the power.

359 Paragraph 4(6) provides that where different procedures apply for powers under paragraph 3 they can be combined in the same instrument. Paragraph 4(7) provides that where there are different scrutiny procedures then the highest procedure would apply.

360 Paragraph 5 provides that existing powers that are not capable of amending primary legislation can amend retained direct minor EU legislation (which is broadly EU tertiary legislation and decisions). Paragraph 5(3) provides that such powers, when amending retained direct minor EU legislation, are capable of making supplementary, incidental or consequential amendments to any retained direct principal EU legislation and anything which is retained EU law by virtue of section 4. Paragraph 5(4) provides that powers to make transitional, transitory or saving provisions are capable of amending retained direct EU legislation or anything which is retained by virtue of section 4.

361 Paragraph 6 sets out that when a power is exercised by virtue of paragraph 5, it is subject to the same scrutiny procedure before Parliament or the devolved assemblies as it would normally be subject to. .

362 Paragraph 7 also lifts, on or after exit day, any implied EU law restriction which might otherwise attach to powers to make, confirm or approve subordinate legislation immediately before exit day.

363 Paragraph 8 provides a number of exceptions and clarifications to the existing powers

paragraphs and allows for the anticipatory use of delegated powers in relation to retained EU law. This means that existing powers can be exercised before exit day to amend retained EU law if they come into force on or after exit day.

Review provisions in existing subordinate legislation

364 Paragraph 9 deals with duties to conduct post-implementation reviews of regulations made before exit, such as under section 28 of the Small Business, Enterprise and Employment Act 2015. In conducting those reviews, ministers will not now need to have regard to how EU member states have implemented former EU obligations.

Future powers to make subordinate legislation

365 Paragraphs 10 and 11 provide glosses on how future (post-Royal Assent of this Bill) powers to make, confirm or approve subordinate legislation may operate on retained direct EU legislation and anything which is retained EU law by virtue of section 4.

366 Paragraph 10(2) provides that future powers to amend subordinate legislation can amend retained direct minor EU legislation.

367 Paragraph 10(3) also provides that future powers to amend subordinate legislation can, context permitting, make modifications, which are supplementary, incidental or consequential to the modification of retained direct minor EU legislation, to retained direct principal EU legislation or anything which is retained EU law by virtue of section 4.

368 Paragraph 10(4) operates on all future transitional, transitory or saving powers and provides that they may amend any retained direct EU legislation or anything which is retained EU law by virtue of section 4.

369 Paragraph 11 provides that any future power which can amend retained direct principal EU legislation will be permitted to non-textually modify any retained direct EU legislation or anything that is retained EU law by virtue of section 4

370 Paragraph 12 provides a number of exceptions and clarifications to the future powers paragraphs and allows anticipatory use of future powers in relation to retained EU law, including those powers in Acts which are passed after and in the same session as this Bill. This means that such powers can be exercised before exit day to amend retained EU law if they come into force on or after exit day.

Affirmative procedure for instruments which amend or revoke subordinate legislation made under section 2(2) of the ECA (including subordinate legislation implementing EU directives)

371 Paragraph 13 provides for the affirmative procedure to apply to certain statutory instruments

made on or after exit day which would otherwise be subject to a lesser parliamentary procedure before Parliament.

372 The requirements apply to statutory instruments that amend or revoke subordinate legislation made under section 2(2) ECA, and which are:

- made by a Minister of the Crown;
- made under a power conferred before the beginning of the 2017-2019 session; and
- not made jointly or otherwise subject to a procedure in another legislature (for example, the Scottish Parliament).

373 A statutory instrument caught by the requirements in sub-paragraph (1) must follow the affirmative procedure in Parliament unless a higher procedure would apply (see sub-paragraphs (1) and (2); the ranking of procedures is set out in sub-paragraph (6)). This means the instrument must be laid in draft and approved by a resolution of each House of Parliament. In the case of instruments that are ordinarily required to be laid before the House of Commons only, the paragraph requires the instrument to be laid as a draft affirmative instrument before the House of Commons only (sub-paragraph (5)). Other procedural requirements attaching to the making of the instrument are not affected (sub-paragraph (2)).

374 Sub-paragraph (8) makes specific provision about what is "subordinate legislation under section 2(2) of the ECA" for the purposes of this paragraph (this also applies to paragraphs 14 and 15). Essentially, this refers to provisions that are made under section 2(2) ECA, whether they appear in a statutory instrument by amendment or otherwise. "Subordinate legislation" is, for these purposes, :

- in an instrument made under a power other than section 2(2) ECA, text inserted into that instrument by amendments made under section 2(2) ECA;
- in an instrument made under both section 2(2) ECA and other powers, provisions made under section 2(2) ECA alone;
- in an instrument made entirely under section 2(2) ECA which has not been amended, other than using powers in section 2(2) ECA, all of the provisions in that instrument;

but does not include:

- in an instrument made under section 2(2) ECA and other powers, any provision made under powers other than section 2(2) ECA. This includes whether the provision is made in the original instrument or added by amendment.;
- in an instrument made solely under section 2(2) ECA which has been amended using

another power, the provisions inserted by that other power

- in an instrument made solely under a power other than section 2(2) ECA which has been amended using section 2(2) ECA, the provisions other than the text inserted by an amending instrument made section 2(2) ECA; or,
- provisions inserted into primary legislation under section 2(2) ECA.

375 Instruments subject to the affirmative procedure by virtue of this paragraph may be combined with other instruments subject to a lower procedure (sub-paragraph (3)). A statutory instrument that does not amend or revoke provision made under section 2(2) of the ECA but would otherwise meet the tests in sub-paragraph (1) may be made by the the draft affirmative procedure, even though it would normally be required to follow a lower procedure (sub-paragraph (4)). This may assist in cases where an instrument to be amended is made under more than one power and it is difficult to distinguish the specific power in relation to a given provision.

Enhanced scrutiny procedure for instruments which amend or revoke subordinate legislation under section 2(2) of the ECA (including subordinate legislation implementing EU directives)

376 Paragraph 14 provides for the an enhanced procedure to apply to certain statutory instruments to be laid before Parliament which are made after exit (for purposes of this paragraph, the definition of "subordinate legislation" explained above in relation to paragraph 13 applies).

377 The requirements apply to statutory instruments that amend or revoke subordinate legislation made under section 2(2) ECA which are:

- made by a Minister of the Crown or another authority[32];
- made under a power conferred before the beginning of the 2017-2019 session; and,
- not subject to a procedure in another legislature (such as the Scottish Parliament).

378 A statutory instrument subject to the requirements of this paragraph must be published in draft at least 28 days before it is intended to be laid before Parliament (or before the House of Commons alone, as set out in sub-paragraph (8)). The calculation of time is intended to exclude recesses and so excludes periods when Parliament is dissolved or prorogued, and any period when either House is adjourned for more than four days (sub-paragraph (9)(d)).

[32] For example, powers to make subordinate legislation are delegated to the Forestry Commission, a non-ministerial government department. Orders in Council made by HM the Queen and Orders of Council made by the Privy Council are also caught by the requirements but in the cases of such Orders, the Minister with responsibility (in effect, policy responsibility) must meet the requirements of this paragraph - see sub-paragraph (11).

379 A "scrutiny statement"must be made by the Minister or other authority before the instrument or a draft of it is laid before Parliament (sub-paragraph (3)). Sub-paragraph (4) sets out the required content. The statement must:

- explain steps taken to make the published draft statutory instrument available to Parliament,
- set out the response to any recommendations made by a parliamentary committee,
- set out the response any other representations made to the Minister or authority about the published draft instrument; and,
- give any other information which the Minister or authority considers is appropriate in relation to scrutiny of the proposed instrument.

380 The scrutiny statement must be in writing and published in a manner the Minister or authority considers appropriate (sub-paragraph 5). The Government expects that the statement would normally be published in the Explanatory Memoranda accompanying the statutory instrument.

381 Sub-paragraph (6) provides for an urgent procedure whereby a statutory instrument may be made without being published in draft and without a scrutiny statement being made. The Minister or authority relying on this provision must make a written statement that the Minister or authority is of the opinion that, by reason of urgency, these requirements should not apply. The written statement about urgency must be published as the Minister or authority deems appropriate. (Other requirements which may affect such instruments under paragraphs 13 and 15 of Part 1 of Schedule 8 will still apply.)

Explanatory statements for instruments amending or revoking regulations etc. under section 2(2) of the ECA

382 Paragraph 15 imposes a requirement for certain statements to be made in relation to statutory instruments that amend or revoke subordinate legislation made under section 2(2) ECA (for purposes of this paragraph, the definition of "subordinate legislation" explained above in relation to paragraph 13 applies).

383 The requirement in this paragraph applies to statutory instruments or draft instruments to be laid before the Houses of Parliament (or before the House of Commons alone (sub-paragraph (1)). It applies whether the statutory instrument is made under powers conferred before, on or after exit day - but does not apply to powers under the Act itself. The duty falls on a Minister

of the Crown or other authority making the instrument[33].

384 The statements must be in writing and made before the instrument or draft instrument is laid before Parliament. It must be published in such manner as the Minister or authority considers appropriate (sub-paragraphs (2), (3) and (5)). The Government expects that these statements should normally be published in the Explanatory Memoranda accompanying the statutory instrument to which they relate.

385 The statements must set out the "good reasons" for the amendment or revocation (sub-paragraph (2)), the law which is relevant to the amendment or revocation, and the effect of the amendment or revocation on retained EU law (sub-paragraph (3)).

386 If the statement is not made as required before the instrument or draft instrument is laid, the Minister or authority must make a statement explaining the failure to do so (sub-paragraph (4)).

387 Paragraph 16 provides for equivalent explanatory statements to those in paragraph 15 to be made by the Scottish Ministers when making Scottish statutory instruments before the Scottish Parliament.

Part 2: Specific consequential provision

Finance Act 1973

388 Paragraph 17 amends section 56 of the Finance Act 1973 (charges for services by Government departments) to remove the reference to "EU obligations", which is no longer relevant.

Interpretation Act 1978

389 Paragraphs 18 to 22 make amendments to the Interpretation Act 1978, which is the legislation which sets out some general rules of interpretation of legislation, including in relation to the construction of certain words and phrases, the effect of repeals and the interpretation of statutory powers and duties.

390 Paragraph 19 provides that the definition of subordinate legislation contained in the Interpretation Act 1978 includes instruments of the same nature made on or after exit day under any retained direct EU legislation. This means that the provisions of the Interpretation Act will apply to instruments which are made under retained direct EU legislation, (for

[33] For example, powers to make subordinate legislation are delegated to the Forestry Commission, a non-ministerial government department. Orders in Council made by HM the Queen and Orders of Council made by the Privy Council are also caught by the requirements but in the cases of such Orders, the Minister with responsibility (in effect, policy responsibility) must meet the requirements of this paragraph - see sub-paragraph (9).

example under powers in a retained EU regulation which have been turned into domestic powers), as they apply to other subordinate legislation. It also means that where other legislation relies on the Interpretation Act definition of subordinate legislation, it will include subordinate legislation made under retained direct EU legislation.

391 Paragraph 20 amends the Interpretation Act 1978 to provide that certain provisions within it will apply (so far as applicable and unless contrary intention is made) to any amendments which are made to converted direct EU legislation. So, for example, where amendments are made to EU regulations which include terms that are defined in Schedule 1 to the Interpretation Act, the Interpretation Act definition will apply to them, unless a contrary intention is shown (though if the same terms were used in an unamended part of the instrument, the Interpretation Act definition would not apply to those instances).

392 Paragraph 21 amends the provisions of the Interpretation Act 1978 as it applies to Northern Ireland so that the old ECA definitions saved by paragraph 22 (below) continue to apply to Northern Ireland legislation.

393 Paragraph 22 adds a number of words and expressions to Schedule 1 to the Interpretation Act 1978. The ECA contains a number of important definitions in section 1 and Part 2 of Schedule 1. These definitions apply to all legislation made by Parliament and by the Northern Ireland Assembly and the National Assembly for Wales (and not just to the ECA), by virtue of section 5 of, and Schedule 1 to, the Interpretation Act. The latter provides that "the EU" or "the EU Treaties" and other expressions defined by section 1 of, or Schedule 1 to, the ECA have the meanings prescribed by that Act. Paragraph 11 moves most of these old ECA definitions across to the Interpretation Act, as otherwise they would no longer exist as a result of repeal of the ECA. However, the definition of "EU customs duty", "EU obligation" and "enforceable EU right" have not been retained in the Interpretation Act as such references will be broken on exit and will need to be amended or repealed using powers under the Act. There are also some changes to some definitions, and some new definitions, to reflect the new context post exit and the relationship between domestic and retained EU law. For example, paragraph 11 inserts into Schedule 1 to the Interpretation Act new definitions of "exit day", "retained EU law", and "retained direct EU legislation" and "retained EU obligation", to ensure those concepts recognised under the Act apply to all legislation.

European Economic Area Act 1993

394 Paragraphs 23 to 28 amend the European Economic Area Act 1993. As explained in the *legal background* of these notes, on exit day the UK ceases to participate in the EEA Agreement. Paragraph 13 therefore repeals section 1 of the EEA Act 1993, which was the basic provision implementing the EEA Agreement in UK law and is therefore redundant. Paragraphs 14 and

15 amend sections 2 and 3 of the EEA Act 1993. These sections ensure that domestic legislation which was in force prior to the entry into force of the EEA Agreement in 1993 is read consistently with the provisions of that Agreement. Paragraphs 14 and 15 ensure that the modifications made by sections 2 and 3 will continue to operate appropriately in respect of legislation that pre-dates the EEA Agreement. Paragraphs 16 and 17 make consequential amendments to the EEA Act 1993.

Criminal Procedure (Scotland) Act 1995

395 Paragraph 29 amends section 288ZA Criminal Procedure (Scotland) Act 1995 so that it refers to the limits on modifying retained EU law that may be applied by the the new powers inserted into the Scotland Act 1998 by section 12(2) and paragraph 1 of Schedule 3, rather than compatibility with EU law.

Human Rights Act 1998

396 Paragraph 30 provides that retained direct principal EU legislation (see the definition in section 7(6)) is to be treated as 'primary legislation' for the purposes of the Human Rights Act 1998 (HRA). This means that if such legislation is found to breach the Act, a court may issue a declaration of incompatibility but may not strike down the legislation.

397 Paragraph 30 also provides that retained direct minor EU legislation (see the definition in section 7(6)) is to be treated as 'subordinate legislation' for the purposes of the HRA, except where it amends primary legislation (where it will be treated as 'primary legislation'). This means that if such legislation is found to breach the HRA a court may strike down the legislation.

Interpretation and Legislative Reform (Scotland) Act 2010

398 Paragraph 31 amends the definition of 'Scottish instruments' in Part 1 of the Interpretation and Legislative Reform Act (Scotland) 2010 (ILRA). This means that where an instrument is made by the Scottish Ministers under a combination of powers in an Act of the Scottish Parliament and powers in retained direct EU legislation the provisions in Part 1 of ILRA (which deal with various rules of interpretation) will apply to that instrument.

399 Paragraph 32 amends the definition of 'enactment' for Part 2 of that Act to include retained direct EU legislation and defines subordinate legislation for the purposes of Part 2 of that Act as including secondary legislation made under retained direct EU legislation. The effect of these changes is to make the normal rules on Scottish statutory instrument procedure contained in ILRA (which deal with scrutiny in the Scottish Parliament) apply to Scottish statutory instruments made by the Scottish Ministers under new powers in retained direct EU

legislation.

400 Paragraph 33 adds a number of words and expressions to Schedule 1 of that Act to bring over definitions from the ECA which would otherwise no longer exist as a result of repeal of the ECA.

Small Business, Enterprise and Employment Act 2015

401 Paragraph 34 amends section 30(3) of the Small Business, Enterprise and Employment Act 2015 to omit the requirement for a review to have regard to how an EU obligation is implemented in other member states. In legislation that implements the UK's international obligations the requirement to review how other countries have implemented an obligation remains.

Part 3: General transitional, transitory or saving provision

Continuation of existing acts etc.

402 Paragraph 35 provides that anything done or in force before exit day (or in in the process of being done), and which relates to any element of retained EU law is preserved. For example, licences lawfully issued before exit day would continue to have effect after exit day.

Part 4: Specific transitional, transitory and saving provision

Retention of existing EU law

403 Paragraph 38 provides that rights etc which arise under EU directives and are recognised by courts or tribunals in the UK in cases which have begun before exit but are decided on or after exit day are preserved by section 4 and are not excluded by subsection (2) of that section.

404 Paragraph 39 makes further provision about the exceptions to the saving and incorporation of EU law set out in section 5 and Schedule 1. The exceptions apply in relation to anything occurring before exit day as well as anything occurring after exit day. However, this is subject to the following specific transitional and saving provision and any specific saving and transitional provision made in regulations under section 23(5).

405 First, the exceptions for the Charter of Fundamental Rights, and for claims in respect of validity, general principles and Francovich do not apply in relation to cases which have already been decided before exit day (see sub-paragraph (2)).

406 Second, the exceptions to preserved and converted law set out in section 5(4) (for the Charter of Fundamental Rights) and paragraphs 3 and 4 of Schedule 1 (for general principles and *Francovich* claims) will not apply in respect of proceedings which have begun before exit but are not decided until after exit (see sub-paragraph (3)). So, for example, a *Francovich* claim

commenced before exit can be decided by a court after exit.

407 Third, the exceptions in paragraphs 1 to 4 of Schedule 1 (for validity, general principles and *Francovich* claims) will not apply in relation to any criminal conduct which occurred prior to exit day (see sub-paragraph (4)).

408 Fourth, sub-paragraph (5) provides that the restriction on challenges based on incompatibility with any of the general principles of EU law (set out in paragraph 3 of Schedule 1) does not apply in respect of certain proceedings begun within three years of exit day. In order to fall within the scope of this sub-paragraph, any challenge must relate to something that occurred before exit day and may be made against either administrative action or domestic legislation other than Acts of Parliament or rules of law. Courts, tribunals and other public authorities will be able to disapply legislation or quash conduct in the event of a successful challenge. The rights of challenge cannot be used in relation to: anything which gives effect to or enforces an Act of Parliament or rule of law; or anything which could not have been different as a result of any Act of Parliament or rule of law.

409 Sub-paragraph (6) provides that a court, tribunal or other public authority will, on or after exit day, still be able to disapply any enactment or rule of law, or quash any conduct on the basis of incompatibility with the general principles where it is a necessary consequence of a decision made by a court or tribunal before exit day, or decisions in proceedings commenced during the three year period after exit day provided for under paragraph 39(5). This saves the effect of case law decided before exit day or during the transitional period in which the courts have disapplied a provision of pre-exit legislation on the grounds that it is incompatible with one of the general principles of EU law.

410 Finally, sub-paragraph (7) delays the prohibition in the Bill on seeking Francovich damages in domestic law (set out paragraph 4 of Schedule 1) for two years after exit day. This ensures that the Bill will not prevent individuals from continuing to seek such damages in domestic law where a breach of EU law occured before exit day.

Main powers in connection with withdrawal

411 Paragraph 40 clarifies that although certain powers in the Act expire, the regulations made under them do not expire.

Devolution

412 Sub-paragraph (1) of paragraph 41 provides that the amendments made to the devolution legislation by section 12 and Part 1 of Schedule 3 do not affect the validity of devolved primary legislation receiving Royal Assent before exit day, subordinate legislation subject to

confirmation or approval that has been made and confirmed or approved before exit day, and any other subordinate legislation made before exit day. Paragraph 42 makes equivalent provision in respect of administrative acts done before exit day.

413 Sub-paragraphs (3) to (5) of paragraph 41 disapply the current EU law limits on devolved competence so that primary legislation can be made validly before exit day in relation to an area that is not specified in any regulations made under the powers inserted by section 12(2), 12(4) or 12(6) or Schedule 3 Part 1 as subject to a limit on competence. Sub-paragraphs (6) to (8) make similar provision in relation to the making, confirming or approving of secondary legislation before exit day. Legislation covered by these sub-paragraphs (other than powers to make, confirm or approve subordinate legislation) must come into force on or after exit day in order to benefit from the disapplication of the EU law limit on competence.

414 Sub-paragraph (10) disapplies – for the purposes of the exercise of the powers in Schedules 2 and 4 – the provisions in the devolution Acts that would otherwise prevent the devolved administrations from making secondary legislation that would be incompatible with EU law.

415 Paragraph 42 is self-explanatory.

416 Paragraph 43 ensures that any consent decisions made by the devolved legislatures before the Bill receives Royal Assent, or in relation to any draft instrument put to the devolved legislatures before that time, would count as a consent decision for the purposes of making regulations under the new powers in section 12 and Schedule 3 Part 1. It would also allow the statutory 40 day period in those provisions to run from a date before the Bill receives Royal Assent.

Other provision

417 Paragraph 44 is a transitional provision related to the definition of 'relevant criminal offence' and reflects a pending amendment to the Regulation of Investigatory Powers Act 2011.

418 Paragraph 45 makes transitional provision for the amendment to section 56 Finance Act 1973. It deals with payment after exit for services etc received before exit. It also saves the effect of section 56 where regulations made under it are preserved and the service is still being provided post exit.

Schedule 9: Additional repeals

419 Schedule 9 lists further legislation which is repealed, either in whole or in part, by this Act.

Commencement

420 Section 25(1) sets out the provisions of the Act that will commence on Royal Assent. Subsections (2) and (3) set out the provisions of the Act that will, for certain purposes, commence on Royal Assent. Section 25(4) sets out that the remaining provisions will commence on the day or days appointed by regulations and different days may be appointed for different purposes.

Related documents

421 The following documents are relevant to the Act and can be read at the stated locations:

- *The United Kingdom's exit from and new partnership with the European Union*, HM Government, February 2017 https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper
- *Prime Minister's letter to Donald Tusk triggering Article 50*, HM Government, March 2017 https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50
- *Legislating for the United Kingdom's withdrawal from the European Union*, HM Government, March 2017 https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper
- A range of further documents are available at https://www.gov.uk/government/publications/information-about-the-withdrawal-bill

Annex A - Territorial extent and application

422 This Act extends and applies to the whole of the UK. In addition, section 24 provides that repeals and amendments made by the Act have the same territorial extent and application as the legislation that they are repealing or amending. For example, the ECA extends to and applies in Gibraltar and the three Crown Dependencies in a limited way. This means its repeal extends to those jurisdictions to the same extent.

423 The Bill also repeals other Acts which extend to Gibraltar, namely the European Union Act 2011, the European Parliamentary Elections Act 2002 and the European Parliament (Representation) Act 2003. These Acts will be repealed in respect of Gibraltar as well as the UK, and the powers in sections 8 and 23 will be capable of making provision for Gibraltar as a consequence of those main repeals.

424 Regulations made under powers in the Act may have extraterritorial effect where they are being used to amend legislation which already produces a practical effect outside the UK.

Annex B - Hansard References

425 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
House of Commons		
Introduction	13 July 2017	Vol. 627 Col. 463
Second Reading	7 September 2017 11 September 2017	Vol. 628 Col. 342 Vol. 628 Col. 455
Committee of the Whole House	14 November 2017 15 November 2017 21 November 2017 4 December 2017 6 December 2017 12 December 2017 13 December 2017 20 December 2017	First sitting: Vol. 631 Col. 191 Second sitting: Vol. 631 Col. 390 Third sitting: Vol. 631 Col. 862 Fourth sitting: Vol. 632 Col. 703 Fifth sitting: Vol. 632 Col. 1045 Sixth sitting: Vol. 633 Col. 190 Seventh sitting: Vol. 633 Col. 404 Eighth sitting: Vol. 633 Col. 1074
Report	16 January 2018 17 January 2018	First Day: Vol. 634 Col. 730 Second Day: Vol. 634 Col. 894
Third Reading	17 January 2018	Vol. 634 Col. 1003
House of Lords		
Introduction	18 January 2018	Vol. 788
Second Reading	30 January 2018 31 January 2018	Vol. 788 Col. 1374 and Vol. 788 Col. 1423 Vol. 788 Col. 1594
Committee of the Whole House	21 February 2018 26 February 2018 28 February 2018 5 March 2018 7 March 2018 12 March 2018 14 March 2018 19 March 2018 21 March 2018 26 March 2018 28 March 2018	First sitting: Vol. 789 Col. 129 Second sitting: Vol. 789 Col. 436 Third sitting: Vol. 789 Col. 663 Fourth sitting: Vol. 789 Col. 834 Fifth sitting: Vol. 789 Col. 1056 Sixth sitting: Vol. 789 Col. 1325 Seventh sitting: Vol. 789 Col. 1570 Eighth sitting: Vol. 790 Col. 13 Ninth sitting: Vol. 790 Col. 317 Tenth sitting: Vol. 790 Col. 623 Eleventh sitting: Vol. 790 Col. 786

Report	18 April 2018 23 April 2018 25 April 2018 30 April 2018 2 May 2018 8 May 2018	First sitting: Vol. 790 Col. 1174 Second sitting: Vol. 790 Col. 1344 Third sitting: Vol. 790 Col. 1568 Fourth sitting: Vol. 790 Col. 1874 Fifth sitting: Vol. 790 Col. 2073 Sixth sitting: Vol. 791 Col. 12
Third Reading	16 May 2018	Vol. 791 Col. 681
Commons Consideration of Lords Amendments	12 June 2018 13 June 2018	Vol. 642 Col. 733 Vol. 642 Col. 908
Lords Consideration of Commons Reasons and Amendments	18 June 2018 20 June 2018	Vol. 791 Col. 1853 Vol. 791 Col. 2082
Royal Assent	26 June 2018	House of Commons Vol. 643 House of Lords Vol. 792

Annex C - Progress of Bill Table

426 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament. The Bill was not amended in Committee in the Lords.

Section of the Act	Bill as Introduced in the Commons	Bill as amended in Committee in the Commons	Bill as introduced in the Lords	Bill as amended in Committee in the Lords	Bill as amended on Report in the Lords
Section 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1
Section 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2
Section 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3
Section 4	Clause 4	Clause 4	Clause 4	Clause 4	Clause 5
Section 5	Clause 5	Clause 5	Clause 5	Clause 5	Clause 6
Section 6	Clause 6	Clause 6	Clause 6	Clause 6	Clause 7
Section 7					Clause 8
Section 8	Clause 7	Clause 7	Clause 7	Clause 7	Clause 9
Section 9	Clause 9	Clause 9	Clause 9	Clause 9	Clause 11
Section 10					Clause 13
Section 11	Clause 10	Clause 10	Clause 10	Clause 10	Clause 14
Section 12	Clause 11	Clause 11	Clause 11	Clause 11	Clause 15
Section 13					Clause 10
Section 14	Clause 12	Clause 12	Clause 12	Clause 12	Clause 16
Section 15	Clause 13	Clause 13	Clause 13	Clause 13	Clause 17
Section 16					*Inserted at Lords Third Reading*
Section 17					Clause 12
Section 18					*Inserted during ping pong*
Section 19					Clause 18
Section 20	Clause 14	Clause 14	Clause 14	Clause 14	Clause 19
Section 21	Clause 15	Clause 15	Clause 15	Clause 15	Clause 20
Section 22	Clause 16	Clause 16	Clause 16	Clause 16	Clause 21
Section 23	Clause 17	Clause 17	Clause 17	Clause 17	Clause 22
Section 24	Clause 18	Clause 18	Clause 18	Clause 18	Clause 23
Section 25	Clause 19	Clause 19	Clause 19	Clause 19	Clause 24

Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1
Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2
Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3
Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4
Schedule 5	Schedule 5	Schedule 5	Schedule 5	Schedule 5	Schedule 5
Schedule 6	Schedule 6	Schedule 6	Schedule 6	Schedule 6	Schedule 6
Schedule 7	Schedule 7	Schedule 7	Schedule 7	Schedule 7	Schedule 7
Schedule 8	Schedule 8	Schedule 8	Schedule 8	Schedule 8	Schedule 8
Schedule 9	Schedule 9	Schedule 9	Schedule 9	Schedule 9	Schedule 9

Annex D - Glossary

Term	Definition
Act of Parliament	An Act of Parliament is a law that both Houses of Parliament have agreed to, and which is enforced in all the areas of the UK where it is applicable.
Affirmative procedure	Under the affirmative procedure a statutory instrument must be approved by both the House of Commons and the House of Lords to become law. There are two sub-categories of the affirmative procedure in this Act. Under the *draft affirmative* procedure (generally referred to as *the affirmative*), the statutory instrument cannot be made unless a draft has been laid before and approved by both Houses. Under the *made affirmative* procedure, the statutory instrument can be made and come into force before it is debated, but cannot remain in force unless approved by both Houses within 28 days.
Bill	A proposal for a new law or an amendment to an existing law that has been presented to Parliament for consideration. Once agreed and made into law, it becomes an Act.
Charter of Fundamental Rights	The Charter of Fundamental Rights sets out 'EU fundamental rights' which is a term used to describe human rights as they are recognised in EU law. EU fundamental rights are general principles of EU law which have been recognised over time through the case law of the CJEU and which have been codified in the Charter which came into force in 2009. The Charter sets out 50 rights and principles, many of which replicate guarantees in the European Convention on Human Rights and other international treaties. See Article 6 TEU.
Coming into force	The process by which an Act of Parliament, secondary legislation or other legal instrument comes to have legal effect. The law can be relied upon from the date on which it comes into force but not any sooner. Also known as commencement.
Competence	Competence means all the areas where the treaties give the EU the ability to act, including the provisions in the treaties giving the EU institutions the power to legislate, to adopt

	non-legislative acts, or to take any other sort of action. It also means areas where the treaties apply directly to the member states without needing any further action by the EU institutions. The EU's competences are set out in the EU treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the treaties, and where the treaties do not confer competences on the EU they remain with the member states. See Article 5(2) TEU.
Converted legislation	EU laws that applied in the UK the moment before the UK left the EU, which are converted into domestic law through the European Union (Withdrawal) Act.
Court of Justice of the European Union (CJEU)	The CJEU has jurisdiction to rule on the interpretation and application of the treaties. In particular, the Court has jurisdiction to rule on challenges to the validity of EU acts, in infraction proceedings brought by the Commission against member states and on references from national courts concerning the interpretation of EU acts. The Court is made up of two sub-courts: the General Court and the Court of Justice (which is sometimes called the ECJ). See Article 19 TEU and Articles 251 to 281 TFEU.
Decision	A legislative act of the EU which is binding upon those to whom it is addressed. If a decision has no addressees, it binds everyone. See Article 288 TFEU.
Delegated Act	A form of EU instrument which is similar to UK secondary legislation. A EU legislative act, such as a directive or a regulation, can delegate power to the Commission to adopt delegated acts to supplement or amend non-essential elements of the legislative act. See Article 290 TFEU.
Devolution settlements	The constitutional arrangements governing which decision making responsibilities and legislation making powers have been devolved and the mechanisms through which these operate.
Devolution statutes (or Acts/legislation)	The principal Acts of Parliament that set out the terms of the devolution settlements. These are the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006. 'Devolution legislation' may refer either to the devolution statutes or to the statues together with the secondary legislation

	made under them.
Devolved administrations	The governments of the devolved nations of the UK. These are the Scottish Government, the Welsh Government and the Northern Ireland Executive.
Devolved competence	The areas in which the devolved legislatures are responsible for making laws ('legislative competence') or the devolved administrations are responsible for governing or making secondary legislation ('executive competence').
Devolved institutions	Used to refer collectively to both the devolved administrations and the devolved legislatures.
Devolved legislatures	The law making bodies of the devolved nations of the UK. These are the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.
Directive	A legislative act of the EU which requires member states to achieve a particular result without dictating the means of achieving that result. Directives must be transposed into national law using domestic legislation, in contrast to regulations, which are enforceable as law in their own right. See Article 288 TFEU.
EU agencies	EU agencies are legal entities (separate from the EU institutions) set up to perform specific tasks under EU law. They include bodies such as the European Medicines Agency, the European Police Office (Europol) and the European Union Agency for Railways.
EU institutions	There are a number of EU bodies which are defined under the Treaties as EU institutions including the European Parliament, the European Council, the Council of the European Union and the European Commission.
The EU Treaties (including TEU and TFEU)	The European Economic Community (EEC) was established by the Treaty of Rome in 1957. This Treaty has since been amended and supplemented by a series of treaties, the latest of which is the Treaty of Lisbon. The Treaty of Lisbon, which entered into force on 1 December 2009, re-organised the two treaties on which the European Union is founded: the Treaty on European Union (TEU) and the Treaty establishing the European Community, which was re-named the Treaty on the Functioning of the European Union (TFEU).

European Commission	The Commission is the main executive body of the EU. It has general executive and management functions. In most cases it has the sole right to propose EU legislation. In many areas it negotiates international agreements on behalf of the EU and represents the EU in international organisations. And the Commission also oversees and enforces the application of Union law, in particular by initiating infraction proceedings where it considers that a member state has not complied with its EU obligations. See Article 17 TFEU and Articles 244 to 250 TFEU.
European Convention on Human Rights (ECHR)	An international convention, ratified by the UK and incorporated into UK law in the Human Rights Act 1998. It specifies a list of protected Human Rights, and establishes a Court (European Court of Human Rights sitting in Strasbourg) to determine breaches of those rights. All member states are parties to the Convention. The Convention is a Council of Europe Convention, which is a different organisation from the EU. Article 6 TEU provides for the EU to accede to the ECHR.
European Council	The European Council defines the general political direction and priorities of the EU. It consists of the Heads of State or Government of the member states, together with its President and the President of the Commission. See Article 15 TEU and Articles 235 and 236 TFEU.
European Parliament	The European Parliament (EP) consists of representatives elected by Union citizens. The EP shares legislative and budgetary power with the Council, and has oversight over the actions of the Commission. See Article 14 TEU and Articles 223 to 234 TFEU.
Implementing acts	A form of EU instrument which is similar to UK secondary legislation. A legally binding EU act, such as a directive or a regulation, can enable the Commission (and in some cases the Council) to adopt implementing acts where uniform conditions for implementing the legislative act are needed. See Article 291 TFEU.
Negative procedure	A statutory instrument under the negative procedure will become law once made without debate unless there is an objection from either House.
Preserved legislation	Existing domestic legislation which implements our EU

	obligations and will be preserved in domestic law through the European Union (Withdrawal) Act.
Regulation	A legislative act of the EU which is directly applicable in member states without the need for national implementing legislation (as opposed to a directive, which must be transposed into domestic law by member states using domestic legislation). See Article 288 TFEU.
Secondary legislation	Legal instruments (including regulations and orders) made under powers delegated to ministers or other office holders in Acts of Parliament. They have the force of law but can be disapplied by a court if they do not comply with the terms of their parent Act. Also called subordinate or delegated legislation.
Statute book	The body of legislation that has been enacted by Parliament or one of the devolved legislatures and has effect in the UK.
Statutory instrument	A form of secondary legislation to which the Statutory Instruments Act 1946 applies.