

Explanatory Memorandum to the Retained EU law (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019.

This Explanatory Memorandum has been prepared by the European Transition Team and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Retained EU law (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019.

I have made the statements required by the European Union (Withdrawal) Act 2018. These statements can be found in Part 2 of the annex to this memorandum.

Rebecca Evans AM
Minister for Finance and Trefnydd
16 July 2019

PART 1

1. Description

These Regulations make minor corrections to the drafting of Welsh EU Exit SIs. These do not make substantive changes, but merely improve on the drafting. They also make minor technical corrections to Welsh made law that are necessary for the statute book to be operable after exit day.

These Regulations come into force on exit day, except for Regulations 3, 4, 5 and 9 which come into force immediately before exit day.

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

These Regulations are being made using powers conferred by paragraph 1(1) of Schedule 2 and paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018 (c.16) (the “2018 Act”), with the exception of Regulation 10 which is made under section 78(1) of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017. The appropriate scrutiny procedure for regulations made under that section is determined by sections 78(3), (4) and 79(3) of that Act. In this case, the amendment made by Regulation 10 will not have the effect of imposing or increasing liability to tax, and as such, the negative procedure is used in accordance with section 79(3).

As set out in the Ministerial Statement in Annex 2 of this Explanatory Memorandum it is proposed that these Regulations be subject to the negative procedure. These Regulations make minor amendments and technical corrections and as such should be subject to annulment.

Regulations 7 and 8 make amendments to the Pupil Information (Wales) Regulations 2011 and the Controlled Drugs (Supervision of Management and Use) (Wales) Regulations 2008 and revoke and replace consequential amendments made to the 2011 and 2008 Regulations by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 that were made by the UK Government. This UK SI was made without the consent of the Welsh Ministers. The amendment made by the UK SI to the Welsh text of the 2011 and 2008 Regulations contained errors. These regulations address this by revoking the amendments to the 2011 and 2008 Regulations and replacing them with new provisions.

Some of the amendments correct technical points reported on previously by the Committee. Specifically:

- Regulation 4 addresses the technical point raised by CLAC that Regulation 5(3)(a) of The Flood and Water (Amendments) (England and Wales) (EU Exit) Regulations 2019 amends Regulation 11(2)(b) of the Nitrate Pollution Prevention (Wales) Regulations 2013 to remove a reference to EU legislation, and substitute references to domestic legislation. However, the amendment fails to take into account wording

inserted into regulation 11(2)(b) of the 2013 Regulations by the Environment, Planning and Rural Affairs (Miscellaneous Amendments) (Wales) Regulations 2018. As such, once these Regulations come into force, Regulation 11(2)(b) of the 2013 Regulations would read “[...] the provisions of the Private Water Supplies (Wales) Regulations 2017 and the Water Supply (Water Quality) Regulations 2018, as last amended by Commission Directive (EU) 2015/1787.” This statement would be incorrect, and is therefore defective.

- Regulation 5 addresses the two technical points raised in relation to the Seed Potatoes (Wales) (Amendments) (EU Exit) Regulations 2019.
 1. Regulation 2(12) substitutes references to the UK for references to the [European] Union in Schedule 1 to the 2016 Regulations. The Welsh text of 2(12) accurately reflects the English. However, there appears to have been an error in the Welsh text of paragraph 8 of Schedule 1 to the 2016 Regulations, so that the words ‘yr Undeb’ (the Union) do not in fact appear. Consequently, it cannot be replaced by ‘y DU’ (the UK) in accordance with Regulation 2(12). ‘Y DU’ should, therefore, be an insertion in paragraph 8, and not a substitution.
 2. The amendments made by paragraphs (16) to (18) of Regulation 2 add references to UK grades of seed potato to existing references to EU grades. The changes in the Welsh text have been expressed as substitutions of UK and EU grades for EU grades. However, the way it has been done in Regulation 2(17)(b)(iii) has resulted in the loss of Union grade S.
- Regulation 6 addresses the technical point raised by CLAC that in Regulation 7(3) of the Central Rating List (Wales) Regulations 2005 there is a definition of “EEA State” which is now redundant (reported in relation to the Local Government Finance (Amendment) (Wales) (EU Exit) Regulations 2019 which amended the 2005 Regulations).
- Regulation 10 addresses the technical point raised by CLAC that Section 36(12) of the LTT Act contains a definition of “collective investment scheme”, which will become redundant as a result of the amendments made by the Welsh Tax Acts (Miscellaneous Amendments) (EU Exit) Regulations 2019.

3. Legislative background

This instrument is being made using the power in Part 1 of Schedule 2 to the 2018 Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

Alongside the 2018 Act powers, Regulation 10 is being made using the power in section 78(1) of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act.

4. Purpose and intended effect of the legislation

Amendment to the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017

What did the law do before exit day?

The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 ("2017 Act") was amended by the Welsh Tax Acts (Miscellaneous Amendments) (EU Exit) Regulations 2019 to correct deficiencies arising from leaving the EU.

Why is it being changed?

The Welsh Tax Acts (Miscellaneous Amendments) (EU Exit) Regulations 2019 specified that a co-ownership authorised contractual scheme as described in the regulations is to be treated as not being a co-ownership authorised contractual scheme for the purpose of land transaction tax. There was a minor drafting error in the original correcting SI which resulted in the retention of an obsolete definition. These regulations will amend section 36(12) of the 2017 Act to omit the definition of "collective investment scheme" to correct this error.

What will it now do?

The 2017 Act will now operate the way that the Welsh Tax Acts (Miscellaneous Amendments) (EU Exit) Regulations 2019 originally intended.

Amendments to the Pupil Information (Wales) Regulations 2011 and the Controlled Drugs (Supervision of Management and Use) (Wales) Regulations 2008

What did the law do before exit day?

The Pupil Information (Wales) Regulations 2011 require a head teacher to disclose a pupil's educational record in response to particular requests. However, in doing so, the head teacher is prohibited from disclosing information which could not lawfully be disclosed to the pupil under the EU's General Data Protection Regulation ("the GDPR") or to which the pupil would have no right of access under the GDPR.

The Controlled Drugs (Supervision of Management and Use) (Wales) Regulations 2008 make provision to ensure the safe management and use of controlled drugs in Wales. They provide for the sharing of information between responsible bodies about healthcare workers' management and/or use of controlled drugs. However, they do not require or permit the disclosure of any information which is prohibited by the GDPR.

The 2011 and 2008 Regulations were both amended by the UK Government's Data Protection, Privacy and Electronic Communications (Amendments etc.)

(EU Exit) Regulations 2019 (“the UK SI”) to address failures of retained EU law to operate effectively and other deficiencies arising from EU Exit. The UK SI replaced the references to the GDPR in the 2011 and 2008 Regulations with references to what, as provided for in the UK SI, will be the UK’s data protection law following EU Exit (“the UK GDPR”).

Why is it being changed?

The 2011 and 2008 Regulations were corrected by the UK SI. The amendments made to the Welsh text of the 2011 and 2008 regulations contained errors. The Welsh Ministers’ consent was not sought for the making of the UK SI even though the changes were to subordinate legislation made by the Welsh Ministers and therefore within the Welsh Ministers’ powers to make corrections under Schedule 2 to the 2018 Act. These Regulations will revoke and replace the amendments made by the UK SI to address these issues.

What will it now do?

The legislation will now operate the way that the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 originally intended.

Amendment to the Central Rating List (Wales) Regulations 2005

What did the law do before exit day?

The Central Rating List (Wales) Regulations 2005 describe all hereditaments which are listed on the Central Rating List for the purpose of collecting and administering non-domestic rates in Wales. These include railway, communications, national and regional gas, local gas, electricity transmission, electricity distribution, water supply, canal and long-distance pipe-line hereditaments.

Why is it being changed?

On leaving the EEA, the definitions set out in the Central Rating List (Wales) Regulations 2005 need to be amended in order to reflect that the UK is no longer in the EEA. Regulation 6 removes the definition of "EEA State" in regulation 7(3).

What will it now do?

The amendment will ensure that the collection of Non-Domestic Rates from the Central Rating List in Wales operates effectively after exit day.

Amendment to Food (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019

What did the law do before exit day?

The Food (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 made corrections to deficiencies in various pieces of Welsh law relating to food, to ensure that legislation would function effectively after exit day.

Why is it being changed?

There were two drafting errors in the Food (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019. Regulations 3(2) and 3(3) correct these errors. In Regulation 2(7), “the relevant authorities” is substituted with “the appropriate authorities”. In Regulation 7(5)(a), “United Kingdom” is substituted with “British Islands”.

What will it now do?

The amendments will ensure that the domestic legislation in the area of food operates effectively after exit day, and aligns across the UK.

Amendment to Seed Potatoes (Wales) (Amendment) (EU Exit) Regulations 2019

What did the law do before exit day?

The Seed Potatoes (Wales) (Amendment) (EU Exit) Regulations 2019 made changes to the Seed Potatoes (Wales) Regulations 2016 to ensure they remain operable if the UK withdraws from the EU without a deal.

The Seed Potatoes (Wales) Regulations 2016 govern the marketing and certification of seed potatoes in Wales.

Why is it being changed?

These amendments seek to address issues identified in the Constitutional and Legislative Affairs Committee’s Report on the Seed Potatoes (Wales) (Amendment) (EU Exit) Regulations 2019. These amendments are necessary to ensure that the Welsh language text has the same legal effect as the English language text.

What will it do now?

The amendments in Regulation 5 ensure that the Seed Potatoes (Wales) Regulations 2016 have the same legal effect in English and Welsh and continue to be operable if the UK withdraws from the EU without a deal.

Amendment to Flood and Water (Amendments) (England and Wales) (EU Exit) Regulations 2019

What did the law do before exit day?

The Flood and Water (Amendments) (England and Wales) (EU Exit) Regulations 2019 made corrections to deficiencies in various pieces of law relating to flood and water, so that the legislation would function after exit day.

Why is it being changed?

There was a small drafting error in the Regulations and this SI will correct that error. Regulation 5(3)(a) of the Regulations amended Regulation 11(2)(b) of the Nitrate Pollution Prevention (Wales) Regulations 2013 by substituting the words “Council Directive 98/83/EC on the quality of water intended for human consumption,” with “the Private Water Supplies (Wales) Regulations 2017 and the Water Supply (Water Quality) Regulations 2018”. Regulation 11 was

separately amended by the Environment, Planning and Rural Affairs (Miscellaneous Amendments) (Wales) Regulations 2018, meaning that on Exit Day the Regulation 5(3)(a) amendment would be inoperable.

What will it do now?

The Flood and Water (Amendments) (England and Wales) (EU Exit) Regulations 2019 will operate as originally intended by amending the substitution in Regulation 5(3)(a).

Amendment to the Welsh Language (Wales) Measure 2011

What did the law do before exit day?

The Welsh Language (Wales) Measure 2011 makes provision about the official status of the Welsh language in Wales and establishes the office of the Welsh Language Commissioner. It also makes provision about imposing duties on bodies to comply with standards.

The Measure only permits standards to be imposed on certain categories of persons. One of those categories is a person who provides services to the public and which receives public money amounting to £400,000 or more in two consecutive financial years. Public money is defined as including money made available directly or indirectly by an institution of the European Union (see Schedules 5 and 7).

Why is it being changed?

On leaving the EU, certain provisions of the Welsh Language (Wales) Measure 2011 will no longer operate effectively and will no longer be appropriate. These Regulations correct these deficiencies. The SI will amend the definition of 'public money' so as not to include monies from an institution of the European Union (as set out in Schedule 5 and Schedule 7).

What will it do now?

The Welsh Language (Wales) Measure 2011 will continue to be operable after exit day.

5. Consultation

As there is no policy change, no public consultation was undertaken. The purpose of the instrument is solely to enable the current legislative and policy framework to remain unchanged by the withdrawal of the United Kingdom from the European Union.

Regulation 3 relates to food legislation, and therefore pursuant to Article 9 of EU Regulation 178/2002 a shortened consultation was undertaken on the proposals to amend this domestic legislation. This consultation began on 11 January 2019 and closed on 31 January 2019. This consultation sought views on the proposed amendments necessary to ensure the law remains operable when the UK withdraws from the EU. The proposals included updating references to EU bodies and definitions. Regulation 3 is necessary to reflect the change in terminology used by the UK Government in amendments made to

the overarching legal framework. These amendments simply correct minor drafting errors. A targeted letter will be issued to key stakeholders so that they are aware of the corrections.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been conducted. No policy change is introduced through these amending Regulations. The Regulations are technical in nature and intended solely to enable the current legislative and policy framework to remain unchanged by the withdrawal of the United Kingdom from the European Union.

These amending Regulations have no impact on the statutory duties as set out in sections 77 to 79 of the Government of Wales Act 2006 or the statutory partners as set out in sections 72 to 75 of the Government of Wales Act 2006.

Annex A

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required of the Welsh Ministers under the 2018 Act. The table also sets out those statements that may be required of Ministers of the Crown under the 2018 Act, which the Welsh Ministers have committed to also provide when required. The required statements can be found in Part 2 of this annex.

| Statement | Where the requirement sits | To whom it applies | What it requires |
|-----------------|---|--|--|
| Sifting | Paragraphs 3(7) and 4(3), Schedule 7 <i>Standing Order 27.9B</i> | The Welsh Ministers exercising powers in Part 1 of Schedule 2 to make a Negative SI. Paragraph 3(7) applies to Ministers of the Crown, but Welsh Ministers committed to make the same statement, which resulted in the requirements in Standing Orders. | A statement to explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation of the CLA Committee (as the sifting committee). |
| Appropriateness | Sub-paragraph (2) of paragraph 28, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2. | A statement that the SI does no more than is appropriate. |
| Good Reasons | Sub-paragraph (3) of paragraph 28, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or | A statement to explain the good reasons for making the instrument and that what is being done is a reasonable |

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| | | jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2. | course of action. |
| Equalities | Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2. | <p>A statement to explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.</p> <p>A statement that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.</p> |
| Explanations | Sub-paragraph (6) of paragraph 28, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2. | A statement to explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g. whether minor or technical changes only are intended to the EU retained law. |
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2. | A statement setting out the 'good reasons' for creating a criminal offence, and the penalty attached. |
| Sub-delegation | Paragraph 30, Schedule 7 | Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and paragraph 1 of Schedule 4 to create a legislative power exercisable not | A statement to explain why it is appropriate to create such a sub-delegated power. |

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| | | <p>by a Minister of the Crown or a Devolved Authority.</p> <p>Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2 or paragraph 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority.</p> | |
| Urgency | Sub-paragraph (2) and (8) of paragraph 7, Schedule 7 | Welsh Ministers exercising powers in Part 1 of Schedule 2 but using the urgent procedure in paragraph 7 of Schedule 7. | A statement that the Welsh Ministers are of the opinion that it is necessary to make the SI using the urgent procedure and the reasons for that opinion. |

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) Act 2018

1. Sifting statement(s)

The Minister for Finance and Trefnydd, Rebecca Evans AM, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Retained EU law (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of the National Assembly for Wales (i.e. the negative procedure)”. This is the case because the changes that are being made are extremely minor in nature, and are making technical corrections to enable the statute book to function properly after exit day.

2. Appropriateness statement

The Minister for Finance and Trefnydd, Rebecca Evans AM, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Retained EU law (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 does no more than is appropriate. This is the case because the changes needed are being made to address deficiencies arising from EU Exit, they make no change to policy and they are minor technical corrections.”

3. Good reasons

The Minister for Finance and Trefnydd has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These are the need to have a functioning statute book on exit day, and the need to correct deficiencies in the drafting of existing EU Exit SIs.”

4. Equalities

4.1 The Minister for Finance and Trefnydd, Rebecca Evans AM, has made the following statement:

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

4.2 The Minister for Finance and Trefnydd, Rebecca Evans AM, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Rebecca Evans AM have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

5. Explanations

The explanations statement has been made in paragraph 4 (Purpose & intended effect of the legislation) of the main body of this explanatory memorandum.

6. Criminal offences

Not applicable/required

7. Sub-delegation

Not applicable/required

8. Urgency

Not applicable/required