

Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: A guide

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1. Background

The European Union (Withdrawal) Act 2018

1. The *European Union (Withdrawal) Act 2018* (the 2018 Act) provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation¹ in order to correct deficiencies in UK law that may arise following the UK's departure from the EU.
2. **Section 8** of the 2018 Act gives UK Ministers the power to make regulations as they consider appropriate to prevent, remedy or mitigate any failure of retained EU law² to operate effectively or any other deficiency in retained EU law.
3. **Section 9** gives UK Ministers the power to make regulations as they consider appropriate to implement any withdrawal agreement arising as a consequence of Article 50(2) of the Treaty on European Union.
4. **Section 11** of, and **Schedule 2** to, the 2018 Act confer powers on the Welsh Ministers to make regulations that correspond to powers conferred on UK Ministers by sections 8 and 9 of the 2018 Act (although the regulation-making powers of the Welsh Ministers are subject to limitations that do not apply to UK Ministers). Schedule 2 also allows for UK Ministers and the Welsh Ministers to act jointly when making regulations.
5. However, the powers in section 8 and 9 for UK Ministers are not limited to being exercised in England. **In effect, the powers permit UK Ministers to act in Wales in devolved areas, i.e. UK Ministers and the Welsh Ministers hold some powers concurrently.**
6. In an **agreement between the UK and Welsh governments**, the UK Government commits not to act in devolved areas without the agreement of the Welsh Government.³ Its states:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved

¹ Secondary legislation is also referred to as subordinate or delegated legislation

² Any law which, on or after exit day, continues to be, or forms part of domestic UK law

³ *Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks*

administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”

7. Section 14 of, and Schedule 4 to, the 2018 Act provides powers for the Welsh Ministers to make regulations in connection with fees and charges.
8. Section 22 of, and Schedule 7 to, the 2018 Act include provisions about the scrutiny by the National Assembly of regulations made by the Welsh Ministers under the 2018 Act, including the sifting of regulations proposed to be made using the negative procedure by the Constitutional and Legislative Affairs Committee (CLA Committee). The sifting process was introduced during scrutiny of the Bill that became the 2018 Act because of concerns about the scale and scope of the regulation-making powers being provided and the need for more scrutiny of the subordinate legislation as a result.⁴ The sifting process, which could potentially result in proposals for negative procedure regulations to be changed to affirmative procedure regulations, is described in chapter 2.
9. Section 23 of the 2018 Act provides powers for UK Ministers to make regulations in relation to consequential and transitional provisions as they consider appropriate as a consequence of the 2018 Act.
10. With regard to making regulations in devolved areas, the result is that the 2018 Act includes a complex mix of concurrent and joint powers exercisable by the Welsh Ministers and UK Ministers.
11. The regulation-making powers under the 2018 Act are listed in Table 1. The regulations will be subject to the negative or affirmative procedures, or the urgent procedure, in accordance with section 22 and Schedule 7 to the 2018 Act.

Procedures for scrutinising regulations made under the 2018 Act

12. In its report, *Scrutiny of regulations under the European Union (Withdrawal) Act 2018: operational matters*, the CLA Committee made recommendations about how the National Assembly's Standing Orders should be changed to ensure that regulations arising from the 2018 Act are scrutinised effectively.

⁴ Concerns were led by the House of Commons Procedure Committee and their work on the subject is available on their [website](#).

13. Following the Welsh Government's response to the report, and that of the Business Committee, the National Assembly agreed changes⁵ to its Standing Orders (based on the Business Committee's recommendations).

14. Under the 2018 Act, regulations in devolved areas can be made in three main ways:⁶

- by the Welsh Ministers (under section 11 of, and Schedule 2 to, the 2018 Act);
- by UK Ministers acting alone in devolved areas with the consent⁷ of the Welsh Ministers (under sections 8 and 9 of the 2018 Act);
- by UK Ministers acting alone in devolved areas without the consent⁸ of the Welsh Ministers (under section 23 of the 2018 Act).

15. All regulations to correct deficiencies in EU law, whether made by UK Ministers or the Welsh Ministers, can be identified by the inclusion of the phrase "(EU Exit)" in their title.

⁵ RoP. [178-191]. 3 October 2018

⁶ While there is scope for UK Minister and the Welsh Ministers to act jointly, or to use concurrent powers in a composite instrument, it is expected that such circumstances will occur rarely.

⁷ Consent under the Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, rather than statutory consent

⁸ Consent under the Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, rather than statutory consent

Table 1: Summary of main powers to make regulations in devolved areas under the European Union (Withdrawal) Act 2018

Power	Can be exercised by	Section or Schedule	Laid before	Does the sifting process apply under the 2018 Act
To correct deficiencies in retained EU law in devolved areas	UKMs acting alone	Section 8	UKP	Yes
	WMs acting alone	Part 1 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 1 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 8 (UKMs) Part 1 of Schedule 2 (WMs)	UKP and NAW	Yes
To implement withdrawal agreement in devolved areas	UKMs acting alone	Section 9	UKP	Yes
	WMs acting alone	Part 2 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 2 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 9 (UKMs) Part 2 of Schedule 2 (WMs)	UKP and NAW	Yes
Consequential and transitional provisions in devolved areas	UKMs acting alone	Section 23	UKP	Yes
Imposing and modifying fees and charges in devolved areas	UKMs acting alone	Schedule 4	UKP	No
	WMs acting alone	Schedule 4	NAW	No
	UKMs and WMs acting jointly	Schedule 4	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Schedule 4	UKP and NAW	No
Regulations to freeze certain areas of retained EU law in devolved areas	UKMs acting alone (but subject to terms agreed in the Intergovernmental Agreement)	Section 12 (i.e. under the new section 109A of the <i>Government of Wales Act 2006</i>) Schedule 3, Part 1 (i.e. under new section 80(8) of the 2006 Act)	UKP (and always subject to affirmative procedure)	No (but before UKMs can lay before UKP, NAW to make a "consent decision" within 40 days)

Key: WMs = the Welsh Ministers. UKMs = UK Ministers. NAW = National Assembly for Wales. UKP = UK Parliament.

2. Regulations made by the Welsh Ministers

Background

16. Under the 2018 Act, regulations made by the Welsh Ministers to correct deficiencies in EU law can be subject to the negative procedure or the affirmative procedure. In each case, the particular procedure is determined by the 2018 Act itself.

17. As described in paragraph 8 of this guide, regulations which the Welsh Government proposes to make using the negative procedure are subject to sifting.⁹ The regulations are being referred to as proposed negatives.

18. In order to manage the number of regulations that may come forward, the CLA Committee and Welsh Government have entered into a Protocol, which provides in particular for notice two weeks in advance of regulations that are likely to come forward.

The sifting process by the CLA Committee for proposed negative regulations

19. The sifting process is set out in paragraph 4 of Schedule 7 to the 2018 Act and is taken account of in new Standing Orders 21.3B, 21.3C, 27.1A, 27.9A and 27.9B. Taken together, the sifting process requires:

- all regulations proposed to be made by the Welsh Ministers under the powers in Parts 1 and 2 of Schedule 2 (other than those to be made jointly with UK Ministers), and which the Welsh Ministers consider ought to be made under the negative procedure, shall be laid in draft before the National Assembly;
- the proposed regulations must be accompanied by an explanatory memorandum setting out why the regulations should be subject to the negative procedure;
- within a period of 14 calendar days after laying, the Welsh Ministers may not make the proposed negative regulations (i.e. sign them into law), unless the CLA Committee have made a recommendation as to the appropriate procedure for the regulations;

⁹ Other than regulations made under Schedule 4 to the 2018 Act.

- within those 14 calendar days, the CLA Committee may consider the proposed negative regulations and recommend that the regulations should follow an alternative procedure (such as the affirmative procedure);
- the criteria that the CLA Committee take into account in making their recommendation are set out in Standing Order 21.3C (see Box 1);
- information about the outcome of the scrutiny of proposed negative regulations is available on the CLA Committee's [webpage](#).

Box 1: Standing Order 21.3C – sifting criteria

The responsible committee under Standing Order 21.3B must report on the appropriate procedure using the following criteria:

(i) whether the memorandum is sufficiently clear and transparent about why the government is of the opinion that the negative resolution procedure should apply;

(ii) whether the memorandum is sufficiently clear and transparent as to the changes that are being made by the regulations;

(iii) whether there has been adequate consultation on the regulations;

(iv) whether the memorandum is sufficiently clear and transparent about the impact the regulations may have on equality and human rights;

(v) whether the regulations raise matters of public, political or legal importance; and

(vi) any other matters the committee considers appropriate.

Note: the memorandum refers to an explanatory memorandum that must accompany any regulations laid before the National Assembly (in accordance with Standing Order 27.1)

After sifting by the CLA Committee

20. After the 14 calendar days have elapsed (or sooner if the CLA Committee has already made a recommendation) the Welsh Ministers may proceed with the proposed negative regulations by:

- the affirmative procedure, where the CLA Committee recommends the regulations should follow the affirmative procedure and the Welsh Government accepts that recommendation (i.e. the regulations require a debate and a vote in the National Assembly before it may be made and brought into force), or
- the negative procedure, where the CLA Committee has not made a recommendation for the regulations to be subject to the affirmative procedure or where it has, the recommendation has not been accepted by the Welsh Government (i.e. the regulations are made and may be brought into force, but they can be annulled if the National Assembly resolves to annul them within 40 days of them being laid).

21. Standing Order 27.9B requires that the explanatory memorandum to accompany the regulations must explain, if relevant, why the Welsh Government has not adopted a CLA recommendation to adopt the affirmative procedure.

22. The regulations are then subject to the standard process for scrutinising regulations and will be subject to scrutiny by the CLA Committee in accordance with the criteria set out in Standing Orders 21.2 and 21.3. For example:

- under Standing Order 21.2, matters considered include those that might call into question the legality of regulations or whether they are made in both English and Welsh. The Committee must consider and report on these matters. Matters reported under Standing Order 21.2 are known as technical reporting points.
- under Standing Order 21.3, matters considered include those that are likely to be of interest to the Assembly, such as regulations that do not implement policy in the way claimed or that are considered to be politically contentious or significant. The Committee may consider and report on these matters. Matters reported under Standing Order 21.3 are known as merits reporting points.

23. The CLA Committee will consider advice from National Assembly lawyers on any set of regulations where there are issues to report.

24. Otherwise they will be noted as having clear reports. At any one meeting, regulations with clear reports will be included in a separate document.

CLA reporting

25. All reports are then laid before the National Assembly enabling Assembly Members to:

- for affirmative regulations, decide whether to approve the regulations when are voted on in plenary;
- for negative regulations, decide whether to table a motion to annul them, which triggers a debate in plenary for Assembly Members to vote on that motion.

26. Information about the outcome of the scrutiny of these regulations subject to either the negative or affirmative procedures is available on the CLA Committee's subordinate legislation [webpage](#).

3. Regulations made by UK Ministers acting alone in devolved areas (with consent of the Welsh Ministers)

Background

27. UK Ministers are able to make regulations in devolved areas under sections 8 and 9 of the 2018 Act. However, they can only do so with the consent of the Welsh Government (see paragraph 6 of the guide). These regulations will be laid before the UK Parliament only.

28. New Standing Order 30C requires that for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement (30C written statement) notifying the Assembly of the regulations in question normally within 3 working days of it being laid in the UK Parliament.

29. Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum (SICM) under Standing Order 30A. Any member may then table a motion to require the National Assembly to formally give consent to the regulations.¹⁰

The sifting process in the UK Parliament for proposed negative regulations

30. For regulations proposed to be made under the negative procedure by UK Ministers in devolved areas and with the Welsh Government's consent, they too will be subject to the sifting process. In the UK Parliament, sifting is being undertaken by two committees:

- the European Statutory Instruments Committee in the House of Commons;
- the Secondary Legislation Scrutiny Committee in the House of Lords.

¹⁰ Standing Order 30A was introduced in October 2013 and therefore not included specifically to deal with the UK's exits from the European Union.

31. The process for sifting is broadly the same although these committees have a longer period in which to sift¹¹ and their sifting criteria are expressed differently.

32. After the regulations have been sifted, the UK Government is obliged to make a written Ministerial statement to both Houses on every occasion they disagree with a recommendation from one or both of the sifting committees.¹²

After sifting in the UK Parliament

33. After sifting all regulations, all statutory instruments (whether negative resolution or affirmative resolution) are then formally scrutinised by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee to undertake the usual technical and merits scrutiny carried out (mirroring the process undertaken by CLA Committee for all Welsh statutory instruments).

CLA scrutiny and reporting

34. Committee Members will receive advice from National Assembly lawyers about these regulations and the relevant Welsh Government 30C written statement, as well as any relevant SICM. The advice will include whether the approach adopted meets the test in the intergovernmental agreement (referred to in paragraph 6 of the guide) namely:

“... the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”

35. If there are any issues, the Committee will likely write to the Welsh Ministers about the issues, and may draw them to the attention of the parliamentary committees referred to in paragraph 33. The timeframes involved mean the CLA Committee is not likely to be in a position to influence the sifting process in the UK Parliament.

¹¹ CLA Committee's report, *Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: Operation matters* explains the background to the difference (pages 25-27)

¹² For a discussion of why this requirement does not apply in the National Assembly, see RoP.178-191. 3 October 2018.

4. Regulations made by UK Ministers acting alone in devolved areas (without the consent of the Welsh Ministers)

Background

36. UK Ministers are able to make regulations in devolved areas under section 23 of the 2018 Act, without the consent of the Welsh Government. These regulations will also be laid before the UK Parliament only.

37. The requirements of Standing Order 30C and Standing Order 30A also apply to such regulations and require that, for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement notifying the Assembly of the regulations in question normally within 3 working days of the regulations being laid in the UK Parliament.

38. These regulations will also be sifted and scrutinised by the parliamentary committees referred to in paragraph 30, again following the same procedures set out in paragraphs 31 to 33.

CLA scrutiny and reporting

39. Committee Members will receive advice from National Assembly lawyers about these regulations, and the relevant Welsh Government 30C written statement, as well as any relevant SICM. The advice will include whether the approach adopted meets the test in the intergovernmental agreement (referred to in paragraph 6 of the guide) namely:

“... the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”

40. If there are any issues, the Committee will likely to write to the Welsh Ministers about the issues, and may draw them to the attention of the parliamentary committees referred to in paragraph 33. The timeframes involved mean the CLA Committee is not likely to be in a position to influence the sifting process in the UK Parliament.