



# European Union and Trade Bill 2018

## EXPLANATORY NOTES

(Revised 15 November 2018)

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Hon Howard Quayle MHK.

### INTRODUCTION

1. These explanatory notes relate to the European Union and Trade Bill 2018 ("the Bill"). They have been prepared by the Cabinet Office in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

### BACKGROUND

3. The Isle of Man's Protocol 3<sup>1</sup> relationship with the European Union (EU) is dependent upon the United Kingdom's (UK's) membership of the EU. The UK's decision to withdraw from the EU, commonly known as "Brexit", means that the Island's relationship with the EU, in its current form at least, will end when the UK's membership of the EU comes to an end at 11.00 p.m. on 29 March 2019. As in the UK, this event will have an unprecedented effect on the Island's legislative framework.
4. Like many international events, this is beyond the control of the Isle of Man, but the Island must ensure that it can respond appropriately in a timely manner.
5. At the time of the writing, negotiations between the UK and the EU have resulted in a final draft text of the Withdrawal Agreement<sup>2</sup>. However, this Agreement has not yet been formally approved by the UK and EU leaders and it will need to be ratified by the United Kingdom and European Parliaments for it to come into force. It is currently unclear whether there is sufficient support for the draft Agreement to be approved by the UK Parliament. There is also still a great deal of uncertainty about the future relationship that will exist between the UK and the EU after exit day, or at the end of the implementation period if there is one<sup>3</sup>.
6. The changes to Manx legislation as a direct or indirect result of Brexit will be wide-ranging and substantial but in the current period of uncertainty about the Island's future relationship (through the UK) with the EU it is not possible to predict exactly

<sup>1</sup> <https://www.gov.im/media/624101/protocol3relationshipwiththeeu.pdf>

<sup>2</sup> [https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en)

<sup>3</sup> However, an outline of the political declaration setting out the framework for the future relationship has been published.  
[https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en)

what those changes will be or make the necessary amendments to the Island's legislation. A substantial amount of preparatory work has been carried out, however, and it is known that the size of the task is very large. Given that, and the limited time to complete the task, the Bill is necessarily largely enabling in nature. But new Manx legislation is required whether or not there is an agreement between the UK and the EU.

7. A number of amendments have been made to the Bill since a draft was published for public consultation, under the title of European Union (Withdrawal) Bill, earlier in 2018. The significant changes are described in the Appendix to these Notes.

## OVERVIEW

8. The Bill that became the UK's European Union (Withdrawal) Act 2018<sup>4</sup> ("the UK Act") was a starting point for the Island's Bill but provisions in other UK Brexit-related Bills have also been considered during the drafting process, in particular the UK's Trade Bill<sup>5</sup>, as have the provisions of the Island's [European Communities \(Isle of Man\) Act 1973](#) ("the 1973 Act") and the Brexit Law that has been adopted by Jersey<sup>6</sup>.
9. The main purposes of the Bill are to:
  - deal with the repeal of the 1973 Act, the preservation (subject to necessary modifications) of EU instruments which fall within the scope of Protocol 3, with the approval of Tynwald; save existing statutory documents made under the 1973 Act<sup>7</sup>; and continue to allow EU instruments to be voluntarily applied to, or implemented in, the Island where useful to do so;
  - make provision by way of enabling powers for effect to be given to a Withdrawal Agreement (which will include the provisions governing the Implementation Period during which, it is proposed, the effect of Protocol 3 will continue) in Manx law, so far as possible;
  - provide enabling powers to allow for continued effect to be given to certain international agreements relating to trade which have been entered into by the EU which currently apply to the Isle of Man by virtue of Protocol 3 (to the extent that their provisions fall within the scope of Protocol 3), or which may be extended to the Island in the future, including certain WTO and free trade agreements; and
  - provide a power for the Department of Environment, Food and Agriculture ("DEFA") to be able to apply certain UK agriculture and fisheries legislation to the Island in areas where the EU legislation is currently wholly or largely directly and automatically applicable to the Island by virtue of Protocol 3 and section 2(1) of the 1973 Act.
10. The Bill consists of 28 clauses and 8 Schedules.
11. Clauses 1 to 3 are introductory.
12. Clause 4 deals with "exit day" from the EU, which has to be the same for the Island as for the UK.

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2018/16/contents>

<sup>5</sup> <https://services.parliament.uk/Bills/2017-19/trade.html>

<sup>6</sup> European Union (Repeal and Amendment) (Jersey) Law 2018:

<https://www.jerseylaw.je/laws/enacted/Pages/L-17-2018.aspx>

<sup>7</sup> In the normal course of events when an Act of Tynwald is repealed the secondary legislation made under that Act ceases to have effect.

13. Clause 5 deals with the repeal of the 1973 Act, the Island's main legislative vehicle for giving effect to its Protocol 3 relationship with the EU.
14. Clauses 6 to 11 concern the retention of certain EU law and rights after exit day.
15. Clauses 12 to 14 contain enabling powers in connection with the UK's withdrawal from the EU, including a power to implement any withdrawal agreement between the UK and the EU.
16. Clauses 15 to 21 contain powers that can be exercised on or after exit day.
17. Clauses 22 to 25 deal with the implementation of, and compliance with, trade agreements.
18. Clauses 26 to 28 are general and final provisions.
19. The Schedules contain provisions which supplement certain of the clauses of the Bill, for example by providing for interpretation and exceptions.
20. A more detailed description of the Bill's provisions is provided in the following paragraphs.

## **NOTES ON CLAUSES**

### **Clause 1**

21. Clause 1 gives the short title that the Act will have if the Bill is passed.

### **Clause 2**

22. Clause 2 provides for commencement of the Bill. Certain provisions will come into operation immediately when Royal Assent is announced in Tynwald and the remaining provisions will be brought into operation by one or more Appointed Day Orders made by the Council of Ministers. Such orders can make consequential, incidental, supplemental, transitional, transitory or saving provisions as are necessary or expedient in connection with the coming into operation of any provision of the Bill.

### **Clause 3**

23. Clause 3 gives effect to Schedule 1, which defines the meaning of terms that are used in the Bill.

### **Clause 4**

24. Clause 4 establishes the day and time of "exit day", i.e. when the UK officially leaves the EU. Unless there are exceptional and unforeseen circumstances this will be 11.00p.m. on 29 March 2019<sup>8</sup>. On this date the EU Treaties<sup>9</sup> are due to cease to apply to the UK in accordance with Article 50(3) of the Treaty on European Union (TEU), being two years following the date on which the UK submitted its formal notification to the EU under Article 50 of its intention to leave the EU.
25. Under Article 50 TEU the two year period referred to above can only be extended with the unanimous agreement of the UK and the other 27 EU Member States. It is not

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<sup>8</sup> However, if the Withdrawal Agreement is agreed, notwithstanding that the UK will leave the EU on 29 March 2019, there will be a status quo implementation period until 31 December 2020.

<sup>9</sup> The Treaty on European Union and the Treaty on the Functioning of the European Union.

expected that this will happen. Nevertheless, the UK Act includes a power to amend the definition of “exit day” to ensure that the day and time specified in the definition are the day and time that the EU Treaties are to cease to apply to the United Kingdom if necessary.

26. Because the Isle of Man’s Protocol 3 relationship with the EU is through the UK’s membership of the Union, the Island cannot have a different exit day to that of the UK. This clause therefore allows the definition of “exit day” to be amended by the Council of Ministers if (and only if) the definition of “exit day” in the UK Act is amended.

## **Clause 5**

27. This clause repeals the 1973 Act on exit day. The 1973 Act is the Island’s main legislative vehicle to give effect to the Island’s Protocol 3 relationship with the EU. Under section 2(1) of the 1973 Act, directly applicable EU legislation (i.e. EU Regulations and relevant EU Decisions) which falls within the scope of Protocol 3 has direct and automatic effect as part of the law of the Island (without the need for any further Manx legislation to apply it to the Island). The 1973 Act also includes enabling powers to implement such directly applicable EU legislation (by, for example, providing for offences and penalties), to transpose EU Directives that fall within the scope of Protocol 3<sup>10</sup>, and to voluntarily apply and implement EU legislation which is outside the scope of Protocol 3 where useful to do so (in particular the application and implementation of EU sanctions measures).
28. Whilst there may still be circumstances in the future where it will be useful to voluntarily apply and implement certain EU legislation in the Island (see clause 17), the original and main purpose of the 1973 Act to give effect to Protocol 3 becomes redundant (and will not work legally) when the Island’s Protocol 3 relationship with the EU comes to an end.

## **Clause 6**

29. Clause 6 preserves in effect all orders made by the Council of Ministers under section 2A of the 1973 Act before exit day and all regulations made by the Council of Ministers under section 2B of that Act before exit day.
30. Normally when an Act of Tynwald is repealed the statutory documents made under that Act automatically cease to have effect. However, since the intention is that the transition from immediately before exit day to immediately following exit day should be as seamless as possible, the statutory documents made under the 1973 Act are preserved in operation when that is repealed. For example, it would be inadvisable for the orders and regulations made under the 1973 Act to apply and implement EU sanctions Regulations to cease to have effect on exit day as this is the main way the Island complies with international sanctions measures.
31. Statutory documents made under this clause will be treated as if they had been made under clause 17 and so it will be possible to subsequently amend or repeal the saved statutory documents using the powers in that clause when appropriate to do so.
32. This clause is subject to the provisions of clause 9 and Schedule 2 which deal with exceptions to savings and retention.

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<sup>10</sup> Unlike EU Regulations and Decisions, which are directly applicable as part of the law of the EU Member States (and, where they fall within Protocol 3, the law of the Isle of Man), EU Directives do not directly form part of the law of the Member States but must be converted (or “transposed”) into national law.

## Clause 7

33. Clause 7 provides for the preservation as part of the law of the Island certain EU legislation that is considered to currently apply directly and automatically, wholly or largely, to the Isle of Man under Protocol 3 and section 2(1) of the 1973 Act.
34. To avoid a potential legislation 'cliff-edge' immediately following exit day, the UK Act will incorporate all "direct EU legislation"<sup>11</sup> which applies in the UK immediately before exit day as part of UK domestic law<sup>12</sup>.
35. The UK's position in relation to direct EU legislation is clear; except in certain limited and well-defined cases the whole body of direct EU legislation (i.e. EU Regulations and relevant Decisions) applies to the UK. The position of the Isle of Man (and the other Crown Dependencies) in relation to direct EU legislation is not, and never has been, as clear. Whilst the general scope of Protocol 3, as supplemented by Council Regulation 706/73<sup>13</sup>, is well-known, exactly which EU instruments are covered by Protocol 3, in whole or in part, has never been explicitly defined. Although work has been undertaken, within the limits of resources and time available, to identify the majority of EU Regulations and Decisions that are likely to be within the scope of Protocol 3<sup>14</sup>, ultimately only the Court of Justice of the European Union could provide a definitive opinion on the applicability or otherwise of a particular EU instrument to the Island by virtue of Protocol 3.
36. Therefore, with a view to providing greater legal certainty after exit day, only such direct EU legislation which is believed to fall within the scope of Protocol 3 before exit day and which is prescribed in regulations made by the Council of Ministers before exit day will continue to form part of Manx law on and after exit day. Although this power is broad enough that it would allow the category of all direct EU legislation that falls within Protocol 3 to be prescribed for the purpose of these regulations, if such should be required, it also allows a list of specific EU Regulations and Decisions that are retained as part of Manx law to be established. The current intention is that there will be a defined list of direct EU legislation rather than retaining broad categories of direct EU legislation. Whilst the power to make regulations under this clause rests with the Council of Ministers the actual work on identifying which pieces of EU legislation that are currently directly applicable to the Island under Protocol 3 should be retained is being carried out by relevant Departments.
37. Any direct EU legislation that is not prescribed under this clause will cease to have effect in Manx law on exit day (but see clause 18). Regulations under this clause cannot be made after exit day.
38. Only the English language version of such prescribed EU legislation will form part of Manx law.
39. Again with a view to providing legal certainty, in any question as to whether a particular EU Regulation, EU Decision or EU tertiary legislation did or did not have legal effect in Manx law by virtue of section 2(1) of the 1973 Act immediately before exit day, a certificate issued by or under the authority of HM Attorney General stating that

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<sup>11</sup> This means EU Regulations; EU Decisions which are addressed to the UK and EU; and implementing or delegated regulations or decisions made under those instruments, or under EU Directives, by the European Commission ("EU tertiary legislation").

<sup>12</sup> Other UK legislation may then repeal and replace or amend the retained direct EU legislation.

<sup>13</sup> Regulation (EEC) No 706/73 of the Council of 12 March 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products – <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521646367502&uri=CELEX:01973R0706-19860424>

<sup>14</sup> And so directly applicable as part of the law of the Island by virtue of section 2(1) of the 1973 Act.

it did or did not have such effect is to be treated as evidence of that fact<sup>15</sup>. Any such certificate would be challengeable by way of Petition of Doleance.

40. In addition, because it is impossible to be certain whether an EU instrument is wholly applicable as part of the law of the Island in all circumstances, to provide the legal certainty that is highly desirable going forward, this clause confirms that any EU instrument which is retained under this clause applies as part of Island both to the extent that it was applicable under Protocol 3 and to any extent that it might not have been applicable under Protocol 3.
41. Retained direct EU legislation can be amended by the Council of Ministers to deal with deficiencies arising from the UK's withdrawal from the EU (see clause 12) and also in limited other ways, including to mirror changes made to the legislation as it has effect in the EU after exit day (see clause 15), in each case subject to Tynwald approval.
42. This clause is subject to the provisions of clause 9 and Schedule 2 which deal with exceptions to savings and retention.

## Clause 8

43. Clause 8 provides that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which are available and recognised in Manx law immediately before exit day by virtue of section 2(1) of 1973 Act (i.e. those rights, powers, etc that fall within the scope of Protocol 3) continue to be available and recognised in the Island on and after exit day. But this saving only applies so far as such rights, powers, etc relate to any statutory document made under the 1973 Act that is saved under clause 6, to retained direct EU legislation under clause 7, or to any Manx legislation passed or made or operating before exit day for a purpose mentioned in section 2B(1)(a) or (b) of the 1973 Act.
44. Clause 8 applies to directly effective rights within the EU treaties (within the meaning of section 1 of the 1973 Act). Directly effective rights are those provisions of the EU treaties which are sufficiently clear, precise and unconditional to confer rights directly on individuals which can be relied on national law without the need for implementing measures<sup>16</sup>.
45. The clause provides for certain exceptions to the retention of directly effective rights.
46. Any directly effective rights converted into Manx law as a result of this clause are capable of amendment under clauses 12 and 15.
47. As with the provision in the UK Act on which it is based, this clause is a safety net provision to ensure that anything that is not set out in EU Regulations or Decisions but which still may be important is not lost inadvertently.
48. This clause is subject to the provisions of clause 9 and Schedule 2 which deal with exceptions to savings and retention.

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<sup>15</sup> This mirrors a provision in the 1973 Act where the power rests with the UK Secretary of State.

<sup>16</sup> For information about the types of rights etc that the UK Government considers are directly effective under the EU Treaties, see paragraph 92 to 96 of the Explanatory Notes on the UK Act in respect of the similar provision in that Act: <http://www.legislation.gov.uk/ukpga/2018/16/notes/contents>

It should be noted that a number of areas identified by the UK Government fall outside of Protocol 3 but others, such as in respect of customs and free movement of goods, would be within Protocol 3 and relate to EU legislation that it is intended will be retained under clause 7.

## Clause 9

49. Clause 9 deals with certain exceptions to the saving and retention of EU law by the Bill. The clause confirms that “retained EU law” (as defined in Schedule 1 to the Bill) is subject to Manx legislation that is passed after exit day. But this clause also confirms that, except for legislation relating to the UK’s withdrawal from the EU, Manx legislation passed or made before exit day is subject to retained EU law; this reflects the fact that currently, by virtue of section 2(1) of the 1973 Act, other laws in the Island must be read in accordance with EU legislation which falls within the scope of Protocol 3.
50. Clause 9 confirms, for the avoidance of doubt, in line with the position under the UK Act, that the Charter of Fundamental Rights of the European Union<sup>17</sup> does not apply as part of Manx law on or after exit day but this does not affect the continuation of rights under the Charter which exist separately from the Charter – any rights or principles codified by the Charter and which exist in any EU law saved and retained under clauses 6, 7 and 8 will be retained as Manx law<sup>18</sup>.
51. This clause also gives effect to Schedule 2 which includes some further limited exceptions to the saving and retention of EU law by the Bill.

## Clause 10

52. Clause 10 deals with how retained EU law is to be interpreted by courts and tribunals in the Island on and after exit day.
53. Firstly, the clause confirms that courts and tribunals in the Island are not bound by new EU case law and cannot refer any matters to the Court of Justice of the European Union<sup>19</sup>, but they may have regard to a decision of the European Court, another EU entity or the EU if they consider it appropriate to do so.
54. Secondly, the clause provides that for retained EU law which has not been modified on or after exit day, any question as to its validity or meaning will be decided in accordance with any relevant pre-exit EU or Manx case law and any relevant pre-exit general principles of EU law. Any such retained EU law will also be interpreted by reference to the limits of EU competences in relation to the Island immediately before exit day, i.e. within the scope of Protocol 3. But retained EU law which has been amended on or after exit day can be determined in accordance with pre-exit EU or Manx case law and the pre-exit general principles.
55. Thirdly, the clause provides that the Staff of Government Division (i.e. the Island’s Court of Appeal) is not bound by any pre-exit EU case law; and in deciding whether to depart from such pre-exit EU case law the Staff of Government Division must apply the same test as it would apply in deciding whether to depart from its own case law. In addition, no Manx court or tribunal is bound by any relevant retained Manx case law (see definition in Schedule 1) that it would not otherwise be bound by.

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<sup>17</sup> The Charter may currently apply to the Island but only to extent that it relates to the EU Treaties and EU legislation which applies to the Isle of Man by virtue of the Island’s Protocol 3 relationship with EU. The Charter is largely a restatement for the EU of rights that exist under other international instruments such as the European Convention on Human Rights and a number of United Nations human rights conventions.

<sup>18</sup> In addition, many of the rights set out in the Charter are similar to rights under international treaties which apply to the Isle of Man and are given effect in Manx law – for example, rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which are given effect in Manx law by the Human Rights Act 2001.

<sup>19</sup> At present the Island’s courts can refer questions relating to EU issues that fall within the scope of Protocol 3 to the European Court and judgments of the European Court on such issues are binding on the Island.

## Clause 11

56. Clause 11 provides for a review of the retained direct EU legislation within 5 years from exit day.
57. The Council of Ministers must cause a review of each piece of retained direct EU legislation, set out the conclusions of the review in a report, lay the report before Tynwald with recommendations on each piece of retained direct EU legislation, and cause the report to be debated in Tynwald at the sitting at which the report is laid or the next following sitting.

## Clause 12

58. Clause 12 gives the Council of Ministers the power, subject to the approval of Tynwald, to make regulations to prevent, remedy or mitigate any failure of, or other deficiency in, retained EU law or other Manx legislation arising from the withdrawal of the UK from the EU. What constitutes a deficiency for the purpose of this clause is defined. As with the power to decide what EU law is retained, whilst the power to make regulations under this clause rests with the Council of Ministers, the work on identifying the amendments that need to be made to EU law that is to be retained and relevant Manx legislation is being carried out by relevant Departments.
59. The Council of Ministers can make regulations to provide for other things to be treated as deficiencies for the purpose of this clause but only with the approval of Tynwald.
60. The clause confirms that retained EU law and other Manx legislation is not deficient only because it does not include any modification to EU law which is adopted or notified, comes into operation or only applies on or after exit day.
61. The clause provides that the power to deal with deficiencies can make the same provision as an Act of Tynwald, including amendments to Acts of Tynwald. However, the clause includes a number of restrictions on the use of this power – it cannot:
- impose or increase taxation;
  - make provision that comes into operation before the date on which the power is exercised (“retrospective provision”);
  - create a criminal offence that has a maximum penalty of greater than 2 years’ custody (“a relevant criminal offence”)<sup>20</sup>; or
  - amend, repeal or revoke the Human Rights Act 2001 or any statutory document made under it.
62. Within 5 years from exit day the Council of Ministers must cause a review to be carried out of each set of Regulations made under this clause to address withdrawal deficiencies. The conclusions of the review must be set out in a report which explains the reasons for each set of Regulations. The report must be laid before Tynwald.
63. No regulations can be made under this clause after two years from exit day.

## Clause 13

64. Clause 13 gives the Council of Ministers the power to make regulations to prevent or remedy any breach of an existing international obligation that applies or extends to the

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<sup>20</sup> See the definition of “a relevant criminal offence” in Schedule 1 which gives more detail on the maximum penalties that can be imposed on both conviction on information and summary conviction.



Island and which arises from the withdrawal of the UK from the EU. Tynwald approval will be required for any such regulations to come into operation.

65. Regulations made under this clause can do anything an Act of Tynwald can do to prevent or remedy any breach of an international obligation. However, regulations under this clause cannot impose or increase taxation; make retrospective provision; create a relevant criminal offence; or amend, repeal or revoke the Human Rights Act 2001.
66. No regulations can be made under this clause after five years from exit day.

#### **Clause 14**

67. Under clause 14 the Council of Ministers can make regulations, with the approval of Tynwald, for the purposes of implementing any withdrawal agreement concluded between the UK and the EU.
68. Regulations under this clause can do anything that an Act of Tynwald might do to implement any withdrawal agreement. However, such regulations may not impose or increase taxation; make retrospective provision; create a relevant criminal offence; or amend, repeal or revoke the Human Rights Act 2001.
69. No regulations can be made under this clause after two years from exit day.

#### **Clause 15**

70. Under clause 15 the Council of Ministers can make certain amendments to retained direct EU legislation (see clause 7) as it considers appropriate on or after exit day. For example, if it is considered appropriate, the retained direct EU legislation could be amended to keep it in line with changes that are made by the European Union to the legislation as it has effect in the EU. The clause also allows for any rights, powers, liabilities, etc preserved under clause 8 to be amended on or after exit day. In both cases the approval of Tynwald will be required.
71. This clause will allow retained direct EU legislation and other retained EU law to be amended:
  - so as to include modifications made to the EU instrument in the EU, including linking to changes made in the EU from time to time;
  - to give effect to the provisions in Manx law;
  - to repeal or revoke it, entirely or in part;
  - to modify it to take account of changes to the retained EU law in the UK.
72. As in other clauses there are certain restrictions on the use of the powers – they may not impose or increase taxation; make retrospective provision; create a relevant criminal offence; or amend, repeal or revoke the Human Rights Act 2001.

#### **Clause 16**

73. Clause 16 allows the Council of Ministers to make regulations, with the approval of Tynwald, to apply to the Island or to implement in the Island, certain treaty provisions. This clause applies to the EU Treaties (within the meaning of section 1(1) of the 1973 Act). This clause may also be applied to other agreements by the Council of Ministers with the approval of Tynwald. Examples of the types of additional agreements that this clause may be applied to are provided, including future agreements between the UK

and EU after exit day. Regulations under this clause cannot come into operation until after exit day.

74. This clause is based on a provision in the European Union (Repeal and Amendment) (Jersey) Law 2018.

### **Clause 17**

75. Clause 17 is similar to existing sections 2A and 2B of the 1973 Act. It will allow the Council of Ministers, with the approval of Tynwald, to:
- (a) voluntarily apply any EU instrument (whether it is operative before, on or after exit day) to the Island (subject to modifications) and to make any necessary provisions to implement such instruments; and
  - (b) implement any other EU law (whether operative before, on or after exit day) into Manx law and to deal with any matters arising out of such implementation.
76. Regulations under this clause can do anything that an Act of Tynwald may do but cannot come into operation until on or after exit day.
77. Regulations must have annexed to them a text of an EU instrument applied by the regulations, incorporating the exceptions, adaptations and modifications specified in the regulations.
78. Regulations under this clause may not impose or increase taxation; make retrospective provision; create a relevant criminal offence; or amend, repeal or revoke the Human Rights Act 2001.
79. As is currently the case with Orders and Regulations under sections 2A and 2B of the 1973 Act<sup>21</sup>, although the power under this clause formally rests with the Council of Ministers, it will normally be for a relevant Department to make the case for and lead on the application and implementation of an EU instrument within their areas of interest.

### **Clause 18**

80. Clause 18 provides the Council of Ministers with the power, with the approval of Tynwald, to retrospectively apply and implement certain EU legislation which may currently be applicable as part of the law of the Island under Protocol 3.
81. This clause is a safeguard provision. Its purpose is to deal with the possible circumstances where a piece of EU legislation is currently directly applicable to the Island by virtue of the Protocol 3 relationship with the EU and section 2(1) of the 1973 Act, but it is not retained using the power in clause 7 and it is later found to be important. In most cases it is likely that the powers in clause 17 could be used to re-apply the EU legislation to the Island with any necessary modifications but there may be rare cases where it is important for the law to be treated as having had unbroken effect rather than it ceasing to have effect on exit day. This clause allows for that possibility. EU legislation applied to the Island using this clause can be treated as if it had been retained using the power in clause 7.
82. This enabling power could also be used to implement into Manx law an EU Directive which the Island had an obligation to transpose into Manx law by virtue of Protocol 3

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<sup>21</sup> For example, Customs and Excise in respect of the application and implementation of EU sanctions and DfE in respect of certain EU intellectual property legislation.

and section 2(1) of the 1973 Act before exit day, but which had not been transposed into Manx law prior to exit day<sup>22</sup>.

83. Regulations under this clause in general can do anything that an Act of Tynwald may do but with certain restrictions. Such regulations may not impose or increase taxation; impose any civil or criminal liability before the day on which the regulations themselves come into operation; or amend, repeal or revoke the Human Rights Act 2001.
84. Regulations made under this clause which apply an EU instrument to the Island must have the text of the applied instrument annexed to them showing any modifications.
85. No regulations can be made under this clause after five years from exit day.

#### **Clause 19**

86. Clause 19 provides the Council of Ministers with the power, with the approval of Tynwald, to apply certain UK legislation to the Island (subject to modifications) by way of regulations.
87. The power in this clause may be exercised in relation to UK legislation relating to —
  - (a) the withdrawal of the United Kingdom from the EU;
  - (b) the approval or implementation of any withdrawal agreement; or
  - (c) the future relationship between the United Kingdom and the EU or any member State.
88. This clause will allow relevant UK legislation relating to Brexit to be applied to the Island if useful or expedient to do so.
89. Regulations under this clause can apply UK legislation as amended from time to time (see clause 21) and can do anything that an Act of Tynwald may do. Regulations under this clause applying UK legislation to the Island must have the text of that UK legislation as modified in its application to the Island attached to them.

#### **Clause 20**

90. This clause will allow the Department of Environment, Food and Agriculture to apply, as part of the law of the Island, UK legislation falling within certain subject areas which are believed to currently largely fall within the scope of Protocol 3, and so are currently directly and automatically part of the law of the Island.
91. This provision may be important to ensure that the Island's legislation keeps in line with the law in the UK to ensure that there are no impediments to free trade in agricultural and fisheries products between the IOM and the UK.
92. The list of subject areas set out in Article 3 of EU Regulation 706/73<sup>23</sup> was the starting point for the list of subject areas in the new clause with certain amendments to clarify and expand that list.

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<sup>22</sup> Unlike EU Regulations and Decisions, EU Directives do not have direct effect as part of the law of the EU Member States. Instead, they must be converted or "transposed" into their national law by each of the Member States. This means that Member States often have more leeway in respect of the implementation of EU Directives.

<sup>23</sup> Regulation (EEC) No 706/73 of the Council of 12 March 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products  
<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:01973R0706-19860424&qid=1536159831864>

93. In addition, DEFA will have the power to apply EU legislation that falls within the scope of this clause (this power is in addition to the more general power that the Council of Ministers has under clause 17).
94. Regulations must have annexed to them a text of the UK legislation or EU instrument applied by the regulations, incorporating the exceptions, adaptations and modifications specified in the regulations.
95. Regulations under this clause may not impose or increase taxation; make retrospective provision; create a relevant criminal offence; or amend, repeal or revoke the Human Rights Act 2001.
96. Tynwald approval will be required for any regulations made under this clause.
97. The intention is that in due course following Brexit when DEFA has a suitable legislative vehicle this provision will be moved into a DEFA specific Bill.

### **Clause 21**

98. Clause 21 enables statutory documents made under clauses 13 to 20 or clause 23 to refer to EU instruments as amended from time to time.
99. The Council of Ministers also has the power under this clause to prescribe by way of regulations statutory documents made under other provisions of Manx legislation as statutory documents which may refer to EU instruments as amended from time to time. This clause cannot create new powers to apply EU legislation; it can only extend existing powers. For example, there are existing powers in the Airports and Civil Aviation Act 1987 for the Department for Enterprise to apply relevant EU instruments to the Island with any necessary modifications; if it was considered desirable that power could be extended so that an EU instrument (or certain parts of an EU instrument) could be applied to the Island as amended by the EU from time to time. Regulations made under this clause cannot come into operation until on or after exit day and are subject to the “negative” Tynwald procedure.
100. The powers in this clause are derived from the existing section 2C of the 1973 Act.

### **Clause 22**

101. Clause 22 enables the Council of Ministers to make regulations to apply to the Island, and implement in the Island, with the approval of Tynwald, the WTO Agreement.
102. The WTO Agreement means the agreement establishing the World Trade Organisation signed at Marrakesh on 15 April 1994 and extended to the Island as modified from time to time; this includes the agreements and associated legal instruments (GATT, GATS, TRIPs, etc) included in Annexes 1, 2 and 3 to the Agreement which are integral parts of this Agreement, which are binding on all WTO Members<sup>24</sup>.
103. Regulations made under this clause can do anything that an Act of Tynwald may do.
104. This is a contingency power. Much of the Island’s compliance with WTO obligations will be through other legislation. For example, in the case of TRIPs<sup>25</sup> the Island largely

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<sup>24</sup> The UK’s ratification of the WTO Agreement was extended to the Isle of Man with effect from 3 March 1997. The legal texts can be found at: [https://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](https://www.wto.org/english/docs_e/legal_e/final_e.htm)

<sup>25</sup> Agreement on Trade-Related aspects of Intellectual Property Rights.

complies through UK intellectual property (IP) legislation which applies to the Island and IP legislation passed or made by the Department for Enterprise.

105. Although the Isle of Man has been included in the UK's membership of the WTO for 20 years, as a result of Brexit and the UK becoming a member of the WTO in its own right rather than as a Member State of the EU, compliance with WTO obligations, both for the UK and the IOM, is under greater scrutiny than previously. It is important that if any deficiencies are identified the Island can address them in a timely manner.

### **Clause 23**

106. Clause 23 enables the Council of Ministers, with the approval of Tynwald, to implement into Manx law an international trade agreement entered into by the Island or, more likely, entered into by the United Kingdom and which has been extended to the Island. Regulations made under this clause can do anything that an Act of Tynwald may do.
107. This clause is based on clause 2 of the UK's Trade Bill but, unlike the clause in the UK Trade Bill, the power is not limited to the implementation only of international trade agreements entered into between the EU and the other signatory(ies) before exit day.

### **Clause 24**

108. Clause 24 provides the Treasury with a power, subject to Tynwald approval, to make regulations for the purposes of obtaining information in relation to the export of goods and services from the Island. Regulations made under this clause can do anything that an Act of Tynwald may do.
109. The clause includes examples of what may be included in any such regulations.
110. This clause is based on clause 11 of the UK's Trade Bill.

### **Clause 25**

111. Clause 25 gives the Treasury a power, subject to Tynwald approval, to make regulations in relation to the disclosure of information for the purpose of facilitating the Treasury's functions relating to trade or for the purpose of facilitating an international organisation or authority's public functions relating to trade. Regulations made under this clause can do anything that an Act of Tynwald may do.
112. The clause includes examples of what may be included in any such regulations.
113. This clause is based on clause 12 of the UK's Trade Bill.
114. The clause confirms for the avoidance of doubt that no disclosure which would contravene the Island's data protection legislation is authorised by this clause.

### **Clause 26**

115. Clause 26 gives effect to Schedule 3 on the rules of evidence for retained EU law.

### **Clause 27**

116. Clause 27 gives effect to Schedule 4 which contains general provisions about the powers to make statutory documents under the Bill.

## Clause 28

117. Clause 28 contains enabling powers in relation to any consequential and transitional provisions that may be required and it gives effect to:
- Schedule 5 (which contains general consequential provisions);
  - Schedule 6 (which contains transitional, transitory and saving provisions);
  - Schedule 7 (which contains specific consequential amendments); and
  - Schedule 8 (which contains repeals not made elsewhere in the Bill).
118. The clause allows the Council of Ministers to make regulations, subject to the approval of Tynwald, which are appropriate as a consequence of the Bill. Such regulations can do anything that an Act of Tynwald may do but they cannot amend Acts of Tynwald passed after the end of the parliamentary session in which the Bill is passed.
119. The clause also gives the Council of Ministers the power to make regulations to make incidental, supplemental, transitional, transitory or saving provisions in connection with the coming into operation of any provision of the resulting Act (including its operation in connection with exit day). Tynwald approval must be sought for any such regulations after they have been made i.e. the Tynwald procedure will be “affirmative”.
120. The clause confirms for the avoidance of doubt that revocation of the European Union (Changes in Terminology) Order 2012 (SD0606/12) made under section 1A(1) of the European Communities (Isle of Man) Act 1973, by virtue of the repeal of that Act, does not affect the continuing operation of article 3(3) of that Order<sup>26</sup>.

## Schedule 1

121. Schedule 1 defines certain terms used in the Bill.
122. It provides that any reference in the Bill to former Article 34(2)(c) of the TEU (such references appear in certain of the defined terms) is a reference to that Article as it applied before the Lisbon Treaty. It is necessary to include these references in the Bill to ensure that it accurately reflects the legal basis for these measures.
123. Any other references in the Bill to certain provisions of the TEU or the Treaty on the Functioning of the European Union include references to those provisions as they apply to the Euratom Treaty.

## Schedule 2

124. Schedule 2 sets out further exceptions to the saving and retention of EU law provided for under clauses 6, 7 and 8. This Schedule should be read together with paragraphs 2 and 3 of Schedule 6 which make transitional, transitory and saving provisions.
125. Paragraph 1 of this Schedule deals with challenges to the validity of retained EU law.
126. It provides that on or after exit day, there is no right to challenge any retained EU law on the grounds that immediately before exit day an EU instrument was invalid.
127. However, this restriction is subject to the following two exceptions —

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<sup>26</sup> By virtue of the Interpretation Act, the amendments made by this Order to the text of Manx enactments became spent after they have been made and so are unaffected by the revocation of the Order.

- (a) the Court of Justice of the European Union had decided before exit day that the EU instrument is invalid; or
- (b) the challenge is of a kind described or provided for in regulations (which require the approval of Tynwald) made by the Council of Ministers.

128. Paragraph 2 of this Schedule deals with general principles of EU law.

129. It provides that only EU general principles that have been recognised in European Court cases decided before exit day will form part of Manx law on or after exit day and there is no right of action in Manx law on or after exit day based on failure to comply with EU general principles. In addition, the Island's courts cannot dis-apply Manx law on or after exit day on the basis that it is incompatible with EU general principles; and courts will not be able to quash any conduct or decide that it is unlawful on the basis that it was not compatible with the EU general principles. Courts will, however, be required under clause 10 to interpret retained EU law in accordance with retained general principles of EU law.

130. Paragraph 3 of Schedule 2 deals with what is known as the rule in Francovich. *Francovich v Italy* was a decision of the Court of Justice of the European Union<sup>27</sup> which established that EU member states could be liable to pay compensation to individuals who suffered a loss by reason of the Member State's failure to transpose an EU Directive into national law. It is sometimes known as the principle of state liability in EU law. To the extent that an EU Directive falls within the scope of Protocol 3, at present the Isle of Man Government could potentially be liable for compensation if an Island resident suffered loss because the Directive had not been properly transposed into Manx law. In line with the position in the UK Act, there will be no right to claim damages on this ground on and after exit day (but see paragraph 3(7) of Schedule 6).

131. Paragraph 4 of Schedule 2 clarifies that the references in clause 9 and this Schedule to the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to be read as references to that Charter, principle or rule as they stand at exit day, not as they will operate in EU law in the future.

### **Schedule 3**

132. Schedule 3 deals with rules of evidence.

133. Section 3(1) of the 1973 Act provides that for the purposes of all legal proceedings any question as to the meaning or effect of any of the provisions of the EU Treaties having effect in the Island, or as to the validity, meaning or effect of any EU instrument having effect in the Island, shall be treated as a question of law.

134. Some EU law will not become retained EU law under this Bill, but it may still be relevant to the interpretation of the retained EU law. Paragraph 1 therefore provides 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.

135. 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.

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<sup>27</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61990CJ0006>

136. Paragraph 2 of this Schedule provides that the Council of Ministers may, after consultation with the Deemsters, 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 or documents issued by or in the custody of an EU entity. This will ensure that appropriate evidential rules can be put in place to reflect the new legal landscape after exit day. The Tynwald procedure for any such regulations will be “affirmative”.

#### **Schedule 4**

137. Schedule 4 contains general provisions about the powers to make statutory documents in the Bill.

138. Paragraph 1 applies to all powers in the Bill to make a statutory document. It provides that any power in the Bill to make a statutory document —

- (a) may be exercised to modify retained EU law or other Manx legislation;
- (b) includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision; to permit a person to exercise a discretion; and to require compliance with standards or the adoption of practices recommended by a specified person or body.

139. This paragraph also confirms that a power in the Bill to make a statutory document does not affect the extent of any other power in the Bill, in retained EU law or in other Manx legislation to make a statutory document.

140. Paragraph 2 of this Schedule deals with the scope of consequential and transitional powers.

141. It provides that the law saved and retained by clauses 6 to 10 may be modified by the power to make consequential provision.

142. It also clarifies that:

- the consequential amendment power in the Bill can, for example, be used to modify retained EU law if the changes are consequential on repeal of the 1973 Act;
- the power to make statutory documents under clauses 2(3) or 28(4) includes the power to make consequential, incidental, supplemental, transitional, transitory or saving provision in connection with the repeal of the 1973 Act or the withdrawal of the UK from the EU which is additional to that made by the clauses in the Bill that deal with the saving, retention and interpretation of EU law, or which alters their effect in particular cases or descriptions of cases;
- the power to make regulations under clause 28(1) includes the power to make transitional or saving provision which is —
  - (a) in connection with any repeal made by such regulations of any Manx legislation which is consequential upon the repeal of the 1973 Act or the withdrawal of the UK from the EU; and
  - (b) is additional to that made by the clauses of the Bill that deal with saving, retention and interpretation of EU law or alters their effect in particular cases or descriptions of cases.

143. Certain such provisions can be treated as retained EU law.



144. Paragraph 3 of Schedule 4 confirms that the power of the Council of Ministers to make regulations to amend retained direct EU legislation, anything which is retained EU law by virtue of clause 8, or any other retained EU law can be exercised before exit day provided that the regulations do not come into operation until on or after exit day.
145. Paragraph 4 provides that the powers in the Bill may be used to make different provision, in particular cases, from the changes made by Schedule 5 (which contains general consequential provisions) and the amendments made to the Interpretation Act 2015 and the Legislation Act 2015 by paragraphs 2 and 3 of Schedule 7.
146. Paragraph 5 provides that where a statutory document modifies earlier statutory documents made under the Bill, the rules for choosing the Tynwald procedure apply afresh<sup>28</sup>.
147. Paragraph 6 confirms that, despite section 93 (power to make public document includes power to amend or repeal) of the Interpretation Act 2015, regulations under the Bill can be used to modify retained EU law or other Manx legislation made by way of a different statutory document. For example, there is a power in section 11A of the Airports and Civil Aviation Act 1987 to apply EU instruments relating to civil aviation to the Island; this new paragraph confirms that the powers in clause 12 to correct deficiencies in EU legislation that applies to the Island can be used to amend EU instruments applied under that Act.
148. Paragraph 7 applies to a statutory document made under this Bill which will be subject to the “approval required” Tynwald procedure. If the Council of Ministers is satisfied that the need to make the statutory document is urgent, the “affirmative” Tynwald procedure can apply rather than the “approval required” procedure. Under the “affirmative” procedure a statutory document must be laid before Tynwald as soon as practicable after it is made and if Tynwald approval is not obtained at that sitting or the next sitting the statutory document ceases to have effect. Any statutory document made in reliance on this provision must include a declaration that the Council of Ministers considers the matter to be urgent and therefore that the affirmative procedure should apply. It will be possible for Tynwald to question the need for urgency when such a statutory document is subsequently moved for approval, and reject the continued operation of the document if it considers this to be appropriate.

## Schedule 5

149. Schedule 5 contains general consequential provisions.
150. Paragraphs 1 and 2 deal with what happens to existing ambulatory references after exit day. Ambulatory references are references to EU instruments as amended from time to time in the future.

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<sup>28</sup> This paragraph makes reference to section 93 of the Interpretation Act 2015, which provides that the power to make a public document includes the power to amend or repeal and gives rules for how the amendment or repealing power may operate:

**93 Power to make public document includes power to amend or repeal**

(1) A power to make a public document includes the power to amend or repeal it.

(2) The power to amend or repeal is exercisable in the same way, and subject to the same conditions, as the power to make the public document.

(3) However, despite subsection (2), a statutory document may, after consultation with the Legislation Consolidation Board under the Legislation Act, be repealed by an order of the Council of Ministers (a “repeal order”) without complying with the conditions.

(4) A repeal order may be made for more than one statutory document and for statutory documents that have different authorising legislation.

(5) Tynwald procedure - negative.

151. The effect of paragraph 1 is that existing ambulatory references to EU Regulations, Decisions and tertiary legislation which are to be retained as Manx law under clause 7 will, on exit day, become references to the retained versions of those instruments as they are modified from time to time in the future by Manx law.
152. Paragraph 2 provides that any existing ambulatory references (which do not fall within paragraph 1) to any of the EU Treaties, other EU instruments (e.g. directives) or to any other document of an EU entity, do not continue to update after exit day. In such cases the references are to be treated as references to the EU legislation, Treaties or document as they had effect immediately before exit day. However, the Council of Ministers, subject to Tynwald approval, may provide by regulations for certain such ambulatory references to continue to have effect.
153. Paragraph 3 of Schedule 5 deals with the effect of the Bill on existing powers to make statutory documents.
154. Paragraph 3(1) provides that any existing powers to make statutory documents in pre-exit legislation are capable of amending retained direct EU legislation. For example, a power in the Animal Health Act 1996 to make statutory documents in respect of certain animal health matters could amend retained direct EU legislation dealing with animal health matters; and, under paragraph 3(2), the Tynwald procedure would be the same as set out in that Act.
155. Paragraph 3(3) provides that pre-exit day powers do not have an implied EU law restriction on or after exit day. This means the powers can be used to legislate in a way that would not have been compatible with directly applicable EU law pre-exit day, as long as the power would be capable of being used in that way on a plain reading.
156. Paragraph 3(4) confirms that subparagraphs (1) to (3) do not restrict the conferral of wider powers (by other enactments) and they are subject to other provisions of this Bill and other Manx legislation.
157. Paragraph 3(5) and (6) provide further clarification about the powers under paragraph 3(1).
158. Paragraph 4 of Schedule 5 provides that powers to make statutory documents in Acts of Tynwald passed after this Bill is passed are capable of amending retained direct EU legislation, unless otherwise provided.
159. Paragraph 5 of this Schedule provides that retained direct EU legislation is to be treated as if it were an Act of Tynwald for the purposes of the Human Rights Act 2001. This means that any retained direct EU legislation is to be treated as primary legislation for the purposes of challenges under the Human Rights Act 2001, so that if the legislation is found to breach that Act, a court may issue a declaration of incompatibility but may not strike down the legislation.

## **Schedule 6**

160. Schedule 6 contains transitional, transitory and saving provisions.
161. Paragraph 1 provides that anything done or in operation before exit day (or 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.

162. Paragraph 2 provides that rights etc which are recognised under EU Directives and are recognised by a court or tribunal in the Island or the UK in cases which have begun before exit day but are decided on or after exit day are saved by clause 8 (saving for rights etc. under section 2(1) of the 1973 Act) and are not excluded under subsection (3) of that clause.
163. Paragraph 3 makes further provision about the exceptions to the saving and retention of EU law set out in clause 9 and Schedule 2.
164. Under paragraph 3(1) the exceptions to the saving and retention of EU law set out in Schedule 2 to the Bill apply in relation to anything occurring before exit day as well as anything occurring after exit. However, this is subject to the remaining provisions of paragraph 3 and also to any provision made by the Council of Ministers under clause 2(3) or 28(4) – both of which deal with incidental, supplemental, transitional, transitory or saving provisions in connection with the Bill coming into operation.
165. Paragraph 3(2) provides that the exceptions for claims in respect of validity, general principles and Francovich do not apply in relation to cases decided before exit day.
166. Paragraph 3(3) provides that the exceptions in paragraphs 2(2) and (3) and 3 of Schedule 2 (for general principles and Francovich claims) will not apply in respect of proceedings which have begun before exit day but are not decided until on or after exit day.
167. Paragraph 3(4) provides that the exceptions for claims in respect of validity, general principles and Francovich will not apply in relation to any criminal conduct which occurred prior to exit day.
168. Paragraph 3(5) provides that the restriction on challenges based on incompatibility with any of the general principles of EU law (set out in paragraphs 2(2) and (3) of Schedule 2) does not apply in respect of certain proceedings begun up to three years after 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 Manx legislation other than Acts of Tynwald or rules of law.
169. Paragraph 3(6) provides that a court, tribunal or other public authority will, on or after exit day, still be able to disapply any Manx legislation 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 made before exit day, or decision in proceedings commenced during the three year period after exit day provided for under paragraph 3(5).
170. Paragraph 3(7) delays the bar on seeking Francovich damages<sup>29</sup> until 2 years after exit day.
171. Paragraph 4 confirm for the avoidance of doubt that where there is time restriction on the use of a power under clauses 13 and 14 of the Bill, regulations made under those clauses before the expiry of the time restriction continue to operate.

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<sup>29</sup> Francovich damages can be awarded to a person where they have suffered harm or loss due to the Government failing to properly implement EU obligations.

## **Schedule 7**

172. Schedule 7 makes specific consequential amendments to certain Acts of Tynwald.
173. Paragraph 1 amends the Customs and Excise Act 1993. These amendments are to ensure that the Treasury has sufficient powers to deal with all possible scenarios when the UK leaves the EU and all the EU customs legislation which currently applies directly and automatically to the both the UK and the Isle of Man no longer applies.
174. Paragraphs 2 and 3 amend the Interpretation Act 2015 and the Legislation Act 2015 respectively consequential to the Bill and the repeal of the 1973 Act.
175. Paragraph 4 amends the European Communities (Amendment) Act 1994, which gave effect to the European Economic Area Agreement (to the extent that its provisions are within the scope of Protocol 3) in the Isle of Man. Although the UK will leave the EEA Agreement when it leaves the EU, the remaining provisions of this Act will continue to deal with the correct interpretation of related matters after exit day.

## **Schedule 8**

176. Schedule 8 lists further Acts of Tynwald which are repealed by the Bill. These Acts are largely amending Acts which amended the 1973 Act.
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**European Union and Trade Bill**  
(formerly *European Union (Withdrawal) Bill*)

The table below describes the substantive changes to the Bill from the consultation draft of the Bill as introduced into the House of Keys.

Change	Description
<p>Short title of the Bill changed from "European Union (Withdrawal) Bill" to "<b>European Union and Trade Bill</b>"</p>	<p>The UK's European Union (Withdrawal) Bill was the starting point for the drafting of the Island's Bill and so it was given the same short title. However, even at the time of the public consultation it was significantly different to the UK legislation. Not only did it include provisions in respect of future trade agreements that were in part derived from the UK's Trade Bill, it also included some provisions that are based on the powers in the European Communities (Isle of Man) Act 1973 ("the 1973 Act") to voluntarily apply EU legislation to the Island after Brexit, if it is considered to be useful and desirable to do so (and it is approved by Tynwald).</p> <p>One of the responses to the consultation correctly noted the Isle of Man has never actually been a member of the EU and it suggested that the original short title of the Bill did not accurately reflect the contents of the Bill.</p> <p>Following the consultation DEFA requested a power to apply UK legislation in certain areas where EU legislation is considered to be directly and automatically applicable (or largely applicable) as part of the law of the Island by virtue of Protocol 3 and section 2(1) of the 1973 Act. (See information about new clause 19 below).</p> <p>A change to the short title of the Bill was therefore considered to be appropriate so that it more accurately reflects the scope of the Bill.</p>
<p>Amendment of <b>clause 6</b> (saving for statutory documents made under the European Communities (Isle of Man) Act 1973)</p>	<p>This clause saves in effect existing orders and regulations made under sections 2A and 2B of the 1973 Act (e.g. for the application and implementation of EU sanctions measures) which would otherwise cease to have effect when the 1973 Act is repealed.</p> <p>In the consultation draft of the Bill there was a separate power to subsequently amend such orders and regulations.</p> <p>In the new version of the Bill these saved statutory documents are to be treated as if they had been made under clause 16 (application and implementation of EU instruments and law), which replicates with modifications sections 2A and 2B of the 1973 Act. By virtue of section 93 (power to make public document includes power to amend or repeal) of the Interpretation Act 2015 they can then be amended or repealed using the power in clause 16 rather than requiring a separate amendment power. This is a technical drafting amendment rather than a policy change.</p>
<p>Amendment of <b>clause 7</b> (retention of direct EU legislation)</p>	<p>This clause allows the Council of Ministers to prescribe a list of EU Regulations and Decisions that are considered to fall within the scope of Protocol 3 that are to be retained as part of the law of the Island after Brexit.</p> <p>There is, however, an issue with Protocol 3. Although it has</p>

Change	Description
	<p>long been understood that certain areas of EU legislation is likely to fall within the scope of Protocol 3, there has never been, and never could be, complete legal certainty about exactly which EU Regulations and Decisions fall within the scope of Protocol 3, or whether such an EU instrument might be applicable as part of the law of the Island wholly or just partly under Protocol 3, or whether it is applicable in all circumstances or only some. This is because the only definitive view on whether an EU instrument is applicable, or the extent to which an EU instrument is applicable, under Protocol 3 would be the view of the Court of Justice of the European Union (CJEU). Obtaining a ruling from the CJEU on every EU instrument that has been adopted over the years would have been impossible.</p> <p>Section 2(3) of the 1973 Act<sup>30</sup> attempted to address this uncertainty by providing for the Secretary of State to issue certificates stating whether an EU instrument is applicable or not, but it does not appear that any such certificate has ever been issued. A similar provision has been included in clause 7 of our Bill, with the power now resting with HM Attorney General<sup>31</sup>. If challenged this will provide some comfort that the inclusion of a particular EU instrument in regulations made under clause 7 was not unreasonable, but it is something of a blunt instrument that does not deal with the nuances of partial applicability.</p> <p>To achieve legal certainty that an EU instrument that is retained under clause 7 forms part of Manx law in its entirety and in all circumstances, it had been considered that there might potentially be a need to make orders under section 2A of the 1973 Act for each such instrument, to apply the instrument to the Island to any extent that it might not have been directly applicable under Protocol 3. This would, however, have been a very significant undertaking given the requirement to have the modified text of each applied EU instrument attached to the orders.</p> <p>New clause 7(3) therefore takes the approach that if an EU instrument is prescribed as being retained under clause 7(1), as being likely to have been largely applicable under Protocol 3, the whole of the instrument forms part of Manx law on and after exit day. Deficiencies in the whole instrument can then be dealt with under clause 11.</p> <p>Additional clarification is also added to clause 7 to confirm that only EU instruments that were in operation immediately before exit day can be retained as part of Manx law on and after exit day under this clause.</p>
Amendment of <b>clause 9</b> (exceptions to savings and retention)	Additional wording has been added to confirm that Manx legislation that is passed and in operation before exit day is only to be construed and have effect subject to retained EU law that was considered to be applicable under Protocol 3

<sup>30</sup> Section 2(3) of the 1973 Act states:

"A certificate issued by or under the authority of the Secretary of State stating that any EU instrument does or does not apply to the Isle of Man shall be conclusive evidence of that fact."

<sup>31</sup> A certificate that had been issued by the Attorney General could be challenged in the Island by Petition of Doleance, meaning that the Manx courts could have the final say.

Change	Description
	prior to Brexit.
Amendment of <b>clause 11</b> (dealing with deficiencies arising from withdrawal)	<p>Additional provision is added to further set out what regulations made by the Council of Ministers can do to prevent, remedy or mitigate deficiencies in retained EU law and Manx legislation arising from the UK's withdrawal from the EU.</p> <p>The Council of Ministers' regulations (which require the approval of Tynwald) can, in addressing deficiencies arising from the UK's withdrawal from the EU, modify retained EU law or Manx legislation to authorise a Department or Statutory Board to make regulations, specify the permissible content of such regulations and set out the Tynwald procedure for such regulations.</p> <p>For example, an EU Regulation concerning animal health that is retained direct EU legislation may include a power for the Commission to modify an Annex to the Regulations which includes technical measures. In modifying the EU Regulation it may be desirable for DEFA to have the power to make regulations to modify the Annex in future.</p>
Amendment of <b>clause 12</b> (complying with international obligations)	<p>This clause has been amended to include a restriction on regulations made under it imposing or increasing taxation.</p> <p>At the Report stage of the UK Bill in the House of Lords a number of Lords tabled further amendments to it and, to avoid defeat, the UK Government submitted an amendment to omit the equivalent provision from the UK Act.</p> <p>Although it is considered that the clause is still a useful and appropriate power to have in the Island's Bill it has been decided that the restrictions on the use of clause should be brought into line with other provisions of the Bill which include restrictions.</p> <p>It might be argued that if the UK Government believed that it could work without such a provision in the European Union (Withdrawal) Act 2018, then the Isle of Man Government can do likewise. However, the Island is not in the same position as the UK, particularly in relation to the time and policy and legislative resources that the IOM has available to it to deal with these issues.</p> <p>It may be noted that this is a contingency power and, at present, it is not clear whether or not it will need to be used. Its use though is actually fairly narrow. It can only be used where:</p> <ul style="list-style-type: none"> <li>a) an international obligation applies to the Island before exit day; and</li> <li>b) Brexit and the loss of Protocol 3 will lead to a breach of such an obligation.</li> </ul>
Amendment of <b>clause 14</b> (amendment of retained direct EU legislation and other rights etc.)	<p>This clause allows EU legislation that is retained under clause 7 and other EU rights that are retained under clause 8 to be amended by regulations made by the Council of Ministers after exit day (subject to Tynwald approval).</p> <p>As originally drafted the clause was undefined in the scope of the amendments that could be made. The clause now clearly</p>

Change	Description
	<p>sets out what regulations made under it can do.</p> <p>The clause will allow retained direct EU legislation and other retained EU law to be amended:</p> <ul style="list-style-type: none"> <li>• so as to include modifications made to the EU instrument in the EU, including linking to changes made in the EU from time to time;</li> <li>• to give effect to the provisions in Manx law;</li> <li>• to repeal or revoke it, entirely or in part;</li> <li>• to modify it to take account of changes to the retained EU law in the UK.</li> </ul>
<p>Amendment of <b>clause 16</b> (application and implementation of EU instruments and law)</p>	<p>A number of amendments have been made to this clause, the purpose of which is to generally replicate with some modifications the powers in sections 2A and 2B of the 1973 Act.</p> <p>The amendment to clause 16(1) is to clarify that where an EU Regulation or Decision which was considered to fall within the scope of Protocol 3 has been retained as part of the law of the Island under clause 7 but in respect of which no implementing regulations (to deal with matters such as offences, penalties, licences, etc) had been made under section 2B of the 1973 Act before exit day, such implementing regulations can be made under this clause after exit day if required.</p> <p>New provisions have been added as clause 16(3) and (4) to confirm that the Council of Ministers' regulations (which require the approval of Tynwald) can, in applying and implementing EU instruments (with any necessary modifications), authorise a Department or Statutory Board to make regulations, specify the permissible content of such regulations and set out the Tynwald procedure for such regulations.</p> <p>Another new provision allows regulations made under this clause to apply and implement EU legislation after exit to be treated as if were retained EU law.</p> <p>Finally, restrictions on what regulations under this clause can do have been set out. These restrictions are based on those in section 2B of the 1973 Act with some modifications.</p>
<p>Amendment of <b>clause 17</b> (application and implementation of previous direct EU legislation and EU law)</p>	<p>Clause 17 is a contingency provision to deal with the hopefully very rare circumstances where if an EU Regulation or Decision which was considered to be directly applicable under Protocol 3 is not initially retained as part of Manx law by regulations under clause 7 but it is subsequently found that not only there is good reason for having it applied as part of Manx law but for it to be deemed to have had unbroken effect in Manx law from exit day.</p> <p>In addition to some technical drafting amendments to this clause new subsection (3) has been inserted and this is consequential to the insertion of new subsection (3) into clause 7 as described above.</p>
<p>Amendment of <b>clause 18</b> (application to the Island of UK legislation)</p>	<p>This clause allows the Council of Ministers to apply to the Island (with the approval of Tynwald) certain UK legislation which relates to the UK's withdrawal from the EU and its</p>



Change	Description
	<p>future relationship with the EU and any member State.</p> <p>There are some technical drafting amendments to this clause and in addition the scope of the legislation that may be applied under this clause is changed from just Westminster Parliament enactments to legislation from any part of the UK.</p>
<p><b>New clause 19</b> (application to the Island of UK legislation and EU legislation by the Department of Environment, Food and Agriculture)</p>	<p>Following an approach from the Department of Environment, Food and Agriculture (“DEFA”) a new clause has been inserted into the Bill to allow that Department to apply, as part of the law of the Island, UK legislation falling within certain subject areas which are believed to currently largely fall within the scope of Protocol 3, and so in respect of which EU law is currently directly and automatically part of the law of the Island.</p> <p>This provision may be important to ensure that the Island’s legislation keeps in line with UK legislation to ensure that there are no impediments to free trade in agricultural and fisheries products between the IOM and the UK.</p> <p>The list of subject areas set out in Article 3 of EU Regulation 706/73<sup>32</sup> was the starting point for the list of subject areas in the new clause with certain amendments to clarify and expand that list.</p> <p>In addition, DEFA will have the power to apply EU legislation that falls within the scope of this clause (this power is in addition to the general power that the Council of Ministers has under clause 16).</p> <p>Tynwald approval will be required for any regulations made under this clause.</p> <p>The intention is that in due course following Brexit when DEFA has a suitable legislative vehicle this provision will be moved into a DEFA specific Bill.</p>
<p>Amendment of <b>clause 27</b> (previously clause 26) (consequential and transitional provisions)</p>	<p>New subsection (9) is added to confirm for the avoidance of doubt that the revocation of the European Union (Changes in Terminology) Order 2012 when the 1973 Act is repealed does not affect continued operation of the savings provision in article 3(3) of that order.</p>
<p>Amendment of <b>Schedule 1</b> (interpretation)</p>	<p>A number of technical amendments have been made to this Schedule.</p> <p>Consequential to the amendment of clause 18 the definition of “Parliamentary enactment” has been omitted as the term no longer appears in the Bill and a definition of “UK legislation” has been inserted.</p> <p>The definition of “relevant criminal offence” has been expanded to clarify the maximum penalties that may be imposed for new offences on summary conviction and conviction on information but the maximum overall penalties are unchanged (i.e. on conviction on information the maximum penalty that may be imposed is custody for two years, an unlimited fine, or both). This is based on the</p>

<sup>32</sup> Regulation (EEC) No 706/73 of the Council of 12 March 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products  
<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:01973R0706-19860424&qid=1536159831864>

Change	Description
	<p>restrictions in section 2B of the 1973 Act (and also under the UK Act)<sup>33</sup>.</p> <p>A new subparagraph has been inserted to confirm that references to retained EU law by virtue of clause of the Bill includes references to any modifications made to that retained EU law by other Manx law.</p> <p>The provision that confirms that EU legislation which applies to the Island under section 2(1) of the 1973 Act by virtue of Protocol 3 before exit day is not “Manx legislation” as defined in the Interpretation Act 2015 has been clarified.</p>
<p>Amendment of <b>Schedule 4</b> (statutory documents)</p>	<p>New paragraph 3 of this Schedule has been inserted to make it clear that the powers in the Bill can be exercised before exit day so as to modify retained EU law which will not exist until exit day. This amendment is based on an amendment to the UK Act made in the House of Lords.</p> <p>Paragraph 4, which confirmed that the Council of Ministers could appoint a time of day for bringing provisions of the Bill into operation by an Appointed Day Order has been omitted. It is unnecessary because there is a general power to do this under the Interpretation Act 2015.</p> <p>New paragraph 6 has been inserted to confirm that, despite section 93 (power to make public document includes power to amend or repeal) of the Interpretation Act 2015, regulations made under the Bill can modify retained EU law or other Manx legislation made by way of a different statutory document. For example, there is a power in section 11A of the Airports and Civil Aviation Act 1987 to apply EU instruments relating to civil aviation to the Island by way of an order; this new paragraph confirms that the powers in clause 11 to make regulations to correct deficiencies in EU legislation d can be used to modify such an order if appropriate.</p>
<p>Amendment of <b>Schedule 5</b> (general consequential provisions)</p>	<p>Subparagraph (2) in paragraphs 1 and 2 of the Schedule has been omitted because it is now considered that although it is still in the UK Act it not required in the Isle of Man context.</p> <p>Paragraph 2 has been amended so that although the default position for ambulatory references to EU legislation that is not retained direct EU legislation will still be that the ambulatory references cease to have effect on exit day, the Council of Ministers may provide by regulations for certain such ambulatory references to continue to have effect. For example, it may be desirable for the ambulatory references in Manx legislation to the Annexes of EU sanctions Regulations (which include list of people who are subject to sanctions, etc) to continue to operate for some time after exit day.</p> <p>Paragraph 3 (existing powers to make statutory documents) and paragraph 4 (future powers to make statutory documents) have been amended to reflect amendments that were made to the UK Act in the House of Lords.</p>

<sup>33</sup> The term “relevant criminal offence” appears in clauses 12(9), 13(3), 14(3), 15(3) and 17(10) of the Bill.

Change	Description
Amendment of <b>Schedule 6</b> (transitional, transitory and saving provisions)	This Schedule has been amended to reflect some changes that were made to the UK, including delaying the bar on seeking Francovich damages <sup>34</sup> until 2 years after exit day.
Amendment of <b>Schedule 7</b> (specific consequential amendments)	Some technical drafting amendments have been made to paragraphs 2 and 3 of this Schedule, which include consequential amendments to the Interpretation Act 2015 and the Legislation Act 2015.

The table below sets out the substantive changes to the Bill as passed by the House of Keys from the Bill introduced into the House of Keys

Change	Description
Amendment of <b>clause 8</b> (saving for rights etc. under section 2(1) of the European Communities (Isle of Man) Act 1973)	This amendment substitutes subsection (2) so that it is clear that where other Manx legislation (e.g. the Food Act 1996) has been used to give effect to Protocol 3 obligations, then the rights, obligations, etc (e.g. Court of Justice of the European Union case law) that arise under or pertain to that other Manx legislation, are also saved by clause 8.
Amendment of <b>clause 9</b> (exceptions to savings and retention)	This amendment amends subsection (1)(b). The effect of the amendment is to ensure that any Manx legislation or rule of law that is passed or made before exit day and comes into operation before exit day, is subject to the whole range of retained EU law as defined in Schedule 1. This is because, for example, EU Directives that are within Protocol 3 do not have legal effect in Manx law under section 2(1) of the 1973 Act; instead they are transposed into Manx law using the 1973 Act or other Manx legislation.
Insertion of new <b>clause 11</b> (review of retained direct EU legislation)	This new clause requires the Council of Ministers to cause a review of each piece of legislation retained under clause 7 of the Bill within a period of 5 years and report to Tynwald. The report must include recommendations and be debated in Tynwald.  The aim of this clause is to provide a catalyst for Departments to assess whether legislation retained under the Bill remains relevant 5 years after exit.  (subsequent clauses are renumbered as a consequence of the insertion of the this clause and cross-references in the Bill adjusted accordingly)
Amendment of <b>clause 12</b> (dealing with deficiencies arising from withdrawal) (formerly clause 11)	This clause was amended in three ways:  Firstly, the power to establish a new public authority in the Island to carry out functions provided for by regulations under this clause, and which are currently carried out by an EU body was omitted.  Secondly, a requirement to review regulations which make deficiency correction and report to Tynwald within 5 years from exit was included. This only applies to deficiency amendments to Manx legislation as any deficiency amendments to retained direct EU legislation will be covered

<sup>34</sup> Francovich damages can be awarded to a person where they have suffered harm or loss due to the Government failing to properly implement EU obligations.

	<p>by the review under new clause 11.</p> <p>Thirdly, a limitation on using the powers under this clause to within 2 years from exit day has been inserted.</p>
Amendment of <b>clause 13</b> (complying with international obligations) (formerly clause 12)	A limitation on using the powers under this clause to within 5 years from exit day has been inserted.
Amendment of <b>clause 14</b> (implementing the withdrawal agreement) (formerly clause 13)	A limitation on using the powers under this clause to within 2 years from exit day has been inserted.
Amendment of <b>clause 18</b> (application and implementation of previous direct EU legislation and EU law) (formerly clause 17)	A limitation on using the powers under this clause to within 5 years from exit day has been inserted.
Amendment of <b>clause 19</b> (application to the Island of UK legislation) (formerly clause 18)	This clause was amended to delete subsection (4) of the clause. It will limit the clause to only being able to apply UK legislation that deals with the matters set out in subsection (3) – that is, relating to the UK's withdrawal from the EU, any withdrawal agreement, and any future relationship between the UK and the EU or any member State.
Amendment of <b>clause 20</b> (application to the Island of UK legislation and EU legislation by the Department of Environment, Food and Agriculture) (formerly clause 20)	A technical has been made to this clause to ensure that the wording of the clause also captures plant propagating material that is not a seed or seedling (e.g. a cutting).
Amendment of <b>clause 25</b> (disclosure of information by the Treasury) (formerly clause 24)	This clause has been amended to put beyond doubt the supremacy of data protection legislation and the fact that nothing in this section would authorise a disclosure which could contravene it.
Amendment of <b>Schedule 2</b> (further provision about exceptions to savings and retention)	<p>This amendment amends paragraph 1 of Schedule 2 by substituting subparagraph (1).</p> <p>The effect of the amendment is to remove the statutory bar to a person challenging the retention of a piece of direct EU legislation under clause 7 of the Bill.</p>
Amendment of <b>Schedule 3</b> (rules of evidence)	Schedule 3 concerns rules of evidence. Paragraph 2 states that the Council of Ministers may by regulations make provision enabling or requiring judicial notice to be taken of a relevant matter or provide for the admissibility in any legal proceedings of specified evidence. This paragraph has been amended to provide that the Council of Ministers should consult with the Deemsters ahead of making such regulations.
Amendment of <b>Schedule 6</b> (transitional, transitory and saving provisions)	New paragraph 4 is inserted into this clause to confirm for the avoidance of doubt that where a time restriction on the use of a power has been inserted into the Bill, regulations made before the expiry of the time restriction continue to operate.