

What does the EU (Withdrawal) Bill mean for Wales and devolution?

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On 13 July 2017, the UK Government introduced the EU (Withdrawal) Bill into the UK Parliament. The Bill – which was formerly referred to as the Great Repeal Bill or Repeal Bill – aims to make the changes the UK Government considers necessary to law in the UK in preparation for the UK’s exit from the EU.

The White Paper leading to the Bill, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), was published on 30 March 2017. You can read more about it [in our blog](#).



In summary the EU (Withdrawal) Bill does three main things.

01. It repeals the [European Communities Act 1972](#), the key “conduit” through which EU law currently flows into, and becomes part of, UK law. The repeal won’t take effect until what the Bill calls “exit day” – a date which is not specified in the



Bill, but is generally assumed to be the day on which the UK actually leaves the EU. If the 1972 Act was repealed earlier, the UK would be in breach of its present obligations as an EU Member State.

02. It states that all EU (and European Economic Area) law which applies to the UK at present will continue to operate as part of UK law, on and after exit day. This is intended to meet the UK Government's commitment to give maximum certainty to individuals and businesses about their rights and obligations after Brexit.
03. The Bill covers both kinds of EU law affecting the UK. One kind is EU law that has already been transposed into UK legislation (Acts, regulations etc). This will now become free-standing UK law. The second kind is EU law that has not previously been converted into UK legislation because it applied "directly" to the UK. An example is some of the laws governing the authorisation of Genetically Modified Organisms and Pesticides. This will now be converted into UK legislation for the first time.
04. It gives UK Government Ministers very wide-ranging powers to change the law. Most of these powers are also given to Welsh Government Ministers (but see below for differences between the two).
05. The first set of these powers allows Ministers to do anything they "consider appropriate" to ensure that former EU law can actually work as part of UK law, after Brexit. A large number of changes will be needed for this purpose. For example, the current EU law on bathing water quality requires the UK to send a report on the quality of its water to the European Commission. But, on exit Day, the Commission will no longer have a role with regard to the UK. Therefore, the legislation needs to be adapted so that the report can be sent to a body within the UK – or, possibly, not sent at all. The power given to Ministers is wide enough to allow them to set up a wholly new public body for this kind of purpose.

Ministers are also given an even wider power – to change the law, or to make new laws, in any area of policy, in any way they consider appropriate so as to fit in with any final withdrawal agreement reached between the UK and the EU 27.

All these powers given to Ministers are so-called "Henry VIII powers". That means that they can be used to do anything that would normally need primary legislation, and they include the power to change or repeal primary legislation – Acts of Parliament,



and Acts of the National Assembly for Wales, the Scottish Parliament and the Northern Ireland Assembly. The Assembly's Chief Legal Adviser states that 'this fact, combined with the fact that the Bill allows Ministers to do whatever they "consider appropriate" in regulations, makes the new powers very wide indeed'. The first set of powers however is still somewhat limited by the requirement that they can only be used to ensure to address problems in the law arising from the UK's withdrawal from the EU. So, for instance, the powers could not be used to change former EU rules simply because Ministers did not agree with them as a matter of policy.

The powers given to Ministers are subject to "sunset clauses" – i.e. they will automatically expire after a certain period. This was recommended by the House of Lords Select Committee on the Constitution [in its report](#) on a Great Repeal Bill and so is likely to be welcomed at Westminster, although the actual periods set out in the Bill may be thought too long by some.

In advance of the Bill's publication, there was considerable controversy over the proposed grant of such extensive powers to Ministers.

The Bill also provides that judgments of the Court of Justice of the European Union given after UK withdrawal will not bind UK courts. However, judgments handed down before Brexit Day will continue to bind all the UK courts, except the Supreme Court.

In all these respects, the Bill essentially follows what was trailed in the White Paper.

What could the Bill mean for devolution?

The Bill has already proved to be controversial in terms of devolution. It imposes a "freeze" on the legislative competence of the National Assembly for Wales and other devolved parliaments. Essentially, the Assembly will still have to legislate within the bounds of EU law, as it existed immediately before the UK withdraws (or within EU-based law that the Bill has converted into UK law). This restriction will continue for an indefinite period. The restriction does not apply to the UK Government and Parliament, who will be able to pass new laws that change existing EU requirements after the UK exits. In areas where policy is devolved – like agriculture or the environment – this means that the UK Government and Parliament could remove former EU rules for England, whereas the Assembly would not be able to do so for Wales.



For example, an agriculture Bill in the Assembly could not introduce a new, bespoke system of payments for farmers in Wales that would be different from the existing EU system and also different from the way in which that system will be converted into UK law. By contrast, the UK Parliament could introduce an agriculture Bill that removed the requirements of any EU rules converted by the Bill.

The UK Government states in the Explanatory Notes to the Bill that this restriction is a 'transitional' restriction which will apply whilst it consults with the devolved governments about whether common policy frameworks in areas such as agriculture and fisheries are needed across the UK after we leave the EU. The UK Government also states in the Explanatory Notes to the Bill that where it is decided that common frameworks aren't needed, then the restrictions will be lifted. The First Minister for Wales, Carwyn Jones has stated in Plenary and in evidence to Committees that it should not be for the UK Government alone to decide whether common frameworks are needed but a joint decision between the devolved nations and the UK Government.

The Bill does not include a 'sunset' clause or time-limit on this restriction on the devolved legislatures and no requirements to consult devolved governments are included in the Bill.

The Bill also gives lesser powers to devolved Ministers than to UK Ministers. Devolved Ministers will not have the power to convert "directly applicable" EU law into the law of Wales, Scotland and Northern Ireland, whereas UK Ministers will have that power in respect of the whole of the UK – or of England alone. Directly-applicable EU law includes much of agriculture law – a devolved area.

Other restrictions also apply to devolved Ministers, such as the need to obtain the consent of UK Government Ministers in certain cases. The White Paper had promised that Ministers in Wales, Scotland and Northern Ireland would be given powers "in line with" those handed to UK Ministers.

And wherever the Bill gives a power to devolved Ministers, it gives the same power to UK Government Ministers. The Assembly's Chief Legal Adviser states that this means that 'London could step in and make law for Wales on devolved matters'. The Bill doesn't stipulate that this would be subject to the agreement of the Welsh Government or the Assembly – although in some cases, constitutional conventions would normally require such consent to be sought.



The First Minister for Wales, Carwyn Jones and the First Minister for Scotland, Nicola Sturgeon have [issued a joint-statement on the Bill](#). In this statement the First Ministers set out their belief that the Bill is ‘a naked powers grab, an attack on the founding principles of devolution and could destabilise our economies’.

The First Ministers also state:

The Bill lifts from the UK Government and Parliament the requirement to comply with EU law, but does the opposite for devolved legislatures: it imposes a new set of restrictions. These new restrictions make no sense in the context of the UK leaving the EU.

They therefore conclude that they will not be able to recommend to the Assembly and the Scottish Parliament that their consent is given to the Bill.

David Rees, Chair of the Assembly’s External Affairs Committee [has stated](#):

On first reading, it appears as though the UK Government may be using Brexit as cover to prevent the Assembly from using powers it currently holds after we leave the European Union.

As we stated in our recent report, this Bill is being introduced following next to no consultation with the Welsh Government and no prior consultation with the Assembly. If this Bill does seek to constrain the Assembly’s powers, then it could be seen as undermining devolution and the democratic will of the Welsh people, as expressed in the 2011 referendum on full law-making powers for Wales.

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