

Research Briefing  
**The European Union  
(Withdrawal) Bill:  
An introductory guide**

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Author: **Nia Moss & Elisabeth Jones**

Date: **September 2017**



**National Assembly for Wales**  
Research Service

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Author: **Nia Moss Research Service & Elisabeth Jones, Chief Legal Adviser**

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## Contact Us

**Nia Moss**  
Research Service  
National Assembly for Wales  
Tŷ Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

 : 0300 200 6313

 : [Nia.Moss@Assembly.Wales](mailto:Nia.Moss@Assembly.Wales)

 : [Assembly.Wales/InBrief](http://Assembly.Wales/InBrief)

 : [@SeneddResearch](https://twitter.com/SeneddResearch)

 : [Assembly.Wales/Research](http://Assembly.Wales/Research)

**Elisabeth Jones**  
Chief Legal Adviser  
National Assembly for Wales  
Tŷ Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

 : 0300 200 6432

 : [Elisabeth.Jones@Assembly.Wales](mailto:Elisabeth.Jones@Assembly.Wales)

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## Research Briefing

# **The European Union (Withdrawal) Bill: An introductory guide**

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On 13 July 2017 the UK Government introduced the European Union (Withdrawal) Bill. The Bill sets out the procedures and processes by which the current body of EU law will be converted into UK law upon the UK's exit from the EU. This paper provides an introductory guide to the key provisions of the Bill, why the Bill is needed, the expected timeline for the Bill and how the Bill will impact on the legislative competence of the Assembly and the powers of Welsh Ministers.

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# 1. Introduction

On 13 July 2017 the UK Government introduced the **European Union (Withdrawal) Bill** into the House of Commons. The Bill - previously referred to as the 'Repeal Bill' - has been long trailed. The UK Government published a **White Paper** on its proposals for the Bill in March 2017. Its primary purposes are:

- to repeal the **European Communities Act 1972**, the Act through which EU law currently becomes part of UK law, but
- to ensure that EU laws currently in place in the UK are preserved on the day the UK exits the EU.

The UK Government's intention is to provide certainty to UK businesses and citizens that the same laws, rules, rights and obligations that apply to them the day before the UK exits the EU, apply the day after and that no 'black holes' appear in the UK statute book overnight.

Whilst the aim of the Bill is clear, the process of converting existing EU law into UK law is complex. Many of the laws that will be preserved by the Bill won't make sense once the UK leaves the EU and will need to be amended to ensure they work effectively in future. For example some of the laws that will be converted from EU law into UK law make reference to EU institutions or bodies that the UK will no longer be a member of. The Bill therefore provides UK Ministers and devolved ministers with powers to make amendments to the laws preserved by the Bill. The Bill also makes provisions about the current requirement whereby the UK's devolved legislatures can only pass laws that are compatible with EU law. The Bill removes the current requirement but replaces it with a new restriction.

The UK Government states that the Bill will provide stability to business and citizens. However, the Bill has been criticised by the Scottish and Welsh Governments for its impact on the devolution settlements. There has also been discussion in both the UK Parliament and devolved legislatures about the relatively broad powers that will be granted to ministers in the Bill and how these should be properly framed and controlled.

This paper provides an introductory guide to the key provisions of the Bill; seeks to explain why the Bill is needed; what it proposes to do and how; what impact will it have on devolution and; what the initial reactions to the Bill have been.

## 2. Key provisions in the Bill

### What will the Withdrawal Bill do?

The Withdrawal Bill will do three main things:

- Repeal the **European Communities Act 1972** with effect from a future date yet to be decided, known in the Bill as "exit day", but not defined being the day on which the UK does actually leave the EU;
- Preserve the body of existing EU law, as it stands the moment the UK exits the EU, as domestic UK law; and
- Give ministers secondary legislation powers to make corrections to the body of EU law preserved by the Bill to make it operable and effective.

Its main aim is to provide legal certainty on the day the UK exits the EU so that the laws and rules that apply to businesses and citizens the moment before the UK exits the EU apply the moment after.

## Why does the UK Government believe it needs to repeal the European Communities Act 1972?

All Member States of the European Union are required to follow EU laws within their territories. In the UK, the main way in which European law is brought into UK law is through the European Communities Act 1972. The Act is described as the main 'conduit pipe' through which European law flows into UK law.

Laws flow through the pipe in two main ways. Firstly section 2(1) of the Act provides for some EU rights and laws to automatically or directly apply in the UK when they are adopted by the EU. These include rights included in the treaties setting out the rules on membership of the EU and regulations passed by the EU on areas such as pesticides, fishing, regulations of chemicals and farming.

Secondly, section 2(2) of the Act provides both UK and devolved ministers with powers to introduce secondary legislation to implement pieces of EU law that don't automatically apply in the UK. This includes secondary legislation to implement EU Directives on areas such as nature conservation, water and air quality. For example UK and devolved ministers have used these powers to introduce the Conservation of Habitats and Species Regulations 2010 which set out the regulations that govern the management of protected nature conservation sites in the UK and implement the EU's Habitats and Birds Directives.

In repealing the Act, the Bill will make clear that the 'conduit-pipe' through which EU law flows into UK law is stopped up and that EU law will no longer be able to flow into UK law. Some academics have argued that this stopping-up would happen automatically when the UK ceased to be a member of the EU.

**Key provisions: Clause 1 of the Bill repeals the *European Communities Act 1972*. The Act will be repealed from what Bill calls 'exit day'. A specific date for exit day isn't included on the face of the Bill. UK Ministers have the power to denote a date and time as "exit day".**

## Why does the UK Government believe the Bill needs to convert existing EU law into domestic law and what does this mean in practice?

If the Bill only repealed the European Communities Act 1972, and did nothing to expressly preserve EU law into UK domestic law, any laws dependent on that Act for their existence would simply fall away. This would be the case for both EU rights and laws that automatically or directly apply in the UK and the secondary legislation used to implement EU law in the UK.

For example the EU's regulation on cosmetic products sets out the rules on the assessment, surveillance and labelling of cosmetic products like shampoo and shower gel. These rules apply directly to UK cosmetic companies because of section 2(1) of the 1972 Act. If the UK Government repealed the European Communities Act 1972 at one minute past midnight on exit day and did nothing to convert EU law into UK law, then the rules on cosmetic products would simply cease to apply. This would mean that there would be no rules on what labels on shampoo bottles produced in the UK would need to say. This would create uncertainty for both manufacturers and consumers.

By converting the EU law that applies in the UK before exit day into domestic law, the Bill will ensure that no gaps in legislation appear on the day the UK exits and the 1972 Act is repealed.

Converting the law will not mean that all current EU laws will apply indefinitely in the UK. After the UK leaves the EU the UK Parliament and where applicable devolved legislatures will be able to modify or repeal EU laws converted into UK domestic legislation. However, the extent to which they can do this may be constrained by what is agreed with the EU in any future trade deal or in the withdrawal agreement itself. For example a requirement in a trade deal for food produced in the UK to meet the same animal welfare standards as the EU will limit the extent to which UK legislatures can amend the body of EU law on animal welfare.

**Key provisions: Clauses 2, 3 & 4 of the Bill set out what current EU law will be converted into UK law on exit day.**

## What EU law is currently in force in the UK and what is being converted?

The Bill groups the EU law currently in force in the UK into three broad categories. These are illustrated in the diagram below. The first category is referred to in clause 2 of the Bill as 'EU-derived domestic legislation'. This group includes UK domestic laws that have already been passed by the UK Parliament or devolved legislatures to implement requirements of EU law.

An example in Wales would be the [Bathing Water \(Amendment\) \(Wales\) Regulations 2016](#). These regulations passed by the Assembly enabled Welsh Ministers to add an additional beach, Aberdyfi Rural Beach, to the list of beaches whose bathing water quality has to be regularly assessed under the requirements of the EU's Bathing Water Directive. The regulations were introduced using powers Welsh Minister have under the [European Communities Act 1972](#). There are a significant number of UK laws that fall into this first category that will be preserved by the Bill.

The second category is referred to in clause 3 of the Bill as 'direct EU legislation'. This is the category of laws that, once adopted by the European Union, automatically apply in the UK without needing the UK Parliament or devolved legislatures to pass additional legislation to implement them. An example of this would be the [EU regulations on the labelling of food](#). The EU regulations setting out what allergens like gluten or nuts need to be printed on food labels automatically apply in the UK without the UK Parliament or devolved legislatures having to pass a separate law.

The third category included in the Bill catches other aspects of directly applicable EU law not captured by the definition in clause 3. This category includes rights and obligations for citizens and businesses included in the EU treaties; for example the right to free movement of people and goods. This category also includes the case-law of the European Court of Justice, in the way it interprets and enforces those rights, obligations etc. The rights and obligations included in the Charter of Fundamental Rights will not be converted by the Bill, however, as these are expressly excluded by clause 5(4).

The Bill will preserve all three categories of law as UK domestic law on exit day. Together, these three categories of EU law will be known as 'retained EU law'.

**Key provisions: Clause 2 defines and preserves 'EU-derived domestic legislation'. Clause 3 defines and converts 'direct EU legislation'. Clause 4 saves other types of direct EU law described as any EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures which are available and enforced in UK domestic law at present. Clause 5(4) expressly excludes the Charter of Fundamental Rights from the category described in Clause 4.**

## The 3 categories of “retained EU law”

**Category 1:** Pre-exit UK law that’s based on EU law and has been used to implement EU requirements in UK law (mainly based on Directives).

“EU-derived domestic legislation” - Clause 2.

**Category 2:** EU Regulations, decisions and tertiary legislation. This doesn’t need to be implemented in UK law before Brexit.

“direct EU legislation”- Clause 3.

**Category 3:** Other EU law that applies directly in UK law at present  
-Treaty Articles with direct effect, general principles of EU law, CJEU case-law (but not the Charter).

Clauses 4 and 5(4).

### How does the Bill propose to convert EU law into UK law?

The Bill expressly states that the three categories of EU law, together referred to as ‘retained-EU law’, will continue to apply after exit day as they do now. Clause 2 on EU-derived domestic legislation states that UK legislation implementing EU requirements will operate and have the same effect after exit day as it did before. Clause 3 on ‘direct EU legislation’ states that all direct EU legislation that is ‘operative’ in the UK immediately before exit day will become UK law on exit day. Clause 4 states that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which had direct effect in the UK immediately before exit day will be available after exit day as they were before.

Direct EU legislation – EU regulations, decisions applicable to the UK and tertiary legislation – will be printed and published in the same way as UK Acts and subordinate legislation, so that citizens can be made more aware of the existence of these types of law within the UK legal system as a result of clause 3 of the Bill. The four principal treaties in the EU/EEA system will be printed and published in the same way; they are examples of law converted into UK law by clause 4. Other EU documents that fall into the clause 4 category, and case-law of the European Court of Justice, can also be printed and published in this way but do not have to be.

There are some exceptions in the Bill to the general rule that all EU law will be automatically converted into UK law. These exceptions include: the Charter of Fundamental Rights which will not be converted; any EU decisions made in relation to Common Foreign and Security Policy; any EU decisions not applicable to the UK; and any treaty provisions or EU legislation from which the UK had secured opt-outs. For example the UK has an opt-out in relation to the Schengen agreement which abolished border controls between Member States.



**Key provisions in the Bill: Clause 2, 3 and 4 preserve EU law in UK domestic law. Clause 5(4), Schedule 1 and Schedule 6 contain the provisions on the areas of law that will be excepted from the general principle that all EU-derived domestic legislation will be converted.**

## Will UK law have supremacy over EU Law after the UK exits the EU?

EU law currently has supremacy over UK law. If the UK Parliament or a devolved legislature passed a piece of legislation that was incompatible with EU law then it wouldn't have any legal effect because EU law in effect 'trumps' UK law. UK courts can strike down even Acts of the UK Parliament that are inconsistent with EU law, and can do the same with Acts of the devolved legislatures and with subordinate legislation. For example, if the Assembly passed a law on recycling which had lower recycling standards than the EU Waste Framework Directive standards, the Welsh Act would be struck down.

Clause 5 of the Bill states that any pieces of UK legislation passed after exit day will have supremacy in the UK even if they contradict pieces of EU law retained by the Bill. However, a piece of retained EU law will still "trump" a piece of UK purely domestic law passed before exit day.

At present when interpreting the law, UK courts and tribunals are bound by judgments made by the European Court of Justice. This is again because EU law has supremacy over UK law. Following exit day, UK Courts will not be bound by any decisions of the European Court of Justice made after exit day, although they can take them into account and follow them if they wish.

However, UK Courts and tribunals will continue to be bound by judgments made by the European Court of Justice before exit day in relation to the body of EU law retained by the Bill. This is to ensure continuity in the way the law is interpreted after exit day. The exception is the UK Supreme Court. As it will be the court of last resort after Brexit, including on retained EU law, it needs to be able to depart from the pre-exit decisions of the European Court of Justice – if only because the European Court of Justice itself may have changed its mind in the meantime. So the Supreme Court will be able to make such departures, but only in the same exceptional circumstances in which it would overrule its own previous case-law.

The outgoing President of the UK Supreme Court, **Lord Neuberger**, has asked the UK Government to provide more clarity in the Bill on 'what judges should do about decisions of the European Court of Justice after Brexit'. Lord Neuberger has stated that judges would hope and expect the Parliament in its consideration of the Bill will 'spell out how the judges would approach that sort of issue after Brexit and spell it out in a statute'.

**Key provisions: Clause 5 of the Bill sets out the areas where EU law will not have supremacy after exit day. Clause 6 of the Bill sets out how UK Courts and tribunals should interpret the body of retained EU-law converted or preserved by clauses 2, 3 & 4 of the Bill.**

## If the main aim of the Bill is continuity why does the Bill contain powers for Ministers to change the body of 'retained-EU law'?

Clauses 7 and 10 of, and Schedule 2 to, the Bill give UK Ministers and devolved Ministers broad regulation-making powers to amend the body of EU law that will be preserved in UK domestic law by the Bill. This is to allow Ministers to ensure that the body of law transferred into UK law is workable after the UK exits the EU. Much of the EU law that will be transferred won't make sense after the UK's

exit unless it is modified in some way. For example some of the legislation makes reference to EU institutions of which the UK will no longer be a member, such as the European Commission, the European Chemicals Agency or the European Medicines Agency. In addition, preserved law that relies on reciprocal arrangements with other Member States, such as the sharing of information on pesticide or GMO authorisations, or indeed the treaty provisions on freedom of movement, won't make sense as the UK will no longer be a Member State. Ministers will only be able to make regulations using these powers for up to two years after exit day. The regulations made will be able to do anything an Act of Parliament could do – including repealing or amending existing Acts of Parliament or Acts of the devolved legislatures.

The powers provided to devolved ministers are similar, but different, to the powers given to UK Ministers. Key differences are explained in the response to the next question in this paper.

The **Secretary of State for Exiting the EU, David Davis, has stated** that the UK Government anticipates that it will need to introduce up to 1000 pieces of subordinate legislation using its powers under Clause 7 of the Bill to correct the EU law converted by the Bill before the UK exits the EU (although the corrected versions won't, normally, come into force until exit day). Devolved Ministers will also need to correct EU-derived domestic legislation in their areas of responsibility. The UK Government states that due to the large volume of legislation that needs to be corrected it would not be possible to make all these corrections in primary legislation such as Acts of Parliament or Acts of the devolved legislatures and so regulation-making powers are needed in the Bill.

Whilst the need for these regulation-making powers has been broadly recognised, scrutiny committees in the Assembly and in the Houses of Parliament have called on the powers to be strictly limited and controlled to ensure that there is proper scrutiny and oversight of them by legislatures.

Both the Assembly's External Affairs and Constitutional Affairs Committees have concluded that it should be for the Assembly itself to decide what powers Welsh Ministers are given to correct retained EU law in devolved policy areas. This is not reflected in the Bill, as it sets out the powers given to all ministers, UK and devolved ministers, on its face.

**Key provisions: Clause 7 outlines the powers that will be given to UK Ministers to make modifications to 'prevent, remedy or mitigate' any failure of retained EU law to operate effectively after Brexit, or to deal with any other deficiency in that body of law arising from the UK's withdrawal from the EU. Clause 10 states that similar powers for devolved Ministers to make changes are set out in Schedule 2 of the Bill. Schedule 2 sets out the powers of Ministers in the devolved institutions.**

## **What are the differences between the powers given to UK Ministers to correct retained EU law and the powers given to devolved Ministers?**

Devolved Ministers are given powers to make changes within the competence of their legislatures, or their own existing regulation-making powers where those are wider. UK Ministers are given powers to change **any** retained EU legislation – including legislation in devolved policy areas and that affects the devolved nations. The **Explanatory Notes** that accompany the Bill state that the UK Government would not use these "concurrent" powers in devolved areas without first consulting the devolved administrations, but there is no requirement on the face of the Bill for them to do so. The UK Government should also normally ask the Assembly for its consent for any regulations that affect primary legislation in a way within the Assembly's competence (whether that primary legislation was passed by Westminster or the Assembly).

Devolved Ministers can only make changes to EU-derived domestic legislation i.e. the first category of law described above and dealt with in Clause 2 of the Bill. Unlike UK Ministers, they will not be able to make changes to directly applicable EU legislation i.e. the second and third categories described above and in Clauses 3 and 4 of the Bill. For example, the devolved Ministers will not be able to make changes to much of the legislation on the common agricultural policy and common fisheries policy which falls within these categories. Nor will they be able to make regulations that would be incompatible with the way in which UK Ministers choose to modify those categories of law.

UK Ministers will be able to give other bodies the power to make regulations within the scope of the Bill – which includes the power to take decisions about the content of those regulations - but devolved ministers will not.

When making changes to EU-derived domestic legislation, devolved Ministers will also need to ask UK Ministers for consent to do some things. These include seeking consent for any regulations that would come into force before exit day and seeking consent where regulations would remove reciprocal arrangements with other EU Member States or an EU body.

**Key provisions: Clause 7 sets out the powers given to UK Ministers; Clause 10 and Schedule 2 set out the powers given to devolved ministers.**

### **What other powers are Ministers given by the Bill?**

Clause 8 of the Bill gives UK Ministers powers to introduce regulations to prevent the UK breaching any of its international obligations as a result of the UK's withdrawal from the EU. For example, the UK is signatory to many international agreements by virtue of its membership of the EU. In withdrawing from the EU, the UK Government will need to ensure that all of its current obligations are properly replicated in UK domestic legislation. Ministers will only be able to make regulations using these powers for up to two years after exit day.

Clause 9 of the Bill gives UK Ministers powers to make any regulations that they 'consider appropriate' to implement the withdrawal agreement with the EU. UK Ministers will only be able to use these powers up until exit day.

Regulations made by UK Ministers using either of these powers will be able to include anything that an Act of Parliament could do.

Devolved Ministers are given similar powers to make regulations to prevent any breach of international obligations and to implement the withdrawal agreement in areas within their legislatures' competence or their existing executive powers. As with the powers to make regulations to correct retained EU law, devolved Ministers won't be able to use these powers to make changes to directly applicable EU law i.e. categories 2 and 3 described above. However, the regulations will be able to do anything that primary legislation could do, and the powers are subject to the same time-limit as those of UK Ministers.

Additional restrictions are also placed on the powers given to devolved Ministers. As in the case of the power to "correct" retained EU law, they will not be able to make regulations that would be incompatible with the way in which UK Ministers choose to modify those categories of EU law that are directly-applicable in UK law – the categories dealt with by clauses 3 and 4 of the Bill.

Devolved Ministers may also have to seek the consent of UK Ministers when using these powers. In relation to the powers on international obligations, devolved Ministers cannot make regulations that relate to the WTO Agreement or any existing quota arrangements, such as those on fisheries, without the prior consent of UK Ministers. They will also need consent if they want to bring any such regulations into force before exit day.

In relation to the power to make regulations to implement the withdrawal agreement, devolved Ministers can't use these to make regulations on quota arrangements without getting the prior consent of UK Ministers.

UK Ministers also have concurrent powers so that they can use the powers given to them by Clauses 8 and 9 of the Bill to pass regulations in areas of devolved policy, as described above.

**Key provisions: Clause 8 of the Bill gives UK Ministers the power to make regulations to prevent the UK from breaching any of its international obligations as a result of the UK's withdrawal from the EU. Clause 9 of the Bill gives UK Ministers the powers to make regulations to implement the withdrawal agreement. Schedule 2 contains similar, but more restricted, powers for devolved ministers.**

## Why are the regulation-making powers given to Ministers in the Bill considered controversial by some?

As set out above, the Bill gives Ministers powers to introduce regulations to:

- make corrections to the body of EU law transferred into UK law so that it makes sense after the UK leaves the EU;
- ensure the UK doesn't breach any of its international obligations as a result of leaving the EU; and
- implement the withdrawal agreement.

These powers are what are known as secondary legislation powers. This type of powers allow Ministers to make changes to the law without needing to introduce a new Bill in Parliament each time the Government wishes to make changes to a law. Often they are used set out the detail of how a law will operate and work; for example, setting out the details of any fines Ministers might impose for a breach of the legislation.

These powers can sometimes prove controversial because they are subject to less rigorous scrutiny requirements than Bills. Members of Parliament and the devolved legislatures can't amend secondary legislation, as they can with Bills, they can only vote for or against it in its entirety. Some types of secondary legislation can also enter into force without the UK legislatures having to actively consider or vote on it. This is what is known as a negative procedure. Yet other types of secondary legislation need no scrutiny at all – "laid-only", or "no procedure" subordinate legislation. For these reasons, UK legislatures are often reluctant to grant secondary legislation powers to Ministers without ensuring they are tightly drawn and without being certain they know what the powers will be used to do. Particularly controversial are what are known as 'Henry VIII' powers. These are powers that allow Ministers to change or even repeal Acts using only secondary legislation powers, and to make other significant changes – like setting up a new public body – that would normally require primary legislation.

The Bill will give UK Ministers and devolved ministers very broad secondary legislation powers. Many of the regulations introduced to correct the body of retained EU law may be technical changes that are uncontroversial in nature, others however may be more significant.

For example, the Bill gives Ministers powers to establish new bodies to replace existing EU bodies such as the European Food Safety Authority, the European Chemicals Agency or the EU Aviation Safety Agency. It also gives Ministers powers to transfer the duties of EU agencies to existing UK bodies. In some instances these types of regulations will require a significant policy decision to be made by Ministers as to who the appropriate body is, whether a new body should be established and how this new work will be funded and by who.

Whilst the need for Ministers to have these powers has been broadly accepted, because of the scale of corrections needed, Committees in both the Assembly and the Houses of Parliament have emphasised the need for these powers to be tightly controlled and restricted. In [its report on the White Paper](#) on the Bill, the Assembly's External Affairs Committee stated:

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*The power likely to be delegated to the Welsh Ministers is wide and without appropriate constraints it risks unbalancing the power dynamic between the executive and the legislature. We recognise the case for a power to be delegated to the Welsh Ministers, and that this power will need to be wide in terms of the legislation it applies to.*

*However, this power must be strictly limited to the uses for which it is intended. We endorse the House of Lords Constitution Committee's call for substantive constraints on the power to be placed on the face of the Bill.*

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The Assembly's [Constitutional and Legislative Affairs Committee](#) has also stated that powers given to Ministers need to be tightly drawn. Both the Assembly's Committees and [the House of Lords Constitution Committee](#) have made a number of recommendations about how the powers could be controlled including limiting the correction powers to only what is strictly necessary to make the EU law transferred workable; placing sunset clauses on the powers and; having appropriate procedures in place to allow the UK's legislatures to consider the large volume of regulations that will be brought forward.

**Key provisions: Clause 7 which sets out the powers given to UK Ministers, Clause 10 and Schedule 2 which set out the powers given to devolved Ministers.**

### What controls are placed on Ministerial powers by the Bill?

In response to calls for the regulation powers given to Ministers to be limited, the Bill includes a number of controls and restrictions. These apply to both UK and devolved Ministers (while additional restrictions apply to devolved Ministers, as described above):

- Sunset provisions are included on the powers given to Ministers. Ministers will only be able to use their regulatory powers to correct retained EU law and to prevent a breach to the UK's international obligations for two years after exit day and the powers to implement the withdrawal agreement up until exit day.
- Ministers won't be able to use their correction powers to increase taxation, make retrospective changes, create a new criminal offence carrying a potential sentence of more than 2 years'

imprisonment, or amend or repeal the Human Rights Act 1998. The Northern Ireland Act 1998 is also protected from most changes. Similar restrictions are placed on the powers in relation to international obligations and the withdrawal agreement.

- Some types of regulation under Clauses 7, 8, 9 and Schedule 2 will have to go through what is known as the ‘draft affirmative procedure’. This is where the Houses of Parliament or a devolved legislature have to actively vote in favour of the regulations for them to be passed. These include regulations that establish a public authority, transfers a power or function from an EU body to a UK body, create or widen the scope of a criminal offence or give another body a power to make legislation, or are about fees to be levied by a public authority.
- All other regulations under the Bill unless amended will be subject to lighter-touch scrutiny. Most will go through the “negative procedure”, whereby Ministers make regulations and they remain valid unless a Member of the relevant legislature requests a debate about them within 40 days, and that debate results in a vote against the regulations. This is very rare and, in the UK Parliament, the Speaker does not always grant Members’ requests for a debate of this kind. Moreover, Ministers will be able to make some regulations under the Bill without even this level of scrutiny: transitional, transitory and saving provisions can be made without any scrutiny at all, even if they change primary legislation; as can the important power of the UK Ministers to set the date and time of “exit day”. And, where UK Ministers consider that a situation is urgent, they will be able to bypass the more thorough “draft affirmative procedure”, instead using the relatively unusual “made affirmative procedure”. Under this procedure, regulations are made by Ministers, but cannot remain in force unless approved by both Houses of Parliament within one month. Therefore, this procedure is in between “draft affirmative” and “negative” in terms of opportunity for scrutiny. This option of bypassing the draft affirmative procedure in urgent cases is not open to devolved Ministers.

The key control on Ministerial powers is normally the way in which the scope of those powers is defined. In the case of the powers in the Bill, the scope is wide in a number of ways:

- Ministers will be able to use the correction powers in Clause 7 to ‘make such provision as they consider appropriate’ to address a failure or deficiency in retained EU law arising from the withdrawal agreement with the EU. The words “as they consider appropriate” confer a wide discretion on Ministers, while some commentators have stated that the terms “failure to operate effectively”, “deficiency” and “arising from” are open to wide interpretation.
- The powers in clauses 8 and 9 are also, phrased in terms of what Ministers “consider appropriate”. In the case of clause 9, Ministers can use the regulations to do anything that they consider appropriate to implement the withdrawal agreement, and that they consider needs to be done before exit day. Therefore the only limit on this power is the terms of the content of the withdrawal agreement itself – which are not known yet.

MP’s and Lords will need to decide in their scrutiny of the Bill whether the controls and restrictions included in the Bill are sufficient, whether ministerial powers are tightly-enough drawn and whether the Bill meets the recommendations made by select committees in the Houses of Parliament and scrutiny committees in the devolved legislatures.

**Key provisions: Clauses 7, 8, 9 and Schedule 2 include restrictions on the extent of the powers given to Ministers. Schedule 7 sets out the scrutiny procedures that will apply to regulations brought forward under the Bill. Clause 17 (5) and schedule 7 also sets out the powers of UK Ministers to bypass the scrutiny procedures in certain urgent cases, and sets out that regulations made by UK Ministers using transitional, transitory and saving provisions are only subject to a scrutiny procedure if a UK Minister considers that it is not appropriate for them not to be exempt from parliamentary scrutiny.**

## **How does the Bill affect the Assembly's competence to pass laws?**

As things stand, under both the current devolution settlement in Wales and the new settlement that will come into force next year, the Assembly can't pass any legislation that is incompatible with EU law. EU law currently has supremacy over UK domestic law so any Welsh Acts or legislation that breach EU law would be outside the Assembly's current competence.

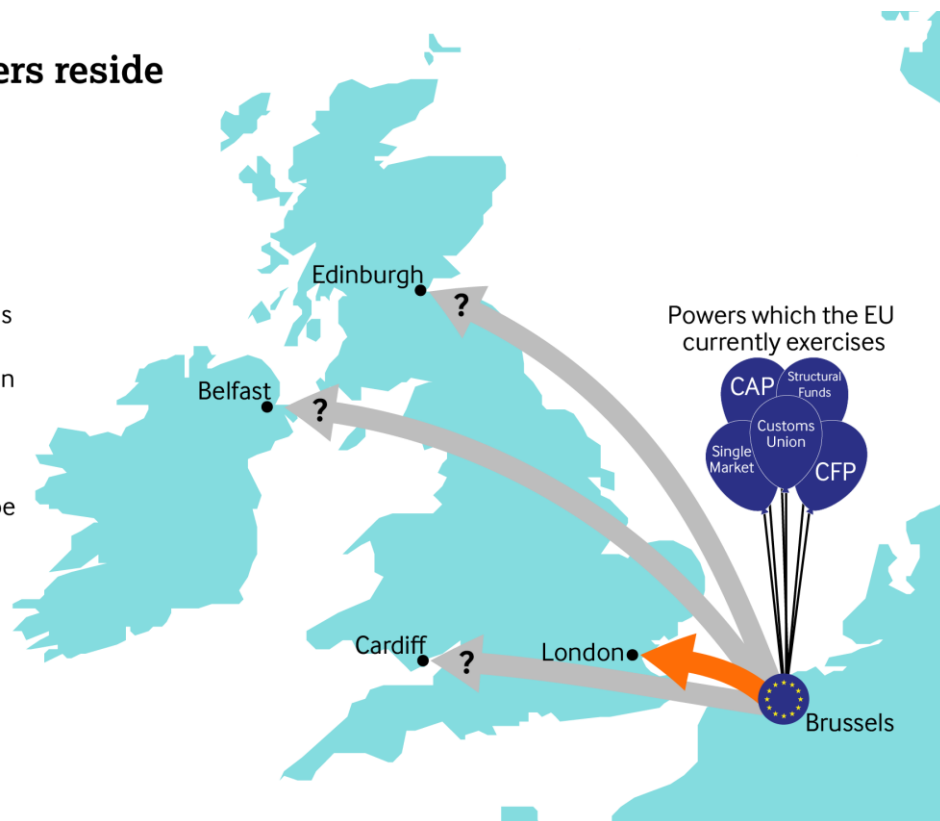
## **How will this change when the UK leaves the EU?**

The Supreme Court, in its ruling on [the Article 50 case](#) brought by Gina Miller on whether or not Parliament had a right to vote on the triggering of Article 50, set out its view on what will happen to devolved competence when the UK leaves the EU. In its judgment, the court stated that, when the UK leaves the EU, competence over areas of devolved policy such as agriculture, fisheries, environment and economic development will automatically go back to the devolved legislatures unless the UK Government actively pass legislation to prevent this from happening. The Bill is an example of this kind of legislation.

For example, at present in implementing its agriculture policy the Welsh Government has to follow all EU rules on support payments to farmers, animal health and welfare, food safety and environmental protection, although agriculture is a devolved subject. This is, because the UK, as a Member State, has agreed to the EU setting rules in those areas of agriculture policy. If nothing was done by the UK Government then on exit day all these powers would flow back from Brussels to Cardiff Bay and the Assembly would be able to pass legislation on farm support, animal health etc., which could set very different rules from the previous EU ones. (There would not be a completely blank sheet to start from, because the UK has other international-law obligations, e.g. in the realms of animal welfare and the environment). This is illustrated in the two infographics below.

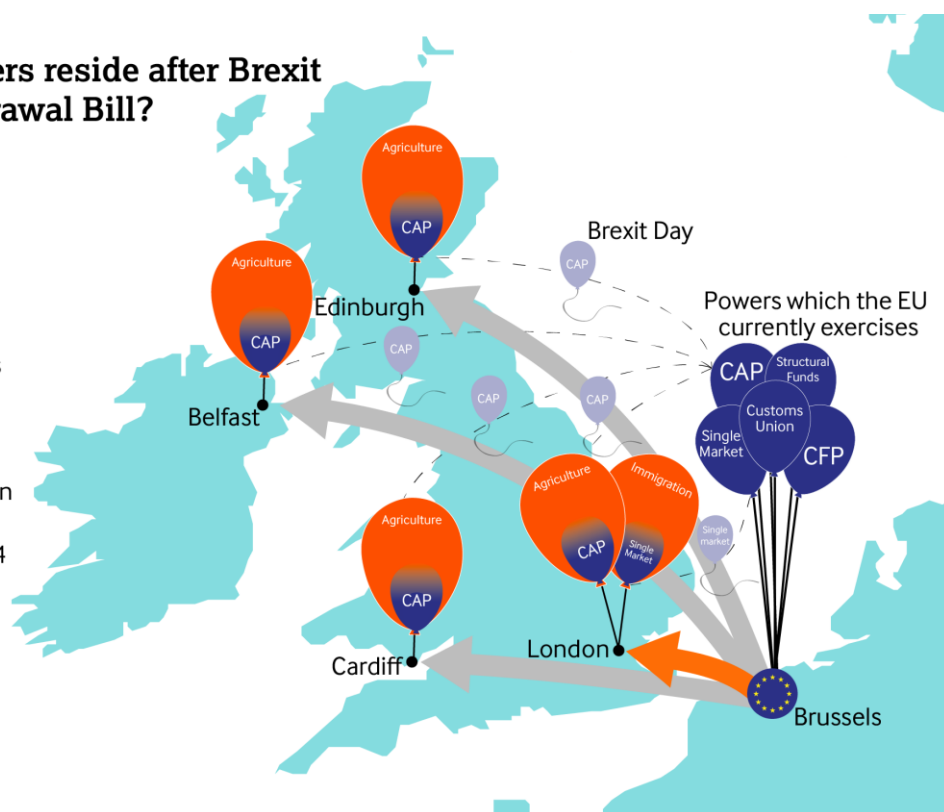
## Where will EU powers reside after Brexit?

One way of looking at powers which the EU currently exercises – such as setting the Common Agricultural Policy or rules on regional development funding - is as self-contained "balloons", anchored in Brussels. Looked at in this way, these balloons will float back across the English Channel on Brexit Day and there will be a choice as to where they should be brought to land.



## Where would EU powers reside after Brexit without the EU Withdrawal Bill?

Each balloon in Brussels forms part of a bigger balloon – the 'Agriculture' balloon, the 'Immigration' balloon, etc. The Supreme Court has confirmed that without the EU Withdrawal Bill, the smaller Brussels balloons would float over to the UK on Brexit Day and expand those big balloons. The 'Immigration' balloon would only swell a balloon in London. The 'CAP' balloon would put air into balloons in all 4 capitals.



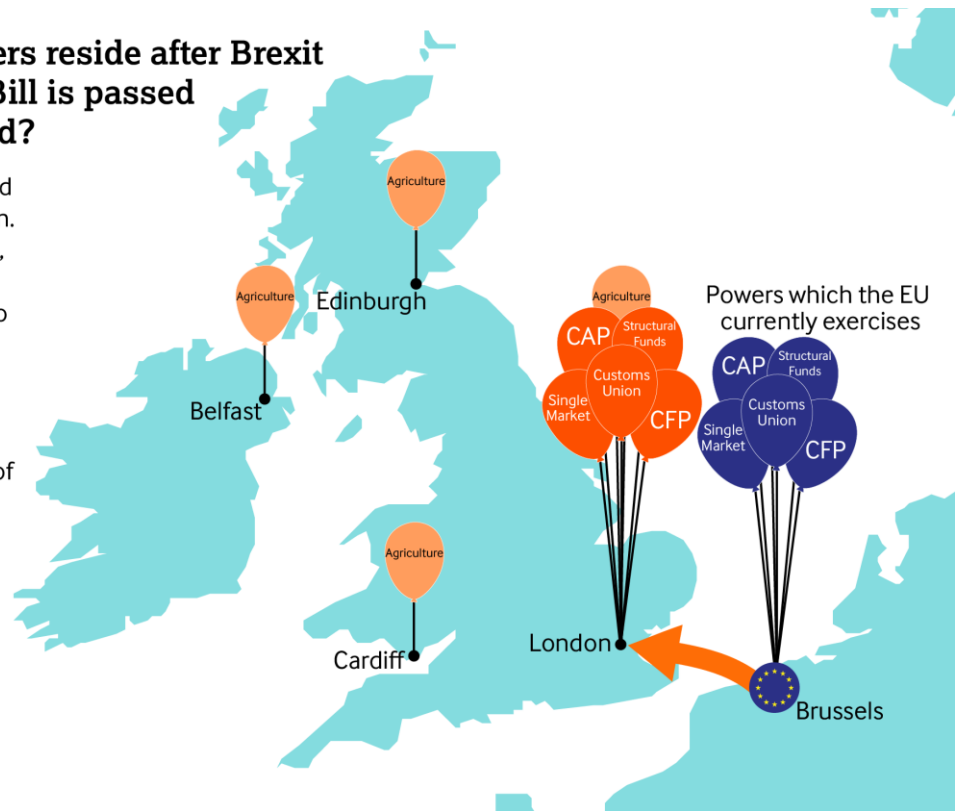
## How will the Bill affect this position?

Under Clause 11 of the Bill the UK Government introduces a new restriction on the competence of devolved legislatures so that in the first instance all powers float directly back to London from Brussels rather than to Cardiff, Edinburgh and Belfast. The infographic below illustrates this.



## Where would EU powers reside after Brexit if the EU Withdrawal Bill is passed as it's currently worded?

The EU Withdrawal Bill would hold all the 'power balloons' in London. The National Assembly for Wales, and the other devolved Parliaments, would still be able to legislate about agriculture, fisheries, the environment etc, but their balloons would not get any bigger - they would not be free to create new laws in place of the CAP, CFP etc. Only the UK Government and Parliament would be able to do that.



### What does this mean in practice for the Assembly's ability to pass laws after exit day?

Effectively, Clause 11 of the Bill will freeze the Assembly's current powers to pass laws after exit day. The Assembly will be subject in effect to the same EU restriction that it is currently under, as the Bill states that the Assembly will not be able to pass any legislation which is incompatible with the body of EU law that will be retained by the Bill. The only exception will be where Ministers (Welsh or UK) have made changes to that body of retained EU law, using the regulation-making powers given by the Bill. In that case, the Assembly will be able to choose: its legislation will either have to be compatible with that changed EU law, or with the unchanged EU law, as it stood at the moment before exit day. However, in practice, they may not have a choice, as the unchanged EU law may no longer be workable after the UK leaves the EU. This would mean that a legislature's competence had been constrained by action taken by an executive.

As mentioned above - UK Ministers alone will have the power to change directly-applicable EU law that has been converted into UK law by the Bill. This means that the Assembly's competence may be constrained by choices made by the UK Government, despite the fact that these changes occur in devolved policy areas in Wales.

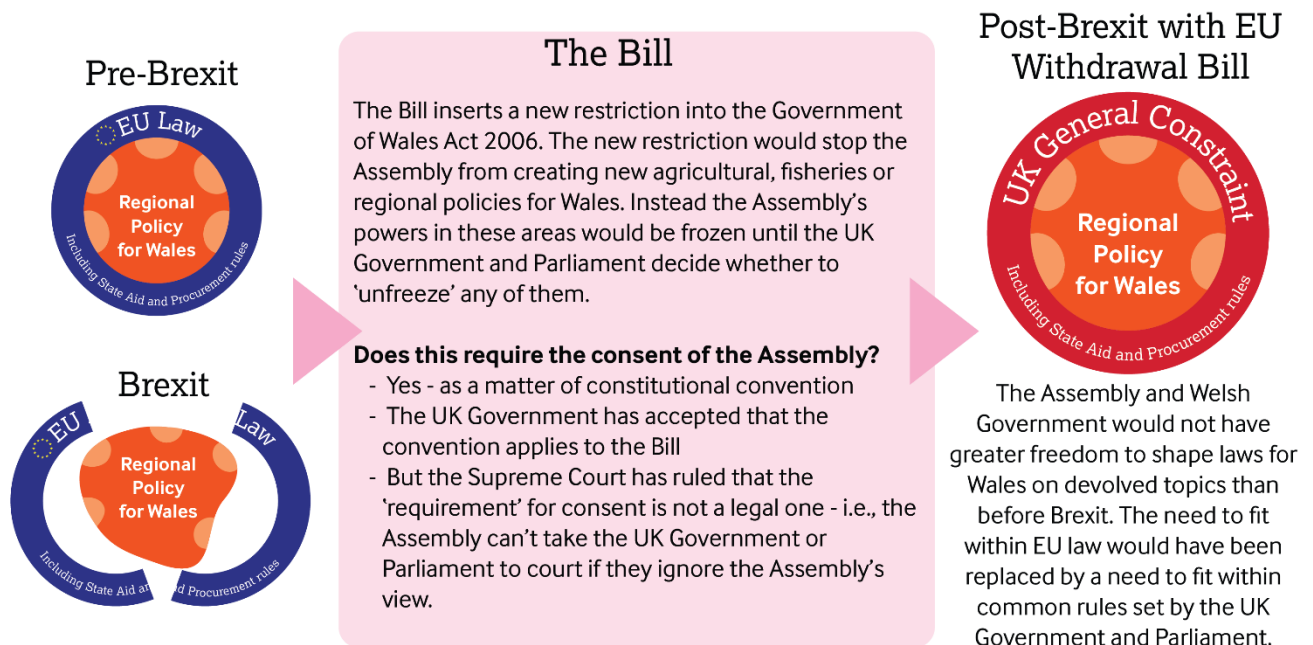
To follow the agriculture example, the Assembly will not be able to pass new laws on farm support, animal health and other areas on which the EU currently makes the rules, as these powers will be held back in London by the UK Government. The same restriction will apply to the Scottish Parliament and Northern Ireland Assembly but the UK Parliament won't be subject to the same restriction for laws it wishes to pass, whether for the whole of the UK, or for England alone.

The Bill does provide a mechanism for un-freezing or releasing these powers to the devolved legislatures at a later stage through Orders in Council. These Orders would set out the details of any powers that the UK Government agrees can be passed back to the devolved legislatures. These Orders would need to be passed by both the UK Houses of Parliament and by the Assembly (for Wales) before they come into force.

The UK Government has stated that the freezing of these powers will be a transitional measure whilst decisions are made on the need for common frameworks and policies across the UK. However, no sunset clause is placed on this restriction in the Bill. The only way of lifting it at any point in future is through the Orders in Council mechanism.

The infographic below illustrates what happens under three scenarios: the EU constraint the Assembly is currently under, what would happen if no new EU restriction was put in place and what will happen with the introduction of the new restriction by the Bill. The example of regional policy is used.

## Legal position if the EU Withdrawal Bill is passed as worded now



### Why has the UK Government introduced this new restriction through the Bill?

In [its factsheets on the Bill](#) the UK Government states that EU rules currently create a consistent approach across the UK's internal market. The UK Government states that this allows businesses across the UK to trade within different countries of the UK on the basis of a common set of rules. For example, all farming businesses in the UK have to comply with the rules set by the EU.

The UK Government states that this freeze on the competence of the devolved legislatures and governments will be transitional whilst they undertake discussions with the devolved governments about what which parts of EU frameworks on areas such as agriculture, fisheries and State Aid should operate at a UK level and which bits could be devolved to a lower level. The principle the UK Government has said it will use to guide these negotiations is that no new barriers to trade within the UK should be created. The UK Government states that it expects these discussions to result in an increase in powers for the devolved governments but has not said if this will lead to an increase in powers for the devolved legislatures or clarified whether or not the competence of devolved legislatures will be reduced in anyway by other pieces of Brexit legislation listed in the Queen's Speech. The UK Government has not yet set out a timetable for these discussions, their format or their contents.

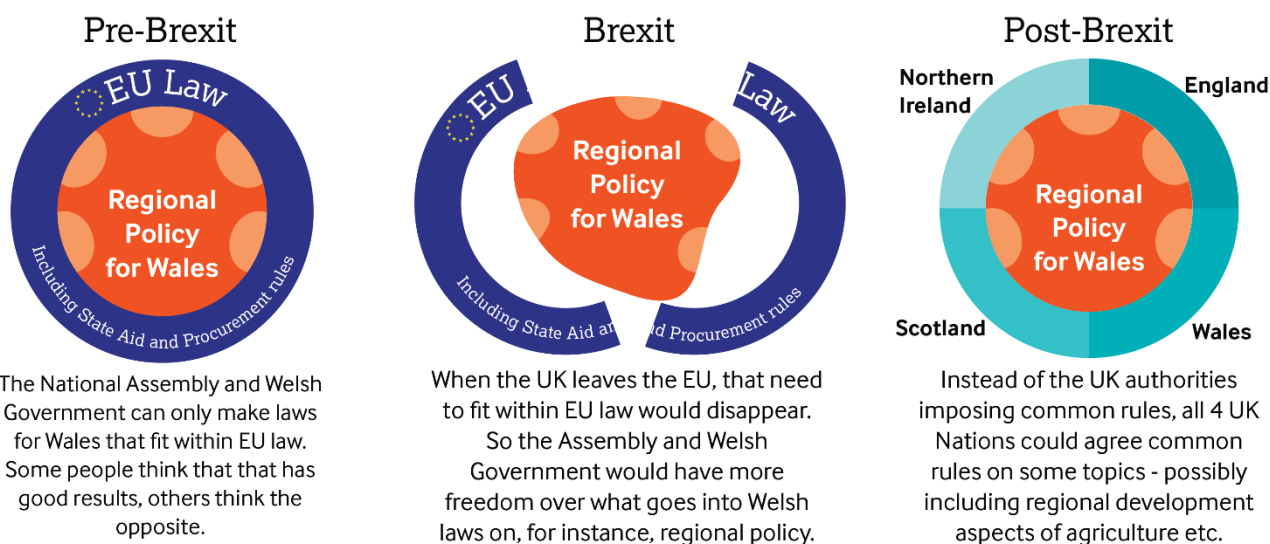
Both the Welsh Government and Scottish Government have rejected the inclusion of this new restriction on the devolved legislatures and governments in the Bill. Whilst they have both supported

the need for common rules in some areas of policy after exit day, they argue that the powers currently held in Brussels should flow automatically back to Cardiff and Edinburgh and then all four nations of the UK should have an equal say on the areas in which common frameworks are needed, and on what those common frameworks should be, in each case. The First Minister of Wales has suggested that this could be done through a Council of Ministers for the UK – similar to the mechanism through which Ministers from each Member State currently agree on common EU rules.

This kind of approach has also been supported the Assembly’s cross-party External Affairs Committee. In its **report on the White Paper** on the Bill the Committee stated that it would be ‘concerned’ about the UK Government freezing, temporarily or permanently, the Assembly’s legislative competence and agreed with the view that powers currently exercised by European Union bodies, in devolved areas, automatically come back to Wales after exit day. The Committee articulated its hope that common frameworks would be agreed by the four nations of the UK acting as equal partners rather than common frameworks being introduced solely by the UK Government.

The first infographic below illustrates how the Welsh and Scottish Government’s proposal would work. The second illustrates the difference between their proposed approach and that set out in the Bill as currently drafted.

## Legal position if there is an Agreed Common Framework



-  EU law – all laws for Wales must fit within it
-  Regional policy in Wales which is within competence
-  Existing exceptions/reservations from Welsh regional policy competence – e.g. “fiscal policy”

# BREXIT AND WELSH DEVOLUTION

What will be the legal position after Brexit?

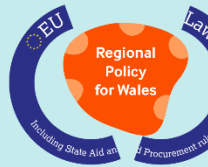
## Pre-Brexit

The National Assembly and Welsh Government can only make laws for Wales that fit within EU law. Some people think that that has good results, others think the opposite.



## Brexit

The Supreme Court has ruled that that the removal of EU constraints, on withdrawal from the EU treaties, will alter the competence of the devolved institutions **unless** new legislative constraints are introduced (see path 1). In the **absence** of such new restraints, withdrawal from the EU would **enhance** the devolved competence (see path 2).



Path 2

## if... Welsh devolution settlement was left as is

## Post-Brexit

Some powers might not be much different in practice because of existing reservations from competence. However, with the need to fit within EU law removed, Wales would have more freedom over what goes into its laws.



## if...the EU Withdrawal Bill is passed as it is

## The Bill

The Bill inserts a new restriction into the Government of Wales Act 2006. The new restriction would stop the Assembly from creating new agricultural, fisheries or regional policies for Wales. Instead the Assembly's powers in these areas would be frozen until the UK Government and Parliament decide whether to 'unfreeze' any of them.

### Does this require the consent of the Assembly?

- Yes - as a matter of constitutional convention
- The UK Government has accepted that the convention applies to the Bill
- But the Supreme Court has ruled that the 'requirement' for consent is not a legal one - i.e. the Assembly can't take the UK Government or Parliament to court if they ignore the Assembly's view.

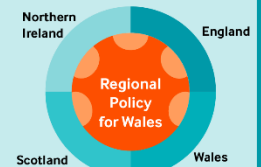
## Post-Brexit

The Assembly and Welsh Government would not have greater freedom to shape laws for Wales on devolved topics than before Brexit. The need to fit within EU law would have been replaced by a need to fit within common rules set by the UK Government and Parliament.



## Post-Brexit - Possible Agreed Common Framework

Instead of the UK authorities imposing common rules, all 4 UK Nations could agree common rules on some topics - possibly including regional development aspects of agriculture etc.



**Key provisions: Clause 11 inserts a new restriction on retained EU law into the Government of Wales Act 2006 and Schedule 3 makes changes to the Government of Wales Act 2006 to introduce a similar restriction on retained EU law for Welsh Ministers. Schedule 3 also includes the provisions on Orders in Council which could be used to transfer powers back to the Assembly that are frozen by the Bill.**

## Will the Bill change the Government of Wales Act in any other ways?

The EU restriction currently in place on Welsh Ministers will be amended so that Ministers are subject to the same new restriction as the Assembly under the Bill. It also makes other more minor corrections arising from the repeal of the European Communities Act 1972 and the UK's exit from the EU; for example, removing references to European Parliamentary elections.

Schedule 7A and 7B of the Government of Wales Act 2006 set out the reservations and restrictions on the Assembly's competence. For example the Assembly has broad responsibility for agriculture but not the import and export of animals outside the UK.

Some of the reservations in the Act make references to pieces of European legislation. For example the definition of what constitutes food makes reference to a piece of EU legislation. These references will need to be corrected as they won't make sense when the UK exits the EU. The Bill doesn't make these changes itself but powers given to UK Ministers by Clause 7 of the Bill are broad enough to enable them to make these changes if they wished. Technically, UK Ministers would not have to obtain the Assembly's consent before doing so; and Welsh Ministers would not be able to make these changes. UK Ministers could also make these corrections using what are known as 'Section 109

Orders'. These are Orders can be introduced using powers under the Government of Wales Act and both the UK Parliament and the Assembly have to approve them.

The **Explanatory Notes** to the Bill states that these changes haven't been made in the Bill because the UK Government intends to 'discuss these changes with the devolved administrations before finalising' its approach.

### Will the Bill need the Legislative Consent of the Assembly?

Under the Legislative Consent Convention, or Sewel Convention as it's otherwise known, the UK and devolved Governments have formally agreed that the UK Parliament should not normally legislate in areas of devolved competence without getting the consent of the devolved legislatures. This is not a legal requirement enforceable by the courts but is an important political convention.. The **Secretary of State for Exiting the EU** has confirmed that the UK Government will seek the legislative consent of the devolved legislatures to the Bill. The **Explanatory Notes** to the Bill set out the provisions for which the UK Government will seek legislative consent. They are:

- The preservation and conversion of EU law as some of the laws will be in areas of devolved competence;
- The new restriction on the devolved legislatures and governments;
- The powers for devolved Ministers to make corrections, implement international obligations and the withdrawal agreement; and
- The repeal of the European Communities Act as references to it are included in the devolved settlements.

It is the responsibility of the Welsh Government to lay a Legislative Consent Memorandum before the Assembly for consideration. The **First Minister, Carwyn Jones, has stated** that the Welsh Government will be minded to recommend to the Assembly that it withholds its consent unless changes to the Bill are made.

### What is the timetable for the Bill?

The Bill is scheduled to receive what is known as its 'second reading' on 7 and 11 September in the House of Commons. The Bill is expected to be considered by a 'Committee of the Whole House' i.e. on the floor of the House of Commons rather than by a smaller Bill committee, during October and November. The Bill is expected to be introduced to the House of Lords in December and be passed by Easter next year. The Bill will need to be passed by the middle of next year to provide UK Ministers and devolved Ministers with sufficient time to make corrections to the EU law preserved by the Bill before exit day. You can find out more about how a Bill passes through the Houses of Parliament and its different stages on the **UK Parliament's website**.

### What were the initial reactions to the Bill?

On its introduction the Secretary of State for Exiting the EU, David Davis, **stated** that the Bill:

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*..means that we will be able to exit the European Union with maximum certainty, continuity and control.*

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The Secretary of State for Exiting the European Union **has also stated** that the Bill:

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*It is one of the most significant pieces of legislation that has ever passed through Parliament and is a major milestone in the process of withdrawal from the European Union.*

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The First Minister for Wales, Carwyn Jones and the First Minister for Scotland **issued a joint statement on the Bill** in which they strongly criticised the content of the Bill. They stated:

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*.. it is a naked power-grab, an attack on the founding principles of devolution and could destabilise our economies.*

*Our 2 governments- and the UK government- agree we need a functioning set of laws across the UK after withdrawal from the EU. We recognise that common frameworks to replace EU law across the UK may be needed in some areas. But the way to achieve these aims is through negotiation and agreement not imposition.*

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The First Ministers **also stated**:

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*The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations as promised. It returns them solely to the UK government and Parliament, and imposes new restrictions on the Scottish Parliament and the National Assembly for Wales.*

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In his response to the Bill, the Secretary of State for Wales, **Alun Cairns, stated**:

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*The UK Government will consult and listen to businesses, local authorities, the third sector, the Welsh Government and the National Assembly to ensure the UK's exit from the EU works for Wales and for the UK as a whole.*

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The Chair of the Assembly's External Affairs Committee, **David Rees AM, stated**:

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*The Bill should be solely about the legal steps needed to leave the European Union.*

*[...]*

*But this Bill does not appear to be just about Brexit. On first reading, it appears as though the UK Government may be using Brexit as a cover to prevent the Assembly from using powers it currently holds after we leave the European Union. It may also pave the way for the UK Government to set policies for Wales in areas that are currently devolved- for example in agriculture and fisheries. If, after further analysis, we conclude that this is the case then it would be gravely concerning.*

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The Chair of the Assembly's Constitutional Affairs Committee, Huw Irranca Davies AM, **wrote a letter to the Secretary of State for Exiting the EU** on the 31 July 2017 setting out his Committee's initial views on the Bill. The letter outlines that the Committee is concerned:

- that Clause 11 of the Bill will place restrictions on the devolved legislatures from passing laws that are incompatible with retained EU law but will not place a similar constraint on the UK Parliament's ability to pass laws for England;

- that the Bill dictates to the Assembly how it should scrutinise any regulations brought forward by Welsh Ministers under the Bill;
- about the powers given to Ministers in the Bill and if they are as clear as they could be, about whether the powers could be used inappropriately as currently drafted and; about the appropriateness of UK Ministers and Welsh Ministers being given powers to amend Assembly Acts by regulations;
- about the different scope of powers given to Welsh and UK Ministers and;
- to ensure that no underlying fundamental rights and principles or lost to UK citizens by not converting the Charter of Fundamental Rights into UK law.





