

BRIEFING: THE REPEAL BILL AND WALES

Overview

The first Brexit bill to come before Parliament is the **European Union (Withdrawal) Bill**. More commonly known as the **Repeal Bill**, it was originally referred to as ‘the Great Repeal Bill’ by the government.

This proposed law would do three broad jobs:

- **Repeal the European Communities Act 1972**, which sets out our relationship with the EU and allows UK laws to be updated in line with EU rules.
- **Copy and paste**, or convert, the existing body of EU law into UK law and amend it so it “functions sensibly,” so that there isn’t a sudden legal vacuum on the day after Brexit is complete.
- **Implement the final deal** we come to with the EU.

Clauses 10 and 11 of the bill address issues relating to devolution. Clause 10 confers powers on devolved authorities to deal with deficiencies, comply with international obligations and implement the withdrawal agreement. Clause 11 amends the devolution settlement to remove the legislative competence test whereby the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly must legislate in a way that is compatible with EU law.

Devolution in the context of the bill

The bill has already proved controversial in relation to devolution. The laws of the Scottish Parliament and the National Assembly for Wales are required to be compatible with EU law. Post- Brexit, this requirement would initially be removed, making it possible for the Scottish Parliament and the Welsh Assembly to pass laws in devolved areas, such as agriculture, the environment and fishing that has been governed by EU law.

However, Clause 11 of the bill replaces the need for compatibility with a new restriction: devolved law must be compatible with what is referred to as ‘retained EU law’. In devolved policy areas (agriculture and the environment for instance), the UK government could remove former EU rules for England, whereas the Welsh Assembly would not be able to do so for Wales¹.

This means all powers currently exercised at an EU level will flow back to Westminster. Furthermore, this restriction has no ‘sunset clauses’, meaning it could last indefinitely, nor does the bill include any statutory requirement to consult with devolved legislatures. While the bill gives devolved ministers some powers to modify retained EU law in already fully devolved policy areas, any changes made must

¹ National Assembly for Wales (2017) [What does the EU \(Withdrawal\) Bill mean for Wales and devolution?](#)

be consistent with modifications made by the UK Government. Clause 11 therefore threatens to undermine hardwon devolution settlements.

The Welsh Assembly's response to the bill

The National Assembly for Wales states in their briefing on the bill that:²

“The UK Government states that it expects these discussions (i.e. discussions on which parts of EU frameworks should operate at UK level or devolved to lower level) 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”.

The First Minister of Wales, Carwyn Jones and First Minister of Scotland, Nicola Sturgeon responded to the bill by stating that:

“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.”³

Key clauses explained

Clause 7, 8 and 9- dealing with deficiencies, international obligations, and implementing the withdrawal agreement

Clause 7 allows UK ministers to make regulations to prevent, remedy or mitigate “deficiencies” in retained EU law, as a minister “considers appropriate”. **Clause 8** gives UK ministers powers to introduce regulations to prevent the UK breaching of any of international obligations as a result of the UK’s withdrawal from the EU. **Clause 9** gives UK ministers the power to make regulations as he or she “considers appropriate for the purposes of implementing the withdrawal agreement”.

Issues with clauses 7, 8, and 9

² The National Assembly for Wales (2017) [The European Union \(Withdrawal\) Bill: An introductory guide](#) pp. 14.

³ The Welsh Government, ‘[Joint statement from First Ministers of Wales and Scotland in reaction to the EU \(Withdrawal\) Bill](#)’ [accessed 09/10/17]

- It's not clear in these clauses what is meant by "deficiencies" or what a minister "considers appropriate" to prevent, remedy or mitigate retained EU law, replicate current EU obligations as well implementing the withdrawal agreement. **These clauses are open to wide interpretation by ministers, creating a risk that the powers are used to make policy changes rather than merely technical changes - as promised.**
- The bill **provides UK ministers the exclusive power to amend retained EU law** in devolved competence areas and there is no requirement for UK ministers to consult with devolved administrations. Such broad powers granted to UK ministers risk undermining hard won devolution settlements. UK ministers could for instance amend the Government of Wales Act 2006 through subordinate legislation.

Clause 10 - Corresponding powers involving devolved authorities

Clause 10 and **Schedule 2** set out the powers given to devolved ministers. They outline that devolved legislatures can exercise the power to deal with deficiencies arising from withdrawal, the power to comply with international obligations, and the ability to exercise the power to implement the withdrawal agreement as defined in Schedule 2.

Issues with Clause 10 and Schedule 2:

- Similar to clause 7-9, the breadth of terms such as "considers appropriate", "failure to operate effectively", and "deficiency" **provide little specificity and are open to wide interpretation**⁴. This gives UK government ministers significant leeway to interpret their powers, further **centralising power in Westminster**.
- Schedule 2 sets out the differences in power between UK ministers and devolved ministers. The **power to amend retained EU law is restricted to UK ministers** even though some elements within this body of law fall under devolved competence and will affect the devolved nations and regions of the UK. This undermines the power of the devolved legislatures.
- Schedule 2 part 5 requires that ministers gain consent, but **consent is not placed on a statutory footing**, nor is it explained what mechanism will be used for giving consent. Given the ineffectiveness of the Joint Ministerial Council, this potentially **leaves the devolved legislatures without a voice in the process**.

Clause 11 - Retaining EU restrictions in devolution legislations etc.

Clause 11 amends the various devolution acts to prevent the devolved institutions from modifying retained EU law. The bill inserts a new restriction into the Government of Wales Act 2006, which would stop the Welsh Assembly from creating new agricultural, fisheries, or regional policies for Wales.

⁴ The National Assembly for Wales (2017) [The European Union \(Withdrawal\) Bill: An introductory guide](#) pp.10

Instead, the Assembly's powers in these areas would be frozen until the UK Government and Parliament decide whether to "unfreeze" any of them⁵.

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 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 UK Houses of Parliament and the relevant devolved legislature (in the case of Wales, the Assembly) before they come into force.

The UK government asserts that the freeze on the competence of the devolved legislatures and governments will be transnational while they undertake discussions with the devolved legislatures about which parts of the EU frameworks should operate at a UK level and which areas could be devolved.

Issues with Clause 11:

- **The powers of the Welsh Assembly will be frozen in relation to amending EU retained law.** Wales must continue to comply with EU law retained after exit. The bill also suggests that that the Assembly may only modify retained EU law to the extent that it had the power to do so immediately before exit. These restrictions are not in place for Westminster, which means withdrawing from the EU has uneven impact in terms of distributing the powers that are returned from the EU.
- **Power will be centralised in Westminster.** Clause 11 would reserve all retained EU law to Westminster, even in policy areas that are matters of devolved competence, unless explicitly devolved by an Order in Council. This alteration of competence is a direct challenge to the principles of devolution.

About the Repeal Bill Alliance

Many charities, NGOs and other organisations in civil society are deeply concerned about the Repeal Bill and the powers that it proposes giving to ministers. A number of grant-making Trusts and Foundations have agreed to fund a post that will coordinate capacity work on the Repeal Bill. This is to ensure that an alliance of campaign, advocacy and civic society organisations can be built to make sure individual and collective voices are heard.

The alliance does not take a position on Brexit per se and activity will be in line with charitable purposes.

For more information contact the alliance's coordinator Jane Thomas at jane.thomas@repealbill.org or [07957 240826](tel:07957240826).

⁵ The National Assembly for Wales (2017) [The European Union \(Withdrawal\) Bill: An introductory guide](#) pp. 14.