



BRIEFING PAPER

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# The *European Union (Withdrawal) Bill*: Devolution

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## Summary

This briefing paper has been prepared for the Committee Stage of the [European Union \(Withdrawal\) Bill 2017-19](#) [Bill 5] (the EUW Bill) in the House of Commons. It concerns provisions in the Bill about devolution, which are due to be considered on days 4 and 5, scheduled for 4 and 6 December 2017. It is one of a series prepared for Committee Stage.

It addresses:

- **Clauses 10** and **11** and their associated **Schedules 2** and **3**. These concern devolution, including the legislative competence of the devolved legislatures in respect of retained EU law, the executive competence of devolved Ministers, and the power of those Ministers to make corrective regulations, and some other regulations, as a result of withdrawal from the EU.
- The legislative consent memoranda submitted by the Scottish and Welsh Governments, in which they explain their reasons for not recommending that the Scottish Parliament and the National Assembly for Wales give their consent to the Bill.
- The question of UK or GB policy frameworks, and the role of the Joint Ministerial Committee, the EU negotiations sub-committee of which has agreed principles for the frameworks.
- The amendments to the Bill drafted by the Scottish and Welsh Governments and tabled by MPs in the House of Commons.

The paper prepared for second reading, [European Union \(Withdrawal\) Bill, CBP 8079](#), 1 September 2017, covers all of the provisions in the Bill.

A separate paper, [Brexit Negotiations: The Irish border question](#), CBP 8042, 17 July 2017, covers matters to do with Northern Ireland, Ireland and UK withdrawal from the EU, especially the border. This paper focuses on the matters in the Bill, which are to do with internal UK constitutional arrangements.

The EUW Bill replaces restrictions on devolved competence arising from the UK's international obligations under the EU Treaties with new restrictions based solely on an Act of the UK Parliament (**clause 11**).

Devolved legislatures and executives will not be able to modify retained EU law in a way that is incompatible with EU law, with exceptions for Ministers correcting deficiencies, complying with international obligations, or implementing the withdrawal agreement. They will remain bound by EU law as it stands immediately before exit day, unless and until the UK Parliament agrees to release them from this constraint.

The EUW Bill creates fewer rights for devolved legislatures and executives to modify retained EU law than apply to their UK counterparts. This change is justified by the UK Government as a way of continuing existing restrictions while decisions are taken on where common policy approaches are needed.

The EUW Bill therefore also contains a power for the UK Government, with agreement from the UK Parliament and relevant devolved legislature, to lift the new restrictions on competences in **clause 11** and **Schedule 3, Part 1**. This power would enable areas of competence to be transferred to the devolved legislatures by Order in Council, once

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agreement had been reached between the UK Government and the relevant devolved authorities.

The EUW Bill also provides powers for devolved Ministers in **Schedule 2** that correspond broadly to those for UK Ministers in **clauses 7, 8 and 9**. They will be able to modify retained EU law (apart from directly applicable law such as regulations) to correct deficiencies, to implement international obligations, and to implement the withdrawal agreement. Devolved ministers can exercise these powers independently subject to certain restrictions, including that all of the contents must be within competence. However, the same powers are given concurrently to UK Ministers.

The Government's White Paper of March 2017 had suggested that there would be a significant increase in the decision-making power of the devolved administrations, and that former EU frameworks would be subject to decisions by democratically elected representatives.

The First Ministers of Scotland and Wales have described the Bill as a "power-grab",<sup>1</sup> and their Governments have drawn attention to the democratic mandates of their own institutions, which they believe are neglected by the Bill.

The Scottish and Welsh Governments have published Legislative Consent Memoranda in which they do not recommend giving consent for the Bill. They drafted joint amendments to the Bill, which have been tabled by MPs in the House of Commons.

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<sup>1</sup> Nicola Sturgeon and Carwyn Jones, [Joint Statement](#), 13 July 2017.

# 1. Introduction

The [European Union \(Withdrawal\) Bill 2017-19](#) [Bill 5] (the EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the *European Communities Act 1972* and removing the competence of European Union institutions to legislate for the UK.

The Bill had its [second reading debate](#) in the House of Commons on 7 and 11 September 2017. The [Programme Motion](#) passed at the end of the second reading debate provides for eight days in Committee of the Whole House.

This briefing paper has been produced to inform the Committee of the Whole House debate on clauses 10 and 11, and associated Schedules 2 and 3, which are due to take place on days 4 and 5. These are scheduled for 4 and 6 December 2017.

The Department for Exiting the European Union (DEXEU) has published [Explanatory Notes](#) to the Bill, a series of [factsheets](#) on the Bill's provisions and a [Delegated Powers Memorandum](#) (DPM) addressed to the House of Lords Delegated Powers and Regulatory Reform Committee.

A large number of amendments have been tabled for the Committee stage. An up to date list of amendments can be found on Parliament's [bill pages](#) online.

The House of Commons Scottish Affairs Committee published a report on the Bill, [European Union \(Withdrawal\) Bill: Implications for devolution](#), HC 375 2017-19, 14 November 2017.

The House of Commons Public Administration and Constitutional Affairs Committee has an ongoing inquiry on [Devolution and Exiting the EU](#).

The House of Lords Constitution Committee has an ongoing inquiry on the [European Union \(Withdrawal\) Bill](#).

The Commons Library produced a [briefing paper](#) to inform the Second Reading debate which sets out full details of the provisions of the Bill and extensive commentary on them.

A full range of statements and reports from the devolved legislatures is available in [Brexit: devolved legislature business](#), CBP 7815, which is updated weekly.

## 2. The Bill's provisions on devolution

The EUW Bill amends the three main devolution Acts to reflect the UK's withdrawal from the European Union.<sup>2</sup>

Devolution is covered in **clauses 10 and 11**, and in **Schedules 2 and 3**.

**Clause 11** concerns the legislative competence of the devolved legislatures, while **Schedules 2 and 3** concern executive competence. **Schedule 3** also covers a variety of technical changes consequential on withdrawal and/or on the other provisions of the EUW Bill. (The sole purpose of **clause 10** is to give effect to **Schedule 2**.)

### 2.1 Clause 11: legislative competence

**Clause 11** deals with the restriction of EU law on legislative competence.

At present EU law creates a limit around the competence of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. They may not legislate in a way that is incompatible with EU law. For instance, an Act of the Scottish Parliament is "not law" insofar as any of its provisions are "incompatible [...] with EU law".<sup>3</sup> Virtually identical provisions are in place for Northern Ireland and Wales.<sup>4</sup>

This is because the UK Government is bound by EU law, and must therefore ensure that nothing incompatible is passed within the UK.

**Clause 11** changes this for each devolved legislature in turn. In future their competence will be defined in relation to retained EU law. This includes a number of policy frameworks set at the EU level, but concerning matters which are otherwise devolved, which the devolved institutions will not be able to modify after exit day, except to the limited extent that is already possible.

As well as setting out this new restriction on legislative competence, c11 also gives effect to Schedule 3, which creates parallel restrictions on executive competence (see section 2.2 below).

The clause is the subject of significant contention. It provides a basis for a continued effect for EU-derived frameworks on devolved matters, which as a result become creatures of a UK Act of Parliament.

#### Scottish Parliament

For the Scottish Parliament **clause 11(1)** changes the restriction from an Act not being law if it is incompatible with EU law to an Act not being law if it breaches a restriction in a new sub-section (4A) to s29 of the

**Clause 11**  
Devolved legislatures may not modify retained EU law except in line with EU law before exit day. This preserves EU framework policies.  
**UK Government:** This retains existing scope of devolved competence. A transitional measure while discussions happen about new UK frameworks or no common approach.  
**Critics:** Matters of devolved competence are effectively reserved in this Act of UK Parliament. Devolved competence frozen into EU law pre-exit, which will go out of date over time. No statutory basis for discussing and making new frameworks.

<sup>2</sup> *Scotland Act 1998, Government of Wales Act 2006, Northern Ireland Act 1998*

<sup>3</sup> *Scotland Act 1998, s29(2)(d)*

<sup>4</sup> *Northern Ireland Act 1998, s6(2)(d), Government of Wales Act 2006, s108(6)(c)*

*Scotland Act 1998*. Read with new sub-sections (4B) and (4C), this provides that an Act of the Scottish Parliament may not modify retained EU law, nor may it create the power to do so through subordinate legislation, unless the modification would have been within the Scottish Parliament's legislative competence immediately before exit day. The kind of modifications that would be allowed include choosing how to implement a framework directive.

Since the Scottish Parliament's legislative competence before exit day is restricted by the requirement to comply with **EU law**, not retained EU law, the effect of these provisions is that the Scottish Parliament may not modify retained EU law in a way that would be incompatible with EU law as it existed immediately before exit day.

Retained EU law is defined in clause 6(7) of the EUW Bill as:

anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).

The point in parentheses at the end of this definition indicates that retained EU law, a new category of domestic law formed of primary legislation, secondary legislation and law converted by clauses 3 and 4 of the EUW Bill, can be changed or added to after exit day. The larger scope for doing so will fall to the UK Parliament and UK Ministers.

The Government may disapply this restriction by Orders in Council, a form of secondary legislation, made under the Bill. This would allow the Scottish Parliament to modify retained EU law, or some aspect of it, to the extent stated in the relevant Order in Council. This means that matters can be released from the lock of retained EU law over time.

The Orders in Council will be subject to approval by each House of Parliament and by the Scottish Parliament.

## National Assembly for Wales

The changes to the legislative competence of the Welsh Assembly are very similar to those for the Scottish Parliament (see above), but there is a further point of interest.

The EU law restriction is contained at the moment in s108 of the *Government of Wales Act 2006*. This provides that an Act of the Assembly "is not law" (s108(2)) if, among other things, it is "incompatible with ... EU law" (s108(6)(c)).

Once s3 of the *Wales Act 2017* enters into force, the numbering will change: the provision will be contained in s108A(1) ("not law") and s108A(2)(e) ("incompatible with EU law").

**Clause 11(2)(a)** of the EUW Bill amends s108A, which will replace s108 in the 2006 Act. New sub-section 108A(8), which has to be read with

s108A(9) and (10), changes the EU law restriction on competence in the same way as for the Scottish Parliament.

This change applies only to new s108A of the 2006 Act, not to s108 as it stands.

New s108A will enter into force once s3 of the *Wales Act 2017* is commenced. This is due to be by regulation, subject to consultation with the Welsh Ministers and Presiding Officer, under s71 of the 2017 Act.

The Secretary of State for Wales, Alun Cairns, has begun his consultation over commencement of s3, with a view to bringing it into force in April 2018.<sup>5</sup> The EUW Bill assumes that this will have occurred before the EUW Bill enters into force.<sup>6</sup>

### Northern Ireland Assembly

The provisions for Northern Ireland are virtually identical to those for Wales, with **clause 11(3)** inserting new sub-sections (6) to (9) into s6 of the *Northern Ireland Act 1998*. These work in the same way as the new provisions for the National Assembly for Wales, so that legislation may not breach a new restriction not to modify retained EU law except in ways that were within competence immediately before exit day. This may be lifted by Orders in Council if drafts are approved by each House of Parliament and by the Assembly.

### Release from constraint of retained EU law

As mentioned, it is possible for the UK Government to release matters from the requirement not to modify retained EU law. This is under the new provisions inserted into the devolution Acts by **clause 11** of the Bill.<sup>7</sup>

This is designed to be used in the event that an agreement is reached either to abandon a common framework across the UK, or to modify an existing EU framework, for instance to create a UK-wide agricultural policy. In order to allow the changes necessary to create a new framework, or to allow the devolved administrations to pursue their own policies, an Order in Council would remove the requirement not to modify retained EU law, presumably subject-by-subject. There is nothing in the Bill to guarantee that the UK approach will be changed or abandoned, nor to determine how the discussions leading to that

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<sup>5</sup> [Letter by Rt Hon Alun Cairns MP to Elin Jones AM](#), Presiding Officer, National Assembly for Wales, reproduced by Elin Jones on National Assembly website. See also, "[Wales devolution date set for April 2018](#)", Alun Cairns says," *BBC News*, 17 July 2017.

<sup>6</sup> Under c17(1) of the present Bill a Minister of the Crown may make regulations that make such provision as s/he considers appropriate as a consequence of the Bill. This would seem to provide the power to commence s3 of the 2017 Act, should the commencement process under that Act become problematic. Also, under c17(2), such consequential regulations may modify any provision of any enactment. This might provide the power to modify the commencement arrangements for s3.

<sup>7</sup> New s29(4C) in the *Scotland Act 1998*, new s108A(10) in the *Government of Wales Act 2006*, and new s6(8) in the *Northern Ireland Act 1998*.

would be conducted. There is further discussion of framework policies in section 6 of this Paper below.

A point to note is that any lifting of this requirement will alter devolved competence. So, if an alternative UK framework were agreed on, say, agriculture, and as a result the devolved legislatures were no longer bound to legislate on agriculture in a way that was consistent with retained EU law, their competence would have been changed.

If this were done by statute, it would trigger the Sewel Convention, and consent would be sought. However, under the provisions in the Bill these changes will be made by Orders in Council, which are not subject to the Sewel Convention. According to the Explanatory Notes that is why the Orders in Council need to be approved by the relevant devolved legislature as well as by both Houses of Parliament, creating an alternative consent mechanism.<sup>8</sup>

There is a precedent for the use of secondary legislation to alter devolved competence. Each of the three main devolution Acts contains a mechanism to change the matters that are reserved or devolved by Order, albeit in a more complex and conditional way in the case of Northern Ireland.<sup>9</sup> The consent mechanism in s11 of the EUW Bill is statutory, and hence firmer than the Sewel Convention, which is a political undertaking.

## 2.2 Clause 10, Schedule 2 & Schedule 3: executive competence

**Clause 10** gives effect to **Schedule 2**. This sets out the power of “devolved authorities” to correct deficiencies in domestic devolved legislation that arise from withdrawal from the EU, to remedy potential breaches of international obligations, and to implement the withdrawal agreement. These are Henry VIII powers: regulations using these powers may make “any provision that could be made by an Act of Parliament”.<sup>10</sup>

Devolved authorities are devolved Ministers plus Northern Ireland departments, which have some regulation-making powers.<sup>11</sup> For ease of reading the text below uses the term “devolved Minister”. The powers of UK Ministers overlap with these devolved powers: the two sets of powers are concurrent.

### Corrective power

Under **Schedule 2, paragraph 1(1)**, a devolved Minister may make regulations

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<sup>8</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 37

<sup>9</sup> *Scotland Act 1998*, s30; *Government of Wales Act 2006*, s109; *Northern Ireland Act 1998*, s4

<sup>10</sup> Sch 2, paras 1(3), 13(3), and 21(3).

<sup>11</sup> Clause 14(1)

to prevent, remedy or mitigate –

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.

Under **Schedule 2, paragraph 1(2)**, this power may also be exercised jointly with UK Ministers.

The power to make these regulations may not be delegated, except for rules of procedure for courts and tribunals.

The parallel power for UK Ministers is set out in **clause 7** of the Bill. This includes a two-year sunset clause: regulations may not be made more than two years after exit day. The sunset clause is applied to devolved Ministers by **Schedule 2, paragraph 1(3)**.

### Conditions on corrective power

The conditions on this power are set out in **Schedule 2, paragraphs 2 – 8**. The main ones are as follows:

- **Schedule 2, paragraph 2**, limits the power to regulations of which all the provisions are within the devolved competence of the relevant Ministers. This means provisions that, if contained in an Act, would be within the legislative competence of the relevant Parliament/Assembly, ignoring the restriction on compatibility with retained EU law. It also means provisions that, if contained in subordinate legislation, do not go beyond the subject matter of the original subordinate legislation, and comply with other similar technical restrictions.<sup>12</sup> Devolved Ministers could use this second possibility where the existing subordinate legislation had been made under powers that would themselves go beyond the legislative competence of the relevant legislature by virtue of the restrictions in the Bill.
- **Schedule 2, paragraph 3**, prevents the use of this corrective power to modify retained **direct** EU legislation (eg regulations) or the retained rights set out in c4. In other words, the corrective power applies only to EU-derived domestic legislation. It is thus a more restricted power than that given to UK Ministers, who may modify EU law retained by virtue of clauses 3 or 4. In addition, the devolved Ministers may not make modifications which would be inconsistent with UK modifications of law retained by clauses 3 or 4. According to the Explanatory Notes, this means that if the UK Government modifies an EU regulation, and the devolved Ministers are responsible for the enforcement legislation, they will have to modify their legislation in a way that conforms to the new modified UK regulation.<sup>13</sup>

#### Schedule 2

Devolved Ministers may correct devolved retained law that is defective because of withdrawal. They may implement international obligations and the withdrawal agreement.

Does not apply to retained direct EU legislation.

#### UK Government:

Replicates position for UK Ministers. Directly applicable law is not currently within competence.

#### Critics:

These powers are shared by UK Ministers, who would not be scrutinised by devolved legislatures when using them. Much direct legislation concerns devolved matters.

<sup>12</sup> The full definition of “devolved competence” is in Sch 2, paras 9-12.

<sup>13</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 161.

- **Schedule 2, paragraph 5**, requires consent from a UK Minister for any corrective regulations coming into force before exit day, or which remove reciprocal arrangements between the UK and the EU or its Member States.
- **Schedule 2, paragraph 6**, requires consent from a UK Minister if that would be needed for an Act of the devolved legislature covering the same subject matter. The same requirement applies to corrective regulations on subject matter that ordinarily requires joint exercise or consultation before a devolved Act could be passed (**paragraphs 7 and 8**).

It is worth noting that very similar conditions are included in the *Trade Bill 2017-19* in respect of the devolved Ministers' powers to make regulations under clauses 1 and 2 of that Bill.

## International obligations

Devolved Ministers gain the power to make regulations to prevent or remedy any breach of international obligations that might arise from withdrawal from the EU. This, with its conditions, is set out in **Schedule 2, paragraphs 13-20**. The UK Ministers' equivalent power is in **clause 8**. The devolved powers are subject to a two-year time limit, under **para 13(6)**, as are the UK powers.

All provisions of the regulations must be within the competence of the authority making them. "Competence" here, and for the implementation of the withdrawal agreement, is defined in **Schedule 2, paragraphs 18-20**. It differs on a purely technical basis from the definition of competence for corrective regulations in **Schedule 2, paragraphs 9-12**.

## Withdrawal agreement

Devolved Ministers also gain the power to make regulations "appropriate for the purposes of implementing the withdrawal agreement." This is in **Schedule 2, para 21**, and the various conditions on the power are in **paras 21 to 26**, which make up **Part 3 of Schedule 2**. The UK Ministers' equivalent power is in **c9**. Both the devolved and UK powers on the withdrawal agreement apply up to exit day.

There are some limits to the regulations, set out in **sub-para 21(4)**. As with international obligations, all provisions must be within competence, and there is no power to modify retained direct EU legislation.<sup>14</sup>

## Limit of EU law

In the same way that the competence of the devolved legislatures is limited at present by the requirement to abide by EU law, so is that of the devolved Ministers. They may not make subordinate legislation nor act in a way that is incompatible with EU law.

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<sup>14</sup> Schedule 2, paras 22 and 23

**Schedule 3** changes this to a limit defined by retained EU law.

The relevant provision for the Scottish Government is in section 57 of the *Scotland Act 1998*:

(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible [...] with EU law.

Under **Schedule 3, para 1**, of the Bill that provision is modified.

Incompatibility with EU law is replaced with modifying retained EU law, and “any other act” has been dropped. Under new sub-section 57(4) of the 1998 Act, a member of the Scottish Government has no power “to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.”

Under new sub-section 57(5) this does not apply to modifications that are within the legislative competence of the Scottish Parliament, to the making of regulations under the Bill itself (for correction, international obligations or implementing the withdrawal agreement), or to the levying of fees for new functions connected with withdrawal.

In addition, as with legislative competence, the UK Government may remove this restriction from particular subject matters by Order in Council. This Order-making power is subject to approval by each House of Parliament and by the Scottish Parliament, under **Schedule 3, para 21**.

The provisions for Wales, in **Schedule 3, para 2**, are the same as for Scotland. The present restriction is in s80(8) of the *Government of Wales Act 2006*. **Para 2** replaces this with new sub-sections 80(8), 80(8A) and 80(8B).

Northern Ireland is covered by **Schedule 3, para 3**, where the provisions are the same as for Wales. They amend s24 of the *Northern Ireland Act 1998* by omitting the sub-section that contains the existing restriction, and adding three new sub-sections.

### Schedule 3

Limits competence of devolved Ministers. They may not modify retained EU law unless within legislative competence for their devolved legislature or making corrections etc under Schedule 2.

## 3. UK Government position

### Overview

The UK Government has emphasised what it sees as the importance of managing the consequences of withdrawal from the EU for devolved powers:

The main question that this Bill must answer to address the constitutional consequences of EU exit for the devolution settlements is how to manage the process of powers being repatriated from the EU.<sup>15</sup>

The UK Government's position is that the Bill retains the existing restrictions on devolved competence, it continues the existing scope for local implementation, and it allows the restrictions to be lifted in the event either that an agreement is reached that the common framework of EU law is not needed, or that an alternative UK framework is to be established.<sup>16</sup> It is "intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed".<sup>17</sup>

The Secretary of State for Scotland, David Mundell, has indicated that discussions are going on to identify matters that would be suitable for a UK-wide approach.<sup>18</sup>

### Policy frameworks

The UK Government sees merit in taking conscious UK-wide decisions about whether to retain common policy frameworks. Once the constraint of EU law is removed, there would be potential for the laws applying in different parts of the UK to diverge to a greater extent than at present. The UK Government wants to guard against this possibility in certain respects.

In her speech to the Scottish Conservative conference on 3 March 2017, Prime Minister Theresa May stated that,

We must take this opportunity to bring our United Kingdom closer together.<sup>19</sup>

She addressed the question of devolved powers in areas covered by EU law:

"The overall approach of this Bill is to provide for continuity wherever possible at the point of exit, not to seek to initiate reforms immediately. That is the approach that guides the devolution provisions as well."

David Davis,  
*European Union (Withdrawal) Bill*,  
second reading  
debate, HC Deb 7  
September 2017,  
c354

<sup>15</sup> *European Union (Withdrawal) Bill*, House of Lords Constitution Committee, HL Paper 19, Department for Exiting the European Union, written evidence [EUW\\_0036](#), 25 October 2017, section 3

<sup>16</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) paras 33-38.

<sup>17</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 34.

<sup>18</sup> Scottish Affairs Committee, oral evidence, [The Work of the Scotland Office](#), HC 376, 24 October 2017, Q7

<sup>19</sup> Taken from [ScottishConservatives.com](#).

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We must avoid any unintended consequences for the coherence and integrity of a devolved United Kingdom as a result of our leaving the EU.

These matters, devolved but strongly subject to EU law, raise several issues that prompt further exploration:

- There might be value for all parties in creating a shared UK framework, for instance to ease international negotiations on these subjects.
- The devolved institutions might seek a strengthened role in feeding into such negotiations, and greater transparency over ongoing talks.
- There would be questions about the balance of the voices creating the framework. The UK level has greater power, not least through the sovereignty of Parliament, but the UK is also the only representative for England and its interests. While the UK Government will stress that it also represents Scottish, Welsh and Northern Ireland interests, that responsibility is shared with devolved representatives in a way that does not apply to England.<sup>20</sup>

The White Paper, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446, gave the following model for framework issues:

When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK, allowing these rules to be set here in the UK by democratically-elected representatives.<sup>21</sup>

It laid emphasis on the value to the integrity of the UK economy of having a common framework:

As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained. Examples of where common UK frameworks may be required include where they are necessary to protect the freedom of businesses to operate across the UK single market and to enable the UK to strike free trade deals with third countries. Our guiding principle will be to ensure that no new barriers to living and doing business within our own Union are created as we leave the EU.

To provide the greatest level of legal and administrative certainty upon leaving the EU, and consistent with the approach adopted more generally in legislating for the point of departure, the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we will begin

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<sup>20</sup> These points have been discussed, for instance, in [Brexit and the territorial constitution](#), R Rawlings, Constitution Society, 2017, pp5-6 and 18-19.

<sup>21</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.2.

intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. Whilst these discussions are taking place with devolved administrations we will seek to minimise any changes to these frameworks. We will work closely with the devolved administrations to deliver an approach that works for the whole and each part of the UK.<sup>22</sup>

The White Paper also suggested that the devolved governments would gain power from this process:

It is the expectation of the Government that the outcome of this process will be a significant increase in the decision making power of each devolved administration.<sup>23</sup>

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<sup>22</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.3-4.4.

<sup>23</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.5.

## 4. Devolved institutions

The Scottish Government and the Welsh Government have criticised the Bill. They have not recommended that consent be given to it by the Scottish Parliament and the Welsh Assembly, and they have drafted a number of amendments to the Bill, put down by MPs in the House of Commons (see section 7 below).

### 4.1 Devolved competence and EU law

At present devolved competence is restricted because the UK Government has international obligations to abide by EU law. In future it will be restricted by retained EU law but solely as a consequence of an Act of the UK Parliament. While this appears to be a technical difference it has two implications:

- Devolved institutions will not have the power that UK institutions will have to change laws derived from the EU going forward: Brexit will not bring (back) control to the devolved level, at least in the short term.
- The retention of common frameworks could be seen as an effective centralisation of power, with the UK Government emphasising its responsibilities for the whole country, whereas the democratically-elected devolved Governments felt that they had responsibility in devolved matters, endorsed in referendums and elections. This bites in Scotland and Northern Ireland, where the majority of voters did not vote to leave.

The Explanatory Notes state that “devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law.”<sup>24</sup>

The devolved institutions had, however, anticipated the continuation of power over matters that are presently devolved but covered in practice by EU law.

Prior to publication of the Bill there was some discussion among academics as to exactly what proportion of EU law concerned devolved matters, and to what extent devolved matters were covered by EU law.

Professor Sionaidh Douglas-Scott argued in a paper for the Scottish Parliament’s European and External Relations Committee in October 2016 that devolved matters were well-covered by EU law:

The aim of the [Great Repeal] Bill is to convert EU law into national law. However, a good part of EU law relates to competences that have been devolved – for example, in the case of Scotland, devolved competences include: agriculture, fishing within Scottish waters, public procurement, environmental law, as

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<sup>24</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 34.

well as others. If the 'Great Repeal Bill' translates EU law on matters that have been devolved into UK law this could amount to legislation on devolved areas.<sup>25</sup>

On the other hand, Professor Alan Page, of Dundee University, argued that relatively few EU competences were devolved to Scotland. He gave a rationale for this in that both the Unions in question, the UK and the EU, were based on and tended to legislate for single markets:

The main conclusion that emerges from this analysis is that most existing EU competences are reserved to the UK Parliament. If we ask why that should be the case, the answer is to be found in the fact that the devolution settlement, like the European Union, is based on a 'single market' in goods, persons, services and capital. There is therefore a considerable degree of overlap between EU competences and reserved matters.<sup>26</sup>

The Scottish Government has published a list of 111 returning powers which it argues relate to devolved matters, while the Welsh Government has identified 64.<sup>27</sup> These are the basis for discussions with the UK Government to identify potential common frameworks.

## 4.2 Reactions in Scotland and Wales

The prospect of UK controls replacing EU ones has caused concern in Scotland and Wales, and plays a part in the refusal of their Governments to recommend consent to the Bill to their legislatures.

The First Ministers of Scotland and Wales, Nicola Sturgeon and Carwyn Jones, issued a [joint statement](#) on 13 July 2017. They drew attention to what they regarded as shortcomings in the Bill, calling it a "naked power-grab", and saying,

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 National Assembly for Wales.

A [report](#) by the Welsh Assembly research service pointed to a number of inferior powers in the Bill for Welsh institutions, which also play a part in shaping reactions. In particular, the report drew attention to the restriction on the competence of the Assembly going forward not to breach EU law as it stands immediately before exit day, which applies also to the Scottish Parliament and Northern Ireland Assembly:

"The Scottish Government rejects the overall approach of the Bill, which is to centralise control and decision making in the UK Government and the Westminster Parliament. [...] On withdrawal, the governance of the UK must respect the devolution settlements, and recognise the powers and responsibilities of the devolved legislatures and administrations."

Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill, LCM-S5-10](#), September 2017, para 37

<sup>25</sup> Sionaidh Douglas-Scott, *The "Great Repeal Bill"*, Briefing Paper for Scottish Parliament's European and External Relations Committee, 9 October 2016, p4, para 7

<sup>26</sup> Alan Page, [The implications of EU withdrawal for the devolution settlement](#) (2016) p4

<sup>27</sup> [EU \(Withdrawal Bill\): letter to Finance and Constitution Committee](#), Scottish Government, 19 September 2017. The Welsh list is not public, but has been referenced eg in ["Finally a Brexit breakthrough with the devolved nations,"](#) A Paun, Institute for Government, 18 October 2017.

[The Bill] 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.<sup>28</sup>

This point was taken up and expanded by the Scottish Government in its Legislative Consent Memorandum on the Bill, which is discussed in detail in section 5 below.

The Welsh Assembly research service pointed out that “wherever the Bill gives a power to devolved Ministers, it gives the same power to UK Government Ministers.” It went on to cite reaction to this:

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.<sup>29</sup>

A [report on the Bill by the Scottish Parliament’s research service](#), SPICe, was published on 24 August 2017.<sup>30</sup> Among other things, it noted the views of Professor Michael Keating of the University of Aberdeen, that the reservation to the UK of former EU powers in devolved matters,

introduces a principle that has, so far, been applied sparingly in the UK, of administrative devolution without legislative powers. It moves us closer to a hierarchical model of devolution, in which the broad principles are set in London and the details filled in across the nations.<sup>31</sup>

The SPICe paper argued:

In practical terms, Professor Keating’s suggestion of a hierarchical model of devolution is not that different from the current system of EU competences where the broad principles of policy are set at EU level and Scottish Ministers are responsible for administering those policies. However, between the UK Government and

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<sup>28</sup> [What does the EU \(Withdrawal\) Bill mean for Wales and devolution?](#), N Moss, 17 July 2017.

<sup>29</sup> [What does the EU \(Withdrawal\) Bill mean for Wales and devolution?](#), N Moss, 17 July 2017.

<sup>30</sup> [The European Union \(Withdrawal\) Bill: implications for Scotland](#), SB17-54, I McIver and F McGrath, 24 August 2017.

<sup>31</sup> [“To devolve or not to devolve,”](#) on *The UK in a Changing Europe* blog, M Keating, 19 July 2017.

Scottish Government, it will alter the balance of control in a significant number of areas.<sup>32</sup>

In evidence to the Public Administration and Constitutional Affairs Committee in November 2017 Professor Alan Page argued that the shift from a restriction on devolved competence that derives from UK membership of the EU to a restriction in an Act of Parliament,

loses its original justification, prompting the suspicion that clause 11 is not so much about legal certainty as stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks.<sup>33</sup>

He suggested that a combination of powers returning from the EU on already reserved matters, plus a “standstill agreement” (a political undertaking not to introduce new barriers before common frameworks have been agreed), would be sufficient to protect the UK single market without recourse to clause 11 of the present Bill.

Nicola Sturgeon and Carwyn Jones said in their joint statement that they could not recommend consent to the Bill:

On that basis, the Scottish and Welsh Governments cannot recommend that legislative consent is given to the Bill as it currently stands.

They concluded:

We have explained these points to the UK Government and have set out what we consider to be a constructive way forward in the spirit of co-operation, based on the involvement of, and respect for, devolved institutions.

Unfortunately, the conversation has been entirely one-sided. We remain open to these discussions, and look forward to coming to an agreed solution between the governments of these islands.<sup>34</sup>

### 4.3 Relevance of the popular mandate

As mentioned above, the UK Government’s March 2017 White Paper spoke of the role of democratically elected representatives in reshaping EU law.

People in Scotland, Wales and Northern Ireland have multiple layers of democratic representation. Each of the devolved institutions was approved in a referendum, in 1997 for Scotland and Wales, and in 1998 for Northern Ireland by means of the referendum on the Good Friday Agreement. There have been successive elections since. The mandate of the Welsh Assembly includes two referendums, the original referendum

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<sup>32</sup> [The European Union \(Withdrawal\) Bill: implications for Scotland](#), SB17-54, I McIver and F McGrath, 24 August 2017, p10.

<sup>33</sup> *Devolution and Exiting the EU*, Public Administration and Constitutional Affairs Committee, HC 484 (ongoing at time of writing), A Page, [written evidence DEU 08](#), 21 November 2017, p2

<sup>34</sup> <https://news.gov.scot/news/eu-withdrawal-bill> (13 July 2017).

on devolution and the referendum in 2011 on a move to the present system of legislating.

David Rees, Chair of the Welsh Assembly's External Affairs Committee, alluded to this point:

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.<sup>35</sup>

Michael Russell, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe, also drew attention to the democratic mandate of the Scottish Parliament:

But UK Ministers should still be in no doubt – to override a vote of the Scottish Parliament and impose the EU Withdrawal Bill on Scotland would be an extraordinary and unprecedented step to take.

[...]

The current proposals are a direct threat to the devolution settlement which the people of Scotland overwhelmingly voted for in 1997.<sup>36</sup>

On 18 July 2017 the National Assembly for Wales held a debate on the Bill, passing a resolution that it was “wholly unacceptable in its current form” and that a separate Welsh continuity Act should be published.<sup>37</sup>

Carwyn Jones explained his position, referring to “the huge challenge that the Bill represents to the devolved settlement as it's developed over the course of the last two decades.”

He reiterated the point about the popular mandate:

This is rooted, let's remind ourselves, in popular consent. The 2011 referendum, for example, saw a large majority vote in favour of giving this National Assembly primary legislative powers. [...] [The Bill is] an attempt to take back control over devolved policies such as the environment, agriculture and fisheries—not just from Brussels, but from Cardiff, Edinburgh and Belfast..<sup>38</sup>

Mr Jones described the Bill as “the thin end of a very big wedge”. He touched on the point made by Michael Russell about the lack of a devolved veto on EU withdrawal, and focused instead on his concern over the centralisation of power in a post-EU UK:

This is not about trying to prevent, undermine or complicate Brexit. It's about resisting an attempt to recentralise power to Westminster and Whitehall and turn the clock back to the 1980s.

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<sup>35</sup> [Brexit Bill could undermine the “will of the Welsh people”](#), National Assembly for Wales news release, 13 July 2017.

<sup>36</sup> [Brexit Bill talks: Scottish Government to recommend consent is rejected](#), Scottish Government press release, 9 August 2017.

<sup>37</sup> [National Assembly for Wales Record of Proceedings](#), 18 July 2017.

<sup>38</sup> Ibid.

## 5. Legislative consent

The Scottish and Welsh Governments are under obligations in the standing orders of their respective legislatures to submit legislative consent memoranda when the UK Parliament considers a Bill that covers a devolved matter or that changes legislative (and in the case of Scotland also executive) competence. They each did so on 12 September 2017, and did not recommend that consent be given.<sup>39</sup> The Northern Ireland Executive is not in existence at present.

### 5.1 Scottish Government's memorandum

The Scottish Government's memorandum indicated what it believed to be the main features of the Bill for which consent were needed:

- The conversion of EU law into domestic law in order to preserve a functioning statute book, which otherwise would be within the competence of the Scottish Parliament on devolved matters.
- The creation of powers for Scottish and UK Ministers to alter the law on devolved matters by secondary legislation, which also otherwise would be within the competence of the Scottish Parliament.
- The removal of the requirement to legislate and to exert executive functions compatibly with EU law, and the imposition of the new constraint to act compatibly with retained EU law.<sup>40</sup>

The Scottish Government's main objections related to the changes to competence, and the powers for Scottish and UK Ministers to alter the law.

#### Competence

The Scottish Government's memorandum remarked on the new constraint not to modify retained EU law:

This new legislative constraint cuts across the well-established and understood scheme of legislative competence, based on reserved areas, set out in the Scotland Act. It would give the UK Parliament and the UK Government power to legislate in relation to policy areas which are the responsibility of the Scottish Parliament and the Scottish Government. It is a constraint which is no longer based (as the current limit by reference to EU law is based) on the need to respect international obligations or the status of the UK as a member of the EU and is therefore entirely a matter of internal domestic law.<sup>41</sup>

"Given this fundamental difference of view on the future of the UK on withdrawal from the EU, the Scottish Government cannot recommend the Parliament consents to the Bill in its current form."

Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), LCM-S5-10, September 2017, para 38

<sup>39</sup> Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), LCM-S5-10; Welsh Assembly Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#)

<sup>40</sup> LCM-S5-10, para 11

<sup>41</sup> LCM-S5-10, para 16

The Scottish Government emphasised the general point of principle that the competence of the Scottish Parliament was being constrained, but also drew attention to the potential anachronism, mentioned above, of a frozen boundary to competence:

The Scottish Government believes that on withdrawal the Scottish Parliament should be in exactly the same position as the Westminster Parliament: able to act within its area of competence in the way it sees fit. The Scottish Government does not accept that the Scottish Parliament and Government, and the other devolved legislatures and executives, should, for an indeterminate period following withdrawal, have their competence defined as if it were the day before the UK withdrew from the EU.<sup>42</sup>

In addition, the Scottish Government argued that withdrawal from the EU should lead to decentralisation, but that the Bill moved in the opposite direction. It repeated its willingness to contemplate UK-wide policy frameworks, but said,

The process of identifying where frameworks are required and what they should contain, must be by agreement, not imposition and, insofar as legislation is required, be legislated for or consented to by the Scottish Parliament.<sup>43</sup>

This point was echoed by Professor Michael Keating, University of Aberdeen, in evidence to the Scottish Affairs Committee. He argued that UK frameworks could be created in various ways, for instance through reservation of powers, through legislating for a framework, control of finance or inter-governmental agreement. He went on:

The EU (Withdrawal) Bill only does one of these things. It reserves all powers in a blanket way. That raises problems of principle about the Sewel Convention and about the assumption that powers should be devolved if they are not expressly reserved. Technically, it is also very difficult too, because I am unhappy with this concept of retained EU law, which effectively is defining the competencies of the devolved institutions by reference to whatever the EU happens to have legislated on, rather than in relation to broad competencies.

Elsewhere in their commentary and other things that the UK Government have said is that the aim of all this is to reserve the UK single market. [...]

[...] the UK single market does not refer to competencies. It is a broad set of principles that cover absolutely everything. It would be more useful to start at that point and ask, "What principles do we need to reserve this UK single market?" and then, "What are the implications for devolution, and what are the instruments?"<sup>44</sup>

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<sup>42</sup> LCM-S5-10, para 17

<sup>43</sup> LCM-S5-10, para 19

<sup>44</sup> Scottish Affairs Committee, oral evidence, [European Union \(Withdrawal\) Bill: implications for devolution](#), HC 375, 11 October 2017, Q5

Scottish Government Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, opened a [debate in the Scottish Parliament](#) on 12 September 2017, in which he expressed his view of the approach taken in the Bill:

The UK Government's approach is not about UK frameworks; it is about UK Government frameworks, which are decided on, operated by and controlled in the UK Government. Returning powers to the Scottish Parliament along the lines of the devolution settlement that is set out in the Scotland Act 1998 would not prevent the agreement of such frameworks. In fact, it would enable that agreement, because mechanisms exist for the two Governments to agree a common or co-ordinated approach—for example, legislation in both Parliaments or in the UK Parliament, with our consent; memoranda of understanding; concordats; and the administrative agreement of common goals.

All those existing mechanisms are based on the existing and well-understood principles of devolution. Regrettably, the bill's approach to UK-wide frameworks suggests a fundamental shift in the UK Government's approach to such relations with the devolved nations.<sup>45</sup>

In its Legislative Consent Memorandum the Scottish Government also objected to the constraint of compatibility with retained EU law on two further grounds.

First, the memorandum stated, it would cut across the existing model in which specified subject matters are reserved to the UK level. Instead, wherever retained EU law operates a constraint would be placed on devolved competence. Over time, with amendments to that law by the UK Parliament or Ministers, this "will become increasingly unsuitable for determining legislative competence."<sup>46</sup>

Even if matters are subsequently released from the constraint not to modify EU law, that would itself operate as a conferral of power, in contrast to the general model of Scottish devolution, in which only those powers reserved to the UK level are stated in the *Scotland Act 1998*:

However, this approach creates further complexity in the devolution settlement by effectively grafting a "conferred powers" model, solely in the area of "retained EU law", onto, and across, the Scotland Act's reserved powers model.<sup>47</sup>

Secondly, the anachronism of having to comply with EU law as it existed the day before exit day will develop over time:

The clause allows the Scottish Parliament to legislate in the areas of retained EU law if it is acting in a way compatible with EU law at the point of withdrawal (hence the claim that the Bill "maintains the current scope of devolved decision making powers in areas

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<sup>45</sup> SPOR, 12 September 2017

<sup>46</sup> LCM-S5-10, para 22

<sup>47</sup> LCM-S5-10, para 25

currently governed by EU law”). However, as amendments are made to retained EU law by domestic UK law, and as the EU amends EU law, the content of “retained EU law” will diverge from EU law as it was on exit day and from EU law as it exists from time to time. Instead of a requirement to assess legislative competence by reference to EU law as it exists at the point when the issue arises, it will have to be assessed by reference to EU law as it used to be on exit day and as subsequently amended under the Bill.<sup>48</sup>

The Scottish Government regarded Clause 11, which introduces the new constraint, as not providing a clear, robust and certain test of legislative competence, and called for it to be removed.

This point attracted supportive comment from an Expert Working Group on the Bill at the Bingham Centre for the Rule of Law. In a paper for a discussion group chaired by Dominic Grieve, it referred to the “unclear” meaning of “retained EU law”, and went on to say:

The uncertainty regarding retained EU Law therefore contributes to the lack of clarity surrounding the definition of ‘devolved competence’ in Schedule 2, paragraphs 9-12. The Rule of Law requires clarity in the law so that individuals and businesses are able to ascertain their rights and obligations.<sup>49</sup>

### Ministerial powers

The Scottish Government was concerned that UK Ministers will have the power to make regulations on devolved matters to correct deficiencies that arise as a result of withdrawal. While these powers are concurrent for retained EU law that is implemented through UK or Scottish legislation, UK Ministers have sole power of correction when it comes to retained directly applicable EU legislation.<sup>50</sup>

It was also concerned that the new powers will be too complex:

The Scottish Government believes that the powers provided to UK and Scottish Ministers under the Bill should be similarly flexible and robust, minimising the legal risk in any exercise of the powers. Given the time available and the likely volume of relevant secondary legislation, these considerations are particularly important. The constraints on the powers of devolved Ministers, and the other qualifications on the powers (for example, requirements for consultation), should be removed from the Bill.<sup>51</sup>

Its preferred solution was to introduce a consent requirement, so that UK Ministers could exercise their powers on devolved matters only with the consent of Scottish Ministers.

In the second reading debate on the EUW Bill, David Davis gave an undertaking on the use of UK ministerial powers to correct defects

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<sup>48</sup> LCM-S5-10, para 23

<sup>49</sup> [Discussion Paper](#), The EU (Withdrawal) Bill and the Rule of Law Expert Working Group, Bingham Centre for the Rule of Law, 30 October 2017, pp3 and 4

<sup>50</sup> LCM-S5-10, para 28

<sup>51</sup> LCM-S5-10, para 30

arising in directly applicable law, which devolved Ministers do not have. He said, “we will always consult the Administrations on corrections made to direct EU law relating to otherwise devolved areas of competence.”<sup>52</sup>

The Scottish Government’s memorandum concluded that the approach of the Bill was “to centralise control and decision making in the UK Government and the Westminster Parliament.” It argued that the Scottish devolved institutions could not be expected “to continue as if the UK had not left the EU, while the Westminster Parliament is no longer bound by its EU obligations.”<sup>53</sup>

## 5.2 Welsh Government’s memorandum

The Welsh Government’s memorandum took a similar view of the provisions requiring consent to that taken by the Scottish Government:

- Clauses 1 and 11 change devolved competence by removing the requirement to comply with EU law, and by creating a new requirement not to modify retained EU law except to the extent possible immediately before exit day.
- Clause 17, and Schedules 8 and 9, give UK Ministers powers to make consequential provision which could alter devolved competence.
- Clauses 2 – 6 and associated Schedules convert EU law into domestic law, which would be within competence for the Welsh Assembly insofar as that EU law related to devolved matters.
- Clauses 7 – 10 and 16, with associated Schedules, on modifying retained EU law, confer powers on UK Ministers to act on devolved matters. They also confer powers on Welsh Ministers which the Assembly would have competence to give.
- Clause 12 and Schedule 4, which allow UK and Welsh Ministers to enable public authorities to charge fees, would be within the Assembly’s competence on devolved matters.
- Clause 13 and Schedule 5, on the printing of retained EU law by the Queen’s printer, would be within the Assembly’s competence on devolved matters.

One of the Welsh Government’s objections was that if a UK Minister used the concurrent power to make, on a devolved matter, regulations correcting deficiencies, in order to comply with international obligations, or to implement the withdrawal agreement, then the scrutiny of this regulation would move from the Welsh Assembly to the UK Parliament. It also pointed out that this could include making

“The UK should be entering Brexit negotiations from a position of unity so we have the best possible chance of securing a good deal with the interests of all parts of the UK at its heart. Instead, the government appears determined to provoke a constitutional conflict we do not need. If the bill is not amended, there is no prospect of my government recommending the National Assembly should give legislative consent to it.”

Carwyn Jones, First Minister of Wales, [press statement](#), 13 July 2017

<sup>52</sup> HC Deb 7 September 2017, c356

<sup>53</sup> LCM-S5-10, para 37

changes to the *Government of Wales Act 2006* on which Welsh devolution is based.<sup>54</sup>

It further noted that UK Ministers will have the power to amend retained direct EU legislation, while Welsh Ministers will not.<sup>55</sup>

The Welsh Government reiterated its acceptance of the concept of UK frameworks in some areas, but argued that,

The process of agreeing where frameworks are required, and what they should contain, must be one based on agreement, not imposition. But the Bill proposes instead a new set of legal constraints on the competences of the devolved institutions in respect of these matters, which we consider wholly unacceptable in principle.<sup>56</sup>

It also complained that the introduction of a new constraint on devolved competence, defined in relation to retained EU law, added complexity and uncertainty to the devolution arrangements. This is particularly interesting in the case of Wales, given that the *Wales Act 2017*, and the changes it made to the model of devolution, was intended to provide a lasting settlement.

The Welsh Government criticised the absence of a sunset provision on clause 11, so that the constraint that the Assembly may not modify retained EU law except in specified circumstances has no stated end date. It called for the clause to be deleted from the Bill, and remarked on what it saw as centralisation:

The imposition of this new restriction on competence on the Assembly represents an unnecessary and unacceptable centralisation of powers at the UK level.<sup>57</sup>

### 5.3 Implications of consent being withheld

If legislative consent were not given by the Scottish Parliament and/or the Welsh Assembly, this would not present a legal impediment to the Bill.

The right of the UK Parliament to legislate on devolved matters is stated in the *Scotland Act 1998* and the *Government of Wales Act 2006* (and also in the *Northern Ireland Act 1998*, although the Assembly is not currently sitting). This is largely for the avoidance of doubt: as a matter of constitutional principle, parliamentary sovereignty entails that amendments can be made to the devolution arrangements by the UK Parliament.

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<sup>54</sup> Welsh Assembly Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, para 26

<sup>55</sup> Welsh Assembly Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, para 27

<sup>56</sup> Welsh Assembly Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, para 31

<sup>57</sup> Welsh Assembly Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, para 34

Scottish Government Minister Michael Russell, in the statement mentioned above, acknowledged this point:

To be clear, [refusal of consent] would not block Brexit and we have never claimed to have a veto over EU withdrawal.<sup>58</sup>

There would, however, be a significant political cost. Successive UK Governments have followed the Sewel Convention, whereby they do not normally invite Parliament to legislate on devolved matters nor on the scope of devolved powers without consent.

The Sewel Convention is only a convention, with political not legal force. It was given statutory form in the *Scotland Act 2016* and the *Wales Act 2017*, but the Supreme Court has held (in the *Miller* case, concerning the use of Article 50 TEU) that it did not have legally binding consequences and remained a political convention. There is more information on this in [European Union \(Notification of Withdrawal\) Bill](#), CBP 7884, 30 January 2017.

The House of Lords Constitution Committee commented:

While the legislative consent of the devolved institutions may not be legally required, as the UK Parliament remains sovereign, the political and constitutional consequences of proceeding with the Bill without consent would be significant and potentially damaging.<sup>59</sup>

## 5.4 Mechanics of consent

The mechanics of legislative consent are set out in the [Memorandum of Understanding and Supplementary Agreements](#)<sup>60</sup> between the UK Government and devolved executives, in [Devolution Guidance Notes](#) 8 (Northern Ireland), 9 (Wales) and 10 (Scotland), and in the standing orders of the devolved legislatures, with minor variations.

In general, the process follows a common pattern. The UK Government first approaches the devolved administration to request consent. The devolved administration then prepares a memorandum explaining why it thinks consent is or is not expedient, and this is normally passed to a relevant subject committee. That committee prepares a report for the legislature to consider in plenary. Following a debate, the devolved legislature votes on a motion to give consent, and, if passed, the Clerk of that legislature informs the Clerk of the House of Parliament in which the Bill is being considered. Consent is usually sought before a bill reaches the final amending stage in the House of Parliament into which it was first introduced, but there is no set time at which consent is

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<sup>58</sup> *Brexit Bill talks: Scottish Government to recommend consent is rejected*, Scottish Government press release, 9 August 2017.

<sup>59</sup> [European Union \(Withdrawal\) Bill: interim report](#), House of Lords Constitution Committee, HL Paper 19, 7 September 2017, para 76

<sup>60</sup> [Memorandum of Understanding and Supplementary Agreements](#), October 2013, para 14

needed, other than the practical point that it must be before the final opportunity to amend the Bill in Parliament.

A bill could become subject to consent as a result of amendment, and it is also possible for bills that have already gained consent to be amended in a way that goes beyond that consent, in which case consent to the amendments might be needed.

DGN 10 sets out this process with regard to Scotland:

Where the provisions are of major significance in the Bill, there should have been prior consultation with the Scottish Executive on these and the LP paper should indicate that it will be possible to confirm at Second Reading that the Scottish Parliament has consented.<sup>61</sup>

It goes on to indicate that amendments may need to be taken into account:

During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament.<sup>62</sup>

There have been examples of bills that were delayed for some time while amendments were agreed in order to gain consent. For instance, the *Scotland Act 2012* was subject to two consent motions either side of Scottish Parliament elections, with about a year between them and a substantial package of amendments. Nevertheless, this is the exception, and in general:

The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.<sup>63</sup>

The [consent motions passed in the Scottish Parliament](#) are listed on its website, and [the motions in the current Assembly in Wales](#) are also listed on its website, along with a [longer-term monitoring service](#).

Refusal of consent has been rare, and it is hard to draw any meaningful conclusions as to what would happen next. The test would be whether the UK Government felt that there were greater merit in securing the Bill as it stands, and accepting potentially strong discontent from the devolved institutions, or in respecting the democratic mandates of

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<sup>61</sup> [Devolution Guidance Note 10](#), para 9

<sup>62</sup> [Devolution Guidance Note 10](#), para 18

<sup>63</sup> [Devolution Guidance Note 10](#), para 19

those institutions and seeking compromise on the Bill, presumably in the form of amendments that would secure consent.

## 6. Joint Ministerial Committee

The Joint Ministerial Committee (JMC) is the main forum in which devolved administrations and the UK Government meet.

In October 2016 the JMC established a sub-committee, known as the JMC (EN) (EN stands for EU Negotiations). The terms of reference were as follows:

Through the JMC(EN) the governments will work collaboratively to:

- discuss each government's requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.<sup>64</sup>

### 6.1 Criticism

There has been criticism of the JMC, particularly the scarcity of its meetings.

According to the UK Government dates are "agreed by consensus across the four governments."<sup>65</sup> Michael Ellis, Deputy Leader of the House of Commons, said:

We established the Joint Ministerial Committee on European Negotiations, chaired by the Secretary of State for Exiting the European Union, which has met four times since its inception in November. The Joint Ministerial plenary, chaired by the Prime Minister personally, has also met twice—in October and January—and there has also been substantial bilateral engagement between Ministers.<sup>66</sup>

However, neither the JMC nor the JMC (EN) met again after Mr Ellis's comments until the October 2017 meeting of the JMC (EN) discussed below.

Following the Prime Minister's statement on the European Council on 14 March 2017, Hywel Williams (Plaid Cymru) raised criticism of the JMC (EN) mechanism:

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<sup>64</sup> [Joint Ministerial Committee communique](#), 24 October 2016

<sup>65</sup> WQ 66931, 7 March 2017

<sup>66</sup> HC Deb 15 March 2017, cc169-70WH

I was glad to hear the Prime Minister say that she has been working with the devolved Administrations, but I was also slightly puzzled because the “Joint Ministerial Committee on Exiting the EU is less organised than a community council”.

Those are not my words, but those of an actual participant: the Welsh Government Minister Mark Drakeford. How is she ensuring that the interests of the devolved Governments are reflected in the Article 50 notification?<sup>67</sup>

David Anderson, the then shadow Secretary of State for Northern Ireland, raised the matter again on 19 April 2017:

The JMC is supposed to be the platform through which the devolved Administrations have their voices not just heard but responded to. The Secretary of State paints a rosy picture, but he is not listening to those voices. Northern Ireland voices are not being heard at the moment, because they are not allowed to attend. From what we have heard this morning, the Scots are saying clearly that their voice is being ignored. The Welsh feel, at best, less than impressed. Will the Government give this body the teeth it needs, put it on a statutory footing and let it do its job properly?

David Mundell, Secretary of State for Scotland, responded:

The purpose of the JMC is to bring together the UK Government and the devolved Administrations, and to work together to formulate our position as we go forward in the negotiations. I very much regret the fact that the Northern Ireland Executive have not been able to be politically present in recent times—we all want that situation to be brought to a conclusion—but the meetings have been robust and, I believe, certainly in terms of the actions that have flowed from them, constructive.<sup>68</sup>

The Labour Party attempted to amend the *European Union (Notification of Withdrawal) Bill* during its committee stage to include a statutory role for the JMC. Jenny Chapman moved New Clause 4, which began with the following:

(1) In negotiating and concluding any agreements in accordance with Article 50(2) of the Treaty on European Union, Ministers of the Crown must consult, and take into account the views of, a Joint Ministerial Committee at intervals of no less than two months and before signing any agreements with the European Commission.<sup>69</sup>

Brexit Minister Robin Walker rejected the amendment on the grounds that the JMC was not a legislative or statutory body and the amendment would undermine its role as a “neutral forum for confidential discussions”.<sup>70</sup>

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<sup>67</sup> HC Deb 14 March 2017, c192

<sup>68</sup> HC Deb 19 April 2017, c659

<sup>69</sup> HC Deb 6 February 2017, c129

<sup>70</sup> HC Deb 6 February 2017 c183

New Clause 65 to the EUW Bill, in the name of the Leader of the Opposition, would give the JMC a statutory role as a forum for discussing the terms of withdrawal, proposals to amend retained EU law, agreed legal and policy frameworks and the process for concluding them.

## 6.2 Agreement of principles for frameworks

A meeting of the JMC (EN) was held on 16 October 2017. This agreed a set of principles for the creation of joint UK policy frameworks after withdrawal from the EU.

The [Communique](#) from the meeting stated that frameworks will set out a common approach for either the UK or Great Britain.

Frameworks will not take a common format:

This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued.<sup>71</sup>

Likewise, they could be implemented in a variety of ways, from legislation to executive action, to memoranda of understanding or other methods.

The Communique set out three principles:

1. Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

2. Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;

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<sup>71</sup> [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017, p2

- lead to a significant increase in decision-making powers for the devolved administrations.

3. Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.<sup>72</sup>

The Communique stated that the discussions on frameworks might be either bilateral or multilateral between the UK and devolved Governments, and that the outcome of discussions would be without prejudice to the UK's negotiations and future relationship with the EU.

The Communique also stated that there would be "close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities."<sup>73</sup>

The Secretary of State for Exiting the European Union, David Davis, addressed at second reading of the EUW Bill the need for discussions over common frameworks:

The Bill gives time for us to work with the devolved Administrations to determine where we will continue to need common frameworks in the future. Crucially, it will not create unnecessary short-term change that negatively affects people or businesses. Before the summer recess, my right hon. Friend the First Secretary of State wrote to the Scottish and Welsh Governments to begin intensive discussions about where common frameworks are and are not needed. In the current absence of a Northern Ireland Executive, equivalent engagement has taken place at official level with the Northern Ireland civil service. We will bring forward further detail on the process underpinning these discussions in due course for Parliament to decide on.<sup>74</sup>

The Secretary of State for Scotland, David Mundell, also gave an indication that discussions were already under way over the fate of the 111 areas of responsibility for the Scottish Parliament, and the 64 areas for the Welsh Assembly, that were due to be covered by retained EU law. In evidence to the Scottish Affairs Committee he said that,

I think what will happen in that dialogue is that—and I am hoping for this and I am confident of it—there will be areas where we all agree that these powers should come directly to the Scottish Parliament. There are areas where we will all agree that there should be a framework and the Scottish Government have indicated publicly that they identify that there are areas where

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<sup>72</sup> [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017, pp2-3

<sup>73</sup> [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017, p2

<sup>74</sup> HC Deb 7 September 2017, c356

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there should be UK frameworks and then there will be a number of areas where we will have a discussion.<sup>75</sup>

He spoke of his own “presumption of devolution”:

I am coming from a presumption of devolution position, so my position is to persuade others that matters should be devolved unless there is a good reason, the reasons we have set out previously in terms of making sure that the UK’s internal market functions, that the practical arrangements as we have talked about before, such as transport of livestock and all these things, can happen. But I am just working on a presumption of devolution and that is my message into Whitehall.<sup>76</sup>

The Scottish Affairs Committee drew on these comments in its report on the Bill of 14 November 2017, recommending an early identification of matters to be devolved, in time for Third Reading of the Bill:

We recommend that the UK Government agrees with the devolved administrations what areas should be subject to common frameworks and which ones can be devolved. These discussions should be based on the premise, set out by the Secretary of State for Scotland, that all powers should be devolved unless there is good reason to reserve them. The outcome of these discussions should be published in time for Third Reading, so that Members have clarity about how provisions regarding Scotland’s devolution settlement will apply in practice, before the Bill finishes its Commons stages. Once agreement has been reached the UK Government should bring forward a plan to devolve all powers not covered by those frameworks to the Scottish Parliament.<sup>77</sup>

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<sup>75</sup> Scottish Affairs Committee, oral evidence, [The Work of the Scotland Office](#), HC 376, 24 October 2017, Q7

<sup>76</sup> Scottish Affairs Committee, oral evidence, [The Work of the Scotland Office](#), HC 376, 24 October 2017, Q14

<sup>77</sup> [European Union \(Withdrawal\) Bill: Implications for devolution](#), Scottish Affairs Committee, HC 375, 14 November 2017, “Conclusions and recommendations,” para 2, p12

## 7. Amendments proposed by Scottish and Welsh Governments

On 19 September 2017 the Scottish and Welsh Governments published a joint set of amendments to the Bill. These fell into four substantive groups, plus some consequential amendments. They have since been tabled as amendments to the Bill in the House of Commons. The main groups were as follows:

- **Preventing the modification of the devolution Acts by SIs under clauses 7 to 9**

Amendments 158, 159 and 160

These amendments prevent the modification of the *Scotland Act 1998* and the *Government of Wales Act 2006* by regulations made by UK Ministers to correct deficiencies in retained EU law and to comply with international obligations. The explanatory statement makes the point that existing provisions in those Acts allow for modification by consent, or a UK Act of Parliament could do so by consent. These amendments also provide that changes consequent on the withdrawal agreement be subject to consent by devolved Ministers.

- **Requiring consent for regulations on devolved matters**

Amendments 161, 162 and 163

These amendments change clauses 7 to 9 so that any regulations made under them (correcting deficiencies, complying with international obligations or implementing the withdrawal agreement) will be subject to the consent of the devolved Ministers if the matter is within their competence.

- **Removal of restriction on modifying retained EU law**

Amendments 164 and 165

These amendments remove the restrictions that the devolved legislatures in Scotland and Wales, and their Governments, may not modify retained EU law. They remove sub-clauses 1 and 2 of clause 11, which impose the new restriction, and replace it with a simple omission of the requirement to act compatibly with EU law (since that law will no longer apply after withdrawal). They therefore evade the reservation to the UK of matters that are currently devolved but covered by EU law. They make similar changes to Schedule 3, in order to remove the same restriction from devolved Ministers in Scotland and Wales.

- **Removal of restrictions on devolved Ministers' order-making powers**

Amendments 166 - 176

These amendments remove a range of restrictions in the Bill on the power of Scottish and Welsh Ministers to make regulations to correct deficiencies, comply with international obligations and implement the withdrawal agreement. Perhaps the most striking is the removal of the provision that they must not modify retained directly applicable EU law (ie, that retained by clauses 3 or 4).

The Secretary of State for Scotland, David Mundell has said that detailed discussions are in train with the two Governments over these amendments. In evidence to the Scottish Affairs Committee he referred to an "amendments forum" between officials, and went on,

As a UK Government, we are discussing those amendments with the respective Governments to understand fully what is sought to be achieved as in the case of the discussion of all amendments. It may be that some amendments can be accepted with a little bit of modification; some amendments ultimately we may decide that we cannot agree on. Obviously, it is ultimately for this House to determine whether amendments are successful in relation to the Bill.

What I am indicating is that there is this detailed dialogue ongoing about the amendments. We did not just say, "Here are amendments submitted by Opposition MPs and we are not interested. Here are amendments from the Welsh Government and Scottish Government." We have sat down at official level, or are about to, and gone through these amendments in detail.<sup>78</sup>

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<sup>78</sup> Scottish Affairs Committee, oral evidence, [The Work of the Scotland Office](#), HC 376, 24 October 2017, Q4-5

## 8. Good Friday Agreement

Questions have been raised over the relationship between the UK's withdrawal from the EU and the Belfast/Good Friday Agreement. While much of this relates to the negotiations over a withdrawal agreement and future relationship, there are concerns that the present Bill should not complicate matters over Northern Ireland.

There is more information on issues to do with Northern Ireland, Ireland and UK withdrawal in [Brexit Negotiations: The Irish border question](#), CBP 8042, 17 July 2017.

### 8.1 The Agreement

The [Good Friday or Belfast Agreement 1998](#) provided the foundations for the devolved arrangements in Northern Ireland, as well as being a major development in the peace process. The Multi-Party Agreement between most of the political parties in Northern Ireland (the Democratic Unionist Party did not support the Agreement) was supported by a bilateral treaty between the UK and Ireland. This British-Irish Agreement means that the UK Government has obligations under international law to another sovereign state in respect of Northern Ireland.

The Good Friday Agreement confirmed that a devolved system of government would be established in Northern Ireland, and that the people of Northern Ireland would determine whether to remain part of the United Kingdom. It also provided a guaranteed human rights framework, and bodies for UK-Irish and north-south relations. It included a right for the people of Northern Ireland to choose to hold Irish or British citizenship, or both.

#### Relevance of UK and Irish membership of EU

Neither the treaty between the UK and Ireland nor the Multi-Party Agreement explicitly requires UK membership of the EU.

However, the preamble to the treaty includes a statement about the status of both countries within the EU:

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union.

The preamble to a treaty is not binding, but common EU membership was an important part of the context within which Republicans found their way to participate in political institutions within the UK.

The common membership of the EU was presumed in the Good Friday Agreement, it was noted there and it was seen as an important reassurance. The EU has itself also played a significant role in Northern Ireland, not least through provision of funds.

## 8.2 The EUW Bill and the Agreement

A paper prepared for the Expert Working Group on the Bill at the Bingham Centre for the Rule of Law made the following comments on the relationship between the Bill and the Good Friday Agreement:

While it does not require the UK to be an EU Member State, the GFA was drafted on the premise of such membership and therefore many of its provisions relate to EU institutions, law and policy.

In addition, the protection of human rights is central to the GFA and receives its own section in the Agreement. Thus, the Bill's non-retention of the EU Charter of Fundamental Rights, and its treatment of general principles and case law from the Court of Justice of the EU raises additional concerns.<sup>79</sup>

The paper went on, citing a legal opinion by Caoilfhionn Gallagher QC and Katie O'Byrne of Doughty Street Chambers and a paper prepared for the European Parliament:

There is uncertainty regarding whether or not withdrawal (and hence the Bill) give rise to a breach of international obligations under the GFA. The Legal Opinion concludes that "the UK's exit from the EU is not congruous with the text or intention of the GFA in all its parts." This conclusion is largely based on a realisation that much of the text of the GFA will require amendment after Brexit to reflect the any new arrangements. For example, the European Parliament has stated that "Brexit must surely require deletion and/or revision of the references to the EU within the Good Friday Agreement." There is no explicit recognition or protection in the Bill of the GFA, nor do the Bill's Explanatory Notes address this issue.<sup>80</sup>

The Northern Ireland Human Rights Consortium, which describes itself as "a broad alliance of civil society organisations from across all communities, sectors and areas of Northern Ireland", expressed concerns about the Bill which are relevant to rights and thus to the Good Friday Agreement:

- A failure to protect the Belfast/Good Agreement and the manner in which EU law currently underpins many elements of the peace process.
- No continuation of the European Charter of Fundamental Rights in UK law, an important current source of human rights protection.

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<sup>79</sup> [Discussion Paper](#), The EU (Withdrawal) Bill and the Rule of Law Expert Working Group, Bingham Centre for the Rule of Law, 30 October 2017, p8

<sup>80</sup> [Discussion Paper](#), The EU (Withdrawal) Bill and the Rule of Law Expert Working Group, Bingham Centre for the Rule of Law, 30 October 2017, p8, citing [Report on how designated special status for Northern Ireland within the EU can be delivered](#), 16 October 2017, and European Parliament, Constitutional Affairs Briefing, [The Impact and Consequences of Brexit for Northern Ireland](#), 2017, p. 6.

- Restricts reference to the European Court of Justice and use of its jurisprudence which removes an important oversight mechanism for rights protections and risks differentiating between rights standards with the rest of Europe.
- Places broad unrestricted powers in the hands of UK Ministers to amend or repeal any retained EU legislation which jeopardises existing rights without proper parliamentary scrutiny.<sup>81</sup>

## Partial protection of Northern Ireland Act 1998 from regulations

Under clause 7 UK Ministers will be able to make corrective regulations to deal with deficiencies in EU law arising from withdrawal, but, among other things, these may not amend or repeal the *Northern Ireland Act 1998* (subject to some exceptions). This restriction does not apply to the power of UK Ministers to make regulations to implement the withdrawal agreement, nor to comply with international obligations.

This is replicated for the powers of devolved Ministers (i.e., Northern Ireland Ministers). Schedule 2, paragraph 1(3) provides that the same restrictions set out in clause 7 on UK Ministers apply to the powers of devolved Ministers making corrective regulations. Regulations arising from the withdrawal agreement and other international obligations are also subject to restrictions, which are a little more extensive than apply to UK Ministers, but which do not protect the *Northern Ireland Act 1998*.

So Northern Ireland Ministers, like their UK counterparts, will not have the power to make corrective regulations amending or repealing the *Northern Ireland Act 1998* going forward (with some very narrow exceptions), but they will have the power to make regulations affecting that Act as part of the implementation of the withdrawal agreement or to comply with other international obligations.

The protection of the *Northern Ireland Act 1998* from corrective regulations in future reduces the risk of contention over compatibility of those regulations with the Good Friday Agreement.

However, if the UK were subject to an international obligation, including under the withdrawal agreement, that would have an overriding force in any case. This may explain the absence of protection for the *Northern Ireland Act 1998* (the main statutory manifestation of the Good Friday Agreement) from regulations implementing the withdrawal agreement or other international obligations.

It may be also that the lack of protection in respect of implementing the withdrawal agreement is an acknowledgement of the role of the Irish

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<sup>81</sup> [EU withdrawal Bill - General Points of Concern in advance of Second Reading](#), Human Rights Consortium, September 2017

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Government within the negotiations over withdrawal from the EU and the potential veto it (like the other EU Member States) will hold.

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