

## **Brexit Bill will weaken devolved governments, Scottish and Welsh First Ministers say**

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**Proposed amendments from the Welsh and Scottish governments to the UK government's European Union (Withdrawal) Bill will attempt to force Prime Minister Theresa May to rethink the UK's exit from the EU and protect the role of devolved legislatures. Welsh First Minister Carwyn Jones and Scottish First Minister Nicola Sturgeon claim the Bill is a 'power grab' of devolved responsibilities, and have set out amendments where they believe change is needed for their governments to accept the Bill. Lawyers from Bircham Dyson Bell and Hogan Lovells look at how some of the amendments seek to protect particular EU principles by enshrining them in UK law, and warn that immediate repatriation of EU powers to the devolved administrations could give rise to significant legal risk and potentially provoke a 'divergence in the legal systems of the UK nations'.**

The UK government's European Union (Withdrawal) Bill is designed to incorporate all relevant EU legislation into British law following Brexit, to ensure existing rules remain in place before any changes are made.

### **Government accused of hijacking devolved powers**

While the Welsh and Scottish Governments have no powers to amend laws at Westminster, the Welsh Government intends to formally object to the Bill to transfer EU laws to the UK immediately after Brexit.

The Scottish Government has refused to put forward the Bill for a consent vote at Holyrood until the issue of where disputed powers will reside is settled.

Carwyn Jones has said the Bill 'hijacks' powers that 'rightfully' belong in Wales, and that the Bill will affect the Welsh Assembly's competence.

However, while Ms Sturgeon has the backing of a large remain vote in Scotland, Wales voted predominantly leave. Mr Jones will therefore have to draw a balance between opposition to the Bill and the popular feeling in Wales.

In a speech on 18 September 2017, Mr Jones said he was committed to a partnership with the Scottish Government 'to defend not only the institutions in which we respectively operate but also the democratic principles that the people of Wales and Scotland have resoundingly supported'.

### **Proposed amendments—powers returning to the UK**

Areas of dispute between the UK government and devolved administrations include fishing and farming, forestry, genetically modified organisms, fracking licensing, environmental regulation, Europol, land use, rail franchising rules, public sector procurement and state aid.

The proposal in the Bill is for powers to first return to Westminster, before incorporation of some powers into UK-wide frameworks, while others are passed to the devolved parliaments.

The Scottish and Welsh governments say the amendments would:

- ensure devolved policy areas come back to the Scottish Parliament and National Assembly of Wales on withdrawal from the EU
- prevent UK ministers unilaterally changing the Scotland Act 2016 and Government of Wales Act 2006
- require the agreement of the Scottish Government on necessary changes to current EU law in devolved areas
- ensure additional restrictions are not placed on devolved ministers compared with UK government ministers

### **Respecting ‘the hard-won devolution settlements of the UK’**

In a letter to the Prime Minister, Ms Sturgeon and Mr Jones say the EU Withdrawal Bill would need to be ‘substantially amended’ for them to be able to recommend legislative consent by the Scottish or Welsh parliaments.

The letter sets out their proposed amendments, which they claim would allow the Bill to ‘work with, not against, devolution’.

It expresses the hope that the amendments would ‘enable progress to be made among the governments in a way which respects the hard-won devolution settlements of the UK’.

The two first ministers said they ‘stand ready to work in a co-operative and co-ordinated way with others to prepare for Brexit’, but said the UK government’s approach was preventing this.

### **Three types of amendments**

Aaron Nelson, senior associate at Bircham Dyson Bell, said: ‘We can expect three types of amendments—first, those which seek to remove entirely the restriction which the government is seeking to impose; second, amendments which seek to speed up the transition to devolved powers (perhaps by introducing a sunset clause on the restriction); and third, amendments which seek to enshrine particular EU principles into UK law (to try to prevent the UK government from changing them).

‘In this regard, the Welsh Government is also promoting its own “Welsh Continuation Bill”, to convert into Welsh law all EU law related to devolved policy areas. Notwithstanding the Welsh “leave” vote, the Labour Welsh Government is adopting the national line of protecting existing workers’ rights and freedoms.

‘A further issue is whether the Sewel convention applies (ie the principle that Westminster will not ordinarily legislate in areas affecting competence of the devolved administrations). The Scots and Welsh may refuse to give consent to the Bill proceeding in Westminster unless significant changes are made.’

### **‘Devolution settlements are not being honoured’ under the Bill**

Nelson added: ‘At the moment, Westminster, the Scottish Parliament, and Welsh and Northern Ireland Assemblies are all required to comply with EU law—Westminster because the UK is an EU Member State, the

devolved assemblies because it is written into their legislative competence in the devolution settlements. Similar restrictions apply to executive action, ie the actions of the UK government and the devolved governments.

‘After Brexit, the UK will no longer be a Member State, and Westminster, and the UK government, will be freed from that requirement, so they can diverge from EU law if they decide to. But the Bill, as drafted, seeks to maintain that restriction temporarily for the devolved administrations—ie they would not be able to act contrary to the EU law which, by the Bill, is being transposed into or retained as UK law (and, if necessary, “corrected”).

‘The UK government says this restriction is necessary because the EU-wide frameworks are what currently ensure common standards across the UK on devolved matters, eg agriculture. The UK government needs time to work out whether new UK-wide frameworks are required post-Brexit and, if so, to implement them. The Scottish and Welsh Governments claim this is a “power grab” and that the devolution settlements are not being honoured—they should be able to set policy and legislate freely on those matters for which they have responsibility.’

### **Reopening the devolution settlement**

Charles Brasted and Andrew Eaton from the public law and policy team at Hogan Lovells International LLP said: ‘The amendments to the European Union (Withdrawal) Bill published jointly yesterday by the Scottish and Welsh governments highlight an aspect of Brexit that has often been overlooked—the potential for the process of leaving the EU, if not managed with the utmost care, to reopen the devolution settlement between the nations of the UK.

‘The current devolution settlement presumes the UK’s continued membership of the EU; uncertainty about what happens to that settlement once the constraints of EU law are removed could have unintended consequences for the constitutional coherence and economic integrity of the UK.

‘As a result, the UK government has proposed a “softly-softly” approach to the repatriation of EU powers. The Bill will still require the devolved administrations to comply with (what will then be) retained EU law and will grant comparatively limited powers to the devolved administrations to modify retained EU law, relative to UK ministers. The UK government has stressed, however, that this is only intended as a temporary measure.’

### **‘A significant risk of divergence in the legal systems of the UK nations’**

Brasted and Eaton added: ‘However, the Scottish and Welsh governments have repeatedly voiced their disapproval and have now proposed an alternative approach. This would prohibit the UK government from legislating in areas of devolved competence without the consent of the relevant devolved administration, and would grant powers to the Scottish and Welsh administrations to alter retained EU law on the same terms as UK ministers. This amounts to a “maximalist” approach to the repatriation of EU powers, which would have the effect of allowing the devolved administrations to amend retained EU laws as they apply in the devolved nations without the oversight and/or consent of the UK government and/or Parliament.

‘The maximalist approach—although understandable from the perspective of the devolved administrations, who guard their competences under the current settlement on the justifiable basis that they have a popular

mandate to govern on that basis—would result in a significant risk of divergence in the legal systems of the constituent nations of the UK. This could have a detrimental impact on the UK's ability to negotiate with the EU and other countries in these areas, and also on the ability of businesses to operate across the whole of the UK largely unencumbered by difference in local laws.

'It may be right that certain EU powers in areas of devolved competence are repatriated to the devolved administrations in due course, but doing so en masse in the first instance in this Bill would give rise to significant legal risk.'



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