

European Union (Withdrawal) Bill: Interim report on the Legislative Consent Memorandum

December 2017

Summary

At the time of reporting, the European Union (Withdrawal) Bill is in the Committee Stage of scrutiny in the House of Commons.

We have considered the Bill in detail.

In October 2017, we set six objectives for improving the Bill. These objectives have yet to be met.

Consequently, we recommend that the Assembly withhold its consent for the Bill in its current form.

This is an interim report and, should the Bill be amended, we will issue a further report.

We continue our work in relation to the Withdrawal Bill and stand ready to consider future legislative consent memoranda relating to amendments made to the Bill.



01. Background

We have been working on the Bill since March 2017 with a view to ensuring that the implications for Wales are understood and acted upon by the UK Government.

1. The UK Government published its White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, on 30 March 2017.
2. We considered the implications for Wales of this proposed approach and published our report, *The Great Repeal Bill: Implications for Wales*, in June 2017.
3. This followed consideration of 13 written submissions and two committee hearings.
4. In summary, we set out the following key messages in our report:

Key messages from our report *The Great Repeal Bill: Implications for Wales*

Consultation

The evidence we received indicates that the UK Government has not consulted meaningfully with the Welsh Government and has not consulted at all with the Assembly in relation to its preparations for legislating for Brexit, as set out in the White Paper. This is unacceptable and we expect the incoming UK Government to engage more constructively with both the Welsh Government and the Assembly.

Delegations of powers, controls on the powers and Assembly procedure

We believe that it should be for the Assembly alone to delegate powers to make subordinate legislation to the Welsh Ministers, to set the controls around their use and to establish the scrutiny procedures that should apply to legislation made by the Welsh Ministers, using such powers.

However, in light of the extremely limited timeframe and the scale of the task ahead, the only practical option may be for the UK Parliament to provide for these powers and the controls applicable to them in the Great Repeal Bill.

With regard to procedures, however, the Bill should not restrict the Assembly's ability to determine its own scrutiny procedures.

Should the Bill provide a power for the Welsh Ministers and set controls on the power, then this must be an exception and should not set a precedent. Such provisions must also be subject to the Assembly's legislative consent.

The UK Government must listen and act upon representations made by the Assembly and its committees once the Bill is introduced if it is to secure that consent.

UK-wide policy frameworks

Decisions about future UK-wide policy frameworks must be agreed between the UK Government and the devolved governments and legislatures. They must not be imposed by the UK Government, even on a time-limited basis.

Transparency of the process

As we wrestle with a myriad of issues, ranging from the technical to the constitutional, we must not lose sight of the fact the decisions that are taken during this period will have a direct and lasting effect on people's lives. It is incumbent on us, and all other actors in this process, to ensure that the process is as transparent as possible and that we seek opportunities to facilitate meaningful two-way engagement with stakeholders and citizens.

5. The European Union (Withdrawal) Bill ('the Withdrawal Bill') received its first reading in the House of Commons on 13 July 2017.
6. The Explanatory Notes accompanying the Withdrawal Bill describes the Withdrawal Bill, in overview, as:

“The European Union (Withdrawal) Bill repeals the European Communities Act 1972 (ECA) on the day the United Kingdom leaves the European Union.

The Bill ends the supremacy of European Union (EU) law in UK law and converts EU law as it stands at the moment of exit into domestic law. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.”

7. In response to the introduction of the Withdrawal Bill, we wrote to the Secretary of State for Exiting the European Union, the Rt Hon David Davis MP. In this correspondence, we expressed our disappointment that the Withdrawal Bill, as introduced, had not reflected the conclusions of our report on the White Paper.
8. In a joint endeavour with the Assembly's Constitutional and Legislative Affairs Committee, we issued a call for further written evidence in July 2017 and held a stakeholder conference to debate the Withdrawal Bill on 18 September 2017.
9. The Committees were joined by Welsh stakeholders and leading constitutional and legal experts from across the UK to explore the implications of the Withdrawal Bill for Wales.
10. The Welsh Government laid a legislative consent memorandum ('the Memorandum') on 12 September 2017.
11. We took evidence on the Memorandum from the Cabinet Secretary for Finance, Mr Mark Drakeford AM, on 25 September 2017.
12. Building on the above evidence, we developed and agreed six objectives for improving the Withdrawal Bill.

Our objectives for amending the EU (Withdrawal) Bill

1. Remove the Clause 11 restriction on the devolution settlement.
 2. Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved competence.
 3. Ensure powers available to Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set out in the Bill.
 4. Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved.
 5. Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers.
 6. Ensure that the Assembly can set its own scrutiny arrangements.
13. We wrote to Members of Parliament, the UK Government, parliamentary committees and the Welsh Government with our objectives on 10 October 2017. Our six objectives, and our reasoning for setting them, are provided as Annex A to this interim report.

14. Mr Stephen Kinnock MP tabled amendments, where they were needed, to give effect to our objectives.
15. Clause 11 of the Withdrawal Bill, relating to our first objective (to remove the clause 11 restriction on the devolution settlement), was debated in the House of Commons on 4 December 2017. Whilst our work was referenced in the debate, **the amendments that we suggested needed to be supported to deliver our first objective were not agreed.**
16. Clauses and schedules relating to our second, third, fourth and fifth objectives were debated on 6 December in the House of Commons. This included debate around the amendments tabled by Mr Kinnock to support our objectives. As on 4 December, our work was referenced in the debate, but **the amendments we suggested needed to be supported to deliver our objectives were not agreed.**
17. The clauses and schedules in relation to our sixth objective (to ensure that the Assembly can set its own scrutiny arrangements) had not been debated ahead of our consideration of this report. They are due to be debated on 13 December 2017.

02. Provisions of the Withdrawal Bill that require legislative consent

The Welsh and UK Governments disagree on the provisions of the Withdrawal Bill that require the Assembly's legislative consent. We have taken advice from the Assembly's Legal Service. We largely agree with the Welsh Government's broader assessment of the provisions that require the Assembly's consent.

02.1. The Welsh Government's assessment

- 18.** The Welsh Government, in its Legislative Consent Memorandum ('the Memorandum'), identifies clauses 1 to 13, clauses 16 and 17, Schedules 2 – 5, and Schedule 7 as requiring the Assembly's legislative consent.
- 19.** The Welsh Government's detailed reasoning is set out in paragraphs 8 to 21 of the Memorandum. A summary of the relevant provisions is provided as Annex A to the Memorandum.

02.2. The UK Government's assessment

- 20.** The UK Government's assessment is summarised in Annex A to the Withdrawal Bill's Explanatory Notes. It states that clauses 5-9, clause 12 and 16, and Schedules 5 and 7 do not require the Assembly's legislative consent.
- 21.** In response to correspondence from the Chair of the Committee, the Parliamentary Under Secretary of State for Exiting the European Union, Mr Robin Walker MP, provided a view on why he does not believe the Assembly's legislative consent is needed for clauses 7 and 9:

“There are two tests for whether a clause meets the test for legislative consent from the Assembly. The first is whether the clause would be within the legislative competence of the Assembly, and the second is whether the clause would alter the legislative competence of the Assembly. Our technical analysis indicates that clauses 7 and 9 do not meet either of those criteria and so they alone do not trigger the legislative consent process.”

02.3. The Assembly's Legal Service's assessment

- 22.** The Assembly's Legal Services largely agree with the Welsh Government as to when consent is required. However, there are several differences between Assembly Legal Services and the Welsh Government on the one hand, and the UK Government on the other, as to when consent is required.
- 23.** A comparison of the UK Government, Welsh Government and Assembly Legal Service assessments of when consent is required is presented in a table at Annex B.

CONCLUSION

Conclusion 1. We agree with the Assembly Legal Service's assessment of the clauses and schedules that require the consent of the Assembly. These are set out in Annex B to this report.

03. Legislative consent

The Welsh Government's position is clear: it cannot support the granting of legislative consent for the Bill as introduced. We have set six objectives for amending the Bill. At the time of reporting, the Bill remains un-amended. Consequently, we recommend that the Assembly withhold its consent for the Bill in its current form.

03.1. The Welsh Government's view

- 24.** In paragraph 23 of the Memorandum, the Welsh Government states that it:

“[...] will not be able to recommend to the Assembly that it gives its consent to the Bill as currently drafted.”.

- 25.** Alongside the publication of the Memorandum the Welsh and Scottish Governments published suggested amendments that they believe need to be made to the Bill if they are to recommend that the respective legislatures grant consent for the Bill.
- 26.** On 27 March 2017, the First Minister stated that the joint Welsh and Scottish Government amendments were “red lines”.

27. The Welsh and Scottish Government amendments were all tabled in the House of Commons. Many of them were debated on days 4 and 5 of Committee Stage (4 and 6 December 2017). None were agreed.

03.2. Our view

28. We are aware of on-going inter-governmental discussions around possible amendments to the Withdrawal Bill and that it is possible that the UK Government could table amendments in time for the Report Stage in the House of Commons (expected in January) or in the House of Lords.

29. It is our intention to examine any future amendments in detail and to consider whether they meet the objectives we set for the Bill. Should we be persuaded that amendments to the Bill substantially meet our objectives then we will reconsider our position on the question of the Assembly granting its legislative consent.

30. However, to meet the Business Committee's request for a report by 13 December 2017, we can only report on the Bill as it stands today.

31. The Bill has not been amended to take account of the concerns raised by the Welsh and Scottish Governments, nor had it been amended to meet our objectives.

32. In observing this, we also note the UK Government's response to these amendments in the House of Commons; the increase in engagement between the Welsh and UK Governments and the increase in the UK Government's engagement with this Committee.

RECOMMENDATION

33. In light of the Withdrawal Bill remaining un-amended, we have little option but to recommend that:

Recommendation 1. The Assembly should withhold its consent to the Bill as currently drafted (i.e. as the text of the Bill stands on 11 December 2017). Should amendments be made at subsequent stages of the scrutiny process then we will carefully examine these amendments before reconsidering our recommendation to the Assembly.

Annex A – The Six Objectives

Objective 1: Remove the Clause 11 restriction on the devolution settlement

Explanation

Whilst the Committee believes that UK-wide frameworks will be necessary in a number of policy areas, it also believes that these should be agreed on a parity of esteem basis between the governments and legislatures of the United Kingdom and not imposed by the UK Government, even on a time-limited basis.

Clause 11, as drafted, places a new and significant constraint on the devolution settlement and shifts the power dynamic around setting common UK frameworks firmly in the direction of the UK Government. The UK Government has provided no information on how these common frameworks will be agreed, the timetable for agreeing them, or how Parliament and the devolved legislatures will be involved in this process.

This is further complicated by the fact that the UK Government is also, in a number of European Union policy areas, acting as the government of England. This leads to a possible conflict of interest when it comes to imposing pan-UK structures.

Professor John Bell told the Committee that *“Clause 11 is drafted in such a way as to hide the extent of the restriction on the future competences of devolved assemblies.”*

The Institute for Welsh Affairs stated in evidence that:

“It is no-one’s interest for a Withdrawal Bill not to be enacted and provide a legal safety net when the UK leaves the jurisdiction of EU law. However, in its current form, this Bill fails to respect the power already granted to the elected governments in Scotland and Wales, and to respect the democratic legislatures in Northern Ireland, Wales and Scotland.”

Below, the Committee identifies some of the amendments that have already been tabled in the House of Commons that it believes could, if agreed, meet this Objective. Of course, other solutions might present themselves as further amendments are tabled. The Committee intends to monitor the progress of the Bill and may write to Members of Parliament again should alternative means of achieving this Objective be presented.

Objective 2: Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved legislative competence

Explanation

The most constitutionally appropriate and efficient route to correcting EU law is to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

The narrower option (as provided for in the Bill) of restricting the involvement of the Welsh Ministers and the Assembly to correcting only EU-derived domestic legislation in devolved areas makes for a less efficient exit process. EU-derived domestic legislation includes UK domestic laws that have already been passed by the UK Parliament or devolved legislatures to implement requirements of EU law.

Welsh Government and Welsh public bodies are responsible for implementing EU law in devolved areas, and have been for 20 years. They hold the knowledge that is required to make sensible corrections to EU law in devolved areas. If UK Ministers were to seek to make corrections in devolved areas, they would need to seek the expert input of the Welsh Government and Welsh public bodies before drafting such corrections. Enabling the Welsh Ministers and the Assembly to correct all aspects of EU-derived law in devolved areas is a more efficient, and constitutionally appropriate, approach to correcting EU-derived law in devolved areas.

Cytûn provided the following assessment in evidence:

“Provisions which permit Ministers of the Crown, in their role as ministers with responsibility for matters in England which are devolved to the other nations, to amend the law in England while ministers in Wales are restricted from amending laws in the same areas in Wales. This creates an unfairness and inequality between the nations of the UK, and could endanger the smooth functioning of the UK single market, the maintenance of which is one of the key policy aims of the Bill.”

Objective 3: Ensure powers available to Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set-out in the Bill

Explanation

We recognise the case for a power to be delegated to the Welsh Ministers, and that this power will need to be wide in terms of the legislation it applies to. However, **this power must be strictly limited to the uses for which it is intended.**

As many Members of Parliament noted in their contributions at Second Reading, the powers proposed for the executive in this Bill are extraordinarily wide and subject to limited controls.

Unless the Bill is amended to place appropriate constraints on these powers, it risks unbalancing the power dynamic between the executive and the legislature at both a UK and devolved level. In terms of the relationship between Parliament and UK Ministers, the Delegated Powers Scrutiny Committee in the House of Lords found that:

“The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.”

The External Affairs Committee believes that the same is true for the powers proposed, and sought, for Welsh Ministers.

Whilst the Welsh and Scottish Governments have sought to align the powers they would receive under the Bill with those to be granted to UK Ministers, they have not sought to place any limitation on these powers.

They acknowledge, in the explanatory notes that accompany their suggested amendments, that:

“We are aware that there are significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed in the Bill, and would be supportive of amendments which sought to define these more narrowly.”

The Learned Society for Wales submitted in writing that:

“The discretion given to Ministers of the Crown to adjust retained EU law is however very wide. Arguably, it is wider than is necessary. [...] The breadth of the discretion effectively makes it impossible to challenge its exercise other than by internal procedures within the UK Parliament.”

The Committee’s view is that the discretion offered to Welsh Ministers should be limited to only “essential” provision. A note on why the Committee has arrived at this formulation, rather than suggesting “necessary” (as has been proposed in other amendments tabled in the House of Commons) is provided after the committee suggested amendments for this Objective.

Whilst the Committee’s interest is in controlling the powers granted to Welsh Ministers, the mechanics of the Bill make it difficult to achieve without also placing limitations on those available to UK Ministers (and other devolved Ministers). The Committee’s preference is to restrict its suggested amendment to the powers delegated to Welsh Ministers. Where possible, this has been done, but has not been practically possible in all instances given how the Bill is constructed.

Note on the use of “essential” rather than “necessary” or “appropriate”

The amendments suggested above would reduce the current wide discretion for using delegated legislation and limit it to those aspects which are truly unavoidable, by replacing the power to make “such provision as the Minister considers appropriate” with a power to make “such provision as is essential”. The discretion is reduced in two ways. First, the word “essential” is, clearly, significantly narrower than the word appropriate. It does indeed focus on what is unavoidable; what must be done in order to make EU-derived law operate effectively after Brexit. Secondly, the amendment would apply an objective test of what is essential, not the test of what a Minister “considers” essential. The latter necessarily includes an element of subjectivity, even with the proviso that the courts will always require Ministers’ consideration to be “reasonable”.

The amendment would limit the discretion for all devolved Ministers. This is simply dictated by the structure of the current Schedule 2.

Other amendments have already been tabled with the same purpose, as regards the powers of UK Government Ministers. However, those amendments seek to replace the word “appropriate” with the word “necessary”. The Committee is of the view that this would still give Ministers too wide a discretion in the context of these extremely broad-ranging Henry VIII powers, and in the extremely important constitutional

context of Brexit. This is because the word “necessary” is capable of a range of meanings. True, it can be interpreted as meaning “essential”. But it has also been interpreted by the courts as meaning “proportionate” (notably, in a Human Rights and indeed an EU-law context). And “proportionate” is very little different from the current term, “appropriate”, which has attracted so much criticism from constitutional experts.

The term “essential” has been used in many pieces of Westminster legislation, e.g. the Consumer Rights Act 2015, the Investigatory Powers Act 2016 and the Financial Services and Markets Act 2000 (now amended). In the Acts mentioned, the term is used in a context involving an element of discretion – as it would be in the Bill. Clearly, therefore, Parliament has considered it an appropriate word where the aim is to strictly limit, but not eliminate, discretion.

Objective 4: Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved

Explanation

As stated against Objective 2 above, the External Affairs Committee believes that the most constitutionally appropriate and efficient route to correcting EU law would be to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

As drafted, the Bill provides UK Ministers with exclusive powers to amend direct EU legislation in devolved areas and concurrent powers with Welsh Ministers to amend EU-derived domestic legislation in devolved areas.

Objective 2 (above) seeks to widen the powers available to Welsh Ministers so that Welsh Ministers can amend direct EU legislation in devolved areas.

This objective 4 seeks to remove the concurrent powers granted to UK Ministers to allow them to amend EU-derived domestic legislation in devolved areas.

This objective goes further than the Welsh Government amendments as it seeks to remove the possibility of UK Ministers amending EU-retained law in devolved areas.

As a mature legislature, the Assembly should not be seeking UK Parliamentary time to address issues for which it is responsible. The Assembly should be responsible for scrutinising legislation for which it is accountable to the electorate for delivering.

The External Affairs Committee believes that all devolved legislatures should be enabled to play their full part in the process of legislating for Brexit.

This approach would not prevent the Welsh Government and UK Government from working together in the preparation of subordinate legislation.

Objective 5: Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers

Explanation

As a point of constitutional principle, the foundation statues for devolution in Wales should only be amended through the use of primary legislation or, in limited circumstances, through the use of a Section 109 Order (as provided for in the Government of Wales Act 2006 “GoWA”).

The Committee has received evidence from a number of sources in relation to both the White Paper and the Withdrawal Bill that emphasise that it should not be possible for the Government of Wales Act 2006 (‘GoWA’) to be amended through the use of delegated powers.

The Withdrawal Bill would currently provide UK Ministers with a power to amend GoWA through the use of subordinate legislation.

The Welsh Government amendments restrict the ability of the UK Government to amend the GoWA through the use of subordinate legislation in most circumstances.

However, the Welsh and Scottish Government amendments allow UK Ministers the ability to amend the GoWA with the consent of Welsh or Scottish Ministers when it comes to implementing a withdrawal agreement.

As a minimum, this should require the consent of the Assembly. However, the more constitutionally appropriate route would be to remove this power altogether and this aligns with the approach taken to the Human Rights Act in the Bill.

Objective 6: Ensure that the Assembly can set its own scrutiny arrangements

Explanation

As acknowledged by the powers provided to the Assembly by Government of Wales Act 2006, it is for the Assembly alone, as the democratically accountable institution for Wales, to set its own procedures.

The Bill as drafted would undermine this constitutionally crucial principle by seeking to set, on behalf of the Assembly, the procedures that will apply to scrutiny of secondary legislation. This cannot be right.

In its report on the White Paper, the Committee stated:

“It would be of grave concern to us if the UK Government were to impose procedure on the Assembly, particularly as it has not consulted the Assembly about this.”

The UK Government has not responded to the Committee’s calls for it to engage constructively with the Assembly.

The Withdrawal Bill seeks to impose procedure on the Assembly without any consultation and in the absence of acknowledging the Committee’s view as expressed in its report on the White Paper.

The procedure the UK Government is proposing (principally for Parliament and, by extension, the devolved legislatures) falls far short of the Committee’s expectations, as expressed in its report on the White Paper.

Professor Bell suggested in writing that:

“The provisions on Scrutiny are inadequate. [...] The Bill does not recognise the magnitude of the task and therefore the need to have differently designed procedures to ensure adequate scrutiny. [...] The Bill assumes current procedures will be used, but that is simply not possible. Very serious attention needs to be given to how scrutiny will operate.”

The Institute for Welsh Affairs wrote:

“Corresponding powers are conferred on devolved institutions by clause 10 and schedule 2, meaning that Welsh Government Ministers could also take Henry VIII powers under this Bill should they wish. It would of course be unsatisfactory to see this power replicated in

Wales, without action to rebalance the scrutiny mechanisms available to the National Assembly for Wales. **Defects in parliamentary scrutiny ought not to be replicated in Cardiff.** [Bold added for emphasis]

The External Affairs Committee believes that amendments that enables the Assembly to establish its own scrutiny arrangements would meet this objective.

The Committee has proposed an amendment that would allow the National Assembly for Wales to set scrutiny arrangements through its Standing Orders. The Committee sees this as enabling a pragmatic option for establishing Assembly scrutiny arrangements quickly, but this would not preclude other avenues being pursued to establish scrutiny arrangements.

Annex B – Comparison of provisions requiring legislative consent

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
<p>Clause 1: repeal of the ECA 1972</p>	<p>Consent is required because clause 1 modifies the Assembly’s legislative competence.</p> <p>The Assembly’s legislative competence is defined by, among other things, the concepts of supremacy of EU law and the direct applicability of EU law. Those two concepts were established by the European Communities Act 1972.</p> <p>Clause 1 modifies the Assembly’s legislative competence because repealing the ECA 1972 removes those two concepts (and they are not replaced with something identical). For example, there will be differences between: (1) EU legislation that will have direct application in Member States, and (2) retained EU direct legislation that will form part of domestic law in Wales on and after exit day.</p>	<p>Yes</p>	<p>Yes</p>



Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
<p>Clause 2 and Schedule 1: saving for EU-derived domestic legislation</p>	<p>Consent is required because clause 2 makes provision for a purpose within the Assembly's legislative competence.</p> <p>Clause 2 provides that existing domestic legislation which implements EU obligations will remain part of domestic law on and after exit day.</p> <p>For example, clause 2 ensures that regulations made under the ECA 1972, such as the Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017, will remain a part of domestic law on and after exit day.</p> <p>Without clause 2, EU-derived domestic legislation made under the ECA 1972 would cease to have effect on exit day, thus leaving a large legislative void in many devolved areas in Wales. Therefore, the purpose of clause 2 is to fill that void and ensure the continuation of legislation in devolved areas such as agriculture, plant health, plant seeds, food and water.</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>Given devolved subjects such as “agriculture”, “plant health”, “plant seeds”, “food” (including drink), clause 2 makes provision for a purpose that is within the Assembly’s legislative competence.</p> <p>Schedule 1 to the Bill provides further detail about exceptions to the saving and incorporation of retained EU law, including retained EU law in devolved areas. Providing further detail about any exceptions to, for example, the saving of retained EU law in devolved areas is within the Assembly’s legislative competence. Therefore, Schedule 1 to the Bill also makes provision for a purpose within the Assembly’s legislative competence.¹</p>		
<p>Clause 3 and Schedule 1: incorporation of direct EU legislation</p>	<p>Consent is required because clause 3 makes provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 3 provides that EU legislation that</p>	<p>Yes</p>	<p>Yes</p>

¹ Schedule 1 also provides for exceptions to clauses 3 and 4. Therefore, this paragraph applies equally to Schedule 1 as it applies to clauses 3 and 4, and is not repeated in the analysis in clauses 3 and 4.

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>currently has direct applicability in the UK will form part of domestic law on and after exit day.</p> <p>For example, clause 3 ensures that EU regulations, such as EU Regulation 1169/2011 on the provision of food information to consumers, will form part of domestic law on and after exit day.</p> <p>Without clause 3, direct EU legislation would cease to have effect on exit day, thus leaving a large legislative void in many devolved areas in Wales. Therefore, the purpose of clause 3 is to fill that void and ensure the continuation of legislation in devolved areas such as agriculture, fisheries and the environment.</p> <p>Given devolved subjects such as “agriculture”, “fisheries” and “environmental protection”, clause 3 makes provision for a purpose that is within the Assembly’s legislative competence.</p>		
<p>Clause 4: saving for rights etc under section 2(1) of the ECA</p>	<p>Consent is required because clause 4 makes provision for a purpose within the Assembly’s legislative competence.</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>Clause provides that any EU rights and obligations that do not come within clauses 2 and 3 will remain a part of domestic law on and after exit day.</p> <p>To the extent that such EU rights and obligations apply in devolved areas, clause 4 makes provision for a purpose within the Assembly’s legislative competence.</p>		
<p>Clause 5: exceptions to savings and incorporation</p>	<p>So far as clause 5 disapplies the principle of supremacy of EU law, consent is required because clause 5 modifies the Assembly’s legislative competence.</p> <p>The Assembly’s legislative competence is defined by, among other things, the supremacy of EU law. By removing that supremacy, Assembly legislation would no</p>	<p>Yes</p>	<p>No</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	longer have to give way to supreme EU law, thus modifying (and expanding ²) the Assembly's legislative competence.		
Clause 6: interpretation of retained EU law	<p>Consent is required because clause 6 modifies the Assembly's legislative competence.</p> <p>Domestic courts can disapply domestic primary legislation that breaches EU law. Those domestic courts are bound by the decisions of the Court of Justice of the European Union.</p> <p>Therefore, when a domestic court currently decides whether an Assembly Act breaches EU law (and, therefore, whether the Assembly Act is outside competence), the court is bound by decisions of the CJEU.</p> <p>Therefore, the Assembly's legislative competence is currently defined by, among other things, decisions of the CJEU. By</p>	Yes	No

² But that expansion is limited by clause 11 of the Bill, which freezes the Assembly's legislative competence by requiring the Assembly to comply with retained EU law.

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	removing the binding effect of future CJEU decisions, the Assembly’s legislative competence is being modified.		
Clause 7: dealing with deficiencies arising from withdrawal	<p>Consent is required because clause 7 makes provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 7 provides that UK Ministers can make regulations to deal with deficiencies arising from withdrawal. This could include deficiencies in retained EU law in devolved areas.</p> <p>For example, the Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017 refer to protocols published by the Community Plant Variety Office. The CPVO is a EU agency, and if the CPVO ceases to be the body that manages the system of plant variety rights in Wales on exit day, then the 2017 Regulations will need to be modified.</p> <p>Clause 7 gives the UK Ministers powers to modify retained EU law, even in devolved areas such as plant health, therefore clause 7 makes</p>	Yes	No

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>provision for a purpose that is within the Assembly's legislative competence.</p> <p>The power in clause 7 could also be used to modify the Assembly's legislative competence. UK Ministers may consider it appropriate to use the power in clause 7 to amend GOWA 2006.</p> <p>For example, from April 2018, the Assembly's legislative competence in respect of food will be defined in GOWA 2006 by reference to EU Regulation 178/2002. UK Ministers may consider it appropriate to define food in some other way, which would modify the Assembly's legislative competence in respect of food.</p>		
<p>Clause 8: complying with international obligations</p>	<p>Consent is required because clause 8 makes provision for a purpose within the Assembly's legislative competence.</p> <p>Clause 8 provides that UK Ministers can make regulations to ensure continued compliance with the UK's international obligations, by preventing or remedying any breach of international obligations that arise from</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>withdrawal.</p> <p>As with clause 7, the UK Ministers can use this power even in devolved areas, therefore clause 8 makes provision for a purpose that is within the Assembly’s legislative competence.</p> <p>The power in clause 8 could also be used to modify the Assembly’s legislative competence (for example, if UK Ministers consider it appropriate to use the power to amend GOWA 2006).</p>		
<p>Clause 9: implementing the withdrawal agreement</p>	<p>Consent is required because clause 9 makes provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 9 provides that UK Ministers can make regulations to implement the withdrawal agreement.</p> <p>As with clauses 7 and 8, the UK Ministers can use this power even in devolved areas, therefore clause 9 makes provision for a purpose that is within the Assembly’s</p>	<p>Yes</p>	<p>No</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>legislative competence.</p> <p>The power in clause 9 could also be used to modify the Assembly’s legislative competence (for example, if UK Ministers consider it appropriate to use the power to amend GOWA 2006).</p>		
<p>Clause 10 and Schedule 2: corresponding powers involving devolved authorities</p>	<p>Consent is required because clause 10 and Schedule 2 make provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 10 and Schedule 2 give powers to the Welsh Ministers to modify EU-derived domestic legislation in devolved areas. Therefore clause 10 and Schedule 2 make provision for a purpose that is within the Assembly’s legislative competence.</p>	<p>Yes</p>	<p>Yes</p>
<p>Clause 11: retaining EU restrictions in devolved legislation</p>	<p>Consent is required because clause 11 modifies the Assembly’s legislative competence.</p> <p>On the face of it, it appears that clause 11 simply freezes the Assembly’s legislative competence in relation to complying with EU law, and therefore does not actually modify the Assembly’s legislative competence.</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>However, clause 11 must be considered in the wider context of Brexit.</p> <p>One automatic consequence of Brexit, in the absence of clause 11, would be to enhance the Assembly’s legislative competence in devolved areas such as agriculture, fisheries, environment (see the judgment of the Supreme Court in the Miller case). However, clause 11 blocks that automatic consequence and therefore modifies that automatic enhancement of the Assembly’s legislative competence.</p> <p>To use the words of the Supreme Court in the Miller case, clause 11 introduces a “new legislative constraint”. And this constraint modifies the Assembly’s legislative competence.</p>		
<p>Clause 12 and Schedule 4: financial provisions</p>	<p>Consent is required because clause 12 and Schedule 4 make provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 12 and Schedule 4 give the Welsh Ministers powers in connection with fees and</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>charges in connection with functions exercised by the Welsh Ministers under Schedule 2, in devolved areas.</p> <p>Therefore clause 12 and Schedule 4 make provision for a purpose that is within the Assembly's legislative competence.</p>		
<p>Clause 13 and Schedule 5: publication and rules of evidence</p>	<p>Consent not required.</p>	<p>Yes</p>	<p>No</p>
<p>Clause 16 and Schedule 7: regulations</p>	<p>Consent is required because clause 16 and Schedule 7 make provision for a purpose within the Assembly's legislative competence.</p> <p>Schedule 7 sets out the Assembly procedure that is to apply to regulations made by the Welsh Ministers under the Bill.</p> <p>Therefore clause 16 and Schedule 7 make provision for a purpose that is within the Assembly's legislative competence (Assembly Acts can, and always do, provide for the Assembly procedure that applies to subordinate legislation laid before the</p>	<p>Yes</p>	<p>Yes</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	Assembly).		
<p>Clause 17 and Schedule 8: consequential and transitional provision</p>	<p>Consent is required because clause 17 makes provision for a purpose within the Assembly’s legislative competence.</p> <p>Clause 17 gives UK Ministers powers to make regulations in consequence of the Bill. Given the Bill provides for the operation of retained EU law in many devolved areas, clause 17 makes provision for a purpose within the Assembly’s legislative competence.</p> <p>The power in clause 17 could also be used to modify the Assembly’s legislative competence (for example, if UK Ministers consider it appropriate to use the power to amend GOWA 2006).</p> <p>Schedule 8 contains various provisions that either modify the Assembly’s legislative competence or make provision for a purpose that is within the Assembly’s competence.</p> <p>For example, paragraph 1 of Schedule 8 modifies the Assembly’s legislative</p>	<p>Yes in respect of clause 17 and Schedule 8 (but unclear in respect of Schedule 9, which is also introduced by clause 17)</p>	<p>No</p>

Clause or Schedule requiring consent	Reason why Assembly Legal Services considers consent is required	Does the Welsh Government consider that consent is required?	Does the UK Government consider that consent is required?
	<p>competence by providing that a current reference to a directly applicable EU Regulation will, on and after exit, be read as a reference to that EU Regulation as modified by domestic law.</p> <p>This principle will apply to the GOWA definition of “food”, which will define food by reference to Regulation 178/2002. On exit, that definition of “food” may be modified by domestic law (for example, by UK Ministers or the UK Parliament). Another example is paragraph 2 of Schedule 8, which makes provision for a purpose within the Assembly’s legislative competence. Paragraph 2 specifies the Assembly procedure that applies to certain regulations laid before the Assembly. Therefore, paragraph 2 makes provision for a purpose within the Assembly’s legislative competence.</p>		

Note on the table: Where Assembly Legal Services states that a clause of, or Schedule to, the Bill makes provision for a purpose that is within the Assembly’s legislative competence, this includes confirmation that there are no other factors that would take the clause or Schedule outside competence. For example, it includes confirmation that there are no exceptions in Schedule 7 that would take the clause or Schedule outside the Assembly’s legislative competence. Equally, it includes confirmation that the clause or Schedule is not incompatible with EU law (which is something that would take the clause or Schedule outside the Assembly’s legislative competence).