

Cynulliad Cenedlaethol Cymru | National Assembly for Wales  
Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol | External Affairs  
and Additional Legislation Committee  
Y goblygiadau i Gymru wrth i Brydain adael yr Undeb Ewropeaidd |  
Implications for Wales of Britain exiting the European Union  
IOB 32  
Ymateb gan Thomas G. Watkin (Safbwynt cyfreithiol a chyfansoddiadol)  
Evidence from Thomas G. Watkin (Legal and constitutional perspective)

In particular, the Committee welcomes views on the following questions:

- What should be the top priority for Wales in advance of the UK Government triggering of Article 50 (which starts the formal process of exiting the EU)?
- Can you provide examples of where the UK's proposed approach to transferring the *acquis communautaire* (the body of European law), through the proposed Great Repeal Bill, into domestic law might have particular implications for Wales?

The following responses are from a legal and constitutional perspective and are made without prejudice to there being other important issues to consider from different perspectives.

**1. What should be the top priority for Wales in advance of the UK Government triggering of Article 50 (which starts the formal process of exiting the EU)?**

- 1.1 The top priority for Wales should be to ensure that the question of whether an article 50 notification can be withdrawn once made is answered authoritatively. The answer to this question needs to be known before the UK Government notifies the European Council of its intention to withdraw under article 50.
- 1.2 Wales should make common cause with the other devolved nations in seeking to have the question raised in the Supreme Court when the court is considering the UK Government's appeal against the High Court's decision in *R (oao Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) ).
- 1.3 It is noted that the Printed Case of the Counsel General for Wales submitted in relation to the appeal and dated 25 November 2016 (UKSC 2016/196) appears to regard the issue of whether an article 50 notification is irrevocable as open to consideration (see ¶62), whereas the parties before the High Court were agreed that an article 50 notification could neither be revoked nor be conditional (see [2016] EWSC 2768 at ¶10).
- 1.4 If necessary, the Supreme Court should refer the question to the European Court of Justice for determination regardless of any delay this may cause the UK Government in its declared intention of making the article 50 notification by the end of March 2017.
- 1.5 If an article 50 notification is revocable, this would enable the UK Parliament and the devolved legislatures to have a rôle in determining whether the terms agreed by the UK Government are acceptable, or whether to leave after two years of notification in any event.



**2. Can you provide examples of where the UK's proposed approach to transferring the *acquis communautaire* (the body of European law), through the proposed Great Repeal Bill, into domestic law might have particular implications for Wales?**

2.1 Currently, the legislative competence of the National Assembly requires that the provisions of Assembly Acts are compatible with European Union law. The same is true regarding provisions made by the Welsh Ministers through subordinate legislation.

2.2 The question therefore arises of what, if anything, will replace this requirement in the event of the Great Repeal Bill being enacted. Will the erstwhile provisions of European law with which Welsh legislation had to be compatible, when re-enacted as provisions of UK domestic law form a new body of legislation with which Welsh legislation will have to be compatible to be within competence?

2.3 If that is so, how will the provisions of the Great Repeal Bill operate thereafter with regard to legislative competence? The provisions of EU law can change, without Wales or, on occasion, the UK having a veto. Will the new body of law contained in the Great Repeal Bill be capable of change, and if so by whom and by what process?

2.4 The restoration of sovereignty to the UK Parliament over matters currently subject to EU law suggests that it would be the UK Parliament that could make changes. However, that would allow the UK Parliament to alter the legislative competence of the National Assembly and the Welsh Ministers. Would a legislative consent motion be needed? Would the devolved legislatures have a voice in whether the changes should be made (and not merely as to whether they consented to the change in their respective territories)? If competence over some of the areas being returned were devolved to the constituent nations in the Great Repeal Bill, would such devolution be symmetrical or would some nations get more than others? Would the single jurisdiction of England and Wales make a difference in this regard? Would the Assembly have any say in alterations to areas of the law which were not devolved but which could affect its competence?

2.5 There are a number of very important constitutional questions attaching to the manner in which the provisions of EU law might be repatriated to the UK and the devolved nations. It might be argued that as the devolved nations have been governed from Europe on these matters, there can hardly be any complaint if they are now governed from London. Against that, it could be argued that repatriation needs to take account of the UK's arrangements for devolved government and legislation when executing Brexit.

**Thomas Glyn Watkin**  
*28 November 2016*