

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 42  
Ymateb gan Ymateb unigol  
Evidence from Individual response

1. This submission focuses on the question ‘Can you provide examples of where the UK’s approach to transferring the *acquis communautaire* through the proposed Great Repeal Bill into domestic law may have particular implications for Wales’. It looks at the issue of competence repatriation, and at the determination of the appropriate level of legislative responsibility. It argues for a post-Brexit redefinition of powers which embraces the notion of shared competence and the meaningful operation of the principle of subsidiarity – that decisions should be taken at the lowest most effective level, and where this is at a UK level there are robust structures for the four legislatures to work together to devise the legislative response. The current internal intergovernmental machinery will require development to be able to deliver this new settlement.

2. The ongoing process of devolution of powers away from London to Cardiff (and Edinburgh and Belfast) has to date taken place in the context of the UK’s membership of the EU. EU membership has provided a framework for the expression of regional interests, both feeding into EU policy making upstream, and implementing EU obligations in devolved areas downstream.

3. EU law has at the same time set important parameters for how devolved nations exercise their powers, limiting the degree to which laws across the UK can diverge in those areas which are both devolved and Europeanised. To date, rule making in these areas has taken place in a framework of pooled state sovereignty, and in which responsibility for action is shared. Subsidiarity has been a defining principle for the exercise of competences. In an EU context, this principle provides:

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. (Article 5(3) Treaty on European Union).

4. On the UK's withdrawal from the EU, powers will be repatriated to the UK – and a determination needs to be made about those powers which are in devolved areas. Under the UK's current constitutional structures, there is a tendency towards a binary allocation of competences as either devolved, for exercise at that level, or not devolved, and for exercise at the UK level. There is little experience of shared competence as practiced in the EU.

5. The repatriation of powers to the UK will likely take place against the backdrop of the move from a conferred to a reserved model of devolved law making competence for Wales. References to EU measures are found throughout the reservations in new Schedule 7A, along with the obligations and functions for the Assembly and Ministers to act in accordance with, and give effect to EU law. The new Wales Act will thus need to be returned to very quickly to ensure it reflects post-Brexit legal circumstances.

6. It is essential that the Great Repeal Bill, and measures taken under it at central UK level give appropriate attention to the devolution settlement. The Repeal Bill should recognize the continuation of EU measures already adopted in Welsh law for Wales, as well as the competence of Welsh ministers to pass secondary legislation reviewing the post-Brexit acquis in devolved areas (a separate submission on the technicalities of the devolution dimension of the Great Repeal Bill and a possible Continuation Act for Wales will be submitted with colleagues from Cardiff Law School and the Wales Governance Centre).

7. The repatriation of powers could see an expansion in the policy competence of the Welsh Assembly and Government. Powers to implement policies previously decided at the EU level could become now powers for Wales to make its own law. However, the repatriation of competence needs to be matched by appropriate resources to be able to exercise these powers – particularly in respect to those policy areas which have previously seen subsidies and support (agriculture, rural development, and support for greening policies).

8. Post-Brexit, and within the scope of its devolved powers, Wales could decide to regulate in line with EU measures, in preference to new UK laws. This may emerge if there are clear policy differences between the Welsh and UK governments – such as a stronger commitment to environmental considerations, or to social justice. A commitment to maintain current employment protections underpinned by EU directives, such as the Working Time Directive and the Temporary Agency Directive has been made by the Prime Minister for as long as she is Prime Minister. Should these be rolled back at a later date, there is little that Wales could do to maintain these measures for Wales. Assuming the Wales Bill will by then be in force, with its shift from conferred powers model to the reserved powers model, the possible

competence to act on employment law issues currently available in line with the *Agricultural Wages* case (and suggested through the connection with public services) would be shut down through the reservations in Schedule 7A.

9. In some cases, a divergence in law across the UK may not be appropriate, particularly in terms of the consequences for the UK's own internal market. Exercise of devolved powers across the UK may result in a patchwork of regulatory responses, making trade across the UK more burdensome and costly than it need be. In other cases, divergence would be legally problematic because it is linked to an otherwise exclusive competence of the UK state, such as the overlap between agriculture and international trade. In these circumstances, opportunities for a coordinated response across the UK need to be effectively embedded in the governance machinery.

10. Shared competence in a UK context would recognize that in certain policy fields, powers to legislate are in principle open to be exercised at both the UK or Welsh level, the determination of the appropriate level on any particular issue to be guided by the principle of subsidiarity. Where the most effective and appropriate level for action is the UK level, appropriate opportunities need to be provided for the devolved nations to feed into law making.

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