

SUBMISSION FROM CONVENTION OF SCOTTISH LOCAL AUTHORITIES (COSLA)

Purpose

The Convention of Scottish Local Authorities (COSLA) is the national and international voice of the 32 Scottish Councils. We welcome the invitation by the Scottish Parliament Finance and Constitution Committee to contribute to this important inquiry.

Our politically agreed position, as expressed in various politically agreed statements and submissions described below is that the return of EU legislation concerns local government hence any discussion about the apportionment of EU returned powers, the creation of Scottish and UK regulatory and enforcement bodies as well as the reporting and commitments to be made in the future to the EU and other international bodies necessarily needs the contribution and ownership of Scottish Local Government.

This submission reflects the position views agreed by the Leaders meeting of 27 February 2020 but also takes stock from earlier positions and COSLA submissions such as previous inquiries by the Scottish Parliament Finance and Constitution Committee on Common UK Frameworks (2018), Impact of the European Union (Withdrawal) Bill on the Devolution Settlement (October 2017) and the Scottish Parliament delegated powers inquiry (2016) and the COSLA Submission to Scottish Parliament CEER TTIP Inquiry (2015) among others.

1. What is the UK internal market?

Just as with environmental matters, competition and state aid matters can have transboundary effects. This applies to relations between UK and EU but also applies at an intra UK scale.

Specifically the Scotland Act 1998, Schedule 5 Part II, contains specific reserved powers to Westminster aimed at ensuring certain uniform rules for the UK wide economy on Financial and Economic Matters (Head A), data protection (Head B), Trade and Industry including consumer protection and product standards (Head C), Professions and Employment relations (Heads G and H), public sector information *Head L) or equal opportunities (Head N).

For four decades some of these provisions were regulated at EU level. Furthermore, the general harmonisation clause for the internal market under 115 TFEU or the free movement of workers under Article 46 TFEU, with the European Commission being both the enforcement and executive body to police the EU Single Market and the European Court of Justice as the ultimate jurisdictional body.

The repatriation of EU powers following EU Withdrawal, effectively at the end of the Transition Period, means that these EU provisions will be returned to the UK but also be crucial for the future UK-EU relationship (International Trade being also according to the Scotland Act a reserved power).

The European Union (Withdrawal) Act 2018 aims to address this issue, denominated common frameworks. However, the Act does not spell out how the “common frameworks” will operate and the Act does not in itself articulate how powers should be apportioned. Notwithstanding the extensive discussions being held at officer level including the commitment that any EU returned powers will be devolved by default, COSLA welcomes that

the Scottish Parliament consider this question given its far reaching constitutional implications.

2. How will international treaties, including trade deals, impact on the UK internal market?

On 27 February 2020 COSLA Leaders meeting agreed to lobby to seek to ensure that the Devolution settlement, Local Government powers and existing employment, state aid, procurement, and trading standards legislation are not undermined or traded off in the Phase 2 negotiations and future Free Trade Agreements with the US or other countries.

Post Withdrawal regulatory regimes

The UK will leave the EU but the issue of how state aid, procurement, trading, employment and environmental standards remains a living issue. Both negotiating positions share the aim to reach a deal based on “no tariffs, fees, charges or quantitative restrictions between the UK and the EU and rules of origin” and to include within the scope of the future UK-EU partnership not just goods but cooperation on technical regulation, standards, non-trading barriers, as well as trade in some services, particularly for professionals and business services, which would include mutual recognition of professional qualifications.

However, there are fundamental issues of principle that separate both sides. The UK is content with a narrowly defined set of treaties on the various issues (e.g. air travel, fisheries, data, etc.) setting high principles. But the EU, following its own traditional approach, wish for a very detailed and comprehensive single agreement. The same is evident when it comes to how respective laws on procurement, state aid, environment, climate, labour and law should evolve, with the EU aiming for a “Level Playing Field” ideally requiring the UK to mirror evolving EU rules almost automatically, and the UK resisting this, because certain such EU standards (e.g. state aid subsidies) are higher in the UK than in EU27. Differences also apply over dispute resolution and the role of the respective courts.

The examples of other EU free trade and association agreements (Canada, Ukraine, Japan, etc.) indicate that to achieve deep and tariff and barrier free trade, and fluid movement of people goods and services, requires a strong alignment on outcomes (equivalence), if not necessarily identical legislation.

The Programme for Government 2019-2020 proposed to keep a degree of dynamic alignment in Scotland by way of EU Continuity Bills, which will be the subject of scrutiny and agreement in this Parliament.

Input into trade Relations

In terms of trade, it is worth highlighting the recommendations of the Institute for Government¹ and others that a formal structure for ongoing stakeholder engagement is necessary to negotiate trade deals, as exists in other large economies (USA, Australia, Canada, etc.). This is even more the case with Local Government, which is not a stakeholder but a competent tier of Government. As COSLA noted during the Scottish Parliament inquiry over the proposed US-EU trade deal (TTIP), ambitious trade deals such as the one already concluded between the EU and Canada (CETA) show that there are significant areas of concern over local public services and procurement obligations. COSLA is keen that any future Trade

¹ Oliver Illott, Ines Stelk and Jill Rutter, “Taking back control of trade policy”, Institute for Government, 2017.

Agreement, be they with the EU or with any other country or trading block, includes at the least the same safeguards for local public services that are currently provided by the EU treaties. The safeguards that were included in the CETA agreement are in our view the bare minimum that any future trade deal must cover.²

Other arrangements are possible, such as participating in EU agencies, interparliamentary and local government political dialogue. This is under discussion and COSLA is lobbying to ensure that continued political cooperation with our European partners such as via a UK-CoR Contact Group, which the EU Committee of the Regions has already formally agreed to set up - where MSPs and Scottish councillors representing COSLA will be able to sit – provided that UK-EU negotiators do not object to it.³

3. What are the priorities and challenges for Scottish businesses and organisations in operating within a UK internal market?

4. What institutional structures will be required to administer and enforce the UK internal market?

On 27 February 2020 the COSLA Leaders meeting agreed to insist that the new UK common frameworks to deal with cross cutting matters on EU returned powers, and participation of Scottish Devolved and Local Government, such as on environmental or state aid matters, is at least equivalent to what has, up to now, been the case when such matters have been dealt with by the European Commission.

State Aid and Competition

As we said in previous inquiries, it is concerning that on the issue of state aid, which shares broadly the same transboundary effects as EU environmental issues, the UK Government has already announced that the Competition and Markets Authority (CMA)⁴ will have oversight responsibility. Irrespective of the regulatory independence of the CMA, this can easily be perceived as Whitehall acting as both judge and jury on state aid issues.

While politically this is not a positive development at least on this issue the UK Government had more a solid case (integrity of the UK market being a reserved power) than is possible in environmental policy (which is mostly devolved, save for energy matters).

The Commission did have an exclusive power, as EU Single Market watchdog, to define State Aid Guidelines. These rules set out the limits and conditions that need to be met by public authorities to grant public subsidies, though formally not binding secondary legislation were treated as such given the ample discretion that the Commission have to interpret the Treaty provisions on state aid. That said, the Commission did consult extensively, including with local authority representatives, in some occasion on a bilateral or Local Government

² COSLA Submission to Scottish Parliament TTIP Inquiry 2015

http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/COSLA_TTIP.pdf

³ EU Committee of the Regions, Resolution RESOL-VI/031 17 May 2018 on the implications of the United Kingdom's withdrawal from the European Union for the EU's local and regional authorities; 195th Meeting of the European Committee of the Regions Bureau. 12th February 2020 – Setting up/Renewal of Working Groups, Joint Consultative Committees and other Political Bodies.

⁴ Letter Andrew Griffiths MP, Minister for Small Business, Consumers & Corporate Responsibility to the Rt Hon. The Lord Whitty, 28 March 2018.

[http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318 - Letter Andrew Griffiths to Rt Hon Lord Whitty.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318_-_Letter_Andrew_Griffiths_to_Rt_Hon_Lord_Whitty.pdf)

specific basis- in addition to consultations with Member States. The same applies to other matter relating to the Single Market such as Value Added Tax and the specific provisions on recoverable VAT by local authorities.

We are not aware that either the UK Government or the CMA are developing a consultation structure that is similar to what has been in place enjoyed at EU level and we urge for those to be set up. That will be also in line with the UK Government commitment to replicate at UK level, whatever consultation arrangements that Local Government enjoyed while the UK was member of the EU.

Indeed, the UK Government indicated its intention⁵ to find another way forward. It confirmed its goal⁶ of a flexible, non-statutory mechanism that, in essence, replicates the kind of engagement Local Government has on EU policy through the Committee of the Regions, but in a lighter-touch arrangement.

Procurement

While procurement is a Devolved matter, the need to ensure a level playing field across the UK as a result of repatriation of powers might challenge the principle of “Devolved by default” agreed with the Devolved Administrations by the previous UK Cabinet and ultimately reflected in the 2018 Withdrawal Act.⁷

However, because procurement falls within the ambit of international trade (a reserved power) Scottish procurement legislation will be affected by the terms and conditions that will be eventually agreed during Phase 2 negotiations between the UK and the EU as per the future trading relationship.

Having said that, the 2014 EU Procurement legislation, eventually transposed to Scotland by way of successive Procurement legislation and particularly the Procurement (Scotland) Regulations 2016, is in fact based and, in some respects, merely transposes the WTO Government Procurement Agreement (GPA). If the Canada-EU trade agreement (CETA), which particularly the UK sees as a useful template for the future UK-EU27 deal, is any form of guidance about the future relationship with the EU, then this did not require any change in Scottish domestic legislation, the EU procurement rules being higher than the GPA and the Canadian regime. Still an issue remains that, without detailed Scottish input into the UK negotiating position towards the EU, there might be matters that are overlooked and become apparent in Scotland only once the future UK-EU27 trade deal is implemented.

Policy Formulation and Enforcement

In terms of policy formulation, as COSLA’s various submissions have shown, there are tried and tested alternative models – the Italian and Austrian cases being perhaps the most promising, as they are constructive, incremental and mainly non-political ways of central-devolved-local intergovernmental negotiation. There is also merit in exploring further the

⁵ Letter Secretary of State MHCLG Sajid David MP to Clive Betts MP, Chair Commons Communities and Local Government Committee 15 January
<https://www.parliament.uk/documents/commons-committees/communities-and-local-government/Correspondence/Letter-from-the-SoS-for-Housing-Communities-and-Local-Government-relating-to-Brexit-and-local-government-15-January-2018.pdf>

⁶ [https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion(Withdrawal)Bill)

⁷ Cabinet Office, “Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland” March 2018.

Welsh Government proposal for the creation of a UK Council of Ministers - which like the EU council should have specific formations such as an Environmental JMC. We hope that the ongoing intergovernmental review of the JMC mechanisms would consider this option.

COSLA's view has consistently been that we are in favour of UK-wide arrangements where they are appropriate; however, we think that it would be contrary to the constitutional Devolution settlements that any new UK-wide body is a UK-Government body. In short:

- Any new UK (regulatory) body should have the ownership of all governments, including local governments (this is specifically discussed below), so that they can jointly develop approaches for better environmental protection, develop new shared outcomes, new guidance (e.g. shipments of waste) or implement instruments (e.g. Environmental impact Assessments)
- Any new UK (enforcement) body should be truly independent from all concerned governments, including the UK Government.

Lastly, it seems logical that in keeping with the Devolution settlement the new UK-wide body or bodies is replicated in Scotland on matters that do not have a UK transboundary effect. In that case there should be coordination between the Devolved and UK-wide bodies not unlike the mechanisms that exist between the different Environmental Agencies across the UK and Devolved areas.

5. What mechanisms should be available to challenge 'unfair' internal market practices?

6. What will be the impact of the UK internal market on devolved powers?

In the case of Scotland in particular, this future degree of interdependence between UK and Scottish responsibilities is unprecedented and will also impact Local Government's own relationships with both the Scottish and UK Governments and Parliaments.

COSLA initial assessment found⁸ that 64 out of the 153 EU returned powers concern Local Government. 18 of those will have a high impact, 16 of a medium impact and 36 a lower impact. Many of those are indeed Local Government powers.

Therefore, regardless of the final outcome of the ongoing political and legal discussions over the common frameworks there is a great likelihood that dealing with them will now require a degree of discussion and negotiation between Local Governments, Scottish and UK Government that is unprecedented in the Scottish local and devolved experience.

7. What should be the role of the Scottish Parliament in relation to scrutinising the UK internal market?

The Interparliamentary Forum on Brexit is welcome, as it should ensure that the Chairs and Conveners of Committees scrutinizing Brexit-related issues in the Scottish Parliament, National Assembly for Wales, House of Commons and House of Lords work together. Clearly as post UK Withdrawal legislation on common frameworks including UK-wide competition

⁸ COSLA submission - Scottish Parliament Finance and Constitution Committee on Common UK Frameworks (2018): https://www.parliament.scot/S5_Finance/Inquiries/COSLA_Submission.pdf

and state aid matters this cooperation should be developed further, as it should in the case of the interparliamentary dialogue with EU27 that is foreseen in the Withdrawal Agreement.

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