UK Withdrawal from the European Union – Governance and Update

**Strategic Development**

This report provides a commentary on the need for formal governance arrangements covering areas of shared competency between Scottish Local Government and the UK Government. It seeks Leaders’ views over both the principles and options for lobbying on a way forward. It also provides an update on the Brexit workplan.

**Summary and Recommendations**

Scottish Local Government needs replacement arrangements that will continue our ability to influence meaningfully the shaping of policy currently managed in Brussels.

Leaders are invited to:

i. Agree how best to proceed in our ‘ask’ for replacement governance arrangements between Local and Central Government over areas where we have shared competencies, as set out in paragraphs 10-19 of the report;

ii. Note that progress is already being made and that proposals would be helpful to all parties;

iii. Note that the Environment and Economy Board has recently considered a detailed paper on future Regional Policy and possible replacement for EU Structural Funds and that a paper on the matter will be submitted to the next Leaders’ meeting;

iv. Note that a paper on migration issues will also be submitted to the next Leaders’ meeting; and

v. Note any feedback provided orally from the Presidential Team’s meeting with Michel Barnier, European Chief Negotiator for Brexit, on 23 October 2017.

**References**

Previous key reports:

- Brexit Update – Leaders, January 2017
- Migration: Implications for Local Authorities – Leaders, January 2017
- Brexit Update & Mandate – Leaders, February 2017
- Stocktake Report on UK Withdrawal From The European Union (Brexit) – Leaders’ August 2017
UK Withdrawal from the European Union – Governance and Update

Strategic proposal
1. COSLA noted in November 2016 that, unless acted on, Brexit will create a governance deficit for local authorities in policy, legal and financial areas that have shared competencies with the EU institutions. Current EU statutory structures provide local and regional Government with a consultative role, backed up by a right to challenge proposals that infringe on the principles of subsidiarity and proportionality. In domestic law the UK’s 2011 Localism Act provides for local authority engagement in developing the UK’s EU policy positions that are to be delivered through councils and where a failure to implement fully could result in fines being applied by the European Commission to the UK and individual local authorities. COSLA is seeking replacement arrangements for Scottish councils that will continue that ability to engage in the shaping and co-ordination of policy.

Current COSLA Position
2. COSLA’s position remains as it was in November 2016, that this governance gap must be addressed. Since then internal research and discussion has taken place to inform this report.

3. Our suggested model going builds on that of the Committee of the Regions (CoR) that we have now. The CoR is a body of the European Union and the official consultative body for local and regional matters. It has direct access to EU negotiators. It has two main functions, to act as a deliberative chamber and to hold to account Commissioners in its plenary sessions. The CoR has a topic based committee structure covering amongst other things: citizenship and governance; territorial cohesion policy; economic policy; environment, climate change and energy; natural resources and agriculture; and social policy, employment and education. These committees debate motions and reasoned opinions that are eventually approved by the whole of CoR as an agreed position.

4. European Commissioners (in the later stages), or their staff (in the earlier ones), can and often do respond directly to the CoR. In principle, if changes that are felt necessary by the CoR to respond to the Treaty obligations on subsidiarity and proportionality are not made, it can refer the matter to the European Court of Justice.

5. In the UK we do not have either a Treaty or Constitution that protect ‘Local Government rights’. Any central/local negotiation processes we rely on are based on bilateral meetings with UK and other Ministers. Local authority association mandates for such negotiations come from our own governance structures. We have not yet established an ability to arrive at collective consensual positions to negotiate on a UK Local Authority Association (LAA) basis, other than through the UK Local Authorities Forum (a meeting of the Presidents or Leaders of LGA, COSLA, and both the Welsh and Northern Ireland LGAs - WLGA and NILGA respectively).
What is changing

6. During this summer the LGA, following our discussions with them on this issue, commissioned their own research into governance to make a case to its members over the need for this to be given political priority. With the Welsh and Northern Ireland Local Government Associations now also on board, all four UK local authority associations agree that this matter needs to be pushed strongly. Therefore, in September 2017 it was raised directly with two Ministers from the Department for Exiting the European Union (DExEU) in a joint meeting with the UK Local Authority Forum. COSLA President, Cllr Alison Evison led the input on this matter. While DExEU Ministers seemed slightly surprised, the response was not unwelcoming as they acknowledged the benefits that Local Government’s influence has had on EU policy and legislation over the years. This was followed up by discussion between the Associations and DExEU civil servants. Practically we need to arrive at politically acceptable, as well as practical and plausible, negotiation arrangements for the immediate Brexit agenda, and then in the post-Brexit world.

Proposed COSLA Position

7. Leaders need to be reassured that the emerging UK Brexit related law, funding arrangements, and regulatory frameworks are developing with meaningful local authority consultation, input and, preferably, consent. The main issues in order of immediacy are:

- The transposition of the existing direct regulation from the EU (covered by the EU Withdrawal Bill);
- Replacement arrangements for regional Policy and the European Social, Regional and Rural Funds, and opting into some post-Brexit EU cooperation programmes;
- Protecting public services where market liberalisation might be included in free trade agreements;
- Procurement arrangements and striking the right balance between local priorities and benefits versus the cheapest;
- The use of state aid locally, in particular, to address market failures but without creating regional competition and a race to the bottom; and
- A broader policy coordination of legislation currently done on an EU basis for which cross nation work is required.

8. The formal current UK Government position that, when the UK and Scottish Government make policy proposals Local Government has a chance to comment on consultation documents alongside many other stakeholders, is not acceptable.

9. The EU Withdrawal Bill will transfer many thousands of pieces of EU regulation into UK and Scots law, with an expectation that some 800 to 1000 pieces of secondary legislation will be required. Arrangements will be needed to allow expected drafting errors to be rapidly addressed. The Scottish and Welsh Governments have pointed out that the arbitrary ministerial power under the proposed ‘Henry VIII’ provisions undermines Devolution, which is why they are proposing Bill amendments to require the consent of Devolved Assemblies on areas of shared competency. COSLA’s position could be that consent equally be required for local powers and that there should be inclusive, constructive policy making during and post-Brexit, covering future UN and International Law as well as trade agreements. Meantime, structured relationships with Ministers who
may consider using the powers over secondary legislation will be helpful, and may also make it possible for COSLA to request their use if there is a good case.

**COSLA Suggested Model**

10. In looking for replacement arrangements for what we have now with CoR, we have taken account of what currently exists in the UK and in Europe (see Appendix 1). Separately we share common ground with the other Local Authority Associations, over what realistically the UK Government will be prepared to work seriously and quickly with us on, and crucially how and where we need to be able to exert influence.

11. The arrangement needs to allow us to negotiate meaningfully with the UK Government. Local government challenges would centre on potential infringements of the principles of subsidiarity or proportionality, but there would also be a positive agenda of working in partnership across the spheres of Government in the UK. Given the very short timeframes within which we seem to be working, an arrangement underpinned initially by a Memorandum of Understanding, running in parallel to the existing Joint Ministerial Committee (JMC) (comprising Prime Minister and First Ministers) could provide a structured set of regular negotiation meetings. The aspiration for statutory underpinning is likely to be a long term ask, given the well-established JMC has no statutory backing either.

12. We could give this a working title of the “UK Joint Local-Central Government Committee” or some variation on this. It is not a CoR, but what it would do is build on existing accepted good practice and provide an interface between UK Government and Local Government approximating to that between the Commission and the CoR.

13. To support an arrangement would be needed that allows us to bring together representatives of the four UK Local Authority Associations in a deliberative committee to formulate agreed opinions that could then be taken through the Joint Local-Central Government Committee. Granted it would create a bureaucracy, but it would be no more than we currently have and pay for as part of the EU.

14. While the specific negotiation model has not been discussed, the underlying principles do seem to have found some real support within UK Government at both political and official levels. We continue to seek some more public acknowledgement of this so that the four Local Authority Associations can begin more formal talks.

**Next Steps**

15. It would be very helpful if Leaders could provide views on how to proceed in our ‘ask’ for replacement governance arrangements. It’s important to reflect that progress is already being made. We already have a commitment to quarterly meetings with DExEU. A short-term alternative might be to simply apply a similar arrangement to the remaining relevant UK Departments’ ministers meeting with our relevant Local Authority Association political spokespersons.

16. We may need to be prepared to go with a degree of informality (even if supported with an exchange of letters) and an element of short-term expediency. But whatever is agreed would need to carry with it a real commitment from the UK Government to engage on a locality rights based approach. One that would ultimately embed an arrangement in statute and take us into the longer term of evolving policy frameworks and engagement in trade
agreements. Discussions are underway with the UK Government that may see the relevant DExEU ministers giving undertakings in Parliament.

17. Turning briefly to Scottish Ministerial arrangements, similar and corresponding issues will arise for devolved assembly policy. The principles, about protecting local self-governance in areas of joint competency, are the same but the solutions could be different. The key issue for COSLA would be joint working between Scottish and Local Government in the early stages of policy formulation and before formal proposals are made. This could be managed through a Memorandum of Understanding or even a statutory arrangement requiring discussion and agreement between COSLA and Scottish Government.

18. The most appropriate position may be to highlight the issue with the Scottish Government and Parliament and suggest that this is progressed within the context of the Brexit and local governance debates that are current, with the trust that an offer will either be based on the proposal we are suggesting for the UK, or on one of the other examples of good EU practice.

19. We hope that Leaders will be prepared to support the above approach or a variation on it. This will allow COSLA senior politicians and officials to begin pursuing the matter more formally.

**General Update**

20. Leaders previously have commented on the need to find an adequate replacement for EU funding. Leaders should therefore be aware that the Environment and Economy Board will consider a detailed report on negotiating principles that should guide COSLA lobbying in the forthcoming discussions to replace EU funds with domestic funding for local sustainable development. In so doing, it will also consider outstanding issues for current EU programmes and the impact of the EU Withdrawal Bill. It will further look at wider post-Brexit issues, such as what might happen post-Common Agricultural Policy and possible avenues to opt into some EU cooperation programmes. A report reflecting these detailed discussions will be submitted to Leaders at the end of November.

21. Similarly, COSLA’s Migration, Population and Diversity Team is working with relevant council professional associations and other officers to work up a response to the Migration Advisory Committee, who have been commissioned by the UK Government to report on the impact on the UK labour market of the UK’s exit from the EU and how the UK’s immigration system should be aligned with a modern industrial strategy. A report on this and broader issues around the future for EU citizens living in the UK and UK citizens living in the EU, will also be submitted to Leaders at the end of November.

22. As Cllr Evison mentioned in her Presidential update to COSLA Convention earlier in October, she and Cllr Houston will meet Michel Barnier, European Chief Negotiator for Brexit, in Brussels on 23 October 2017 to explain Scottish Local Government’s position on Brexit. An oral update will be provided on that meeting.

23. For information, a summary of recent UK Government activity is attached as Appendix 2.
Summary and Recommendations
24. Scottish Local Government needs replacement arrangements that will continue our ability to engage in the shaping of policy currently managed in Brussels.

25. Leaders are invited to:

i. Agree how best to proceed in our ‘ask’ for replacement governance arrangements between Local and Central Government over areas where we have shared competencies, as set out in paragraphs 12-22 of the report;

ii. Note that progress is already being made and that guidance would be helpful to all parties;

iii. Note that the Environment and Economy Board has recently considered a detailed paper on future Regional Policy and possible replacement for EU Structural Funds and that a paper on the matter will be submitted to the next Leaders’ meeting;

iv. Note that a paper on migration issues will also be submitted to the next Leaders’ meeting; and

v. Note any feedback provided orally from the Presidential Team’s meeting with Michel Barnier, European Chief Negotiator for Brexit, on 23 October 2017.
POSSIBLE MODELS FROM ACROSS EUROPE

In the UK the Joint Ministerial Committee (JMC), is a consultative body established by a memorandum of understanding between the UK Government and devolved administrations in Scotland, Wales and Northern Ireland. The JMC seeks to act as a focus for the coordination of the relationships between these administrations.

Building on the Partnership Council for Wales model: this joint Local and Welsh Government body was created by the Government of Wales Act 2006. Being in statute it is a step further than the 2007 COSLA – Scottish Government Concordat. However, as it doesn’t specifically cite the European Charter on Local Self-Government, it does not provide an ability to resist unilateral propositions from the Welsh Ministers to reduce further the number of councils.

Formal Intergovernmental bodies – unlike the UK’s Joint Ministerial Committee there are highly formalised ministerial bodies such as Conferenza Statio Regione in Italy and the Inter-ministerial Commissions in Spain. This is a good option for Devolved Administrations but unlikely to address local authorities’ engagement, as local authorities are not included.

Joint Central Local Team – The Dutch have a Model underpinned by a political Code of Inter-governmental Relations. It is a much larger joined up approach than the Memorandum of Understanding for Devolved Administrations or the Scottish and Local Government Concordat, and crucially is based on a partnership between central and local level. While the UK consults widely when drafting legislation, the Dutch Model is much more open. As elected representatives, during policy formulation councils are considered as part of the country’s governance and not lumped in with civil or private stakeholders.

Political Forum of Ministerial Coordination: Similar to, but more effective than, the UK’s Joint Ministerial Committee (JMC), another example is the Austrian Landeshauptleutekonferenz (Governors’ Conference). This is not so much due to the mechanism itself but because of the different party political structures there. The Welsh Government’s proposal to reinforce the JMC is not dissimilar and could be explored further but including Local Government representatives.

Parliamentary Hearing and Mandate: If we followed this (Danish) model, the UK Parliament would consult widely including Local Government before giving a formal negotiating mandate to the National Government. It would take the Legislative Consent Motion and apply it more widely, including at the start of international negotiations. This is something that successive UK governments have refused as it is outwith our constitutional model.

Another Parliamentary Chamber – the Bundesrat is the upper legislative chamber in Germany. It represents regional governments. In the UK, this could mean having a 3rd Chamber, where a delegation of MSPs, AMs, English MPs and Local Government representatives would sit to consider UK wide legislation and foreign trade or other agreements affecting devolved and local powers.
UK Government Timeline

19 June: David Davis MP (Secretary of State for Leaving the European Union) and Michel Barnier (European Chief Negotiator for Brexit) meet to start the first formal round of negotiation talks. The content of the 'first phase' is decided to be citizens' rights, the financial settlement, the Ireland/Northern Ireland border and 'other separation issues'.

26 June: Government begins its publication of a series of papers with a paper on EU nationals' potential status in the UK, as well as their vision for UK citizens in Europe.

13 July: EU (Withdrawal) Bill is introduced to the House of Commons.

17 July: the second round of talks between British negotiators and their EU counterparts begin. Discussion over citizens’ rights take place but no other major developments occur.

28 August: the third round of Brexit negotiations begin accompanied by the publication of a series of position papers and future partnership papers from the UK. Talks focussed on citizens’ rights, the financial settlement and a range of other issues including judicial cooperation and customs arrangements.

11 September: EU (Withdrawal) Bill passes its Second Reading in the Commons unamended. The Bill will now go through the Committee and Report stages and be voted upon at its 3rd reading before entering the Lords.

22 September: Prime Minister Theresa May makes a major speech on Government policy in Florence, outlining her wish to see a two year transition period during which the UK pays into the EU budget, a new style of trade agreement for the UK and the EU.

28 September: The fourth round of negotiations close with continued discussion on citizens' rights, the financial settlement and Ireland.

19 October: The Prime Minister writes to all EU citizens living in the UK.

19 October: The Prime Minister addresses EU Leaders in an after-dinner speech.

Summary of Parliamentary Bills of Relevance to Local Government

Repeal Bill: Repeals our membership of the EU and convert all existing EU law into UK law
Trade Bill: Facilitates UK trade deals in future
Immigration Bill: Enables a UK immigration policy and ends free movement across the EU
Customs Bill: Ensures that we have a stand-alone customs regime on exit
Fisheries Bill: Ensures UK control of waters and quotas
Agriculture Bill: Enables a post-Brexit CAP and agriculture policy

UK Papers Published in Advance of Formal Negotiating Rounds To Inform Discussion

Safeguarding the position of EU citizens in the UK and UK national abroad: All EU nationals lawfully resident for 5 years will be able to apply for “settled status”.

Continuity in the availability of goods for the EU and the UK (position statement) / Future customs arrangements (policy paper): Seeks a partnership arrangement with the EU for a temporary and long-term customs union. Also seeks the ability for UK trade deals during exit negotiations.

Exchange and protection of personal data: Seeking a post-Brexit deal where there is no substantial regulatory change.

Enforcement and disputes resolution: ECJ may have role during a transition period. EU citizens in UK only subject to UK law.

All papers can be found at: https://www.gov.uk/government/collections/article-50-andnegotiations-with-the-eu#position-papers