

Inquiry into EU reform and the EU referendum: implications for Scotland

COSLA

COSLA welcomes the opportunity to make a submission to this Scottish Parliament inquiry. EU reform, good governance and subsidiarity have all been the subject of a good degree of consensus among Scottish Councils for decades. This is the latest of a series of submissions to the Scottish Parliament over recent years.

COSLA as a cross-party organisation does not take a view on the issue of the in and out referendum. However, just as we did with our submission to the Smith Commission we do have specific views on the issues of EU Reform that we would like to see addressed during the negotiations that may see a new settlement for the UK and most likely to the EU as a whole.

While we are likely to come up to agree a full detailed position in the early Autumn COSLA already has a detailed and agreed position on EU reform from the full Convention of June 2014. This submission takes the our agreed 12 key position and uses them to address the more recent key developments on EU reform and related Scottish/UK developmens and likely direction of travel on this issue.

Key recommendations:

General

- *COSLA believes that EU involvement should take place only when it has clear EU Treaty competence (the principle of conferral), and where its' actions can provide real EU added value;*
- *COSLA strongly defends the **subsidiarity principle** whereby “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” as well as the principle of Proportionality;*
- *COSLA is a keen advocate of the position that European Union legislation should fully respect the local competences and Autonomy of Councils in organising and providing local services*

Comment:

The current Treaties hold an internal contradiction regarding subsidiarity: on the one hand the Preamble mentions the commonly understood notion of Subsidiarity that ‘decisions should be taken at the lowest possible level’. However the actual article 5.3 of the Treaty, which is the actual provision that is enforced, says something rather different, which is that decisions should be taken where it is more efficient, fundamentally saying that if an “*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.”

This often is taken to mean that whenever the EU and national and/or subnational level share competencies (and this is often the case in the vast majority of issues) the action should be taken at the EU level. This view is often led by the Commission. An example is the recently launched *Better Regulation package*, which in many ways is the first set of proposals put forward by the Commission to address the concerns of the functioning of the EU raised by the UK (and many others) does not fundamentally change that view, nor does the way the Commission justify its actions.

Thus a clear avenue for EU reform would be to either reinterpret the Treaties or indeed reword their subsidiarity provisions to ensure subsidiarity in practice actually means that “decisions should be taken at the lowest possible level”.

Coupled with that Protocol 26 on Services of General Interest, which establishes that the EU shall “*respect the essential role and the wide discretion of national, regional, and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*”. This was greatly welcomed by COSLA and our local government peers across the EU. However as this Protocol contradicts Article 14 of the Treaties which gives leeway to the Commission to regulate the EU single Market including how public services are to be defined and provided, the Commission has been able to exploit this contradiction and not fully apply Protocol 26. This has resulted in issues, for example, around TTIP that could have been resolved earlier on and upfront by simply evoking Protocol 26 in the negotiations with the US. Instead there has been a great deal of political controversy that could have otherwise been avoided.

It would be useful to eliminate the contradiction between Article 14 and the Protocol 26 so as to ensure and ensure that the EU respects local service provision, particularly when this does not have any impact in the EU-wide internal market.

Detail

Scottish Government

1. *Scottish Local Authorities should be considered equal partners in developing EU policies and legislation in areas that fall within their competence and affect the services they deliver.*

Comment

Local Governments are not ‘stakeholders’ but public democratic institutions in just the same way as the Scottish and UK Parliaments and Governments are. It is regrettable that the UK and Scotland are among the few democratic countries in the world that do not have constitutional protection for local government. But it is however unquestionable that locally elected members form a tier of accountable government and that many of its powers are shared with the Scottish, UK and EU spheres, in what it is effectively a complex Multi-Level Governance system.

For this to work whenever the Scottish Government formulates a “Scottish position” it must do so in conjunction with Local Government particularly when the powers being exercised at an EU level affect local government. This is starting to work. Over the last year and a half there have been detailed discussions between COSLA and Scottish civil servants as well as a range of statements both from COSLA and at Ministerial Level that go in that direction.

However to date this is far less a developed arrangement when compared with the robust systems that our EU peers from Scandinavia and the Netherlands have.

2. *Scottish Local Authorities, through COSLA and other representative bodies, should work closely with the Scottish Government in developing a systematic mechanism to assess the impact of EU legislative proposals and legislation on local competences across policy areas.*

Comment:

Following on from the above examples in the Netherlands there is a detailed *Code of Inter-institutional Relations*¹ that define an effective partnership approach between the Dutch national association for municipalities and the Dutch government involving Joint EU dossier Teams for all major issues where local and national powers are concerned.

3. *Scottish Local Government needs to be involved on a regular basis in joint policy formulation and development with the Scottish Government. COSLA is aiming to become an equal partner in issue-based working groups with Scottish Government, similar to that already institutionalised in other European countries such as Netherlands, Denmark and Finland.*

Comment

This is essentially our argument against the position that institutionalising such an arrangement cannot be done in Scotland due to the sui generis constitutional nature in the UK. We believe that such arrangements exist not only in Scandinavia and the Netherlands but also in many other rather diverse Member States such as Austria, Sweden, Spain and Italy. These need to be formalised here if there is to be meaningful localism.

4. *The Scottish Government needs to engage in joint forward planning and work with Scottish Local Government on the Scottish Government’s EU strategy - the Action Plan on European Engagement - in order to adequately cover areas concerning us.*

Comment

¹ <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brochures/2009/07/28/code-of-interadministrative-relations/07br2008g111.pdf>

While the recent EU Action Plan was subject to some general discussion between the COSLA and Scottish officials before its approval and that local government is broadly mentioned it is none the less not neither a core element of the strategy or policy making arrangements. This needs to be revised in line with the above statements.

As regards to the wider issue of EU Reform we note that since last year the Scottish Government developed a paper on this issue, one that was subsequently reshaped for its submission to the Smith Commission. While there are a lot of points that we can agree on the way this was developed constitutes a missed opportunity for both local and national government to come together and develop a shared understanding on how the EU should made work for Scotland. It could have followed the same way that COSLA and the then Scottish Executive did in the previous EU renegotiation back in 2001. We would be keen to carry out a similar same exercise this time round as negotiations for EU reform take place.

5. *Scottish local authorities need to be closely involved in formulating Scottish positions on implementing key EU policies and specific parts of EU legislation.*

Comment:

Inclusive EU policy formulation (as mentioned above) is important. It is also equally important that joint arrangements are needed to ensure that legislation is transposed without gold plating and in a way that maximises discretion over how the outcomes can be realised locally. The “Guide to Handling EU Obligations” only generally mentions Local Government as a stakeholder and not clearly as a tier of elected representation on a par with the others. We are often the sphere that actually has the competence, experience and knowledge to act and deliver new EU legislation and frameworks. We have urged the Scottish Government to fundamentally revise the way EU obligations are handled so that whenever a local government power is involved the first point of call is COSLA or the local authorities themselves, as appropriate.

UK Government

6. *COSLA urges the UK Government to put into practice the principles of involving Local Government in Scotland in developing the UK negotiating position on EU legislative proposals reserved to the UK level and covered by the Localism Act 2011.*

Comment

Compared to Scottish legislation, UK legislation (and the EU Policy Statement of the Localism Act 2011) has a much clearer and explicit recognition of the role of Scottish local government and specifically COSLA in its EU policy formulation at UK level. COSLA and our English peers helped develop this approach. While it is intended avoid, and failing that respond to, infraction proceedings COSLA it has already proven a constructive mechanism to ensure that Scottish Local Government views

are taken on board on UK negotiating positions to the EU, or on the implementation of EU policies.

While there are areas where the UK Localism provisions could be improved and more consistently applied across Parliaments we would be keen that the Scottish Government develops an equivalent mechanism in Scotland.

Scottish Parliament

7. *Considering the role of state and devolved parliaments in monitoring subsidiarity, there should be a right for Scottish Local Government (and Scottish Committee of the Regions members) to formally request the Scottish Parliament to launch a subsidiarity check on EU draft legislation directly affecting Scottish councils.*

Comment

COSLA asked the Smith Commission to recommend specific provisions over the issue of UK and Scottish Parliament cooperation in Subsidiarity Scrutiny. In the Balance of Competence Review on subsidiarity the UK Devolved Parliaments were not even mentioned, only Westminster. At the moment, unlike other Member States with Federal and devolved structures there is little by way of UK inter-parliamentary arrangements ensuring that the Scottish Parliament is associated with the Subsidiarity Early Warning arrangements as intended by the Lisbon Treaty Subsidiarity Protocol.

A clear avenue for improvement is for the Treaties to more explicitly recognise the involvement of Devolved legislatures in the Early Warning System. Equally we welcome the efforts led by a range of national parliaments, including the UK House of Lords, in putting forward a “Green Card” system. This is presently being trialled as a procedure which both allows Member State parliaments to react to legislation and also to put forward new proposals.

COSLA is in favour of more robust new provisions on subsidiarity, ones that would allow national parliaments to block EU proposals when a majority are clearly against them. Equally there is a need for changes so that the parliamentary contribution is not always reactive and contrarian but proactive. The Scottish Parliament (and other devolved parliaments) should be treated like a national parliament within this system (as is already the case for the Belgian regional parliaments), including being represented in the official inter-parliamentary cooperation body COSAC.

Having said this, there is a scope for the Scottish Parliament to work within the current Treaty rules – in particular as many MSPs are involved in the streamlined approach to handling EU dossiers which builds on the existing Scottish Parliamentary system of EU reporters. As mentioned in previous submissions COSLA is able to provide, very early on, and occasionally years in advance its views on the impact on local government of draft EU legislation. This could be better used by the Scottish Parliament to inform its own positions and scrutiny work.

We regret that the recent review of the Scottish Parliament Standing Orders did not accept our request that COSLA should be recognised as acting on behalf of Local Authorities (or Local Authorities themselves) as part of Rule 10.A.2 alongside the Scottish Government, the UK Government and UK Parliament. All should have an equal status in bringing to the attention to the Scottish Parliament matters concerning compliance with the principle of subsidiarity of EU legislative proposals. We hope that the Scottish Parliament will soon reconsider this. It would bring the Scottish Parliament closer to the high standards of the Danish and Finnish Parliament's EU Affairs Committee arrangements which deliver probably the most robust scrutiny of EU legislation.

8. *Existing arrangements between Scottish MSPs and councillors in the EU Committee of the Regions should be deepened to strengthen a joint Scottish approach.*

Comment

The Committee of the Regions is an advisory body of the EU institutions which is to date the only official channel that local authorities and devolved institutions have to participate in EU decision making. Since the Lisbon Treaty it has also the power to go to the European Court of Justice to enforce the Principle of Subsidiarity.

Currently COSLA nominates and supports four Members. The Scottish Parliament nominates another four. They are all unpaid members but with an official status that results in them attending around 10 meetings a year.

It is widely believed that CoR has failed to develop its full potential. Partly the problem arises from its original design. It mixes a large diversity of sub-Member state representatives. Also members do hold a representative mandate - once accredited they are not bound to represent or be accountable to the local or devolved institutions that nominated them. So, rather than being a legislative chamber actually representing federal and devolved or local governments such as the German or Austrian Bundesrat, it is a deliberative assembly such as the French or Spanish Senate (both made in part by subnational members)

COSLA welcomes the recent proposals by the Committee of the Regions to address their structural weaknesses of the CoR². COSLA and the Scottish CoR members contributed to the review.

COSLA is in favour of a more coordinated approach among Scottish CoR members acting as a national section within CoR. Considering that at best only 4 Scottish Members can attend a given CoR meeting (that is, less than half of other countries of

² Committee of the Regions (2015) "Resolution on Improving the functioning of the European Union: Lisbon Treaty and beyond" RESOL VI-005, <https://webapi.cor.europa.eu/documentsanonymous/cor-2015-03307-00-00-res-tra-en.docx>

a similar size) it is essential that on matters of national interest there is a coordinated, cross-party approach at CoR and beyond.

European Commission

9. *Having the main legislative initiative, the European Commission needs to fulfil its EU Treaty obligations. It needs to recognise in a robust way local and regional competences in its pre-legislative consultation procedures, ensuring that these specifically address local impacts.*

Comment:

As mentioned in the first section, the Commission nearly always adopts the view that subsidiarity should be interpreted as meaning economies of scale and that where there are shared competences decisions should be taken at EU an level, where the Commission has an effective monopoly of legislative initiative.

There is no reason why 60 years on the Commission should continue to have such a monopoly. It could perhaps be helpful to improve the democratic legitimacy of the EU that the European Parliament, National Parliaments and the Council shared this power.

The Commission is increasingly aware that the way it acts causes resentment and alienation. For this reason we welcomed the recent Better Regulation Package that aims to consult more and to have greater reassurances that new legislation is really relevant and necessary before it is tabled. Unfortunately when trying to assess the impact of future EU legislation at a local level, or simply its subsidiarity implications, the Better Regulation package provides very limited improvements. There is scope for more robust provisions as indicated in the first section.

10. *The European Commission must ensure that, in the evaluation of the effectiveness of legislation, local governance is actively considered.*

Comment

The Commission continues to have undertake only limited assessments of the impact of EU legislation locally even when in areas such as waste or energy efficiency where it is the municipalities that implement most of the EU legislation. The engagement with local government representatives such as COSLA is patchy and very much depends on the specific department, policy and lead civil servants. To be heard often requires the initiative of local authority associations such as COSLA.

Most of our sister associations take great exception to the recent agreement between the European Parliament and the Commission to classify local government members and officials as lobbyists requiring them to register alongside private individuals and companies if they want to engage in any way with the EU institutions.

This is entirely inappropriate and contrary to the Treaties themselves (article 4 TEU obliges the EU institutions to respect local government). It is even more pointed an

attack on the democratic mandate of locally elected members given Devolved institutions and Member State correctly are not required to register. This is why COSLA and our peers are campaigning for this mistake to be rectified.

European Parliament

11. *COSLA seeks to increase the interaction between Scottish Members of the European Parliament (MEPs) and senior councillors.*

Comment:

We respect the separate electoral mandate of MEPs as well as their different workload, timescales and availability. However there is a need to work collectively across the different spheres of elected representation. There is merit in exploring a system such as in the Danish Parliament where MEPs have a structured relationship with MPs in the scrutiny of draft EU legislation and the formulation of national negotiating positions. Our sister organisation Local Government Denmark is part of that scrutiny system.

Local Government

12. *Scottish Local Government's collective & concerted action in Europe will be strengthened through regular exchanges between councillors with an active role in EU affairs, through the Scottish Local European Elected Representative group (SLEER)."*

Comment:

Scottish Local Government EU engagement is vast and diverse. It is probably more comprehensive than that carried out by the municipalities in other EU countries of a similar size. This sort of engagement goes beyond COSLA's own European priorities which have been determined by our own governing body. Because of this there is merit in ensuring a better understanding of these diverse sets of engagements to identify where there are areas we could work together for the overall benefit of the Scottish people. SLEER has been used to help co-ordinate our positions in the past.

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