



## COSLA submission

### **Impact of the European Union (Withdrawal) Bill on the Devolution Settlement**

1. The Convention of Scottish Local Authorities (COSLA) as the national and international voice of Scottish Local Government is pleased to provide a written response to this inquiry. It updates earlier submissions and oral evidence that we have made to this and other Committees of the Scottish and UK Parliaments.
2. COSLA's Leaders and Convention are continuing to consider the implications of Brexit for local government, local economies and communities in Scotland. From the very beginning of the discussions concerning the outcome of the EU Referendum, it was clear that the role of local government had scarcely featured in the debate. This was despite local government having a legitimate place as a sphere of democratic government in Scotland, the UK and Europe. COSLA is actively seeking a formal governance or consultative model to be developed that engages with Scottish councils.

### **The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers;**

3. The Bill confirms the March UK Government 'Brexit' White Paper intention to ensure that all EU law in force on March 30th 2019, will remain so (but as UK law) the day after. However, this is not straightforward. The more obvious and easier to deal with laws are the Directives, as these are already in the UK and Scottish statute books having been transposed into domestic legislation (law or statutory instruments under the ECA).
4. However, as COSLA's own position has long identified:
  - There are many pieces of legislation that are not in UK Statute that now need to be transformed into UK law – namely the Regulations and Decisions.
  - Equally there are pieces of legislation that, to work, will require reciprocity with the EU.
  - There are binding reporting obligations to the EU.
  - There are important aspects of EU regulation, such as the several State Aid Guidelines, which in some cases are effectively by-laws of the Commission, that do not appear to be covered by the Bill. This implicitly leaves full discretion to Ministers to change or scrap them.
  - Finally, there are shared competencies on single policy issues (e.g. food safety) that are now spread between Local, Scottish, UK and EU laws and regulations.
5. As was expected, the difficulty with this draft Bill is that it is not just an amending bill, but an "omnibus bill". This is not unusual with EU law. The Commission often uses one new piece of EU law to amend ('recast') several other pre-existing ones. The result is difficult to read as the text approved is just a collection of paragraphs that are to be amended elsewhere. In the case of the Withdrawal Bill, this is virtually unavoidable as it tries to cope with landing the implications of many thousands of pieces of EU law.

6. This raises a number of issues:

- It places the main power for repatriating and adapting these sources of EU law into the hands of UK ministers, with only consultation allowed for Scottish Ministers. This risks excessive ministerial discretion and a lack of accountability for powers that are currently shared between the EU and the devolved administrations (often with Local Government input).
- Parliamentary scrutiny is limited. In the case of the Scottish Parliament its main contribution would be at the beginning of the process with the issuing of a Legislative Consent Motion.
- The Bill incorporates most of the “EU acquis”. What it particularly lacks is a statutory mechanism for negotiation and policy coordination for areas of shared or devolved competencies with devolved bodies or local government. The lack of an intergovernmental or interparliamentary arrangement (including councils) for the returned powers does not feel like ‘bringing the powers home’.
- As things stand we will have less local government influence on existing EU Policy areas than we do now. The excessive discretion that could be given to UK and Scottish ministers without a challenge over subsidiarity and proportionality would be a backward step.
- The Bill makes no provisions for policy areas that might need to remain shared with the EU 27, or could be covered by the future trading agreements with other countries or the post-Brexit EU. This is despite the UK Government’s “future partnership” position papers which see the possibility of the UK opting into some EU programmes or being associated with some EU policies.
- Also the UK position paper on jurisdictional and dispute resolution matters tabled last August leaves the door open for the UK to opt into the jurisdiction of the EFTA Court or an equivalent arrangement.

7. COSLA believes in principle that the currently devolved and local powers should remain where they are, even if new co-ordinating arrangements are needed to manage competencies that are currently shared with other EU member states. This point in time presents an opportunity to address the imbalances and piecemeal approach of the last 20 years of devolution where shared competencies rarely feature due mostly to the clear separation of policy areas into either reserved or devolved areas. We need consideration to be given as to how constructive and cooperative intergovernmental / interparliamentary decision making can be achieved across the UK. Our preference is that the arrangements to do this should be in the Bill.

**The approach proposed in the Bill for repatriating powers which are currently competences of the European Union and the implications of this approach for the devolution settlement in Scotland;**

8. ‘Brexit’ will be a significant change to the UK constitution. We could develop distinctive governance approaches not tied to our current UK wide arrangements. The unique position (compared to many federal states) of the UK devolution model, where powers were devolved in full to Scotland, is quite unlike the EU central structures in, for instance, Germany and Austria where most powers are shared with the federal government which sets most of the basic legislation. The same could be said of Italy and Spain.
9. From a local perspective, many powers are presently seen as being exclusively managed by either Scotland or the UK. This is misleading as the reality is that many are in fact also shared with the EU through the development and implementation of policy frameworks, in which all spheres of Government have a role to play. These shared powers will still need to be shared in many cases. This matter is covered in different parts of the Bill.

10. In that respect the initial detailed list of 111 powers identified by Scottish ministers in their correspondence (on 19 September) to this Committee is accurate. But it is also the case that many of the powers do not singly concern the devolved arrangements. Environmental and energy legislation, state aid, procurement and trading standards currently concern local government as well as the Scottish Parliament..
11. Brexit provides a challenge to the existing constitutional and political settlement of the UK. While Scotland has not had an issue with the existing model of asymmetric and piecemeal devolution of powers – other countries may be less content. The Prime Minister’s observation is that this model has so far been one of “Devolve and forget” by Westminster. But even now Westminster has shown little interest in creating an inclusive UK wide policymaking process more involving devolved and local government. If the ‘United Kingdom’ is to count for anything Brexit offers an opportunity for, perhaps even requires, a joined-up partnership based, coproduced and owned UK multi-level system that maintains the unity across the 4 countries in many of the current EU policy areas while allowing local discretion.
12. So far it is apparent that there will be some current EU powers that should be managed at a UK level and other that could be fully devolved. We simply need to apply the same logic which saw some powers transferred to the EU as they had impacts beyond local and national levels. Matters with a UK dimension include issues such as state aid that requires co-ordination to avoid damaging our internal market. But we would question the right of the UK Government alone to define such an issue and believe it should be done in partnership with devolved and local administrations.
13. The “Proposed Amendments to the European Union (Withdrawal) Bill” document outlined by the Scottish Government on September 19 would change the Bill’s provisions, with Scottish Ministers being consulted to Scottish Ministers giving their consent. This would introduce a new constitutional settlement closer to a federal model by introducing a form of multi-level governance, something that it is sorely lacking in the UK. A limitation is a risk of a “joint decision trap” - or mutual veto, delivering a political stasis. It would be better if a more holistic approach could be agreed to deliver a consensual, intergovernmental decision making mechanism. Further, below we suggest a range of other possibilities that could be considered.
14. From a local government perspective, we are currently being left on the side-lines as arguments are made over which part of central government has the upper hand. There is no mention on how powers could be shared on a tri-partite bases between the UK, Scottish and Local Government. The amendments we are aware of do not appear to touch directly on the Scottish Parliament. Scottish Parliament scrutiny and consent powers (compared with Scottish Government) are not significantly changed.

### ***Towards a UK subsidiarity settlement***

15. Under the EU Treaty 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. Such a principle does not currently exist in the UK or Scottish constitutional arrangements.
16. However, it is worth noting that the UK Government January 2017 White Paper “The United Kingdom’s exit from and new partnership with the European Union” covers this area (without calling it Subsidiarity) saying that

*“3.5 As the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before. We have already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved...”*

*3.8 We will also continue to champion devolution to local government and are committed to devolving greater powers to local government where there is economic rationale to do so.”*

17. Also, the second White Paper (published in March), “Legislating for the United Kingdom’s withdrawal from the European Union”, contains a similar undertaking

*“As we leave the EU, we have an opportunity to ensure that returning powers sit closer to the people of the United Kingdom than ever before”.*

This is reprised in the main text:

*“4.5 This will be an opportunity to determine the level best placed to take decisions on these issues, ensuring power sits closer to the people of the UK than ever before.”*

### **Local Government**

18. There is no statutory constitutional protection for local government in any of the local government jurisdictions of the UK. This is at odds with the European Charter of Local Self Government which the UK Government signed. This has repeatedly been the source of concern as the Council of Europe’s Congress of Local and Regional Authorities monitoring reports (the last one in 2014). Local Government engagement in the UK side EU policy formulation has been characterised as ad hoc, and heavily influenced by the ethos of a given policy department, as well as changing political circumstances.
19. One aspect of this was addressed as a by-product of the Localism Act 2011. It concerned the EU fines being passed down to a council where they are deemed liable. Both the English (LGA) and Scottish (COSLA) Local Authority Associations made the ‘natural justice’ case that a punitive approach needed to be preceded by our engagement in an early local-central EU policy formulation mechanism, so by better designing the policy and its application we could avoid EU fines for infringement later on. This resulted in the UK Government “Policy Statement on Part 2 of the Localism Act 2011”. The Scottish Government belatedly produced similar guidance<sup>1</sup>. While both sets of guidance require Local Government to be actively involved in the formulation of UK and Scottish Government EU positions neither is used proactively by them to guide civil servants, although occasionally the texts are cited by us as local government counterparts.
20. There is a strong case to revisit arrangements to ensure that Devolved and Local Governments participate as equals in the Brexit withdrawal process as far as their competencies are concerned. There is a similar case for our engagement in the negotiation of future Trade and other international agreements, and in the development of what may be called the ‘UK Shared Prosperity Fund’ to replace existing EU funding programmes. We should be able to build on the good work of Local Government with Devolved and UK Ministries (BEIS, DEFRA, CLG) to draft a UK Partnership Agreement as a basis to develop these new frameworks.

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<sup>1</sup> Scottish Government (2016) “Influencing EU Policy A guide for Scottish Government officials”.

21. This would both build on the good practice and know how accumulated in designing and delivering EU frameworks over several decades, and also acknowledge that the large UK local authorities have their own significant budgetary and regulatory weight, particularly in providing the right business climate for SMEs, who collectively are the largest employers in the country. Any new UK place-based policy and funding arrangements needs to be developed with local government to ensure they are sufficiently place-specific and draw from all the territorial capital (resources, infrastructure, know how) of a given area.

**Apportionment of returned powers:**

22. Powers should be allocated following the principles of subsidiarity and proportionality and homemade equivalents to matters such as EU competition law (perhaps including a “UK internal market test”). Essentially local or Scottish policy differentiation should be the norm when there is unlikely to be a distorting effect in other parts of the UK, or a failure to fulfil the intended outcomes of UK policy or commitments. We also need to avoid the dead hand of bureaucracy where it is disproportionate to the effect of the regulation. Procurement regulation is a case in point with wide application. Only 3.5% of procurement contracts above the EU thresholds are awarded on a cross-border basis (for services it is even lower at 2%), yet all contracts above the threshold are tied up in red tape. We run a risk that similar effects being achieved if powers are returned without clear criteria for apportioning them. Criteria on allocation of powers should be based on proportionality, a demonstrable UK wide dimension and subsidiarity. All need to be explicit in the Bill.

23. Local government would like to take a more nuanced view on the regional and local devolution of EU competences. Some legislation could clearly benefit from being lift and dropped as is, amended to ease implementation, and some simply being dropped. What we will want is to be able to participate in framing the new UK and Scottish legislation and to seek flexibilities in line with the principles of subsidiarity and proportionality.

24. Using again the procurement example, current EU rules make it very difficult to introduce “Buy Local” clauses in public tenders. Equally they set detailed limits on how and when to share local public services through joint working between councils. During the passage of the present EU Directives we argued that such detailed provisions were disproportionate for the overall goal intended (to enable competition from the rest of the EU) when applied to local government. The Withdrawal Bill and process provide opportunities to revisit this.

**Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements for these suggested by the European Union (Withdrawal) Bill; and alternative models for discussing, agreeing and operating any common frameworks that may be required;**

25. Yes - there is. The existing principles of robust, transparent and fair rules should continue to underpin the returned EU powers on environmental legislation, trading standards, energy efficiency, state aid and procurement regimes post UK withdrawal. The ‘Brexit’ process allows us to rethink whether the regulatory regime is proportionate, consistent and manageable in a way that prevents unfair competition but stimulates local economic development.

26. After withdrawal, there will be market and regulatory issues that need to be dealt on a UK-wide basis to maintain the single internal market. The notion that this should be done by restoring pre EU -membership Westminster-only arrangements seems unreasonable as devolution and multi-level governance has changed the constitutional and legal landscape in the intervening period. New models of intergovernmental policy coordination are needed.

27. The UK Government's 'Brexit' White Papers and position papers, as well as the Explanatory notes of the European Union (Withdrawal) Act, leave the option to set up an UK-wide regulator that oversees and issues rules to prevent unfair competition and discriminatory subsidies given by public authorities across the UK. Given the integration of the UK's own internal market this approach may seem sensible, but the extent of the regulation could become problematic if the bodies lack effective democratic accountability and start replicating the bureaucracy that has gone on before. An example is over the current State Aid regime where the Commission acts as a political executive and not just a market regulator.
28. Transposing such a system to the UK so that one tier of government would be both regulator and beneficiary would not be desirable, the more so given the increasingly divergent policy and political landscape across the UK. A more, independent, partnership based regulator than what is currently proposed seems more in line with the political and constitutional realities of the UK.
29. There would be benefit in considering establishing a UK-wide competition body whose oversight is independent of UK, Devolved and Local Governments, but with the aid and other guidelines being drafted by a partnership of the UK, Devolved and local government representatives. The same arguments apply to an independent regulator overseeing many other issues from Energy standards, to trading standards to atmospheric pollution, environmental impact assessment.
30. We expect that some of the existing EU reporting obligations (ie on environmental performance) would be retained though simplified and mainstreamed into domestic reporting duties so they can be shared with the EU and the UN. The latter is a case in point given the commitment of the UK & Scottish Governments to the United Nations Sustainable Development Goals. The Bill sets out the 3 options for reporting obligations (already outlined in the White Paper back in March):
- Some information to continue to be shared with the EU as at present.
  - Others will be reported to a UK body.
  - the reporting obligations that double up with UK ones will be scrapped.
31. The problem with this is that the reporting elements of the Bill does not say if and when this will be done. It would end up allowing Ministers to decide unilaterally in each individual case. Once again, this would amount to excessive arbitrary ministerial discretion.

**The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks;**

32. The Miller and Dos Santos Supreme Court Ruling earlier this year showed the weaknesses of the existing parliamentary and intergovernmental negotiations. The devolved administrations do not have any formal international presence and there are no proposals now to change the weak and informal nature of the JMC arrangements. Given the growing importance of shared competencies a review of where we all are is needed. It should cover the provisions of the Localism Act and its Policy Statement as well as the existing MoU as regards to UK-devolved government relations.
33. Some benefit in deciding how to proceed could be had if we consider other national arrangements

- **Formal Intergovernmental bodies** – unlike the JMC there are highly formalised ministerial bodies such as *Conferenza Stato Regione* in Italy and the Inter-ministerial Commissions in Spain. It would be a good option for Devolved Administrations but unlikely to address Local Authorities' engagement
- **Joint Central Local Team** – Dutch Model underpinned by a political *Code of Intergovernmental relations*. While the UK consults widely when drafting legislation, the Dutch Model is much more open and crucially is based on a partnership between central and local level. As elected representatives during policy formulation councils are not lumped in with civil or private stakeholders. It is a model of much larger joined up approach than the MoU for Devolved Administrations or the Scottish & Local Government Concordat.
- **Political Forum of ministerial coordination:** similar to the JMC another example is the Austrian *Landeshauptleutenkonferenz* but could be seen as a more effective arrangement than the UK's. This is not due to the mechanism itself but because of the different party political structures there. Still the Welsh Assembly Government proposal on reinforcing the JMCs should be explored further but including local government representatives.
- **Parliamentary Chamber** – the Bundesrat is the upper legislative chamber in Germany. It represents regional governments. In the UK, this would mean having a 3<sup>rd</sup> 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.
- **Parliamentary Hearing and Mandate:** If following the (Denmark) 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. Something that successive UK governments have refused as outwith our constitutional model.
- **Local and Devolved Representatives at Lords:** one of the functions of Lords is to provide a forum for a range of interests (churches, universities) to be implicitly involved in legislative and scrutiny. Therefore, instead of a stand-alone structure, Lords could house representatives from Local Authorities and MSPs.

### **Mechanisms that could be put in place to ensure that the Scottish Parliament has sufficient oversight over the process of negotiating and legislating**

34. As said earlier, the powers of UK and Scottish Parliaments to scrutinise the use of the repatriated powers need to be enhanced if decisions making is to be brought closer to the people. The current provisions of the Bill are weaker than the existing EU arrangements. Where the Commission is acting as an executive, it is legally empowered by European Parliament and the Councils of Ministers by them delegating aspects of legislation on their behalf (the so-called Delegated and Implementing Acts). However, MEPs and Member States have the possibility to scrutinise each and every piece of legislation that is managed in this way before it is approved.
35. Equally the UK Parliament and indirectly the Scottish Parliament currently have the power to scrutinise draft EU legislation under the Early Warning System to ensure its compliance with the EU Subsidiarity Principle

Clearly, given the amount of legislation that will have to be amended it is very likely that either Parliament would make extensive use of these powers. However, if these provisions were included in the Withdrawal Bill, it would provide minimum guarantees that some scrutiny can be applied to Ministers, thus reducing the risk of their acting arbitrarily.