

UK-EU Negotiations - Update

Summary and Recommendations

This paper provides an update for Leaders on the possible implications locally of the ongoing negotiations around the future partnership between the European Union and the United Kingdom. In particular, it provides a summary of key aspects of the UK Internal Market Bill, the Scottish Continuity Bill and recent and ongoing COSLA political and officer engagement.

The pace of work continues to increase and some of the detail of this report may be superseded over the next few days. Further oral updates will be provided at the meeting where required.

Leaders are invited to:

- i. endorse the work by COSLA detailed in the attached report;
- ii. agree particularly that COSLA continue to press for meaningful engagement by UK and Scottish Governments with Local Government in advance of any decisions being taken, particularly those with direct implications for councils, the services provided, and our communities; and
- iii. agree that further reports be provided as required.

References

Previous reports:

- COSLA Leaders 28 August 2020 – UK EU negotiations
- COSLA Leaders 12 June 2020 – UK-EU negotiations extension
- COSLA Leaders 28 February 2020 – UK-EU negotiations

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Purpose

1. To update Leaders on the potential implications of the ongoing negotiations around the future partnership between the European Union and the United Kingdom and provide details of COSLA's work thereon.

Current position

2. The UK withdrew from the EU on 31 January 2020, as the EU and the UK both ratified the Withdrawal Agreement reached last October. The UK did this by way of the EU (Withdrawal Agreement) Act 2020. This Act also sets in UK law that the present Transition Period must end on 31 December of this year. Until then, while the UK is no longer a Member State, the EU budget, EU law and rules such as on state aid, as well as EU rules on freedom of movement, continue to be binding in the UK. The rights of EU or UK nationals residing in the UK or EU27 by end 2020 to stay in the UK or the EU are safeguarded by the Withdrawal Agreement, which has also provisions to avoid border checks between Northern Ireland and Ireland while seeking “unfettered access” of goods between the rest of the UK and Northern Ireland.
3. Negotiations for a longer-term UK-EU27 free trade and partnership agreement have continued throughout the summer and must be finalised by the European Council Summit of 15-16 October to allow sufficient time for ratification by each side. If a deal is to be reached, guidance published by both sides suggests currently that it will be a limited deal, with significant changes on trade in goods and particularly services, border controls, worker mobility, transport and fisheries. At the time of writing, there are indications of concessions having been offered and some indications that the next few days may be crucial in finding a deal. An update will be provided at the meeting if required.

What is changing?

4. Having said the above, negotiations have progressed slowly so far and there remains a real risk that there will be no deal. Further, although the Withdrawal Agreement and the EU Withdrawal Acts of 2018 and 2020 ensure a degree of legal stability as the UK transitions to post-Brexit rules, there are many issues that require secondary legislation.

Scottish Continuity Bill

5. The Scottish Government has tabled the EU Continuity Bill¹, which is currently at Stage 1 in the Scottish Parliament. This Bill would empower Scottish Ministers to “keep pace” with future EU legislation when appropriate. The Bill also integrates EU environmental justice principles into Scots Law and sets up a new oversight body, Environmental Standards Scotland. While consultation on future environmental standards is well recognised in the Bill, the Bill fails to apply the same consultation provisions for councils for any other EU derived obligations.
6. COSLA Environment and Economy Spokesperson, Cllr Steven Heddle made that point when he gave evidence to the Finance and Constitution Committee on 5 September. In July, the COSLA President had already agreed with Cabinet Secretary, Mike Russell, that officers work together to seek to amend the Bill so that Local Government is consulted

¹ <https://beta.parliament.scot/bills/uk-withdrawal-from-the-european-union-continuity-scotland-bill-2020>

meaningfully whenever Scottish Ministers, in seeking to keep pace with EU rules, look to impose new obligations upon councils. Work is currently ongoing between Scottish Government and COSLA officers on this, and COSLA awaits the suggested potential amendments to the Bill that might allow this. Cllr Evison is also in the process of setting up a further meeting with Mr Russell to press on this matter. Leaders will be kept aware of developments.

UK Internal Market Bill

7. On 9 September the UK Government tabled the Internal Market Bill. Further, the UK Business Secretary of State made specific announcements on State Aid.
8. This Bill covers several issues: it introduces non-discrimination and mutual recognition across the different parts of the UK, including the power to disapply provisions of the Withdrawal Agreement in connection to Northern Ireland; it defines state aid as a reserved power expanding the functions of the Competition and Markets Authority (CMA) by creating an Office for the Internal Market as a subset of the CMA; and it legislates for the replacement of EU funds, also as a reserved power. Some aspects of the Bill were unexpected given previous discussions with UK Ministers and officials and further detail is provided below.
9. The UK Government's stated premise is that while, as agreed in the 2018 Withdrawal Act, the devolved administrations will have full powers on many EU returned areas, the new Bill is necessary to prevent differing standards which could disrupt trade across the UK. While civil servants from the four Governments have been developing Common UK Frameworks for those EU returned powers having a UK-wide dimension and, on which, consultation with Local Government was expected to start in September, the UK Government wishes to define some of these issues in law and as a reserved power.
10. In responding to the White Paper consultation that preceded this Bill, COSLA, the Scottish Government and others expressed concern that, while we recognise that there are UK-wide matters that cut across reserved and devolved, and indeed local powers, it is preferable to develop frameworks that ensure the buy in of the different administrations, and particularly from COSLA's point of view, Local Government, rather than to legislate from a top-down approach.

UK Internal Market principles

11. The Bill places a legal requirement on administrations and competent authorities such as councils to mutually recognise certain types of regulatory requirements across the UK, and not to discriminate based on the origin of goods, services and professional qualifications. The stated aim is to prevent new regulatory barriers arising between England, Scotland, Wales and Northern Ireland.
12. The principle of mutual recognition should be the rule. Current exemptions under the EU, such as public health, environmental protection and protection and promotion of local heritage, do not appear to be exempt from the proposed new UK rules. Except in a narrow range of areas, including threats to human, animal or plant health, unfettered market access is given priority. The EU's principles of proportionality and subsidiarity are also excluded.
13. Mutual recognition and non-discrimination would not apply to the provision of public goods and services, including health, education and economic development, except for when education covers professional qualifications.

Office of the Internal Market

14. To replace the watchdog role of the European Commission, the Bill proposes to set up the Office for the Internal Market (OIM). Contrary to initial expectation it will not sit atop the Competitions and Markets Authority (CMA), it will be a subsidiary. It will provide the UK Government and, on request, the devolved administrations with “independent, technical, non-binding expert advice ... on regulation or regulatory proposals that may impact the Internal Market.” The OIM will consult businesses, professional bodies and consumers when making its recommendations.

15. Engagement with devolved administrations in defining these internal market provisions will be subject to the ongoing and much delayed review of Intergovernmental Relations. As yet, it remains unclear how Local Government might formally be recognised and consulted by the OIM.

State Aid

16. The legislation introduced in this Bill reserves the area of subsidy control to the UK Government. This is what under EU law is known as state aid and has been an exclusive power of the European Commission as watchdog of the EU Internal Market. The aim of the EU rules and that of this Bill, and unlike what happens in countries such as the USA, is to prevent companies playing different administrations against each other in getting subsidies for setting up or retaining businesses in an area.

17. Together with fisheries, this is one of the key issues slowing the UK-EU negotiations as the EU wants the UK to have a state aid policy and enforcement equivalent to that of the EU. The Bill suggests the governance, the new rules of what subsidies can be provided and which criteria public authorities, such as councils, must follow to grant such aid.

18. The UK Government’s view is that this should be reserved (or excepted, in Northern Ireland). It believes it important to enable the Government to legislate for a single, unified subsidy control regime, should it decide to do so, in the future.

19. Alongside this, the Business Secretary announced that the UK will follow World Trade Organisation (WTO) subsidy rules and other international commitments, replacing the EU state aid laws, from 1 January 2021. In noting that, unlike the EU, most countries do not have a state aid regime over and above the WTO rules, he said the Government is seeking to simplify the existing EU state aid regime and will consult in the coming months on whether the UK should have additional rules and how control mechanisms will operate.

20. Meantime, the UK Government has announced that, by the end of the year, clear guidance on WTO rules will be published for public authorities.

21. COSLA officers will work with SLAED, Directors of Finance and SOLACE colleagues to assess the implications for councils going forward and to consider the best means by which to influence the new arrangements.

Northern Ireland

22. As has been widely reported, the Bill introduces legal provisions empowering Ministers to “disapply” parts of the Northern Ireland Protocol of the Withdrawal Agreement. The UK Government’s stated aim is to eliminate any requirement that would undermine the unfettered access of goods between Northern Ireland and the rest of the UK. Leaders will be aware of the considerable controversy around this part of the Bill. While not commenting on the specifics of that, how this matter is resolved could have major implications for ports like Cairnryan and for the infrastructure and officer support that might be needed there in future.

23. Not directly related to the Bill, there are indications of a UK Government Infrastructure Fund designed to fund new, expanded and enhanced border controls at rail, sea and airports. Currently, we understand that it will be a bid fund open from end September to end October, paying for work from design to build, but which must be completed by 1 July 2021. More details will be provided when available.

Replacement of EU Funds

24. The Bill creates a new reserved “Power to provide financial assistance” for UK Ministers to spend on infrastructure, economic development, culture, sport and to support educational and training activities and exchanges both within the UK and internationally.

25. This power aims to enable the UK Government to fund projects, including any replacements for current EU programmes through external organisations, at a strategic UK-wide level on UK priorities as part of the Government’s “levelling up agenda”.

26. In other words, this Bill provides the legal basis for the UK Government to launch, in the context of the next Spending Review, the long awaited UK Shared Prosperity Fund replacing the EU Structural and Investment Funds.

27. COSLA has been actively contributing to Scottish Government work developing a Scottish template for the UK Shared Prosperity Fund. Following several rounds of consultation, the Programme Board that Cllr Heddle is member of, had provided a template that would ensure that most programme decisions, priorities and delivery are decided in Scotland, with a strong local dimension.

28. The Bill seems to mark a very different route. Unlike the EU Structural Funds, which in the case of Scotland were fully devolved, with very limited role for the UK Ministries, the Bill is legislating for a very centralised approach at UK level. Although the Scottish devolved institutions and councils have extensive local and economic development powers, this Bill conceives this new power as a reserved one.

29. So far, what this might mean in practice remains unclear and we continue to press for further information, and stress particularly that there must be meaningful consultation with Local Government on the detail. Current indications are that we may need to wait until the Comprehensive Spending Review for any further detail.

Ministerial Engagement

30. In terms of COSLA’s political engagement, our Presidential team is continuing to press the UK and Scottish Government on COSLA’s well established positions at every opportunity.

31. The Ministry for Housing, Communities and Local Government EU Transition Delivery Board met on 7 September and was attended by UK Government Ministers from the Home Office, DEFRA, DfT, and MHCLG. This enabled Cllr Evison to join with the calls from the other UK local authority associations for engagement and consideration of specific local issues including immigration policy and particularly its potential effect on social care, the possibility of freeports in Scotland and the replacement for EU funding (this was just before the introduction of the Bill above). Cllr Evison also raised issues around Export Health Certification, the EU Settlement Scheme, common frameworks, and INTERREG. While there was positive discussion and Ministers welcomed the points being made, they refused to be drawn on most of these issues. The Minister chairing indicated that he would provide further thoughts in writing. Should this be received before the meeting then an update will be provided to Leaders.

32. On 9 September Cllr Evison and Cllr Houston met with Iain Stewart MP Parliamentary Under Secretary of State (Minister for Scotland) to discuss matters including UK Exit from the European Union and press further on the matters mentioned above. Again he was not

in a position to comment but he did agree to raise COSLA's representations with colleagues across UK Government. He promised a further meeting to brief the President and Vice President on the Internal Market Bill.

33. The President followed up both these recent meetings with letters to underpin those discussions and to secure further information.

Environmental Health

34. At the time of writing there are indications of further funding from Scottish Government to employ officers to support the Export Health Certificate work going forward. This follows a long period of lobbying for such resources. Details will be provided to Leaders once available.

Brexit Coordinators

35. As agreed at the last meeting, Cllr Evison has written to the Cabinet Secretary requesting funding for Brexit Coordinators in each council. Again, Leaders will be kept updated on developments.

Proposed COSLA Position

36. The pace of work has increased considerably in recent weeks and officers are engaging regularly in various meetings with officers from councils, Scottish and UK Governments, and depending on the subject matter, key agencies, relevant bodies from the public, private and third sectors, and the other local authority associations. This is all being done in the context of ongoing work to respond to Covid.
37. Much of the detail of that ongoing work is reflected in the update above. A key point going forward relates to the meaningful consultation of, and engagement with, Local Government in advance of any decisions being taken, particularly those with direct implications for councils, the services provided, and our communities. That has been variable so far and the President particularly has been pressing strongly for that, particularly as we examine over the next few weeks the practical implications of the Transition Period ending.
38. The Scottish Continuity and UK Internal Market Bills will require evidence and briefings at appropriate points, as will other related primary and secondary legislation over the weeks to come. These will continue to be based on COSLA's previously agreed positions. As further detail emerges, Leaders will be asked to inform this further.
39. Further political meetings are being arranged with UK and Scottish Ministers.
40. Consideration is being given to webinars and briefings to be circulated to councils over the coming weeks. As an example, a session has been arranged on Immigration policy in the week of Leaders meeting where Home Office has agreed to meet councils representatives better to understand the implications of the new points based system in Scotland.

Next Steps

41. Leaders will be kept informed on the progress of UK-EU negotiations, the accompanying legislation and the practicalities of the Transition Period ending, and additional positions might be requested as these discussions progress.