Culture, Tourism, Europe and External Relations Committee

Inquiry - Article 50

Written submission from Convention of Scottish Local Authorities (COSLA)

Overview

The Convention of Scottish Local Authorities (COSLA) is the national and international voice of Scottish Councils. We welcome the opportunity to contribute to this new enquiry of the Scottish Parliament Culture, Tourism, Europe and External Relations Committee, which updates earlier submissions and oral evidence that we have made to this and other committees of the Scottish and UK Parliaments.

There is no doubt that the so-called ‘Brexit’ is one of the main issues of the day and will remain so for years to come. The negotiations have now started and quite an abundant set of formal mandates and position papers from both sides are now in the public domain. This submission aims to assess these documents, and most particularly the so-called ‘Great Repeal Bill’ and the first elements that are emerging of the Withdrawal and future UK-EU Partnership and Trade Agreements. This submission considers the legal, reporting and constitutional issues of these three negotiation processes for Scottish Councils. We contrast the available evidence with the agreed views by Convention and Leaders. However, as COSLA has reconvened after the May local government election we are likely to expand and review our existing positions as negotiations progress, and we will be happy to make them available to MSPs.

The European Union (Withdrawal) Bill

This Bill is the main of several pieces of legislation that aim to ensure that there is no major disruption when the UK leaves the EU end March 2019. It is an ‘omnibus’ bill as it aims to amend existing pieces of domestic legislation affected by the EU (including the Scotland Act) and, by repealing the European Communities Act 1973, convert existing EU legislation into UK legislation.

The main challenge is the scale of review of legislation and incorporation of EU legislation. Some of this is straightforward (EU Directives are already transposed into domestic law) but COSLA earlier submissions to the Scottish and UK Parliaments have long identified the following challenges:

There are many pieces of legislation that are not in the UK Statute that now need to be transformed into UK law – namely the Regulations and Decisions – this requires thousands of very small clauses over 20,000 pieces of legislation to be changed. Hence the Bill foresees that this power is given to UK, and in some circumstances, Scottish/Welsh/NI ministers, for a period two years.

Equally there are piece of legislation that to work require reciprocity with the EU (pensions, waste shipments, etc.).
There are also binding reporting obligations to the EU. This has long been a challenge for Councils. The Act foresees that such obligations may be scrapped or passed on to Scottish or UK bodies - on a case by case basis.

Finally, there are responsibilities on a single issue (e.g. food safety) now spread between Local, Scottish, UK and EU laws and regulations. There might be a case of devolving responsibilities or regulating them at Scottish or UK-wide level (e.g. state aid rules).

The difficulty with the Bill is that it does not replace existing EU rules as such, it merely foresees a mechanism whereby MPs mostly empower UK and Devolved governments and parliaments to deal with the detail of these changes. This generates issues in terms of parliamentary scrutiny but also in terms of ability of competent bodies such as Councils to ensure that they are not negatively impacted by Councils.

Parliamentary scrutiny and legislation

While acknowledging that the scope of engagement of MSPs is framed by the degree of cooperation between the UK and Scottish Government, a significant amount of work moving forward is being shaped by the so-called ‘Great Repeal Bill’. This concerns the Legislative Consent Motion but also the provisions where the future Act foresees that Scottish Parliament to amend Scottish legislation and statutory instruments, some of them will have a bearing on present EU legal, oversight and reporting duties upon Councils. We are keen to provide advice on these matters as MSPs consider the Legislative Consent Motion but also when amending existing legislation to comply with the terms of the European Union (Withdrawal) Act once approved in Westminster

Transfer of powers

The so-called ‘Great Repeal Bill’ places unto the First Secretary of State and the Scottish Secretary the scoping, in discussions with the Scottish ministers, which powers or, parts of powers, currently held by the EU could be devolved. Our view is that there might be powers that can be devolved, others that may need to be agreed UK-wide and others can be devolved to Councils. Therefore, discussions of possible devolved powers cannot be held between Scottish and UK Governments alone but need to also include the views of COSLA by way of the Scottish and UK Governments seeking our views they start talks of which powers or agencies need to be devolved or created at UK or Scottish level.

Developing of domestic frameworks and policies

The implementation of the of the Withdrawal Act clearly foresees that new domestic bodies are created (unless agreement is reached with the EU to opt into some agencies) to act as regulators or reporting bodies of existing EU obligations. We remain open to consider what is the most appropriate level to deal with a returned power, however we expect that the principle of subsidiarity, so that decisions are taken at the level as close as possible to the citizen is applied in taking that decision. We believe that a partnership approach between UK, Scottish and local
governments is the best way to apportion the returned powers but also to seek ways to jointly deliver them.

Other key element is the replacement policies and financial mechanisms currently organised at EU level. This is notably the case of the CAP farm and rural funding and the EU Structural Funds (regional, coastal and social funds). While the Treasury and Scottish ministers have guaranteed that current EU allocations running until 2020 (in practice 2022) will be honoured, there has been precious little progress in scoping the post withdrawal UK and Scottish policies to replace these EU programmes. Clearly there has been more progress on farming subsidies, and we expect that the UK will asks to opt into some EU programmes such as research funding. Opting into the European Investment Bank (EIB) where the UK is one of the main shareholders and one of the main loan beneficiaries should be considered.

However, per the manifestos of most parties at the recent election there is a cross party support to develop new home grown schemes to support local economic development in both rural and urban areas. As with the negotiations of the 2014-2020 programmes COSLA is ready to have early engagement to both the UK and Scottish Governments on how these new programmes could look like. Our view, as expressed in previous submissions is that the new domestic schemes should have the same strategic, predictability beyond the term of a single parliament and partnership approach that are the key added value of current EU funds.

**Constitutional issues**

More widely ‘Brexit’ will be the biggest constitutional change since Devolution. It will reshape the governance of the UK. Notwithstanding future decisions on holding a second independence referendum there is a case of making the governance of the UK more inclusive by involving the Devolved and local governments in the key strategic decisions made by Westminster post Withdrawal. For instance, as the controversies over CETA and TTIP showed, such engagement prior and during negotiations should occur when negotiating trade deals. In that respect COSLA and our counterparts had negotiated with the UK Government the EU Policy Statement on the Localism Act 2011 to precisely ensure that local government helps scope the implications at subnational level of government EU negotiation lines. A similar approach was also developed by the Scottish Government in 2015. There is merit to expand those partnership approaches at to cover international deals as well.

Furthermore, COSLA and its counterparts across the UK have already hinted at a Constitutional Convention. The Welsh Government has recently made detailed proposals to strengthening inter-ministerial cooperation, as has the Scottish Parliament last December and with regards of the Smith Commission. Previously COSLA and our counterparts have agreed with the UK Government This should be progressed on in the next few months rather than at the end of the ‘Great repeal' and UK-EU negotiation process.

The UK Government has repeatedly said that the UK may leave the EU but not Europe. The constitutional issues raised with EU withdrawal highlight more than ever that the UK, despite being a signatory of the Charter of Local Self Government (CETS 122), a treaty signed under the Council of Europe, remains to this day as the only Council of Europe Member State (which is much larger in membership than the
EU) not to have transposed the charter in any statutory or other way. Thus, this is an opportunity for both the Westminster and Holyrood parliaments to address this.

**UK-EU Withdrawal and Free Trade and Partnership Agreements**

The UK and the EU are presently negotiating the terms of a Withdrawal Agreement that need to be formalised by an agreement (ratified by the European Parliament and Member States) by ‘Brexit’ day of departure, 31 March 2019. This may include some transitional period. COSLA priorities, as agreed by Leaders and Convention are to mitigate the impact of leaving in communities, certain sectors (e.g. care services or food processing) and Councils, secure the continued rights of EU citizens in Scotland and of Scots in the EU, ensure that powers returning from the EU are devolved as close as possible to communities.

From October, if sufficient progress is reached on the terms of withdrawal, the negotiations will start on the **UK-EU Partnership and Free Trade Agreement** (working title). This means that this will not only cover trade issues but also cooperation on issues such as security, and possibly opting in into EU programmes and agencies deemed of mutual interest. The current UK government position is that of full withdrawal of the customs union (thus requiring UK goods into the EU to pay tariffs and be subject to border controls) and of the EU Single Market (this includes the end of freedom of movement), but negotiating preferential access to the EU market (ideally including financial services), as little as possible border control for goods, retain many (but not all) rights of EU citizens living in the UK (and vice versa) while still allowing certain movement of workers (particularly highly skilled ones or those needed for certain sectors), students and tourists to be as less cumbersome as possible. The EU formal position, as expressed in the official mandate and negotiation papers, is much more restrictive as to grant these conditions it requests upon the UK obligations (including oversight by the European Court of Justice) that very much resembles the present situation. Clearly there is a long road ahead before a settlement will be found by October 2019 so that it can be ratified by ‘Brexit’ day.

For COSLA the position agreed by Leaders and Convention calls for Scottish Councils to be able to access some EU funds (not just territorial cooperation but some research or environmental ones) just as Local Authorities of non-EU members such as Iceland and Norway can (with Treasury covering the UK part). EU Regional Commissioner Cretu has formally and publicly confirmed that this is entirely possible should de UK requests that during the negotiations. Furthermore, anticipating UK Government concerns over European Court of Justice jurisdiction over these kinds of funds our inquiries so far show that any issue relating to Scottish bodies participation in these projects would be dealt by UK authorities and courts alone.

We would also be keen to ensure than on issues on citizens’ rights and matters requiring reciprocity (pensions, social rights, waste shipments, emissions trading, etc.) the resulting agreement upholds standards that are comparable with those that exist at present. This will ensure legal certainty post withdrawal and a sufficient degree of regulatory equivalence between Scottish/UK and EU jurisdictions.

Qually Councils should retain the ability of continue having political dialogue and exchange with their counterparts in the continuing EU (a role that can be facilitated
by the Committee of the Regions (which sought the Committees views on June 22) as already agreed in its Brexit Resolution VI/02 of March 24.)

However, the more detailed the Partnership and Free Trade Agreement becomes, the more likely is that the UK and Scotland must mirror or shadow the evolving EU rules on state aid, procurement, environmental regulation, employment laws to trade with the EU, thus requiring COSLA to continue influencing EU decisions via our peers from other countries and our European umbrella CEMR.

**Conclusion**

This is just an overview of the detailed views and assessments that we have developed over the last year on the issues dealing with withdrawal, handling of returned powers, constitutional matters and developing a new UK-EU relationship, one that recognises the specific status and needs of Scotland and of Councils. COSLA will be developing its views further and continues to gather evidence from Councils which we are happy to continue sharing with the Scottish Parliament.