

**FINANCE AND CONSTITUTION COMMITTEE**  
**COMMON UK FRAMEWORKS CALL FOR EVIDENCE**  
**SUBMISSION FROM**

**COSLA response**

**Scottish Parliament Finance and Constitution Committee**  
**Common UK Frameworks - Call for Evidence**

**Purpose**

The Convention of Scottish Local Authorities (COSLA) is the national and international voice of the 32 Scottish Councils.

Our politically agreed position, as expressed in various politically agreed statements and submissions described below is that the return EU of EU legislation concerns local government hence any discussion about the apportionment of EU returned powers, the creation of Scottish and UK regulatory and enforcement bodies as well as the reporting and commitments to be made in the future to the EU and other international bodies necessarily needs the contribution and ownership of Scottish Local Government.

**Local and Devolution issues:**

The UK and Devolved governments have been for almost a year negotiating how to apportion EU returned powers including the need to establish UK-wide “common frameworks”.

This raises the issues that new UK bodies to deal, for instance, with state aid subsidies. There is concern that the UK Government would be both a judge and beneficiary of decisions made. Amid intergovernmental tension there is slow progress to reach a consensus between the 111 and 153 lists of powers returned from the EU – particularly about those with 24 EU returned “areas” that the UK Government seeks to retain at UK level as opposed to being “Devolved by default” as Cabinet Secretary Lidington offered earlier this year and was ultimately reflected in the Withdrawal Bill.<sup>1</sup>

A fundamental issue, that neither the Joint Ministerial Communiqué of 16 October 2017<sup>2</sup> nor successive documents on “common frameworks” make very clear what a “common framework” is. A reading of the various lists identified by civil servants shows that such frameworks are a combination of legal, political, organisational and aspirational issues. The stability of such mix of issues and purposes has not yet met the test of time and may well be contested when such frameworks are in operation.

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<sup>1</sup> Cabinet Office, “Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland” March 2018.

<sup>2</sup>  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652285/Joint\\_Ministerial\\_Committee\\_communique.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf)

Furthermore, the Withdrawal Act does not spell out how the “common frameworks” will operate and the Act does not in itself articulate how powers should be apportioned. The successive UK and Scottish and Welsh documents do not attempt to create a narrow legal apportionment of EU returned legal competences in the way that the successive Scottish or Welsh Devolution Acts neatly does for powers devolved from the UK Parliament since 1999.

While the fate of such proposed apportionment is very much link to the fate of the European Union (Legal Continuity) (Scotland) Act which the UK Supreme Court is hearing on 24 July this is only part of a wider picture that also concerns local government.

In the case of Scotland in particular, this future degree interdependence between UK and Scottish responsibilities is unprecedented in the Scottish experience and will also impact local government own relationships with both the Scottish and UK Governments and Parliaments.

**COSLA initial assessment so far finds that 64 out of these powers concern local Government. 18 of those will have a high impact, 16 of a medium impact and 36 a lower impact.** Many of those indeed are local government powers and a significant proportion of those concern environmental matters.

Therefore, regardless of the final outcome of the ongoing political and legal discussions over the common frameworks there is a great likelihood that dealing with them will now require a degree of discussion and negotiation between Local Governments, Scottish and UK Government that is unprecedented in the Scottish local and devolved experience.

For this reason, it is welcome the UK Government announcement (following the active campaigning by COSLA and our counterparts from the rest of the UK) to create a consultative mechanism between the UK and Local Government to deal with Brexit.

Indeed, the UK Government indicated its intention<sup>3</sup> to find another way forward. It confirmed its goal<sup>4</sup> of a *flexible, non-statutory mechanism that, in essence, replicates the kind of engagement local government has on EU policy through the Committee of the Regions, but in a lighter-touch arrangement.*

While we wait for such arrangement to be in place it seems pertinent that this mechanism is embedded into the above-mentioned intergovernmental arrangements at ministerial level that are being currently developed to deal with Brexit. Equally such arrangement should be extended to the new above-mentioned UK-wide bodies that the is setting up or expanding to deal with EU returned powers. We are keen that UK has announced that is environmental body that the UK Government is creating so as to enable local government to contribute to it in the areas of its competence, just as the UK and the Devolved Administrations.

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<sup>3</sup> Letter Secretary of State MHCLG Sajid David MP to Clive Betts MP, Chair Commons Communities and Local Government Committee 15 January

<https://www.parliament.uk/documents/commons-committees/communities-and-local-government/Correspondence/Letter-from-the-SoS-for-Housing-Communities-and-Local-Government-relating-to-Brexit-and-local-government-15-January-2018.pdf>

<sup>4</sup> [https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-03-19/debates/47210FF1-A5B4-4CC6-895D-8F4C1838316D/EuropeanUnion(Withdrawal)Bill)

In that respect -as we have previously outlined to the Scottish Parliament<sup>5</sup>- the comparisons with our neighbouring counterparts show that there are positive models that we could take inspiration from at both UK and Scottish levels to bring together central, devolved and local governments on EU or international issues concerning their respective legal competences: be that formal structures (Italy) or informal (Netherlands, Austria) of intergovernmental negotiations but also more predictable, effective and stable consultation mechanisms with local government such as in Sweden, Denmark or Finland. COSLA closely works with our sister organisations from those countries including the hosting of a seminar on this very issue last May<sup>6</sup> and we are able to provide more details on the specifics of each model if that is deemed useful.

Lastly there are some good precedents in the UK on how UK/Scottish-local partnerships could be developed to deal with common frameworks and future international engagements, such as the Partnership Council for Wales<sup>7</sup> or the 2012 CLG EU Policy Statement to Part 2 of the Localism Act 2011.<sup>8</sup>

We take the opportunity to comment on a couple of UK proposals for common frameworks whose details are already available:

#### **Environmental Governance and Environmental Justice:**

Most of enforcement of EU environmental legislation is done by way of the supervisory powers on the European Commission and the means of legal redress including sanctions for non or under compliance with EU Law provided by the European Court of Justice. The UK is at present time about to be brought again by the Commission (alongside other seven Member States) to the European Court of Justice for lack of compliance at local level across the UK to EU Air Quality Legislation. Under the terms Part 2 of the Localism Act 2011 any infringement fine will be passed on to the concerned Councils. The UK Government has already indicated that post Withdrawal these environmental justice powers will be recreated within the UK. COSLA request urgent confirmation whether the provisions of Part 2 of the aforementioned act concerning the passing of EU fined would be phased out (as we prefer) replicated or absorbed by this new EU body.

The recent DEFRA Environmental Governance consultation document<sup>9</sup> confirms that” The role which has been played in the past by the EU Commission and courts should be filled now by a UK body embedded in the UK's parliamentary democracy. (...) The new statutory policy statement on environmental principles and the new environmental body will be created through an Environmental Principles and Governance Bill.”

COSLA would welcome the creation of an independent body to ensure high environmental standards that carries on the tasks currently carried out by the European Commission.

<sup>5</sup> COSLA Submission - Scottish Parliament delegated powers inquiry, 2016

[http://www.parliament.scot/S5\\_Delegated\\_Powers/2\\_COSLA.pdf](http://www.parliament.scot/S5_Delegated_Powers/2_COSLA.pdf)

<sup>6</sup> Background note - EU-Central-Local Relations Seminar, Brussels 15th May.

[https://vng.nl/files/vng/20180321\\_background\\_note\\_eu-central-local\\_workshop\\_-final.pdf](https://vng.nl/files/vng/20180321_background_note_eu-central-local_workshop_-final.pdf)

<sup>7</sup> Sections 72 and 73 of the Government of Wales Act 2006

<sup>8</sup> <https://www.gov.uk/government/publications/policy-statement-for-part-2-of-the-localism-act-2011>

<sup>9</sup> DEFRA, “Environmental Principles and Governance after EU Exit - Consultation Document », 2018.

[https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting\\_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf](https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf)

Such a body should be independent from Government. Its structure should clearly separate policy and guidance making from enforcement. In fact, it could be argued would be preferable that these tasks are entrusted to **two separate bodies**:

- one dealing with policy/regulatory matters;
- and another dealing with enforcement.

In terms of policy formulation as COSLA's various submissions have shown<sup>10</sup>, there are tried and tested alternative models – the Italian and Austrian cases being perhaps the most promising, as they are constructive, incremental and mainly non-political way of central-devolved-local intergovernmental negotiation.<sup>11</sup> There is also merit in exploring further the Welsh Government proposal for the creation of a UK Council of Ministers<sup>12</sup> - which like the EU council should have specific formations such as Environmental JMC. We hope that the ongoing intergovernmental review of the JMC mechanisms would consider this option.

Given the transboundary nature of many environmental issues and the asymmetric nature of Devolution we should see the new body taking over or complementing some of the existing joint bodies between the UK Government and the devolved administrations such as the Joint Nature Conservation Committee (JNCC) or the Committee on Climate Change and Adaptation Sub-Committee (CCC).

COSLA view has consistently been that we are in favour of UK-wide arrangements where they are appropriate; however, we think that it would be contrary of the constitutional Devolution settlements that such UK-wide body is an UK-Government body. This is particularly concerning given the asymmetric nature of UK Devolution where the central government deals with issues for the whole of the UK as a whole and for the non-Devolved part of the UK (England) puts any such UK governmental body in the position of being both jury and party. In short:

- Any new UK (regulatory) body should be truly have the ownership of all governments including local governments (this specifically discussed below) so that they can jointly develop approaches for better environmental protection, develop new shared outcomes, new guidance (e.g. shipments of waste) or implementing instruments (eg. Environmental impact Assessments)
- Any new UK (enforcement) body should be truly independent from all concerned governments including the UK Government.

Lastly, it seems logical that in keeping with the Devolution settlement the new UK-wide body or bodies is replicated in Scotland as regards to environmental matters that do not have a transboundary effect. In that case there should be coordination between the Devolved and UK-wide bodies not unlike the mechanisms that exist between the different Environmental Agencies across the UK and Devolved areas.

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<sup>10</sup> COSLA Leaders Item 6 UK Withdrawal from the European Union – Governance and Update, 27 October 2017.

[http://www.cosla.gov.uk/sites/default/files/documents/17-10-27\\_item\\_06\\_withdrawal\\_from\\_the\\_european\\_union.pdf](http://www.cosla.gov.uk/sites/default/files/documents/17-10-27_item_06_withdrawal_from_the_european_union.pdf)

<sup>11</sup> COSLA submission. Scottish Parliament Finance & Constitution Committee call for Evidence. Impact of the European Union (Withdrawal) Bill on the Devolution Settlement, October 2015.

[http://www.parliament.scot/S5\\_Finance/Meeting\\_Papers/25\\_Oct\\_public\\_papers.pdf](http://www.parliament.scot/S5_Finance/Meeting_Papers/25_Oct_public_papers.pdf)

<sup>12</sup> Welsh Government “Brexit and Devolution”, 2017

[https://beta.gov.wales/sites/default/files/2017-06/170615-brexit\\_and\\_devolution\\_%28en%29.pdf](https://beta.gov.wales/sites/default/files/2017-06/170615-brexit_and_devolution_%28en%29.pdf)

## State Aid and Competition

It is concerning that on the issue of state aid, which shares broadly the same transboundary effects as EU environmental issues, the UK Government has already announced that the Competition and Markets Authority (CMA)<sup>13</sup> will have oversight responsibility for state aid. Irrespective of the regulatory independence of the CMA, this can easily be perceived as Whitehall acting as both party and jury on state aid issues. While politically this is not a positive development at least on this issue the UK Government had more a solid case (integrity of the UK market being a reserved power) than it is possible in environmental policy (which is mostly devolved, save for Energy matters).

While the “Chequers” White Paper confirms the UK Government intention to keep the state aid regime in broadly the same terms as at present as to ensure the widest possible terms of the post Withdrawal free trade deal there is merit in simplifying the current variety of overlapping regime of state aid guidelines. At present, prior to unveiling new State Aid Guidelines the Commission consults formally Member States and, in some cases, interested parties such as Local Authorities. Clearly any new common framework and UK-wide regulator and enforcer on state aid should include the same consultation mechanisms that are available at EU level.

## International Engagement post Brexit

The UK will leave the EU but it will aim to establish a broad alignment with the EU – most certainly in terms of state aid and procurement but also in a looser way on other issues such as environmental matters. The Withdrawal Agreement and the Brexit White Paper propose that such alignment should be achieved by way of a Joint Committee between both the UK Government and the European Commission. Other arrangements are possible, such as participating in EU agencies, interparliamentary and local government political dialogue. This is under discussion and COSLA is lobbying to ensure that continued political cooperation with our European partners such as via a **UK-CoR Joint Commission** which the EU Committee of the Regions have already formally agreed to set up – provided that UK-EU negotiators do not object to it.<sup>14</sup>

In terms of trade it is worth to highlight the recommendations of the Institute for Government<sup>15</sup> and others that a formal structure for ongoing stakeholder engagement is necessary in negotiating trade deals, just as it exists in other large economies (USA, Australia, Canada, etc.). This is even more the case with Local Government, which is not a stakeholder but a competent tier of government. As COSLA noted during the Scottish Parliament inquiry over the proposed US-EU trade deal (TTIP) ambitious trade deals such as the one already concluded between the EU and Canada (CETA) show that there are significant areas of concern over local public services and procurement obligations. COSLA is keen that any future Trade Agreement, be they with the EU or with any other country or trading block, includes at the least the same safeguards for local public services that are currently provided

<sup>13</sup> Letter Andrew Griffiths MP, Minister for Small Business, Consumers & Corporate Responsibility to the Rt Hon. The Lord Whitty, 28 March 2018.

[http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318 - Letter Andrew Griffiths to Rt Hon Lord Whitty.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318_-_Letter_Andrew_Griffiths_to_Rt_Hon_Lord_Whitty.pdf)

<sup>14</sup> EU Committee of the Regions, Resolution RESOL-VI/031 17 May 2018 on the implications of the United Kingdom's withdrawal from the European Union for the EU's local and regional authorities.

<sup>15</sup> Oliver Illott, Ines Stelk and Jill Rutter, “Taking back control of trade policy”, Institute for Government, 2017.

by the EU treaties. The safeguards that were included in the CETA agreement are in our view the bare minimum that any future trade deal must cover.<sup>16</sup>

More widely there is scope for a partnership-based approach in Scottish, and indeed UK, international representation, at these post Brexit UK-EU arrangements. This could also be extended to beyond the EU to United Nations and other international organisations, for example the Council of Europe, the OECD United Nations Climate Conference (UNFCCC) and UN agencies dealing with local government: UN HABITAT and United Nations Development Programme (UNDP), United Nations Advisory Committee of Local Authorities (UNACLA). Many agreements reached in these fora end up being adopted as national policy.

Very often participation of Scottish and UK national and local government representatives at such fora is overlapping without the benefit of pulling forces together where it can make sense.

For instance, both the UK and the Scottish Government have formally committed to deliver the UN Sustainable Development Goals (SDGs) and indeed the UK in the 25 Year Environment Plan has formally committed to produce an UK Voluntary Report to the UN in 2019. For its part the Scottish Government has agreed to mainstream the SDGs via the National Performance Framework, a document that COSLA endorses. COSLA has been involved through our own international membership bodies in developing the SDGs since the outset of negotiations until their final approval in 2015. However, the process of Localisation of SDGs is more than a technical or procedural issue it is a matter of political choices and decisions to be made by national and local governments, including making commitments to international bodies such as the UN.

For that reason, we would be keen that the new UK-EU arrangements for post Brexit includes also mechanisms so that Devolved and Local Governments can meaningfully input into the UK positions and contributions to EU and international fora and commitments on sustainable development, climate and energy.

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**August 2018**

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<sup>16</sup> COSLA Submission to Scottish Parliament TTIP Inquiry 2015  
[http://www.parliament.scot/S4\\_EuropeanandExternalRelationsCommittee/COSLA\\_TTIP.pdf](http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/COSLA_TTIP.pdf)