

European and External Relations Committee

Treaty of Lisbon inquiry

Written submission from the Convention of Scottish Local Authorities
(COSLA)

COSLA RESPONSE

Introduction

The Convention of Scottish Local Authorities (COSLA) is the representative voice of all Scottish Local Authorities both nationally and internationally and therefore welcomes the opportunity of participating in this inquiry. Many provisions directly affecting Councils are introduced or modified in the Lisbon Treaty, and therefore COSLA has been actively preparing for its eventual entry into force.

Back in January 2008 COSLA Leaders' *"noted the signing of the new EU Lisbon treaty and welcomed the new opportunities for local government contained within it"*, without prejudice to individual party political positions as regards to the Lisbon Treaty as a whole.

The 23 October 2009 COSLA Convention agreed on a number of key political messages and proposed a number practical solutions on how the provisions of the new Treaty could be maximized. The below responses to this enquiry are in the main directly extracted from this COSLA position.

The underlying theme of our response is that 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.

Extended and new competences

- **What are the implications of the extended or new competences outlined in the Treaty of Lisbon which apply to devolved areas, for example, Freedom, Security and Justice?**

On matters specifically affecting local government the Lisbon Treaties introduced very significant changes:

New Competences:

In terms of Transparency the fact that the Lisbon Treaty outlines for the first time which are areas of exclusive and shared competences between the EU and MS (including its devolved areas) and areas of supporting actions should greatly clarify the scope of EU action as well as introducing more transparency both for experts and the citizens.

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.

Therefore it is to be welcomed that in particular Article 5.1 and Article 5.3 specifically aim at restraining EU action along the lines outlined above.

Public Services:

The Lisbon Treaty will considerably boost this area for local government. For the first time there will be a specific “**Protocol on services of general interest**”. This was added at the request of Member States that wanted to reduce the European Commission’s ability to regulate local public services. The Protocol, which has a legally binding nature, stresses that any future EU legislation 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;*
- *The diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*
- *A high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*

COSLA calls on the European Commission to fully implement the Protocol of Services of General Interest and in so doing enable local authorities to decide the best way of providing local services both individually and jointly.

This protocol has a great impact in crucial issues such as Shared Services. The European Court of Justice (ECJ) “*Stadtreinigung Hamburg*” ruling of earlier this year upheld a complaint made against the European Commission which believed that compulsory tendering should be applied to arrangements between councils who were developing a shared services approach to their waste management. The decision supported the right of councils to cooperate in these types of arrangements without interference. With the Lisbon Treaty Protocol there should be more guarantees and safeguards to prevent excessive European Commission intervention on this area.

Similarly, the Protocol could be also argued to ensure that the European Commission adopts a more consistent and proportionate approach to public procurement, by allowing more local flexibility in EU-wide tendering requirements. The forthcoming revision of the Procurement Directives should be a test case for the Commission to work under the limits imposed by the new Treaty.

Territorial Cohesion

For the first time Territorial Cohesion is recognised as an EU Objective in the EU Treaties. This means that the EU Institutions and all EU policies should ensure that Economic and Social Cohesion is available in all EU Territories. This new Treaty Objective has profound implications at a time where there are emerging concerns about the EU Budget Review and the future of EU funding available for local communities in Scotland post 2013.

This new Objective provides a legal basis to argue that EU funding to those local areas where it can provide added value shall be made available. EU Cohesion, Rural Development etc are not just one off programmes but in different shapes and forms EU funding should be made available to support and address the gaps in the functioning of the EU Internal Market.

- **What impact might these changes have on the Scottish Parliament and the Scottish Government?**

The Treaty will create significant changes for the Scottish Devolved institutions as the Protocols on Subsidiarity and the Role of National Parliaments offer for the first time legally binding mechanisms whereby Scottish and UK institutions can formally influence the decisions being taken at EU level.

While COSLA would like to see the Concordat commitment to joint policy development having an increasing impact on the way EU dossiers are managed in Scotland between Scottish Government and local government, we are also keen to ensure joint working with the Scottish Parliament wherever possible. The development of joint positions between the major Scottish representation and governance arrangements will help form the basis of a stronger *“Team Scotland”* approach.

We agree with the statement on the Action Plan on European engagement that points out *that the Scottish Government clearly has a key role to play in driving forward this approach, for “Team Scotland” to be most successful, it will not be limited to, or necessarily driven by Government activity, but a genuinely collaborative approach, open to all of Scotland’s stakeholders.*

We would like to see a stronger emphasis developing on local government’s role, not so much as a stakeholders with an equivalent status to the others listed in the Action Plan, but the form of representation and governance closest to the people, as is recognised in the European Charter of Local Self Governance, to which the UK is a signatory. Local Government is one third of the governance of Scotland and it is in the interest of all levels of governance and representation to be engaged in the development of joint policy positions both in domestic and EU dossiers.

COSLA can provide a wide expertise and draw on a good range of policy knowledge available across local government. Crucially this involves international contacts and strong partnerships we have built over the years with our counterparts from other member states and our European umbrella organisation the Council of European Municipalities and Regions (CEMR).

This together with our support to the work of our four nominated CoR members (in addition to the four MSPs who are also CoR Members) would enable COSLA to provide sound advice to the Scottish Parliament and form in effect an "early warning to the early warning" system on matters of specific importance to Scottish Councils.

Institutional and procedural changes

- **What are the implications of the key changes to the functions and powers of a) the European Parliament b) the Court of Justice of the EU c) the European Commission d) the Council of Ministers?**

Among the great number of changes in the inter-institutional balance, COSLA would like to emphasise the below for their specific relevance for Scottish Councils:

European Parliament:

The generalisation of co-decision and the ensuing increase of influence of the European Parliament (crucially, areas of direct relevance for Councils such as Cohesion, Agriculture or Fisheries now all under co-decision) offer enhanced opportunities for COSLA to continue its successful cooperation with the Scottish MEPs as they can directly influence EU legislation. In that regard Scotland enjoys a good comparative advantage vis-à-vis other devolved powers in other Member States where their MEPs are elected in Member State single constituencies and therefore the link with the home nation or region is much weaker.

European Commission:

The Protocol on Services of General Interest and the provisions on subsidiarity and conferral should be actively used to ensure that EU legislation understands and respects devolved and local powers and competences.

On a proactive side, the Subsidiarity Protocol stipulates that the **Commission shall consult widely¹ before tabling legislation and** shall also take into account the regional and local dimension of the draft legislation and justify the need for EU action needing to be put in practice.

Therefore COSLA calls on the European Commission to establish robust mechanisms of pre-legislative consultation to local stakeholders in matters that affect them directly.

A first step would be for the Commission to revisit the 2001 White Paper on Governance and to propose early in the next mandate a detailed system of early engagement with regional and local representatives. COSLA, as well as our European umbrella CEMR, already performs this function, but at the present time, other than occasional pre-legislative consultations, we have to lobby our way into the Institutions.

¹ Art. 2, Protocol on the Application of the Principles of Subsidiarity and Proportionality.

A system of early and structured engagement by the European Commission would benefit from the expertise on the ground that local and regional government can provide which will in turn benefit the overall quality of the proposal and would avoid implementation problems further down the line. This pre-legislative should cover the subsidiarity aspect as well as the legal and financial implications for a proposal at local level and the fully exploit the new concept of Territorial Impact Assessments.

Committee of the Regions

COSLA believes that this section of the Inquiry should also include a reference to the Committee of the Regions. Long considered a mere consultative body, in the process that led to the present treaty it gained for the first time full institutional powers on the matters of subsidiarity.

The Committee of the Regions (COSLA nominates four members and the Scottish Parliament four members) will benefit from this Treaty as it secures several concessions that have long been fought for:

- For the first time, the CoR will be able to bring an issue to the European Court of Justice to protect CoR prerogatives and challenge alleged EU infringement of the principle of subsidiarity. This should mean in practice that the CoR will enjoy the same rights as the European Institutions. In preparation for this future scrutiny role, a Subsidiarity Monitoring Network has been set up between CoR and the Brussels Offices of local government associations.
- The CoR term of office has been extended from four to five years to match the mandates of the European Parliament and Commission. This is both a politically symbolic step and a way of keeping CoR work in synchrony with the European Institutions.
- The European Parliament is now required to consult the CoR alongside the Council of the European Union and the European Commission (thereby formalising the current practice of CoR-European Parliament co-operation).

COSLA's experience in working in the Committee of the Regions could be of benefit in coordinating subsidiarity scrutiny initiatives at both the CoR and Scottish Parliament levels. This would also be an advantage through the fact that some MSPs sitting in the European and External Affairs Committee are also members of the Scottish CoR contingent. Cooperation between COSLA and MSP CoR members should be reinforced in the future for matters of common Devolved interest, from policy coordination in CoR Opinions as well as actively substituting each other, wherever possible, in CoR official meetings.

- **What are the implications of the extension of co-decision into new and devolved areas?**

As highlighted in the previous questions the generalisation of co-decision would have a positive impact in Scotland due to the enhanced influence that this means for the Scottish MEPs and CoR members.

- **What are the implications of these changes for the Scottish Parliament and the Scottish Government?**

As regards to the Scottish Parliament, the Treaty changes enable an enhanced role in a formal capacity, for the Scottish Parliament in EU Scrutiny.

The COSLA Convention agreed that this activity might be strengthened further if there is cross-party support on the specific European Union recommendations that have come from the Calman Commission. These include:

“Closer involvement between Scottish MEPs and the Scottish Parliament is needed, and Scottish MEPs should be invited to attend, and should attend, the Scottish Parliament European and External Relations Committee regularly on a non-voting basis. The Committee should schedule its meetings to facilitate their regular attendance”.
(Recommendation 4.18)

“Scottish MPs should actively demonstrate appropriate oversight and stewardship of the constitution by way of regular scrutiny of the shape and operation of the devolution settlement” (Recommendation 4.20)

To cover all levels of Scottish Representation, and to be in compliance with the European Charter on Local Self Governance, COSLA’s Convention agreed to call for the inclusion of our Scottish CoR Members in the above arrangements, alongside the MEPs and MPs.

This would provide a useful opportunity for COSLA to provide our well established political weight, international contacts and technical knowledge on the proposed subsidiarity scrutiny process.

We are of course aware of the legal difficulties that exist over the full implementation of the Calman recommendations. Nevertheless, whatever framework that is finally set up to involve more the MEPs in the EU Scrutiny work of the Scottish Parliament, we believe that this should be open to the CoR members as well in areas of relevance for local government.

Subsidiarity

- **How and to what extent will the Protocol on the application of the principles of subsidiarity and proportionality impact on the role of the Scottish Parliament?**

The Lisbon Treaty offers for the first time an official route for the Scottish Parliament into the EU decision making process. The Lisbon Treaty

Subsidiarity Protocol clearly states that ² devolved Parliaments that pass primary legislation, like the Scottish Parliament, can be consulted by the Member State Parliament [Westminster] when it is involved in scrutinising potential legislation regarding the application of the subsidiarity principle. For that to happen a consultation mechanism to involve the Scottish Parliament in this EU subsidiarity scrutiny process would need to be devised. The role of local government in this process would also need to be considered.

The research paper already commissioned by the Scottish Parliament³ points out the key legal and practical difficulties of making these provisions work.

The research paper already commissioned by the Scottish Parliament⁴ points out the key legal and practical difficulties of making these provisions work.

The main *legal* problem is that the decision to cooperate with sub-state parliaments on subsidiarity scrutiny in principle remains at the discretion of the UK Parliament. **Therefore it could be argued that the best guarantee for any sub-state Parliament to be involved in this mechanism is to lobby and negotiate with the State Parliament a binding agreement** or at least a politically accountable Memorandum of Understanding detailing the conditions, timeframes for feeding reasoned opinions into the State Parliament with joint MP-MSP/AM – local authority association bodies for subsidiarity scrutiny.

The main *practical* problem is the reduced timeframe of eight weeks that Member States Parliaments are allowed to scrutinise the EU legislation. This will only be exacerbated for sub-state Parliaments, as the SPICe research paper also points out. Due to the short time period there is the risk that this Early Warning Mechanism could be left mainly in the hands of the Parliamentary legal services rather than via actual parliamentary and local government discussion.

This difficulty however might be softened by as many of EU legislative pieces of legislation will be known well in advance of the moment they are tabled (sometimes between six to twelve months). Where this is the case Parliaments could deploy robust mechanisms of early intelligence in order to prepare for the moment the proposal is actually tabled, such as governments and interest groups do.

As stated earlier, within our resource capacity COSLA is keen to offer an "early warning to the early warning" on matters that are of particular concern

² "It will for each national Parliament [Westminster] or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers [i.e. the Scottish Parliament]". Art. 6 Subsidiarity Protocol

³ Ian McIver, The Subsidiarity Protocol in the Treaty of Lisbon, SPICe briefing, 24 April 2008, 08/21.

⁴ Ian McIver, The Subsidiarity Protocol in the Treaty of Lisbon, SPICe briefing, 24 April 2008, 08/21.

to Local Government. This would draw on both our own direct expertise as well as that of our European counterparts. We are usually able to anticipate the launch and main elements of a forthcoming pieces of legislation or policy papers about six to twelve months in advance.

Ex post judicial review: both the CoR and the National Parliaments can bring an EU proposal to the EU Court of Justice. This is what legal experts treat as a “nuclear option” as there has never been a counterbalance legal tool like this in previous Treaties. How it will be used will depend on how the Court of Justice case-law evolves, and whether it will argue against the Commission on grounds of “subsidiarity” (which will be difficult to bed down) or in terms of competence (i.e. whether the Commission has the legal power to legislate on something). The latter would be a quite a step change in how EU and national levels operate.

With this procedure the Scottish Parliament has another avenue of influencing EU legislation, both via its link to the UK Parliament as well as via its joint membership of the Scottish CoR delegation. COSLA is keen to ensure that on matters of such importance both Scottish CoR Councillors and Scottish CoR MSPs should work hand in hand if we are ever to launch a CoR court case. This procedure will obviously be used as a last resort, however the fact that it exists will curb significantly the margin of discretion of the European institutions.

- **How might the Scottish Parliament work with the UK Parliament and devolved assemblies in respect of the subsidiarity provisions of the Treaty of Lisbon?**

As mentioned above it is important that all UK legislative assemblies conclude a detailed formal agreement on Subsidiarity Scrutiny both ex ante and ex post. These provisions should also include cases when the UK Parliament would agree to launch the red card or trigger a case to the ECJ when specifically (and in some cases, exclusively) devolved powers are affected by EU legislation.

The practical problems linked to the eight week timeline can be softened by increasing capacity to scrutinise EU legislation at an officer level and crucially, by making use of the expertise that other parts of the public sector, including COSLA already have available. In addition, the extensive use of electronic means of transmission of legislation and reasoned opinions should help the Scottish Parliament respond to the UK Parliament, and the UK Parliament in turn to coordinate itself with other devolved parliaments in an effective and timely fashion. Perhaps the development of interparliamentary electronic repositories to process and gather information could be explored further.

- **Are there examples of protocols and/or mechanisms developed by other regional parliaments with legislative powers from which the Scottish Parliament could learn?**

Scotland, because of its separate legal system, and its position within a wider Member State that is unique across the EU, together with a parliamentary scrutiny culture that is more developed than in other countries, should be able to position itself to lead by example. Moreover the fact that in the UK there are only three devolved parliaments or assemblies, as opposed to close to twenty in other states such as Spain, Germany or Italy, would increase the political visibility and weight of any "red card" raised by the Scottish Parliament.

Having said that, given the quite developed arrangements that are being set up in other Member States, notably Germany's Bundesrat, Flanders/ Belgium, Denmark or the Netherlands it is to be welcome that CALRE increases the exchange of experiences on the EWS, particularly at this early stage.

Due to our close contacts with our counterparts from other EU countries COSLA is keen to help gather intelligence on how the EWS is being developed elsewhere.

Serafin Pazos-Vidal
Head of Brussels Office
Convention of Scottish Local Authorities (COSLA)
January 2010