**Convention of Scottish Local Authorities (COSLA) – Written Evidence (CMP0033)**

**Overview**

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.

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 the fact that local government has a legitimate place as a sphere of democratic government in Scotland. COSLA is therefore actively seeking a formal governance or consultative model to be developed that engages with Scottish councils.

We believe therefore that the Sub-Committee should hear local government’s viewpoint about the implications of Brexit in Scotland. Given the Scottish landscape of a devolved Scottish Parliament and Government, this in itself creates a different dynamic from the rest of the UK when it comes to how the impacts of Brexit will be felt.

From the outset, we need to be clear that the negotiations and policy direction around these are far from clear as to what a settlement will eventually look like. It is too early to be able to provide definitive answers to the Sub-Committee’s questions, Our evidence is therefore of necessity high level. Nonetheless we hope the Sub-Committee will find our evidence helpful in understanding the interests of local government, in particular the implications for local democratic control and for local government’s role in protecting and enhancing local communities and economies.

**General**

- **What should competition policy in the UK set out to achieve? What guiding principles should shape the UK’s approach to competition policy after Brexit?**

The financial impact of Brexit will depend of the nature of the UK-EU Withdrawal currently under negotiation and future Partnership and Free Trade Agreements. Still, in addition to localised impacts that came up in our research with Councils, there are a few areas that are certain to change. While there is often focus on the financial transfer elements, notably the EU Structural Funds and Common Agricultural Policy, the EU currently frames in a significant amount the discretion that Councils have to provide, tender and share services. This comes mainly by way of the EU Procurement and State Aid rules, whose impact in public expending far exceeds the amount of EU funds allocated to Scotland.

Councils, also act as regulators in their own area of legal competence ensuring a level playing field for local business around environmental health, safety and trading standards.
While the existing principles of robust, transparent and fair rules should continue to underpin the state aid and procurement regime post UK withdrawal (as reflected in the Regulatory Reform (Scotland) Act and the equivalent UK Government better regulation policies), including the avoidance of subsidy competition across localities across the country, the so-called ‘Brexit’ UK Withdrawal 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. In so doing the same cross-boundary issues that led to these matters be dealt with at EU level, post Withdrawal there will be UK-wide market issues that need to be dealt on a UK-wide basis rather than devolved. However we would contend with the notion that this could be done by returning to the previous Westminster-only arrangements prior to EU accession as Devolution has changed the constitutional and legal landscape in the intervening period. This requires to set up new models intergovernmental policy coordination at local, Devolved and EU level that also covers procurement and state aid issues.

**Procurement**

The degree of consistency of EU and UK competition law will very much depend on the depth and scope of the future UK Partnership and Free Trade Agreement (otherwise known in the UK negotiation papers as the “Deep and Special Partnership”). There are however a range of background conditions that are unlikely to change – notably the significant share of trade between the UK and the EU. Because of this it is our expectation that regardless on the nature and scope of the post Withdrawal UK-EU agreement (which has not yet started to be negotiated) it is likely that due to the importance of trading with the EU there will be incentives for the UK to keep a competition framework that is broadly aligned with that of the EU.

This will have implications for local government. While the EU Procurement Directives have already been transposed to domestic legislation by the Procurement Reform (Scotland) Act 2014 and the Scottish Procurement Regulations 2016, some of its elements (such as reporting obligations) will be affected by the future European Union (Withdrawal) Act. However, the biggest potential change can come from the State Aid rules.

Still as we have also seen with the recent discussion over the Canada-EU Free Trade Agreement (CETA) that has already been agreed and the negotiations on the USA-EU Free Trade Agreement (TTIP) procurement and wider competition policy is likely to be part of any future EU-UK deal. Ironically the lessons learned out of the Canada and USA negotiations is that the EU procurement and competition policy is far more integrated that that of those federal states, as they lack uniform and detailed nationwide rules that are comparable with the EU ones. Thus, we can anticipate that given the current level of UK-EU legal harmonisation it is likely to remain at the beginning quite close. Indeed, even in the case of a narrow UK-EU agreement both present and future UK and EU competition policy does and will remain based on the WTO General Procurement Agreement (GPA) as indeed the current EU Directives were built upon.

There are, however opportunities for some UK-EU differentiation – namely on issues around reporting, thresholds, specific guidelines and covered sectors.

In terms of reporting the European Union (Withdrawal) Bill will empower Ministers to change existing Directives provisions over reporting to the Commission. Given the UK traditional policy over free trade and services (such as was highlighted by the thorough implementation of the Services Directive in the UK via the Internal Market
Information system, IMI) there may be an interest to continue sharing information with the EU, and vice versa.

On the issue of thresholds upon which the full extent of the current procurement Directives kick in, these were set on a basis of EU-wide averages and not necessarily fit the specific circumstances in the UK, so they may be open for review in the future.

More regulatory consistency is also a possible benefit. At the moment, there are procurement rules scattered across a wide range of EU directives, in turn issued by a diversity of EU Directorates-General a trend that the latest review of the EU Directives has only softened. In that sense a post Withdrawal domestic procurement framework can progress on a one stop shop set of rules for procurement than it is currently possible at EU level.

The issue of shared services, which has been framed at EU level for the first time by way of the present Directives, should be excluded from any domestic new UK procurement rules. Councils, as democratically elected institutions, should be free to decide how to organise themselves, how to provide, share or contract out services. This is an expression of their local autonomy and not a matter for competition rules. It is currently subject to the shifting caselaw of the European Court of Justice, though it has progressively softened its stance of this issue (e.g. StadtReinigung Hamburg case C-480/06, Remondis case C-51/15). Freedom to provide and share services should be a key gain for Local Government from a post EU withdrawal framework.

Last but not least, there should be opportunities to include “buy local” clauses in procurement tenders. This is at the moment very narrowly framed by the EU rules. It is only possible indirectly using a range of specific guidelines such as those relating to social procurement. While COSLA is strongly in favour of robust, transparent and fair local tendering processes the withdrawal process offers an opportunity to reconsider how local procurement decisions could help boost local economic development.

**State Aid**

- **Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU?** Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?
- **Will the UK require a domestic state aid authority after Brexit?**

As outlined the biggest and more immediate change in competition policy will take place in the form of State Aid. Currently it is grounded in the Treaty itself -Art. 107 TFEU (ex Article 87 TEC)-, which empowers the European Commission, as guardian of the EU Single Market, to adjudicate on state aid issues, which it does by way of Guidelines.

At the moment the Commission Guidelines set out the thresholds and obligation to notify public aid for a variety of purposes (regeneration, public sector duties, transport, environment, broadband, etc.) are in fact issued as by-laws by the European Commission, which under the Treaties has exclusive power over these issues. The UK Government’s successive ‘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 is sensible.
However we are concerned that doing this in a centralised fashion by way of an agency that is dependent from central government risks being at odds with the constitutional nature of the UK. Clearly, in setting the current State Aid regime the Commission acts as a political executive and not just a mere market regulator. However, its distance from 27 diverse Member States made it sufficient autonomous for its guidance to be perceived as fairly neutral vis a vis the diversity of interests of each Member State. By contrast, 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 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.

- **What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?**

While the option of setting up a UK-wide regulator that oversees and issues rules to prevent unfair competition and discriminatory subsidies given by public authorities across the UK seems sensible at this stage, it is open to question that such a UK-wide body can be considered neutral, if it is a UK government agency, as it would be both ‘rule maker’ and ‘rule taker’.

There is benefit in considering the establishment of a UK-wide competition body whose oversight is independent of UK, Devolved and Local Governments, but that the aid guidelines are drafted by a partnership mechanism by UK, Devolved and local government representatives.

- **What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK’s ability to support industries, or individual companies, through favourable tax arrangements?**

The existing WTO rules affect the UK by way of EU frameworks already. Regardless the future shape of UK state aid policy this is likely to remain the case.

- **How will the Government’s industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission’s state aid policy limited interventions that the UK Government may have otherwise pursued?**

Indeed, state aid policy has a direct bearing upon industrial, regional or place-based policy interventions. The proposed UK Industrial Strategy, and the related proposal of a UK Shared Prosperity Fund, are deemed to introduce domestic frameworks that will replace a number of EU policies such as the EU Structural Funds or the EU Research policy. At present the EU State Aid Framework and the EU Structural I Funds are closely aligned as they are devised from the same Commission Department (DG REGIO). However, they are often at odds, overlap (as with regards to the General Block Exemption Regulation) when not contradictory with similar guidelines issued by other parts of the Commission. For instance, the requirement levels are different between the Regional Aid Guidelines and the EU Research Guidelines.
In spite of the State Aid Modernisation process that concluded in 2014 the abundance of different Commission guidelines makes it difficult for few other than senior experts to navigate this complex set of state aid rules. While it should be noted that even the Commission has clearly realised this, as evidenced by the Notion of State Aid Communication (C/2016/2946) and the subsequent lighter regulatory regime that the Commission has issued for some sectors (e.g. regional airports rules in Commission Regulation (EU) 2017/1084 of 14 June 2017, local cultural and local public support measures announced on 21 September 2016) the UK withdrawal offers opportunities for a more consistent and uniform and consolidated set of state aid rules that does away with the current complexity.

Developing a new domestic state aid regime and a new industrial strategy and replacement of EU funds is by definition a multilevel process that needs to be done in partnership between central, devolved and local governments. While the implication of the EU Withdrawal Bill is that most of the acquis will remain in place immediately after the UK withdrawal date. However, the extent that the State Aid Guidelines (which are by laws of the Commission acting as an executive power rather than primary or secondary legislation) will be covered by the Act is unclear. This needs to be confirmed during the passage of the Bill as to ensure that there is legal certainty. On the issue of the Industrial Strategy and the related Shared Prosperity Fund developing a new policy and funding regime that replaces and hopefully expands on the existing EU Regional funds work on this needs to start as soon as possible.

We should be able to build on the good work of Local Government with Devolved and UK Ministries (BEIS, DEFRA, CLG) in drafting the UK Partnership Agreement as a basis to develop these new frameworks.

This is not only good practice carrying on the know how accumulated in designing and delivering these EU frameworks over several decades, but it is also a reflection of the fact that UK local authorities, which are on average among the largest in size and budget in the developed world, have on their own significant budgetary and regulatory weight, particularly in providing the right business climate for SMEs, the largest employers in the country. Hence any new UK place-based policy needs to be developed with local government to ensure it is sufficiently place-specific that draws from all the territorial capital (resources, infrastructure, know how) of a given area.

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