



**COSLA response to the UK Balance of Competences call for evidence on the application of subsidiarity and proportionality**

The **Convention of Scottish Local Authorities** (COSLA) is the representative voice of all Scottish Local Authorities both nationally and internationally. It 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.

COSLA also 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

*Q1: Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.*

Although it is often cited that 70% of domestic legislation originates from the European Union, the actual proportion depends on how one counts the legislation and on the different ways and extent that each EU Member State transposes EU legislation into national law. While the proportion could range between 8% to 84%, a recent study by the House of Commons <sup>[1]</sup> shows that in the UK as little as 15% of all Westminster statutory instruments are explicitly EU related. If EU regulations are added it turns out that close to 50% of legislation enacted in the UK (Westminster) in a typical year is EU related. Furthermore if Devolved legislation and local statutory instruments are also added COSLA believes that the 70% figure is plausible.

Far more important though is the **qualitative impact** that EU legislation and policy has on Scottish local government competences and services. A snapshot of recent pieces of EU legislation that COSLA has been working on illustrates the very detailed influence that EU legislation has on Scottish councils:

- **Services of General Economic Interest** (SGEI) is the term used in EU law to refer to public services. The European Commission continues only to lightly observe the new EU Treaty provisions (protocol 26) that were added to limit the ability of the EU institutions to constrain the way national and local authorities define and provide public services.

- **EU Public Procurement** – sets the framework on how Councils invite tenders for their services and also if they can share services amongst themselves. It increasingly influences what councils can buy (green award criteria).
- **Environmental Legislation (Waste, Emissions, Energy)** the EU sets binding targets and often requires special commitments from local authorities. Often these proposals have a poor assessment of their impact at a local level.
- **Employment legislation:** e.g. Working Time Directive, that sets limits on the work and rest period affecting longstanding work practices of key public services such as fire and rescue of health and care providers.

Waste, State Aid, Energy Efficiency interventions add to the breadth and detail of EU legislation that affect Councils. Our approach to the wide range of EU dossiers is agreed yearly by COSLA<sup>1</sup>. Key concerns for us, which underpin our approach to EU processes, is the adherence to the subsidiarity and proportionality principles.

### **Subsidiarity**

The subsidiarity principle, (European Union (Art.5 (3) TEU)), requires the EU to consider which level of government is appropriate where decisions towards a specific end should be taken and that these should take place at the level closest to the citizens. Often this would mean local government.

In applying the principle of subsidiarity, the Treaties require the EU institutions to respect and safeguard the existing powers of local government. However, this has not always been the case as recent examples have shown (see Box 1).

#### **Box 1: Subsidiarity concerns in EU action on urban mobility**

The European Commission's initial plan to propose legislation on urban mobility is a recent example where the EU has tried to overstep its competences conferred on it by the EU Treaties, and in particular the principles of subsidiarity.

As the Commission does not have powers whatsoever in local planning it is arguing for the creation of uniform rules on urban mobility using their vast powers with respect to the Internal Market. The latest attempt was to set up binding EU legislation on urban mobility through the draft EU Urban Mobility Action Plan. Essentially it used the alleged that there was an argument economic gain and the reductions to barriers to intra-EU trade. If this was agreed it would open the door to the European Commission having new powers on a policy area that is not conferred to it in the treaties.

It was only due to the concerted action of COSLA and others working with national governments that the Commission agreed, for now, halt on its legislative proposals this time round.

When considering tabling a piece of legislation the Commission is required to argue that it is backed by several articles in the EU Treaties.

However while Treaty article 5 urges the Commission to respect the subsidiarity principle the Commission is able to "pick and choose" other articles that in its eyes justify new EU legislation. Using the above example on urban mobility the Commission can argue that Articles 114 (internal market) or Article 192 (environmental protection) empower the Commission to legislate. Very often it argues that a problem is not merely local there is a "transnational element" thus prompting and permitting the Commission to act.

Instead **COSLA** believes that the principle of subsidiarity is a horizontal clause (as defined in the Treaty Protocol 2), one that cuts across and overrides all other articles that confer EU powers to the EU.

The Treaty **Protocol 26 on Services on General Interest of the Lisbon Treaty** requires the Commission to fully 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”*. In any forthcoming proposal or initiative local public service provision needs to be protected.

In other words the Commission cannot and must not be allowed to argue that because some provision in the Treaties give it powers to legislate on an area it can automatically use this to override the subsidiarity principle and thus local powers. It needs to consistently prove that EU action is going to be more effective than local action.

### **Proportionality**

The principle of **proportionality**, requires the EU to show that the measures it proposes are required to achieve its specific objectives, and not to interfere excessively with domestic legislation and competences.

It is in the interest of Scottish Local Government that the proportionality principle is applied correctly as it is we who are often responsible for implementing EU legislation. **COSLA wants to ensure that EU legislation is neither excessive nor obstructive to us implementing existing national policies with similar objectives** (see the various Boxes below). Proportionality may also mean that there needs to be a certain degree of flexibility to ensure that it can be implemented in the national and local context.

#### **Box 2: Energy efficiency obligations**

The Energy Performance in Buildings Directive, the Renewables Directive, and the Energy Efficiency Directive all include specific targets for Local Authorities (either explicitly or by virtue of them being the bodies that have the specific competence that the EU directive relies on, for example planning powers or enforcement of building standards). The original Commission draft proposals for this legislation proposed far more detailed obligations on the subnational authorities than were eventually included in the final legislation. Despite this, even where the Commission proposals are softened during the legislative negotiations it often re-introduces them again in the next review of the EU legislation.

For instance in the Energy Efficiency Directive the Commission's proposal for additional building refurbishment targets for the public sector (noting that in practice Local Authorities as the largest owners of buildings) would have clearly gone beyond the financial and administrative capacity of Scottish councils, and quite possibly most other municipal and regional authorities in Europe. This was a particularly irksome piece of legislation given the similar Energy Performance in Buildings Directive had only been agreed two years earlier and it contained specific targets that were just being implemented in Scotland at the time. As we prepare for the new Energy 2030 proposal we expect this scenario to be repeated again.

#### **Box 3: Proportionality in Data Protection:**

The EU Data Protection rules are a sensitive policy area with ramifications well outside the EU. The legislation currently being discussed, though originally conceived for the private sector has finally extended into the management of data inside the public sector. This ignores the fact that public authorities have a statutory obligation to collect and keep data to provide public services and thus do not use data for commercial purposes.

Previous data protection policy for the public sector was dealt with through separate EU legislation. We have been working with our counterparts as it became evident that a disproportionate set of requirements was to be imposed upon Councils, often setting up requirements over how Councils should organise themselves internally. While at best there would be limited additional benefit to citizens in those countries who already have data protection legislation it was at significantly greater cost to Councils, and of course therefore to the public. The UK Government's own impact assessment estimated the cost of complying being at least £250m per year. Interestingly when the Commission tabled its proposal no similar projection on the financial impact on the public sector was undertaken.

### **Civil Registry Documents**

The European Commission has also proposed the standardisation of civil registry documents (birth, marriage and death certificates). While there may be some marginal benefit for those moving across the EU, there is already a worldwide international treaty that deals with this.

This is also an issue of subsidiarity and the ability of Councils to define their own registry arrangements.

### **Box 4: Proportionality in the EU waste framework review**

Scottish Local Authorities play a key role in many EU environmental areas. A good example is the EU's waste targets as well as national targets set out in the Waste (Scotland) legislation. As the EU's waste framework is currently under review, it is important that EU legislation is proportionate to achieving the EU's waste objectives (e.g. phasing out of landfilling). The European Commission, before tabling a new legislative proposal, therefore needs to consider existing national measures and local circumstances to be able to effectively support efforts rather than imposing new obligations regardless of the national policy framework.

For Scottish local government, proportionality and policy coherence is essential. Scottish domestic legislation is more ambitious than the EU waste targets, and does not depart from the outcomes sought from the EU rules.

However, the danger is that new EU legislation could introduce detailed implementation provisions, and alter the framework under which Local Authorities operate in waste management. This could lead to both domestic legislation needing to be amended in order to meet new EU requirements and a disruptive effect on the ground where policy implementation has already started and can come at a significant additional cost, without any additional improvement in outcomes.

The same could be said for the **Air Quality** legislation where EU targets and requirements for very local air quality standards run against the notion that such impacts have any transnational effect at all. Furthermore EU legislation in this area fails to acknowledge that Councils often are not responsible for background conditions affecting local air quality standards. This can result in the pointless referral of UK local authorities (and half of the other Member States) to the European Court of Justice for infringement of EU Law.

### **Box 5: VAT reform**

The Commission has been consulting on whether the existing EU Directive that enables local authorities to recover VAT should be scrapped. It sees article 13 as a barrier to intra EU trade. This runs against the evidence that most local government activities are eminently local and therefore do not obviously distort intra EU trade.



Considering that VAT recovery scheme amounts to one tenth of the Scottish local government budget, changes to EU VAT rules would require compensation arrangements to be put in place. Knock on effects to the internal UK fiscal and domestic taxation arrangements not being covered by EU legislation, mean additional administrative burdens would be created.

What appears to be only an EU matter could indirectly shape internal Member State taxation and internal fiscal transfer arrangements which according to the current Treaties would be against the principles of conferral, subsidiarity (as the EU has not powers on domestic taxation) and indeed proportionality (for the theoretical gains of doing away with the VAT recovery schemes are outweighed by the significant distortion of internal fiscal arrangements that they would entail).

*Q2: What are your views on how the principles have been interpreted in practice by the EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?*

### **EU institutions**

The EU Commission is required to consider subsidiarity and proportionality when proposing legislation. In the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, it is clearly required to “consult widely”, before tabling legislative proposals, also taking into account the local dimension of the proposal. However, the Commission has not established a mechanism to do this and it is not transparent in how it responds internally to the result of such consultations.

Following a recent European Parliament resolution and the Multi-Level Governance White Paper **COSLA wants to see the Commission develop a more robust approach to subsidiarity that includes regional and local levels of self-government as well as the relationships between the EU and its Member States.**

### **Impact Assessment**

The Commission carries out impact assessments before tabling legislation and is reviewing its own guidance at the moment. Our view is these tend to be overly optimistic when it comes to cost at a local level. We note that despite the Treaty provisions and the Commission's own internal guidelines it tends to satisfy itself as being compliant with the requirements but doesn't explain how it arrives at such conclusions.

**COSLA wants to see the Commission adopt a set of guidelines to assess subsidiarity. The starting point could be the 'Subsidiarity and proportionality analysis kit', developed by the Committee of the Regions and which at the moment the Commission is not obliged to use.**

The Commission normally contracts out external consultants for the assessment work. This is often split into several sub impact assessments. The contracts have narrow terms of reference, both in what and who they ask. This places a severe constraint on when the Commission is prepared to hear our views and what they are prepared to hear local government bodies say. Similarly when the consultation is carried out in house, we see a growing and worrying trend to use narrowly formatted e-questionnaires that do not allow a proper representation of views particularly if they significantly depart from the Commission's originally assumptions.

**COSLA wants the Commission to engage with local and central government representatives ahead of launching any impact assessment so as to ensure that the results of the surveys and broader consultations are properly representative and able to capture the real evidence from the ground.**

Finally, it is worth highlighting that when the Commission is thinking about new legislation it often fails to take into account the territorial (local) impact of that draft Legislation. This is why COSLA urges the Commission to join in the development of a new ESPON CoR Territorial Impact Assessment tool as this tool could help make the Commission more aware of the impact of its proposals further down the line.

### **Governments**

While EU affairs is a reserved matter for UK Government, in practice the current devolution settlement means that Scottish Councils need to work both with the Scottish Government in the devolved areas, and the UK for reserved ones. Due to the short timescales to inform EU negotiations and because EU legislation can cut across UK and Scottish legislation this should be done simultaneously and in an open and transparent way with both governments. The opportunities to engage with UK Government officials can be limited. The institutional culture of each department often means contact is frequently limited to public consultations and bilateral meetings between civil servants or ministers.

COSLA very much welcomes the UK Government Policy Statement on Part 2 of the Localism Act 2011 as it includes a clear and unambiguous recognition of local government: *"Local government is one of the democratically elected tiers of government in the UK. Local authorities have a broad span of responsibilities, covering a large range of issues which affect people locally. Many of these responsibilities are affected by EU laws and regulations"* (point 29).

As regards to EU legislation that affects local government competences or may result in legal obligations, the Policy Statement says *"the UK Government specifically names local government as a key sector for involvement"* (point 30). It also sets out the involvement of Local Authorities and their representative bodies in EU matters. In addition the position goes on to say:

*"The UK Government would involve local government – or a suitable representative body as appropriate – at the following stages:*

- 1) In time to influence EU negotiations – the relevant UK Government Department would look to identify local implications where known (for example, technical administrative, resource and financial implications) in the relevant Explanatory Memorandum which it prepares on the EU legislative proposal, and to be accessible to the local government sector to discuss any local implications. (...)*
- 2) Ahead of transposition into domestic law – the relevant UK Government Department should also take into consideration the New Burdens doctrine, which is part of a suite of measures to ensure council tax payers in England do not face excessive increases, and the Better Regulation Executive guiding principles that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors. (...) The purpose of this involvement would be to inform local government of any new legal obligations arising from new EU laws and the UK implementing measures and to give local government the opportunity to inform the legislative process. (points 31-31)"*

This recognition of Local Government having a keen interest in being involved in EU matters opens new possibilities of engaging in the upstream policy formulation, but there are limitations:

- Engagement is based on a policy statement not on a bilateral agreement
- It provides only some, but not all key, information
- It sets out the principles but not the detail of how Scottish Councils/ COSLA would be involved in formulating UK European policy or implementing EU legislation; in the end it all comes down to the current ad hoc arrangements and proactive approaches made by COSLA and our counterparts

- It lacks the engagement at a political level to set out the overall vision on where Councils and the UK are heading in EU policy and legislation

In northern European Member States, there are more formal, stable and predictable arrangements for Local Government - Central Government EU policy developments. These are covered in the next question and COSLA would like both the UK and Scottish Governments to have similar standing arrangements here with us.

At a Scottish level, we have central-local policy development arrangements. However this mainly deals with domestic policies and not EU ones. These arise from political rather than legal agreements (Concordat 2007, Statement of Ambition 2012). Frequently (as indicated in the "Handling EU obligations" <sup>11</sup> guidance for civil servants). Instead, on EU matters, local authorities are treated as stakeholders on a par with private or voluntary bodies and not as a democratically elected partner in its own right.

This democratic deficit is a longstanding cultural and structural issue affecting UK and Scottish governance<sup>1</sup>, rather than something particular to individual political administrations.

As discussed further below **COSLA wants to see a significant improvement in how draft EU legislation affecting local government is addressed in the UK. A way forward would be to build on the Localism Act 2011 provisions and take good practice examples in how subsidiarity is handled in other Member States – as shown in the examples below**

### **Parliaments**

Once an EU legislative proposal is tabled, the UK and other national parliaments have the right to submit concerns during the subsidiarity monitoring procedure (set out in Protocol No 2 on the Role of National Parliaments). The strict eight-week time frame for submitting reasoned opinions, the required majorities and the capacity constraints makes it difficult for this Subsidiarity Early Warning Mechanism to work effectively.

COSLA often contributes to the very comprehensive early stage consultations. However we regret that UK Parliament scrutiny is "ex post" that is an evaluation of tabled or agreed legislation, after it has been finalised. This makes it difficult to shape EU legislation directly. It would be better if we could influence the Government's negotiating position at an earlier stage as is the case for the Danish Parliament.

**COSLA would like to see**

- **The establishment of a formal agreement between the Devolved and UK Parliaments for handling subsidiarity issues so as to better take into account the impact of EU law in devolved or local powers.**
- **The Scottish and UK Parliaments take stock of arrangements in the Danish, Finnish and Dutch Parliaments that enable local authorities to formally raise subsidiarity concerns in a way that could trigger a subsidiarity scrutiny of draft EU legislation.**
- **Current parliamentary standing orders being changed to allow Local Government to formally raise with the Scottish or Westminster parliaments any subsidiarity concern on EU legislation specifically affecting them on a similar basis available to the Scottish Government or MEPs to do so.**

---

<sup>1</sup> See for instance, the statement made by COSLA Vice President Corrie McChord to Parliament back in 2005: "*our main interest concerns future arrangements between the Scottish Executive [NB: as it was then known] and Scottish Parliament and how the strategy is externally co-ordinated with other governmental, public and private sector bodies. We believe there should be a direct role for local government members, through COSLA, in determining such a strategy and its priorities, given that there are qualitative differences between the stakeholders with a democratic mandate and those that are simply representing their members' interests. It would therefore be appropriate to ensure that the arrangements differentiate between the different types of bodies*"



### **Committee of the Regions**

The Scottish Parliament and COSLA nominate four members each to the CoR. This is the only EU institution to provide for Scottish democratically elected institutions to have an official conduit into EU legislative negotiations.

The Lisbon Treaty allows the Committee of the Regions, within two months of adoption of EU legislation, to bring an action before the EU Court of Justice (ECJ) for infringement of the subsidiarity principle. This concerns those legislative acts which the EU Treaty provides that the Committee be consulted on. Up until now the CoR has not made use of this right. The diversity of its internal membership (from small French 'parish' councillors to German Land Presidents) and the fact that this power is regarded as a politically charged one and a last resort mechanism, makes it difficult to establish broad consensus even if there's a clearly unambiguous and straightforward case.

While recourse to the ECJ would always be a last resort, the CoR needs to reorganise its internal working so that subsidiarity issues are more central to its work than at present. Unfortunately even with such a change to its core business, it would also have to change the way it produces its main outputs - the Opinions - which tend to be too general in scope. The CoR having chosen to organise itself in a way that mirrors the structures of the parliamentary chamber, means that most of the subsidiarity work is carried out externally and through the Subsidiarity Monitoring Network (of which COSLA is a member). Clearly some of these internal challenges are recognised by CoR itself and hopefully will be responded to as part of its ongoing 20<sup>th</sup> Anniversary review.

*Q3: Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?*

COSLA believes there is ample scope for the UK and Scottish Governments (and Parliaments) to better engage with Local Government and their national representative bodies at an early stage and benefit from the expertise that Councils can provide on issues that specifically affect them.

To achieve progress would not require a change in the constitutional settlement but a move toward formal, structured, stable and predictable arrangements of Local Government – Central Government EU policy developments - just as they exist in the advanced democracies of northern Europe. Just a few very relevant examples:

#### **Danish Special EU Committees:**

While Local Government is recognised in the Danish Constitution there is no legal framework for consultation procedures. Parliamentary rules of procedure (standing orders) stipulate that all relevant partners are to be consulted prior to the presentation of a bill to parliament. There are established procedures for 'Local Government Denmark' (their COSLA equivalent) to be consulted on all legislation with a bearing on local and regional authorities, as are individual local authorities or regions whenever pending legislation has a special bearing on them. While purely consultative this gives a degree of predictability that enables proper policy development by local government.

Within the Danish EU decision-making process is a formal avenue to shape government policy through their 33 "EU Special Committees."<sup>iii</sup> The chair and secretariat of each committee is provided by the appropriate ministry and each Committee is required to evaluate the judicial, administrative and economic consequences that the proposal in question might have in Denmark, as well as whether the proposal is at odds with Danish interests. Local Government Denmark is currently represented in 10 committees; the list is public and can be found at the footnote <sup>iv</sup>



Formally, the ministries have four weeks to prepare a common Danish position. Within that timeframe, the special committees must be consulted. However, the deadlines of both written consultations and convocations of meetings vary, and are often very narrow.

In Scottish terms this arrangement is similar to the CAP Stakeholder Group as it is both structured and predictable and that LG is represented among a variety of other stakeholders. The obvious difference is that the Danish Special Committees do meet with the purpose of shaping EU negotiating positions on EU legislation whereas the sole Scottish example has a wider remit, including also implementation.

### **Finland – EU Affairs Sub Committees**

The Committee for EU Affairs meets usually on Wednesdays and serves as an advisory and mediatory body in the coordination of EU affairs among the different ministries. To prepare the work it has appointed 40 sector-specific preparative subcommittees<sup>v</sup> which constitute the foundations for the preparation of EU affairs at the civil servant level. Some committees hold meetings almost monthly, some before the Council meetings and some only twice a year.

The sub-committees can assemble in a restricted or extended composition. An extended composition includes representatives of various interest groups and other concerned parties.

The Finnish Association of Local and Regional Authorities (AFLRA) are represented in most of the extended EU sub-committees and in the sub-committee on Regional and Structural Policy. Currently AFLRA attends 18 of the 40 Sub Committees<sup>vi</sup>.

While similar in format to the above Danish Committee system we understand that in terms of performance its handling is more robust and structured, with a more fluid exchange of information and negotiation on points rather than a mere listening exercise.

### **Netherlands EU Dossier Teams**

The Local Autonomy (Provinces and Municipalities) is recognised both in the Constitution and in secondary legislation of Holland. This imposes an obligation to consult councils on matters affecting them.

Code Intergovernmental Relations “Code Interbestuurlijke Verhoudingen 2013”

To formalise this relationship the Code<sup>vii</sup> contains agreements between the central government, provinces, municipalities and water authorities that contribute to a good interaction taking place between the various local authorities, so that each can be accountable of the areas of their responsibility.

It contains rules of conduct to be observed between the three tiers of government; general principles for the distribution of public funds between the national level, the provincial and the municipal level; and guiding principles for tri- or bi-lateral co-operation in particular fields of public policy and/or for new legislation. This is a formal, legally worded document which has a specific section (article 9) which requires that

*-domestic central-local negotiations agreements also apply on a like for like basis to European issues.*

*-The State and local authorities will at the earliest possible stage of the policy will assess the administrative and financial implications (including administrative expenses) through consultations.*

*-The State and local governments will, for EU issues affecting local authorities, at the earliest possible stage explore the potential for cooperation.*

*-For these policy areas, they work in all phases of the policy (for the negotiation and implementation stages) as much as possible (e.g., based on inter dossier teams) and use each other's networks. Local authorities and central government to keep the space to act independently.*

This was expanded via an "Action Plan Europe and Local Government" signed by both Minister and the national associations of municipalities and provinces.

**Bilateral meeting** - *Europe Overleg Binnenlands Bestuur* (EOBB) is a monthly ministerial-local government which was established by the Minister of Public Administration to provide a practical platform for ensuring the 'Europe and local governments ' early interagency cooperation.

**« Inter-administrative EU dossier teams" (IBDT).**

This is the crucial innovation of the Dutch model as teams representatives of the national government and of the Local Authority associations cooperate from the start of new EU policies until its implementation in national legislation. There are about 20 Dossier Teams, 13 of them specifically EU-only. The Dossier teams assess and formulate Dutch EU policy in terms of subsidiarity, financial impacts, administrative burden, and impact on business, environmental and societal impacts.

Lastly, the Dutch local government national organisations the IPO and VNG participate in the national co-ordinating working group that prepares the first Dutch positions for the COREPER (Ambassadors meeting ahead of Council of Ministers) and the working groups of the Council (weekly meetings), as well as in the national expert group on EU Law.

COSLA believes that a version of the above three models would constitute a great improvement if applied in full or in part to Scotland. The Dutch model, due its formal, structure and predictable format, means Dutch local government can ensure that Dutch EU policy does reflect the constitutional issues and specific concerns of local government. It has the involvement of local government at a political level in shaping EU policy and crucially, through the bilateral **EU Dossier Teams** (and the participation in the Council of Ministers preparatory meetings).

It is worth noting that the Netherlands is as centralist as Scotland/UK and its national institutions no less precious of its status. Still this has not been a barrier to the profound culture change in how EU affairs are being conducted there.

*Q4: The EU Treaties treat Subsidiarity differently from Proportionality. National parliaments have a role in reviewing whether EU action is appropriate (Subsidiarity). The EU is not legally permitted to act where it is not proportionate (Proportionality). Does it make sense to separate out the two principles like this, and use different means to protect them?*

The principle of subsidiarity is to ensure that the EU only acts when strictly necessary, taking into account the capacities of domestic legislation and action in achieving certain objectives. The principle of proportionality determines the scope of EU action, which is to be limited to the extent that is needed to achieve the specific objectives.

While subsidiary and proportionality are separate legal principles for different purposes, they are complementary and equally important for Scottish local government. The scrutiny arrangements for both legal principles should go hand in hand.

Subsidiarity is often more difficult to determine compared to proportionality. This is because in many cases powers on a given policy area are structured differently in different member

states. In some states central or local government will have exclusive duties and powers for a given area and in others they will have shared competencies. Additionally the Treaties are excessively ambiguous. This allows the Commission to argue even when it doesn't have the explicit power to legislate on a given matter, that it can use its Internal Market competency as the watchdog of the EU free movement of goods, people and capital as a basis for taking the initiative.

Concerns over proportionality are more frequent and easy to articulate. Most of the examples highlighted in response to Question 1 have an element of proportionality. The Commission tends to overreach itself on proportionality when drafting legislation. In contrast to central governments the Commission has very significant regulatory powers but next to no law enforcement ones. To compensate for this the Commission tends to legislate in as much detail as the European Parliament and the Council of Ministers allow it to. It then relies on Member States, sub national government and ultimately the courts to ensure that EU legislation is acted on.

An emerging source of great concern for proportionality are the new Delegated and Implementing Acts created by the Lisbon Treaty. Their purpose is to enable detailed implementing provisions on how EU legislation are to be understood and applied to be left out of the legislation.

**COSLA is concerned that in practice the new delegated rules give the Commission significant powers to legislate in detail beyond what the legislator (Parliament and Council) have agreed to.** The Commission hand is further strengthened as the European Parliament and Council of Ministers have only 8 weeks to either approve or reject such delegated acts as a whole.

**COSLA would like to see the establishment of general criteria or a checklist that the Commission needs to act on before deciding if a matter can be left to a Delegated Act** instead of being addressed in main body of EU legislation.

---

## Future Options and Challenges

*Q5: Where might alternative approaches or actions as regards the scope, interpretation and application of the principles of Subsidiarity and Proportionality be beneficial?*

On 27 June 2014 the full COSLA Convention agreed the following key political messages:

### UK Government

*COSLA urges the UK Government to put into practice the principles of involving Local Government in Scotland in developing the UK negotiating position on EU legislative proposals reserved to the UK level and covered by the Localism Act 2011.*

### Scottish Government

*Scottish Local Authorities should be considered equal partners in developing EU policies and legislation in areas that fall within their competence and affect the services they deliver.*

*Scottish Local Authorities, through COSLA and other representative bodies, should work closely with the Scottish Government in developing a systematic mechanism to assess the impact of EU legislative proposals and legislation on local competences across policy areas.*

*Scottish Local Government needs to be involved on a regular basis in joint policy formulation and development with the Scottish Government. COSLA is aiming to become an equal partner*



*in issue-based working groups with Scottish Government, similar to that already institutionalised in other European countries such as Netherlands, Denmark and Finland.*

*The Scottish Government needs to engage in joint forward planning and work with Scottish Local Government on the Scottish Government's EU strategy - the Action Plan on European Engagement - in order to adequately cover areas concerning us.*

*Scottish local authorities need to be closely involved in formulating Scottish positions on implementing key EU policies and specific parts of EU legislation.*

#### Scottish Parliament

*Considering the role of state and devolved parliaments in monitoring subsidiarity, there should be a right for Scottish Local Government (and Scottish Committee of the Regions members) to formally request the Scottish Parliament to launch a subsidiarity check on EU draft legislation directly affecting Scottish councils.*

*Existing arrangements between Scottish MSPs and councillors in the EU Committee of the Regions should be deepened to strengthen a joint Scottish approach.*

#### European Commission

*Having the main legislative initiative, the European Commission needs to fulfil its EU Treaty obligations. It needs to recognise in a robust way local and regional competences in its pre-legislative consultation procedures, ensuring that these specifically address local impacts.*

*Also the European Commission must ensure that, in the evaluation of the effectiveness of legislation, local governance is actively considered.*

#### European Parliament

*COSLA seeks to increase the interaction between Scottish Members of the European Parliament (MEPs) and senior councillors.*

*Scottish Local Government's collective and concerted action in Europe will be strengthened through regular exchanges between councillors with an active role in EU affairs, through the Scottish Local European Elected Representative group (SLEER)."*

*How to operationalise the proposals to these different bodies is explained in great detail throughout this submission.*

#### **Article 352 TFEU ('flexibility clause')**

*Q6: In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action? How appropriately has Article 352 been used?*

The Article 352 TFEU allows the EU to gain more powers without having to reform the EU Treaties. COSLA believes that if the European Commission is to use this mechanism to put forward legislative proposals, the principles of subsidiarity and proportionality must be respected. This means that the Commission must always prove why local, regional and national domestic legislation would not suffice to achieve the proposal's common objectives, while proposed measures need to be proportionate to what is necessary to achieve these objectives.

The 'flexibility clause' mentioned has not yet been used in an area directly affecting Scottish local government. However, it potentially opens up ways to legislate in policy areas, whether or not they are covered elsewhere and where they are not mentioned in the EU Treaties,

including policy areas that touch upon Local Authorities' competences. It is therefore important to read the flexibility clause in line with the principle of conferral (Art. 5(2) TEU).

In social and education policy, the EU has highly limited competences and is mostly restricted to supporting national coordination and exchange. At the same time, the EU Treaties explicitly exclude harmonisation of domestic regulation, including national standards and service provision (Arts. 149, 153(2), 165(4) TFEU).

**COSLA would oppose the use of the "flexibility clause" to create new EU competences in amongst others the areas of education, welfare provision and culture. Even if high level intergovernmental agreement could be achieved to harmonise practice, this would be unacceptable as it would undermine local democracy and accountability**

Equally COSLA is concerned with the fact that as a result of the Lisbon Treaty the "flexibility clause" no longer refers to completing the EU Internal Market (ex Art.308 TEC; Nice Treaty) and now under the Lisbon Treaty it applies to any areas of EU competence. **COSLA is concerned that this clause could be used to expand existing EU powers on transport, environment or social policy and thus undermine the existing local government competences and services.**

*Q7: Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?*

**COSLA would welcome a narrower and more precise definition on how and when this "flexibility clause" could be used to expand EU powers to the detriment of national and local government.**

At a UK level COSLA believes that section 8 of the European Union Act 2011 should be used by the UK Government and Parliament to seek the views of Local Government before deciding whether to accept the use of the flexibility clause.

## **Other**

*Q8: Are there any general points you wish to make on how well the current procedures and actors work to ensure that the EU only acts where it is appropriate to do so, and in a way which is limited to the EU's objectives, which are not captured above?*

COSLA has a final point about the recent agreement on the Transparency Register also known as the Lobby Register. The last minute amendments to the legislation fundamentally altered the parity of esteem between elected members from all spheres of government. It is unacceptable that Scottish Local Government is to be treated in the same way as private enterprises which need to be regulated to control personal gain, rather than a democratically elected partner in the governance of Scotland...

It ignores the progress of the *Committee of the Regions* in establishing a public register of all local and regional representatives at an EU level. **COSLA would like to see the UK Government and the new European Commission and Parliament change this provision and simply require that local and regional authorities working on EU policies be included in the Committee of the Regions existing register.**

---

## **References used throughout this report**

- COSLA (2009) [COSLA key Institutional messages for the new EU Term](#)
- COSLA (2010) [COSLA views on Multi-level Governance](#)

- COSLA (2012) COSLA response to proposed policy statement for Part 2 of Localism Act 2011
- House of Commons, 2010, How much legislation comes from Europe? Research 10/62 13 October 2010 HMSO: London
- House of Lords, 2007, Report on Article 308 TEC  
<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxix/41-xxix.pdf>
- European Parliament resolution of 13 September 2012 on the 18th report on Better legislation - Application of the principles of subsidiarity and proportionality (2010) (2011/2276(INI))  
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-340>
- Policy Statement Part II Localism Act 2011:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6070/2180375.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6070/2180375.pdf)
- CEMR (2007) "Consultation procedures within European states. An assessment of the systems for consultation between central governments and the national associations of local and regional government"  
<http://www.issirfa.cnr.it/download/File/CCRE.procedure%20consultation%20en.pdf>

---

<sup>i</sup> COSLA EU Priorities: [http://www.cosla.gov.uk/sites/default/files/images/cosla\\_eu\\_priorities\\_2012.pdf](http://www.cosla.gov.uk/sites/default/files/images/cosla_eu_priorities_2012.pdf)

<sup>ii</sup> Scottish Government (2011) "Handling EU Obligations"  
<http://www.scotland.gov.uk/Resource/Doc/274450/0082138.pdf>

<sup>iii</sup> Decision Procedure in Denmark and the EU:  
<http://eu.um.dk/en/info%20about%20denmark%20and%20the%20eu/decision-procedure-in-denmark-and-the-eu/>

<sup>iv</sup> Danish model: <http://www.eu-oplysningen.dk/upload/application/pdf/1d745fb1/SpecialudvalgunderEUUdvalget270213.pdf%3Fdownload%3D1>

<sup>v</sup> Finnish Model: <http://valtioneuvosto.fi/eu/suomi-ja-eu/asioiden-kasittely/jaostot/fi.jsp>

<sup>vi</sup> Handling EU affairs in Finland: <http://valtioneuvosto.fi/eu/suomi-ja-eu/asioiden-kasittely/en.jsp>

<sup>vii</sup> Code Administrative Relations Netherlands <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/publicaties/2013/02/11/code-interbestuurlijke-verhoudingen-2013/code-interbestuurlijke-verhoudingen-2013.pdf>