Why the Executive fails in Europe

How the Scotland Act ties Scotland's hands in Brussels and how to remove our handicap

Alyn Smith MEP
SNP Europe Spokesman
1 February 2007

Introduction

Seven years into devolution, it is empirically obvious that the Scottish Executive does not do very well when it comes to EU rules and regulations or human rights. The unionist parties are, still, pondering how to "do Europe" better.

From the Noel Ruddle challenge in the earliest days of the Executive, to the fridge mountain, from fishing to recent controversies over CalMac ferries, Fergusons Shipbuilders, air routes to islands, and other issues, the Executive seems to be either willingly harsher against Scots than against anyone else or somehow otherwise unable to fight Scotland's corner.

There is nothing in Brussels that is anti-Scottish. Quite the reverse. There is nothing in EU rules and regulations that other countries considerably smaller than us do not successfully navigate every day of the week. There is nothing that precludes direct Scottish negotiation with the Brussels institutions, yet we rarely see it happening. Our own Executive seems uniquely hamstrung. Why?

This brief assumes that our Ministers and civil servants are no less competent or enthusiastic than any other country. Leaving aside the calibre of Executive Ministers, and the obvious difficulties presented in dealing through Whitehall departments, this brief recognises and praises the professional officials serving Scotland in Scotland House in Brussels, and Edinburgh. This brief attempts to provide an explanation of why the sum appears considerably less than the parts.

Congratulations to Mr Ross Finnie MSP, the only Executive Minister in 6 years of operation to admit the actual reason. He stated to Robbie Dinwoodie of *the Herald* that ***"Scotland is uniquely bound by the Scotland Act to abide by EU law - even more so than most member states"*** (Herald, 30 August 2005, our emphasis).

The truth is, Scotland's reality as a devolved region of the UK puts us in a worse position than Malta, Estonia, Denmark, Ireland or even the UK itself. The Scottish Ministers in the Parliament so many fought so long to achieve actually have less power when it comes to representing Scotland in Europe than Ministers in the bad old days of the Scottish Office. This brief will go on to demonstrate that all Scotland's problems in the EU stem from the limitations placed upon us by the Scotland Act.

There is no better case scenario than Independence in Europe.

However, there are measures that can be taken to improve our situation now. The Scotland Act is holding us back, and the Scotland Act can be changed.

Legal position

EU law

EU law applies to all people, bodies and organisations within the EU territory. EU law covers a vast amount of subjects, and is always open to interpretation in terms of how it should be implemented. The interpretation of EU rules is often left to the relevant competent authority, be it local authority, health board or the like. The organisation ultimately responsible for that interpretation however is the UK government.

Seen from a Brussels perspective, devolved Scotland is a region of the UK with little distinct legal status, and any letter of complaint about the interpretation of EU rules would be addressed to London.

The only final legal authority on the interpretation of EU law is the European Court of Justice in Luxembourg. The decisions of the Court are binding, though bringing an action before it takes time. Few European Court of Justice cases actually result in substantial financial penalties, only where there was manifest intention to subvert EU law will heavy fines be levied. The usual sanction is that the domestic law is struck down, the member state ticked off and told to put it right, together with making redress to those citizens who lost out because of the member state misinterpretation.

The UK government is currently up before the European Court of Justice in **ten cases and before the Court of First Instance in two**[1]**.**

UK Constitutional law

The Scotland Act 1998 established the Scots Parliament, which, according to that Act, must act within the powers granted to it by that Act.

There is no European requirement that EU law apply more stringently to some organisations over others. Yet the Scotland Act makes clear in Section 57(2) that:

"A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law."

Why did the Westminster parliament deem this provision necessary when EU law already clearly applies?

The Act goes on, in Section 58(1) to make clear that:

"If the Secretary of State [for Scotland] ***has reasonable grounds to believe*** *that* ***any action*** *proposed to be taken by a member of the Scottish Executive would be incompatible with any international obligations, he may by order direct that the proposed action shall not be taken."*

This section goes on to stress that this power applies retrospectively, so this power to countermand legislation or other actions (for example awarding a tender to a Polish shipyard)

[1] Cases recorded either by or against the UK as of Nov 2006

is subject only to the "reasonable grounds to believe" criterion. That is, the action may not necessarily contravene EU law, the Secretary of State need only think it *might*.

Hypothetical explanation

I believe that this explicit demarcation of responsibility (and hence liability) in EU affairs between the Executive and the UK ministries was written in to the Scotland Act in order to make the lives of London ministers easier. From a UK perspective the last thing the mandarins in Whitehall would want would be to find themselves before the European Court of Justice because of the actions of a sub-national authority, Scotland, flexing its muscles.

This was in fact the case in Belgium for some years when the Federal government was regularly castigated for the actions of the Flemish devolved government, because the EU looks only to the member state capital without any adequate comeback in Belgian law against the Flemish Parliament because the devolution settlement there did not make provision for it.

Practical Effects - why the Executive fails in Europe

The power to overrule the Scottish Ministers granted to the often forgotten Secretary of State for Scotland throws the relationship between the UK and Scottish Ministers into sharp relief. The Secretary of State for Scotland is not a heavy hitter in the London cabinet, but can certainly hit the Executive hard in Edinburgh.

The Act makes clear that not only is the Scottish Executive responsible for any failure to interpret EU law, the Secretary of State may countermand any action of the Executive on **reasonable suspicion alone**.

Remember, the Scottish Executive civil servants are not under the ultimate control of the Scottish Ministers. They are part of the UK home civil service, answerable to London. The yardstick they use in looking at EU rules will be the same as that set down for the Secretary of State by the Scotland Act.

The provisions of the Scotland Act, therefore, effectively deny the Scottish ministers any scope for interpretation when dealing with EU rules.

Any UK Secretary of State has the right, as a member of the UK government, to run a risk, however small, that their interpretation of EU law is the correct one. The Scottish minister must be 100% certain.

The only way to be 100% certain is to take the harshest interpretation possible of whatever is under consideration and it is clear that the Scottish Executive would rather make the lives of Scottish business or individuals more difficult or waste taxpayers money on failed tenders than face a hypothetical challenge from the European Commission. **The Scotland Act makes clear that they do not have the power to take a risk.**

This brief has only obliquely considered the consequences of breach of EU rules. The consequences are not as stark as the Executive regularly claims, a mere glance at the recent cases of the ECJ confirms this.

However, as this brief has outlined, the problem is not European, it is domestic. The Scotland Act has placed the Scottish Executive, which it created, under a unique impediment when representing Scotland in Europe and interpreting EU laws in Scotland.

Independence in Europe will sweep this away. Pending that, repeal of sections 57 and 58 would help the Executive do what it was set up to do and get the best deal for Scotland.

Conclusion and next steps

I believe that this paper makes a reasonable case for the urgent repeal of sections 57 and 58 of the Scotland Act 1998. I believe the powers of the current Scottish Executive are insufficient to adequately represent Scotland in Europe and to sensitively transpose legislation into domestic law.

Despite my own obvious conclusions, this document is a consultation paper, and I am actively seeking comments from any and all interested parties in Scotland. It has been sent to senior academics, commentators, many others with an interest in the subject and all MSPs, MPs and MEPs for Scotland. I will publish a summary the feedback in due course.

Please send comments to me, by the end of February, at:

alyn.smith@snp.org

Or

Alyn Smith MEP, c/o SNP Headquarters, 107 McDonald Road, Edinburgh EH7 4NW

Many thanks for your time. I believe this subject, while technical, cuts to the heart of a national failing, which I further believe is more than capable of remedy. You may have a different conclusion, and prescription, to mine. I am more than willing to take that debate on and hope that, in true European style, a suitable consensus can be found.

Yours aye,

Alyn Smith MEP
SNP Europe Spokesman

Section 57. - (1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.

(3) Subsection (2) does not apply to an act of the Lord Advocate-

(a) in prosecuting any offence, or

(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland,

which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

Section 58. - (1) If the Secretary of State has reasonable grounds to believe that any action proposed to be taken by a member of the Scottish Executive would be incompatible with any international obligations, he may by order direct that the proposed action shall not be taken.

(2) If the Secretary of State has reasonable grounds to believe that any action capable of being taken by a member of the Scottish Executive is required for the purpose of giving effect to any such obligations, he may by order direct that the action shall be taken.

(3) In subsections (1) and (2), "action" includes making, confirming or approving subordinate legislation and, in subsection (2), includes introducing a Bill in the Parliament.

(4) If any subordinate legislation made or which could be revoked by a member of the Scottish Executive contains provisions-

(a) which the Secretary of State has reasonable grounds to believe to be incompatible with any international obligations or the interests of defence or national security, or

(b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters,

the Secretary of State may by order revoke the legislation.

(5) An order under this section must state the reasons for making the order.