

3rd March 2014

You will be aware of the UK Government's Balance of EU Competences Review, an audit of how the EU's powers affect a number of policy areas. The Scottish Government has been engaging constructively with this review and I am pleased to inform you that we published a summary of our responses, and our proposals for reforming EU law and policy within the framework of the existing EU treaties, on February 18, 2014.

This paper, entitled "Scotland's Priorities for EU Reform", highlights the positive impact that membership of the EU has had on Scotland and outlines the areas of EU law and policy which we are seeking to reform in accordance with Scotland's priorities. The paper focusses on the relationship between Scotland and the European Union in a policy context, examining how the EU exercises its powers in many areas which are particularly important for Scotland, such as agriculture, fisheries and environment and climate change. We are of the view that these aspects can be improved without treaty change.

It is important to note that we consider that any result of the Balance of EU Competences Review is of a different timescale and nature than any treaty change delivering the "continuity of effect" and "no detriment" principles outlined by the Scottish Government, should there be a "yes" vote in Scotland's independence referendum this year.

"Scotland's Priorities for EU Reform" is available online at:
<http://www.scotland.gov.uk/Publications/2014/02/6799>. I have also attached a copy below for your convenience.

I hope this paper provides a useful overview of the Scottish Government's vision for its future within the European Union.

Kind regards
Fiona Hyslop

FIONA HYSLOP

Scotland's Priorities for EU Reform

February 2014



Foreword by the Cabinet Secretary for Culture and External Affairs

The European Union is central to the Scottish Government's policy drive for growth and jobs. The EU provides peace and security, and access to the world's largest single market, with the free movement of goods, services, capital and people. The EU institutions derive their powers from the EU Treaties, and may not – in their legislative and policy actions – exceed the limits placed on their actions by them.

The UK Government is currently assessing the balance of competences between the UK and the EU. This Balance of Competence Review is essentially an assessment of the legislative and policy powers that have been conferred on the EU and its institutions by successive revisions to the EU Treaties. The intention is, therefore, to identify legislative instruments that may be damaging to UK, or indeed EU, economic or wider political interests. The Scottish Government is a willing contributor to this review, highlighting areas of EU competence which work well for Scotland, as well as those where some element of reform would have a positive impact.

Under the current UK constitutional settlement, the Scottish Government is responsible for many policy areas for which the EU possesses competence – agriculture, fisheries, energy, the environment and climate change, to name but a few. Despite sharing competence with the EU in these areas, one of the anomalies of the current UK constitutional settlement is that the UK Government itself has exclusive responsibility for Scotland's relations with the EU and its institutions. This means that, despite being able to set the domestic policy in these areas, the Scottish Government is unable to participate directly in the development of EU law and policy. This peculiarity of the UK constitutional settlement gives the UK Government the authority to speak on behalf of Scotland when it comes to the formulation of EU law and policy – even in those areas where the UK Government cannot legislate for Scotland. The reality of the UK constitutional settlement means that where the Scottish and UK priorities on an issue within EU competence do not align, it will be the UK Government's view which is communicated in the EU institutions.

In his Bloomberg speech of 23 January 2013,¹ the UK Prime Minister committed a post-2015 Conservative Government to re-negotiating the UK's terms of EU membership, and to holding an "in/out" referendum on Europe. This poses a real threat to Scotland's continued place in the EU. A re-negotiation of the EU Treaties with a choice to opt-in or opt-out, would have a huge impact on all of the areas within the legislative competence of the Scottish Parliament, as well as the potential to devastate the growth of the Scottish economy.

It is against this backdrop that the Scottish Government has been engaging with the UK Government over the review. Through hard-based evidence, we are stressing to the UK Government the importance of Scotland's continued place in the EU. Whilst we agree that the EU is not perfect and that there is a great deal of EU legislation in need of reform, the Scottish Government believes that this is best effected through the existing framework of the EU Treaties and institutions. The Scottish Government is eager to play a leading role in the reform of EU law and policy, but its sphere of influence is curtailed by the current UK constitutional settlement.

As an independent Member State, the Scottish Government would be responsible for representing Scotland's interests at all levels within the EU and in each legislative and policy matter over which the EU has competence, including the issue of future reforms. By working as an independent country, we will be much more effective in ensuring that the key interests of Scotland, along with its European partners, are driven forward. By acting directly rather than through intermediaries, we will be much better placed to support the EU institutions to deliver progress in areas which have proved challenging, such as ensuring a worldwide climate change agreement. By pressing a strong reform agenda in partnership with the EU institutions and likeminded Member States, a proactive Scotland will be an asset to all of Europe and its citizens.



Fiona Hyslop MSP
Cabinet Secretary for Culture and External Affairs

¹ David Cameron, *EU Speech at Bloomberg*, 23 January 2013 - <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>

1. UK Balance of Competences Review: What does the Review involve?

1.1. The Review of the Balance of Competences between the UK and the EU is essentially an assessment of the legislative and policy powers that have been conferred on the EU and its institutions by successive revisions to the EU Treaties. Each of these revisions have been agreed upon, unanimously, by all Member States. The EU institutions derive all of their powers from the EU Treaties, and may not – in their legislative and policy actions – exceed the limits placed on their actions by them. Where power (or competence) has been conferred on the EU, the EU institutions may adopt legislative or non-legislative measures in accordance with the rules set out in the Treaties on the exercise of their powers. The EU institutions may not, however, adopt any legislative or non-legislative measures in an area where the Member States have not conferred the competence on the EU.

1.2. Implicit in the Review of the Balance of Competences is the possibility, if not likelihood, that a future UK Government may seek a revision to the EU Treaties in order to return legislative authority to the Member State and away from the EU level. Indeed, in his EU speech at Bloomberg, Prime Minister Cameron indicated that the environment, social affairs, and crime are policy areas in which a shift in the balance of competences between the EU and Member States may be desirable. However, any revision to the EU Treaties to achieve a change in the legislative balance between the EU and the Member States – either for all Member States or exceptionally, for the UK – would have to be agreed by all Member States.

1.3. An alternative perspective, and one supported by the Scottish Government, is to distinguish between the legislative and policy competences assigned to the EU by the Treaties on the one hand, and the manner in which the EU Institutions discharge their legislative prerogative on the other hand. Like other governments, the Scottish Government believes that the wider objective of better EU governance can be achieved by improving the manner in which the EU legislates within the competences it has, rather than embarking on a new round of Treaty revisions designed to change the areas of policy over which the EU has competence to legislate.

1.4. The Scottish Government considers that the quality and complexity of EU legislation can prove to be overly burdensome on small and medium sized enterprises and can prove to be a brake on economic growth. We therefore act as a proponent of better and smarter regulation, at both the national and EU level, and are supportive of the REFIT package, which the European Commission is using to simplify the legislative burden. The REFIT package was launched in December 2012 and has made substantial progress in improving the EU legislative process by introducing summaries of impact assessments and making further use of common commencement dates. The Scottish Government is eager to see this continue into 2014 and beyond, with the substantive reform of EU legislation in a number of areas which directly impact on Scottish businesses.

1.5. The categories and areas of EU competence are set out in Title I of the Treaty on the Functioning of the European Union. There are three different types of competence: exclusive, shared and supporting. In an area where the EU has exclusive competence, such as the customs union or the conservation of marine

biological resources under the Common Fisheries Policy, the power to take action vests solely in the EU institutions. Member States cannot take action, except insofar as power has been delegated to them by an EU measure. In an area where the EU and Member States 'share competence', such as the environment, transport and energy, both the EU institutions and Member States may enact legislation, although the laws passed by Member States in areas of shared competence may not conflict with EU laws enacted in that policy area. In an area of supporting competence, such as industry, culture and tourism, both the EU institutions and the Member States may take action.

2. General: The principles of subsidiarity and proportionality

2.1. It should be noted that the exercise of EU competence is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which are not within the exclusive competence of the EU, the EU is only permitted to take action if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the Member States themselves, either at central, regional or local level. In addition, the subsidiarity principle demands that, by reason of the scale or effects of the proposed action, it will be better achieved at EU level.

2.2. The principle of subsidiarity is an important limitation on the powers of the EU, preventing its institutions from adopting measures where action by the Member States themselves can achieve the objective. The principle of subsidiarity ensures that decisions are taken at the level of government which is closest to the people whom they are going to affect. This means, for example, that in an area which is both devolved to the Scottish Parliament and within the supporting competence of the EU - such as education - the EU will only take action where the objectives cannot be sufficiently achieved by measures adopted by the Scottish Parliament. The Treaty of Lisbon established a new system whereby the parliaments of Member States are empowered to object to a legislative proposal on the grounds that it violates the principle of subsidiarity. If over one-third of parliaments object on this basis (or one forth for matters of justice, crime and security), the European Commission is obliged to respond.

2.3. All actions of the EU in the exercise of its competences are also limited by the principle of proportionality. That is to say, the substance of any adopted measures cannot go beyond what is necessary to achieve the objectives of the EU Treaties.

2.4. Through our engagement with the UK Government's Review and our analysis of the way in which EU competence has affected Scotland, we have overwhelmingly found that being a part of the EU has been of enormous benefit in almost every aspect. While EU law adds a layer of regulation which can sometimes prove to be frustrating, the wider commercial benefits of being able to access the single market by conforming to EU rules and regulations more than outweighs these frustrations.

2.5. However, this does not mean that EU regulations are always appropriate. Accordingly, the Scottish Government is committed to increasing its influence over the development of EU law and policy so that these frustrations can be addressed within the existing framework of the EU Treaties. The work conducted by the Scottish Government in the context of the Review of the Balance of Competences clearly demonstrates a requirement for greater regionalisation (subsidiarity) and flexibility

(proportionality) in EU regulatory activity. While EU competence across a wide swathe of economic and social policies is necessary to drive forward common policies and maintain a level playing field in the single market, much could be done to improve the process through which the EU institutions operate and discharge their functions at every stage in the legislative process.

2.6. Proposals for reform

The Scottish Government would like to see:

- Greater weight put on collective policy and funding initiatives where binding EU legislation might not be the most effective or appropriate way of addressing an issue.
- Greater adherence paid to the principles of subsidiarity and proportionality in developing proposed EU legislation, so that policies and laws are taken closest to the people that they are most likely to affect. This would also prevent the imposition of needlessly complicated and burdensome legislative frameworks which are not necessary to address given objectives.
- Greater use of Directives rather than Regulations where comprehensive harmonisation of the laws of the Member States is not absolutely necessary. Directives give greater flexibility to the Member States to incorporate EU law into their domestic legal systems in a way which is tailored to, and fits better, with differences in geography, customs and legal systems.
- Enhanced consultation on proposals for legislation with the conducting of more detailed impact assessments, including at those stages in the legislative process at which significant amendments to legislative proposals are made.

3. Detailed Policy Areas

Areas covered in semester one

3.1. The UK reports in the first semester of the Balance of Competences Review, along with all of the evidence submitted in each policy area, were published on 22 July 2013. These cover an overview of the single market; taxation; animal health and welfare and food safety; health; international development and humanitarian aid co-operation; and foreign policy.

3.2. The Scottish Government is pleased that the weight of the evidence in each of these areas pointed to EU competence being 'broadly appropriate' and generally of benefit to the UK. This is in line with our perception of the EU's existing powers, which we believe add value in a number of ways.

3.3. The Scottish Government is not alone in using this exercise to highlight the benefits of remaining a member of the EU. In the review's first semester, a number of businesses and political and governmental figures responded to the calls for evidence by underlining the vital importance of continuing EU membership. For example, Sir David Manning, the former British Ambassador to the United States,

warned that “the risk to the UK of leaving the European Union is of a rapid drift into international irrelevance.”² This ‘irrelevance’ would not only sideline the UK’s influence in foreign policy negotiations, but would also mean that the economic opportunities offered by EU membership – such as increased scope for foreign direct investment and access to a single market comprising of 500 million fellow European citizens and around 20 million businesses – would be extinguished.

3.4. This message was echoed by the Confederation of British Industry; British-American Business; the US Chamber of Commerce; Vodafone; the Bioindustry Association; and the Japanese Government, which each pointed to the UK’s presence in the Single Market as key to attracting foreign investment and driving forward the UK economy.³ Taking Japan as just one example, the perception of the UK “as a gateway to the European market” has attracted investment by 1300 Japanese companies in the UK, in turn improving the functioning of the labour market by creating 130,000 jobs⁴. Looking at the case of Scotland, there were over 2,100 foreign owned companies established here in 2012, which employed over 290,000 people and turned over £87 billion.⁵ Taking this into account, the ability to ‘opt out’ of EU membership, as the UK Prime Minister proposes, would have a devastating effect on our economy and the livelihoods of everyone living and working in Scotland.

Areas covered in semesters two and three

Semester two

3.5. The UK Government recently published its reports in semester two, covering the following competences: Single market: Free movement of Goods; Single market: Asylum and Immigration; Trade and Investment; Environment and Climate Change; Transport; Research and Development; Tourism, Culture and Sport and Civil Justice.

3.6. The Scottish Government has submitted responses to these calls for evidence, which are available on our website at [http:// www.scotland.gov.uk /Topics/International/Europe/Our-Focus/Balance-Of-Competences-Review](http://www.scotland.gov.uk/Topics/International/Europe/Our-Focus/Balance-Of-Competences-Review)

3.7. Again, the reports in this semester focussed heavily on the value of the UK’s membership of the EU – particularly with regard to participation in the single market. As the Council of British Chambers of Commerce in Europe stated, “EU action.. supporting and enhancing the free movement of goods within the EU is very positive for business. [It] results in a more competitive market, cheaper prices and better quality”, which in turn benefits consumers.⁶

3.8. The need to ensure secure better, and less, regulation at the EU level was also highlighted in the semester two reports. This reflects the Scottish Government’s position that regulation at the EU level should be done in a manner which is least burdensome and reflects local circumstances.

² *Submission of Sir David Manning to the Balance of Competences Review*, July 2013

³ *UK Balance of Competences Review Report on the Single Market*, para. 3.15

⁴ *Submission of the Government of Japan to the Balance of Competences Review*, 15 July 2013

⁵ *Scotland in the European Union*, Scottish Government 2013, p.64

⁶ *Submission of COBCOE to the Free Movement of Goods report in the Balance of Competences Review*, 2013

3.9. Finally, the reports also confirm the Scottish Government's view that while it is essential that the EU retains its existing competences, a number of these could be exercised in a better manner through greater adherence to the principles of subsidiarity and proportionality.

Semester three

3.10. The calls for evidence recently closed for Semester three, covering the following competences: Single market: Services; Single market: Financial Services and the Free Movement of Capital; EU Budget; Cohesion; Social and Employment; Agriculture; Fisheries; Competition and Consumer Protection; Energy and Fundamental Rights.

3.11. This report continues on to give a summary of the key points made by the Scottish Government in semesters two and three.

4. Scottish Government Findings by Policy Area

4.1. The Single Market and Trade and Investment

Single market

4.1.1. Our assessment of the balance of competences between the UK and the EU in relation to the single market⁷ demonstrates the absolute necessity for EU competence in this area. The single market could not function properly simply by the Member States working flexibly together; it required supranational institutions to establish it and will require supranational institutions to oversee its continuation and completion.

4.1.2. The establishment of the single market is one of the key achievements of the EU. It now constitutes the world's largest single market, comprising of more than 500 million consumers. In 2010, the EU27 accounted for over 25% of total world economic output (GDP).

4.1.3. The single market has ensured the free movement of goods, services, capital and people across the EU, which has created a wider society with benefits to businesses, consumers and workers alike. A number of studies⁸ have attempted to estimate the economic impact of the Single Market, but due to variations in the methodology applied, it is difficult to draw direct comparisons across studies. However, as noted in a recent report by the UK Government, "most studies suggest that the GDP of both the EU and the UK are appreciably greater than they otherwise would be, thanks to economic integration through the Single Market."⁹ Analysis by

⁷ Encompassing Scottish Government submissions to the Balance of Competences Review on the Free Movement of Goods, Services, Persons and Capital; Financial Services; Trade and Investment; Competition and Consumer Protection; and Social and Employment Policy.

⁸ An overview of these studies is provided in the following report:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf

⁹ *Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market*, July 2013,
<https://www.gov.uk/government/consultations/call-for-evidence-on-the-governments-review-of-the-balance-of-competences-between-the-united-kingdom-and-the-european-union>

the European Commission suggests that over the period 1992 to 2006, the Single Market has generated an additional 2.75 million jobs in the EU and an additional 2.2% in GDP¹⁰.

4.1.4. Membership of the EU and access to the single market provides Scottish businesses with greater access to suppliers, labour and customers. Increased competition has also resulted in technological advancement, whilst keeping the prices of goods and services down. Scottish exporters are already benefiting from access to the Single Market. The European Union (EU27) is the main destination for Scottish international exports – accounting for 46% of international exports in 2011, with an estimated value of around £11 billion.¹¹ Since 2006, the value of Scottish exports to the EU has increased by 35.1%, which compares to growth of 29.1% in total international exports over the same period.¹²

4.1.5. The Scottish Government believes that EU regulations provide value in supporting the functioning of the single market. For businesses, it is much easier to export goods and services to markets with one common set of rules, rather than 27 differing ones. For example, the Community trade mark and the registration of industrial designs have reduced the burdens on business and protected intellectual property, as EU companies can register a trade mark or an industrial design once and have it recognised in all 28 Member States. EU competition law also ensures that many businesses have been able to access markets which were previously closed to new entrants. For consumers, EU technical product standards provide reassurance that the goods they purchase are of good quality, no matter where they were produced in the EU.

4.1.6. Despite the clear advantages of EU action in relation to the single market, the Scottish Government is also mindful that EU laws in this area have become extremely technical and complicated and can act as a brake on economic growth by imposing too many burdens on new and small businesses. We wish to work in partnership with the EU institutions and Member States to ensure these problems are addressed.

Trade and investment

4.1.7. Scotland's place in the single market also carries significant advantages when it comes to trade and investment. Scotland benefits from a number of bilateral trade deals that the EU has negotiated with third countries. These allow preferential, and often free, access to these markets. Standing alone, the UK would not be in a position to negotiate such advantageous deals.

4.1.8. By virtue of being part of the single market, Scotland is an attractive place for foreign investors. Investment in Scotland, as part of the EU, equates to investment in the single market and the freedom within that market from import duties and other restrictions on trade.

¹⁰ *Steps towards a deeper economic integration: the Internal Market in the 21st Century – a contribution to the Single Market Review*, January 2007,

http://ec.europa.eu/economy_finance/publications/publication784_en.pdf

¹¹ *Global Connections Survey 2011*, Scottish Government,

<http://www.scotland.gov.uk/topics/statistics/browse/economy/exports/GCSIntroduction>

¹² *Scotland in the European Union*, Scottish Government 2013, Annex 3

Free movement of persons and social and employment

4.1.9. In order to benefit from access to the single market, it is only right that Scotland takes on the responsibilities of being part of it. The single market is secured on the fundamental freedoms which require, in principle, all EU citizens, goods and service providers and investors to be treated on the same basis as those in Scotland. Workers cannot be attracted to come to work in Scotland if they are not given the same support should they lose their job due to economic or health circumstances.

4.1.10. Our responses to the UK Government's calls for evidence on the Free Movement of Persons, as well as on social and employment issues, demonstrate the positive impact that migrants have had on the Scottish economy, particularly in rural areas. These responses recognise that the single market can only function well if all Member States provide a minimum level of protection for employment opportunities, wages and other employment conditions. As such, the Scottish Government considers that these social and employment protections are vital to the functioning of the single market and go hand in hand with having a dynamic and competitive economy.

4.1.11. EU freedom of movement has also provided opportunities for people to live and work in Scotland – and contribute to Scotland's economic performance. Students from other EU states are eligible to study in Scotland, often through Erasmus and other formal programmes, and they do so with confidence in the standards of teaching and resources they will receive. At Scottish higher education institutions in 2011/12, there were 17,475 EU (non-UK) domiciled students (both undergraduate and postgraduate), accounting for 8.1% of all students in Scotland. Freedom of movement has also given Scots the opportunity to live and work in other Member States. In 2011/12, over 1,350 Scottish students were studying at universities throughout Europe through the Erasmus programme.¹³

4.1.12. Figures from the International Passenger Survey, produced by the Office of National Statistics, provide a very rough estimate of EU migration in and out of Scotland. They have estimated that over the last 10 years, covering mid-2001 to mid-2011, there has been a net gain of between 36,000 and 83,000 EU migrants in to Scotland. The Scottish Government recognises the positive economic impact these migrants have had for the UK as a whole. For example, during the year 2008-2009, A8 migrants paid 37% more in direct or indirect taxes than they received in public goods and services.¹⁴

4.1.13. Further, the free movement of persons throughout EU member states has allowed skills shortages to be addressed throughout the UK. For example, the UK oil and gas sector reports that the shortage in skilled personnel is one of the biggest challenges for the UK's offshore oil and gas industry. In 2012, 82.8% of the personnel who travelled offshore were of British nationality. Out of the remaining nationalities, eight out of the top 10 were European Economic Area nationals, (the

¹³ *Fiscal Commission Working Group – First Report – Macroeconomic Framework*, February 2013, <http://www.scotland.gov.uk/Publications/2013/02/3017>

¹⁴ *The fiscal effects of A8 migration to the UK*, Christian Dustmann, Tommaso Frattini, Caroline Halls, 8 August 2009, VOX: Research-based policy analysis and commentary from leading economists, www.voxeu.org/article/fiscal-effects-a8-migration-uk

other two being Canadian and American nationals), which illustrates the importance of the sector's access to EEA migrants.¹⁵

Proposals for reform

4.1.14. From our assessment of EU competence in relation to the single market, the Scottish Government wishes to see:

- EU legislation passed to oversee the completion of the single market and the removal of barriers to trade in all Member States - in particular, advancement of the freedom to provide services.
- The reform of EU legislation which is so complex and burdensome that it acts as a barrier to establishing a new business and employing staff, as well as expanding a small or medium-sized business.
- The reform of EU legislation which is so complex and burdensome that it prevents businesses from investing in research and development.
- Progress made on the EU2020 Digital Agenda so that, Scotland, and the entire EU, has a world class digital infrastructure making it an attractive place for enterprise, enabling it to compete on a global scale.
- The EU Youth Employment Initiative and the Youth Guarantee built upon to promote the goal of full youth employment, since unemployment of youth in other Member States affects Scotland too.
- The benefits of the single market used to tackle poverty and deprivation across Europe.

4.2. Fisheries

4.2.1. The importance to Scotland of our marine environment and fishing industry cannot be overstated. Within Europe and indeed, the UK, Scotland has a unique marine environment and the fishing industry occupies a prominent position in our communities, economy and history. Despite comprising only 10 per cent of the UK's population, Scotland accounts for 70 per cent of the UK's fishing industry and 90 per cent of the UK's aquaculture.

4.2.2. EU competence in relation to the conservation of marine biological resources is necessary. Many of the valuable fish stocks found in the seas around our coastline are shared by other nations. Sea-fishing in Scotland can only be sustained, therefore, if co-ordinated action is taken by all Member States which share an interest in our key stocks. This requires supra-national measures.

4.2.3. Historically, however, EU competence in relation to the Common Fisheries Policy has been poorly exercised through micro-management and a 'one size fits all' approach. Indeed, the Common Fisheries Policy has been characterised by a decline in the quantity and diversity of marine life. Nobody cares more about, and

¹⁵ UK Continental Shelf Offshore Workforce Demographics Report 2013', Oil & Gas UK, <http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EM012.pdf>

relies more on, Scotland's marine environment than the people of Scotland. Since the people of Scotland have the greatest influence over the elections for the Scottish Parliament, it is only right that the Scottish Government has a significant influence over the protection of Scotland's marine environment. The influence of the Scottish Government is, however, restricted in two ways.

4.2.4. Firstly, the exercise of EU competence in the protection of the marine environment allows little action to be taken by the individual Member States. The marine environment in Scotland has not been adequately protected by a centralised European policy. Greater flexibility is required so that local measures may be adopted for local issues.

4.2.5. Secondly, the marine environment is significantly more important to Scotland than it is to the UK as a whole. When the UK Government is negotiating the development of EU law and policy through the Council of Ministers, it is only logical to conclude that it will act in the interests of the whole of the UK and not Scotland. This is evident from the fact that the Common Fisheries Policy is not a priority item on the UK Government's agenda, when it would be one of the main priorities of the Scottish Government.

Proposals for reform

4.2.6. The Scottish Government will seek to work within the current Treaty framework so as to:

- Continue the move away from a centralised approach to fisheries management in favour of greater flexibility and the further delegation of powers to the national and regional level.
- Grant Member States further autonomy in relation to inshore waters to ensure the survival of Scottish fishermen's traditional fishing grounds.
- Ensure a more equitable allocation of fisheries funds, access rights and quotas, which takes account of regional diversity among the Member States.
- Simplify the vast array of EU legislation which confuses fishermen and complicates compliance.

4.3. Agriculture

4.3.1. The original form of the Common Agricultural Policy, which aimed to deliver its policy goals by regulating the market for agricultural products among a small and relatively homogeneous collection of Member States, lent itself readily to action at the European level. It had little need to allow for flexibility to tailor the policy to local needs. The evolution of the Common Agricultural Policy alongside the progressive enlargement of the EU has seen an increase in the heterogeneity among the Member States and the introduction of new policy tools which, unlike the original market regulation approach, either benefit from or actively require local tailoring.

4.3.2. The Common Agricultural Policy has, therefore, moved from a 'one size fits all' approach to one embracing more local flexibility. The Scottish Government is supportive of the exercise of the EU's competence in this manner. We would encourage the move towards greater national and regional discretion in the Common Agricultural Policy, but equally recognise the need for the EU to retain competence so as to ensure a level playing field for farmers across Europe.

4.3.3. The geography of Scotland, where farmers and crofters face relatively extreme farming conditions (approximately 85 per cent of Scotland's agricultural land is classified as "Less Favoured Area" under the Common Agricultural Policy), distinguishes Scotland, both in the UK and among the EU Member States. Farming practices, therefore, vary widely from the remainder of the UK and Europe. Again, Scotland has no direct voice in the EU institutions to represent our farmers and crofters who face very different farming conditions from their UK and European counterparts. Due to the current UK constitutional settlement, the UK Government is responsible for representing the UK farming industry as a whole and cannot, therefore, give a voice to the minority of Scottish farmers. The UK Government's decision not to allocate the full Pillar 1 convergence uplift to Scotland, even although the UK only received this money because of Scotland's low per hectare payment rate, is a prime example. By distributing this money pro rata across the UK, Scotland's farmers and crofters will lose out on payments that the EU intended to benefit them.

Proposals for reform

4.3.4. The Scottish Government will seek to work within the current Treaty framework so as to:

- Ensure that CAP payments received in respect of Scottish farmers and crofters are paid to those farmers and crofters.
- Increase the flexibility in the Common Agricultural Policy, while maintaining a minimum level playing field throughout Europe.
- Supplement EU competence with national and regional policies aimed at protecting plant health and regional diversity in plants and seeds.
- Reduce the growing administrative burden imposed on farmers and growers by increasingly complex EU legislation.
- Retain national competence in respect of forestry.

4.4. Energy, environment and climate change

4.4.1. Our assessment of the balance of competence between the EU and the Member States in relation to energy, the environment and climate change stresses the requirement for the EU to retain competence in these areas. The Member States, acting individually, cannot effectively tackle the problems that Europe faces in terms of finite energy resources, escalating damage to the environment and the stark dangers posed by climate change. Our environment is a collective resource and it is only through collective action that the Member States can pursue economic growth

and development in a sustainable fashion. It is in this field that the EU institutions have played a strong leadership role. For example, strong EU action has allowed us to secure cost-effective collective action to reduce emissions and reap the economic benefits of a low carbon economy. The costs of acting together in this area are far lower than the costs of acting alone, and the trans-boundary impacts of climate change render unilateral action ineffective. A strong EU climate *acquis* not only ensures a fair burden in emissions reduction among the Member States, but it also ensures a strong voice, leading by example, in the global climate negotiations.

4.4.2. In terms of energy, the EU 2020 renewables targets have been a key driver for renewables investment in Scotland, creating the investor confidence which has enabled Scotland to unlock its massive offshore wind, wave and tidal resources for European benefit. This, coupled with the availability of EU funding, has had an extremely positive effect on research, development and the demonstration of new technologies in Scotland. For example, the European Fuel Cells and Hydrogen Joint Undertaking has supported the hydrogen-powered bus project in Aberdeen, which has been rewarded with €9.3 million of EU funding. This, in turn, has inspired a Scottish project to develop the world's first car and vehicle ferry powered by hydrogen fuel cells.

4.4.3. An EU with a strong position on energy, environmental protection and climate change will also be able to influence these matters on a global level – and it is a global solution that is necessary in relation to these issues.

Proposals for reform

4.4.4. If the Scottish Government were responsible for Scotland's relations with the EU and its institutions, it would seek to work within the current Treaty framework in order to:

- Enhance the role of the EU institutions in driving forward initiatives on environmental protection and climate change and setting ambitious but realistic targets, where this adds value and is appropriate to EU competence.
- Move away from a 'one size fits all' approach and allow greater flexibility in the setting of targets which are tailored to each Member State's geography and state of industrial development.
- Encourage the European Commission to better promote EU policy coherence across energy, climate and environment policy.
- Seek structural reform of the Emissions Trading Scheme. The ETS is currently suffering from a very low carbon price due to an overabundance of allowances (due in most part to the financial crisis and subsequent reduction in production but arguably also due to over-generous allocations of free allowances), which has led to negotiations on restructuring the market to reduce the volume of allowances.

- Encourage EU action to promote and support the development of new energy technologies such as offshore wind, marine energy, energy storage and carbon capture and storage.
- Encourage an EU-wide ramp-up of offshore wind technology development to accelerate increased investment and commercial success to meet the 2020 targets, and support progress looking towards to 2030.
- Advocate marine energy being given full support under the revised Strategic Energy Technology Plan, and incentivised by an EU 2030 climate and energy package.
- Encourage EU action on energy storage, including issues such as gas standards and the capacity of gas networks, given the increase of renewable energy in Europe and the related issue of balancing between supply and demand across Europe.
- Commit to the development of carbon capture and storage technology on a commercial scale, given that CCS is the only technology available to mitigate greenhouse gas emissions from large-scale fossil-fuel usage, and encourage the incentivisation of CCS at EU level.

4.5. EU Budget and Cohesion

4.5.1. Competence in respect of the EU budget and cohesion is exercised almost exclusively by the EU. The Scottish Government considers that the balance of competences between the EU and the Member States is just about right in this area. A collective budget for the EU fosters a strong philosophy of partnership amongst the Member States and highlights the importance of developing and linking infrastructure to enhance opportunities and economic development. It enables the Member States to act collectively to enhance economic growth, create education and employment opportunities, to invest in research and development, to protect the environment and tackle market failure, inequality and deprivation in all parts of the EU. These matters could not be addressed as effectively by the Member States acting individually out of the national interest.

4.5.2. Scotland has received significant levels of financial support from across a number of EU funds, including European Structural Funds, the European Agricultural Fund for Rural Development and the European Fisheries Fund. These funds play an integral role in Scotland's economy. During the funding round between 2007 and 2013, for example, Scotland received £1.3 billion of structural funds, which were used to build 10 regional roads and six ports in the Highlands and Islands; to support 55 urban regeneration projects; to provide infrastructure, skills and R&D for business; and to train over 250,000 individuals, mostly from marginalised groups.¹⁶

4.5.3. Although the Scottish Government is supportive of the EU's competence in relation to the budget and cohesion policy, we do recognise that there are issues

¹⁶ *Submission of the Scottish Government to the Balance of Competences Review on Cohesion, 2013*

with the way it is exercised. The process for agreeing the budget is fraught with complexity and tensions which invariably leads to the extension of timescales. Delays in agreeing the budget have an effect on the individual programmes which it supports and the associated regulations, often leaving programmes in limbo until agreement is reached. Complex legislation around the use of funds can also lead to a variety of differing interpretations and lead to the misuse of funds. Auditing procedures occur at both a national and EU level and create a huge administrative burden. While there is a need to ensure consistency across the EU, delegating greater responsibility to the Member States for auditing the use of funds (particularly those with robust systems in place) would cut down on duplication and enable the funds to be applied more effectively.

4.5.4. The current constitutional settlement in the UK also poses particular problems for Scotland. Geography, natural resources and the extent of the development of the economy are all critical factors in determining investment priorities in the use of funds received in respect of the UK. These factors vary widely enormously across the UK, meaning it is impossible for the UK Government to negotiate the EU budget with a view to reflecting the needs and priorities of Scotland.

Proposals for reform

4.5.5. The Scottish Government will seek to work within the current Treaty framework so as to:

- Ensure greater funding is dedicated to building infrastructure to create a platform for real economic growth – not only within each Member State, but between the Member States, improving economic co-operation and cohesive economic growth.
- Ensure the EU institutions recognise the economic circumstances prevailing in the Member States so that restraint is shown in economic downturns.
- Ensure a greater role for regions, so that variations in the geography, resources and economic conditions within an individual Member State are accounted for in the agreement of the budget.
- Build a budgetary system which respects the interdependency of agreeing the budget with the progress of individual programmes and associated regulations so as to allow sufficient flexibility in its use in the likely event of delays in the timescales for reaching agreement.
- Reduce the bureaucracy in respect of auditing by simplifying regulations and imposing greater responsibilities on the Member States.

4.6. Research and development

4.6.1. Evidence from throughout the Scottish business base and academic institutes supports the view that participation in EU research and innovation programmes can deliver many positive outcomes. This includes the potential to increase scientific and

business reputations (as participation in EU programmes is based on excellence); the ability to attract and retain world-class researchers; and the potential to maximise opportunities to access new markets and funding.

4.6.2. Scotland has bolstered the impact of EU action in the field of research and development by taking an active and enthusiastic part in pursuing the aspirations of the Bologna Process. As part of Bologna, the European Higher Education Area (EHEA) was launched in 2010 with objectives including the removal of obstacles to student mobility; facilitating recognition of qualifications; enhancing the global attractiveness of European HE; and, establishing a common framework for HE systems across Europe. In the 2009 Bologna Stocktaking Report, Scotland achieved maximum scores for all action lines and was unique among the 46 countries in doing so.

4.6.3. Scottish institutions have a good track record of attracting EU funding from the Seventh Framework Programme (FP7) and other funding sources within the EU. According to the Higher Education Statistics Agency, in 2010/11, Scottish HEIs generated £64.1m from research grants and contracts from EU sources. Since 2007, under FP7 Scotland has attracted €374m, with Scottish universities receiving €314m for Research and Technological Development (83.7% of the total share). The income Scotland has received from FP7 since 2007 represents 9.4% of the UK total and 1.4% of the EU total for that period.

4.6.4. This year sees the introduction of Horizon 2020 and its increased focus on moving research into innovation to help create economic growth. It is anticipated that this change in focus, along with the introduction of simplified application procedures, will help to encourage greater business engagement. This is particularly welcome in Scotland.

4.6.5. Despite the advantages of EU action in this area, the EU's State Aid control over research and development subsidies is challenging. In theory, it means that EU rules might restrict UK ambitions to subsidise research and development in order to maintain a level playing field between Member States. Particularly in Scotland, where the number of projects within the renewable energy sector is gathering pace, some of the research and development financial thresholds are potentially too small given the scale and risk involved with many renewable energy projects. There is also general concern that countries outwith the European Economic Area, such as the USA or Japan, receive much higher levels of funding, thus giving them much better market position as opposed to Scotland, which is generally bound by the limits permitted under EU Regulations.

Proposals for reform

4.6.6. From our assessment of the balance of competences in this area, the Scottish Government:

- Feels measures should be taken to reduce the bureaucracy of EU research and development funding procedures, ensuring that the funding process is quick and transparent. The Scottish Government welcomes Horizon 2020's proposed simplified programme structure,

single set of rules and simplified reimbursement model, which will go some way to doing this.

- Believes more focus should be placed on the translation of research and development into goods and services through innovation and knowledge exchange. Again, it is expected that Horizon 2020's stronger focus on innovation and close-to-market activities will address this.
- Welcomes increases in the research and development financial thresholds permitted under EU State aid rules, as they should enable EU Member States to undertake large-scale projects in stronger competition with countries outwith the EEA, such as the USA and Japan. We would further welcome increases to the percentage threshold permitted for experimental development.
- Would value further progress in shortening the approval timescales involved when notifying the European Commission of a State aid scheme. The Scottish Government welcomes the contribution that the on-going EU State Aid Modernisation consultations are currently making in this area, and in particular consultation on the draft Union Framework for State aid for Research, Development and Innovation. We would hope that the higher aid intensities proposed under the new general Block Exemption Regulation (GBER) will further contribute to reductions in these timescales through eliminating the requirement to fully notify certain schemes.

4.7. Fundamental Rights

4.7.1. The Scottish Government is committed to creating a modern, inclusive Scotland which protects, respects and realises internationally recognised human rights. We strongly support and subscribe to the principles enshrined in the European Convention on Human Rights and regard the EU Charter for Fundamental Rights as a positive force for progress in both Scotland and wider Europe.

Proposals for reform

4.7.2. The Scottish Government will work within the current Treaty framework so as to:

- Encourage the EU institutions to adopt non-legislative initiatives which promote fundamental rights across Europe and protect minority and disadvantaged groups. The promotion of fundamental rights can often prove to be a more effective tool in tackling inequalities than legislative measures.
- Ensure that standards set at EU level are implemented effectively in Scots Law in a way which reflects the importance of proportionality and effective implementation.

4.8. Civil Justice

4.8.1. The area of freedom, security and justice is within the shared competence of the EU and Member States but, with respect to the UK and Ireland, is subject to the Protocol to the Treaty of the Functioning of the European Union (“TFEU”), which requires the UK to opt-in to any measures adopted under Title V of Part Three.

4.8.2. The Scottish Government is supportive, in principle, of the European Union having competence in the area of civil judicial co-operation by virtue of Article 81 of the TFEU. Measures adopted under Article 81 are mainly aimed at ensuring that court judgments and other judicial decisions in one Member State are recognised and can be enforced in another Member State. It also enables the EU to adopt measures which harmonise national laws in this field. Creating mechanisms for the expeditious enforcement and recognition of judgments across Member States is vital to the proper functioning of an internal market and for the effective enforcement of civil rights.

4.8.3. There have, however, been civil law proposals under Article 81 TFEU which would not have translated correctly into Scots private law. The Scottish Government therefore considers it is important to maintain a safeguard in this area, and therefore supports the principle of the opt-in which the United Kingdom currently enjoys.

4.8.4. The Scottish Government believes that retaining this flexibility strikes the right balance between preserving the uniqueness of Scots law while seeking to participate in as many EU measures as possible. Indeed, the Scottish Government has supported the UK opting in to the vast majority of civil judicial co-operation measures; for example: European Enforcement and Payment Orders, the European Small Claims Procedure and the Mediation Directive.

4.8.5. The Scottish Government considered that we should not opt-in to proposals on matrimonial property regimes and property consequences of registered partnerships. We noted at the time that the law in Scotland on financial provision on divorce and dissolution is very different to the ‘ancillary relief’ provisions operating in other parts of the UK. However, on behalf of Scotland, we should not opt into the EU proposals. We considered that the proposals could lead to fragmented jurisdiction and it was not clear how the proposals would fit with succession law and the drafting of the proposals was criticised by a number of bodies (including academics in Scotland).

4.9. Asylum and immigration

4.9.1. Our assessment of the balance of competences between the UK and the EU in relation to Asylum and Immigration recognises the importance of both EU and national competence in this area. We are satisfied that membership of the Common Travel Area (comprising the UK and Ireland), as opposed to the Schengen Area is most appropriate for Scotland given its geographical location. Despite this, the Scottish Government recognises the importance of the Member States taking action together to deal with the difficult challenges that all Member States face, particularly in relation to asylum. For example, the on-going conflict in Syria, as well as the Arab

Spring, have displaced a number of citizens, which requires action in the EU member states. It is evident that in these circumstances, the EU must act in harmony to ensure that this is done in a consistent and equitable manner.

4.9.2. The Scottish Government recognises its responsibilities in this area and welcomes the contribution that recognised refugees can make to our economy and society. Due to the constitutional settlement in the UK, however, the Scottish Government for the most part has extremely little influence over asylum and immigration policy, even though it does have responsibility for providing support to recognised refugees who settle in Scotland.

Proposals for reform

- Encourage EU action on asylum so that recognised refugees receive similar treatment in all Member States.
- Encourage greater police and judicial cooperation to combat organised crime in relation to people trafficking – an area which cannot adequately be tackled by the Member States acting alone and requires commonality throughout the EU.

4.10. Transport

4.10.1. In supporting the free movement of people and goods throughout the EU, transport is central to the realisation of the single market. EU action in this area provides consumers and industry with confidence that minimum standards for passenger rights and roadworthiness testing exist across the single market. For example, motor insurance directives and the recent Roadworthiness Package provide Scottish drivers with confidence, wherever they drive in the EU, that their counterparts across the EU are adequately insured and driving a vehicle subject to comparable safety standards. Drivers' hours legislation similarly helps to ensure that commercial drivers are not in an overtired state while on UK roads, supporting fair competition which does not neglect road safety imperatives.

4.10.2. EU action has also helped to open and liberalise transport markets, most notably in the aviation sector. This has led to air travel becoming more affordable and accessible, in turn creating significant economic benefit for the UK, whose airports handle more passengers than any other EU country. The benefits of opening up aviation markets can also be illustrated by the increased number of flights from Scotland to countries such as Poland, which joined the EU in 2004.

4.10.3. As the EU continues to expand, the Scottish Government recognises that there may be challenges in balancing the need for minimum standards (e.g. on safety, passenger rights) while ensuring that harmonisation proposals do not lead to abortive costs and indirectly penalise Member States and regions who have already invested heavily to improve in these areas.

Proposals for reform

4.10.4. The Scottish Government will seek to work to work within the current Treaty framework so as to:

- Prioritise improving transport routes in rural areas of Europe and between the Member States.
- Improve the European Commission's impact assessments, in partnership with the Member States, for transport proposals which are not currently of a consistently high quality, often underestimating the cost to industry and government.
- Reform the EU legislation governing rail transport which currently prevents host-State owned rail providers from tendering to run rail transport in the host State, while permitting those State owned rail providers in the other Member States to tender.
- Reverse the Commission's proposals to introduce mandatory distance-based HGV charging, based on the "polluter pays" principle. These proposals aim to influence investment and planning priorities, along with target setting in Member States, and as such, do not respect the principle of subsidiarity.

4.11. Tourism, Culture and Sport

4.12. Our analysis of the EU supporting competence in relation to Tourism, Culture and Sport reinforces the view that EU action in these fields has proven to be extremely fruitful in Scotland. Concerns that the establishment of the single market, the free movement of persons and the prohibition of State Aid could lead to a decline in the cultural diversity of Europe have not materialised. EU programmes and funding have helped to promote and preserve Scottish culture and heritage.

Proposals for reform

4.13. The Scottish Government will seek to work within the current Treaty framework so as to:

- Continue to encourage EU activity and funding in the fields of tourism, culture and sport with a view to supporting the Member States preserving and promoting their cultural and sporting heritage.
- Ensure that the EU rules on State Aid give greater freedom to allow national, regional and local governments to invest in industries which protect cultural diversity (such as the Scottish film industry).

5. Conclusions

5.1. The fourth and final semester of the Balance of Competences Review will launch in spring 2014 and will provide a further opportunity for the Scottish Government to offer its views on how EU competence affects Scotland, in areas such as police and criminal justice and subsidiarity and proportionality. We will continue to engage with the review going forward, highlighting the benefits of Scotland remaining a member of the EU and the areas in which, by engaging constructively with our EU partners, we can make a real difference in improving the way in which the EU exercises its competence.

5.2. Although the review has proved to be a useful exercise in the consideration of how EU policy affects Scotland, the intention of the UK Conservative Party to use the review's findings as a basis to re-negotiate the terms of the UK's EU membership, or indeed, as a basis to withdraw from the EU altogether, is a major cause for concern for the Scotland.

5.3. As stated at the outset of this paper, the Scottish Government is eager to play a leading role in the reform of EU law and policy, but believes that this must be done in partnership with our European neighbours and within the framework of the existing EU treaties, without the issuing of ultimatums or threats to leave. As our sphere of influence is curtailed by the current UK constitutional settlement, the Scottish Government believes that these reforms are best achieved by Scotland taking its place at the top table in Brussels as an independent nation within the EU.



© Crown copyright 2014

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

ISBN: 978-1-78412-284-3 (web only)

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS24892 (02/14)

Published by the Scottish Government, February 2014

w w w . s c o t l a n d . g o v . u k