

Rùnaire a' Chaibineit airson Cultair agus Cùisean an Taobh a-muigh  
Cabinet Secretary for Culture and External Affairs

Fiona Hyslop MSP/BPA

T/F: 0845 774 1741

E: [scottish.ministers@scotland.gsi.gov.uk](mailto:scottish.ministers@scotland.gsi.gov.uk)



Christina McKelvie MSP  
Convener  
European and External Relations Committee  
The Scottish Parliament  
EH99 1SP



By email: [europa@scottish.parliament.uk](mailto:europa@scottish.parliament.uk)

8<sup>th</sup> October 2013

Dear Christina

As discussed when I appeared before the committee on 19 September, the Scottish Government has prepared responses to all of the second semester areas in the UK Government's Balance of Competences Review. This is an important opportunity for us to outline our policy position with regard to a number of important issues and highlight the value that Europe adds to our work.

I attach the responses that we have now submitted to Whitehall, which cover policies such as transport; environment and climate change; trade and investment; asylum and immigration; research and development; civil justice and culture, tourism and sport. I hope you will find these to be a useful examination of the EU's competence in each of the relevant areas.

Kind regards  
Fiona

**FIONA HYSLOP**

## BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

### FREE MOVEMENT OF GOODS AND TRADE AND INVESTMENT

#### HISTORICAL DEVELOPMENT OF POLICY AREA

1. In relation to the EU, the key issue for business is the Single Market and the so-called Four Freedoms; the free movement of goods, services, people and capital. What is now known as the Single Market was a concept at the heart of the original Treaty of Rome, which came into force in 1958. That Treaty aimed at creating a “common market”, later “internal market”, covering the whole territory of the then six members of the then EEC. That common market involved a Customs Union and the free movement of goods – that is, a single external customs tariff plus the abolition of all duties and similar mechanisms between the Member States – as well as provisions on the free movement of workers, of services, and (in guarded form) capital, known as the Four Freedoms. There were provisions on competition policy and government aid to business (state aids). All these mechanisms continue to form the core of the Single Market.

2. The Customs Union was completed, and duties between Member States abolished, in 1968. But there was little EU legislation, partly because at that time it had to be agreed unanimously by all the Member States. In parallel, though, there was significant evolution of the jurisprudence affecting the system, through a series of important judgments of what was then termed the European Court of Justice, which promoted the Single Market, and invalidated trade barriers.

3. In 1985, the Commission submitted to the Milan European Council a White Paper entitled *Completing the Internal Market*, which argued for a new more dynamic strategy based on mutual recognition and on more legislative harmonisation. It listed 279 specific legislative measures to be brought into force by 1992, and proposed a series of Treaty changes to enable that to happen more swiftly. This essentially set the agenda for the Single Market as we know it today.

4. At the same time, the Commission proposed a new approach to Single Market legislation. Hitherto, the approach had been to spell out the content of harmonisation in great detail in the legislation. This was slow, hard to agree, and often outdated by technical progress. There was also no link to the wider process of setting standards for products. The new approach, now incorporated into Directive 98/34, was based more clearly on the mutual recognition of Member States’ standards where possible; on more transparency between Member States in standard-setting; and, where mutual recognition was not sufficient, on limiting legislative harmonisation to the health and safety area, with the private standardisation bodies setting out the technical standards. The advantage was that legislation could be less detailed and hence drafted more easily, and that technical progress could be incorporated through the standards process rather than redrafting legislation. The New Approach has been refreshed on several occasions and the principles are currently set out in Decision 768/2008/EC.

5. The “completion” of the Single Market was formally marked on 31 December 1992, by which time almost all of the original 279 measures had become law. In reality, the Single Market was far from complete at this point. Integration was much deeper in the areas of goods and free movement of workers than in other areas. Services liberalisation was limited and rested almost entirely on jurisprudence rather than legislation. In addition, some restrictions on capital movements between Member States remained in place. The twenty years since 1992 have been years of progressive deepening of integration in respect of the Four Freedoms. Although there have been major adjustments to the original Treaty framework, the Single Market principles, as first conceived in 1958, have remained largely intact.

6. The Maastricht Treaty (1993) added new EU competences in areas relevant to the Single Market such as consumer protection and trans-European networks; modified other areas such as the environment; gave Treaty standing to the 1988 legislation that largely abolished controls on capital and payments transfers between Member States; and created the concept of European citizenship, which would turn out to have major implications for freedom of movement within the EU. The Amsterdam Treaty (1999) brought social and employment policy fully into the EU Treaty framework, ending the UK-specific opt out, and brought many of the Third Pillar free movement provisions into the normal EU framework, though with special opt-out arrangements for the UK. Energy became a specific EU competence only with the Lisbon Treaty (2009) though there had already been much legislation liberalising the energy market on the basis of general Single Market provisions.

7. Political impetus for continued economic reform, including deepening the Single Market, came from the 2000 Lisbon Agenda, which aimed to make the EU the “most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”. Similar single market principles underlie the current “Europe 2020” programme.

8. Over this whole period there has been an increasing identification of the Single Market with the EU’s broader micro-economic policy-making effort – that is, an acceptance that the Single Market represents more than just the Four Freedoms. That was arguably inherent even in the original Treaty of Rome, but it has become more explicit since then. For many Member States, the current Treaty represents a “bargain” in which every Member State has to accept some decisions they find unpalatable in order to gain in other areas. Given Member States’ different national traditions and their different “varieties of capitalism”, that is probably inevitable. Mario Monti, in his 2010 report, set out the issue most clearly, and controversially for some:

*“The new comprehensive strategy ... should be seen as a “package deal”, in which Member States with different cultural traditions, concerns and political preferences could each find elements of appeal important enough to justify some concessions, relative to their past positions. In particular, Member States with a tradition as social market economies could be more prepared to [make] a new commitment on fully embracing competition and the single market, including a plan with deadlines on putting in place the single market in areas where it is still lacking, if Member States in the Anglo-Saxon tradition show readiness to address some social concerns through targeted measures.”*

The EU is currently in the middle of another phase of deepening the Single Market, kicked off by the Monti Report in 2010, and with legislative proposals subsequently enshrined in two Single Market Acts in 2011 and 2012. This work in progress is wide-ranging, but particular areas of emphasis have been developing the legislative framework to create a genuine digital single market, improving consumer protection to enhance confidence in cross-border purchases, improving financing for small and medium-sized enterprises, and deepening and enforcing liberalisation in the major network industries such as transport and energy.

### **Treaty provisions covering the Single Market**

Article 3(3) of the Treaty on European Union (TEU) requires the EU to “establish an internal market”.

Article 26(1) of the Treaty on the Functioning of the European Union (TFEU) requires the EU to: “adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties”.

Article 26(2) of the TFEU then defines the Single Market as: “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”.

9. The detailed provisions covering these Four Freedoms are then laid out in Articles 28 – 66 of the TFEU. Some other relevant provisions are to be found elsewhere in the Treaty, notably Articles 110 -118 TFEU. The basic legal power allowing the EU to legislate in this area is found in Article 114 TFEU.

10. The EU is given the powers to act in this area by means of a “shared competence” between the EU and the Member States (Article 4(2)(a) TFEU). Articles 114 and 115 TFEU give the EU a specific legislative power to legislate in the Single Market area, by qualified majority in one, by unanimity in the other. Article 118 gives a specific power to legislate in the specialised field of intellectual property.

11. In fields of shared competence, in principle, powers can be exercised at EU level or by Member States nationally. The principle of subsidiarity guides the choice as to whether the aims of the measure can be better achieved at Member State or EU level. However, once the EU has acted, Member States can no longer act in ways which contradict that EU legislation.

The effect is that:

- (i) Where there is EU legislation, Member States must act in accordance with it and enforce it;
- (ii) Where there is no EU legislation, a Member State can exercise its own powers. But when it does so, it must do so in a way which is compatible with the Treaty provisions and the CJEU’s jurisprudence.

12. In other words, Member States are bound not just by the legislation but by the Treaty and the general principles of the CJEU’s jurisprudence. Indeed, even if all EU

legislation relevant to the Single Market were repealed overnight, the Single Market would continue to exist because Member States would still be bound by the Treaty provisions.

13. The UK Government report on the *Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market* concludes that:

*“... integration has brought to the EU, and hence to the UK, in most if not all observers’ opinions, appreciable economic benefits. It has also spread the UK’s liberal model of policy-making more widely across the EU. But it has brought with it constraints on policy-making of varying kinds, and a regulatory framework which some find difficult to operate within or find burdensome, even if the obligations are not necessarily any greater than would have been imposed nationally. Is that trade-off, between cost and benefit, between economics and politics, of overall benefit to the UK? ... Most observers, and indeed most of the evidence received for this report, answer positively. They do so, not without qualifications or reservations, but with a focus on the economic benefits already achieved... and on those potentially available in the future.”*

14. In terms of future challenges, the report concludes that there is:

*“a broad consensus that [the Single Market] is at the core of the EU’s development, that it has driven growth and prosperity in the Member States, and that it should continue to do so. At the same time the political will to drive its development into more politically sensitive areas is under challenge. The “free good” of significant enlargement of the market may not be on offer in the near future. Institutional developments in the euro area could also influence it significantly, for good or ill. All this means that the Single Market could once again be more at the centre of European political debate, which could open up opportunities for Britain.”*

### **Scottish competence relative to the UK Government and EU**

15. The competences in the many areas that affect business vary: regulation is heavily affected by the EU and, within the UK, economic and competition regulation is reserved, while areas such as licensing are devolved. Financial and other support for businesses is affected by EU policies such as State Aid regulations and in the UK is a shared power, where both the UK Government and the Scottish Government have powers to act.

### **European, and Scottish policy direction and interaction**

16. Membership of the EU, and access to the Single Market, provides Scottish firms with access to more firms to trade with, and more potential customers to sell to. The EU is therefore, not surprisingly, the main destination for Scotland’s international exports - accounting for around 46% of Scotland’s international exports in 2011. Scotland also benefits from the large number of bilateral trade deals that the European Union has negotiated with third countries that provide member states with preferential, and often free access, to these markets.

17. The direct and indirect economic benefits accruing from membership of the EU single market are considerable. Exports to the EU single market provide an important direct source of jobs and activity across the Scottish economy, while further jobs are supported indirectly through various local and national supply chains utilized by our exporting firms. Consumers also benefit from access to the wider range of products available across the internal market, while greater competition between suppliers helps keep prices down and ensures the consumer gets the best possible value for money.

18. However, there are two fundamentally different views on the Single Market in the EU. Most countries take the view that the Single Market is both an economic and a social construct, one that sees EU policies assisting economic growth across the member states resulting in a greater degree of cohesion, with the benefits of growth shared by all. The UK has traditionally viewed the Single Market as first and foremost a free trade area/customs union that improves prospects for business and has regularly sought to hold up or to gain a derogation or opt out from social measures.

19. The Scottish Government does not believe, as the UK Government clearly does, that a “social Europe” is incompatible with the collective ambition of the EU to be the world’s most dynamic and competitive economy. Indeed the opposite is true: the Scottish Government is convinced that Europe will not be able to achieve this prize unless it is able to demonstrate that the gains of increased competitiveness are shared among all Europe’s citizens and not reserved to the few.

20. This is at the heart of the Scottish Government’s Purpose, as set out in the Government Economic Strategy, to create a more successful country, with opportunities for all of Scotland to flourish through sustainable economic growth. As such, the Scottish Government seeks where it can to represent and protect Scotland’s economic, commercial and social interests when key decisions are being made.

21. The Scottish Government firmly believes that continued membership of the EU provides the best international economic framework within which to maximise the economic and social potential of Scotland and tackle the global challenges that we face. That is why we do not agree with the approach of ultimatums or threats to leave the European Union. That approach serves only to undermine the integrity of the EU system, weaken the UK’s negotiating position and side-line its influence in EU policy discussions.

22. Instead, Scotland is already, within the current devolved policy levers, making a substantive economic and social contribution to the challenges facing all European economies - as demonstrated through our distinct Scottish National Reform Programmes.

23. Many of the specific actions are being developed and delivered within the framework of the EU’s ‘Europe 2020’ growth strategy and are focused on delivering smart, sustainable and inclusive economic growth – objectives that closely echo the priorities that underpin the Scottish Government’s economic strategy.

24. These specific actions include flagship initiatives to help Europe exploit the full economic and social potential of rapidly developing digital technologies; to bolster innovation in products, services and business models; to enhance the employment prospects for our young people; to promote renewable energy and improve the resource efficiency of our economic activity as part of the wider shift towards a low-carbon economy; to promote industrial competitiveness; and to reduce poverty and social exclusion.

25. A large proportion of regulation which impacts on business in Scotland comes from the UK Government or Europe, including Employment, Health and Safety, Company Law, Tax and Pensions. The UK Government has a strong de-regulation agenda with initiatives including the one-in, two out rule; sunset clauses; Red Tape challenge; and micro business exemption. Scotland's approach to better regulation focuses instead on adopting five key principles of regulation - encouraging a risk-based, enabling approach; and a range of activity to tackle the stock, flow and culture of regulation.

### **Future options and challenges relating to balance of competence**

26. Scotland would wish to remain a member of the EU, and as part of the EU single market, companies would continue to benefit from access to markets across Europe, including the UK. The ability to trade within a single market of 500 million citizens is a central aspect of our strategy to stimulate growth by increasing international trade.

27. The Scottish Government's policy on the EU is clear - Scotland should remain part of the European Union, given the benefits of free movement and access to a single market covering more than 500 million fellow European citizens and around 20 million businesses

28. As a sovereign member state, Scotland could have benefited from a rule that by 2019, no member state would receive less than approximately £175 (€196) euros per hectare in direct payments to farmers. That could have resulted in an increase in payments to Scottish farmers worth £850 million for the period up until 2020.

29. According to the Global Connections Survey 2011, exports to the EU from Scotland were valued at £11.0 bn. 46% of total exports.(increase of 14.6% over previous year)

30. Membership of the EU single market plays an important role in attracting foreign direct investment (FDI) to Scotland from outside the EU – an area in which Scotland has performed strongly in recent years. By investing in Scotland, foreign companies not only gain access to Scotland's highly skilled and productive labour force, they are able to export to the large EU single market free from import duties and other trade restrictions. In addition to the jobs created through FDI, foreign-owned firms are often more productive (relative to domestic firms) and have the potential to boost the underlying growth potential of Scotland's economy, particularly where there are knowledge and innovation spillover effects.

31. The EU single market allows workers from any member state to move to partner countries where their skills are best rewarded. Scotland's economy, and our society, benefits significantly from the 160,000 citizens from other member states who have chosen to live, work or study here. Students also have the right to pursue their studies, in part or in whole, in any EU member state and this enhances further the long term economic – and societal – rewards Scotland enjoys from being part of the EU.

32. Taken together, the trade, investment, and capital and labour flows associated with membership of the EU make a significant impact on the drivers of economic growth in Scotland. Increased competition and trade opportunities, high levels of inward investment, a strengthening of the economy's scientific, innovative and skills base along with flows of skilled workers provide compelling arguments in support of an independent Scotland taking its place as a full member of the European Union.

33. Scotland needs to play a full and constructive role in the European Union, working with its partners to address common economic and social challenges on a basis of mutual respect in co-operation in accordance with the terms and spirits of the EU Treaties. Many countries in Europe believe that there is a need for reform in order to bring Europe closer to its citizens to address more accurately their concerns. The Scottish Government is developing proposals for the reforms an independent Scotland would like to promote in co-operation with its partners.

34. The reforms would tackle the following 3 main issues:

- \* a deep seated sense of a growing distance between the EU institutions and the EU citizens – we need to act to bring decision making closer to the people and the institutions that represent them;

- \* the development of longer term EU level policies better able to deliver a sustained economic recovery across all member states – a greater focus on boosting growth and employment; and

- \* the promotion of an active role for member states to work together in partnership to deliver key EU objectives.

35. A key starting point for Scotland is to ensure that we approach these negotiations firmly within the EU and not by threatening to leave it. We wish to see Scotland play an active role in driving reform for the common good, not as part of a country which is seeking to block progress for narrow political interests.

36. At European level, we are fully supportive of the principles of the 'Youth Guarantee' adopted by EU Employment Ministers, in particular the need to intervene as early as possible to prevent young people becoming long term unemployed.



## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **ENVIRONMENT AND CLIMATE CHANGE**

1. The Scottish Government welcomes the opportunity to contribute to this call for evidence. We were approached by the Department of Environment, Food & Rural Affairs (Defra) prior to the launch of the call and have engaged throughout the process. Defra has also consulted key Scottish stakeholders such as Scottish Power, the Environment Exchange, the Scotch Whisky Association and the Scotia Gas Network at a Scottish Government event in Edinburgh on 4 July, 2013.

#### ***Scotland and the environmental acquis***

2. Overall, the environmental acquis works well for Scotland, with a strong role for the European Commission in supporting individual Member States to enhance and protect the environment. The Commission's work to develop the 7<sup>th</sup> Environmental Action Programme was warmly welcomed by the Scottish Government, as it recognises that environmental policy must be seen in the wider context of the government's role - not as a silo. In particular, the Scottish Government welcomes the positive connections between the environment and economic growth opportunities as part of the 2020 agenda. We recognise that the European Commission and Council have a strong leadership role to play and that work in the climate change and waste arenas are clear examples of where Europe adds value to supporting our collective international efforts. The resource efficiency agenda is also an example of where the Commission's role in supporting the single market can have wider benefits in other policy areas, such as environmental issues.

3. Subsidiarity and ensuring that decisions are taken at the right level is a key enabler of effective policy development and delivery. The European Commission has a strong role to play in those areas that impact on the effectiveness of the single market. In addition, where activities and actions can have trans-boundary impacts, the Commission plays a part in augmenting the legislation and policy within the competence of individual member states. In some areas, the European Union has an important global leadership role. Clarity and consistency and consistent application around where these demarcation lines lie is important.

4. For example, the Scottish Government believes that the requirements of the Environmental Noise Directive (END) to undertake strategic mapping of environmental noise and develop action plans every 5 years should be highlighted in the context of the balance of competencies review. END requirements are now embedded in domestic policy and awareness of the impacts of environmental noise has increased. The question remains therefore, in line with the subsidiarity principle, whether the benefits of noise mapping and action planning would be achieved without EU drivers to enable more effective policy development and delivery, or whether the drivers need to be amended to allow for local flexibility.

### ***Further development of the environmental acquis***

5. On a number of occasions, we have heard the suggestion that the way forward for Europe, particularly to support consistent delivery across member states, is that more EU legislation should be introduced by regulation rather than directive. Whilst we support the development and maintenance of a level playing field, we question the 'one size fits all' approach that regulation would impose. As the EU has expanded – as of this Presidency to 28 member states – the 'one size fits all' approach is very challenging, and in some quarters challengeable in supporting effective and equitable implementation. In last year's Water Blueprint, we welcomed, in the context of the water stress issues, the recognition that a 'one size fits all' approach is not possible or appropriate. Given the significant differences across member states, we would like to explore greater opportunities for differential implementation approaches based on risk assessment. This is an approach already recognised in the Water Framework Directive. Whilst this is a challenging concept, given the importance of consistent delivery within the EU, we note that there are examples, e.g. around animal health, where EU legislation permits this within evidence based risk assessment.

6. We also recognise the importance of ensuring that EU environmental law is enforced at all administrative levels and that a level playing field in the internal market is guaranteed. Natural resources are the basis of our economic prosperity, and Scotland's business benefit from the proper management of those resources and the consistency that the internal market brings. We recognise the role of the European Commission in enforcing and ensuring proper implementation of EU legislation under the acquis. The Scottish Government welcomes in particular the new 'pilot' approach to dealing with potential infringements to EU legislation that was introduced in 2008 with the aim of providing quicker and fuller answers to questions, and solutions to problems arising in the application of EU laws – particularly those raised by citizens or businesses – requiring confirmation of the factual or legal position in a member state. The Scottish Government believes that this process is in general working well as a means of addressing legitimate citizen concerns on the decision-making process, without recourse to the formal infringement procedures under Article 258 of the Treaty.

7. The 'pilot' system has allowed a more flexible, proportionate approach to ensuring proper enforcement of the EU acquis. The Scottish Government also recognises the agreement reached in the recent 7<sup>th</sup> Environment Action Plan to further develop the inspection support capacity at an EU level. We welcome initiatives to reinforce peer review and best practice sharing and joint inspections within member states, at their request. However, we would be particularly concerned if application of this agreement resulted in onerous new EU level inspection burdens being placed upon Scottish businesses that ran contrary to our own better regulation principles. It is important that EU competence remains at the appropriate level under the new EAP, with full respect for subsidiarity principles in enforcement of EU environmental law.

8. The environmental acquis has a particularly strong impact on the Scottish planning system. In 2009, the Scottish Government contributed to a research project commissioned by the UK Government Department of Communities and Local

Government (DCLG) aimed at developing a tool to assess the impact of EU Directives on UK planning policies. The research, which was undertaken by Ove Arup, drew on a number of case studies including two in Scotland; one on the impact of the Habitats and Wild Birds Directives on planning policy for wind farms in Lewis, and the other on the impact of the Strategic Environmental Assessment (SEA) Directive on the strategic development plan for Edinburgh and South East Scotland (SESplan).

9. The research report, which was published in 2012, sets out a method for assessing the impacts of EU legislation on UK planning policies. It notes that EU directives can be in significant tension with development objectives. In Scotland, this has probably been most apparent in the tension between EU legislation on habitats and birds and efforts to realise the potential of renewable energy resources. We consider that the findings of this research are relevant to the current review in contributing to thinking on the development of a more systematic assessment of the implications of new EU legislation for national policy and procedures. The Scottish Government has drawn on the method set out in the Ove Arup report in a pilot project which assessed the potential impacts of the review of the Environmental Impact Assessment (EIA) Directive for Scotland. The latter is still proving useful and is now being considered by AMEC, the consultants appointed by DCLG to undertake the UK wide impact assessment of the EIA Directive.

10. Many aspects of the environment acquis also touch closely on agriculture. The Scottish Government will respond fully to the Balance of Competencies review of agriculture during autumn 2014. Our comments here are restricted to those parts of EU agricultural policy which are shaped by the environmental acquis. The new future Common Agricultural Policy which has just been agreed in Europe highlights how a 'one-size fits all approach' becomes harder as the size of Europe increases.

11. This is particularly true for agriculture since its nature varies so much across member states. Here in Scotland, we have mainly extensive type of farming systems which are at a much lower intensity than elsewhere in Europe as a high percentage (85%) of our agricultural land falls under the definition of "areas or natural constraint". Therefore, it is vital that we have the flexibility to cater for this. As part of the new CAP deal, there will be a requirement to green the CAP, but because the measures have to be implementable across all of Europe, they are likely to have very limited benefits in Scotland. It may have been preferable for our Ministers to decide for themselves how best to implement greening with measures more appropriate for Scotland's unique climate and topography and to take account of unique agricultural systems, such as crofting, which tend themselves to "high nature value" farming. In addition, Scotland would have liked to have seen the CAP do more to address climate change than is allowed in the framework set out by Europe.

12. The larger that the EU becomes, the more we would want the option for decisions using the precautionary principle to be taken, if possible, at local level. Two examples of this are that our Ministers would like to be able to decide for themselves whether or not to cultivate GM crops. Scotland is generally more precautionary than the rest of Europe and this is reflected in pesticides policy, where

we have tended to be more precautionary than England (e.g. on neonicotinoid insecticides and Fipronil).

13. The Scottish Government believes that as Europe grows larger, this sort of decision where there are public concerns should be devolved to regions although, clearly, the Scottish Government aspires for Scotland to be an independent EU member state, in our own right.

### ***Further development of the climate acquis***

14. In climate policy, the Scottish Government continues to believe that the EU is the most effective body for achieving cost-effective collective action to reduce emissions and secure the economic benefits of the low carbon economy – the costs of acting together 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 amongst the EU's member states, but it also ensures a strong voice, leading by example, in the global climate negotiations. Scotland is recognised for its ambitious climate change targets (42% reduction in greenhouse gas emissions by 2020 with a 25.7% reduction achieved by 2011) and is an active participant in the UK delegation to the UNFCCC COP, in support of the EU negotiating position in that process. Continued and developing ambition by the EU is vital to achieving the necessary reductions in greenhouse gases that are needed to limit global temperature rises. That is why we fully support EU action on the 2020 climate and energy package, and why we are supporting high climate ambition in the proposed 2030 package. Strong EU legislation and consensus amongst member states strengthens the voice of individual member states in the UN negotiations, and the Scottish Government continues to support the need for a collective EU position to reinforce domestic ambition in these negotiations.

15. Linked to this, we support strong EU action to reform the ETS. 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. These negotiations have been difficult and the level of ambition from most member states has been lower than that of the UK and lower still than Scotland. Scotland and the UK as a whole continue to press for more ambition and we support the benefits of an EU-wide ETS in ensuring a level-playing field for Scottish businesses, and as the most cost-efficient means of reducing emissions through collective EU action. Discussion on revised F-Gas Regulations are on-going in Europe, and Scotland continues to engage with the UK Government to ensure the regulations provide effective environmental goals whilst avoiding prohibitive costs on industry.

## ***Scottish Government involvement in influencing the future of the EU environment and climate acquis***

16. Managing effective EU relations is a challenging but valuable exercise. Our final comment is that in addition to reviewing the balance of competences within the EU, we must also use the opportunities to use this exercise to look domestically. Devolved Administration Ministers and officials regularly participate in Councils and working groups. Within the current devolution settlement, we consider that there are greater opportunities that could be taken to the most, and best value of this resource, in support of shared objectives. Having four different administrations analysing EU legislative proposals means that the UK can make a better analysis than some other member states. We would welcome greater emphasis on early upstream engagement from the UK Government to fully consulting and involving the Scottish Government in the development of the UK position on EU legislation as it develops. We have seen successes in areas where we have been able to do this, such as in the current Environmental Impact Assessment Directive negotiations, where the Scottish Government has played an active role in influencing the EU institutions in support of the UK position.

17. As we have previously identified and discussed with the UK Government, there is scope for a greater role, including speaking, that could be undertaken by devolved Ministers to the agreed UK line. There are further opportunities around using our collective network of contacts to pursue engagement with other countries. There are some examples, e.g. around the UNFCCC climate change talks, which we can point to already, where Scottish Ministers have supported and reinforced UK arguments for higher ambition with other member states in Councils and the UNFCCC, particularly in Eastern Europe and in small island states and sub-Saharan Africa. As part of this review, we think there are real opportunities where Scottish Ministers, and other devolved administrations, can be more actively and positively used to support and add value in the pursuit of agreed and shared objectives across the whole of the EU environmental acquis.

### EXAMPLES OF EU GOOD PRACTICE

#### Climate change

1. The Scottish Government fully supports EU efforts for high climate ambition within the EU and globally and has adapted a 2020 target of a 42% reduction in greenhouse gas emissions with 25.7% reduction achieved as at 2011. We are leading by example with the world's strongest domestic climate change and renewable electricity targets, and a new electricity generation decarbonisation target for 2030, and will continue to be at the forefront of EU efforts to realise an ambitious global climate agreement in 2015.

#### EIA Directive

2. The Scottish Government has a range of work underway to support the continuous development of efficient and effective EIA practice: in 2011 the Scottish Government's Planning and Architecture Division established an annual EIA forum for planning authorities to encourage and support continuous improvement in EIA practice. The recent Short Life Task Forces examining the permitting of offshore and onshore renewable energy, led by the Minister for Energy, is a further example of measures taken to support more efficient and effective EIA in Scotland. In light of this experience, the Scottish Government set out, as part of EU Sustainable Energy Week 2012, further opportunities for supporting improved implementation in practice, proposals which were well received. The Commission has since published its proposals for substantive legislative change through proposed amendments to the Directive, negotiations for which are currently underway.

#### Biodiversity

3. The *2020 Challenge for Scotland's Biodiversity* is Scotland's response to the *Aichi Targets (2010)* set by the *United Nations Convention on Biological Diversity (2010)* and the *European Union's Biodiversity Strategy for 2020 (2011)*. These call for a step change in efforts to halt the loss of biodiversity and to restore the essential services that a healthy natural environment provides. Investment in the natural assets of Scotland will contribute to sustainable economic growth and support wellbeing and wealth creation.

Scotland's *2020 Challenge* aims to:

- protect and restore biodiversity on land and in our seas, and to support healthier ecosystems;
- connect people with the natural world, for their health and wellbeing and to involve them more in decisions about their environment.;
- maximise the benefits for Scotland of a diverse natural environment and the services it provides, contributing to sustainable economic growth.

4. A key contributor to achieving the aims of the 2020 challenge and the EU Biodiversity Strategy is Scotland's contribution to the EU-wide network of sites designated under the EU Birds and Habitats Directives (entitled "Natura 2000"), which covers some 15% of Scotland's landmass and accounts for more than 50% of the terrestrial UK network.

### **The Emissions Trading Scheme (ETS)**

5. The Emissions Trading Scheme (ETS) has recently moved into Phase III, which includes more ambitious auction levels and full participation from aviation operators. Scotland's participation in the scheme as part of the UK member state includes full participation in policy making, with the exception of revenue (on which we are consulted) and the Scottish Environment Protection Agency manages Scottish participants.

6. Continued participation in the ETS is essential if Scotland is to meet its ambitious climate targets. It provides a key driver and incentive for low carbon behaviours and incentives and over 100 Scottish operators participate in the scheme from a variety of sectors. If Scotland were to stop participating in the ETS due to the UK leaving the EU, it would be effectively impossible to meet our 2020 emissions target unless we put in place a UK-wide equivalent scheme. The Scottish Government has been a vocal supporter of structural reform of the ETS and supports the UK position of a preference for the cancellation of allowances, but has supported back-loading in the interests of future reform.

7. A UK domestic trading scheme would not function as effectively as the EU-wide scheme which offers a larger market and ensures that UK operators do not face a disadvantage in comparison to other European nations. The UK also hosts one of only two non-EU-wide auctioning platforms and 90% of the market is based in the UK. Member States receive the revenue raised from auctioning allowances, which has raised over £1bn for the UK since 2008 and, with greater levels of auctioning from 2013, revenues will rise – expected to be about £900m a year from 2017. In line with UK policy on hypothecation, Scotland does not receive specifically-allocated revenue from the scheme.

### **ODS/F-Gas**

8. Regulation of the gases supports our environmental goals of protecting the Ozone Layer and reducing our greenhouse gas emissions and action at the EU level ensures a level playing field across Europe. Ozone-Depleting Substances are regulated through the Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2011, replacing previous regulations from 2002 and 2008. These regulations establish the enforcement framework necessary to give full effect to the EU legislation in the UK, including setting out offences. The UK goal is the total phase-out of HCFCs by 2015. EU Regulations were introduced in 2006 and implemented in the UK through the Fluorinated Greenhouse Gases Regulations 2009. A revised F-Gas regulation is currently under discussion in Europe. The regulation of F-Gases has become increasingly important as industry moves away from the use of ODS, F-gases made up 2.5% of total Scottish GHG emissions (c.1.3 Million tonnes CO<sub>2</sub> equivalent). This has increased from 0.32% in the 1995 base

year, primarily due to the take up of Hydrofluorocarbons to replace phased-out ozone-depleting substances. F-gases also make up 2.5% of UK greenhouse gas emissions (including international aviation and shipping).

## **Better Environmental Regulation**

9. The primary focus of Scotland's Better Environmental Regulation (BER) programme is to deliver EU requirements proportionately and effectively in Scotland. This approach is consistent with the proposed 7<sup>th</sup> Environment Action Programme focus on better implementation and the current Presidency's priority to promote better environmental governance.

10. Under the BER programme we have also been looking at wider improvements to the implementation of environmental regulation in Scotland, to ensure compliance with EU legislation but in a more proportionate and integrated way. The introduction of an integrated permissioning structure in Scotland will lead to clearer and simpler procedures, helping to save Scottish businesses money every year and contributing to sustainable economic growth and jobs. However, developing this improvement has been made additionally complex due the mismatches between the EU regulations for the separate regimes; for example, the definitions of waste and waste treatment processes in the Waste Framework Directive and Industrial Emissions Directive do not match.

## **Waste & Resource Efficiency**

11. The Scottish Government has simplified and streamlined the energy and resource efficiency advice and support delivery landscape. This has been achieved through the integration of non-domestic energy and material resource efficiency services previously provided by Zero Waste Scotland, Carbon Trust and Energy Saving Trust. The new Resource Efficient Scotland programme, delivered by Zero Waste Scotland, provides a one-stop-shop giving support to businesses, third sector and public sector organisations to reduce overheads through improved energy, material resource and water efficiency, and in doing so it will help cut carbon across public and private sector organisations. This holistic approach to low carbon transition ultimately aims to help more businesses to reduce their emissions, save money and increase their competitiveness. The programme is one of the most comprehensive programmes of its kind in Europe and shows the important contribution that Scotland is taking to delivering the EU resource efficiency agenda, without the need for new EU legislation or targets.



## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **TRANSPORT**

1. The Scottish Government welcomes the opportunity to contribute to this call for evidence. We were approached by the Department for Transport (DfT) prior to the launch of the call and have engaged throughout the process, with teleconferences held between the Scottish Government and DfT on 13 June and 30 July.

2. We also requested that key Scottish stakeholders, including CoSLA and Regional Transport Partnerships, were consulted as part of this exercise. We would ask that, where possible, any Scottish-specific issues raised by respondents are reflected in the final transport report.

#### **Development of EU Transport Competence**

3. Transport is central to the realisation of the single market. EU competence therefore continues to seek improved standards, market liberalisation and interoperability of transport systems across Member States, to support the free movement of people and goods.

4. Although transport has long been an area of shared competence, the Commission has broadened its transport policy focus in recent times. In earlier years, EU action on transport was often restricted by national interests, or limited to rules for cross-border services.

5. However, in the last 20 years, a series of White Papers have bolstered the EU vision of a common transport policy, most notably through the continued opening of markets across all transport modes, but also increasingly in the areas of al protection, safety and passenger rights.

6. This broad scope of competence is illustrated by the extensive list of major pieces of legislation published as part of the call for evidence. We would add that Trans-European Transport Networks and Connecting Europe Facility regulations are also highly significant but understand that these will be covered under the Cohesion review in Semester 3.

7. The current Treaty of the Functioning of the European Union includes a number of articles establishing EU transport competence, most notably articles 90-100 but also 170-172 and 177 (Trans-European Networks and its funding, respectively). Overall, the Treaty seeks to support a Common Transport Policy including:

- common rules applicable to international transport to or from, or passing through, at least one Member State;
- conditions under which non-resident carriers may operate transport services within a Member State;
- measures to improve transport safety; and
- any other appropriate provisions.

8. The Treaty makes clear that, while its provisions only apply to rail and road, the Council and Parliament may also make provision in the areas of maritime and aviation transport, again if appropriate. This has led to an increasingly wide range of legislative proposals which are now typically subject to co-decision and Qualified Majority Voting.

9. the most recent EU Transport White Paper, *Roadmap To A Single European Transport Area* (2011), focuses on a fully integrated transport network and sets out long term aims for improved safety, modal shift and significant reductions in greenhouse gas emissions from transport. These mirror the key transport aims of Scottish Ministers, as reflected in our National Indicators to reduce Scotland's carbon footprint, traffic congestion and road deaths, as well as increase journeys made by public and active transport.

### **Benefits and opportunities**

10. In supporting the free movement of people and goods throughout the EU, transport is central to the realisation of the single market. For example, consumers and industry require confidence that minimum standards for passenger rights and roadworthiness testing exist across the common market.

11. In many cases, EU legislation helps to ensure that other Member States improve their standards (e.g. safety, accessibility) in line with those already employed in the UK. Taking motor insurance directives and the recent Roadworthiness Package as examples, minimum standards 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.

12. 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.

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

14. While this market liberalisation has brought about significant economic and other benefits, this must be balanced with specific geographical circumstances, for example the continued need to support 'lifeline' transport services, especially ferries, to remote Scottish regions. This will help to ensure that all EU regions have the opportunity to prosper.

15. Strategic issues where the EU is a global leader, such as action on emissions reduction, require international cooperation and cannot be achieved by Member States in isolation. In areas such as international maritime law and aviation agreements with third countries, there are also benefits from having a strong,

collective EU voice at the negotiating table. This collective EU action on transport has helped create an environment of sharing best practice on safety, security and technological advances such as Intelligent Transport Systems.

16. There a common approach is not appropriate, there is, of course, scope to exercise opt-outs. For example, the UK has opted out of certain aspects of the Schengen Agreement, favouring the Common Travel Area between the UK, Ireland, Channel Islands and the Isle of Man. This, however, has more of an impact on border control and visas than transport policy.

## **Challenges**

17. Certain EU proposals have raised subsidiarity issues, aiming to influence Member State investment and planning priorities, and target setting. One such area is road charging, which Scottish Ministers oppose, and where the Commission's ultimate aim is to introduce mandatory distance-based HGV charging based on the "polluter pays" principle.

18. The original proposals for revised Trans-European Networks guidelines (being covered separately under Cohesion), to take another recent example, raised issues around EU competency creep in the area of planning, which is devolved to Scottish Ministers. While negotiations have led to a compromise, this again illustrates the potential appetite for more EU influence on national and regional transport policy.

19. There are short-term challenges in funding strategic transport infrastructure at both a national and EU level. Longer term, as the EU continues to expand, 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.

20. Perhaps the greatest challenge will be reducing emissions from transport, in order to achieve the vision set out in the 2011 White Paper. While the Scottish Government supports these aims and believes they can throw weight behind our own world-leading climate change targets, care must also be taken to ensure that the principles of subsidiarity and proportionality are recognised.

21. There is a sense that the Commission's impact assessments for transport proposals are not of a consistently high quality, often underestimating the cost to industry and government, and that it therefore often falls to individual Member States to untangle the rationale for proposals. We would continue to encourage the Commission to undertake more thorough impact assessments, perhaps in partnership with Member States.

22. The EU has had a long standing aim of liberalisation of the railway sector and various Directives over the last 13 years have been introduced to support that. We have worked closely with the Department for Transport and the Commission to ensure that we are compliant, although it does restrict Scottish Ministers' options for ensuring the greatest benefit for rail users and taxpayers. It is regrettable that in our current franchising procurement programme it is possible for foreign state-owned

companies to bid to run ScotRail services while a domestic state-owned railway cannot. Indeed, we are not alone in feeling restricted by these EU Directives as several other Member States are facing infraction proceedings for failing to implement them.

23. The EU has also pursued an open market in the provision of maritime transport, reflecting the international nature of the shipping industry. EU maritime cabotage and State aid rules and guidance seek to strike a balance between keeping markets open and ensuring the provision of essential ferry services. Our experience of working with these rules over a number of years is that they are unnecessarily restrictive particularly when compared with the parallel rules for other modes such as rail and bus. In particular, ferry service contracts are limited to 6 years when the typical amortisation period for a vessel is 25 years – this makes it impractical for operators to buy new tonnage. We consider that contracts of 12 years should be permitted when operators are making significant investments.

24. Clearly, there are transport challenges faced by all Member States. It will be important going forward that DfT, in partnership with the Scottish Government and other devolved administrations, engage with other Member States and the European institutions to help ensure that proposals reflect EU transport competence and shared goals from the outset. This will help build confidence in new proposals at an early stage and ensure they are fit for purpose.

## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **RESEARCH & DEVELOPMENT**

1. The Scottish Government welcomes the opportunity to contribute to this call for evidence.
2. In drafting this response, we have consulted with a number of partners including those from our Enterprise Agencies and Scotland Europa.

#### **Development of EU Research and Development Competence**

3. Scotland is home to world-class entrepreneurs, scientists and internationally renowned universities. European research and development activities have greatly benefited Scotland and offer significant opportunities towards our aim of securing sustainable economic growth.
4. Through the implementation of the Framework Programmes in 1984, and their subsequent success and additional funding increases, opportunities to participate and direct positive policies towards engagement have increased.
5. Next year will see 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.
6. The launch of the Europe 2020 strategy and Flagship Initiatives has also given Scotland the opportunity to think about national and regional priorities and measures in parallel with those of the EU. As a result, we are developing a refreshed innovation and entrepreneurship framework, which will embed the principles of the EU's Smart Specialisation Strategies within it.
7. The protection of intellectual property arising from research and development activities is of importance. The recent creation of a unitary patent system will assist in making obtaining a European Patent less complex and cheaper for businesses, while ensuring legal certainty throughout the entire single jurisdiction in the participating member states. It will also help to make Europe a more attractive place for investors, boost competitiveness and enhance the Single Market.
8. The main pieces of legislation applicable to this policy area are:

Research and Innovation - Treaty of EEC, Single European Act, Maastricht Treaty, Treaty of Amsterdam, Treaty of Nice, Treaty of Lisbon, Framework Programme 7, Horizon 2020.

Under the Lisbon Treaty (2009), the wider European Research Area (ERA) will be non-legislative and based upon co-operation and collaboration. As such, we feel this is an entirely appropriate way to encourage cross-border participation and the sharing of ideas. Framework Programme 7 has made inroads into this.

Intellectual Property - Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Two regulations with a view to implementing enhanced cooperation in the area of the creation of unitary patent protection (PE-COS 72/11) and its translation arrangements (18855/2/11 REV 2).

Space - The Treaty of Lisbon created the legal basis to enable the EU to conduct a European Space Policy. The Lisbon Treaty of 2009 reinforced the case for space in Europe and strengthened the role of the European Space Agency (ESA) as an R&D space agency. The Treaty also extended qualified majority voting to space policy, when prior to that it required unanimity according to the Treaty of Nice.

9. Article 189 of the TFEU requires the Union to develop European space policy to promote scientific and technical progress, industrial competitiveness and the implementation of the policies. It also stipulates that the EU should establish appropriate relations with ESA. ESA is not an agency or body of the European Union (EU) but they do share common goals.

### **Advantages of EU Research and Development Competence**

10. European activity in research, development and innovation is generally of benefit to Scotland. The aims of the EU's Framework 7 programme, for research and innovation, aligns well with the Government Economic Strategy and initiatives such as the Scottish Funding Council's Innovation Centres.

11. We consider Scotland to be an effective user of EU funding. For example, Framework Programme 7 has seen significant gains for Scotland, with our academic research institutes especially performing extremely well under the programme. To date, almost €505 million has been secured by Scottish organisations since 2007 [source: Scotland Europa, July 2013].

12. There is also demonstrable evidence throughout the Scottish business base and academic institutes to support 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 programmes are based on excellence; improve the ability to attract and retain world class researchers and maximise opportunities to access new markets and funding opportunities.

13. Given the international nature of much research and development, the involvement of Scotland in EU programmes has helped to support multi-partnerships with a number of European and non-European organisations. This has also fostered better understanding of the scientific communities in research sectors and shared knowledge across different societal challenges.

14. Programmes also provide opportunities for academia and business to work together more collaboratively. For example, Scotland was particularly successful in the EU Innovative Medicine Initiative European Lead Factory competition which brings together industry and academia with an aim to speed up the discovery and development of new drugs.

15. The more affordable Europe-wide patent protection will encourage EU businesses to increase their innovation activity and is particularly good news for SMEs who have limited resources. It will also help boost business competitiveness and make EU countries more attractive places for investors.

### **Challenges of EU Research and Development Competence**

16. The bureaucracy of EU research and development funding procedures, general regulatory requirements and speed of process can often lead to frustrations and cause delay to funding. Equally, the proliferation of programmes and the overlaps can be confusing. These areas can discourage applicants. However, we recognise that through Horizon 2020's proposed simplified programme structure, single set of rules and simplified reimbursement model that such issues will be addressed.

17. EU funding has in the past focused on research and development rather than its translation into goods and services through innovation and knowledge exchange. Therefore, full economic benefits may not have been realised. However, it is expected that Horizon 2020's stronger focus on innovation and close-to-market activities will address this.

18. The EU has competence in State Aid control over research and development subsidies, and this means that, in theory, EU rules might restrict UK ambitions to subsidise research and development in order to maintain a level playing field between States. There have already been some concerns that, 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. With Scotland being a major innovator in wind and wave power, this may have a greater impact than in the rest of the UK. There is also general concern that countries outwith the EEA, 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.

19. Previous concerns also existed over the approval timescales involved in notifying the European Commission of a State Aid scheme. This introduced a lot of uncertainty, especially to those trying to implement research and development schemes and funding. However, the draft State Aid Research, Development and Innovation Framework is helping reduce these timescales. This should have a positive effect on implementation times in Europe.

20. Finally, the opportunity to directly influence research and development funding calls can present challenges due to Scotland not being a member state. However, being an independent country in the EU would help enable Scotland to have greater influence than we currently do in these calls. Status as a member state would also place Scotland in a more influential position to back Scottish applications bidding for research and development funding.



## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **CIVIL JUDICIAL CO-OPERATION (INCLUDING FAMILY MATTERS)**

#### **Operation in Scotland**

##### **General remarks**

1. 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 Treaty of the Functioning of the European Union (“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 judgements across Member States is vital to the proper functioning of an internal market and for the effective enforcement of civil rights.

2. 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.

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

##### **How is Article 81 TFEU applied in Scotland?**

4. Subject to certain constraints, the Scotland Act 1998 transfers general competence to the Scottish Government and Scottish Parliament to implement EU obligations in devolved areas. Depending on the requirements of the EU measure, a number of implementing options might be appropriate, and might require administrative as well as legislative measures to give them full effect.

5. Scots private law (civil law) is not, in itself, a reserved matter but it can relate to devolved or reserved matters. In practice, most areas of Scots private (civil) law relate to devolved matters.

##### **Practical application of Article 81 TFEU in Scotland**

6. In the time available, the Scottish Government has not been able to carry out a consultation of its own. It has, however, made enquiries of the Scottish Court Service; the Accountant in Bankruptcy; the Keeper of the Registers of Scotland; and offers observations from its own perspective as a Central Authority under the Brussels Regime. Separately, the Law Society of Scotland<sup>1</sup> and the Faculty of

---

<sup>1</sup> [http://www.lawscot.org.uk/media/649594/lawref%20civil\\_judicial\\_cooperation.pdf](http://www.lawscot.org.uk/media/649594/lawref%20civil_judicial_cooperation.pdf)

Advocates<sup>2</sup> have submitted responses to the Ministry of Justice from the perspective of practitioners on the domestic application of Article 81 TFEU.

7. There is little data readily available held by the Court Service on the numbers of court actions relying on measures made under Article 81 TFEU, nor by the Keeper regarding property registrations in Scotland relying on Article 81 TFEU measures.

8. However, the Keeper is of the view that civil judicial co-operation is advantageous as it results in the formulation of statutory evidentiary criteria which the Keeper can refer to when seeking to determine if a particular document is acceptable from a registration perspective, which augments the reliability of the registration system overall.

9. Again, there is little data readily available regarding insolvency practice. However, the Accountant in Bankruptcy has found the current Insolvency Regulation a useful measure, and has successfully used it to recover cross-border assets that would otherwise have been disposed of. This has been particularly important where there is the opportunity for “bankruptcy tourism” (or forum shopping) to allow trustees to quickly take control of cross-border assets.

10. The Scottish Government has more experience as a Central Authority under the Brussels Regime, particularly in relation to Parental Child Abduction (Council Regulation No 2201/2003, “Brussels II bis”) and Family Maintenance Obligations (Council Regulation No 4/2009). The Central Authority dealt with 20 cases under the Brussels II bis Regulation in 2012, 44 in 2011 and 23 in 2010. The Regulation is a useful bolt-on to the 1980 Hague Convention, for example in relation to provisions for the collation and exchange of information between Member States. The Maintenance Regulation has only been in force for two years. In the first year of operation, the Scottish Central Authority dealt with just under 100 cases. There have been a few teething problems, but we generally find the processes to work well.

### **Intra-UK issues**

11. EU measures adopted under Article 118 TFEU do not make provision for the recognition and enforcement of judicial decisions as between different jurisdictions in a single Member State. The Scottish Government has noted that there continue to be issues about the enforcement of certain judgments and orders as between the different jurisdictions in the UK. We have previously noted the terms of section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982.

12. That appears to mean, for example, that Domestic Violence Protection Orders issued by Magistrates Courts in England and Wales are, at least in theory, not enforceable in Scotland. This would be anomalous given that we are due to implement the EU Regulation on the Mutual Recognition of Protection Measures in Civil Matters. Any legislation to amend section 18(3)(a) would be for Westminster.

13. There have also been examples of difficult intra-UK cases in relation to residence of and contact with children. It would be helpful to highlight in England and Wales that, in certain circumstances, there may be Scottish jurisdiction in cases

---

<sup>2</sup> [http://www.advocates.org.uk/downloads/news/responses/20130814\\_balanceofcompetencies.pdf](http://www.advocates.org.uk/downloads/news/responses/20130814_balanceofcompetencies.pdf)

with a Scottish connection (see, for example, the terms of section 41 of the Family Law Act 1986).

### **Examples of challenges to the EU's competence in this area**

14. The Scottish Government agreed with the UK Government that we should not opt-in to proposals on matrimonial property regimes and property consequences of registered partnerships.

15. 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, we agreed that the UK should not opt into the EU proposals. We considered, along with the UK Government, that the proposals could lead to fragmented jurisdiction; 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).

16. The Scottish Government also agreed with the decision not to opt into the Succession Regulation. We agreed that the divergence between, on the one hand, the UK's succession regimes and, on the other hand, those used in most other EU Member States was not satisfactorily addressed in the Regulation. Specifically, the EU Regulation on Succession and Wills does not offer adequate protection to creditors, it imposes an unnecessary court process on non-contentious succession cases and fails to protect recipients of lifetime gifts from future clawback.

17. Although not covered by Article 81 TFEU, the Scottish Government has concerns about the draft EU Regulation on the abolition of legalisation and the introduction of common format multi-lingual civil status documents.

18. There are no significant concerns about the abolition of legalisation. However, it is not clear that the introduction of common format documents is proportionate.

19. The extension of the proposal to other documents, such as documents showing property rights could be particularly problematic. Property registration covers complex matters such as:

- The boundaries of the property.
- Any rights others have over the property.
- Any rights others have in relation to the land beneath the property.
- Any standard security (mortgage) or other charges over the property.

## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **ASYLUM AND IMMIGRATION**

1. The Scottish Government welcomes the opportunity to contribute to the call for evidence. We are aware that key Scottish stakeholders, including CoSLA have provided a response as part of this exercise. We ask that, where possible, any Scottish-specific issues raised by respondents are reflected in the final Free Movement of Persons and Asylum & Immigration reports.

#### **Schengen and Common Travel Area**

2. It is the Scottish Government's position that it is in the best interests of Scotland and the UK to opt out of the Schengen Protocol and continue the operation of the Common Travel Area ('CTA'). Indeed, the European Treaty of Amsterdam recognises the provisions of the CTA in order to distinguish it from the Schengen area.

3. Opting out of the border and visa aspects of the Schengen Protocol protects the integrity of the UK and Ireland social union. Given practical considerations of geographical and working arrangements, it is in the national interests of Scotland, Ireland and the rest of the UK to remain in the CTA. These arrangements are not only robust and help protect the security of the CTA, but also that of the Schengen area.

#### **EU and Asylum**

4. The Scottish Government view the advantages of participating in a Common European Asylum System as including increased information sharing, inclusion in the Dublin Convention, freedom of movement and increased rights for asylum seekers coming to the EU. Working within these common frameworks helps minimise multiple asylum claims and where these occur, means that asylum seekers can be effectively returned to the country of first application under the Dublin Convention.

5. The EU will face particular challenges in the future; in particular, with the on-going conflict in Syria as well as the Arab Spring, the EU may continue to see increased numbers of asylum seekers arriving in the EU. For Scotland's interests, Scotland welcomes the contribution that recognised refugees make to our economy and society.

6. The EU will inevitably face challenges as membership expands, and how these play out will depend on the new member states and their approach to asylum. It is impossible to predict what these might be, however we will need to consider wide and varied potential ramifications. A significant challenge would be if, for example, new member states have an approach which would result in asylum seekers not being treated humanely.

## EU and Legal Migration

7. As a member of the CTA rather than Schengen, the UK and Scotland have slightly different needs regarding immigration. Not opting into EU competences around Legal Migration and returns and admissions gives the UK the opportunity to act in a way that takes into account the best interests of the CTA partners. Given the special nature of the UK's position within the CTA, it is in the UK and Scotland's interest to retain control of legal migration into the UK.

## Future developments

8. Future developments in IT and technology will require continuing cooperation between the CTA and EU partners to work together to develop systems and procedures to ensure the CTA's security and national interests. Ensuring that data protection principles in all member states are sufficient and robust, will allow the sharing of Passenger Name Record (PNR) within the EU and better connect the information required to combat the threat to terrorism and organised crime.

9. Improvements in technologies may make the detection of issues at the border, and the data contained at the border, vulnerable. There is an increasing threat of Serious Organised Crime along with human trafficking operating across borders and this will continue to pose a threat and a challenge.

10. Organised crime costs the UK between £20 billion and £40 billion a year [source: *Local to Global: Reducing the Risk from Organised Crime*, HM Government, 2011] and organised crime groups often operate across boundaries - both in terms of crime type and geography. Improvements in technology may make the operation of cross border crimes harder to detect with respect to visas when physically moving across borders, but also with respect to the types of crime which are committed.

11. The joining up and extension of electronic data sets, watch lists and alerts within the EU, as well as continued police and judicial co-operation (Schengen Information System II) will deliver better access to information and maintain/build interoperability across the border. It will also enable improved public and law enforcement officer protection, greater identity assurance at the border, reduced crime – particularly via the ability to screen for wanted criminals via border controls. We look forward to the evaluation process in Scotland and encourage pan-EU application with new member states.

## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **FREE MOVEMENT OF PERSONS**

1. The Scottish Government welcomes the opportunity to contribute to the call for evidence. We are aware that key Scottish stakeholders, including CoSLA have provided a response as part of this exercise. We ask that, where possible, any Scottish-specific issues raised by respondents are reflected in the final Free Movement of Persons and Asylum & Immigration reports.

#### **Free Movement of Persons**

2. As is detailed throughout this response, there is evidence that the ability to exercise free movement rights in another member state impacts positively on UK nationals and the UK as a whole.

3. Net migration has been the main contributor to population growth in Scotland in recent years and Scotland benefits from being its citizens being part of the EU. The Scottish Government has taken a positive and welcoming approach to migrants as they can contribute to improvements in Scotland's economic growth performance and to help address the demographic challenges that Scotland faces. The mid-year population estimates published on 8<sup>th</sup> August 2013 show that in mid-2012, Scotland's population was at its highest – 5,313,600, a rise of 18,200 people since Census Day on 27 March 2011. The rise was due to over 6,000 more births than deaths and also a net migration in-flow of 15,200 people, 14,300 of which were from overseas (the other 900 were from the rest of the UK). The Scottish Government has set a target to match average European population growth over the period 2007 to 2017 and the new population figure shows that Scotland is continuing in the right direction to meet that target [source: *'Scotland's population at its highest ever'*, National Records of Scotland, 8 August 2013].

4. 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. These migrants accounted for around half of the estimated non-British people added to Scotland's population over the period. Of these EU migrants, an estimated 28,000 to 53,000 who entered Scotland were citizens of A8 countries. Between 5,000 and 17,000 of A8 citizens left, leading to a net gain of between 15,000 and 43,000 A8 citizens. These accounted for around half of the EU citizens added to Scotland's population over the period and around a quarter of the total non-British people added.

5. With the right of free movement, Scottish and UK nationals do not have to obtain permission to live and work in other EU member states and they also have access to a common market in which to provide services. Through pension arrangements, they are able to work in other EU countries and accrue rights to a state pension based on that work. Furthermore, Scottish and UK nationals who move to other member states may bring developed experience and skills back to the

UK. This will in turn contribute to the Scottish and rest of UK economy. Around a quarter of in-migrants and half of out-migrants moving between Scotland and overseas are British citizens, leading to net outward migration of between 28,000 and 78,000 people over the last ten years. We do not have specific estimates for Scotland but for the UK as a whole, migration both to and from EU countries is common for British citizens. France, Switzerland, Spain and Germany were among the top ten destination countries for British migrants from across the UK in 2011.

6. There is evidence to suggest that EU migrants impact positively on the public finance in the UK although these studies tend to focus on the net fiscal impact within a given year or a relatively short time period and do not generally focus on estimating the long-term impacts on the public finances. In particular, a study on the fiscal effects of A8 migration found that in each fiscal year from enlargement in 2004 to 2009, A8 immigrants made a positive contribution to the UK public finance. During the year 2008-2009, A8 immigrants paid 37% more in direct or indirect taxes than they received in public goods and services. In contrast, during 2008-2009, UK-born individuals contributed 20% less to the Exchequer than they received in terms of public goods and services. [source: *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](http://www.voxeu.org/article/fiscal-effects-a8-migration-uk)].

7. As will be seen in this response, economic theory and empirical evidence suggests that the benefits of immigration outweigh the costs and Scotland benefits from EU freedom of movement.

#### Access to and impact on Social Security and Public Services

8. EU competence protects the rights of Scottish and UK nationals exercising their right to free movement in other member states within the EU. EU competence also provides for equal access to welfare benefits across the EU, thereby facilitating the rights of Scottish and UK nationals to work and access benefits and services in other member states.

9. Under social security co-ordination of systems arrangements (Regulation (EC) No 883/2004) Scottish and UK residents are able to access necessary state healthcare throughout the EEA during short-term visits, in the event of illness or accident, using the European Health Insurance Card scheme. They can also travel for planned state treatment, in certain circumstances, under the S2 scheme. Scottish and UK State pensioners who decide to retire to another part of the EEA are also entitled to access state healthcare on the same basis as a person who is resident in that country under the S1 scheme. The schemes facilitate freedom of movement and are administered by the DWP, who would be best placed to provide figures on the uptake by Scottish nationals / residents.

## Impact on Social Security and Public Services in the UK

10. There is considerable evidence that suggests that EU migrants do not negatively impact on welfare provision and public services in the UK.

11. A study of the fiscal effects of A8 migration to the UK published in July 2009 found that A8 immigration has not been a burden on the welfare system and has instead contributed to strengthen the UK's fiscal position. [source: *Assessing the Fiscal Costs and Benefits of A8 Migration to the UK*, Christian Dustmann, Tommaso Frattini, Caroline Halls, (2009), Centre for Research and Analysis of Migration Discussion Paper No. 18/09] The study found that A8 immigrants are about 60% less likely than natives to receive state benefits or tax credits, and to live in social housing. Even if A8 immigrants had the same demographic characteristics of natives, they would still be 13% less likely to receive benefits and 28% less likely to live in social housing. The study found that A8 immigrants make much lower use of benefits and public services than UK-born workers.

12. The study also came to the view that there is little reason to believe that in the longer term, A8 immigrants who came to the UK between 2004 and 2008 will constitute a net burden to the welfare system. This view is in line with the study's results of the analysis on the probability of welfare claims, which showed that even if they were identical in a large number of characteristics to natives, like age, education, number of children and disability, A8 immigrants would still be less likely to claim benefits.

[source: *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](http://www.voxeu.org/article/fiscal-effects-a8-migration-uk)].

13. Furthermore, a March 2012 Guardian newspaper article noted that according to figures from the Department of Work and Pensions (DWP), of the roughly 1.8 million people from elsewhere in the EU of working age, about 90,000 (around 5%) are claiming an 'out of work benefit'. This compares to around 13% for natives. The article also noted that although there are already at least 140,000 Bulgarians and Romanians in the UK, neither nationality is in the top 20 countries of origin for foreign benefit claimants, which suggests that the numbers are minimal [source: *A crisis over the UK's benefits bill for EU migrants? What crisis?*, Jonathan Portes, 6 March 2013, The Guardian <http://www.theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis>].

14. In relation to Scotland in particular, analysis on the Impact of Recent Migration into Scotland (covering migration from the 2005 Accession countries), published in 2009, suggested that recent migration had not resulted in as large an increase in demand for services as had been expected and there was little evidence of an increase in the demand for health services [source: *Recent Migration into Scotland: The Evidence Base*, NIESR, March 2009, <http://www.scotland.gov.uk/Publications/2009/02/23154109/0>]



15. The Scottish Government would be concerned by any changes to EU competence in this area that acts as a barrier to the Scottish Government's policy of encouraging skilled migrants to work and study in Scotland. However, we note that the UK Government has recently made representations to the European Commission about the failure of a number of Spain's state hospitals to recognise the EHIC when providing treatment to foreign nationals, and agree that it is important that all Member States play by the rules.

#### Access to the Labour Market and impact on the economy, wages and employment

16. Migrants who move from the EU to Scotland and the UK are making a positive contribution to the economy. For example, figures from the Annual Population Survey show that employment rates for EU nationals (aged 16-64) living in Scotland are higher than for UK nationals (see table below).

**Table:** Employment Rates for UK, and EU Nationals Living in Scotland

	Employment Rate (16-64)	
	UK Nationals	EU Nationals
2007	74.0%	76.9%
2008	73.7%	77.6%
2009	72.4%	74.0%
2010	71.1%	76.1%
2011	70.8%	76.4%
2012	71.0%	71.8%

Source: APS, January-December dataset, ONS

An overview of the evidence on the economic impact of migration on the UK was produced by the House of Lords, as a result of an enquiry conducted by the Select Committee on Economic Affairs (House of Lords, 2008).

17. At the macro-economic level, an increase in net immigration may affect output, inflation, unemployment, wages and the return to capital. Evidence suggests that the increases in net immigration, from A8 countries and more widely, has been found to increase output and employment (Riley and Weale, 2006). There is also evidence that consumers may have benefited through reduced prices (House of Lords, 2008). [source: Recent Migration into Scotland: The Evidence Base, NIESR, March 2009, <http://www.scotland.gov.uk/Publications/2009/02/23154109/0>]

18. The ability to exercise rights of free movement to access the labour market benefits Scottish and UK nationals. EU action which further protects the rights of economic migrants is a positive development as it provides for better protection of Scottish and UK nationals who wish to exercise their right of free movement throughout the EU.

19. The empirical evidence suggests that in aggregate, immigration does not significantly impact upon the overall labour market outcomes of native workers.

20. However, the impact can vary across different groups. For example, some studies have identified that immigration can negatively impact upon labour market outcomes for lower skilled workers - although this is likely to be in the short-run only

if workers can retrain or find alternative employment – whilst there is evidence to suggest that immigration benefits higher skilled workers. [source: evidence summarised in *The Economic Impact of Immigration*, House of Lords Select Committee on Economic Affairs 1<sup>st</sup> Report of Session 2007-08, April 2008]

21. Analysis by the Migration Advisory Committee (MAC) – published in January 2012, suggests that immigrants from EU member states do not have a negative impact on the employment outcomes of native workers. [source: *Analysis of the Impacts of Migration*, Migration Advisory Committee, January 2012]

22. Previous assessments of the impact of A8 immigration to the UK have found no evidence that the enlargement of the EU in 2004 led, on average, to a setback of wages of workers born in the UK and has not detected any effect for natives' wages or unemployment. [source: '*New Labour? The Impact of Migration from Central and Eastern European Countries on the UK Labour Market*', Sara Lemos and Jonathan Portes, October 2008, <http://ftp.iza.org/dp3756.pdf>]

23. In relation to Scotland, previous evidence has shown that employers in Scotland have valued migrant labour and, in general, view migrant workers positively. Employers in the low skilled, temporary work and hospitality sectors have frequently reported that they could not function without migrant labour and would not have been able to grow. [source: *Recent Migration into Scotland: The Evidence Base*, NIESR, March 2009, <http://www.scotland.gov.uk/Publications/2009/02/23154109/0>]

24. The Scottish Government welcomes the brightest and best migrants to work and study in Scotland in order to advance Scotland's skills and stimulate the Scottish economy.

25. The Scottish Government views EU competence in protection of employment opportunities, wages and employment conditions positively. Protection of wages and employment conditions contribute to strengthening standards of employment in Scotland and the UK more widely, thereby stimulating the economy and benefitting Scottish and UK nationals.

#### Impact of this area of EU competence on varying sectors in Scotland

26. Evidence illustrates that EU competence on the free movement of people has a positive impact on various sectors in Scotland.

27. Many Scottish Life Sciences companies work in a niche area which demands a multi-disciplinary skillset. Although employers tend to be satisfied with candidates' qualifications, they can face challenges finding senior candidates with the right blend of skills, knowledge and experience of Life Sciences markets and products. This creates a need to recruit outside of Scotland which can bring challenges, especially for small companies who do not have a dedicated HR function. It also means that Life Science companies may have to look outside of the EU for the staff that they need.

28. To address these issues, Scotland encourages employers to invite any high quality candidates who have applied for jobs with them to join TalentScotland. This will ensure that they are not lost from the talent pool, even if they are unsuccessful for a particular role within one company.

29. We promote Scotland (on an international level) as a Life Sciences careers destination and seek to deliver a European careers event for Life Sciences, and other key sectors, to attract skilled engineers. We also seek to make it easier to recruit outside of Scotland. This will involve the delivery of short seminars to introduce SMEs to the UK immigration system. Immigration advice and support will also be offered to Life Science employers on a one-to-one basis where appropriate. [source: Life Sciences Skills Investment Plan (SIP), produced by Skills Development Scotland (SDS) 2013]

30. Research carried out in Scotland by the Financial Services Skills Gateway in 2011/12 found that employers across all Financial Services subsectors found it challenging to source technical and specialist roles in risk and compliance, actuarial, investment specialists, change management, technology and IT. These were all deemed to be 'can't do without' roles in the next 5 years. If employers are unable to fill technical & specialist roles from within Scotland, they commonly explore other options. The most commonly reported were recruiting from the rest of the UK, offshoring and recruiting globally (including sourcing staff globally from within the organisation). The Financial Services Skills Investment plan has a specific action to work with partners such as Talent Scotland to define and promote a clear 'Scottish Offer' aimed at attracting top talent from outwith Scotland [source: Financial Services Strategy Refresh presentation prepared and delivered by Scottish Enterprise (sourced as ONS)].

31. In relation to the education sector, according to a 2011 analysis carried out by London Economics, on behalf of the Department for Business Innovation and Skills, EU domiciled post-graduate students brought to the Scottish economy an estimated £12.4 million in tuition fees in 2008-2009. Furthermore, undergraduates and postgraduates brought an estimated £146.8 million in non-tuition fee expenditure (including accommodation and other day-to-day expenses). This illustrates the level of financial income the Scottish economy receives from EU students. [source: <http://www.bis.gov.uk/assets/biscore/higher-education/docs/e/11-980-estimating-value-of-education-exports.pdf>]

32. Furthermore, the hotel and restaurant trade, including the tourism market more generally, is dependent on a skilled but adaptable workforce, particularly due to the seasonal nature of this important and growing employment sector. EU migration has brought benefits to this sector through the provision of a motivated, skilled and enthusiastic workforce. The ability to maintain free migrant worker movement rights between other member states and Scotland is also important for agricultural sectors as it helps fulfil labour needs, particularly in hard to fill areas.

33. Finally, the UK oil and gas sector reports that the shortage in skilled personnel is cited as 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, 8 out of the top 10 were EEA (European Economic

Area) nationals, the other two being Canadian and American nationals, which illustrates the importance of the sector's access to EEA migrants [source: 'UK Continental Shelf Offshore Workforce Demographics Report 2013', Oil & Gas UK, <http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EM012.pdf>].

#### Impact of this area of EU Competence on local communities

34. The Scottish Government encourages skilled migrants to work and study in Scotland to share and develop skills. Immigration by way of this EU competence benefits the Scottish economy, allows employers to employ skilled migrants and fill labour gaps and develops businesses and employment sectors, stimulating the economy.

35. Migration of EU nationals to Scotland's communities increases the sharing of skills and experience, which in turn stimulates and encourages growth in the economy. Migration can also assist with strengthening community sustainability, particularly in those areas facing acute demographic challenges. Inward migration to rural areas plays a pivotal role in offsetting natural population decline and in maintaining birth rates in rural Scotland. [source: Skerratt et al, 2012, *Rural Scotland in Focus*]

36. A Guardian newspaper article from April 2013 noted that evidence to date suggested that migrant children did not have a negative impact on school performance.

[source: 'Bulgarian and Romanian immigrants – how much impact will they really have?', 5 April 2013, The Guardian, <http://www.theguardian.com/commentisfree/2013/apr/05/bulgarian-romanian-immigrants-impact-numbers>]

37. The Guardian article makes reference to a 2012 study of primary schools in England which found that an increased presence of children who did not speak English as their first language was not detrimental to the educational attainment of native English speakers. The study found that following the EU's eastern enlargement in 2004, there was evidence that the increase in some Catholic schools of white non-native English speakers resulted in native English speakers benefiting to a small extent in their maths results. It was suggested that possible reasons for this result were that firstly, immigrants from East European countries are better educated and also are more attached to the labour market than the native population.

[source: 'Children whose second language is English do not have a negative impact on education outcomes of native English speakers', Nuffield Foundation, 20 March 2012 <http://www.nuffieldfoundation.org/news/children-whose-second-language-english-do-not-have-negative-impact-education-outcomes-native-en>]

38. There is also evidence to suggest that since EU enlargement in 2004, rural areas in Scotland have experienced an increase in migrant workers, who have played a key role in addressing labour market shortages in sectors such as food processing, agriculture, hospitality and tourism, health and social care. [source: De Lima and Wright, 2009 – *Welcoming Migrants? Migrant Labour in Rural Scotland*]

### Future options and challenges

39. The Scottish Government considers that the continuation of EU competence in this area will strengthen the common market and free movement rights to increase opportunities for employment, economic growth, communication, sharing of skills and experience, and the protection of workers' rights across the EU. This benefits the national interest of Scotland and the UK more generally. The Scottish Government is not aware of any evidence to illustrate that there is abuse of free movement rights under EU law.

40. Future enlargement of the EU would provide further opportunity for Scottish nationals to exercise their right of free movement throughout a broader range of EU member states. Likewise, future enlargement will provide the opportunity for individuals from other EU member states and cultures to work and study in Scotland, sharing their skills and experiences and contributing to Scotland's society and economy.

41. The Scottish Government welcomes EU migrants who exercise their rights of free movement to work and study in Scotland and as per the evidence provided in this response, considers economic migrants to have a positive impact in developing and sustaining Scotland's economic growth.

## **BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE**

### **TOURISM, CULTURE AND SPORT**

1. The Scottish Government welcomes the opportunity to contribute to this call for evidence.

#### **CULTURE**

2. Overall, we believe that the opportunities for cultural organisations and bodies are strengthened by the availability of funding and partnership programmes and expertise from Europe, but would acknowledge that more probably needs to be done in Scotland and at the UK level to support organisations to have better access to the opportunities on offer. Scotland is keen to develop partnerships across Europe for cultural, creative, social and economic benefit and see the EU and EU nations as some of the many partners available to us to do this. At the EU Culture Council in May 2013 the Cabinet Secretary for Culture and External Affairs represented the UK in the Ministerial policy debate on the role of culture as a soft policy option in EU external relations. She highlighted the value that both the Scottish and UK Governments place on culture as a valuable asset in promoting our nations around the world. Drawing upon a number of recent examples including the Olympics, the forthcoming Commonwealth Games in Glasgow, the Edinburgh Festivals and Scotland's recent cultural exchanges with China, the Cabinet Secretary highlighted how culture can help to build trust in bilateral and multilateral relationships, help to pave the way for trade promotion through exports and inward investment, and serve as a marketing tool to drive up tourism, which is a major contributor to jobs and economic growth.

#### **Benefits**

3. Between 2007 and 2013, over 200 UK participants in 176 transnational projects received funding from the EU's Culture Programme. In 2011, 43 UK cultural organisations participated in transnational projects and five UK-based European cultural organisations received an estimated €5.7 million in grants from the Cultural Programme.

4. Although it is very difficult to provide exact figures for projects based in Scotland, it is possible to highlight where Scotland has been part of a wider EU partnership and therefore in receipt of some funding. Of these projects, the Selected Projects Promoting Arts & Culture Across Europe (SPPACE) database highlights the following involving Scottish organisations:

2012: Edinburgh University, Glasgow Live in collaboration with Creative Carbon Scotland and the Scottish Sculpture Workshop - each worked in partnership with other European bodies and benefitted from funding.

2011: the National Youth Orchestra of Scotland, the North Highland Initiative and the Glasgow Sculpture Studios

2010: Imagine, University of Glasgow and UZ Arts.

2009: Badac Theatre Company.

2008: The Scottish Fisheries Museum.

2007: Aquacetera, Birds of Paradise Theatre Company, New Moves International and the University of Strathclyde.

2006: ARCH, Dionysia Press.

The Scottish Government is aware that Visiting Arts, which acts as the contact point in the UK for the European Commission's Culture Programme, have recently suggested that UK based cultural programmes could improve their access to funding if they were, amongst other things, better able to build on partnership working across Europe.

### **Creative Europe**

5. This programme offers Scotland-based cultural practitioners great opportunities to access further funding and we welcome the intention to combine the current media and culture programmes, particularly with reference to the emphasis on employment, innovation, social cohesion and economic growth. The Cabinet Secretary for Culture and External Affairs spoke on behalf of the UK about the recent benefits of the Media and Media Mundus programmes, as well as the potential benefits of the Creative Europe programme when she attended the EU Culture Council in May 2012.

- The Scottish Government welcomes the €1.3 billion that has been allocated for this programme across Europe for the period 2014 -20 and the opportunities that this offers creative and cultural bodies across Scotland and would welcome a specific desk for Scotland in addition to the desk which currently represents UK interests and which is sited at Visiting Arts. **A Scottish Creative Europe desk would be very welcome in order to publicise and promote the programme in Scotland. The Cabinet Secretary for Culture and External Affairs made this point during the EU Culture Council in May 2012.**

### **EU Competition Law & State Aid**

6. Culture is affected by EU competition law, but where a Member State is able to argue that the aid is necessary to protect cultural diversity then, as we are aware, that aid is permissible.

7. An example of where Scotland benefited in this regard would be when the UK introduced tax reliefs for British films, animation and high-end TV, all of which were approved by the Commission on these grounds.

8. This facilitated the building of a new television studio and production base at Cumbernauld, North Lanarkshire where *Outlander*, a US Sci-Fi series, will go into production later this year.

- **The Scottish Government welcomes any opportunity to facilitate the production of television, film and animation in Scotland, thus supporting skills and the local economy.**

### **European Capitals of Culture**

9. In its current format, two cities from two different EU Member States are designated each year as European Capitals of Culture, and host year-long cultural programmes.

10. Glasgow was selected as a European City of Culture in **1990**, and the Scottish Government would take the view that this initiative has left a long-standing and meaningful legacy for the city. Glasgow used the opportunity that the ECC initiative afforded to successfully demonstrate how culture can be used to address a range of economic and social objectives as well as promoting community development and participation.

11. The UK is scheduled to host a European Capital of Culture in 2023.

- **The Scottish Government recognises the great benefits that the Capitals of Culture programme can bring to a city and, indeed, the recent UK City of Culture programme and our support for the city of Dundee, is predicated on an understanding of those benefits.**

### **SPORT**

12. The EU dimension in sport has been enhanced and supportive to Member States (and Scotland) since the publication of the EU White Paper in 2007, which covers the social, economic and organisational role for sport. The Communication of the European Commission in 2011 (*Developing the EU Role in Sport*) took this further and helpfully developed and focussed these general themes of the White Paper within the context of the supporting competence for sport, as established in the Lisbon Treaty 2009. In the context of the UK and Scotland, the EU supporting competence has been supportive in developing existing policy priorities particularly in the areas of anti-doping (at a UK level), physical activity and healthy ageing (in Scotland).

13. The EU action in the area of anti-doping has been supportive of the role of WADA (World Anti-Doping Association) and, as such, has supported Scotland and the UK to provide a consistent and reinforced position with National and Scottish Governing Bodies of Sport. In the area of Guidelines for Physical Activity, the original EU guidelines (being supportive of the World Health Organisation Guidelines) have supported Scotland to assess its policy approaches. They were also used as the basis for the National Strategy for Physical Activity in Scotland, along with many strategies and plans at a local level. The EU guidelines remain an



important contribution to policy initiatives in physical activity and sport. The international sharing of approaches to policy implementation and delivery through the HEPA network has been welcome and the growing relationship between the HEPA network and the EU Expert Group on Health and Sport has helped develop the relationship between sport and health actors within UK and across EU. Scottish delegates have been able to participate and exchange learning with senior colleagues across the EU through both of these networks. This has brought access to evidence of policy implementation for sport and physical activity in a range of other EU countries that would not otherwise have occurred. This has also allowed for a consensus on the minimum level of EU monitoring of activity (both policy delivery and population outcomes) to be reached. This consensus on a few key variables will enable us to compare approaches and outcomes across EU. We welcome this possibility as an opportunity to learn further about successful approaches to tackling health through physical activity and sport.

14. More specifically, Scotland hosted the World Congress on Active Ageing in 2012 in Glasgow during the *EU Year of Active Ageing and Solidarity Between Generations* and this was in direct support of the work strand 'Healthy Ageing' within the EU Expert Group on sport and health. There was also a specific event within Scotland engaging a wide range of delivery and policy agencies to discuss the importance of healthy and active ageing and to prioritise actions for implementation. This is being led by the health department and third sector partners working in health and social care, illustrating the contribution that the evidence and supporting competence of the EU can add to influencing cross-sectoral work in sport within member states.

15. In summary, we have benefitted from the supporting competence of the EU in sport and see no need to extend this in the areas discussed above. Specifically, the opportunities for sharing policy, implementation and outcome learning across Member States have been of benefit to Scotland. The need for EU action in sport to cooperate with global organisations such as WADA and WHO is important in exercising the supportive competence.

## **TOURISM**

16. The EU's new specific competence in tourism only came about in 2009 with the Treaty of Lisbon, with Article 195 specifically acknowledging the importance of tourism to Europe:

16.1 The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector.

To that end, Union action shall be aimed at:

- (a) encouraging the creation of a favourable environment for the development of undertakings in this sector;
- (b) promoting cooperation between the Member States, particularly by the exchange of good practice.

16.2 The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States to achieve the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.

17. The EU had acted in the field of tourism for a number of decades prior to this formalisation, but without the level of competence afforded by the Lisbon Treaty. For example, in 1986, a Council decision established a consultation and co-operation procedure in the field of tourism, under which Member States exchange information and co-operate in the provision of services to tourists.

18. That being said, there remains little in the way of tourism specific legislation to date (the current revision of the existing Package Travel Directive is from a consumer protection angle).

19. Following the Lisbon Treaty, the European Commission published a communication in 2010, "Europe, the world's No 1 tourist destination – a new political framework for tourism in Europe", which set out its policy to promote tourism and maximize the industry's contribution to growth and employment - specifically stimulating competitiveness; promoting sustainable and quality tourism; and maximising the potential of EU financial policies for developing tourism. Specific examples of policies include the Calypso low season tourism project; the European Tourism Label for Quality Schemes; and the European Destinations of Excellence initiative to promote emerging destinations and sustainable tourism.

20. There are also a number of broader EU policies and programmes which have a direct tourism impact. For example, the European Regional Development Fund (ERDF) which supports more sustainable patterns of tourism to enhance cultural and natural heritage; the European Social Fund (ESF) which co-finances projects to enhance productivity and quality of employment and services in the tourism sector through education and training.

21. Tourism is a devolved responsibility of the Scottish Parliament, albeit there are issues such as VAT and visa control etc. that have implications for tourism that are reserved to Westminster, but which also have EU implications. While the functions of the state in providing for or supporting tourism are also subject to EU State Aid considerations, there is very little direct legislative control by the EU on tourism specifically.

22. Although the duties and responsibility of the national tourist body, VisitScotland, were established by an act of the UK Parliament – the Development of Tourism Act 1969 – any changes to the legal framework can now be undertaken by the Scottish Parliament (as evidenced by the Tourist Boards (Scotland) Act 2006, which made changes to the structure of tourism boards in Scotland).

23. SG involvement in tourism is primarily through setting the policy and legal context in which VisitScotland (VS) operates. VS' role is to grow and develop the sustainable economic benefit of tourism to Scotland's visitor economy which it

achieves through its marketing, promotion and information activities; the provision of support and advice to the industry to assist in improving the quality and sustainability of the tourism sector in Scotland; and through EventScotland, implementing the national events strategy, which helps sustain, develop and promote Scotland's international profile.

24. European policy on tourism is very much aligned to that of the Scottish Government and the Scottish tourism industry. Both VS and the industry-led Scottish Tourism Alliance have reflected the EU priorities outlined in the 2010 communication in terms of the development of sustainable, responsible and high quality tourism. VS' role is to focus on the development of a sustainable visitor economy; while the STA published its national strategy, Tourism Scotland 2020, which identified the key areas of development being leadership, sustainability; quality and skills and marketing as a means of making Scotland a destination to what it refers, of first choice for a high quality, value for money and memorable customer experience, delivered by skilled and passionate people.

25. EU policy in terms of funding and the movement of goods and people has been important to the industry; its specific focus on the tourism economy will also be of benefit to Scotland.

## **Employment**

26. Growth in the tourism sector and the need to replace staff has created a reliance on employing workers from other EU member states. Skills Development Scotland figures indicate that 14% of the sector workforce were born overseas – above the average for other sectors of 8%. The ability of other Member States' citizens to be able to work in Scotland has therefore directly benefitted the tourism industry.

## **Funding**

27. EU funding in particular has been important for both promoting Scotland and improving the sector. VS have benefitted from substantial EU funding for business development and marketing initiatives – almost £12m in the last six years. For example, ERDF has been used to develop green tourism within Scotland and support Homecoming 2009. In the past ERDF and ESF schemes operated by Highlands and Islands Enterprise (HIE) provided significant support to the tourism sector, including for upgrading accommodation standards (although the only support to tourism from EU funds that HIE now operate is the part funded Graduate and Summer Placement schemes).

28. Infrastructure development funded through the EU has also benefitted the tourism sector, particularly improved transport linkages in the Highlands and Islands as a result of its Objective 1 status in the 1990s.

29. Changes to European support to agriculture to improve the rural environment and encourage tourism as a way to diversify the rural economy also helps maintain an important aspect of Scotland's attraction to visitors – its natural beauty, especially so in 2013, the Year of Natural Scotland. For example, under LEADER a range of

schemes have been funded. Bike Trossachs were awarded £25,850 towards the Aberfoyle Bike Skills Area project, which will allow the lease of a hill and development of two tracks for mountain bikes where visitors and locals will be able to practice their skills and increase their fitness. Discover Clackmannanshire were awarded £3,146 towards holding the ScotFest festival in Alva in 2013 - a celebration of local food producers and healthy eating, which was expected to draw a large number of visitors to the area to experience the local produce.

30. An example of the wider work being undertaken is the “Go Rural” initiative devised by a team of Rural Leaders taking part in the 2012 Scottish Enterprise (SE) Rural Leadership Programme and funded by Angus Council (via an European Rural Tourism Business Support project) plus contributions from Association of Scottish Self Caterers, NFU Scotland, SE, VS Growth Fund and Scottish Land and Estate.

31. An on-going example of how EU competence and funding in an area can benefit tourism is the Sail West Malin Waters investment programme. As part of a collaboration of more than 20 partners from the West of Scotland, Northern Ireland and Ireland, Malin Scottish projects received £2.2 million of INTERREG IVA funding towards upgrading Scottish sailing infrastructure - with 25 per cent extra funding from local authorities and organisations on top bringing the total for Scotland to £3m. This will improve the infrastructure for sailors on the shared maritime region off the coasts of western Scotland, Sligo, Donegal and Northern Ireland, helping Scotland as well as the region in general become an important marine and cultural tourism destination.

32. Scotland is actively involved in European initiatives to promote tourism and is participating in its new policy competency areas. The Scottish Government sees potential in Scotland being involved in the various projects that are underpinning the Commission’s tourism action framework, some specific examples being:

### **Quality Assurance European Tourism Quality Label**

33. Since April 2011, VS have participated fully in an open consultation process involving all member states on the planned European Tourism Quality Label. This has been led by the Directorate General for Enterprise and Industry - Tourism Policy. VS have provided data on their Quality Assurance schemes, participated in workshops, and contributed to research. The consultation is still live, currently focused on internal consultation within the Commission.

34. VS are also developing plans to hold a Quality Forum in Scotland in 2014, with a key target being the Nordic / Baltic countries. The aim of this Forum would be to discuss quality assurance, in which VS is a leader, with a view to influencing the thinking of other European destinations and ultimately shape European policy on the proposed Quality Label.

35. VS have also been proactive in working with partner organisations in other Member States in the area of quality improvement . For example, in Sweden they have developed a partnership supported by Tillväxtverket, the Swedish Agency for Economic & Regional Growth to support the development of a new Swedish quality

scheme. This started initially with West Sweden Tourist Board but now has been adopted nationally under the Swedish Welcome organisation.

### **Accessible tourism**

36. VS have been very proactive in promoting accessible tourism for older and disabled people through their Accessible Tourism Project (ATP), which has been mainstreamed into their operational thinking, and has ensured that Scotland has taken a march on other countries in what is a growth area that remains relatively untapped. From hosting a successful accessible tourism conference attended by over 240 delegates in March this year, VS were invited to sit on the EU Accessible Tourism Task Force, at which they will shortly be giving a presentation on the ATP, as well as engaging with the tourism industry.

37. VS is also actively bidding to speak at the EU Tourism day event in December 2013 in Brussels, which this year has “accessibility” as its central theme. This would focus on VS use of their business case for developing accessible tourism, in that there are a large number with a significant spend – for example DCMS indicated that there are 11 million disabled people in the UK with a potential spending power of £80 billion per year; in the EU, 166 billion Euros for over 45 million disabled people (European Commission 2004) – and as a driver to engage, and indeed change people’s perceptions of this subject, differing from the EU legal approach.

### **Challenges**

38. EU competition law has had a direct impact on the operations of VS as well as the other national tourist bodies within the UK. The Commission’s view in respect of state aid compliance regarding the provision of a web booking service on VS’s website led to its agreement to curtail such operations from December 2012. Activities undertaken by VS and other publicly funded organisations within the tourism sector have therefore to be State aid compliant, which may limit organisations’ aspirations or the demands for action from the industry.

39. EU procurement rules in respect of the threshold or number of quotes required has particular implications in rural areas, and can have a bearing in terms of tourism. This is to reflect areas such as islands where trades are already limited and travel costs dissuade mainland based companies. Flexibility could reduce unnecessary costs, whilst still having a transparent process that recognises the challenges of remote rural living.

### Background Information on Culture

#### Development of EU Culture Competence

1. EU Competence in relation to culture is 'Supporting', where both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking their own action.
2. The culture competence was introduced with the signing of the Maastricht Treaty in 1992, which provided a limited competence in culture. The Treaty also gave the EC a competence to act externally by co-operating with third countries and international organisations in relation to culture. Importantly, Maastricht also provided a new specific route for approval of State Aid in relation to culture and heritage preservation.
3. This new role was nevertheless limited to promoting co-operation between the cultural operators of the different Member States, or to complementing their activities in respect of promoting both national and regional diversity, as well as highlighting a shared European cultural heritage.
4. A further step was taken in 1999, when the Treaty of Amsterdam extended the cultural competence, and required the European Community to take cultural aspects into account in its actions under other provisions of the Treaty on European Union: in particular in terms of respecting and promoting cultural diversity.
5. One of the main mechanisms the EU uses to attempt to promote Europe's diverse culture is through funding programmes. For example, a Media Programme provided funding to support a pan-European network of cinemas including Eden Court in Inverness, as well as Edinburgh Napier University's ENGAGE training course.

#### Creative Europe

6. The Commission's proposal for a new Creative Europe programme follows on from the current Culture, Media and Media Mundus programmes which will come to an end in December 2013.
7. The Council adopted a partial general approach on Creative Europe in May 2012. (Ms Hyslop was part of the UK delegation at this Council and she spoke about the merits of the Media Programme in Scotland). It adopted a revised partial general approach, incorporating text relating to the proposed new loan guarantee facility, in November 2012. The programme budget remains outside the scope of the partial general approach.
8. The Culture and Education Committee of the European Parliament adopted its report on the Creative Europe on 18 December 2012. Dates for the debate and vote in the plenary session have not yet been set.

9. The Presidency has been holding informal trilogue meetings with the Commission and the European Parliament, with a view to negotiating a text which could form the basis of a First Reading agreement. The Council working group and COREPER have been kept informed of the progress of these discussions and Member States' views have been sought on possible compromise amendments.

10. Funding will open in January 2014 and this will become the main EU programme for culture, audio-visual and CIs.

11. There will be numerous opportunities for Scotland and having the Scottish desk should, in theory, be helpful.

12. There is a proposal for a Creative Europe Programme, which aims to promote cultural and linguistic diversity and strengthen the competitiveness of the cultural and creative sectors. The UK Government flagged some issues around a new loan guarantee facility, stating that it is not convinced that a sector-specific guarantee is the right way to proceed. There is also a question around Creative Europe Desks, and whether or not each member state should only have one desk or more. **At present, there is a single UK desk for culture and three media desks, one of which is based at Creative Scotland.**

## **EU Competition Law & State Aid**

13. Culture is affected by EU competition law. The Treaty on the Functioning of the European Union states that where competition law is necessary for the functioning of the Internal Market, it is within the exclusive competence of the EU. This means that even if the EU does not act, Member States may not.

14. Perhaps the most relevant element of competition law for culture is State Aid, i.e. the intervention of the State to aid a particular sector, including tax reliefs, lottery funding or local authority funding.

15. All State Aid measures by Member States must be approved by the European Commission, which will reassure itself that the aid will not lead to a distortion in the Internal Market. If the Commission does not approve the aid, it is illegal for the Member State to provide it. The UK cannot over-ride these decisions, but they are subject to reviews by the EU courts.

16. There are specific provisions for some State Aid measures in relation to culture. This still requires approval by the Commission, but if a Member State can successfully argue that the aid is necessary to protect cultural diversity then aid is permissible.

17. The UK has introduced tax reliefs for British films, animation and high-end TV, all of which were approved by the Commission on these grounds.