

## British Balance of Competence Reviews, Part III:

### More reform than renegotiation or repatriation

Michael Emerson, Graham Avery, Miroslav Beblavý,  
Arno Behrens, Steven Blockmans, Hugo Brady,  
Alžběta Hájková, Karel Lannoo, Jorge Núñez Ferrer

#### Abstract

This paper is the third in a series for a CEPS project on the 'The British Question'. It is pegged on an ambitious exercise by the British government to review all the competences of the European Union on the basis of evidence submitted by independent stakeholders. A total of 32 sectoral policy reviews are being produced over the period 2013-2014, as input into public information and debate, which Prime Minister Cameron would like to lead into a referendum in 2017 on whether the UK should remain in the EU, or secede. This third set of eleven reviews covers a wide range of EU policies: for the single market for services, financial markets, the free movement of people, cohesion, energy, agriculture, fisheries, competition, social and employment policies, and fundamental rights.

The declared objective of the Prime Minister is to secure a 'new settlement' between the UK and the EU. From political speeches in the UK one can identify three different types of possible demand: *reform* of EU policies, *renegotiation* of the UK's specific terms of membership, and *repatriation* of competences from the EU back to the member states. As most of the reviews are now complete, three points are becoming increasingly clear:

i) The reform agenda – past, present or future - concerns virtually every branch of EU policy, including several cases reviewed here that are central to stated UK economic interests. The argument that the EU is 'unreformable' is shown to be a myth.

ii) The highly sensitive cases of immigration from the EU and social policies may translate into requests for renegotiation of specific conditions for the UK, but further large-scale opt-outs, as in the case of the euro and justice and home affairs, are implausible.

iii) While demands for repatriation of EU competences are voiced in general terms in public debate in the UK, no specific proposals emerge from the evidence as regards competences at the level at which they are identified in the treaties, and there is no chance of achieving consensus for such ideas among member states.

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# Contents

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1. Introduction .....	1
2. Sectoral reviews.....	2
2.1 Free movement of services.....	2
2.2 Free movement of capital and financial services .....	4
2.3 Free movement of people.....	7
2.4 Competition and consumer policies .....	10
2.5 EU Budget.....	12
2.6 Cohesion Policy .....	14
2.7 Social and Employment Policy .....	16
2.8 Agriculture .....	19
2.9 Fisheries .....	21
2.10 Energy .....	23
2.11 Fundamental rights.....	26
3. Conclusions .....	29
Annex A: Balance of Competences Review - Schedule of the UK government's work .....	34

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**Michael Emerson, Graham Avery, Miroslav Beblavý,  
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Alžběta Hájková, Karel Lannoo, Jorge Núñez Ferrer\***

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## 1. Introduction

This is the third in a series of four working papers on the British government's Balance of Competence Review. The government is in the middle of producing the most comprehensive ever review of all domains of EU policy, screening for evidence that the EU's competences might have become unduly large, or otherwise warrant reform. The distinguishing feature of these reviews is that they are based on responses to an open invitation for stakeholders to submit evidence, and the published reports are based on submissions from all quarters – business, academia, civil society, etc. The reports have been drafted by the relevant British government departments, but the civil servants were not mandated to draw conclusions; rather to assemble the evidence submitted in an ordered way. Others are invited to draw their own conclusions, however, which is an invitation that the present authors are happy to take up.

This huge exercise is producing 32 sectoral reviews, of which the first 14 were discussed in our first two working papers in the current series.<sup>1</sup> The third set of 11 reviews was published in July and covers a wide set of EU policies: for the single market for services, financial markets, the free movement of persons, cohesion, energy, agriculture, fisheries, competition, social and employment policies and fundamental rights. The remaining seven reviews are due to be published before the end of 2014.

The declared objective of the British Prime Minister is to secure a “new settlement” between the UK and the EU, but apart from his very recent demands regarding immigration this has not yet been translated into a set of operational demands. However, from political speeches in the UK one can identify three different types of possible demand:

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\* Michael Emerson is Associate Senior Research Fellow at CEPS, Graham Avery is Senior Member of St. Anthony's College, Oxford University, Arno Behrens is Senior Research Fellow at CEPS, Steven Blockmans is Senior Research Fellow at CEPS, Miroslav Beblavý is Senior Research Fellow at CEPS, Alžběta Hájková is Assistant to Miroslav Beblavý, Hugo Brady is visiting Fellow at the LSE, Karel Lannoo is CEO of CEPS, and Jorge Núñez Ferrer is Research Fellow at CEPS.

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<sup>1</sup> Michael Emerson and Steven Blockmans, “British Balance of Competence Reviews, Part I: ‘Competences about right, so far’”, CEPS/EPIN Working Paper No. 35, October 2013 ([www.ceps.eu/book/british-balance-competence-reviews-part-i-%E2%80%98competences-about-right-so-far%E2%80%99](http://www.ceps.eu/book/british-balance-competence-reviews-part-i-%E2%80%98competences-about-right-so-far%E2%80%99));

Michael Emerson, Steven Blockmans, Steve Peers and Michael Wriglesworth, “British Balance of Competence Reviews, Part II: Again, a huge contradiction between the evidence and Eurosceptic populism”, CEPS/EPIN Working Paper No. 40, June 2014 ([www.ceps.eu/book/british-balance-competence-reviews-part-ii-again-huge-contradiction-between-evidence-and-eurosc](http://www.ceps.eu/book/british-balance-competence-reviews-part-ii-again-huge-contradiction-between-evidence-and-eurosc)).

- *Reform* of EU policies. This category of action has potential from consensus across the EU as a whole, but it suffers from vagueness of definition, and loose use in much political discourse. In principle, reform means major or radical measures, but it is often stretched to cover all matters of policy improvement. Cases of repeal of individual items of legislation can be regarded as either repatriation or reform, but for our present purposes we count them in the reform category and leave repatriation to matters of competences, as they are identified and defined in the treaties. This may seem to be a mere semantic question, but the issues of whether or not adjustments of competences would require treaty change or not is of fundamental political importance.
- *Renegotiation* of the UK's specific terms of membership. The UK has already negotiated major opt-outs from the euro and the area of freedom, security and justice (including the Schengen system), and special terms for its budget contributions. The rest of the EU may be willing to discuss further issues such as immigration, but there will be red lines of resistance beyond a certain point.
- *Repatriation* of competences from the EU back to the member states. If competences were to be deleted at the level they are identified in the treaties, there would have to be agreement on the part of all member states and formal treaty changes subject to ratification. These are arduous conditions, to say the least. The repeal of individual legislative acts not requiring treaty amendment may best be regarded as reform measures.

## 2. Sectoral reviews

### 2.1 Free movement of services\*

This is one of the most important chapters of the Balance of Competences Review, for several reasons. Services account for an increasing share of the modern economy and involve a highly complex and differentiated set of sub-sectors, with correspondingly complex regulatory requirements. The British government is at the forefront of those pushing for 'completion' of the internal market for services, which is currently still fragmented by a huge variety of inconsistent national regulations. There are also technological trends in the economy that blur the distinction between goods, where the market is largely completed, versus services where it is less so.

The government report presents in detail the evolution of the EU's competence in this field. The free movement of services and freedom of establishment for individuals and companies was already enshrined in the Treaty of Rome and was carried over in successive treaties up to the current Treaty of Lisbon. Individuals and companies can go to the European Court of Justice to secure enforcement of their rights under the treaties, and as a result a wide body of case law has developed. From the early days this put much emphasis on the prohibition of discrimination on grounds of nationality. However, this approach has been progressively extended to measures that, while not strictly discriminatory, would be liable to impede the supply of services from other member states.

Nonetheless, many remaining restrictions meant that the services sector still lagged some way behind the goods sector in the degree of true openness in the single market, and given the growing importance of services to the economy it was increasingly felt that a more ambitious approach was required. This led to the Services Directive proposal of 2004, which sought to radically apply the 'country of origin' principle, or in other words mutual recognition of the regulatory regimes of each member state. This went beyond what the political market could

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\* By Michael Emerson.

take, however, and political polemics emerged, as famously represented by the ‘Polish plumber’ who would be undercutting the native plumber in France.

As a result a highly complex directive finally emerged in 2006, with many sub-sectors securing protection for a host of specific national provisions. Nonetheless, the directive is recognised as having made a major advance in opening services markets. It applies to a very wide range of services that, in spite of various exclusions, are estimated to account for 46% of the EU’s GDP. The directive is described as being ‘horizontal’ since it sets out general principles that have to be observed for all service sectors that have not been explicitly excluded. The included sectors cover the regulated professions, craftsmen, business-related services, distributive trades, tourism, leisure services, construction services, information services, rental and leasing services, hotels and restaurants, real estate services etc. The excluded services are in several cases regulated separately by the EU under sector-specific legislation (financial services, transport, telecommunications, etc.), and the main real exclusions from EU competences are public health, public education and social services.

The main substance of the directive consists of two lists, first of “prohibitions”, and secondly of “requirements to be evaluated” for the service sectors covered. The prohibitions include discrimination on grounds of nationality and many detailed restrictions on the activities of companies or service providers (e.g. a company cannot be required to make its main place of business in the member state where it supplies a service, or cannot be required to pre-register, or limit its service for a certain length of time). The requirements to be evaluated, to assure that they are not restricting the openness of the single market, cover such cases as where the service provider should have a certain number of employees, or be restricted to one location, or have certain types of shareholders.

Because of the huge complexity of the task of policing what practices might be inconsistent with the directive there is recourse to a ‘mutual evaluation’ process of peer review of each member state’s practice by other member states. Member states are also required to undertake ‘screening’ exercises to test the compliance of their practices with the EU legislation. This has led to the elimination of thousands of illegitimate restrictions and, in the view of a detailed CEPS report, the removal of barriers on a scale “far more extensive and rigorous than could reasonably have been expected”.<sup>2</sup>

For the professions the EU has developed legislation for the Mutual Recognition of Professional Qualifications (MRPQ). This legislation has recently been revised with important new features, notably a transparency process to subject national practices to peer pressure and possible challenge, and the introduction of the European Professional Card, which may be adopted profession-by-profession.

The Digital Single Market receives particular attention in the review, and this is an example of an area where the British government recognises the need for an important application and development of EU competences, and has established a list of six priorities for this sector. All of these rely on regulatory action by the EU covering copyright, data protection, payment services, high-speed broadband, telecoms and E-commerce. The digital economy is the fastest growing sub-sector of manifest importance for the EU’s competitiveness, and for this sector EU regulation is inescapable, as is the need for Europe to take a solid common position in negotiations with the United States in this area.

In the area of public procurement the EU has adopted a package of new rules, which contributors of evidence to the report generally consider to be valuable in improving public procurement in the UK itself as well as in opening other markets. The defence procurement

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<sup>2</sup> Federica Mustilli and Jacques Pelkmans, “Access Barriers to Service Markets – Mapping, tracing, understanding and measuring”, CEPS Special Report No. 77, June 2013.

sector is dealt with separately, however, and is subject to efforts by the Commission to extend its effective EU competence. While the case for rationalisation of European defence industries is widely recognised, various stakeholders treat the prospect of enhanced EU competence cautiously, in view of its implications for national security.

### Assessment

There was general support for the current balance of competence in this broad area, with the advantages of EU action outweighing the disadvantages. There were calls for greater integration of the single market for services, and the completion of the Digital Single Market was cited as an example. It was recognised that even non-exporting businesses have benefited from the liberalisation of domestic service markets, and that any national legislation would not be dissimilar to the current EU regime.

Services are more important to the UK economy than for many other member states, and business associations welcome liberalisation at the EU level for this reason. The British Chambers of Commerce note that “free movement of services is a critical aspect of EU membership as it provides our members with access to a market of 500 million people. The UK is the second largest exporter of services in the world”. The Federation of Small Businesses notes that those of its members that do service business abroad do so overwhelmingly with other European countries.

Incomplete or ineffective implementation of existing services legislation has hindered the development of the free movement of services. There is scope to go further in services liberalisation within the current level of EU competence, extending the ‘country of origin’ principle further within specific sub-sectors.

There has to be consistency in the narrative calling for completion of the internal market for services and a reduction of regulations coming out of Brussels. Popular calls for cutting EU ‘red tape’ are often too general and simplistic, failing to recognise that if the UK’s national interest in the completion of the services market is to be achieved, many inconsistent national regulations will have to be replaced by European legislation.

#### The evidence at a glance – services

- Broad support for EU competence, strong UK economic interests
- The UK is highly active on the reform agenda to complete internal market
- Issue requires EU regulation to replace inconsistent national regulations
- Digital sector urgently needs more developed EU policy
- Telecommunications sector has an important reform agenda

## 2.2 Free movement of capital and financial services\*

This is one of the most detailed and complex case studies in the entire Balance of Competence Review, with a very substantial documentation of evidence. This may not be surprising because, as is well known, financial services are vital for the City and the UK economy in general. The City is the second largest global financial centre, and a leader in many sectors. For a large and diverse financial hub like London, free branching and free provision of services across the whole of the EU are considerable benefits, and any other regime would be a considerable disadvantage for the City. However, the overarching need to find solutions to the financial crisis

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\* By Karel Lannoo.

that began in 2007 brings huge complexities to the interactions between EU financial markets policies and those of the eurozone.

The EU's regulatory regime, as with international rules and standards in the financial markets sector, has been subject to dramatic reform since the onset of the financial crisis in 2007. While the EU's policies before the crisis focused on opening up the EU internal market, since the crisis the emphasis has shifted massively onto the issues of financial stability and the soundness of banks.

Reforms at the EU level were initiated in 2008 with the recommendations of the de Larosière report, which responded to the grave shortcomings of the existing system of fragmented national supervisory authorities. Enhanced EU competence in this field became a strategic imperative for the EU economy as a whole and the UK in particular. The review records how the de Larosière report led eventually to the establishment of a completely new European System of Financial Supervision (ESFS), with several agencies created in 2011, including the European Banking Authority (EBA) located in London, and the European Securities and Markets Authority (ESMA) located in Paris.

The EBA is entrusted with devising the European Single Rulebook, which had been proposed by the UK government in 2009 before its subsequent adoption by the European Council. The Single Rulebook aims to provide a set of harmonised rules that financial institutions throughout the EU must respect. It allows the EU to adopt more directly applicable regulations and implementing rules. The disadvantage of a single rulebook may be a lack of proportionality, which is certainly an issue for less developed financial centres and systems. But it should be noted that the UK was at the forefront of advocating the Single Rulebook in order to protect the integrity of EU wholesale financial markets, which are at the heart of the City's interests.

Going beyond these developments in the EU-wide system, eurozone member states have been driven to take more radical steps to defend their financial system. Under the heading 'Banking Union', these initiatives comprise a Single Supervisory Mechanism (SSM) run by the European Central Bank, and a Single Resolution Mechanism (SRM) to handle emergency cases of failing banks. The UK has negotiated for itself (and any other non-euro member state) provisions for it not to participate in the Banking Union, and at the same time to protect its interests against possible discriminatory measures taken by the eurozone. These protections concern the role of the EBA in relation to the Single Resolution mechanisms, and the EBA's relations with the European Central Bank as bank supervisor. The detail of these provisions is about avoiding discrimination, sticking to common EU competition policy rules and voting practice in the EBA (p.18). Given the volume of interactions between the functioning of EU financial markets and that of the eurozone, the key point to note here for the UK is that with goodwill on both sides it proved possible to successfully negotiate both non-participation in the Banking Union and non-discrimination against the non-participating member states.

The Review still argues that significant reform of the EU's policy-making framework is needed, and that the quality of policy-making is uneven. These criticisms are no different from what is heard in other financial centres or from other players in the EU. It should be recalled that many problems with policy-making originate from the wishes of UK policy-makers, such as the Single Rulebook, or are a reaction to practices in the UK financial market, notably bonuses (on which more below).

Many of the respondents made detailed and targeted criticisms, covering "the quality of the Commission's impact assessments, consultations, and policy-making and policy proposals". However "respondents had few criticisms to make where the Commission had consulted properly or faithfully transposed international standards" (p.86). These reactions can be heard in other countries as well, or in other sectors. It is widely acknowledged re-regulation of the financial sector had to be pushed through at lightning speed after the financial crisis, and was largely agreed at global level, in the context of the London and subsequent G-20 Summits. True,

the EU Commission could have reacted faster, but expertise was probably lacking more within the European Parliament and many member states in the EU Council. The quality of impact assessments can certainly be improved upon, but interest groups often have very biased definitions of impact assessments.

The Review refers extensively to the three cases in which the UK challenged EU law before the European Court of Justice (ECJ). The first concerns the Short Selling Regulation, and the possibility for ESMA to ban short selling in emergency situations, which the UK challenged on the grounds that the powers conferred to ESMA were unlawful. This challenge was dismissed by the Court on all grounds. The ECJ found that in an emergency situation such measures taken by ESMA would be in the interests of guarding financial stability. The review cites the Bar Council's response to the Court judgment, arguing that its reasoning was "very troubling".

The second case challenged, but has not yet settled, concerns about access to euro-denominated financial instruments outside the eurozone, which the UK challenges on single market grounds. The location policy of the ECB specifies that clearing houses that clear euro-denominated financial instruments above a certain threshold must be located in the euro area. However, as this is a monetary policy related rule, it seems unlikely that the EU's challenge will be upheld by the Court.

The third case refers to the 'bonus cap' in Capital Requirements Directive (CRD), which is implementing the Basel III rules in European law. An amendment introduced by the European Parliament in the legislative process caps bonuses to one-times-salary (or two-times with shareholders' approval). The UK challenged this on grounds of the treaty base and procedure. The relevant provisions lack evidence and were not supported by the Commission's impact assessment, it is argued (p.88 of the Review). However, the UK withdrew its challenge in November 2014 after it became apparent that it would not succeed in the European Court.

*Post-script.* Since publication of the review a new development is the Capital Markets Union – an idea floated by the incoming President of the Commission, Jean-Claude Juncker. The possible content of this initiative will be of keen interest to the UK, and the incoming British Commissioner, Jonathan Hill, will be responsible for fleshing it out.

## Assessment

The division of competences between the EU and the UK in financial services is considered in the Review to be "broadly appropriate" (p.5). But in deepening this assessment it is necessary to distinguish between matters of strategic reform and system development, versus matters of policy improvement.

At the strategic level, first of all, there is consensus on the need for the EU competence to ensure freedom of movement of payments and capital.

Secondly, as regards financial stability consensus also emerged that the pre-crisis system of fragmented national supervisory authorities was defective and had to be corrected with a new European System of Financial Supervision with several new EU agencies. It was also agreed, with strong UK backing, that there should be a single rulebook for regulatory standards. These reforms were rushed through in response to the emergency.

Thirdly it became apparent that supervisory system of the eurozone system itself needed further reinforcement, which has led to the Banking Union, in which the UK does not participate, but UK respondents to the Review show support for the eurozone itself.

Fourthly, complex issues regarding the inter-relations between the EU financial market system and the Banking Union have emerged. Here, the UK has effectively negotiated a sophisticated system to control for non-discrimination in eurozone measures towards non-eurozone member states.



With respect to the details of EU financial sector regulation, respondents raise various criticisms about poor policy-making and inadequate impact assessments and consultations, which are concerns largely shared in other EU member states. The UK government has gone further in challenging the EU over three cases before the ECJ, but which most observers would not give (or have given) a good chance of success. The review concludes that the UK should engage earlier and more effectively with the EU institutions, as well as with other member states.

The UK government itself still struggles to find a balanced approach to financial sector regulation, seven years after the start of the financial crisis. The UK's financial markets have continued to suffer from its light regulation approach, as illustrated recently (in November 2014, subsequent to publication of the Review) in the fines that had to be levied as a result of the huge foreign exchange rate-rigging practices.

#### **The evidence at a glance – financial services**

- The single market for financial services is strategic for the City and UK economy
- EU regulatory approach radically reformed since 2008 financial crisis
- From old market-opening policies, on to new financial stability mechanisms
- Complex challenge of reconciling single market with eurozone needs
- UK secured both non-participation in Banking Union and non-discrimination
- Continuing debate and criticisms over policy details and Court cases
- New Capital Market Union idea

### **2.3 Free movement of people \***

Britain's debate over the free movement of people within the EU has generated more heat than light. Nonetheless, it remains at the heart of why UK attitudes toward European integration have shifted from one of sceptical, but relatively benign neglect, to one of officially defensive hostility.<sup>3</sup> EU-watchers therefore eagerly awaited the government's balance of competences review to set out officially how free movement impacts Britain's national interests.<sup>4</sup>

A key reason why the free movement of people has become such a hot political issue for Britain is traced to its decision not to restrict access to its labour market in 2004, on the eve of the accession of the so-called EU8 countries. This meant that the spike in arrivals of nationals from these countries to the UK was much sharper than for many other member states that retained transitional restrictions. Between 2004 and 2012 the number of EU citizens resident in Britain more than doubled from 1.1 million to 2.3 million. Flows were significantly lower from Bulgaria and Romania, which received only staggered access to the UK labour market until January 2014. The more recent accession of Croatia has had no perceptible impact on immigration to the UK.

The report discusses the impact of free movement on Britain in terms of actual numbers, the impact on the welfare state, public order and the economy (broken down by sector such as medicine, engineering and architecture). Helpfully, it includes a section on how some 1.4-2.2 million Britons abroad benefit from, and make use of, free movement rights such as British

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\* By Hugo Brady.

<sup>3</sup> See, for example, David Cameron's intervention: "Free movement needs to be less free", *Financial Times*, 26 November 2013.

<sup>4</sup> The relevant EU legislation under review is the free movement Directive (2004); the Council Regulation on the free movement of workers (2011); a Directive on the enforcement of the free movement rights (adopted 2014); the EU's social security Regulation (2004) and the Directive on the mutual recognition of professional qualifications (latest amendments adopted in 2013).

retirees in Spain and France, and how the EU's social security arrangements operate in this respect.<sup>5</sup> The analysis here focuses on the need for an even application of free movement related legislated across all member states. For example, the decades-long discrimination faced by non-native EU lecturers in Italy is highlighted.

Broadly, the text supports the view that intra-EU migration is positive for the UK economy noting that, according to the UK's Office for National Statistics, some 60% of EU migrants coming to Britain to work already have job offers on arrival. The Russell Group – a UK research consortium that includes Britain's highest ranked universities – points out that non-UK EU nationals make up some 13.4% of researchers across its members (including Oxford, Cambridge, the LSE and Kings College London).

The City of London mounted a robust defence of intra-EU migration, noting that the average EU migrant pays around £23,000 per year in taxes while spending significantly on UK goods and services to the benefit of the wider economy, while being less likely to draw on public services such as the National Health Service. This fact is becoming more widely acknowledged in the UK with the result that the debate has moved on to focus more on the exportability of benefits, housing and school places. According to a study cited in the Review, some two-thirds of local councils in England expected to experience a shortage of school places by September 2016.

Public opinion in the UK has swung definitively against the free movement of people over the last decade, with a *YouGov* poll recording that nearly half the population was against the principle in 2013 from a position of two-thirds in favour in 2005. (UK unemployment remained low by historical standards, even during the 2008-2010 period of economic crisis but more natives than migrants lost their jobs.) Many Britons feel that free movement is no longer fair; that it has become massively one-sided in terms of flows. EU/EEA immigration rose from 10% of UK net migration in the 1970s to almost 40% by 2007. The exportability of UK benefits abroad – be it by British citizens or EU/EEA residents who have worked in Britain – remains a totemic issue in the 'fairness' debate since European migrants have the right to draw down universal benefits such as disability or children's allowance, if the children are not resident in the UK (but see the postscript below).

The Review never misses a chance to stress the measures that the Cameron government has taken to restrict abuse of free movement within the bounds of the current legislation, including the fact that other EU governments such as Germany have also taken action to combat 'poverty immigration' from elsewhere in the Union. The coalition has tightened up the immigration regulations that give effect to EU free movement rules in Britain. For example, since 1<sup>st</sup> April 2014, newly arrived EU migrants are no longer eligible for housing benefit in the UK. The UK has also made it harder for migrants who lose their 'right to reside' in Britain through long periods of economic inactivity to re-enter the country after a short interregnum. The 'right to reside' requirement was introduced to Britain's 'Habitual Residency Test' in 2004 as a means of managing an expected increase in EU migration. The criteria to qualify for the 'right to reside' are designed to ensure that only those migrants whose "centre of interest" is the UK and who have some prospect of employment remain eligible for benefits.

The residence test is currently the subject of an infraction proceeding against the UK taken by the Commission to the European Court of Justice. The report notes hopefully that recent ECJ case law seems to support the arguments of Britain's lawyers that member states have the right to make access to benefits by EU nationals who are not economically active conditional upon them meeting the necessary requirements for obtaining a legal right of residence in the host member state.

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<sup>5</sup> The discrepancy between the estimated figures is probably because a significant number of Britons spend part of their year abroad and part at home.

*Postscript.* Subsequent to the publication of the Review there have been two significant developments. First, the ECJ made a ruling in the Dano case (C-333/13) in November 2014 that supported national competences in deciding upon residence requirements and their significance in determining eligibility for certain social benefits. While the case in point was in Germany, the ruling is supporting rather than undermining national competences in this field, and the British Prime Minister commented on it as “simple common sense”.

Second, on 28<sup>th</sup> November the Prime Minister set out in detail what he hopes to negotiate with the EU in order to control immigration from the EU more strictly, without breaking the principle of free movement of persons. These proposals include:

- Denial of tax credits, and housing benefits for EU citizens before four years of residence
- Removal of job seekers if they do not find a job within six months
- Stronger measures to deport criminals
- No payment of child benefits for children resident abroad
- Longer waiting period for free movement for citizens of future acceding states

The detailed legal analysis shows a mixed bag: of measures that the UK is entitled to take freely as a matter of national competence, of others that would be more difficult in that they require legislation by the EU decided by qualified majority, and some that would seem to be virtually impossible in requiring treaty change decided unanimously by all member states and ratified by all national parliaments<sup>6</sup>.

This is the only instance so far where the Prime Minister has set out an operational agenda for negotiation or re-negotiation with the EU, hinting that some solutions might be either through EU-wide legislation, or new special provisions for the UK. It is significant that these are proposals of the Prime Minister, not of the coalition government with the Liberal Democrats, signalling only partial support from them. As a consequence, the proposals would only be formally addressed to the EU after the 2015 general election, and only then if there were an outright Conservative Party government. Reactions from Brussels have signalled a willingness to examine these requests, but it would seem that negotiations can await the next British government.

### **Assessment**

The report on free movement presents a far broader range of facts and analysis relevant to this sensitive topic than is usually in evidence in Britain’s debate on Europe. For the first time, for example, we read evidence from Britons exercising free movement rights abroad (there are ‘expat’ pensioners’ associations with chapters in France and Spain). Moreover, various professional representative associations (such as the Architects Registration Board), regional governments and large firms are supporting the case for free movement.

On balance, it does not seem unreasonable to recommend some changes to a free movement regime originally designed to operate between six broadly similar countries to better reflect a Union far more diverse in incomes, social security arrangements, work expectations and migratory patterns. The proposals of the Prime Minister can be examined in this spirit, and notably so because he has explicitly taken care not to challenge the basic free movement principle, which is a clear ‘red line’ for the EU as a whole.

But the report’s concluding passages lend conspicuous weight to the views of a single expert, who considers the UK’s opening to Central and Eastern Europe in 2004 an historical error, arguing that free movement has dangerously unbalanced Britain’s social contract. He argues that EU rules need to be re-cast to allow preference to be given to native workers in certain

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<sup>6</sup> Steve Peers, EU Law Analysis (<http://eulawanalysis.blogspot.co.uk/2014/11/the-nine-labours-of-cameron-analysis-of.html>), 28 November 2014.

instances; that transitional arrangements for allowing new EU members access to Britain’s labour market need to be based on more flexible criteria such as income disparity and economic convergence; and that governments should be free to impose caps on inward EU migration. This last ‘cap’ idea would clearly be unacceptable to the EU as a whole, and its retention in the conclusions of the report is a reminder of the highly politicised context that surrounded the finalisation, and delayed publication, of this text.

#### **The evidence at a glance – free movement of people**

- Competence for free movement considered fundamental in EU as a whole
- Sharply contested within UK; divergences between interest groups and political parties
- 2008 enlargement caused immigration spike in UK, heavily impacted public opinion
- UK residents in other EU countries the same in number as other EU residents in UK
- ECJ case helpful in clarifying national competences for residence and thence access to certain social benefits
- Prime Minister announces operational reform or re-negotiation proposals, some within existing national competences, others requiring EU agreement of varying difficulty

## **2.4 Competition and consumer policies\***

This review covers both competition policy for which the Treaty provides the EU with “exclusive competence” for “establishing the competition rules necessary for the functioning of the internal market” (Article 3, TFEU), and consumer policy for which the Treaty provides for “shared competence” (Article 4, TFEU).

The competition policy divides between “anti-trust” provisions (Articles 101-106, TFEU) and “state aid” rules (Articles 107-109, TFEU). The competition rules prohibit anti-competitive agreements between undertakings and the abusive conduct of dominant undertakings.

The state aid rules prohibit such aids in general, but with exemptions allowed for several categories of case: aid to small and medium-sized enterprises (SMEs); social aids to disabled people; regional aid; environmental aid; and research and innovation spending. These provisions originated in the Treaty of Rome and have not been materially changed since then. However, they have been further elaborated through numerous case decisions by the ECJ, and a merger control competence was introduced in 1989.

For competition policy the Review explains the relationship between the EU’s competences and national competition policies, and the UK’s Competition Act of 2008 is a case in point. Member states retain considerable autonomy in their own enforcement of competition rules, and notably over cases that have no impact on inter-state trade, for which the EU has no competence. However, the UK’s Competition Act was deliberately modelled on EU law in order to ease the burden for business so that they would not have to respect two different regimes. Investigative and sanction powers of the UK authorities are similar to those of the Commission.

Since 2004 the enforcement of EU anti-trust provisions has been reformed to permit a greater extent of decentralisation of enforcement to national competition authorities. There is considerable flexibility in the extent to which individual member states may take up these possibilities, reflecting the varying strengths of national administrations. Stakeholders and respondents were clearly supporting the EU’s competence in this area as corresponding to the national interest, in making markets more effective and dynamic and ensuring a level playing

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\* By Michael Emerson.

field. The de-centralisation of enforcement was seen to be “an exemplar of subsidiarity working well in practice” (p. 39).

The level of fines on companies infringing competition rules can be very high; up to 10% of worldwide turnover, with both *Intel* and *Microsoft* having been fined over €1 billion for abuse of dominance.

The competence for merger control is shared clearly between the EU and member states, with the EU only to act where the mergers have an ‘EU dimension’.

For state aid, respondents gave evidence that there was broad agreement in principle on the current balance of competence (p.42). The Commission proposed a “reform package” in 2012, which resulted in Council regulations in 2013 that enlarged the exemptions categories and adopted procedures to handle complaints faster and more predictably. The Commission has also revised its ‘Guidelines’ to enable it to concentrate on cases that have the biggest impact of the internal market. There has been debate whether the minimum size (actually €200,000) of aid before EU controls should be raised. The UK coalition government and the Commission have agreed that this would not be really helpful, however; extending exemptions might be a better approach.

Competition policy has an important international perspective, with the EU model having proved a significant factor in the expansion to 128 countries of competition policy regimes. In this regard the Review notes that “the EU system has proved to be a more popular transplant than the US one, the only feasible alternative, and many overseas competition regimes are modelled on EU provisions” (p.64).

For consumer policy its legal foundations came much later with the Single European Act in 1987 and the Maastricht Treaty in 1993. In this case of ‘shared competence’ between the EU and member states there is much scope for debate about how the principles of subsidiarity and proportionality should be applied. There has been a lively debate about whether EU consumer rules should specify minimum or maximum standards. Minimum standards allow for more flexibility in setting higher national standards where desired, and many UK stakeholders supported this view. The case for maximum standards is based on the need to avoid fragmenting the internal market. As a result of negotiations on this issue in response to the Commission Green Paper of 2007, the outcome was that most provisions should be harmonised at the maximum level, but with important exemptions to be allowed for certain categories of goods and services.

A case in 2013 in which the Commission proposed to regulate the packaging of olive oil on the tables of restaurants illustrates the state of the debate over subsidiarity in the consumer policy domain. The Commission had been lobbied by producers into proposing that olive oil had to be displayed in the original producer’s packaging to prevent consumers being afflicted by sub-standard olive oil. There was instant public outcry that this regulation was not really needed, and the proposal was rapidly withdrawn. This conforms to the doctrine advanced by the Commission nowadays that the EU should do fewer small things, and concentrate on big issues.

### **Assessment**

The Review reports strong consensus on the need for centralised competences at the EU level for both anti-trust polices and the control of state aid. In the case of the UK there is good coherence between its national policies and those of the EU, with UK policies being modelled on those of the EU.

Consumer policy is also an essential feature of an effective single market, and in ensuring that it works well for consumers and society as a whole.

In all three cases – anti-trust, state aids and consumer policies – there has been lively debate about how to optimise the subsidiarity principle. In each case there is evidence of policy refinement or reform that includes elements of enhanced decentralisation, while in all cases there is a reasoned limitation to how far this should go.

An interesting international aspect is that the EU model of competition policy is the one most emulated by other countries developing their own policies.

#### **The evidence at a glance – competition and consumer policies**

- Overwhelmingly stakeholders support EU competition policy competence
- But no competence over cases not affecting inter-state trade
- 2004 reforms provide for greater decentralisation of enforcement
- ‘Exemplar’ of subsidiarity working well in practice
- 2013 reforms of ‘Guidelines’ on state aid to focus on big cases and get faster procedures
- For consumer policy balance of opinion favourable, but with nuances
- Much copying internationally of the EU model as ‘best practice’

## **2.5 EU Budget\***

The EU budget serves principally to support several specific policies – including agriculture, the structural funds, research and external relations – and these are reviewed in their respective sector reports, without being duplicated here. The present report is therefore confined to cross-cutting issues raised by the budget.

Among the issues considered by the British government to be of the highest priority concern is the aggregate evolution of the budget, which currently amounts to €142 billion per year. The British government has worked hard this past year to restrain the growth of the budget, and claimed a major reform in securing the first ever reduction in real terms in the new Multiannual Financial Framework (MFF) for 2014-2020. The report notes the agreed real cut of 3.4% as an example of how the UK can work for reform of the EU through regular procedures, even qualifying this somewhat euphorically as an ‘historic’ achievement. Alongside important cuts being made in national budgets, the MFF saw the EU make commitments to reducing staff numbers in the institutions by 5%, and to increase the retirement age for EU civil servants from 65 to 66 years.

The report recognises that the budget is of a very modest size compared to that found in federal economic and monetary unions. There is debate about whether the eurozone should have its own budget of significant macroeconomic size, and if so whether this should become part of the EU budget. The UK Treasury has, from outside the eurozone, argued that this should be the case. While there is little political momentum in favour of such a development, it would in any case be irrelevant for the UK as it remains outside the eurozone.

The second issue highlighted is the distinction between what the report calls “high EU-value added” expenditure versus low value added categories. Research and innovation, and expenditure under the heading “connecting Europe” (transport infrastructures, energy networks) are placed in the high category, with agriculture in the low category, and the cohesion policy of the Structural Funds somewhere in between (see below, section 2.6). In fact, the proportions between the major blocks of spending have been very slowly undergoing significant change over the years in the direction of high value added policies. For example, in 1984 agriculture accounted for 66% of the budget. By 2014 it had declined to 40% and by 2020 it is expected to

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\* By Michael Emerson.

fall further to 34%. Alongside this there has been the build-up of the Structural Funds, which started with the creation of the Regional Fund in the late 1970s as an initiative promoted notably by the UK and Italy.

These changing expenditure structures are key to the debate around a third major issue, namely the British rebate, or ‘abatement’ in EU jargon, which returns to the UK a significant amount of its net contribution to the budget. The origin of the abatement goes back to the first British renegotiation of 1973-74, when the predominance of agricultural spending in the budget, and the relatively small size of the British farming sector, resulted in the UK paying the highest amount of net contributions per capita. This abatement (or ‘corrective mechanism’) has been enhanced and revised over time, while becoming more complicated as other big net payers also sought a degree of compensation. The Review shows that in 2012 the UK received the lowest amount of EU expenditure per capita of all member states, and that its net contribution to the budget before the abatement was correspondingly the highest; but after the abatement the UK’s net contribution was the fifth largest and the middle of a core group of ‘old’ member states including Germany, France, Italy, Sweden, Finland and the Netherlands.

The report sets out the debate around whether the abatement is a good idea or not. Academics criticise it for distorting incentives between member states in their negotiations over policy-making, while recognising that it is a political response to an unbalanced expenditure structure. If this were corrected, then the abatement could be scrapped. The British government’s view is that as long as the expenditure imbalances persist, the abatement is justified. The EU has accepted successive revisions of the UK net contribution, and secured the abatement mechanism with treaty status (i.e. these provisions cannot be cancelled or changed without unanimous agreement, thus including that of the UK).

The fourth issue concerns the funding of the budget, known as its ‘own resources’. Over time the structure of funding has changed, with an increasing dependence of contributions on a gross national income. There is a longstanding debate about endowing the EU budget with truly ‘own’ fiscal resources, beyond the present modest contribution of pooled customs revenues. In this regard the UK government is content with the present balance of competences, in which the idea of granting the EU new taxing powers has little political traction. The most recent attempt to create a new EU tax has been the proposed Financial Transaction (‘Tobin’) Tax, which the Commission proposed in 2011, but was opposed, notably by the UK and Sweden. As a result 11 member states that supported the proposal decided to proceed with an action under the ‘enhanced cooperation’ procedure, but this has yet to be definitively agreed.

The fifth issue that receives considerable attention in the report is that of financial management. The British government is concerned that the European Court of Auditors has for many years been refusing to grant complete ‘discharge’ for the budget, on the grounds that the incidence of ‘errors’ has been too high. The report notes that the Court of Auditors estimates that there is a 4.8% error rate, which is comparable to the 4.4% error rate found in the US federal budget. The report notes that ‘error’ and ‘fraud’ are two different things, and the fraud rate is estimated at a low 0.2% rate. ‘Error’ is where there has been a degree of non-compliance with EU rules such as for public procurement, or through the incorrect calculation of costs eligible for funding, and such cases are not necessarily fraudulent. The errors are largely committed by the administrations of member states in their execution of about 80% of all EU spending instruments. Yet there remains a problem of public perception, since the Eurobarometer poll shows that three-quarters of EU citizens consider there to be corruption in the EU institutions themselves, for which there is zero evidence.<sup>7</sup>

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<sup>7</sup> The Santer Commission was famously forced to resign by the European Parliament in 1999 for alleged financial mismanagement, but the nearest thing to corruption found was the case of Commissioner Edith Cresson, who hired her dentist as a scientific adviser without following official procedures properly.

## Assessment

The report notes that stakeholders on the whole considered that

“while the balance of competences in the budget was broadly appropriate, the application of these competences could be improved by reform of budget structures, though improving financial management of the EU budget in member states and EU institutions alike and particularly through reform of budget expenditure, focussing on areas of genuine added value” (p. 5).

British interests have been strongly represented in the evolution of the EU budget, starting, however, from a very disadvantageous initial position upon accession in 1973 when the budget structure adopted before UK accession saw a huge predominance of agricultural spending. This initial disadvantage was largely compensated by the abatement mechanism, while the build-up of the Structural Funds originated in the regional fund that was strongly advocated by the UK. In recent negotiations the UK has been effective in leading pressure to restrain the growth of the budget for the years ahead until 2020. There have been no new tax competences that the UK would have been doctrinally opposed to, while other ideas such as the Financial Transaction Tax or, more remotely, a specific eurozone budget, would not apply to the UK.

### The evidence at a glance – EU budget

- EU competence considered broadly appropriate
- Major UK complaint over disproportionate net contribution met by permanent rebate
- Long-term structural reform agenda to switch from low to high value added activities (e.g. less agriculture and more research and innovation)
- UK achieves reform objectives to curb & reverse growth of real expenditure volume

## 2.6 Cohesion Policy\*

This report examines the objectives of the EU’s cohesion policy, its performance, the impacts within the EU, and the potential costs and benefits for the UK in the development of regions. Given the large number of objectives and measures covered by the policy policies, its evaluation is complex. The policy is composed of a number of instruments with different territorial dimensions and objectives, namely the Structural Funds, composed of the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund, the Connecting Europe Facility (formerly the Trans-European networks), the European Solidarity Fund and the European Aid to the Most Deprived Persons.

The main objective has always been balanced territorial development across the EU, but over the years it has become something of a tool to achieve a multiplicity of other EU objectives, such as those for sustainable growth, energy and climate change, with contributions to industrial policy and the completion of the single market. As a result, all regions in the EU are now eligible for funding from cohesion policy, albeit with different intensities.

The report starts with an historical review of the development of the policy and the latest reforms undertaken for the Multiannual Financial Framework 2014-2020 and follows with a review of evidence on its rationale and performance.

The report has to contend with the lack of clear evidence in favour or against the cohesion policy. There a large number of position papers either defending or condemning the policy, but studies with solid results on the impact of the policy are inconclusive, principally because the

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\* By Jorge Núñez Ferrer.



financial size of the cohesion policy is small compared to the EU GDP and that of most member states. There is, however, evidence that in some areas the policy is important for recipient regions. However, this does not solve the problem of the right distribution of competences and it is left to the reader to reach a conclusion.

For the Review the following questions were at the core of the analysis:

- Should the EU have a cohesion policy, in particular with regional redistributive aspects, or should redistribution be entirely a national competence?
- Should the EU be financing programmes in rich member states, in particular those that are not for cross-border objectives?
- Are the programmes financed yielding value for money?
- Are the management of funds and administrative requirements reasonable and proportional to the level of EU support?

For poorer member states there seems to be a general consensus that the cohesion policy is a good thing. Only a minority of the views submitted defends the thesis that the policy should be focusing more strictly on promoting economic growth, given that the returns to investment tend to be higher in the most developed regions. The policy should thus be reformed to focus on growth poles. The prevailing view was that the solidarity principle at EU level should be supported. However, solidly researched counterfactual analysis comparing the situation to one without the support has not proved feasible.

The second question is the core issue in the report, with a considerable number of experts giving evidence favouring the elimination of support to richer countries, even if most support the distributive role for the poorest member states. The central argument presented is simply the circular nature of the financial flows. The money spent in the UK seems to correspond to the contribution of the beneficiary regions to the EU budget in this policy area. The argument goes that the money could have been spent directly in the regions without the costs and burden of sending it through Brussels. Estimates show that the average contribution of the beneficiary regions to the cohesion policy through the UK budget contribution is nearly identical to the amount they receive in return.

In the negotiations the British government used this argument in negotiations over the Multiannual Financial Framework for 2014-2020, namely the challenge to the notion that cohesion policy should also be spent in richer member states. Should the EU have a redistributive role from richer to poorer regions within richer countries? This depends on the interpretation of the main objectives of the policy. According to the Commission the EU budget also has an important allocative role, not only a redistributive one. It is designed to promote EU priorities that would not be pursued separately by member states, or would be less efficient. National programmes would not replace EU ones, but would pursue objectives influenced by potentially narrower local priorities that risk being less valuable in the longer term and lead to lower growth in the EU as a whole. It also severs the cohesion policy's links with the EU's industrial policy.

The report finds little evidence of the superiority of a policy administered through Brussels from one run domestically. However, the local government authorities of the UK are strong defenders of the cohesion policy programmes. The Welsh government argued that the strong redistributive nature of EU regional policy was necessary, given the absence of a robust national regional policy. There is a reasonable doubt expressed by local authorities whether, if the cohesion policy ended, London would spend the money saved to support the lagging regions to the same extent. Another argument favouring EU operations in the regions is the multiannual structure of the policy, allowing programmes to be protected from national annual budgetary cycles and thus offering stability. Some experts point to benefits of having a coordinated policy approach across the EU through the benefits of best-practice exchange.

Regarding value for money, the report considers that the evidence is inconclusive for the policy as a whole, but there is some evidence that the UK benefits from EU policies targeting the development of the single market, in particular for cross-border networks and from economic improvements in poorer member states. For other investments the report sees little benefit. It also asks whether some measures of the policy, particularly distributive policies of the European Social Fund, should be exclusively for national bodies. Some social policies have been introduced that the UK government considers to be beyond the remit of the cohesion policy.

Finally, there is a concern over the administrative burden of EU funding. The UK agrees that EU funding needs solid controls, but does question some of the measures in place. A particular mention has been placed for cumbersome auditing requirements in member states that have already well-established and functioning auditing structures.

### Assessment

The report, as in other reviews, does not present an explicit government position on the right balance of competences, and principally presents the evidence submitted by experts, regional authorities, administrators of the policy, parliamentarians and other interested parties. However, the concluding chapter on the way forward draws some careful final recommendations, which are very similar to existing positions of the UK government.

The main argument of the report from a balance of competences point of view is the lack of rationale for the EU to spend cohesion policy resources in richer member states. It tends to support, in line with the existing position of the government, the ending of support to richer member states, with the exception of trans-European network projects and some limited specific programmes in favour of promoting competitiveness at EU level. The report does acknowledge that ending the funding to richer member states would require the agreement of all member states, and that this is unlikely. The report also indicates that the cohesion funds are strongly supported in Scotland, Wales and Northern Ireland. In the highly charged political climate surrounding and following the September 2014 referendum in Scotland, the evident sensitivity of proposals to scrap the cohesion funds in richer states deserves due understanding in London.

More plausibly, the UK could push for reform in the sense of procedural simplification. Some of the administrative requirements of the policy are excessive where member states have solid domestic institutions and control systems. It is possible that agreements could be reached on the accreditation of national auditing authorities and practices for such those countries. It may also manage to convince the EU to allow for less bureaucratic but more results-oriented risk-based approaches to auditing. On this the UK may be able to win the support of other member states.

#### The evidence at a glance – cohesion policy

- Competence for a regional solidarity policy generally supported
- UK advocates for this to be restricted to less rich member states, not accepted by all
- Multiplicity of objectives (regional, energy, climate, industrial policy) makes evaluation difficult
- Lack of clear evidence on impact on regional disparities

## 2.7 Social and Employment Policy\*

This review of a notoriously controversial field of EU competence – social and employment policy – starts with a chronological map of its development. In the beginning, social and

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\* By Miroslav Beblavý and Alžbeta Hájková.

employment policy did not have its own legal base. When social objectives were pursued, it was always with reference to the economic union, i.e. they were issues that were covered to the extent that they related to the primary goal of the union, which was the sound functioning common market. The 1992 Maastricht Treaty was the first to recognise social and employment policy as an objective worthy of pursuit not merely with regard to its relation to the common market, but as a goal in itself. The Social Chapter of the Maastricht Treaty, which broadened the EU competence in the field of social policy legislation, met with strong opposition from the UK Conservative government, which secured an opt-out provision for itself. The UK came to be bound by the Social Chapter only in 1997, as a result of its Labour government's agreement to accede to it as part of the Treaty of Amsterdam.

Discussion of the development of the EU competence within the social and employment policy ends with the conclusion that the 2009 Lisbon Treaty ultimately broadened the scope of EU competences by adding the "well being of its people" to the objectives of the Union, and fully acknowledging the importance of the pursuit of social justice and social progress. Furthermore, it stresses the combat against social discrimination and inequalities.

Before the Review moves to the views of the respondents, it introduces the main articles in the EU treaties that serve as a basis for the directives and regulations in social and employment policy. It frames the competence the EU has within those fields as the "competence to adopt measures in health and safety at work, conditions of work and social security, and competence to ensure cooperation between Member States." With regard to this range of competences, it is interesting to note that while the UK frequently resisted adoption of the pertinent EU legislation, in many cases the UK's own pre-existing legislation was already adhering to these principles. The illustration of such a case used by the Review is a Health and Safety at Work Act (1974), which in fact inspired the European Directive on "the measures to encourage improvements in the safety and health of workers," although the directive was more prescriptive in its nature than the original act.

The next part of the review, dealing with results of the public consultation, confirms that this area of EU policy is highly controversial, and respondents' views range from the uncompromisingly negative to the resoundingly positive and offer no clear median. Interestingly, the previously discussed link between the EU as a primarily economic union and the EU as a community that ought to promote social progress was also explored by the respondents. Many argue that setting minimum requirements in the social policy area guarantees that businesses and workers within the single market have the same basic level of protection. On the other hand, various business respondents considered the EU-level social and employment policy to be a burden, and were convinced that their business would benefit if EU regulations were lifted.

Upon being called to assess the role of social partners, respondents were not negative in principle about their role in the defining of market rules as such. Rather, they expressed worries that certain types of business and workers (e.g. small or micro businesses, and part-time workers) are often disenfranchised, which decreases the overall representativeness of the negotiations.

The Review makes it clear that the feedback from the respondents was quite negative when it came to adoption of minimum requirements. The general view is that the EU often goes beyond what would be a proper EU-wide minimum in the realm of health and safety at work issues, and imposes higher standards than are necessary. These standards are, in the opinion of many respondents, excessively prescriptive, opaque, and disproportionate with regard to the different economies of individual member states. In addition, they often represent additional costs for businesses. The Working Time and Temporary Agency Workers Directives are the ones that were marked as the costliest, with a negative impact on business.

Respondents also felt that when it comes to implementation of the EU directives, the UK is particularly careful about applying the legislation ‘to the letter’. The Review claims that there is a commonly held belief that the UK is more thorough in enforcing the EU legislation than other member states, which supposedly puts it at a disadvantage, precisely because EU legislation is perceived as something burdensome. The Review also notes that this sentiment is generally not supported by evidence.

The European Court of Justice is also seen as an element that is harmful to national interests in its interpretation of the EU laws in the fields of employment and discrimination. On the other hand, the Review makes an important observation that the Court tends to side with individuals, hence giving them a chance to have a full reliance on and take advantage of the rights guaranteed by the EU law. It is precisely individuals that, according to the Review, profit the most from EU social and employment rules. While businesses might perceive many aspects of EU policy as burdensome, a number of respondents indicated that the same policy contributed to creating a better work environment in terms of equal pay, anti-discrimination, the status of part-time workers, worker protection and health and safety at work. Another notable positive point made is that as a whole, EU law is more stable than national law and hence provides a solid basis for a business to plan its future.

### Assessment

Three major conclusions emerge from the Review.

First, while there are many anecdotes and case studies available, claims about either the positive or negative effects of EU competences in social and employment policy on the British economy or its workers are hardly ever supported by quantitative evidence. This often means that partisans resort to arguments based on ‘first principles’. The Review was not intended to – and it could not – produce original datasets or evidence to remedy this.

Secondly, a small number of regulations appear to account for much of the controversy. It is obvious from the text that the Directives on working time and agency workers are where EU legislation causes many stakeholders discomfort, or, at the very least, much irritation. Any renegotiation of the UK’s relationship with the EU in social and employment policy would likely focus on this area.

Thirdly, the British self-image of exceptionalism both does and does not match reality. The Review demonstrated two types of British exceptionalism – one real and one probably fictional. The first is in how employment is organised in the UK compared to most continental countries – being less focused as it is on full-time work and the traditional employer-employee relationship. The second is the perception, which can probably also be found in a number of member states, that “others do much less implementation and enforcement than ‘we’ do”.

#### **The evidence at a glance – social and employment policies**

- Strong support for ‘social Europe’ competence in much of EU to complement single market
- Contested in the UK, but with divergences among political parties and interest groups
- History of UK policy zig-zags, with opt-out of Social Chapter in 1992, opt-back-in in 1997, and current pressures for selective opt-outs
- Loudest UK complaints over small number of regulations (working time and agency workers)

## 2.8 Agriculture\*

Agriculture is a field in which the EU has extensive competences. The Common Agricultural Policy (CAP) combines a greater degree of regulatory harmonisation, common financing and economic integration than any other area of EU activity. Moreover, it is a policy that British governments have always considered to be disadvantageous to UK interests. Since agriculture is less important to the British economy than in other member states, and British farms are generally larger in size, the UK receives relatively little benefit from CAP rules designed to support market prices and farmers' incomes. For British commentators agricultural policy is often perceived as the most negative aspect of EU membership, both from a general economic point of view (transfer of resources to inefficient producers) and financially (for many years agriculture took the largest share of the EU budget, and for the period 2014-2020 it still takes 36%). In fact, the high level of EU expenditure on agriculture, combined with Britain's limited receipts, was and continues to be the main justification for the UK's demand for a budgetary 'rebate'.

Against this background, it is not surprising that the British government's Balance of Competences Review contains strong criticism of the EU's agricultural policy. The majority of respondents argued that "the CAP remains misdirected, cumbersome, costly and bureaucratic", or that "the CAP's objectives remain unclear and the criteria for allocation of funding are irrational and disconnected from what the policy should be aiming to achieve".

Nevertheless, there is "a recognition that the CAP has changed significantly, particularly over the past 30 years. The most damaging and trade-distorting elements have been removed and the UK has played a significant role in driving reform" (p.5). The focus of the CAP has switched decisively from indiscriminate support of market prices to direct support of farm incomes and enhancement of the environment: Europe's butter mountains and wine lakes have long since disappeared. The practice of dumping agricultural products on world markets ended with the progressive reduction of export refunds from 1993 to practically zero by 2010. The reform process has had several major episodes, starting with the MacSharry reforms from 1992, which cut back on market support measures in exchange for income support. In 1999 market intervention prices were reduced and brought closer to world market prices, and from 2006 income support was decoupled from production levels.

The report on agriculture, like other reports, includes no explicit conclusions and makes no proposals. It explains scrupulously that it does not predetermine or prejudge proposals in the future for changes to the EU or about the appropriate balance of competences.

The first question addressed is "Should decisions on agricultural policy be made at the European, national, or other levels?" On this, the conclusions to be drawn from the report are rather clear. In view of the single market for agricultural goods, and the EU's role in international negotiations on agricultural trade, the EU's competence in agricultural policy is justified. On the question of external competence, the evidence of the Scotch Whisky Association is particularly robust: it has

"identified over 450 tariff and non-tariff barriers affecting Scotch in more than 150 of its export markets outside the EU. Future export growth for Scotch Whisky is therefore heavily dependent on the removal of trade barriers through the trade policy and market access work of the Commission" (p. 51).

But in relation to other objectives of agricultural policy, such as income support for the farming community, rural development, and the supply of environmental goods, the question of competence is more debatable. The Review suggests that more account should be taken under the CAP of the principle of subsidiarity. It quotes the powerful argument of Harald Grethe

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\* By Graham Avery.

(Professor at Hohenheim University) that “the economic nature of direct payments has changed fundamentally, from a production subsidy to a sectoral and personal income policy” and that “sectoral and personal income transfer policies are generally designed and financed at the Member State level, not at the EU level” (p. 52).

In the same line of argument, the report suggests more flexibility for national and regional implementation of EU rules, observing that diverse regional situations exist within the UK itself (England, Scotland, Wales, and Northern Ireland) and that some competences are already devolved to regional governments. But it warns that more flexibility could lead to problems of unequal application: greater discretion for member states can lead farmers to suspect that ‘the grass is greener on the other side’. It recalls that a fundamental aim of the policy is to ensure fair competition between farmers in different member states and to avoid a subsidy race; it remarks that this tension between the need for recognition of local circumstances (‘one size cannot fit all’) and the need for fair competition (‘the level playing field’) has been identified in many other balance of competences reviews.

On environmental aspects of the CAP, the report remarks that agri-environment schemes have been beneficial across Europe and provide a regime for conservation that might not otherwise exist. Positive arguments are offered by the Royal Society for the Protection of Birds (RSPB) - with more than 1 million members, Europe’s largest voluntary environmental organisation. The RSPB says that shared natural resources such as biodiversity, air, carbon stores and water require a cross-border approach, and that EU competence for agriculture, land management and plant health is clearly justified because these resources require an international framework for environmental protection. It also argues that the EU can take a longer-term view, and that its competence for agriculture helps to shield environmental investment from changes in government, and political priorities at national level.

The second major question addressed is “What are the policy’s advantages or disadvantages from the point of view of the UK’s interests?” The budgetary cost of the CAP has always been a focus of criticism in Britain. The report correctly remarks that “the UK contribution to EU expenditure on agriculture is complicated by the fact that it does not contribute to the CAP but to the overall EU budget; and its contribution is net of the UK abatement, sometimes called the rebate” (p.37). However the report also cautions that “this makes it difficult to estimate a net UK contribution to the CAP, but it also reports the more direct assessment that the rebate “has neutralised for UK taxpayers a major part of the CAP’s net costs” (p. 38).

An interesting aspect of the Review is its examination of the implications for the UK of radical options such as leaving the Common Agricultural Policy, or leaving the European Union altogether. Here a key question is the level of national agricultural support that would replace the CAP: most respondents argued that it would be lower, but others noted that outside the EU both Norway and Switzerland have higher levels of agricultural support than the EU.

A group of former British government officials (the Senior European Experts Group) suggested that “with a return to separate national subsidies, there would be such a wide variation in the degrees of subsidy that a level playing field would be impossible; without EU action, there would either be a subsidy race between member states determined to protect their farmers, or a breakdown of the Single Market, or both.”

Several respondents argued that if the UK left the EU and followed the ‘Norway option’ (membership of the EEA) it would not have to apply the CAP but would nevertheless have to follow most single market rules, with no vote or influence over shaping them. The National Farmers Union commented that this would be “hugely risky to farmers, leading to lower farm prices, loss of the UK’s major export market, and reduced protection from imports produced to a lower standard” (p. 79).

On the question of British influence on the CAP today, the report relays the plaintive comment that “the low number of UK nationals within the Commission means that our knowledge of

agricultural economics and perspective on trade and the role of the market is not influencing the formulation of EU policy” (p. 59).

### Assessment

The report on Agriculture, although critical of the CAP, shows that the policy has developed in ways that successive British governments have advocated; that the EU’s role in this sector is justified in relation to the internal market and external trade; that there are limits to the extent to which the subsidiarity principle can be applied in a sector such as agriculture; and that if Britain left the EU, it would still be directly affected by EU rules. This is a balanced and realistic approach, which will not be what British Eurosceptics expected.

For the future, although the CAP is likely to remain a focus of British criticism, we can expect its long-term development to respond to the dynamics of the EU’s economic and political situation. The need to focus the European budget’s limited resources on policies that promote growth and investment, the requirement to adapt agricultural policy mechanisms to diverse national and regional situations, and the logic of financing social income aids at the national level, will continue to drive reform of the CAP in a rational direction.

#### The evidence at a glance – agriculture

- Competence justified for single market and external trade reasons
- Policy severely criticised, but reforms since 1990s in directions advocated by the UK
- Shift from production to income support
- No more butter mountains, wine lakes and dumping on foreign markets
- Repatriation of farm income support has some minority advocates

## 2.9 Fisheries\*

The European Union has an unhappy record in fisheries. For many years policy-makers, including European Commissioners for Fisheries, denounced the failure of the Common Fisheries Policy (CFP) to achieve its objectives: fish stocks and employment in fisheries have been in constant decline. For the British, the policy had an inauspicious origin: it was adopted in 1970 by the ‘Six’ just before opening membership negotiations with the UK, which has more fisheries resources than any other EU member state. Successive attempts at reform failed to grasp the nettle of conserving fish stocks in order to support a sustainable industry. It is hardly surprising that British governments have been critical of the EU’s role in the management of fisheries policy, and British Eurosceptics have targeted the CFP as a candidate for ‘repatriation’ of powers from the EU to the national level.

But as a result of the decisions on reform of the CFP taken in 2013, this negative picture has changed. These decisions, taken jointly by the Council of Ministers and the European Parliament, include fundamental changes:

- a ban on ‘discards’ of fish at sea, to take effect between 2015 and 2019
- a legally binding commitment to fish at sustainable levels to achieve ‘maximum sustainable yield’ by 2015 where possible, and by 2020 at latest
- decisions on annual quotas to be underpinned by scientific advice
- decentralised decision making, with regionalisation of fisheries management consistent with the principle of subsidiarity.

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\* By Graham Avery.

The results of these reforms, which came into force only in January 2014, are yet to be seen, and their success will depend on effective implementation and rigorous enforcement throughout the EU. However, they were welcomed by the British government, and have been perceived by British commentators as a successful case of UK advocacy of EU reform, aided by enlightened support from the European Parliament.

Against this background, the British government's Balance of Competences report on fisheries is positive in tone, declaring that "the recent reforms, for which the UK Government pressed, are considered by many to have taken major steps to address the policy's fundamental problems." Many respondents "highlighted the opportunities presented by the new regionalisation process" and hoped that it would "end micromanagement, decentralise decision-making and allow more responsive fisheries management, yet still offer the benefits of central EU coordination" (p.26)."

Two questions are the focus of the report, first the balance of competences between the EU and the UK, and then the more general question of how the EU affects the UK and its national interests.

The first question addressed is 'Should decisions on fisheries policy be made at the European, national, or other levels?' On this, the report states that the majority of respondents support some form of supranational management of fisheries, due to the trans-boundary nature of fish stocks. Many respondents considered it essential to have a central coordinator to set conservation objectives for all countries with an interest in a particular fishery. It is not possible for one member state to achieve sustainable fisheries if another continues unsustainable practices, and conservation decisions at the EU level provide the opportunity to raise standards for fisheries management over a wider geographic area than the UK acting alone.

Many criticisms are made of the way in which decisions have been taken by the EU on the setting of catch limits, with annual negotiations leading to unsatisfactory political compromises. Here the government's report prudently refrains from comment, since British ministers took part in those political decisions. Concerning the quota system, the prize for candour goes to the Cornish Fish Producers Organisation, which states that although the system has many problems "it is very far from clear if any superior alternative is available."

A small number of respondents suggested alternative models of competence. A Conservative Party Green Paper and a report by the Tax-Payers' Alliance on "What Powers David Cameron Would Need to Repatriate" suggested that fisheries policy should revert to exclusive national control of fisheries resources. The United Kingdom Independence Party (UKIP) claimed that this would be worth £2.5bn per year to the British economy.

But others questioned whether these benefits could be achievable, given the shared nature of fisheries and the reduced strength of the UK's negotiating position. A group of former British government officials (Senior European Experts Group) argued that if competence for fisheries is repatriated, the UK would need to negotiate with other countries (including EU countries) who currently share access to stocks, and that it could not mount a credible case for an increase in quotas at the expense of other countries, given that the current shares have been unchanged for over 30 years and are themselves based on historic fishing activity.

The second question addressed is 'What are the policy's advantages or disadvantages from the point of view of the UK's interests?' On the economic and social consequences of the CFP, the report notes the decreasing numbers of vessels and fishermen in the UK, in line with the trends seen across the EU, though to what extent this reflects more effective fishing techniques and technology is unclear. However other evidence argued that the declining trend preceded UK accession to the EU and was a global phenomenon, and countries outside of the CFP had seen similar declines in vessel numbers.



An interesting aspect of the report is its review of the implications of EU competence for reciprocal fisheries agreements with non-EU countries. Respondents pointed out that EU fisheries agreements with Norway and the Faroe Islands have given positive benefits for the UK. Thus British fishing opportunities in Norwegian waters are currently “paid for” mostly by transfers of fishing opportunities from other Member States to Norway<sup>7</sup>. The report itself comments that the UK could reap benefits in the region of £17m per annum from the Norway Agreement.

### Assessment

The report contains many justified criticisms of the Common Fisheries Policy, but is positive about the EU’s recent decisions on reform. It is instructive in showing that, in British fisheries circles, the logic of EU competence and EU coordination is generally accepted. The European fisheries industry now has the prospect of a period of policy stability in which the various elements of the reform can be applied, and hopefully achieve the desired results.

The report also demonstrates that, in this sector, reform of a common policy has been successfully advocated and negotiated by the British government with its EU partners, with the aid of the European Parliament. This has wider implications for the British political debate on the EU. Statements of ministers quoted in the report are much more positive than what we usually hear from the British government.

According to the Deputy Prime Minister, Nick Clegg, “for years people said the Common Fisheries Policy was beyond reform. Yet we led the way on a historic agreement that will transform fishing practices across Europe, and end micro-management from Brussels, massively benefiting our fishing industry and our marine environment” (p.26). The Minister for Europe, David Lidington, declares “this has shown how the UK can work successfully with European partners to deliver significant reforms that benefit our country” (p.26). These are political messages that, in the British context, should have a wider resonance.

#### The evidence at a glance – fisheries

- Competence justified to prevent unsustainable over-fishing and external negotiations
- Early policy severely criticised, but repatriation would be highly problematic
- Radically reformed in 2013, with ban on discards at sea, binding sustainability constraints and more decentralised management

## 2.10 Energy\*

The UK is both the third largest producer and consumer of energy in the European Union. However, while final energy consumption is picking up as a consequence of economic recovery, domestic production of crude oil, natural gas and hard coal continues to decrease rapidly.<sup>8</sup> Since three-quarters of the UK’s energy mix are still based on fossil fuels, this means that import dependency is quickly rising. In fact, while the UK has mostly been a net exporter of energy since 1980, it became a net importer again in 2004 and by 2012 imported some 42% of its energy needs. In addition, the heavy dependence on fossil fuels causes the UK to remain the second largest emitter of greenhouse gases in the EU, with emissions again on the rise since 2011. Finally, the UK – like other EU member states – has been facing increasing oil and

\* By Arno Behrens.

<sup>8</sup> For example, UK natural gas production decreased from 98 Million tons of oil equivalent (Mtoe) in 2000 to 35 Mtoe in 2012. Similarly, UK crude oil and natural gas liquids (NGL) production decreased from 128 Mtoe in 2000 to 46 Mtoe in 2012.

electricity prices, in particular since 2003, despite full liberalisation of electricity and gas markets in the late 1990s. Concerns about energy prices and competition, security of energy supplies and climate change have thus increased the attention on energy policy in the UK over the past decade, *inter alia* leading to the establishment of its own government department in October 2008.

Most of these concerns, however, are not UK specific but have been shared by the majority of other EU member states. From this point of view it is not surprising that the UK was a major driver of EU energy policy, in particular with the 2005 Hampton Court informal European summit being considered as a major new impetus for a more common approach to energy at the EU level. In fact, it was this summit that led to the European Commission Green Paper on “A European strategy for sustainable, competitive and secure energy” in 2006, which in turn laid the foundations for the EU’s energy and climate change package and the related 2020 targets agreed upon in 2007 – the centrepiece of EU energy and climate policy to this day.

While the UK has particular interests as a major producer of energy sources (some of which are well guarded in the Lisbon Treaty, see below), it also benefits from a more European approach towards the European energy market. This is particularly the case regarding further integration of the internal market, which has always been at the heart of the UK approach towards EU energy policy. The energy report of the review is very clear in this respect, highlighting the creation of a level playing field for competition within the single market as a key benefit for the UK, together with the facilitation of cross-border trading, enhancing interconnectivity and improving security of supply as a result of physical market integration.

Although the internal energy market was to be ‘completed’ by 2014, slow or partial implementation of the Third Energy Package by some member states means that many barriers to competition are likely to remain beyond that date. This is rightly criticised in the energy report, which calls for more effective monitoring by the Commission and appropriate action (infringement procedures) where member states fail to implement existing legislation. The report also mentions that the UK experienced disadvantages from over-implementation (‘gold plating’) of EU internal energy market legislation in some areas, and indeed, the UK currently faces no infringement procedures, either under the second or the third energy package.

However, the report does not mention the fact that the UK itself has more recently deviated from its market-oriented approach by adopting the Energy Act in 2013, which includes *inter alia* provisions for so-called Contracts for Difference (CfDs) as well as for capacity markets. Such provisions will most likely not only increase electricity prices in the future, but – worse than that – will increasingly lead to the replacement of market rules with national regulations as the basis for investment decisions. Although in October 2014 the European Commission found that price support in the form of CfD for the new Hinkley Point nuclear power station did not contradict EU state aid rules, such measures are designed as national policy instruments, thus further undermining the internal energy market and efforts to deliver cost-effective solutions through competition.

The Review also reflects the strong interest of UK stakeholders in the security of energy supplies. In this respect, the main emphasis of the report is on infrastructure and the exploitation of domestic energy sources. Regarding infrastructure, an EU-wide approach was found to be particularly effective regarding common rules for trans-boundary interconnection projects and EU funding through the Connecting Europe Facility, which the UK will also be able to benefit from. The first list of ‘Projects of Common Interest’ includes several UK clustered electricity interconnection projects, a smart grid project and gas projects involving Northern Ireland.

Enthusiasm for a pan-European approach to energy infrastructure was counterbalanced by scepticism towards EU action regarding the exploitation of oil and gas reserves in the North Sea and the refining of fossil fuels. Article 194 (TFEU) of the Lisbon Treaty clearly protects a member state’s right “to determine the conditions for exploiting its energy resources, its choice

between different energy sources and the general structure of its energy supply". Fears of upstream stakeholders are therefore more oriented towards EU safety legislation and changes to the technical Network Codes. Similarly, the UK energy sector seems to see no need for additional EU legislation on shale gas exploitation, although environmental groups noted that existing national and EU legislation was not sufficient to mitigate potential environmental impacts.

As a result of this dichotomy, the report reflects a contradiction between those who criticise the fact that security of supply issues had not been given sufficient weight at the EU level and those who believe national solutions are more appropriate to secure supplies. Declining domestic reserves and increasing import dependence may shift future preferences further towards strengthening the EU component in security of supply policies.

Since environment and climate change have already been dealt with in the context of a separate review, the energy report focuses mainly on renewable energy sources, energy efficiency, and carbon capture and storage. Not surprisingly, renewables sector and environmental groups argue that EU targets and policies had helped the UK to advance further on renewable energy and energy efficiency than it would otherwise have done in the absence of such actions.

But the Review also correctly identifies the need for more policy coherence between multiple EU targets (i.e. climate, renewables and energy efficiency). In this respect, the report reflects the debate about whether technology specific targets are a cost-effective means to achieve emissions reductions. In particular, the focus on renewables is said to distort the market by undermining the carbon price signal and reducing incentives to invest in carbon capture and storage technologies (and other low carbon energy sources), which had large potential in the UK.

*Post-script.* The UK government initially supported a single greenhouse gas emissions reduction target in the context of the EU negotiations over its 2030 framework for climate and energy policies, which in turn is an essential input into the global climate change negotiations currently underway. While the UK advocated the adoption of a unilateral EU wide greenhouse gas emissions reduction target of 40% for 2030, it was opposed to specifying particular ways in which this target must be achieved. In order to preserve flexibility and allow member states to choose the best and most cost-effective way to meet their emissions reduction commitments, the UK government thus initially neither supported a renewable energy target to be included in the 2030 framework nor a binding energy efficiency target.

The agreement finally reached by the EU in October 2014 was different but still seems to be a good compromise for the UK. It includes a binding 40% greenhouse gas emissions reduction target (to be translated into binding targets on member state level for the non-ETS sectors), but downgraded the 27% renewables target to an obligation only binding on the EU level. What this means precisely is still unclear, but there will certainly not be binding commitments for member states to reach national targets. The 27% energy efficiency target also remains indicative and thus neither binding on the EU nor on the member state level. This compromise is favourable to the UK position. In particular, it steers a path between those member states that advocated a less ambitious climate target on the one hand, and those that favoured higher and binding obligations on renewables and energy efficiency on the other.

### **Assessment**

Overall the Energy report provides a balanced overview about the successes and failures of EU energy policy, as well as the about its advantages and disadvantages for the UK. Looking at the key challenges that lie ahead in the energy field from the viewpoint of UK stakeholders (see below), the report leads to the conclusion that more EU energy policy could benefit the UK in addressing these challenges. Cases made for the UK to repatriate energy policy issues from the competences of the EU are scarce.

Three prime challenges are identified. The first concerns the impact of growing global energy demand and geo-political developments on the security of EU and UK energy supplies. As UK import dependency rises, the UK will increasingly benefit from more interconnections, EU funding for infrastructure development and increasing solidarity between member states, as laid down in the TFEU. The interdependence of member states calls for more collective action, in particular regarding network development and opening up markets, but also regarding a more coherent external action. Fears over EU intervention in national energy mixes are unfounded as the EU has no competence over such matters, leaving it up to the UK to exploit indigenous energy sources such as shale gas, nuclear or (clean) coal.

The second challenge is relates to the internal market as the means to secure a key objective of EU energy policy from the British standpoint, namely to assure a level playing field for competition, notably in a context in which there is actually an increasing disparity of energy prices between individual member states, with consequences for UK competitiveness. Concerns voiced in the report about the slow and partial implementation of internal market legislation in some member states are thus in stark contrast to the UK government's recent initiatives to introduce more national measures, including Contracts for Difference (CfDs) and capacity mechanisms, which will lead to further fragmentation of the internal market. This is counterintuitive to the report's findings that a "well-functioning internal energy market should place downward pressure on gas and electricity prices". More EU rather than less, i.e. fully functioning liberalised EU-wide electricity and gas markets, is what UK stakeholders seem to prefer. The UK should thus be leading this development in its own interest. This can best be done proactively from within the EU. A hypothetical EU secession, on the other hand, would leave the UK without the possibility to influence internal market legislation, even if it still had to implement it should it remain part of the single market.

Finally, UK stakeholders share other member states' concerns about the need to deliver cost-effective decarbonisation of energy. An immediate priority has thus been to agree on the 2030 framework for climate and energy policies, and so provide both investment security and improve the prospects for a global climate agreement. While the UK could surely pursue an ambitious climate policy – also outside of the EU – more cost-effective solutions can be found through concerted action (e.g. through the EU emissions trading system, pioneered by the UK in a pilot national scheme from 2002). The UK actually received much of what it wanted in the 2030 framework agreement reached in October 2014.

#### **The evidence at a glance – energy**

- Competence justified by common concerns for security of supplies and single market
- UK a main driver for EU policy, especially now that own oil and gas production declines
- UK drive for fully liberalised and integrated internal market for efficiency and security
- But some UK policies are less simply liberal, and accepted under EU state aid policy
- New 2030 EU framework reforms agreed to boost renewables, but with details left to member states, as the UK wanted

### **2.11 Fundamental rights\***

The 1993 Treaty of Maastricht codified standing case law developed by the EU's Luxembourg-based European Court of Justice (ECJ) over the previous decades, stating in Article F that:

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\* By Steven Blockmans.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>9</sup>

In keeping with the overall method of the Balance of Competences Review, the report on fundamental rights soberly presents a state of play on a topic that has become highly contentious in the political debate. The Review does not concern any specific EU competence on individual rights, since the treaties do not confer express competence on the EU to adopt legislation or to take specific action in this field. Instead, it addresses the EU's overarching competence on fundamental rights. The most important feature of this competence is the obligation resting on the shoulders of the EU, i.e. its institutions *and* the member states in their role as agents of the Union, to respect fundamental rights, which are recognised by the ECJ as general principles of EU law, and reaffirmed in the Charter of Fundamental Rights of the EU.

As set out in chapter 2 of the Review, the EU legal order protected the fundamental rights of individuals long before the Charter was first proclaimed. The UK government's position is that the Charter did not alter the legal effect (meaning and scope) of fundamental rights in EU law: "they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretations. Both the Charter and the general principles of EU law are part of the EU's primary law. The courts can therefore refer to the Charter and the general principles interchangeably when applying fundamental rights to EU institutions and member states"(p. 34). This view is largely reflected in the evidence.

The most contentious issue discussed in the Review concerns the question whether Protocol 30 to the Lisbon Treaty (on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom) presents an opt-out of the Charter. The Review states that "the Protocol is not, and never has been, an opt-out for the UK from the application of the Charter" (p. 25). While it only applies to the UK and Poland (the Czech Republic having rescinded its initial inclusion under the Protocol) its purpose is rather to clarify, in legally binding terms, how the Charter applies to the EU institutions and member states. The UK government's position is that the Charter reaffirms the rights, freedoms and principles recognised in EU law, but does not create new rights or principles. This view is almost unanimously supported in the evidence and is consistent with the preamble to the Charter itself.

Chapter 4 of the Review is of most interest as it summarises the wide range of evidence submitted on the impact on the UK of the EU's competence on fundamental rights, in the following terms.

"Beyond recognition that when [EU institutions and member states (within the scope of EU law)] act they should do so consistently with some form of human rights protection, [the evidence shows] little consensus on what constitutes the UK interest in this context. Views on whether the EU's competence on fundamental rights is being exercised consistently with the interests of the UK vary depending on perspectives on the role of supranational human rights mechanisms and national sovereignty" (p. 45).

This is particularly evident in the widely differing assessments of how the ECJ exercises its jurisdiction in high-profile cases, with the following formulations quoted in the report: from "naked grab of territory by the ECJ" to "there is little or no evidence of competence creep", and

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<sup>9</sup> To be clear on the 'ABC' of the complicated institutional set up, the ECJ is quite separate from the Strasbourg-based European Court of Human Rights (ECtHR), which is part of the Council of Europe. The Strasbourg Court guards and implements the European Convention for Human Rights (ECHR), which also, however, figures in the jurisprudence of the EU, as the above quote shows, and this text further explains below.

“the protection afforded to citizens’ fundamental rights by the ECJ is insufficient when balanced against the rights enjoyed by business under EU law” (p. 48).

Whereas EU law contains a wider array of rights than those protected under the UK’s 1998 Human Rights Act or the 1950 Convention (ECHR), the evidence presented in the report indicates that EU fundamental rights have so far had a limited impact on domestic case law. Yet, respondents from civil society, academia and the legal profession have suggested that the EU guarantees that could offer a greater standard of protection are the right to a fair hearing (especially in the sphere of immigration and asylum) and the prohibition on discrimination.

An inherent problem with the multi-layered order of fundamental rights protection is that this partially overlapping system compromises legal certainty. Moreover, the complexity of the system means that enforcing fundamental rights is expensive for both litigants and the public purse. The evidence collected in the report nevertheless indicates a high degree of consistency between the level of protection afforded by EU fundamental rights and that afforded by the Convention. In part this is due to the ECJ following the jurisprudence of the Strasbourg Court.

As a founding member of the Council of Europe, the UK was one of the first to sign the Convention and it has been an ardent supporter of the Strasbourg-based court for decades. However, in recent years, a number of deeply unpopular judgments have sparked complaints against the overall binding nature of ECtHR judgments on British law, notably declaring illegal the ban on prisoners in jail from voting in elections, and the barring the deportation of alleged al-Qaeda terrorist Abu Qatada (who was repeatedly imprisoned but never prosecuted for any crime). With the rise of UKIP and anti-immigration sentiment, a storm has been brewing over ‘European’ oversight of the UK’s human rights track record.

Subsequent to the publication of the review, an eight-page strategy paper of the Conservative Party (i.e. not the government) was published in October 2014 entitled “Protecting Human Rights in the UK”, in relation to which Justice Secretary Chris Grayling of the Conservatives stated:

“We can no longer tolerate this mission creep. What we have effectively got is a legal blank cheque, where the court can go where it chooses to go. We will put in place a provision that will say that the rulings of Strasbourg will not have legal effect in the UK without the consent of parliament. Effectively, what we are doing is turning Strasbourg into an advisory body.”<sup>10</sup>

Grayling added that a new Conservative government (i.e. without the coalition with the Liberal Democrats) would withdraw from the ECHR if Parliament failed to secure the right to veto judgments from the ECtHR. Prime Minister David Cameron had summarised the policy at a party conference in Birmingham in September 2014: “Let me put this very clearly: we do not require instruction on this from judges in Strasbourg.”

Arguments about the alleged undue influence of the Court on national matters may be put into perspective with some statistics from the Strasbourg court. Between 1959 and 2013, the number of judgments involving the UK totalled 499 judgments, of which only 3% were found against the British government. By comparison France has had 913 cases, Russia 1,475 (since 1996), Italy 2,268, and Turkey 2,994. The number of cases found against the UK is both quite small and arguably of secondary gravity compared to the many arising in Russia or Turkey. However the collateral damage done to the ECtHR by UK withdrawal could be of major importance, with Russia and others exploiting the precedent.

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<sup>10</sup> [www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document](http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document)

## Assessment

The evidence gathered by the Balance of Competences Review shows that there is broad consensus that respect for human rights is in the national interest of the UK, which celebrates with pride in 2015 the 800<sup>th</sup> anniversary of the Magna Carta. As much as the EU fundamental rights system has been deemed “inherently beneficial to all sectors in the UK because it keeps the EU in check”, so too is the ECtHR’s primary function to provide external (independent, impartial and expert) scrutiny to prevent any member state from acting or mandating to act in a manner that is inconsistent with 21<sup>st</sup> century levels of human rights protection in Europe.

Conservative party threats to withdraw from the Convention and ECHR are, in our view, a populist overreaction to a handful of adverse rulings from the Strasbourg Court and would be a major reversal of the human rights cause in Europe as a whole. The idea that the status of the Court’s judgments could be reduced to advice for the British parliament has no chance of general acceptance by the member states in the Council of Europe.

Withdrawal from the Convention would link into the debate about Britain’s possible exit from the EU. After all, respect for the rights and freedoms as guaranteed by the ECHR, as part of the general principles of EU law, is one of the pre-conditions for EU membership. Domestic protection of rights and freedoms under a new British Bill of Rights and Responsibilities might be less than under the Convention, and thus raise the question whether it was good enough to continue to satisfy EU membership criteria.

Discussion about a British withdrawal from the ECHR could also undermine the EU’s ongoing negotiations to accede to the Convention pursuant to the Lisbon Treaty (Article 218 TEU), which requires unanimity in the Council and ratification in all member states.

In other words, while the Conservative Party’s target is mainly the ECtHR in Strasbourg, secession from the Convention there could have highly complicated and damaging impacts on the UK’s relations with the EU, as well as undermining the general human rights system in Europe as a whole.

### The evidence at a glance – Fundamental rights

- UK a strong supporter of human rights, tradition back to the Magna Carta
- EU law links to Council of Europe’s human rights Convention and Court
- Small number of Strasbourg judgments against UK prompts Tory ire
- Secession from Strasbourg would spill over damagingly into EU competence
- It would also damage human rights system in wider Europe

## 3. Conclusions

In the conclusions that now follow we consolidate the broad findings of all the reviews published so far, including those covered in the two earlier working papers (as Part I and Part II). Key points from the evidence collected are summarised in Table 1 by groups of policy.

For the *core single market policies*, namely the four freedoms plus competition policy, there is on the whole strong UK support for the EU’s competences, except for reservations over the free movement of people. While the UK strongly supports the single market only for goods, services and capital, the rest of the EU insists that the integrity of all four freedoms together is fundamental and an untouchable red line (on which more below).

Going a bit deeper, all four freedoms demonstrate importantly different characteristics. For the free movement of goods the EU system has basically reached a mature state, following important reform measures adopted in the 1990s to lighten the harmonisation process in favour

of a high degree of mutual recognition, under the leadership of the British Commissioner at that time, Lord Cockfield. For the free movement of services the system is still far from complete, and the UK is at the forefront of those pushing for stronger effective EU measures to eliminate contradictory national regulations, so here the reform agenda remains very much open. For financial markets there has been a continuing process of drastic reform in the wake of the 2008 financial crisis, starting with the de Larosière report, which got the reforms off to a remarkably fast start, and remain ongoing. The UK's City interests in all this have been so far adequately protected, which would cease to be the case in the event of secession.

*Table 1. Summary of Balance of Competence findings*

<b>Sector of policy</b>	<b>Competence question</b>
<b><i>Core single market policies</i></b>	
Single market overview	Strategic priority for UK. Large support for EU competence
Free movement of goods	Key 1992 reform: more mutual recognition with less harmonisation
Free movement of services	UK interests in enhanced EU policy, including digital sector
Free movement of capital	Major reforms since the 2008 crisis. UK City interests protected
Free movement of persons	Sharply contested within UK. Tories want reduced EU competence
Competition/consumer policy	Competition policy strongly supported, consumer policy nuanced
<b><i>Sectoral policies</i></b>	
Transport	EU competence supported, UK leading role in shaping policy
Agriculture	Severely criticised, but policy gradually reformed over decades
Fisheries	Severely criticised, but radical reforms achieved in 2013
Energy	UK increasing energy importer, driver for enhanced EU policies
Environment & climate	UK driver of EU policies. EU as amplifier of UK interests
Food safety, animal welfare	EU harmonised approach essential. UK a driver of EU policies
Work place safety	<i>Not yet available</i>
Public health	Limited EU actions useful, including inflow of health professionals
<b><i>Economic, monetary, social policies</i></b>	
Economic and monetary union	<i>Not yet available</i>
Social & employment	Divisive issue in UK. Sharp controversy over a few directives,
Taxation	Limited EU competences useful. Unanimity rule safeguards
EU budget	UK retains special rebate. UK gets reform with real cuts for future
Cohesion	Competence for some regional solidarity supported
<b><i>Justice and home affairs</i></b>	
Asylum, non-EU immigration	UK opt-outs & opt-back-ins. UK has flexible special arrangement
Civil justice	UK opt-outs & opt-back-ins, flexibility suiting UK legal system
Fundamental rights	Divisive UK debate over European Court of Human Rights
Police and criminal justice	<i>Not yet available</i>
<b><i>Education, research, culture</i></b>	
Education	<i>Not yet available</i>
Research & space	UK major beneficiary of EU programmes; big science achievements.
Tourism, culture & sport	EU niche activities useful. UK driver for good governance for sport



<b><i>External relations</i></b>	
Foreign policy	EU multiplier of UK interests. Unanimity rule safeguard
Development & humanit. aid	EU multiplier of UK interests. UK free to determine own aid policy
Trade & investment	EU competence in national interest. No good alternatives outside EU
Enlargement	<i>Not yet available</i>
<b><i>General</i></b>	
Cross-cutting areas	<i>Not yet available</i>
Subsidiarity, proportionality	<i>Not yet available</i>

On the free movement of people, the current harsh confrontation in the British political debate is up to a point overplaying realities. The fourth freedom for people concerns the right to circulate and take up employment, and does not include the right to reside or to receive comprehensive welfare benefits on a non-contributory basis, as has recently been confirmed by the European Court of Justice<sup>11</sup>. This ruling is far from the stereotypical argument that the Court is an agent of EU ‘competence creep’, with the Court here clearly supporting national competences. Member states thus retain competence for determining the right to residence and thence details of what social security benefits can be extended to immigrants from other EU member states. The UK is not alone in wanting to tighten up on these national policies, which can be done without calling into question basic EU legal competences. Prime Minister Cameron has now set out his agenda for further tightening up the system to limit immigration without, however, breaching the cardinal rule of free movement of persons. It will take some time to clarify the extent to which these proposals can be implemented on the basis of existing national competences, or how far they will require more or less difficult negotiation with the rest of the EU.

There is a large group of *sectoral policies* that are buttressing the single market as well as pursuing their own specific policy objectives. These are all ‘shared’ competences, and the evidence shows that the detailed sharing between EU and national legislation is in most cases found to be broadly appropriate. This also fits with perceptions of the UK’s national interests, both in government and business circles. Several important sectors stand out for particularly marked UK interests, notably energy, environment and climate change, financial markets, transport, and services in general. In all these sectors UK ministers and senior officials have played leading roles in shaping or reforming the EU policies in question. Here the evidence is that the EU’s competences at the level at which they are defined in the treaties are not only uncontested, but on the contrary it is widely considered – in both the UK and the EU as a whole – that stronger EU policies in these sectors are necessary.

Two notoriously controversial sectors, agriculture and fisheries, have seen important reforms along the lines advocated by the UK. Reform of the agricultural policy proves to be a decades-long process, and one that has to go on. The ‘butter mountains’ are no more, however. This represents reforms achieved since the 1990s from production support to income support. The burden for the EU budget remains big, but has nonetheless declined from its 75% share of the total in 1985 to the 36% planned for 2014-2020. For fisheries the reforms decided in 2013 represent a sharper and more immediately effective correction of past problems, represented most clearly in public opinion by the anomalous policy of ‘discards’ of fish back into the sea, which is now stopped alongside other more basic reform measures.

The broad single market sector, the four freedoms and sectoral policies, is responsible for a large proportion of EU legislation. The hypothetical alternative of national competences, for example for product safety and prudential regulation of service sectors, is not a plausible

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<sup>11</sup> Dano case, C-333/13, 11 November.

prospect. National regulations would not necessarily be less demanding, but would have the serious drawback of allowing 28 variations that would effectively disintegrate the single market and permit reintroduction of protectionist technical barriers to trade. Without doubt, there is debate about whether the EU produces too much ‘red tape’. On this it is helpful that the new Juncker Commission sees its First Vice-President charged explicitly with controlling respect for the principles of subsidiarity and proportionality (Brussels-speak otherwise meaning avoidance of unnecessary ‘red tape’). To be sure there is an important reform issue here (to be covered no doubt in the forthcoming review on subsidiarity and proportionality). For perspective it should be recalled that whenever there is a food safety crisis, such as in the horse meat scandal of 2013, the conclusion tends to be that national implementation of EU regulations needs to be reinforced, and not that EU regulations should be abandoned. Even more dramatically, the financial crisis of 2008 demonstrated the grave inadequacy of national regulatory policies in this area.

The broad domain of *economic, monetary and social policies* presents a much more varied story. The biggest issue here is the eurozone system, which has seen huge crises and systemic developments since 2008 (and is also due to be reviewed in the final set of reports). The eurozone system proved defective, and the response has been to reinforce eurozone-level competences with the banking union and hugely increased financial assistance to the sovereign debtors in difficulty. There have also been reinforcements of the procedures and powers at European level to constrain budget deficits, which remains a highly contested matter. Yet this does not directly affect the British situation, since it has a permanent opt-out from the euro system, and the UK has been able to use its own macroeconomic and monetary powers to recover faster from the recession than the eurozone.

Of other items in this group of policies, the review on taxation notes the EU’s limited but useful competences, and also the safeguard that exists against ‘competence creep’, since all measures on taxation require unanimity. On the EU budget there are two features of special relevance to the UK. The first is that over the years the UK has renegotiated the initially weak corrective mechanism adopted before the 1975 referendum, and since Mrs Thatcher’s premiership a substantial rebate mechanism has been in place, which is guarded by its treaty status (i.e. it can only be changed by unanimous decision, and therefore with UK acquiescence). The second is that the UK negotiated hard to secure a reduction in real terms in the new 2014-2020 multiannual commitments for the EU budget, which Prime Minister Cameron has marked up as an important reform. In the case of the cohesion policy the case is made in the review to restrict funding to poorer member states, thus repatriating the competence for richer member states. This proposition has a rationale, but is not at present generally accepted by other richer member states, nor by Scotland, Wales and Northern Ireland. Its time may come, but not soon. As for social and employment policies, the UK has followed a zig-zag path, opting out of the Social Chapter at the time of the Maastricht Treaty in 1992, opting in with the Amsterdam Treaty in 1997 with the Labour government, but resuming criticism of some pieces of labour market legislation under the present government.

In the field of *freedom, security and justice* the picture is dominated by opt-outs for the UK and Ireland, not only for the Schengen system of border control and visa policies, but also judicial and police cooperation of home ministry affairs. The UK has managed to secure the unenthusiastic but nonetheless effective agreement of the rest of the EU for it to have huge flexibility in choosing where it wants to opt back in to selective provisions of EU law. No other member state, except Ireland, which felt obliged to follow the UK, is able to do this, and no accession candidate could possibly secure such terms. The rest of the EU is on a determined course to reinforce EU policies in the broad justice and home affairs domain, but the UK can stand aside from this except where it wants to join in, subject to the agreement of the rest of the EU. In the core matters of internal justice and home affairs the UK has in 2014 opted out of 130 EU laws, while opting back in to 35 of them, including the high profile case of the European

Arrest Warrant. In the field of civil judicial cooperation the UK again has an opt-out, with the possibility to pick and choose in accordance with its perception of what fits sufficiently well with British legal tradition. The UK's threat to withdraw from the European Convention on Human Rights and the European Court of Human Rights in Strasbourg, while not directly a matter for the EU, would nonetheless indirectly cause complications for it, as well as undermine the cause of human rights in wider Europe.

The evolution of EU *foreign and security policies* is seen broadly as a 'force multiplier' for UK interests and values, with wishes expressed for it to become more effective. At the same time the unanimity rule for decision-making guards against UK concerns about 'competence creep'.

Overall, the emerging conclusions take the following shape as regards the three stated categories of possible action: reform, renegotiation, and repatriation.

The *reform* agenda – past, present and future – is shown by the reviews to be extensive in virtually all areas of policy. It means that political argument sometimes heard that 'the EU is unreformable' is not borne out by the evidence. Maybe even more surprising for British public opinion, the evidence shows that UK negotiators in EU affairs, both at political and senior official levels, have a remarkable track record of leading policy reform or improvement across many sectors. The serious problems for the UK in agricultural policy mainly arise because the ground rules were negotiated before the UK's accession. By contrast the UK's policy influence since accession in 1973 has been very substantial, comparing favourably with any other member state. This is illustrated in several sectors reviewed in the present document, and includes cases where the UK and others see the need for enhanced EU policies (energy, climate change, service sectors, financial services, the digital sector etc.).

The agenda for *renegotiation* is limited because the UK has already secured opt-outs from two major blocks of policy, the euro and the area for freedom, security and justice, combined with the possibility to request to opt back in at any time, as well as special budget rebate provisions. The flexibility that the UK requests in its relationship with the EU is thus already a reality on a grand scale. There remain two areas of high political controversy, namely immigration from the EU, where the Prime Minister has already set out his agenda for negotiation, and certain labour market rules, where this might be expected. It remains to be seen how these issues will be treated, bearing in mind that they are subject to serious divisions of opinion within the UK itself, quite apart from questions of negotiability within the EU.

Finally, the reviews so far throw up no plausible cases for *repatriation* of competences at the level at which they are defined in the treaties, and there is virtual certainty that any such proposed repatriation would fail to win the required unanimity for treaty change. On the contrary, the evidence is that most existing competences are found to be 'about right'. This in no way excludes the many real needs for refinement of these competences with amendment or repeal of individual legal acts and policy improvement in general, but this can be regarded as reform in which all member states and EU institutions have an interest.

## **Annex A: Balance of Competences Review - Schedule of the UK government's work**

Each item involves the publication of a report of around 40,000 words.

Summer 2013 (published July 2013)

1. Single market report(synopsis)  
<https://www.gov.uk/government/consultations/call-for-evidence-on-the-governments-review-of-the-balance-of-competences-between-the-united-kingdom-and-the-european-union>
2. Taxation  
<https://www.gov.uk/government/consultations/taxation-report-review-of-the-balance-of-competences>
3. Food safety and animal welfare  
<https://www.gov.uk/government/consultations/call-for-evidence-animal-health-welfare-and-food-safety-review>
4. Health  
<https://www.gov.uk/government/consultations/review-of-the-balance-of-competences-health>
5. Development cooperation and humanitarian aid  
<https://www.gov.uk/government/consultations/development-cooperation-and-humanitarian-aid-report-review-of-the-balance-of-competences>
6. Foreign policy  
<https://www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences>

Winter 2013 (published in February 2014)

7. Single market – free movement of goods  
<https://www.gov.uk/government/consultations/single-market-free-movement-of-goods-report-review-of-the-balance-of-competences>
8. Single market – free movement of persons  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/335088/SingleMarketFree\\_MovementPersons.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf)
9. Asylum and non-EU migration  
<https://www.gov.uk/government/consultations/asylum-and-non-eu-migration-review-of-the-balance-of-competences>
10. Trade & investment  
<https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-trade-and-investment>
11. Environment & climate  
<https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>

12. Transport  
<https://www.gov.uk/government/consultations/eu-balance-of-competences-review-transport-call-for-evidence>
13. Research  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279331/bis\\_14\\_592\\_balance\\_of\\_competences\\_review\\_government\\_reponse\\_to\\_the\\_call\\_for\\_evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279331/bis_14_592_balance_of_competences_review_government_reponse_to_the_call_for_evidence.pdf)
14. Tourism, culture & sport  
<https://www.gov.uk/government/consultations/call-for-evidence-culture-tourism-and-sport>
15. Civil justice  
<https://www.gov.uk/government/consultations/balance-of-competences-review-call-for-evidence-on-civil-judicial-cooperation>

Summer 2014 (published in July 2014)

16. Single market – free movement of services  
<https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-the-single-market-free-movement-of-services>
17. Single market – financial services and free movement of capital  
<https://www.gov.uk/government/consultations/balance-of-competences-review-single-market-financial-services-and-the-free-movement-of-capital>
18. EU budget  
<https://www.gov.uk/government/consultations/balance-of-competences-review-eu-budget>
19. Cohesion policy  
<https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-cohesion-policy>
20. Social and employment policy  
<https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-social-and-employment-policy>
21. Agriculture  
<https://www.gov.uk/government/consultations/agriculture-report-review-of-the-balance-of-competences>
22. Fisheries  
<https://www.gov.uk/government/consultations/fisheries-review-of-the-balance-of-competences>
23. Competition and consumer policy  
<https://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-competition-and-consumer-policy>

24. Energy

<https://www.gov.uk/government/consultations/energy-review-of-the-balance-of-competences%20>

25. Fundamental rights

<https://www.gov.uk/government/consultations/balance-of-competences-fundamental-rights-review>

Autumn 2014

26. Economic and monetary union

27. Workplace health & safety & consumer protection

28. Police and criminal justice

29. Education

30. Enlargement

31. Cross-cutting areas

32. Subsidiarity & proportionality