

BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

FREE MOVEMENT OF GOODS AND TRADE AND INVESTMENT

HISTORICAL DEVELOPMENT OF POLICY AREA

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

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

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

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 This was slow, hard to agree, and often outdated by technical progress.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

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

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

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

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

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

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

Treaty provisions covering the Single Market

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

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

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

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

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

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

The effect is that:

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

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

would continue to exist because Member States would still be bound by the Treaty provisions.

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

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

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

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

Scottish competence relative to the UK Government and EU

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

European, and Scottish policy direction and interaction

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

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

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

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

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

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

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

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

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

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

Future options and challenges relating to balance of competence

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

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

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

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

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

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

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

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

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

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

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

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

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

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