

BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

SUBSIDIARITY AND PROPORTIONALITY

Background

1. As part of the UK Government's Review of the Balance of Competences between the UK and the EU, the Scottish Government has assessed, in each substantive policy area, the level of competence conferred on the EU by the Member States and the manner in which this competence has been exercised by the EU institutions. Our assessments, the findings of which have been submitted to the UK Government, have overwhelmingly revealed that where competence has been conferred to the EU, its subsequent exercise has been of considerable benefit to the people of Scotland and the way in which we use our resources. Our findings have not revealed significant problems with the levels of competence conferred on the EU. Rather, they have highlighted practical issues which have arisen as a result of the way in which the EU has exercised its competence in a number of policy areas.

2. We consider that the Call for Evidence issued by the Foreign & Commonwealth Office in respect of subsidiarity and proportionality is one of the most important aspects of any review of the balance of competences between the EU and its Member States. The principles of subsidiarity and proportionality (as well as the flexibility clause) enshrined in the EU Treaties should function as the mechanisms which ensure an appropriate balance is struck between the exercise of competence by the Member States and the exercise of competence by the EU institutions. Through our engagement with other parts of the Review, we have found that these mechanisms are not always functioning in the way as originally envisaged by the Member States which can lead to the view that, in certain circumstances, the EU is exercising excessive powers. The Scottish Government, therefore, considers that the strengthening of the principles of subsidiarity and proportionality should lie at the heart of EU reform. The proper monitoring and enforcing of those principles and the flexibility clause would go some way to ensuring that the EU institutions are not exercising competence when it is more appropriate for this to be exercised by the Member States themselves, whether at local, regional or national level. The principles of subsidiarity and proportionality also form part of the better regulation agenda in Scotland. We consider that a combination of more use of the subsidiarity and proportionality mechanisms and a stronger emphasis on better regulation at the EU level, rather than a complex and protracted process of renegotiating the individual competences conferred on the EU by the Member States, is the best and most appropriate means of ensuring that EU action fully respects the limits of competence imposed on them by the EU Treaties.

Scope of the principles of subsidiarity and proportionality

3. While the principles of subsidiarity and proportionality do not affect the distribution of competences as between the European Union and the Member States, they are central to the exercise of EU competence. Article 5(1) of the Treaty on European Union makes it clear that the exercise of the competences conferred on the EU institutions by the Member States through the EU Treaties are to be governed by both the principles of subsidiarity and proportionality:

“The use of Union competences is governed by the principles of subsidiarity and proportionality.”

The principle of subsidiarity

4. Article 5(3) TEU sets out the scope of the principle of subsidiarity which is:

“... in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

5. The Commission itself has confirmed that:

“Subsidiarity is a guiding principle for defining the boundary between the Member State and EU responsibilities – that is, who should act? If the Union has exclusive competence in a particular area, then clearly it is the Union which should act. If the Union and the Member State share competence, the principle established a presumption in favour of the Member States taking action. The Union should only act if Member States cannot achieve the objectives sufficiently and if, by reason of the scale or effects, the Union can achieve them better.”¹

6. The fundamental aim of the principle of subsidiarity can, therefore, be accurately described as *“to ensure that decisions are taken as closely as possible to the citizens of the Union”*.²

7. The principle of subsidiarity is, therefore an important limitation on the exercise of competence by the EU, preventing its institutions from adopting measures where action by the Member States individually or bilaterally can achieve the policy objectives. The principle of subsidiarity ensures that decisions are taken at the level of government which is closest to the people whom they are going to affect.

8. The Scottish Government regards the principle of subsidiarity as a cornerstone of the EU Treaties and as one of the key provisions in maintaining the democratic legitimacy of the European Union by ensuring that the EU does not exercise its competence in areas where the policy objectives can be achieved by the local, regional or national governments in a Member State. In areas of shared competence between the Member States and the EU, such as agriculture and fisheries, the principle of subsidiarity should, therefore, operate as a mechanism to ensure that the EU only takes action where the policy objectives cannot be sufficiently achieved by the Member States acting individually or bilaterally. Where the policy objectives can be sufficiently achieved by the Member States, under the

¹ European Commission, 18th Report on Better Lawmaking covering 2010

² The first recital to the preamble to Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

current constitutional settlement for the UK, it would be for the Scottish Parliament to legislate.

The principle of proportionality

9. Article 5(4) TEU defines the principle of proportionality as follows:

“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

10. Unlike the principle of subsidiarity, the principle of proportionality applies to the exercise of all competences by the EU, whether these are exclusive, shared or supporting. The principle of proportionality is concerned with the content and form of EU action and preventing this from going beyond what is necessary to achieve the objectives of the EU Treaties. In practice, this means ensuring that the exercise of EU competence (such as the formulation of EU secondary legislation) is proportionate to the objectives set out in the Treaties and does not include any action which is not necessary to achieve those objectives. EU action which is disproportionate can, therefore, be regarded as outside of the EU's competences and as trespassing on the competence of the Member States.

Observance of the principles of subsidiarity and proportionality in practice

Application of the principles of subsidiarity and proportionality

11. Under Article 5(3) and (4) TEU, the EU institutions are required to apply both the principle of subsidiarity and the principle of proportionality in accordance with the provision made in the Protocol on the application of the principles of subsidiarity and proportionality ('Protocol 2')³.

12. Article 1 of Protocol 2 requires each institution to ensure 'constant respect' for the principles of subsidiarity and proportionality. Article 2 of Protocol 2 requires the Commission, before proposing legislative acts, to 'consult widely' with those consultations taking into account 'the regional and local dimension of the action envisaged'. Article 4 of Protocol 2 requires the Commission to forward its draft legislative acts to the national Parliaments of the Member States while Article 5 of Protocol 2 requires those draft legislative acts to be justified with regard to the principles of subsidiarity and proportionality and, therefore, contain a detailed statement making it possible for those parliaments to appraise the compliance of the draft legislative act with the principles of subsidiarity and proportionality.⁴

13. In addition to the detailed statement, Article 5 of Protocol 2 requires that draft legislative acts:

³ Protocol (No 2) to the EU Treaties on the application of the principles of subsidiarity and proportionality.

⁴ In particular, Article 5 of Protocol 2 requires the detailed statement to contain 'some assessment of the proposal's financial impact and, in the case of a directive, of its implication for the rules to be put in place by Member States, including, where necessary, the regional legislation' and the reasons for concluding that a Union objective can be better achieved at Union level are to be substantiated by 'qualitative and, wherever possible, quantitative indicators'.

‘... take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved’.

14. Meanwhile Article 9 of Protocol 2 also requires the Commission to submit an annual report to the European Council, the European Parliament, the Council of Ministers and the national Parliaments of the Member States on the application of the principles of subsidiarity and proportionality.

15. While equivalent provision is made in Protocol 2 in relation the application of the principles of subsidiarity and proportionality, it makes different provision in respect of the procedure for the monitoring and enforcement of each principle.

Monitoring and enforcement of the principle of subsidiarity

16. Articles 6 and 7 of Protocol 2 set out the procedure for the national parliaments of the Member States to object to a legislative proposal on the grounds that it violates the principle of subsidiarity (‘the reasoned opinion procedure’) while Article 8 of Protocol 2 confers jurisdiction on the Court of Justice of the European Union in actions brought by Member States under Article 263 TFEU on the grounds that an EU legislative act infringes the principle of subsidiarity.

17. Article 6 of Protocol 2 enables any national parliament⁵, within an eight-week period, to issue a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission stating why it considers that a draft legislative act does not comply with the principle of subsidiarity. The Commission (or, if relevant, another EU institution which has proposed the draft legislative act in question) is then required to take account of the reasoned opinions that have been issued.

‘Yellow card’ procedure

18. Under Article 7(2) of Protocol 2, where the reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all votes allocated to the national parliaments (the national parliaments of each Member State have an aggregate of 2 votes) then the EU institution must review its legislative proposals. This is known as a ‘yellow card’. There is, however, no obligation on the EU institution to withdraw its proposals.

‘Orange card’ procedure

19. Under Article 7(3) of Protocol 2, where a draft legislative act is subject to the ordinary legislative procedure and reasoned opinions on the draft legislative act’s non-compliance with the principle of subsidiarity amount to a simple majority of votes allocated to the national parliaments, then following the review of the proposals, if the Commission chooses to maintain the proposal, the Commission must submit a reasoned opinion for the consideration of the European Parliament and the Council with a justification of why it considers that the proposals comply with the principle of

⁵ Article 6 of Protocol 2 provides that it is for each national parliament to consult the appropriate regional parliaments with legislative powers.

subsidiarity. If, the Council (by a majority of 55% of votes) or the Parliament (by a simple majority of votes) consider that the proposals are not compatible with the principle of subsidiarity then the draft legislative act requires no further consideration. This is known as an 'orange card'.

Monitoring and enforcement in practice in Scotland

20. The Scottish Parliament plays an active role in considering whether proposed EU legislative acts, which impact in policy areas falling within its legislative competence, comply with the principle of subsidiarity. In considering the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office⁶, the Justice Committee of the Scottish Parliament reported that it did not consider that the establishment of the European Public Prosecutor's Office was necessary in order to achieve the stated objective of tackling EU fraud or that action at EU level would bring greater benefits than the Member States could achieve acting collectively. The full Parliament debated this report on 5 September 2013 and agreed with the Committee's position and this was communicated to the relevant committees of the House of Commons and the House of Lords by the Presiding Officer. Many other national Parliaments considered likewise and reasoned opinions amounting to 18 votes were issued which resulted in a 'yellow card'. The Commission, however, rejected the concerns of the Member States and the legislative proposals progressed to consideration by the Council and the European Parliament. To date, the right conferred on the Member States to challenge an EU legislative act on the grounds that it infringes the principle of subsidiarity has not yet been exercised.

Monitoring and enforcing the principle of proportionality

21. Despite being consulted on draft legislative acts, there is no formal mechanism enabling the national parliaments to object to a draft legislative act on the basis that it does not comply with the principle of proportionality. The procedure set out in Articles 6 to 8 of Protocol 2 apply solely to the principle of subsidiarity.

The flexibility clause

22. Article 352 of the Treaty on the Functioning of the European Union (known as the flexibility clause) is also relevant to any examination of the principles of subsidiarity and proportionality and the exercise of EU competence. Article 352 TFEU provides a supplemental power to the EU to take action in furtherance of the objectives of the EU Treaties but where no specific provisions of the Treaties confer express or implied power on the EU institutions to take action:

'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the

⁶ COM(2013) 534 final.

Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'

23. Naturally, a number of concerns have been expressed about the broad scope of this power and the potential for it to be used in a way which extends EU competence into areas which have not been conferred by the Member States. A number of mechanisms should ensure that this is not the case and that the use of Article 352 as a legal base for the adoption of legislative acts which are beyond the balance of competences set out in the Treaties.

24. First of all, there is the in-built protection provided by the text of Article 352 itself which limits the use of Article 352 as a legal base for measures which are adopted by the Council acting by unanimity. A single Member State may, therefore, block any legislative acts which it considers may be an extension of the competence of the EU.

25. Secondly, In the declarations annexed to Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 concerning the provisions of the Treaties, two declarations are included on the meaning of Article 352.⁷ Declaration No. 42 clarifies the understanding of the Member States on the limited scope of Article 352 TFEU and that it '*cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union*'.

26. Thirdly, Article 352(2) provides that the procedure for monitoring the observance of the principle of subsidiarity (set out above) shall also extend to the use of Article 352 so that national parliaments have a role in monitoring and enforcing.

27. Finally, within the UK, section 8 of the European Union Act 2011 provides that no UK Minister may support a proposal for a draft EU legislative act which uses Article 352 as its legal base unless the draft legislative act has received the prior approval by an Act of the Westminster Parliament.

Future options and challenges

28. We have outlined above how the Scottish Government considers that the principles of subsidiarity and proportionality enshrined in Article 5 TEU should be regarded as cornerstone provisions in the Treaty and should provide effective mechanisms for ensuring the proper exercise of EU competence. Our assessment of the exercise of EU competence in each policy has resulted in the conclusion that these principles are not being adequately observed which we consider derives from uncertainty as to their meaning and application and a monitoring system which is not proving to be truly effective.

29. In the aftermath of the 2014 elections for the European Parliament where the voting turnout and results have reflected a growing disconnect between the EU

⁷ Declarations No. 41 and 42.

institutions and its citizens, the Scottish Government considers that greater observance of the principle of subsidiarity, is one of the key means of maintaining the democratic legitimacy of the EU. The analysis below of how the principle of subsidiarity has been interpreted and applied suggests that the existing Treaty framework established an adequate structure for ensuring that the principle of subsidiarity is observed but that logistics are constraining its effectiveness.

More effective monitoring and enforcement of the principle of subsidiarity

Greater role for regional parliaments

30. With regard to policy areas falling within the devolved legislative competence of the Scottish Parliament, we consider that the Scottish Parliament is the legislature which is best positioned to identify particular regional and local dimensions to EU proposals for legislation which may apply in Scotland. Indeed, both the Scottish Government and the Scottish Parliament use considerable resources in examining the compatibility of EU legislative proposals in policy areas which have the potential to impact on devolved matters with the principle of subsidiarity. Despite this, the Scottish Parliament has no authority to submit a Reasoned Opinion to the European Commission on the compatibility of legislative proposals with the principle of subsidiarity. While the Scottish Parliament can provide input into a Reasoned Opinion issued by the Westminster Parliament, it has no direct voice of its own. This is not a problem where both Parliaments are in agreement over EU legislative proposals, as was the case with the European Public Prosecutors Office, but it could become so if opinions were to differ. Even where views coincide, such as on the draft Directive on the Presumption of Innocence⁸, it is not always clear that the role of the Scottish Parliament feeding views to Westminster is widely understood⁹. It should be remembered that Scotland has a distinct legal system from that of England and Wales and that the regional and local dimensions applying in Scotland are radically different to those applying in the other parts of the United Kingdom. It is, therefore, a major concern that in relation to EU legislative proposals which would affect devolved matters such as agriculture or fisheries, the Scottish Parliament has no remit to provide direct comments to the Commission and must instead rely on the Westminster Parliament, despite the fact that that Parliament has no legislative competence in relation to devolved matters such as fisheries and agriculture in the devolved administrations' territories.

31. This is one example of the benefits that will flow to Scotland from being a full, independent, member state. The Scottish Government also considers it is essential that the procedure for monitoring subsidiarity by national parliaments is extended further to give an enhanced role for regional parliaments.

Increasing time for consideration of legislation

32. Article 6 of Protocol 2 requires that an eight-week period must elapse between a draft legislative act being made available to the national parliaments and the date on which it may be brought before the Council for adoption. This is a very

⁸ COM(2013) 821 final

⁹ For example, <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140210/debtext/140210-0004.htm>, Col 672

short period in order to engage in effective analysis of what are often very lengthy complex legal provisions and to assess the regional dimensions which may come into play. This period is often further shortened in respect of the Scottish Parliament since, as described above, its role is to provide input to the Westminster Parliament so that it can respond in those timescales. This was an issue with the draft Directive on Presumption of Innocence where, owing to the necessity of providing views to Westminster in time for the latter Parliament to meet its own deadlines, there was very little opportunity for discussion in the Scottish Parliament's Justice Committee¹⁰. In this case a draft Directive had been issued prior to the Christmas holidays. The House of Commons' eventual Reasoned Opinion itself quoted the Scottish Parliament's Justice Committee on this problem¹¹.

33. The Scottish Government, therefore, considers that proper and effective scrutiny by national and regional parliaments should be given greater priority in order to increase the democratic accountability of EU legislation. One simple way in which this could be achieved is by extending the period of time which those parliaments have to consider EU legislative proposals.

Enhancing the regard given to the views of national parliaments

34. Following the experience of the Scottish Government on the legislative proposals for the European Public Prosecutor's Office and our examination of the wider EU practice, we consider that greater regard must be given to the views of national and regional parliaments, where these have been expressed, on the compliance of draft EU legislative acts with the principle of subsidiarity. It is not acceptable for a draft EU legislative act to progress without significant amendment where a number of national parliaments have issued reasoned opinions expressing concern with regard to the draft act's compliance with the principle of subsidiarity.

35. The Scottish Government, therefore, advocates a change in approach by the Commission whereby it pays greater respect given to the views of national parliaments before progressing with its legislative proposals. We consider that the current framework set out in the EU Treaties leaves substantial room for the Commission to alter its practise and strengthen the yellow and orange card procedures without the requirement, at this stage, for the formal amendment of the Treaties. Failure by the Commission to adapt its practise is only likely to increase the calls for the amendment of the Treaties going forward.

Right to suggest initiation of legislation

36. We consider that the national and local parliaments in the Member States are in the best position to assess the regional and local dimensions of proposed EU action. With this in mind, we advocate an increased role for national and regional parliaments in the very early stages of the development of proposals for EU legislative acts. Where collective action by the EU action is deemed necessary to achieve the objectives of the Treaties, national and regional parliaments may be best placed to consider the extent of the action that is necessary and how it may best be tailored to the regional and local dimensions prevailing throughout the EU. We,

¹⁰ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8821&mode=pdf>, Cols 4148-4151

¹¹ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxix/8304.htm>, para 18

therefore, support in principle a role for national and regional parliaments to work together to bring forward proposals for EU legislation – something which has been termed a ‘green card’.

Greater monitoring and enforcement of the principle of proportionality and flexibility clause

37. We have highlighted a certain lack of effectiveness with the procedures for national and regional parliaments to enforce compliance with the principle of subsidiarity, despite this we continue to advocate the extension of these procedures to the principle of proportionality alongside their strengthening. National and regional parliaments are well-positioned to identify areas where EU action is going beyond what is necessary to achieve the objectives of the Treaties and straying into action which is best left to a national, regional or local level. As well as being able to consider the proportionality aspects of draft EU legislative acts, those parliaments should also have the ability to highlight these to the EU institutions and to prevent the progress of legislation where its provisions do not comply with the principle of proportionality.

38. Similarly, we would also propose that the strengthening of the procedures for the monitoring and enforcement of the principle of subsidiarity apply to any exercise of the flexibility clause and measures which national and regional parliaments consider have been adopted using the incorrect legal base.

The roles of subsidiarity and proportionality within the wider drive for better regulation

39. The Scottish Government considers that the principles of subsidiarity and proportionality which, respectively, determine the level (EU or Member State) at which action should be taken and the extent to which action can be taken, are in actual fact, expressions of the wider concept of ‘better regulation’, which is being taken forward at EU level through the Commission’s Regulatory Fitness and Performance Programme REFIT initiative.

40. On the domestic front, the Scottish Government has its own distinctive ‘better regulation’ agenda and introduced the Regulatory Reform (Scotland) Act Bill in the Scottish Parliament on 27 March 2013¹². The Act has the aim of improving the way regulation is developed and applied with a view to protecting Scotland’s people and environment, helping business to flourish and creating jobs through increasing sustainable economic growth. The Act aims to tackle the stock, flow and culture of regulation to enhance Scotland’s competitiveness through better regulation – regulation which is *proportionate, consistent, accountable, transparent and targeted*.

41. The Scottish Government recognises that a considerable amount of legislation applying in Scotland derives from the European Union and that, in order to make Scotland an attractive place to do business on a global stage, the way in which EU regulation is developed and applied must also be improved.

¹² The Bill received Royal Assent on 19 February 2004.

42. We recognise, however, that EU regulation has been, and will continue to be, absolutely essential in order to achieved the objectives of the EU Treaties including the establishment and maintenance of the single market. Although there appears to be a general perception that EU regulation is an unnecessary burden on business and enterprise and acts as a brake on economic growth, we recognise that a considerable proportion of EU regulation actually facilitates and contributes to economic growth. Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, for example, is a legislative instrument which facilitates and encourages research and innovation in the field of medicinal products. Regulation 469/2009 enables the manufacturer of a medicinal product to extend the protection provided by a patent to compensate for delays in bringing the product to market so that the product can be fully tested and authorised. Without it, pharmaceutical companies would experience diminishing returns on their research and development of new medicinal products which could result on their relocation out of the EU or a stark reduction in innovation and research and development.

43. Nonetheless, we recognise that the volume and complexity of the EU regulation affecting businesses in Scotland can pose a significant administrative and financial burden on them (particularly small and medium-sized enterprises) and is threatening their ability to recover from the economic and financial crisis. We, therefore, support the Commission's Regulatory Fitness and Performance Programme (REFIT) by which it is seeking to review the entirety of legislation with a view to identifying burdens, inconsistencies, gaps and ineffective measures. The Commission has stated that REFIT is '*the expression of the Commission's ongoing commitment to a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens*'¹³. The Scottish Government is supportive of REFIT and has identified a number of synergies between REFIT and our *better regulation* agenda. At their core, both initiatives share the same goal – the simplification of the regulatory burden – and the same means of getting there – improving the process by which legislation is made. Key to this process are the Commission's commitment to amend and consolidate EU legislation; the commitment to increased evaluations and fitness checks for EU legislation; and the commitment to withdraw or repeal unnecessary proposals and legislation.

44. We consider that the exercise of EU competence should also accord with the principles of better regulation, that is regulation which is *proportionate, consistent, accountable, transparent* and *targeted*. We, therefore, advocate:

Proportionate regulation:

- Greater adherence to the principle of proportionality in developing EU legislation so that burdensome and complex legislation which is not necessary to achieve the given objectives becomes a thing of the past.
- Where EU legislation provides for sanctions and penalties for non-compliance with its provisions, greater flexibility so that the sanctions and penalties align with the level of

risk posed by non-compliance and the outcomes sought.

Consistent regulation:

- Greater adherence to the framework set by the EU Treaties with less '*competence creep*' without formal amendment of the Treaties.
- Where Regulations are considered to be more appropriate than Directives, greater use of Regulations which create a framework of principles rather than impose detailed rules, as was used in the Access and Benefit-Sharing Regulation to implement aspects of the international Nagoya Protocol on access to genetic resources.
- Increased review of dated existing EU legislation which is not appropriate for today's current climate.

Accountable regulation:

- Greater adherence to the principle of subsidiarity in developing EU legislation so that policies and laws are made closest to the people that they are most likely to affect.

Transparent regulation:

- Enhanced consultation on proposals for legislation with the conducting of more detailed impact assessments, **including at those stages in the legislative process where significant amendments to the proposals are made.**

Targeted regulation:

- Greater use of Directives which give greater flexibility to the Member States to incorporate EU laws into their domestic legal systems in a way which is tailored to, and fits better with, differences in geography, customs and legal systems.
- Greater use of exemption schemes so that, for example, onerous regulatory burdens which are appropriate for large enterprises are not imposed on smaller and medium-sized enterprises.

45. Our responses to the Calls for Evidence issued in a number of the substantive policy areas of the Review of the Balance of Competences provided illustrations of how the principles of subsidiarity and proportionality have impacted on some of the most important policy areas within the devolved legislative competence of the

Scottish Parliament. We have attempted to recapture some of these in the Annex to this response.

Conclusion

46. While the exercise of EU competence adds a layer of regulation which can sometimes prove to be frustrating, the wider commercial benefits of being able to access the single market by conforming to EU rules and regulations more than outweighs these frustrations. However, this does not mean that EU regulation is always appropriate. Accordingly, the Scottish Government is committed to increasing its influence over the development of EU law and policy so that these frustrations can be addressed within the existing framework of the EU Treaties. The work conducted by the Scottish Government in the context of the Review of the Balance of Competences clearly demonstrates a requirement for greater regionalisation (subsidiarity) and flexibility (proportionality) in EU regulatory activity. While EU competence across a wide swathe of economic and social policies is necessary to drive forward common policies and maintain a level playing field in the single market, much could be done to improve the process through which the EU institutions operate and discharge their functions at every stage in the legislative process.

47. The Scottish Government considers that the current framework of the EU Treaties provides solid foundations for the proper exercise of the competences conferred on the EU by the Member States. Our assessment of the exercise of EU competence suggests, however, that the protections afforded in the Treaties, particularly the principles of subsidiarity and proportionality, are not being fully observed and that reform, within the existing Treaty framework, is both necessary and desirable to ensuring that the EU is not acting outside of its competence or exercising it in a way which does not respect regional and local dimensions. This would assist in reconnecting the EU to its citizens, a key prerequisite of the EU Reform Agenda.

Annex – Subsidiarity and proportionality in practice

The Environment

Proportional transposition and implementation

1. Unlike EU regulations, EU directives are binding on the Member States only as to the result to be achieved and leave the discretion to the national authorities as to the choice of form and method for implementation. Directives, therefore, require to be transposed into national law. The transposition of EU directives into domestic legislation is a matter for the national authorities and must also be done in a proportionate manner. Rather than 'gold-plate' transposing legislation by imposing more onerous obligations, national authorities should consider the outcomes being pursued by the directive against the context of the domestic situation with a view to transposing and enforcing the directive in a manner which is consistent with achieving those ends, without 'gold-plating'.

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

3. The Commission has launched its own better regulation initiative (REFIT) and has set a programme of activity for future years, including the planned review of the Habitats Directive in 2014/15. We are working with it and key allies to feed in lessons from the Scottish approach, including lessons from e.g. wind farm experience such as the Viking Case in Shetland and subsequent offshore cases. We are also promoting the benefits of the overall Scottish approach to better regulation, which puts emphasis on issues such as having a sophisticated (rather than mechanical process); taking social and environmental as well as business issues into account; and involving the social partners.

Principle-based framework regulations

4. In order to limit the burden of transposition, a new development in the European Commission, in particular DG Environment, is the use of EU Regulations which create a framework of principles rather than impose detailed rules. This is the approach that was taken, for example, in Regulation (EU) No 511/2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources.¹⁴ Such use of Regulations ensures that the principles set out in the legislation are directly applicable in the Member States while still leaving the

¹⁴ [Regulation \(EU\) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.](#)

flexibility of how to achieve the outcomes and enforce the principles to the Member State.

Risk-based regulation and enforcement

5. A further means of enhancing the proportionality of EU legislation, particularly but not exclusively, in the environment field would be to take a more risk-based approach at two stages. Firstly, vary the level of regulation, penalty and the detailed requirements within the legislation according to the level of risk posed and the outcome sought. Secondly, vary the response to an apparent failure to correctly implement regulation to the level of risk posed by the failure to achieve outcomes.

6. The European Commission's main tool to ensure and enforce the compliance of Member States with the obligations imposed on them by EU law is through infringement proceedings. This often constitutes a disproportionate response to the level of risk posed by the specific failure. The Scottish Government is encouraging the Commission to take a more risk-based approach as has, for example, been adopted by the Scottish Environment Protection Agency on the domestic front in Scotland. We are also encouraging the Commission to make greater use of the pilot scheme which enables them to investigate an alleged breach of EU law on a more informal basis with the Member State and seek resolution before any formal procedures are commenced.

Agriculture

7. In many areas of agriculture and related policy it is vital that there should be the ability for local tailoring of EU policies to meet specific needs. Indeed, the need for local tailoring has increased as a result of the big changes which agriculture policy has undergone since the 1960s and which have accelerated in recent decades. The balance between EU-level action and local discretion must be constantly reviewed and, if recent trends continue, the need for local-tailoring must be expected to increase in the future.

8. EU enlargement has resulted in a much greater degree of heterogeneity between Member States. This is particularly relevant to agriculture, where production systems are inevitably constrained by factors such as climate and quality of agricultural land. The original six EEC members had a combined population of around 170 million and only stretched from Germany to Sicily north to south, and from Brittany to Bonn east to west. Currently the EU 28 has a total population of over 500 million, stretching north to the Arctic Circle, and east to west from Portugal to the Black Sea. There are significant differences in the levels of economic prosperity in the EU 28, with GDP per capita ranging from a low of around €13,000 to a high of €80,000. In light of these trends, the EU has accepted that a one-size-fits-all approach to the CAP would be untenable, and has introduced more local flexibility in many parts of the policy. This development is to be welcomed. Indeed it is particularly important for those parts of Europe where conditions are most different from the European average. This is the case for Scotland, where farmers and crofters face relatively extreme farming conditions compared with European norms.

9. One illustration of this is that about 85% of Scotland's agricultural land is classified as 'Less Favoured Area' under the CAP, meaning that agricultural systems

there are seriously constrained by land quality and climatic factors. So the introduction of more local discretion into the CAP has been vitally important for Scotland. However, there is a potential drawback to this development, in that increasing the level of local discretion within EU policies can lead to greater complexity. This can create additional burdens for both beneficiaries and authorities. In the case of Pillar 2 of the CAP, the recently-agreed rural development regulation for 2014-2020 aims to reduce complexity slightly, for instance by removing some of the requirements for a certain percentage of each programme to be spent on particular policy areas. This re-setting of the balance between local flexibility and EU-wide uniformity was necessary, and is to be welcomed.

Transport

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

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

12. There are short-term challenges in funding strategic transport infrastructure at both a national and EU level. Longer term, as the EU continues to expand, there may be challenges in balancing the need for minimum standards (e.g. on safety, passenger rights) while ensuring that harmonisation proposals do not lead to abortive costs and indirectly penalise Member States and regions who have already invested heavily to improve in these areas.

13. In terms of rail transport, the European Commission's 2011 White Paper "Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system" set out a vision to establish a single European railway area with the intention to create an internal railway market and remove unnecessary technical and administrative barriers. The Commission subsequently published its proposals for the Fourth Railway Package in 2013 covering interoperability and safety, domestic passenger liberalisation, independent infrastructure management, and ensuring a skilled workforce. Responsibility for the specification and funding of the railways in Scotland is devolved to the Scottish Ministers and it is their ambition to have a railway that offers value for money, ensures that the railway industry acts in a coordinated, integrated manner, and, crucially, has passengers' interests at its heart.

14. The Scottish Government is therefore supportive of measures that can help support growth in the industry, help improve the quality of services to passengers, improve efficiency, and ensure a level playing field across Member States. With respect to the most recent EU proposals set out in the Fourth Package, it is vital that procedures around the contracting for rail passenger services as well as rules governing the structural relationships between operators and the domestic rail

infrastructure manager are practical and flexible with a degree of subsidiarity to reflect local circumstances and priorities for rail.

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

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

Fisheries

17. Fisheries management decisions are better made by those with practical experience and understanding of the fishing industry. These parties have the greatest interest in sustaining fisheries and are best able to change management actions at short notice to take account of stock dynamics and highly variable marine systems.

18. This is why Scottish Ministers have championed the regional approach to fisheries management during the reform of the Common Fisheries Policy. The Scottish Government has succeeded in significantly moving management decisions away from the centralised model that has hamstrung the CFP previously, though Ministers recognise this should simply be a first step towards greater decentralisation.

19. Regionalisation provides a means of addressing the drawbacks of the current system. Agreement to high level principles and objectives at the EU level will help establish the direction for management policy, which can be implemented and adjusted rapidly at regional level, sensitive to local needs. This approach helpfully shifts the focus of the EU institutions from process to strategic outcomes.

Energy

20. The Scottish Government recognises that much of the key legislative elements relating to the oil and gas industry are matters reserved to the UK Parliament. However, their impacts are very much felt in Scotland and elements of environmental legislation relating to the offshore industry are applied from Scotland. While we acknowledge the important role that the European Commission plays in proposing and implementing directives and regulations that ensure a level competitive playing field among EU Member States, it must always be borne in mind that there are some areas of industry that are of more importance to some Member States than others. This can lead to tensions when the Commission is proposing new legislative measures in industries like offshore oil and gas, where a one-size-fits-all method of regulation may not be appropriate.

21. A good example of this was the Commission proposal for a new regulation to centralise control of offshore health and safety and environmental protection in Europe, instead of the current situation where each national government is responsible for regulating offshore activities in their own waters. The Regulation would apply to all of the EU 27 Member States, as well as Norway, which is not a member of the EU. The UK position, which was fully backed by Scottish Ministers, was that a regulation would have been disastrous for an industry that was already leading the world in terms of safety. It took no account of the fact that a world-leading, robust regulatory system was already in place. The UK, again with the backing of the Scottish Government, argued successfully for a Directive instead.

22. Supporting the UK Government line, the Scottish Government has been opposed to any proposal from the Commission that would have involved binding European legislation on regulating unconventional hydrocarbons, with a key concern being lengthy delays in implementation of specific rules. The guidance of the Commission that was published in January 2014 was a satisfactory outcome. However, while not binding on Member States, it is clear that the Commission will be minded to recommend legislation if Member States do not implement what it sees as the minimum requirements for a well-regulated and safe shale gas industry.