



## British Balance of Competence Reviews, Part I:

### 'Competences about right, so far'

Michael Emerson and Steven Blockmans

#### Abstract

This paper is the first in a series for a CEPS-EPIN project entitled "The British Question and the Search for a Fresh European Narrative". It is pegged on an ambitious ongoing exercise by the British government to review all the competences of the European Union with the aid of evidence submitted by independent stakeholders. The intention is that this should provide a basis for informed debate before the referendum on the UK remaining in the EU or not, which is scheduled for 2017. The paper first summarises the first six reviews, each of which runs to around 80 pages. Since there will be 32 reviews in all, to be published progressively by early 2015, the overall output will be a massive contribution to knowledge about the workings of the EU. The first six reviews cover foreign policy, development policy, taxation, the single market, food safety, and public health.

The present authors add their own assessments of these materials. The reviews are impressively researched. While understandably giving due place to British interests, they are of general European relevance. The substantive conclusions of this first set of reviews is that the competences of the EU are judged by respondents to be on the whole as 'about right', which came as a surprise to eurosceptic MPs and to the tabloid media, who reacted with 'Whitehall whitewash' language. Our own view is that the reviews are objective, and these populist complaints illustrate the huge gap between the views of informed stakeholders and general public opinion, and therefore also the hazard of subjecting the 'in or out' choice for decision by referendum. If the referendum is to endorse the UK's continuing membership there will have to emerge some fresh popular narratives about the EU, and so the paper concludes with some thoughts along these lines, both for the UK and the EU as a whole.

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ISBN: 978-94-6138-362-4

Available for free downloading from the CEPS (<http://www.ceps.eu>) and EPIN (<http://www.epin.org>) websites

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# British Balance of Competence Reviews, Part I:

## 'Competences about right, so far'

*EPIN Working Paper No. 35 / October 2013*

Michael Emerson and Steven Blockmans\*

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### 1. Introduction

The political context for the present project was set by Prime Minister Cameron's speech about Europe on 23 January 2013, when he announced his intention to "negotiate a new settlement with our European partners", and submit the results for an 'in or out' referendum in 2017. While this five-year process is full of political and economic hazards, one positive feature of it is the British government's decision to launch a comprehensive and open investigation of all the EU's competences, based on evidence submitted by independent stakeholders and individuals.

This 'Balance of Competences Review' is going to consist of no fewer than 32 sectoral reports (similar actually to the 35 chapters of the accession process), of which the first six were published in July 2013. The remainder will be published at roughly six monthly intervals until early 2015 (as listed in Annex A). The present document assesses these first six reviews, each of which is quite voluminous.<sup>1</sup> While UK interests are understandably fully represented in the reports, their overall content and research quality will be of value to the EU as a whole. The reports are relevant to how the EU should respond to the rising tide of euroscepticism in many member states, even if UK public opinion is the most extreme in this respect. The reviews should be useful to other member state governments, such as the Netherlands and Germany, which are keen to see stricter subsidiarity and proportionality tests applied in EU regulatory affairs.

The subtitle of this document, 'Competences about right', is ours. However, it serves to highlight a striking and perhaps unexpected feature of the first set of reviews. It remains to be seen whether the narrative changes later on, since some of the sectoral reviews to come may be more problematic than these first ones.

In the present paper we first review each of the six reports individually. At the end some preliminary overall conclusions are drawn, with reflections on how to identify some fresh European narratives. The need for this is already pressing in view of the forthcoming European Parliament elections in May 2014; thus well before the British referendum scheduled for 2017.

### 2. The First Six Reviews

#### 2.1 Foreign policy

This review examines the EU's foreign policy, or to use formal language its Common Foreign and Security Policy (CFSP), including Common Security and Defence Policy (CSDP). After giving an overview of Britain's foreign policy interests, the Review gives a richly documented

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<sup>1</sup> Links to these six reports are given in: (<https://www.gov.uk/government/news/first-reports-in-the-review-of-balance-of-competences-published>).

account of the complex legal and institutional framework for the EU's foreign policy, its instruments and tools.

The review does not go into the EU's external action under non-CFSP competences, which will be for other, sector-specific reviews to cover (e.g. issues pertaining to trade and investment, EU enlargement, or the defence industry, for that matter). However, the report does cover civil protection, and the solidarity clause in the event of terrorist attacks or natural disasters, which fall outside of the scope of CFSP.

These editorial choices highlight important legal points. First, they underline the legal specificity of the CFSP. Indeed the CFSP is the only policy area covered explicitly in the Treaty on European Union (TEU) because it is "subject to specific rules and procedures" (Article 24(1), TEU), whereas all other competences are defined in the Treaty on the Functioning of the European Union (TFEU). The CFSP is an area characterised by the intergovernmental method of decision-making (largely by unanimity voting). The review expresses this most vocally with respect to the CSDP: "*each Member State has a power of veto, not least over the deployment of EU military operations and civilian missions. (...) The Member States can also act unilaterally, or via other international organisations, not least NATO, when they see fit (p.5)*". Moreover, the roles of the Commission, the European Parliament and the Court of Justice remain limited in CFSP. In other words, the member states retain a high degree of sovereignty and control over the CFSP and CSDP. There are no powers to be repatriated here.

Second, they expose problems related to competence delimitation between areas (CFSP and non-CFSP), which are governed by the different procedures and instruments. Whereas the EU's specific competences in the defence field (CSDP) are more or less clearly defined (Articles 42-46 TEU), the open-ended notion of "all areas of foreign policy and all questions relating to the Union's security" (Article 24(1) TEU) is rather unhelpful in determining the scope of CFSP. The sphere of the CFSP does not extend to those external competences attributed to the Union under the TFEU (trade, financial and technical assistance, etc.). In the event of different interpretations among EU institutions and member states, it will eventually be up to the Court of Justice to settle the boundaries between CFSP/CSDP and the other EU external policy domains. Such disputes are currently pending judgment before the Court.

Third, the CFSP is a non-exclusive EU competence, since it runs concurrently with national competences in the same field. To make sure that the CFSP would not affect national competences, Declarations Nos. 13 and 14 to this effect were, upon the insistence of the UK,<sup>2</sup> attached to the Lisbon Treaty. In the same spirit, the review offers an *ex post* justification of the UK's controversial stance over 'representation creep' in the EU institutions' role in international organisations, which it is argued can lead to 'competence creep' (to use British political language). The criticism was made that High Representative Ashton was incrementally expanding her competence in external representation on behalf of the EU and its member states. For this reason, and much to the annoyance of the other 26 member states, in 2011 the UK held up the adoption of approximately 100 CFSP declarations, causing them to expire. The issue was supposedly resolved at the Council meeting of 22 October 2011 when there was endorsement of the "General arrangements for EU statements in multilateral organisations", although its content seems little more than a statement of the obvious.

Fourth, there is the need to reconcile such differences in order to enhance coherence in policy-making and the visibility and effectiveness of EU external action (writ large). This is illustrated with a set of case studies of prominent foreign policy issues in which the EU has been or is involved: the strategic relationships with China, Russia and the US; the Arab Spring; Iran's nuclear ambitions; human rights in Burma; restoring order in Mali; the stabilisation of Somalia;

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<sup>2</sup> See House of Commons, Foreign Affairs Committee (2008) Foreign Affairs Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-8, London, 16 January 2008.

ensuring long-term stability in the Western Balkans; and rebuilding Afghanistan. These case studies show, in various ways, how the political, security and defence aspects of the EU's external action (led by the member states and the European External Action Service and decided by consensus in the Council) are increasingly interdependent with non-CFSP aspects of foreign policy, such as trade, energy, and transport relationships (which are largely led by the Commission and, in general, decided by qualified majority vote in the Council and majority vote in the EP).

Based on analysis of the evidence, the report draws conclusions about the value added and the disadvantages for the UK of working through the EU in foreign policy. The key benefits include: *“increased impact from acting in concert with 27 other countries; greater influence with non-EU powers, derived from [the UK's] position as a leading EU country; the international weight of the EU's single market, including its power to deliver commercially beneficial trade agreements; the reach and magnitude of EU financial instruments, such as for development and economic partnerships; the range and versatility of the EU's tools, as compared with other international organisations; and the EU's perceived political neutrality, which enables it to act in some cases where other countries or international organisations might not.”*

The disadvantages of operating through the EU are: *“challenges in formulating strong, clear strategy; uneven leadership; institutional divisions, and a complexity of funding instruments, which can impede implementation of policy; and sometimes slow or ineffective decision-making, due to complicated internal relationships and differing interests.”*

## **Assessment**

On foreign policy in general *“the majority of the evidence we received argues that it was strongly in the UK's interests to work through the EU”* (p.87), with the detailed arguments cited above). The disadvantages noted about slow and complicated decision-making (as also quoted above) are largely the result of the multiple and differentiated sets of competences and decision-making rules. The unanimity rule for all 'pure' foreign policy is in itself a major constraint, but this is compounded by the need often to join up with other EU competences that have external impacts.

On the other hand the complexity of bringing together the EU's many external relations capabilities is also a reminder that the global governance challenges of the 21<sup>st</sup> century are profoundly changing the nature of foreign policy (writ large). The need for more effective global regulatory policies fits well with the broad development of the EU's own regulatory competences that occurred over the last decades. By contrast, in the hypothesis of UK secession from the EU, its residual national capabilities would (in the view of the present authors) be thin and carry little weight by comparison. The view that secession by the UK would see a downgrading of its standing internationally has already been openly stated by the United States at the highest level, or as several commentators in the Review put it, the UK would be deprived of the EU serving as a 'force multiplier' for its foreign policy interests.

On defence, stakeholders were 'unanimous' in saying that CSDP operations could be improved, and that 'most commentators' considered that this *“came down to member states' political will, both to deploy their personnel and invest in capabilities”* (p.76), rather than a matter of institutions and legal competences.

The Review presents no proposals for changing EU competences in this field, either for enhancement or repatriation (indeed there is little to repatriate), and cites the argument that *“competence in the sense of effectiveness concerns most commentators more than legal competence does”* (p.76). In the view of the present authors this is a somewhat disingenuous argument. Of course effectiveness and efficiency are paramount objectives for whoever holds the competences, but simply to advocate better coordination and more political will seems to

reflect more a political preference to retain the status quo, rather than for the engineering of solutions.

In its summary the Review says that it “*suggested ways in which the EU could reform its external action to be more effective in playing its part*” (p.7). While all can agree that there is room for qualitative improvement the Review is not so clear about how to do this, beyond saying that it is not a matter of changing legal competences. By contrast, eleven foreign ministers of the EU, including all the founding member states, issued a declaration in September 2012 favouring more majority voting in the foreign and defence fields.<sup>3</sup>

## 2.2 Development cooperation and humanitarian aid

*A parallel competence.* In both development cooperation and humanitarian aid the EU has parallel competences, meaning that the EU has competence to carry out activities and conduct a common policy, but that this does not prevent member states from exercising theirs (Article 4(4)TFEU). As a result there is nothing to repatriate in the sense of the member states regaining freedom of action for their own policies. The general view projected in the report is in support of this parallel competences regime. Criticisms make the case for improved implementation, not repatriation of competences.

Parallel policy-making at the EU level and at the national level still, however, has the potential to result in conflicting policies. Member states have a tendency of 'uploading' their development policies and objectives to the Union level, resulting in an EU development programme with an overloaded agenda.

*Scale and range of activity.* The EU and its member states account for about 60% of global Official Development Assistance (ODA). The report acknowledges that the Commission's large aid budget provides economies of scale and strengths in key areas such as infrastructure and regional projects. It leverages contributions from member states that might not otherwise commit equivalent funds to international development. Because EU aid is allocated over seven-year cycles, it provides a more predictable and longer-term source of finance than aid provided by donor countries (including the UK) or other organisations. The EU's global reach is much greater than that of any of the member states acting individually.

The EU is by far the UK's largest multilateral aid partner: £1.2 billion of UK aid was managed through the European Commission in 2011/12. Most of this aid (£812 million) is non-discretionary because it forms part of the UK's overall contribution to the EU general budget, which it is legally obliged to pay by virtue of being a member state. The rest is channelled through the European Development Fund (EDF), which is governed by the Cotonou Agreement. The UK spends the remainder of its aid budget bilaterally, working directly with 28 priority countries.

The EU is a major contributor to global efforts to reduce poverty, it is perceived to be politically neutral, it provides a platform for collective action and seeks to coordinate the efforts of its member states – all facts that are seen by many respondents as being major advantages of working through the EU. These attributes add value and a multiplier effect to the UK's efforts to achieve its own policy objectives, as exemplified by the UK's role in negotiating the EU's 'Agenda for Change' programme of reform proposals for a more strategic EU approach to reducing poverty, including a more targeted allocation of funding.

The EU's competences in development cooperation and humanitarian aid link or overlap with related areas of EU competence in trade, neighbourhood relations, democracy and human rights, agriculture, fisheries, energy, environment, climate change and migration. This illustrates the

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<sup>3</sup> Eleven EU foreign ministers, “*Future of Europe*” *communiqué*, 18 September 2012.

richness of the EU's toolbox compared to other multilateral organisations, but also the coordination challenges that this poses.

*Institutional issues.* Since the introduction of the European External Action Service (EEAS) in 2011, responsibility for managing and disbursing EU aid has been split between the EEAS and two Directorates-General of the European Commission: that for Development and Cooperation (DEVCO), and that for Humanitarian Aid and Civil Protection (ECHO). In this collaborative framework, the Commission retains responsibility for developing policy proposals and for the overall management of the external instruments, whereas the EEAS contributes to the programming and management of these instruments. In doing so, the EEAS works with the Commission throughout the process and submits proposals to the Commission for adoption. The High Representative (and therefore the EEAS) is also tasked with ensuring the overall political coordination, as well as the unity, consistency and effectiveness of the EU's external actions and instruments. The report paints a fair picture of the well-documented difficulties that exist in finding the right working relationship between DG DEVCO and the EEAS, in particular.

These issues are well known in the member states themselves, who have experience of various models for the integration of development policy and management under foreign offices, or their separation. In the new EU system the argument has been made for the DEVCO to be integrated with the EEAS. Debate over these issues will doubtless continue. The division of roles between these two EU bodies is indeed far from simple.

*Heavy procedures.* The report's biggest lament is that the EU development programme management and delivery is complex and inefficient. The checks built into the financial management systems (and the Financial Regulation in particular) have contributed to a common criticism of the Commission that it is overly bureaucratic. Commission rules are inflexible and cumbersome, which hampers the ability of management to achieve results; there is no clear overall system for demonstrating the results of EU-funded activities; and there is limited flexibility after funds have been committed to specific activities and a risk of steep fall in support once EU funding has ended. The report considers as a major disadvantage the fact that the EU does not systematically measure the results and outcomes of EU aid.

## **Assessment**

The 'parallel competence' regime of development cooperation is not in itself challenged. The member states retain freedom to run their own development policies, and there is no argument made that the EU should cease its activity in this field; on the contrary, the main argument is that the EU's programmes serve as a multiplier for UK (and other member states) policy objectives, both in scale and range. The main criticism about efficiency leads into the well-known matter of cumbersome procedures at the EU level, but here (in the opinion of the present authors) the member states and European Parliament have to take their responsibilities for imposing on the Commission so many checks and constraints, which the Commission itself often considers excessive. The new institutional arrangements between the EEAS and the Commission (DEVCO and ECHO), remain the subject of uneasy concern, and may require revision in due course.

### **2.3 The single market**

This review of the single market is a preliminary overview of a vast field, with many of the other reviews due to go into much more detail sector by sector, including those that follow below.

Overall, the review observes a broad consensus that the single market is at the core of the EU development that has driven growth and prosperity in the member states. It is noted that most studies concur that the single market has brought appreciable benefits to the EU economy as a whole, including that of the UK.

It highlights the strong influence that the UK has had on the development of the single market, driving it in a broadly liberalising direction. The big move towards completing the single market began in 1985, when the objective was set to achieve this goal by 1992 with the aid of 279 legislative measures, masterminded by the Commissioner Lord Cockfield. There were two general keys to this achievement; first the move to qualified majority voting in the Council; and second the increased emphasis on the method of mutual recognition as opposed to harmonisation.

Business interests note that the single market regime brings qualities of legal certainty and market openness, but also carries regulatory burdens. These burdens are not necessarily greater than if there were national regulations, however, and of course enterprises engaged in cross-border business are saved from having to master 28 different regulatory regimes.

In seeking to summarise what powers remain in the hands of member states, the review rightly comments that the boundary between EU and national competences sees no clear borderline, but rather a continuous process of interactions. Member states remain free to act as long as they do not infringe upon EU law, and in particular any restrictions on the free movement of goods, services, people and capital are subject to legal challenge.

The review analyses effects on the economy, on economic actors, and on policy-making.

In goods market integration under the single market has meant the development of complex cross-border supply chains for both material and service inputs. However, integration has lagged behind in some important network industries, including energy, telecoms, transport and the digital IT sector. Whereas the early single market agenda has reached a stage of maturity, for the network industries much remains to be done, and many popular comments that the EU is 'over-regulated' misses this point.

As regards foreign direct investment (FDI) there is a particular British interest in the single market, since the UK has been winning a disproportionate share of the EU total, notably from Japan. It is generally considered that international investors would downgrade the ranking of the UK as an investment location in the event of its secession from the EU and mean the loss of completely secure access to the single market.

Regarding the burden of regulations on businesses there is a broad distinction between large internationally oriented businesses that place a high value on legal certainty for their operations, whereas small and medium-sized businesses that do not export would prefer less regulation. However, the Review notes that it is not self-evident that national regulations would be less burdensome. UK respondents have two particular concerns, that the UK itself may be 'gold-plating' its implementation of EU regulations with unnecessarily burdensome provisions (but the evidence for this is not clear), and that other member states may be less diligent in implementing measures than the UK.

As regards the policy-making process the review notes the significant influence of the UK in pushing single market policy in a liberalising direction, and indeed other liberally oriented member states are concerned that secession by the UK would weaken this strategic outlook. For UK interests contemplating the prospect of secession there would be a double risk, both that access to the EU market would become uncertain, and that the single market regime itself could become less liberal.

Looking to the future the review considers that a new long-term strategy for the single market will be called for after the renewal of the Commission and Parliament in 2014. This will need, on the one hand, to fit in with the growing globalisation of the world economy, and on the other hand be reconciled with the widening scope of eurozone economic governance, notably in financial markets. On the question of what priorities to set for making good weaknesses in the single market, the Review highlights the case for the Digital Single Market.



Finally, the review asks where the UK might gain from the EU doing less in the single market area. If this meant weakening the depth of integration, “..it is hard to see that could be in the UK’s interest” (p.57). Although it is easy to say that the EU should regulate less, to justify this in operational terms is not so easy when it comes to saying what and how. The review acknowledges the continuous pressure from markets and technological change to develop new or revise existing regulations. “The EU could help itself in this area by, for example, ensuring it has a properly functioning mechanism that screened legislative proposals more systematically and objectively, for example that a proposal would only proceed if it clearly had a positive impact on growth” (p.57). The present authors concur that there is much room for improvement of the policy-making and regulatory processes in the EU, and the REFIT programme aims at this, which the Review does not mention.<sup>4</sup> The question therefore is whether this is a ‘properly functioning mechanism’.

## Assessment

At the strategic level the review has shown how the UK has been a leader/key driver in support of a liberal regulatory order in the single market. The appreciable economic benefits of the single market to the EU as a whole, including the UK, are considered matters of broad consensus. The UK’s interest in the single market is highlighted by its success in attracting a disproportionate share of foreign direct investment from third countries, which would be undermined by secession.

The review does not explicitly discuss the consequences of hypothetical secession. But since this is scheduled to be the subject of decision by referendum it is necessary to be clearer on this point. A seceding UK would surely wish to retain secure access to the EU single market, but the only evident model for doing this is the EEA regime enjoyed by Norway with Iceland and Liechtenstein, which the British Prime Minister has ruled out on grounds that it would mean an unacceptable loss of sovereignty. Anything less than this opens up a large unknown as to what the post-secession regime would consist of, however. One hypothesis is that existing market legislation of the EU would remain in force until and unless it was repealed or replaced. However, what is certain is that a seceding UK would have no say in the adoption of new EU regulations or revisions of old ones, and no assurance at all that the direction of EU single market policies might not go in directions that were against its interests. As the review clearly shows, the EU’s single market regulatory processes are in continuous interaction with the dynamics of globalisation and technological change, so merely keeping existing EU regulation on the books would soon become an obsolete option.

## 2.4 Taxation

The EU’s tax regime is characterised by strong harmonisation of the main indirect taxes (VAT and excises), but much more limited actions in the field of direct taxation. The whole field is covered by the unanimity decision-making rule.

Overall “respondents and interested parties were content with the current balance of competences, taking into account the protections offered by unanimity voting” (p.6). EU level action is judged appropriate where there is an internal market justification and the principles of subsidiarity and proportionality are respected.

The indirect tax regime for the VAT has a largely harmonised tax base. Member states retain freedom to set the rates subject to minima (not less 15% for the standard rate, and 5% for reduced rates). Respondents generally welcomed this as ensuring a level playing field in the single market and facilitating cross-border trade. In addition the UK has enjoyed a special

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<sup>4</sup> European Commission, “Regulatory Fitness and Performance (REFIT): Results and Next Steps”, COM(2013)685, final, 2 October 2013.

derogation from accession, allowing the zero rating for VAT of some products. Excise duties on tobacco, alcohol and energy are subject to minimum rates, but above that the member states are free to set the actual rates. This basic regime for indirect taxes is not contested.

In the fields of direct taxation, both for person and corporations, the EU's actions have been confined to easing cross-border problems, rather than touching on the main issues of tax bases and tax rates. There is one proposal for a common consolidated corporate tax base (CCCTB) currently under discussion as a possible action under 'enhanced cooperation'. The UK opposes this, seemingly out of doctrine to avoid any major increase in EU fiscal powers, whereas the case for the CCCTB is to reduce business tax accounting overhead costs and to improve fiscal transparency, without constraining national powers to set tax rates. This proposal encounters objections from other member states, however, and appears to be deadlocked.

In the business tax field three measures to lessen obstacles for business across borders are highlighted:

- The Mergers Directive
- The Parent-Subsidiary Directive
- The Interest and Royalties Directive

The view of respondents was generally to welcome these measures as reducing various tax liabilities that hinder cross-border business.

Respondents welcomed the role of EU law in enforcing the fundamental freedoms, including the illegality of fiscal discrimination against individuals or corporations on grounds of nationality.

Three particular concerns are prominent in the Review. One is the inclusion of tax aspects in various sectoral policy initiatives, which themselves are subject to qualified majority voting. Examples quoted include fiscal aspects of the European Emissions Trading Directive and the Eurovignette Directive for road freight, which were adopted on non-tax legal bases. This is seen as eroding the unanimity principle for taxation.

Second, there is concern over the role of the European Court of Justice. While its positive role in enforcing EU law in the tax area is noted in several decisions, some respondents also view it as making rulings that go beyond its competence; effectively taking legislative decisions that elude the veto power of member states, for example in details of the VAT regime. However, one respondent noted a change in the Court's approach since 2005 – effectively attenuating this problem.

Third, there is concern over the use of enhanced cooperation in the tax field, as exemplified by both the CCCTB idea already mentioned, and the proposed Financial Transaction Tax (FTT). The concern of the City of London is that the FTT would impose requirements on non-participating member states, and the UK in particular because of the size and structure of its financial markets. However, this proposal also seems to be stuck amidst widespread disagreements over its desirability or feasibility, and the present authors also consider it to be unsound.

There are further detailed concerns about the need for timely updating of EU law in the fiscal field and for better impact assessment to accompany proposals.

## **Assessment**

As noted, the overall assessment is that UK respondents find the broad level of EU competences to be about right.

The fundamentals of the EU's tax regime are supported by the respondents, namely, limited and clearly demarcated competences in the indirect and direct tax field, and ongoing measures at the

level of details to facilitate cross-border business. The UK's strong preference for the unanimity principle in this field is not seriously challenged by the rest of the EU. Neither is the UK's special derogation in the VAT field under any threat. While there has been some continuing debate about creating new 'own resources' for the EU budget, this is not an operationally live issue at present.

The several areas of concern mentioned are typically issues for ongoing negotiation, with thorough debate of pros and cons. For example, the present authors would join in criticism of the proposed Financial Transaction Tax, which would best be dropped. But we would support the Common Consolidated Corporation Tax Base proposal, and find the UK's objections unconvincing.

As regards the general concern that EU actions under enhanced cooperation risk prejudicing the interests of non-participating EU member states, several comments are in order. There have to be at least nine states to take part in the action, all member states may participate in the Council's deliberations on it, but without a vote for non-participating states,<sup>5</sup> and its content has to comply with the EU treaties and law and not undermine the internal market. On the other hand, and even more important for the UK but not made clear in the review, in the hypothesis of secession these risks would be categorically higher, since from the outside there would be no protections at all. But in any case both the two cases in point (the CCCTB and FTT) fail to progress at the level of EU legislation, so the UK's anxieties should not be exaggerated.

## 2.5 Public health

Although public health is a relatively new express competence of the EU at the level of treaty provisions, standards for products involved in public health care have long been subject to EU legislation under its single market competence (medicines, medical devices, nutrition and labelling, tobacco & alcohol, etc.). In addition, there are important implications of EU legislation for public health policies in the area of free movement of persons and provision of services, and employment policy. While these activities are of considerable importance, the treaties nonetheless make it clear that the competence for organising and delivering health care lies with the member states.

This Review is notably rich in content and in the contributions by professional stakeholders, including medical and nursing professions and industries supplying medicines and medical devices. Overall on the basis of evidence submitted, it was observed that stakeholders considered the present balance of competences to be '*broadly appropriate*'.

For medicines and medical devices, the majority of respondents felt that the balance of competences was appropriate. "*The EU helps ensure a high standard of health safety across the EU, early launch in the UK of new medicines and medical technologies, and the competitiveness of the UK life sciences industry*" (p.27).

The EU works notably on selected public health issues. EU directives now assure the free movement of blood, organs, tissues and cells, subject to minimum standards. This is recognised to be beneficial for patients. EU activity for nutrition and food labelling, which has been harmonised for over 30 years, is judged by respondents, including the government, to be appropriate, serving the UK well. As regards action over tobacco that stresses its harmful effects on health, most respondents felt the current balance of competences was working well. Similar views are expressed as regards alcohol, with harmful drinking a particular challenge in the UK.

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<sup>5</sup> Except for enhanced cooperation in the field of exclusive competences and the CFSP where unanimity in the Council is required.

*Health security.* The EU has established systems for the surveillance and early warning of communicable diseases. This is appreciated by respondents, including the government, as adding real value.

*Employment policy.* The impact of the Working Time Directive on the public health sector is a well-known subject of criticism from the UK. The review makes a balanced assessment, noting the benefits that may be provided for the work-life balance of medical staff, and avoidance of treatment by tired staff. The main criticism is over lack of flexibility in the directive to accommodate the needs of different operating environments, and in particular problems for the supply of continuous care, avoiding too much staff turnover.

*Free movement of health professionals.* The relevant EU directive assures recognition of professional qualifications, such that there are in general no restrictions on EU nationals to move within the EU labour market. This is of particular importance to the UK as a substantial net importer of health professionals. Gaps in skills within the UK can be rapidly filled. The nursing profession now has a particularly large reliance on nurses from other EU countries.

*Cross-border health care.* An EU directive clarifies the rights of citizens to purchase health care in “other” EU countries and to claim reimbursement from their home country. The UK makes a large use of this provision, with for example 400,000 British pensioners in Spain alone.

*Health research.* The UK is the largest beneficiary of EU funding for health research under the Framework Programmes, which are a significant driver of cross-border partnerships and information dissemination in the health sector.

## **Assessment**

The EU’s competences in the public health sector consist of a portfolio of very specific activities, which do not impinge up the responsibilities of the member states to run their own health services. EU actions are clearly complementary with national competences, and address issues that cannot be easily or efficiently handled at the national level. There are some friction points with respect to details, and maybe most of all over the Working Time Directive, but these should not obscure the main message that the EU is adding value, and that the balance of competences is judged to be broadly appropriate.

The review reveals quite a number of specific fields in which the UK clearly benefits from EU activity, ranging from medical product standardisation to research. While UK public opinion decries excessive immigration in general, the National Health Service would be in much greater difficulty without the free movement of labour within the EU, given that it is a considerable net importer of health professionals.

## **2.6 Animal health and welfare and food safety**

There is a large amount of very detailed EU regulation here, and the review lists almost one hundred regulations or directives. The summary conclusion of the review is: “*While many respondents expressed support for the current balance, the evidence also demonstrated several areas for improvement*” (p. 56). Respondents from the farm industry and related civil society organisations considered a harmonised approach to food safety and animal health as “essential”, and a competence for animal welfare at the EU level “vital”. The Consumer Advisory Panel of the UK Food Safety Agency felt that the UK benefits from being part of EU food law, with no rationale for operating alone. It is unlikely that national legislation by the UK would be less rigorous than current EU practice.

The UK’s trade in food and beverages with the EU is twice that of trade with the rest of the world. The industry is now structured with extensive cross-border supply chains across the EU, which could not function without common technical standards and/or mutual recognition. Moreover, for food safety these supply chains must observe strict hygiene controls.

Since 2003 the EU has been developing a far-reaching reform of its food law to handle the problems of complex supply chains, establishing traceability obligations from covering 'farm to fork'. The horse-meat scandal of 2013, which reverberated around the EU, illustrated the need for correct enforcement of EU regulations, and not a lightening or repatriation of EU competence. This case illustrated a broader political point that while there is much political rhetoric about over-regulation by Brussels, whenever a serious problem arises in the area of food safety the call is invariably to strengthen EU rules and/or their implementation.

The outbreak of so-called Mad Cow Disease (BSE) has been the most serious instance of a food safety problem of European and international concern originating in the UK, resulting in widespread banning of UK beef exports. When the problem was overcome EU legislation enforced the re-opening of EU markets in 2006, with the aid of a European Court of Justice to make a dissenting member state comply. Russia's ban lasted six years longer, however, while US and Japan markets remain closed.

Respondents for Scottish whisky interests and producers of regionally branded products noted the strength of EU branding protection both within the EU and in international markets.

The issue of whether the EU over-regulates or imposes excessive implementation burdens is discussed in the review. The UK has been in the lead in advocating that the Commission progress with 'better' and now 'smart' regulation, with impact assessments needed to accompany all proposals. The Commission has been responding with new impact assessment guidelines, and annual publication of a report on application of the principles of subsidiarity and proportionality.<sup>6</sup> Key concepts are 'risk assessment' and 'risk management', given that regulations that seek to be too absolute in eliminating food safety problems will lead to unduly heavy burdens. EU food law recognises these concepts, but some respondents argued that the EU (and the European Parliament in particular) was at times inclined to be unduly prescriptive and embrace proposals insufficiently based on scientific evidence. Important instances here involve highly controversial cases such as cloning and GMO elements in the food chain.

The olive oil packaging affair of 2013 now becomes famous as an iconic case of a proposed regulation that failed to take the subsidiarity principle seriously. Producer interest groups pushed the European Commission into drafting a regulation that would require all restaurants to put olive oil on the table only in original packaging, rather than glass carafes, to 'protect consumers' from sub-standard olive oil. The public outcry was so lively that the proposal was rapidly withdrawn. While the Commission was at fault for embracing the proposal, the reaction and outcome illustrates the checks and balances that now exist around the issue of subsidiarity.

Animal welfare respondents indicated the importance of the UK having influenced the shaping of EU standards in a progressive direction. This brings out an interesting aspect of defining 'British interests'. In this case the objective is to develop norms of significance for animal welfare as widely as possible, i.e. chickens in cages in general, not just 'British chickens'. While progress on this account worldwide is extremely difficult to secure, at the EU level the UK's leading advocacy has had a real impact.

## **Assessment**

One of the most striking points made by the review is that only 20% of consumers were aware that the EU was largely responsible for food safety regulation, while 75% preferred that it be a UK responsibility. This reflects the view that the UK could do perfectly well by going it alone.

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<sup>6</sup> The Commission produces an annual report on subsidiarity and proportionality, of which the latest for 2012 was published in July 2013 at:

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:EN:PDF>).

The evidence presented is the opposite on both accounts. The EU is largely responsible for food safety and animal welfare law, and the prospects of UK secession would pose huge problems, disrupting now well-established industrial networks and trading structures, without any apparent case for either raising or lowering standards. For these reasons respondents broadly endorsed the present attribution of competences to the EU.

The UK has been one of the most progressive influences within the EU on two accounts, first the case for ‘smart’ risk-contingent regulation, and second, animal welfare.

Under the secession hypothesis it seems most likely that the UK would choose to keep EU standards on its books, at least initially. But if it then chose not to follow new EU legislation and to innovate with its own, the question whether this would prejudice access to the single market would be constantly posed.

The food safety and animal welfare sector illustrates the huge disconnect between, on the one hand professionally informed opinion in the UK, and on the other hand, the present state of public opinion, and indeed the hazards of resolving this difference by a referendum vote ‘in’ or ‘out’.

### 3. Overall Conclusions and the Search for New Narratives

This first set of six reviews reveals no grounds in the assessments of British stakeholders for any large repatriation of competences, nor for further opt-outs. There is a widespread desire for policy improvement or refinement in many details, but this can generally be put under the heading of demands for smarter regulation and the serious application of the principle of subsidiarity and proportionality.

The conclusions may be summarised a little more precisely as follows:

- *Foreign policy*: majority evidence, strongly in the UK’s interest to work through the EU. No competences to repatriate. Lock on unanimity rule.
- *Development policy*: member states retain freedom for own policies; EU continues? its substantial actions as multiplier of member states objectives; institutional and efficiency questions.
- *Single market*: core EU function, bringing appreciable benefits to all.
- *Taxation*: balance of competences about right; possibility of further EU competences guarded by unanimity rule.
- *Public health*: balance of competences about right, many useful actions not impinging upon principal national competences.
- *Animal health and food safety*: balance of competences about right, essential EU function.

Overall, the assembly of evidence has been done most impressively with substantial contributions by independent professional associations and civil society. The degree of detail is sufficient to give a clear and credible view of each sector, with the findings combining a balanced coverage of British interests and analysis of general EU relevance.

This balance of competences exercise is only just beginning, however, with six out of 32 reviews now completed. Several of the reviews to come (budget, agriculture, social policy, institutions, etc.) may go less smoothly than this first sample.

Since the findings have been relatively positive compared to the expectations in the UK of many members of parliament, the tabloid press and public opinion, their publication has been greeted in eurosceptic circles with the headline “Whitehall whitewash”. This underlines the huge challenge for public information and education providers to communicate realities in the European Union before a referendum. We now turn to this task of finding new narratives at the level of British public opinion and then for the EU as a whole.

## **The British narrative**

Currently this narrative largely goes as follows.

*“Brussels is interfering too much. We want to run our own affairs. Brussels is unreformable”.*

The possible new narrative from the standpoint of British interests might be as follows:

*“We have the special deals we want and need: to be out of the euro and Schengen but still in the single market and part of broader European decision-making. We have unanimity locks on taxation and foreign policy. We are now also getting what we want by way of smarter and less regulation. Secession would be extremely hazardous for the UK economy and our international standing”.*

A more precise statement would be as follows. The landscape of EU competences divides into three main categories, for each of which there is a clear but very different response to priority British interests:

1. Competences where the balance is about right, notably in the broad single market area where the UK sees its priority interests, and where there is a broad interest in the EU as a whole for continuous policy improvement.
2. Competences where the possibility of enhanced EU powers is guarded by the unanimity rule, and whose retention the UK strongly supports (foreign policy and taxation).
3. Competences where the UK has secured the opt-outs or special deals it wants (euro, Schengen/JHA, zero rated VAT products, budget rebate).

Other main points weighing in the assessment of British interests for staying in the EU or seceding are:

4. As regards the complaint about over-regulation from Brussels there is a move underway towards smarter regulation and fuller application of the principles of subsidiarity and proportionality, where the UK has been one of the keenest advocates.
5. As regards the question of repatriation of competences, the balance of competence reviews and Commission reports are showing that this may be plausible at the level of repeal of unnecessary or obsolete regulations, but not at the treaty level. Most of the competences are ‘shared’ with member states, and the borderlines between EU and national competences is a matter for constant refinement.
6. The risks to the UK economy of a secession scenario are very serious (“economic suicide” in the words of Deputy Prime Minister Clegg), with major international corporations in both industrial and financial service sectors already warning that the attractiveness of the UK as an investment location would be significantly damaged.<sup>7</sup>
7. The consequences of secession for the UK’s standing in international affairs also look hazardous. The US has already spoken clearly on this point, and the rest of Europe would look on with dismay at the UK appearing to disregard all of the historic political achievements of post-war, post-communist, and post-Soviet Europe.
8. The secession process, which the reviews do not so far assess, would itself involve perilous negotiations over what the UK’s relationship with the EU would become. The Prime Minister has said he would not consider the Norwegian/Swiss models, which would seem to imply an alternative model with less secure access to the EU for goods, services and people.

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<sup>7</sup> Multinationals with major interests in the UK that have already voiced this view include Goldman Sachs for the City, and Nissan and Hitachi for the manufacturing and energy sectors. A recent survey of the British manufacturing industry federation (EEF) comes to similar conclusions.

If the above ‘alternative narrative’ were to come about there would have to be an extremely powerful public communications effort to get it understood and considered credible. Otherwise, the current trend of aggressive euroscepticism among many Conservative MPs, the rising UKIP party and the tabloid press is unlikely to be swayed. Here the responsibility of British political leaders in choosing the terms of their public discourse is, of course, of prime importance. At present the discourse tends to include various remarks that are incorrect and unjust to European realities, and instead play to populist eurosceptic opinion, such as in the Prime Minister’s major speech on the EU in January 2013 ... “the EU cannot harmonise everything”. This remark might have been pertinent about 30 years ago, before Mrs Thatcher’s appointee to the Commission, Lord Cockfield, successfully introduced, with Jacques Delors, the alternative paradigm of mutual recognition. On the other hand, Foreign Minister Hague has qualified the Commission’s recent REFIT document as “a step in the right direction”.<sup>8</sup>

### ***The broader European narrative***

The rest of the EU also has the challenge of inventing a fresh positive narrative, but the first issue for core Europe is to make the euro monetary union truly sustainable, and to strengthen the macroeconomic recovery. The challenge of correcting the systemic weaknesses of the eurozone is going to involve ‘more Europe’, notably in the commitment to a Banking Union. But the challenge of organising a more effective and democratic set of constraints on fiscal policy remains work in progress.

At the same time there is widespread support in much of the EU for an increasingly effective foreign policy, as illustrated in the initiative of the 11 foreign ministers in September 2012. The long, legalistic British efforts in 2011 and 2012 to limit the ‘actorness’ of the EU in the foreign policy domain in the light of the Treaty of Lisbon received little support.

The concern over an excessively intrusive EU (i.e. European Commission) is also widely felt, but secession is not part of any other member state’s agenda. Nor is there talk of ‘repatriation’ of competences at the level at which they are listed and defined in the Treaty, but there are calls for a stricter application of the principles of subsidiarity and proportionality, notably in the Netherlands, which has produced its official list of 54 measures it would like to see corrected.<sup>9</sup> These measures largely concern the broad single market domain, and overlap British complaints, such as the 30 recommendations of a report of a business task force of the British Prime Minister.<sup>10</sup>

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<sup>8</sup> European Commission, “*Regulatory Fitness and performance (REFIT): Results and Next Steps*”, COM(2013)685 final, 2 October 2013. As a small example of ‘discourse and reality’, this document says that the Commission will not propose legislation for the safety and health of hairdressers, thus declining the request by professional associations for such a measure, presumably on grounds of subsidiarity. However, in a speech in February 2013 at CEPS, the British Minister for Europe, David Lidington, had already used language that seemed to imply that the Commission had made such a proposal.

<sup>9</sup> The Dutch subsidiarity and proportionality initiative, launched in June on 2013, listing 54 points where the Dutch government would like to see reforming measures, is set out in: “*Testing European legislation for subsidiarity and proportionality – Dutch list of points for action*”. (<http://www.government.nl/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and-proportionality-dutch-list-of-points-for-action.html>.” A summary assessment of this was published by CEPS: Michael Emerson, “*The Dutch wish-list for a lighter regulatory touch*”, CEPS Commentary, July 2013 (<http://www.ceps.eu/book/dutch-wish-list-lighter-regulatory-touch-eu>).

<sup>10</sup> “*Cut EU red tape*”, Report of the Business task Force, October 2013 ([http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249969/TaskForce-report-15-October.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249969/TaskForce-report-15-October.pdf)).



At the present time it is unclear how much support could be obtained for something like the Dutch agenda, and at the same time the British agenda, excluding its radical repatriation or secessionist aspect. There are rumblings in Berlin, but the intentions of the Merkel III administration are not yet clear in this regard.

The question for the EU institutions would be how to go about an enhanced regulatory reform programme operationally, and in ways that are well understood by public opinion. It is possible to imagine an initiative at the level of the European Council inviting all member states to submit to the Commission's REFIT process their own lists of complaints, with this to lead into a broader strategic reform process. In this process the role of the Commission as proposer of legislation and as executive institution should be distinguished from its role as guardian of the treaties, where member states have to respect its independent role in monitoring compliance with EU law and enforcing it, if necessary.

The challenge of correcting the perception of 'overly intrusive Brussels' remains important across the whole EU. For those concerned with the formation of public opinion there is the question whether the present wave of euroscepticism is founded on realities, or rather on the misleading stereotypical narratives that have taken hold. Unfortunately, the problems of the eurozone and the related economic recession are very real, so on this account the state of public opinion can hardly be criticised.

The message emerging from the British balance of competences review is still important, however. The gap in opinion between informed stakeholders and the general public and popular press on the broad matter of EU regulatory policies is huge. This is both a problem and an opportunity. If the realities are sounder than the stereotypes suggest, the possibility for achieving a turn-around should be real too. But this will require that exercises undertaken by the Commission, such as the REFIT programme, have to be convincing, and overcome scepticism that it amounts to no more than tokenism. It will require also that major political actors at the member state level buy into the process.

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

Each item will see publication of a report of around 40,000 words.

### July 2013

1. Internal market (synopsis)
2. Taxation
3. Food safety and animal welfare
4. Health
5. Development & humanitarian aid
6. Foreign policy

### Winter 2013

7. Internal market – goods
8. Internal market – persons
9. Asylum & immigration
10. Trade & investment
11. Environment & climate
12. Transport
13. Research
14. Tourism, culture & sport
15. Civil justice

### Summer 2014

16. Internal market – services
17. Internal market – capital
18. EU budget
19. Cohesion
20. Social & employment
21. Agriculture
22. Fisheries
23. Competition
24. Energy
25. Fundamental rights

### 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

## About EPIN

EPIN is a network of European think tanks and policy institutes with members in almost every member state and candidate country of the European Union. It was established in 2002 during the constitutional Convention on the Future of Europe. Then, its principal role was to follow the works of the Convention. More than 30 conferences in member states and candidate countries were organised in the following year.

With the conclusion of the Convention, CEPS and other participating institutes decided to keep the network in operation. EPIN has continued to follow the constitutional process in all its phases: (1) the intergovernmental conference of 2003-2004; (2) the ratification process of the Constitutional Treaty; (3) the period of reflection; and (4) the intergovernmental conference of 2007. Currently, EPIN follows (5) the ratification process of the Lisbon Treaty and – should the treaty enter into force – (6) the implementation of the Treaty.

Since 2005, an EPIN Steering Committee takes the most important decisions. Currently there are seven member institutes: CEPS, Clingendael (the Netherlands), EIR (Romania), ELCANO (Spain), HIIA (Hungary), Notre Europe (France) and SIEPS (Sweden).

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### Structure

Currently there are 34 EPIN members from 25 countries, also from countries outside of the EU. The 'hard core' work of the network is based on the cooperation of about 10 most active institutes. The member institutes are quite diverse in size and structure, but are all characterised by political independence and the absence of any predetermined point of view or political affiliation.

EPIN organises at least three events across Europe per year. The network publishes Working Paper Series and other papers, which primarily focus on institutional reform of the Union. The network follows preparations for the European elections, the EU's communication policy, and the political dynamics after enlargement, as well as EU foreign policy and justice and home affairs.

### Achievements

EPIN is a network that offers its member institutes the opportunity to contribute to the 'European added-value' for researchers, decision-makers and citizens. The network provides a unique platform for researchers and policy analysts to establish personal links, exchange knowledge and collaborate on EU-related issues. Members bring their national perspectives to bear on the issues tackled and through collaboration they contribute to establish a 'European added-value' (e.g. on EU communication, flexible integration). By doing so, they strengthen a common European dimension in the national debates on Europe.



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