



Discussion paper No. 4:

Re-delegation of policy responsibility and delivering policies more efficiently.

This paper supports the envisaged discussion at the fourth meeting of the Task Force on Subsidiarity, Proportionality and Doing Less More Efficiently. This discussion will focus on Task (b) of those identified by President Juncker i.e. *the identification of any policy area where over time decision making and/or implementation could be re-delegated in whole or in part or definitively returned to the Member States*. The discussion is the first of two envisaged on this topic. The paper aims to stimulate a discussion about how to identify areas where the Union might want to do less and how to improve the efficiency and effectiveness of what the Union does.

Possible questions the Task Force may wish to address

- (1) Do Task Force members agree with the 4 main ways identified of doing less more efficiently?**
- (2) Does the Task Force have any concrete examples about the four ways of doing less more efficiently that can be discussed further in subsequent meetings? Do previous assessments undertaken about Union competences (in annex) provide relevant information?**
- (3) What processes or mechanisms could be envisaged to tackle the issue of doing less more efficiently on an ongoing basis (c.f. the REFIT programme for tackling unnecessary regulatory costs)?**
- (4) How might legislation that is "too dense" be identified? And how might the legislation be "lightened" thereby giving more flexibility and discretion to local and regional authorities?**
- (5) On what basis might individual policy instruments be identified for repeal?**
- (6) On what basis, might Union competences be identified for removal from the Treaty?**

Background Information

1. INTRODUCTION

The Commission's [White Paper on the future of Europe](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf)¹ sets out possible paths for the future of European Union of 27 Member States. The White paper offers five illustrative scenarios for how the Union could evolve, depending on the choices made. Scenario 4 is about "*Doing Less (and doing it) More Efficiently*". It assumes consensus that the EU 27 should focus its limited resources on a smaller number of activities and to tackle these priorities more efficiently. The scenario represents, therefore, a continuation of the Juncker Commission's focus on 10 key policy priorities² and being big on the big things and small on the small things.

2. FOUR ASPECTS OF DOING LESS MORE EFFICIENTLY

(1) Conferral of competences: Doing less through Treaty change

The Union can only act in a given area if it has been given competence to do so by the Treaties. This means that competences not been given to the Union remain with the Member States³. The Union must not overreach the competences it has in attaining the relevant Treaty-based objectives⁴. The three main types of competence conferred on the Union are:

- In areas of exclusive competence, only the Union may legislate. The Member States may act only if empowered by the Union or for implementing Union acts. Exclusive competence covers the customs union, common commercial policy, competition rules, monetary policy for the euro area, the conservation of marine biological resources under the Common fisheries policy and in the conclusion of international agreements affecting the Union's internal rules and competences.⁵
- In areas of shared competence both the Member States and the Union may adopt legally binding acts but the members can only act to the extent that the Union has not acted. Where the Union's ceases to exercise its competence the Member States are again free to exercise theirs⁶.
- In some specific areas, the Union has competence to support, coordinate or the actions of the Member States but without superseding their competence to act. These cover protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation⁷.

Article 48 TEU sets out the procedure to revise the Treaty in respect of increasing or reducing the competences conferred on the Union. While a simple majority of members of the European Council is required to initiate the process, the final amendments agreed by a Convention tasked with preparing the Treaty change must be ratified by all Member States. A unanimous political consensus is needed, therefore, to reduce formally the competences conferred on the Union.

¹ https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

² https://ec.europa.eu/commission/priorities_en

³ Article 4(1) Treaty on European Union.

⁴ Article 5(2) Treaty on European Union

⁵ Articles 2(1), 3(1) and 3(2) of the Treaty on the Functioning of the European Union.

⁶ Articles 2(2) and 4(2) Treaty on the Functioning of the European Union.

⁷ Articles 2(5) and 6 Treaty on the Functioning of the European Union.

A brief description of other assessments of the Union's competences is provided in the attached appendix.

(2) Doing less more efficiently without Treaty change: Repeal of existing Union acts/policies

In the area of shared competence, the Union can give back competence to the Member States by ceasing to act at Union level. This would not require Treaty change but would require identifying specific policy instruments and making proposals to the legislator to repeal them.

Identifying existing legislation for repeal could be undertaken on the basis of the evidence generated by applying the Commission's better regulation policy⁸. The existing stock of legislation and policies is managed actively by the Commission. Evaluations are undertaken periodically and near systematically before making proposals to revise existing legislation. Each evaluation looks at the continued relevance of the legislation and assesses its EU added value. They also engage actively with civil society via public and targeted consultations. These assessments provide, therefore, a solid evidential basis upon which the Commission could decide to propose a repeal of specific legislation. Clearly, it would also be within the Commission's discretion to propose repeal of Union acts without having undertaken an evaluation. This is part of the Commission's powers under the Treaty and could be done as part of the political programme of a new incoming President.

(3) Doing less more efficiently: No new proposals & focusing on implementation

The Commission could refrain from exercising certain powers. By choosing not to exercise powers at European level or confining European legislation to minimum standards, the EU would already 'do less' or leave the Member States discretion to act to the extent that the Union hasn't acted. This is particularly relevant for those policy areas where a comprehensive body of legislation already exists. The Commission could decide not to pursue new legislation in these policy areas but to concentrate its efforts on better implementation and enforcement. This is part of the Commission's discretion to prioritise what it does and reflects, for example, the programme of the current Commission of President Juncker and his ten priorities. This approach would be open to change under successive Commissions.

(4) Doing less more efficiently: tackling the density of Union legislation

An important observation of the Task Force meeting of 15 March was the similarity of content and form of directives and regulations. An important reason is the lack of trust between Member States and the institutions which results in a heightened level of detail and prescription in Union legislation (directives) and less reliance on the principle of "mutual recognition" as a means to lessen the "density" of legislation. Overly prescriptive legislation not only deprives local and regional authorities of flexibility in how they implement legislation but may also lead to unnecessary costs for those having to apply the legislation.

The choice of policy instrument (hard law/soft law, directives versus regulations, etc.) and designing legislation to be innovation friendly and capture the benefits of ICT are all aspects covered by the Commission's guidance^{9,10} on how to apply its better regulation policy. If applied properly, it should help in the framing of more efficient and effective legislation.

⁸ See Task Force Background Paper No. 2 on Better Regulation: https://ec.europa.eu/commission/publications/background-paper-no-2-better-regulation_en

⁹ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

¹⁰ https://ec.europa.eu/info/better-regulation-toolbox_en

There has been a trend to delegate significant responsibility for implementing Union legislation to agencies who work closely with national competent authorities. This can be effective in building capacity in particular Member States, strengthening collaboration and adherence to legislative requirements. A few examples illustrate the principle:

- Historically, the Union's rules on anti-competitive behavior were applied solely by the Commission. However, since 2003 there has been shared enforcement with national competition authorities using the European Competition Network that facilitates the sharing of information and expertise. As a result, approximately 85% of cases are now dealt with at national level.
- The Agency for the Coordination of Energy Regulators provides another example of the role and importance of good coordination. ACER complements and coordinates the work of national energy regulators at EU level. It plays a central role in the development of EU-wide network and market rules with a view to enhancing competition. The Agency coordinates regional and cross-regional initiatives which favour market integration.
- The European Chemicals Agency works closely with the Member States and the European Economic Area (EEA). Member State representatives are members of ECHA's Management Board, the Agency's Committees, the Forum and several networks. ECHA cooperates closely with the competent authorities in many of its processes, exchanging information, providing support and training to the Member States. The European Aviation Safety Agency¹¹ follows a similar approach in developing agency rules including guidance on acceptable means of compliance on all aspects of air worthiness.

This Agency model of implementation may also help overcome the lack of trust between Member States and help reduce the legislative density of Unions acts. An additional important factor relating to the lack of trust between Member States comes from the perceived or real lack of appropriate governance in the Member States. The debate on re-delegation of policies or implementation has to be seen, therefore, against the need to improve governance in all Member States as a means to promote the mutual trust necessary for the Union to function properly. The importance of the Commission's and national implementation plans was also recognised in the Task Force's meetings of 23 February. Again better implementation and coordination of the implementation process can lead to better implementation and better results.

¹¹ <https://www.easa.europa.eu/the-agency/the-agency>

3. IDENTIFYING "INEFFICIENT" LEGISLATION

Challenge to ensure effective and efficient policies and legislation

The Commission reports annually on the application of Union law in the Member states and as a function of the main policy areas¹². These reports present the infringement actions¹³ pursued by the Commission for non-compliance with Union law as well as complaints from individuals¹⁴. There are also complaints handled informally by SOLVIT network¹⁵ in the field of the internal market. These all illustrate the gap between what should be delivered by the Union's policies and legislation and what individuals actually experience. These difficulties also restrict the Union's ability to deliver effectively on a smaller number of priorities (the "big things") that it might set for itself. In line with the priority actions announced in 2016, the Commission presented its new enforcement policy in the Communication "EU law: Better results through better application"¹⁶. The Communication sets out a more strategic approach to the Commission's infringement policy, focusing on systemic problems, where Commission's enforcement action can make a real difference.

Better regulation: simplification and tackling unnecessary costs

Better regulation underpins all the Commission's work to ensure the EU does what is needed and does it well. Better regulation means designing legislation that delivers its societal objectives in the most efficient way. The Commission has emphasised that actively managing existing EU legislation is as important as preparing new initiatives. It is essential to ensure that legislation remains fit for purpose and delivers the results that EU law-makers intended. At the heart of its efforts to deliver simpler legislation, the Commission focuses on tackling unnecessary costs and eliminating administrative burdens without compromising policy objectives. Making legislation simpler and less burdensome also improves implementation and enforcement, and ultimately delivers better results.

The Commission's better regulation processes allow all stakeholders to provide comments and suggestions about how to simplify specific legislation¹⁷. These suggestions are then taken up by the REFIT Platform¹⁸ who may adopt opinions and recommendations to the Commission. Clearly the focus of the current REFIT programme is on regulatory simplification but issues linked to reducing the legislative density and the role local and regional authorities could also be envisaged in REFIT or its successors.

¹² https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en

¹³ For example, 986 new infringement procedures launched in 2016. See also the fact sheet: https://ec.europa.eu/commission/sites/beta-political/files/better-regulation-factsheet_en.pdf

¹⁴ 3783 in 2016, 3450 in 2015, 3715 in 2014.

¹⁵ Problems encountered in relation to the functioning of the internal market: 2414 cases handled in 2016, 2228 in 2015 and 2368 in 2014. See the internal market scoreboard: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm

¹⁶ C(2016) 8600, OJ C 18, 19 January 2017. https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AC%3A2017%3A018%3ATOC&uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG

¹⁷ https://ec.europa.eu/info/law/contribute-law-making_en

¹⁸ https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en

Legislation where problems have been raised previously

The reasoned opinions of the national Parliaments from 2010 have been reviewed to see whether they provide any insight about problematic EU legislative action. Opinions cover a wide range of policy areas and individual policies. No clear patterns emerge. Among the 163 Commission proposals for which reasoned opinions were received, the largest share concerned proposals in the internal market/financial services area (27 initiatives), followed by policies in the justice and consumer protection area (21), health and food safety (17), transport (16) and taxation (15). A similar picture emerges when considering the overall number of reasoned opinions.

The following policy sectors raised most concern: Financial Markets and banking supervision (reasoned opinions for 11 proposals), information obligations for businesses (5), public procurement rules (3); justice cooperation and judicial proceedings (6), gender balance (3) and data protection (3); animal health and welfare (4), food safety (4) and medical products regulation (4); rail transport (6), air traffic and airports (4) and road safety (3); common bases for taxation and the financial transaction tax (6). Of the 6 Commission proposals originating in the environment field which received reasoned opinions, 4 concerned legislation on waste.

After the three yellow card cases to date¹⁹, the individual proposals that triggered the most reasoned opinions concerned the internal market for electricity (11 reasoned opinions), a framework for maritime spatial planning and integrated coastal management (9), the proposals of 2011 and 2016 for the Common consolidated corporate tax base (9 each), the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (8), common rules on the temporary reintroduction of border control at internal borders (7), market access to port services and financial transparency of ports (7), and the manufacture, presentation and sale of tobacco and related products (7).

In the most criticised proposals²⁰, national Parliaments not only criticise action at EU level as being not sufficiently justified (subsidiarity) but often cite a disproportionate interference in existing national legislation (proportionality) or that the Commission is given too wide (control) powers through delegated and implementing acts.

¹⁹ Posting of workers, European Public Prosecutors Office, Monti II proposal on services)

²⁰ See also the examples included each year in the Commission's Annual report on subsidiarity and proportionality:
http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/subsidiarity_reports_en.htm

Appendix
Summary of selected assessments of the Union's competences

Subsidiarity and proportionality report from the Netherlands (2013)²¹

This assessment was undertaken by all Dutch ministries and was complemented by a targeted consultation of stakeholders. It assessed both subsidiarity and proportionality and presented thirty or so action points on specific files together with some general recommendations. The overarching conclusion was “Europe where necessary national where possible”. General recommendations included not using soft-law instruments, drafting goals-based legislation rather than prescriptive rules, not using uncertain or indirect legal bases and ensuring the involvement of Member States in policy preparation.

Many specific files were criticised because there was no transnational dimension (EU programme for school milk, environmental noise directive, common consolidated corporate tax base, etc.) or concerned only a few Member States (e.g. tunnel safety directive), or related to very disparate circumstances in the Member States (e.g. insurance of natural or man-made disasters). Other areas such as criminal law and forestry were circumscribed as areas which should be left to the Member States.

UK Balance of Competences²²

An extensive review of the balance of competences between the Union and the Member States was completed by the UK in December 2014. It produced 32 separate reports based on 2300 written pieces of evidence. The review cost between £4.5 – 5 million²³.

One of the sectoral reports focuses specifically on subsidiarity and proportionality which draws on the other 31 reports²⁴. The report focused primary on institutional and procedural aspects to protect subsidiarity and not identifying individual policy areas where the principle of subsidiarity was not respected. Examples and issues were raised in the other reports.

Some respondents to the UK's review cited cases where, the balance of competences was appropriate, they felt EU proposals or laws would have been better at the national or devolved/local level (subsidiarity) or which had disproportionate costs to the expected benefits (proportionality).

For example, evidence to the Environment and Climate Change report highlighted the considerable debate on how far environment and climate change competence should extend and whether the EU always acted in accordance with the principles of subsidiarity in a way which is compatible with the principle of localism. In addition, evidence was received about the disproportionate nature of the proposal to ban the use of reusable olive oil jugs in restaurants and regarding the non-conformity with subsidiarity of a draft directive on occupational pension schemes because no evidence was given of an EU-wide problem.

However, there was also recognition in evidence received that some issues, such as cross-border environmental problems or the Single Market, justified EU level action, and examples were given of measures considered to be proportionate.

²¹ <https://www.government.nl/latest/news/2013/06/21/european-where-necessary-national-where-possible>

²² <https://www.gov.uk/guidance/review-of-the-balance-of-competences>

²³ <https://publications.parliament.uk/pa/ld201415/ldselect/ldcom/140/14003.htm> ;

²⁴ <https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences>

Centre for European Policy Studies: “Britain’s Future in Europe”, M. Emerson et al, 2015²⁵

Taking the UK’s 32 sectoral reviews from its balance of competences exercise, CEPS undertook a detailed assessment including identifying conclusions that the UK government refused to do.

The prime purpose of the balance of competence review was to screen for those existing competences of the EU that should better be returned to the Member States. CEPs concluded that in not one of the 32 reviews is evidence presented by predominant or even majority views to suggest that any existing competence should be deleted from the Treaty. On the contrary, the predominant finding is that the competences of the EU are ‘about right’, and that they have often found a sensible balance, notably in the sphere of the shared competences between EU and national levels.

Bertelsmann Stiftung: How Europe can deliver: Optimising the division of competences among the EU and its member states (2017)²⁶

The study aims to provide guidance for a better-performing EU through an improved allocation of competences between the European Union and its Member States. The study analyses eight specific policies.

Common Agricultural Policy (CAP) direct payments to farmers. The current EU scheme was compared with a national counterfactual in which income support is the responsibility of the national welfare system. The results pointed to significant free riding under the current European arrangement and massively excessive costs resulting from ill-targeted income support. According to the study's results, income protection through the CAP exceeds the level defined by national minimum income support in 21 Member States. Overall, the study concluded that having national responsibility is preferable to the current EU approach.

For asylum and refugee policy. The status quo entails a mixed division of responsibilities but Member States largely decide their own policies. The analysis concludes that European responsibility would be superior, as it would reduce massive free riding on the reception efforts of other Member States. In addition, annual cost savings of between €5 billion and €12 billion (given refugee numbers like those experienced in 2015) appear realistic as a result of economies of scale.

Corporate taxation. The comparison used a harmonised corporate tax base definition and an apportionment of corporate profits among Member States. The competence of tax-rate setting remained at the national level. Taken together, the study indicates that there are disadvantages to having this remain a national prerogative. In addition to reducing inefficiencies in tax base competition, there would be substantial cost savings in tax compliance.

Defence policy, the study lends support to current political initiatives for more Europe in defence. The counterfactual is a fully integrated European army with unified decision-making and a centralised provision of military equipment financed from the EU budget. The analysis finds a large number of indications that the current fragmentation results in significant diseconomies of scale.

Development policies are currently a shared responsibility. The study contrasts this situation with a far-reaching European counterfactual in which development aid is fully financed and managed by the EU. Development aid financed from the EU budget would reduce free riding

²⁵ https://www.ceps.eu/system/files/Britain's%20Future%20in%20Europe_0.pdf

²⁶ https://www.bertelsmann-stiftung.de/fileadmin/files/BSSt/Publikationen/GrauePublikationen/EZ_Kompetenzstudie_2017_ENG.pdf

on the efforts of other Member States. Substantive economies of scale can be achieved by cutting back high administrative costs and reducing other inefficiencies associated with the current aid fragmentation.

Higher education. The results of the study indicate that it would be more advantageous to have responsibility for higher education remain at the national level. There is no evidence of European economies of scale. Free riding would increase compared to the status quo, under which national costs and benefits are largely aligned. Overall, the current approach of having the EU concentrate on mutual recognition of qualifications and fostering student mobility appears to be appropriate.

Results *for railway freight transport* are indeterminate.

A European unemployment insurance scheme. The study considers a new European scheme that complements existing national unemployment protection in the euro area countries. The study indicates that current protection may cause free riding by other countries, which also benefit from the general stabilisation effects of such national insurances. The results confirm that this problem could be resolved within a European scheme.