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•Can Brussels Earn
The Right To Act?

•Mark Leonard and
Jonathan White

Next Generation Democracy 3

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CAN BRUSSELS EARN THE RIGHT TO ACT?

By Mark Leonard and Jonathan White

This document is the third output from the 'Next Generation Democracy: Legitimacy in Network Europe' project, which aims to:

- **Reinvigorate discussion about democracy in an enlarging Europe, working from 'first principles' of democratic participation rather than established hierarchies and institutions.**

- **Explore how citizens can interact with policymakers in developing a powerful analysis of the role Europe can play in solving problems of national democracy.**

- **Analyse how democratic debates can operate effectively across cultural, social, political and national frontiers, and link local-level government to European institutions.**

- **Establish an on-line practice of communication across countries, and explore how new media of communication can help in harnessing shared democratic values.**

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EXECUTIVE SUMMARY

1. The debate about Europe has often revolved around whether we have "too much" or "too little" Europe, with less attention paid to the sort of outcomes that the institutions of the European Union are delivering. The debate about dividing competences in the Convention on the Future of Europe is going down this route as well. The suggestions made focus on solutions to a 'democratic deficit', requiring structural adjustments to make the Union more politically accountable and better able to enforce the subsidiarity principle. But the real problem is that of a 'delivery deficit', which needs reforms which are focused on improving governmental performance.

2. We suggest that the way forward is to develop a dynamic version of subsidiarity based on the principle of **"earning the right to act"** where powers are allocated according to performance – moving up and down from a national to a European level to achieve specific objectives.

3. In our analysis there are four basic criteria which any future division of competence in the Union should meet: **clarity**, so that citizens of the Union understand the basis on which competences are allocated; **reversibility**, so that failing policies can be reviewed and, if necessary, reallocated to a different level of governance; **accountability**, meaning that the division of competences is overseen by elected representatives responsible to the citizens of the Union; **effective delivery**, without which all other considerations are meaningless.

4. The European Union should learn from the performance-based approach to governance that has been pioneered in several other governmental systems. Its essence is that policies are subject to ongoing review so as to ensure not only that they are being implemented effectively but that they are being executed at the most appropriate level of governance.

5. Incorporating some of the techniques of performance-based governance, a new model can be constructed combining the missing element of effectiveness with the best features of the proposals currently on the table. The main features of this new model would be:

   ▪ A set of principles embodying the demand that EU-level institutions 'earn the right to act' from the citizens and states of the Union by executing effective governance. Two principles are key to this. The effectiveness principle should guarantee that the European Union will only work in areas where it can out-perform and be seen to out-perform member states acting on their own. Secondly the principle of

reversibility which makes it clear that the European Union's powers are held in trust on behalf of member states. If they are not seen to be delivering results, they can be taken away as well as extended. These principles would bring **clarity** to the division of competences.

- The setting of clear policy objectives against which all policies can subsequently be evaluated. The Commission should introduce clear and measurable objectives into the preambles of all its documents. As yardsticks of satisfactory or unsatisfactory performance, these would bring **accountability**.

- An independent assessment process to identify where failings lie and how they may be remedied. There should be a rolling review of all policy areas which judges them against objectives every ten years. This should be co-ordinated by the European Court of Auditors in conjunction with the different national audit offices. Policy areas should be classified according to a "traffic light" model (green for satisfactory areas, yellow for borderline cases and red for areas that are failing). Recommendations for improving failing areas would be made – including the possibility of repatriating policy. The reports would be published and used to create a public debate. This would help to enhance policy-**effectiveness**.

- There should then be a political review process based on this assessment. National parliaments, the European Parliament and the Committee of the Regions could all debate the auditor's reports and call Commissioners and national ministers to give evidence. They could attach their reports to the auditor's reports. The reports would then be sent to the European Council which would make strategic decisions about the overall distribution of competence – if necessary moving powers up and down from the European level depending on performance. This flexibility in the distribution of competence, would bring **reversibility** into the system.

SECTION ONE: WHY WE NEED A NEW AGENDA FOR DIVIDING POWERS BETWEEN MEMBER STATES AND THE EUROPEAN UNION

The search is on to define the ultimate constitutional shape of the European Union – the *finalité politique*. The Brussels policy community hopes that this will be the key to closing the gap between the European Union and its citizens.

Some hope to fix the division of powers between national governments and the European Union before it is enlarged to take in an additional ten members. Others argue against any attempt to fix the European Union's powers in their current form when some areas (such as the Common Foreign and Security Policy and the Justice and Home Affairs agenda) are still in such embryonic form. In this paper we argue for a different approach: introducing a dynamic system that allocates powers according to performance – with legislation moving them up and down between national and European levels at different points in order to achieve specific goals.

Underlying the different approaches to the division of powers are radically different diagnoses of the problem. The key question is whether one ascribes Europe's legitimacy problems primarily to a "democratic deficit" (the need to have more directly elected European institutions, or input legitimacy) or to what some have called a "delivery deficit" (the need to prove that the EU can deliver effective outcomes, or output legitimacy).

Critics of the European Union have argued that whereas in a liberal democracy governmental legitimacy is conferred once every five years at the ballot box, the European Union does not have this basis of legitimacy. There is no direct electoral mechanism for the appointment of two of the three main institutions, and elections to the third enjoy the participation of only a meagre proportion of the EU electorate. Responding to these attacks has led many pro-Europeans down the blind-alley of the democratic deficit. For example, some delegates to the European Convention – the discussion forum specifically set up to examine these ideas – have argued that the way to enhance the EU's legitimacy is to make it structurally more like a national democracy by strengthening the powers of the European Parliament or by electing the president of the European Commission in a direct election under universal suffrage.

But because Europeans living across the European Union do not have as strong a sense of community as most national political systems – which sustains the institutions through the bad times as well as the good times –

they are unlikely to accept decisions which go against their interests even if they have gone through a democratic process. That is why the failure of certain European Union policies will sometimes bring support for the whole enterprise of European integration into question. This means that formal changes of this sort made in the name of 'input legitimacy' are likely to be too cosmetic to mute the chorus of criticism that presents the Union as out of touch and ineffectual. Public support for the integration process will not be won by presenting the citizens of Europe with a *fait accompli*, the substantial powers that the EU institutions have acquired over the past fifty years suddenly legitimised by a slight re-jigging of the institutional arrangements of the Union, accompanied by a thunderclap public relations campaign.

This means that EU institutions cannot simply 'earn' their legitimacy by expressing the popular will at election-time. Instead, they have to reflect the popular will in a more ongoing, concrete fashion - by delivering effective action in the areas in which the citizens of the EU wish to see it. The very essence of the European Union is the voluntary pooling of sovereignty by each of the Member States *for the benefit of all of them* – it is only as valuable, in other words, as the public goods that it brings. If the legitimacy of the EU is in direct correlation to its effectiveness, the powers that the Union has accumulated are legitimate powers only in so far as they contribute to the effective execution of widely-desired policies. This implies that it is the institutions of the European Union that carry the 'burden of proof'[i], the responsibility of demonstrating that they can be more effective than national governments acting on their own. This in turn implies that the delegation of power from the level of the citizen to the level of the Community must be regulated by some kind of mechanism which ensures this movement of powers is justifiable in terms of the results that it can and does achieve.

Unfortunately, this is not the approach which has generally so far been taken in the 'Future of Europe' debate which has been focusing minds in Brussels over recent months. The debate about dividing powers between the European Union and the member states has gone down the route of the "democratic deficit" – looking at the formal rules for allocating powers rather than monitoring performance. Calls have been made to "draw a line in the sand" on European integration and clearly delineate which powers the EU should legitimately exercise and which should be kept at a national level. This is essentially a reworking and refinement of the old principle of subsidiarity – the idea that powers should lie at the level closest to the citizens at which they can be effectively exercised. The implication is that subsidiarity is a workable principle which simply needs fine-tuning.

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[i] Frank Vibert: 'Governance in the European Union - from Ideology to Evidence', European Policy Forum 2001

As we shall go on to explore (in appendix one), this principle has never been effectively defined or implemented, and many decisions have been taken – in areas as diverse as zoo regulations, drinking water and tobacco advertising – which clearly could have been taken at a national level or through an international agreement to implement these measures nationally. Subsidiarity has too often been overlooked.

The real problem with subsidiarity is that it is a theoretical concept. It asks which level of government is *theoretically* best placed to deliver good results rather than examining which level can best deliver *in practice*. Moreover, so far there has been no organised system of evidence-gathering which would provide an objective, rather than subjective, basis for decisions on the allocation of powers. There are many things that the EU should, in theory, be better placed to do than the nation state – such as the delivery of overseas aid – but in which it is in fact failing. If a policy is failing, the people need to know about it – and there needs to be a system for turning it around, or, if ultimately necessary, returning it to the national level.

The whole current debate about the division of competences is in danger of basing itself on theory rather than practice. The danger is that the members of the Convention draw up an elegant and scholarly scheme for allocating competences which fails to address the roots of the EU's legitimacy problems.

In our view there are four criteria which the European Union must meet if it is to undermine the charges made by its critics and win over sceptical popular opinion, i.e. if it is to close the delivery deficit by "earning the right to act" from its citizens:

1. **CLARITY: THE ABILITY TO UNDERSTAND.** Larry Siedentop has argued that "no political system can be legitimate which it's citizens do not understand." It is clear that it is not just the citizens of the European Union but also many parliamentarians and officials who struggle to understand both the processes and the principles behind European integration. This is exacerbated by the lack of a clear rationale for dividing or sharing powers between the European Union and its national governments. Even if the EU's legitimacy is, as we have argued, ultimately founded on its efficiency, it is clear that appropriate attention must be devoted also to the formal clarity of the system, the extent to which it is readily comprehensible to the non-specialist observer.

2. **REVERSIBILITY: THE ABILITY TO REVIEW OR RENEW.** Certain policies, like the Common Agricultural Policy, have come to be adopted over the years in response to a pressing historical need.

However, decades later, when these needs have disappeared, the policies remain in place and seem virtually impossible to reform. The next six months will provide a perfect example, in the frantic efforts to reform certain aspects of the CAP before the enlargement process begins. It is astonishing that the reform of an outdated policy, approved already by almost all member states, should become a potential impediment to the Union's top strategic priority of the early years of the 21st century. A sense of irreversibility contributes to a feeling for many that the main driving force behind European integration is the ideology of "ever closer union" rather than a concern with delivering positive outcomes. It is important therefore to enshrine the principle that all policies can be reversed or subject to review (through the existing Treaty article 308[ii] or through some other mechanism). But a mechanism alone is not enough. There must also be something that gives impetus to the review of policies or else the bureaucratic inertia of the EU system will mean that the Union retains instruments or objectives long after they have served their useful purpose.

3. **ACCOUNTABILITY: THE ABILITY TO ELECT.** Many people have described the European Union as an unaccountable bureaucracy where judges and civil servants are more important than elected politicians. For this reason it is important for legitimacy purposes that people have the sense that the distribution of powers between national governments and the European Union is overseen by elected politicians whom they can 'throw out' if they feel they have failed. By and large, this means having the process overseen by national parliamentarians and national governments, who are the focus of media attention and who are visible enough to have an influence on the domestic political scene.

The link to national politics goes further still, especially where questions of subsidiarity are concerned. In the past, problems of disputed authority have arisen not where the allocation of competences has made bad *theoretical* sense, but where decisions have been made about seemingly technocratic regulations which have a high salience in certain member states. Certain single market regulations on subjects ranging from double-decker buses to carrot jam to snuff have developed a disproportionate level of political sensitivity in the UK, Portugal and Sweden respectively. Dealing with these issues in an appropriate way is a political as much as a legal

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[ii] Article 308 of the TEC is a catch-all article which allows the Community, by unanimous decision of the Council, to adopt the measures necessary to attain objectives laid down in the Treaty where the powers necessary to attain these have not been provided.

challenge. People must know that regulations with a high national salience will be reviewed and overturned if they do not work.

4. **DELIVERY – GETTING THINGS DONE.** It is worth remembering Abraham Lincoln's Gettysberg address, where he talked about democracy as government "for the people" as well as "by the people". In the EU, very little attempt has been made to address this first side of the legitimacy debate – what exactly it is that the EU gets done for the people of Europe. And yet it is clear that most citizens worry more about the effectiveness of policies than the processes by which they are drawn up. There are many areas where EU-level action already brings benefits that could not be achieved by member states acting on their own. Regulating the market at a European level means that consumers, producers, retailers and workers benefit from the added choice, economies of scale, and competition which a market of 370 million consumers brings. But the European Union has consistently failed to monitor the effectiveness of its policy decisions.

Of the various reasons that can be attributed to this, two are of particular concern to us here:

- **The supremacy of 'negotiability' over evidence.** In complex negotiations, the ease with which a certain solution can be negotiated will often take precedence over the evidence base for that solution. This is more noticeable in the implementation stage for a policy, as the Commission links proposals to likely outcomes as it draws up legislation. However, in the post-legislative phase, this sensitivity has never been matched, given that the Commission has not been able to *react* to outcomes and to review its policies accordingly once they have been implemented. This has remained the case despite a few attempts, perhaps insufficiently radical, by the Commission (in 1996 for example) to introduce some guiding 'principles of evaluation' which would allow policies to be more easily and effectively adapted once they are underway.[iii] In the dry words of the recent Working Group Report on 'Evaluation and Transparency', 'only 7 of 25 Directorate Generals that manage expenditure programmes have an evaluation unit. Thus it would

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[iii] Commission Communication on Evaluation (SEC(96)659final). See also July 2000, SEC(2000)1051. As the Report of the Working Group makes clear (p.9), though this has lead to some efforts to evaluate whether existing programmes could be improved (*formative* evaluation), *summative* evaluation (concerning whether it should exist at all) is rare.

be premature to claim that the Commission has a general evaluation culture."[iv]

- **The splitting of implementation between national governments and European institutions.** This also makes it very difficult to measure policy effectiveness, as the criteria used are often not directly comparable. Top-down attempts at evaluation are not the same as an official audit. Even the audits that are carried out are of limited use, as national audit offices very rarely co-operate on parallel studies, and in the few examples where they have done so, it has tended to be an examination of the ability of national institutions to administer European programmes or the fulfilment of regulations, rather than the ability of policies to meet goals. There is also no political impetus to have these evaluations discussed, as they are presented to the European Commission rather than to specialist scrutiny bodies such as national parliaments or to the European Parliament. An official in the Swedish national audit office made this point very forcefully: "The CAP constitutes almost half of the EU budget. Policy objectives have been set, monitoring methods are in place with EUROSTAT, there is evaluation by the European Court of Auditors and still there is no Commission interest in evaluation of programme effectiveness. The studies made indicate failing policies but strong political interests at the national level prevents evaluation."

Over the course of the Future of Europe debate launched two years ago by Joschka Fischer, three main models have been advocated for making subsidiarity work. One of these takes a **judicial** approach, vesting in the European Court of Justice (ECJ) the role of final arbiter in disputes over the application of subsidiarity. The second accords this arbitrating role to a **political** body of elected representatives (usually involving national parliamentarians as well as MEPs). The third seeks to combine the strengths of judicial **and** political review by giving both the ECJ and a political body a role in the monitoring of competence distribution in accordance with subsidiarity. In Appendix One, we assess these three models, together with that which we shall propose below, against our four criteria for reform.

Our belief is that the hybrid approach, which draws on the clarity of a legal framework and the flexibility of a political one, is the right approach, but that for it to be effective it has to be harnessed to an ongoing process of independent performance assessment. Such performance assessment would ensure that decisions on the allocation of competence were rooted in

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[iv] Report of the Working Group, p.10.

clear understanding of how policies were working in practice. Only on the basis of this will it be possible to turn subsidiarity into a meaningful guideline with practical relevance rather than simply a loosely-defined abstract concept – only in this way, in other words, can institutional reforms be made to satisfy all the four criteria for reform.

In the next section we explore some of the lessons of performance-based government in other countries, and in the final section we set out a mixed model for "earning the right to act" which brings together legal and political instruments with an objective assessment of the effectiveness of institutions.

SECTION TWO: THE MISSING LINK - PERFORMANCE-BASED GOVERNMENT

The missing link in all of the proposals for reform is the focus on performance. The European Union still bases its solutions on what can be negotiated, not on what can be audited, verified or factually proven – and none of the proposals we have examined would correct this. The number of different lobbies and interests that must be satisfied across so many different dimensions means that it is uniquely difficult to introduce an element of evaluated performance into the system. This is the central cause of the "delivery deficit".

But even in political systems where there are fewer interests to satisfy there are often important tensions to be resolved between the theory about where a certain policy should lie, and the ability of institutions to deliver that policy in practice.

A good example of this is the debate about local government in Britain where, on the one hand, the present Government believes that many policies should be decentralised, but, on the other, it doesn't have faith in the ability of many local authorities to deliver results. As a result it has devised a set of minimum national standards which must be met and pioneered the idea of "earned autonomy" where local health authorities, hospitals and schools are given greater control over their activities and budgetary support if they can prove their effectiveness.

An example of this happening in reverse is the relationship between state and federal government in the United States of America, where Congress has introduced measures to place the burden of proof on the federal government, insisting that it demonstrates that it can deliver more effective outcomes than states can acting on their own. The 1993 Government Performance Results Act was introduced to 'improve the confidence of the American people in the capability of the Federal Government by systematically holding Federal agencies accountable for achieving programme results.'[v] The US government was responding, in other words, to exactly the same problems of popular consent faced by the institutions of the EU.

This idea of "performance-based government" has been pioneered in a number of different countries as a way of giving extra public accountability to governmental policy-making and execution. The schemes share some of the following characteristics:

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[v] Government Performance Results Act 1993, p.2.

- A **preliminary assessment** to establish what is working and what is not (bench-marking). Considerable attention has to be paid to mitigating factors, to ensure that all performance comparison between different institutions is fair and accurate.

- **Classification**. This may take the form of a 'traffic-light' scheme, whereby performance is classed as 'green', 'yellow' or 'red', where green is a high standard and red is low.

- **Allocation of competences and powers**. Those organisations classified green are accorded substantial freedoms, whether managerial (freedom to take decisions on policy, personnel etc.) or financial (access to central funds) or both; those classified yellow get 'support' with the way they manage their programmes and finances; those classified red receive 'intensive support' and close monitoring from central government.

- **Setting of performance objectives**. These are to be commensurate with the classifications regarding current performance, so that there is a realistic chance of their being met.

- **Periodic assessment** and reassessment of how far these performance objectives are being met. Assessment is based on a range of Performance Indicators, examining the effects of changes and providing the opportunity (and incentive) for improvement. Once again, performance is judged relative to the particular circumstances in which it is carried out (together with some kind of absolute minimum). This is followed by a **continual review process** to ensure that the criteria and policies adopted remain current.[vi]

It is clear how these systems could go a long way to dealing with our four criteria. Having a specific set of objectives and an overarching principle (effectiveness) provides a very **clear** way for deciding what level of government should be responsible for legislation. Secondly, the idea of allocating competences according to performance tackles the arguments about **reversibility**. The focus on performance should help tackle the European Union's **delivery** deficit. And finally, establishing clear criteria for judging the existing delivery of competences also allows the political and judicial processes to have a better framework for **input democracy**.

[vi] It should be noted that the system has to have **stability**, so that organisations are not bouncing from one classification to another without proper justification, causing undue upheaval.

2.1   Performance-based government in the European Union

There are, however, some important differences between performance-based government as it has been employed in the two above examples and as it would be used in the EU.

First, it is more difficult at European level to define, monitor and make conclusions from objectives set. For example in the health service, the criteria of good performance are fairly clear, since the goal is to maximise the standard of treatment accorded to patients in a quantifiable way. In this context, it is methodologically and statistically relatively easy to carry out a cost-benefit analysis. Within a more complex political context, the nature of the objectives set, against which performance is measured, is likely to be less clear. This point was made by one of the Working Groups that helped to draw up the European Commission's White Paper on governance: 'it is difficult to evaluate the results or effectiveness of any initiative if its objectives are vague or even contradictory'.[vii] Moreover, there are no connections in the EU budget lines with objectives or performance programmes.

Secondly, the transnational nature of the EU makes it more complex to establish a centralised system of monitoring. The fact that many Community policies are implemented at a national level means that it is very difficult to get an overall picture of how effective a particular policy is. This means that any solution will have to combine national and European-level evaluations. At present the European Court of Auditors audits the Commission but it is not allowed to use the results of National Audit Offices (who rarely conduct performance audits of EU institutions anyway). This presents a double-challenge for National Audit Offices: the need to use comparable measures when auditing national implementation of European policies; and the need to audit the implementation of EU policies against EU objectives rather than simply examining the efficiency of the administration. One of the rare examples of a National Audit Office doing this comes from the Swedish National Audit Office which carried out a goal-based audit of the largest single element of EU spending: the arable area payments scheme. Although they worked with other audit offices on looking at administrative efficiency, they failed to persuade other National Audit Offices to carry out parallel studies on the ability of the scheme to meet its goals. The three reports which this study produced audited the scheme against the three basic objectives for the policy which were set out in the Treaty of Rome: increasing agricultural productivity; ensuring supplies reach consumers at reasonable prices; and ensuring a fair standard of living for the agricultural community. They concluded with a warning about the lack of information "In view of the budgetary amounts involved [the Swedish National Audit Office] regards it as

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[vii] Report of the Working Group, p.37.

remarkable that the arable area payments are not more frequently followed up and evaluated in relation to EU objectives. In our audits we have not found any requests for good statistics or evaluations which describe the development".

Of course any national audits will need to be set alongside a study of the effectiveness of the European institutions at meeting their goals. The Commission has in the past tried to make its Directorates General (DGs) themselves responsible for evaluating performance, but this has meant that there is no overall coordination, and very little analysis of the ability of policies to achieve goals.[viii] This would seem to suggest the value of extending the remit of the European Court of Auditors (ECA). To give it the responsibility for the performance evaluation of large sections of Community activity would demand a substantial enlargement of the ECA, but the evaluative function which it would be undertaking would be a natural development of the auditing role that it currently performs. The ECA already extends its activities beyond the monitoring of Commission resources into the monitoring of national governments and their management of resources, and as an institution with considerable experience and a wide network of activity the ECA would seem to be exactly the right body to provide a coherent analysis of Community policy-making and the ways in which it might be reformed.[ix] The challenge will be to move on to a new kind of auditing based on the fulfilment of specified goals. This would require a review of how the ECA operates and how it is constituted.

Finally, in a European context there are important questions of identity and legitimacy which mingle with these questions of efficiency. Questions of sovereignty are somewhat more complicated than they would be even in a federalised country like the US. In the national context, the power hierarchy remains fairly conventional even after performance-based government has been introduced, because it is central government which is monitoring the use of power, and bestowing it or taking it away. In the EU, the flow of autonomy would be from central government *upwards*, from national governments to the Community institutions – rather than *downwards* to regional or local government.

If policies are failing to meet their goals, the European Council will have to decide on recommendations that authority over a particular policy-area be

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[viii] See Report of the Working Group 'Evaluation and Transparency' (part of the preparations for the ECWP) p.9.
[ix] It should be noted that there are some strong counter-arguments to the establishment of a single overseeing body, as highlighted by the Report of the Working Group, p.23. Equally, however, it should be emphasised that the evaluation reports are but the prelude to a political discussion process during which any serious objections to the reports may be raised.

redistributed: either upwards or downwards. A radical recommendation might be that a piece of legislation be removed altogether.

Developing a performance-based culture in the European Union does pose some hard questions. The nature of the *acquis communautaire* is that measures should be implemented in a uniform way. What should the European Union do when faced with asymmetrical performance across member states – where measures seem to work in some countries, but other countries fail to implement them effectively? There are examples from fields like Justice and Home Affairs or environmental policy where one country can create real problems for another by failing to deal with migration or pollution effectively. In these cases one could imagine the audit examining whether the policy worked in a majority of countries, and maybe recommending sanctions against countries that consistently under-perform.

With all these schemes there will be many detailed issues to resolve, but it is clear that performance evaluation can bring a sharper edge to the sometimes fuzzy discussions about the division of competences. The key benefit of introducing a scheme such as this one will not be the use that is made of it in individual policy areas, but the effect of changing the culture of the European institutions so that delivery rises to the top of the agenda. In the next section we attempt to put these principles into practice – to develop a system of evaluation which allows Brussels to 'earn', and most importantly be seen to have 'earned', the right to act.

SECTION THREE: EARNING THE RIGHT TO ACT – A NEW MODEL FOR ALLOCATING POWER

Democracy and delivery are treated as different problems that need different solutions. But the solutions that are being developed to solve an imagined "democratic deficit" could have a real impact on the ability of the European Union to win consent by delivering effective outcomes. We argue in this paper that attempts to re-work the European constitutional framework need to be governed by the need to close the "delivery deficit" as well. This means that we must be ready to re-examine the old principle of subsidiarity and reform it so that powers are distributed according to performance as well as constitutional theory.

In this section, we attempt to show how an element of performance measurement can be built in to the legal and political processes that have been suggested for allocating competences. We argue that this approach is the most appropriate way to meet the four criteria for reform set out in the introduction. First, the European Union must set out clearly the constitutional principle of "earning the right" to act in order to provide **clarity** about the reasons for actions being taken at a European level. Second, the European institutions must start systematically setting objectives, so that there is a clear **input** basis against which performance can be measured. Third, an independent assessment of the performance of different community instruments and policies must be carried out so that **delivery** is a key criterion for decisions about competences. Finally, there must be a political review of each policy area after a performance assessment to provide a political impetus for the **reversibility** of policies that do not work.

3.1 Enshrining the principle of "earning the right to act" in the constitutional preamble to the Treaties.

The preamble of the Treaties should be re-written to replace the commitment to "ever closer union" with a new set of principles that set out aspirational goals and explain the limits of European integration. This could both bring greater clarity to the institutions and act as a highly symbolic way of dealing with peoples' concerns about excessive integration. The over-riding principle should be the principle of "earning the right to act". This must contain two components:

(a) **the effectiveness principle** – the European Union will only act in areas where it can deliver more effective results than member states acting on their own. There should be a legal obligation on member

states and European institutions to supply data on the performance of this policy. In marked contrast to the traditional subsidiarity principle, this would state that effective delivery rather than federal theory must be the guide to all allocation of competences.

(b) **the reversibility principle** – The European Union can only exercise powers that are granted to it by member states. It holds these powers in trust, and they can both be given and taken away. This principle could explain that existing legislation may also be reviewed, on the basis of independent reports, if it is considered unsatisfactory by a significant majority of Member States.

3.2   Systematically setting objectives for policy

It is important to set clear objectives for legislation and executive action so that performance can be judged. This is essentially a question of making clear and explicit what is already present in implicit form in most current Community action. The goals of European-level programmes are rarely made public or cast in such a form as to be readily used to measure subsequent performance. One way of standardising the use of objectives would be to demand that the preambles to all Commission documents include a specific and detailed set of objectives to be realised by the measures that follow, plus an explanation of the mechanisms by which their effectiveness is to be assessed. In this way, the task of performance evaluation would be made significantly more transparent, and the need for consistent and unequivocal objectives highlighted in the Working Group Report above would be met. The objectives might be of both a macro- and micro-level type. As well as policy-specific objectives included in the preambles, one could envisage broad, outline objectives being set in the European Council. One would then see a series of Community legislative and non-legislative measures taken to realise this overall objective, each having their own more specific, lower-level targets. This would allow one to assess the necessity of new legislation, but would it contribute to the achievement of the overall objective?1

3.3   An independent assessment of performance

Once the use of explicit policy objectives has become widespread, the basis is set for an ongoing evaluation of performance in all the main areas of EU policy competence (including Justice and Home Affairs, Social Policy, Environmental Policy, the Internal Market, Financial Services, Cohesion, and Agriculture). There is a danger that an attempt to review all the European Union's policies in one go could create an enormous volume of red tape and eat up a good deal of parliamentary time. One possibility would be to hold these rolling reviews on different policy areas at different times – aiming to review each policy area once a decade - which would establish a culture of

performance evaluation without crippling the EU's ability to make new decisions.

The review should be based on a parallel auditing process at a European and national level. The European Union will need to establish a new framework of co-operation between the European Court of Auditors and National Audit Offices. The European Court of Auditors could set out a common approach and a common set of indicators which can be pursued by each National Audit Office. The national reports could then be brought together with an assessment of the Commission's performance by the ECA and then published for public dissemination. A final report could be drawn up which evaluated all the European Union's policy instruments in each policy area against the objectives set in the European Council. The policy instruments could then be classified according to a traffic-light scheme. Successful policies, which would be classified as green, would be left intact. The reports could end with a series of recommendations for change on areas where existing EU-level action is proving to be unsuccessful. For policies that are classified red, there should be some ideas for refining the policy – or if necessary returning elements of it to a national level. Borderline policies - classified as yellow - could be held under greater supervision and reviewed at a later date.

3.4   A political review process

The auditors' reports would be nothing more than a set of recommendations, often of a fairly technocratic nature. They would not in themselves carry the authority to make changes (since the ECA has not been designed to be democratically accountable). Rather, these reports would be the basis for a political review process which would lead to political decisions about the allocation of competence. In Appendix One, we will discuss the different political and legal approaches which are being considered by those charged with rethinking subsidiarity. Our idea is that the auditors' reports would provide a more objective basis on which to take decisions about the allocation of power. Though we would favour a mixed approach, it would be possible to introduce an element of performance review into any model which the Convention chooses.

The review process would see the ECA's reports presented to the relevant political bodies. This could be the European Parliament, a new body containing national parliaments, a revised version of COSAC or the Committee of the Regions – or even some combination of all the above. These bodies could attach an Opinion to the reports and debate them in public. It is important to ensure that European Commissioners (and national ministers in the case of dilatory implementation at member state level) could be called for cross-examination. This process of discussion and debate could

be concluded with the drawing up of a Final Report which reflects the positions of the various bodies. The report could be compiled by the European Commission, European Parliament or a new subsidiarity body (if one is established). The Final Report could be sent to the European Council for ratification. The European Council would then initiate reform measures and feed the Final Report's recommendations back into the setting of new objectives (or would demand new objectives, dealing with criticism, to be delivered by the Commission). (For a diagrammatic representation of the above, see Figure One of the Appendix.)

Importantly, the reports would also be published for public scrutiny. This would generate media involvement in the specifics of policy-making. Public scrutiny would also be a useful means by which to cut away at the culture of 'deal-making' that is so prevalent in Brussels: national governments would have to take their share of responsibility for the policy-measures being pursued, they would have to react to the criticisms of the ECA reports, and they would be less able to slur the European Commission for all unpopular legislation and policy-measures.

The value of having auditing *seen* to be conducted by an external body, rather than by those responsible for policy execution, should not be underestimated, particularly given the current challenge of renewing public faith in Community activity. Recommendations for improving performance would be readily available so as to lead the reform process and improve effectiveness. The reports would have the authority of neutrality and objectivity which could act as a point of arbitration for those in dispute about where to place decision-making and executive authority – and act as a basis for decisions by a political body.

SECTION FOUR: CONCLUSION

No political system can survive in the long term without the consent of the people it serves. The European Union is no exception.

This pamphlet has sought to map out a way of allowing Europe's institutions to "earn" that consent by consistently outperforming national governments – and by having the ability to prove it. By designing all EU reform so that it works best to satisfy the four criteria of clarity, reversibility, accountability and effectiveness, the idea has been to ensure that attempts to increase legitimacy in the formal sense (by tackling a perceived democratic deficit) do not undermine the basic effectiveness of the system, which is also a central component of its legitimacy (in other words do not undermine attempts to tackle the delivery deficit).

This emphasis on 'outcomes' is in no sense intended to undermine the importance of 'input legitimacy' – that is, the formal side of democracy. It is quite clear that this programme of delivery will have to take place within a broader democratic framework, one which allows people to feel that they have been part of the process which set the objectives for delivery. Only the reform of institutional structures from a formal perspective can achieve this, and naturally we are fully supportive of what the Convention is trying to do in this respect. Indeed, some of the institutional innovations that are currently being proposed at the Convention (the subsidiarity chamber in particular) are an integral part of the system that we are advocating.

But we firmly believe that attempts to address 'input legitimacy' in this way are of little value if they are not complemented by a concern for the legitimacy conferred by practical effectiveness, a fact which is too often neglected in the debate about how to direct the reform of the Union's governance.

The mantra of "delivery, delivery, delivery" will of course never be sufficient in its own right. It will always be true that at some stage the citizens of Europe will have to embrace the *idea* of Europe, and that this idea will always be larger than the sum of its parts, that it will embody some kind of ideal as well as a 'list of practical advantages'. The words of Lionel Jospin in May 2001 make this point with eloquence: 'Europe is made up not merely of regulations, directives and disputes. It is first and foremost a work of the mind, a societal model, a world view. The European idea as part of reality – that is what counts …'[x]

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[x] Jospin, Lionel, "On the Future of an Enlarged Europe" speech, 28 May 2001

But the people of the European Union will not make that conceptual leap of faith unless they are confronted with the practical benefits of the EU on a daily basis. If governmental effectiveness is consistently improved, levels of popular consent will be heightened accordingly, and consequently substance will be added to the formal side of democratic legitimacy. If this is not done, the citizens of the Union will simply have little interest or enthusiasm for the European project, a problem which no amount of structural tinkering will remedy.

APPENDIX ONE: THE REFORMS ON THE TABLE: WHY THEY WON'T MAKE EUROPE MORE LEGITIMATE

In this section we will look at some of the main proposals that have been made to satisfy the demands of these four criteria of popular legitimacy.

The legal solution

The legal principle of subsidiarity was introduced over a decade ago in an attempt to address concerns that power was moving ever upwards to European level, and to give a benchmark against which the appropriateness of a given piece of European legislation could be judged. It was developed under pressure from regional levels of government such as the German Laender, as well as from the less Brussels-focused member states such as Denmark and the UK. Essentially it was a legal principle, designed to combat the over-centralisation of competences within the EU. It was incorporated into the Treaty on European Union signed at Maastricht and developed further in the Amsterdam Treaty. It asserts that decisions should be "taken as closely as possible to the citizens".

It was hoped in some quarters that the legal principle would spawn a new political culture where actors in the decision-making process take it constantly into account when developing or implementing legislation. Despite support in federal and decentralised systems such as Germany and Spain that has not happened. This is partly because the legal definition of the term means that application of the principle is in the hands of the European Court of Justice – and proposals can only be referred to the European Court of Justice after the main decisions have been taken and the agonising process of negotiation is complete. The difficulty of treating subsidiarity as a legal concept partly stems from the vagueness of the definition – as there are no clear criteria against which to judge it, it will always demand a subjective decision.

The other problem is that subsidiarity relies on challenges to proposals, and there is no political impetus in the EU decision-making system for enforcing it:

- The **Member Governments** use competences as bargaining counters to broker package deals, resulting in power being pushed upwards to the supra-national level – what the political scientists call 'log-rolling'.

- The **Commission** is keen to propose things which the Council will support but which are also likely to generate further EU-level action.

- The **European Parliament** has tended to support anything which increases Community-level power – and therefore its own significance.

- The **Court of Justice** is by its very nature integrationist – often extending the role of the European Community and by so doing increasing its own jurisdiction.

Some have argued that the European Court of Justice should give decisions on existing proposals before they are passed, but this is unlikely to work much better than the current system if there is not a tightening of the definition of subsidiarity.

As a result, some people have called for a much clearer "division of competences" – containing a catalogue of the powers of the European Union, with a clear definition of where and how they are exercised. This would have the advantage of addressing the first of the four criteria - clarity - in that it removes the responsibility for defining subsidiarity from the whims of individual lawyers and judges.

But this idea fares less well against the other criteria.

First, although the initial catalogue of competences would be drafted and agreed in a political forum, its subsequent implementation would be legal. This would mean that sensitive decisions about the grey areas of sovereignty would be in the hands of lawyers rather than elected politicians who would be more aware of the potential pitfalls of public opinion.

Second, a detailed division of competences would be in danger of ossifying the distribution of policy-making power, which would make the task of future reform and refinement ever harder.

Third, actual effectiveness would be left out of the discussions about the allocation of authority because the catalogue of competences would be based on a theoretical assessment of the appropriate level for legislation.

Finally, the feasibility of such an exercise is questionable. Given the scale of shared sovereignty within the European Union, it would probably be impossible to do more than map out the areas where the European Union and the member states have exclusive sovereignty, and the areas where their sovereignty is shared (e.g. the environment) or complementary (e.g.

education). This would not solve the trickiest decisions about the allocation of sovereignty.

The political solution

Many have favoured a political approach to their projections for the future of Europe - involving national MPs or MEPs in deciding whether things are done at the right level. The idea is to create a body that would look at proposals as they are made, rather than waiting until they have gone through the decision-making cycle. This political body could take several forms which range from a full second chamber (as advocated by Tony Blair, the French Senate and Joschka Fischer) to a body mandated by the European Council to examine borderline legislation against the principle of subsidiarity before decisions are made in the Council.

The gist of these suggestions is that this body would not vote on the substance of directives and rulings, but would play an essential role in applying the principle of subsidiarity. It would do this by offering advice on whether any given decision is being taken at the right political level and with the right political input, and would give an opinion on whether the appropriate instruments of co-operation are being used. In doing this, it would clarify the areas to be reserved for member state competence, whilst facilitating desirable action at the European level. In short, it could help to make sure that the subsidiarity principles laid down by the Treaty are better respected in individual instruments.

This system has merits. First, it scores well on input legitimacy as decisions are made by elected politicians rather than the Courts (although the right to challenge in the European Court of Justice once legislation has been passed would remain). This is particularly important as many of the problems with divisions of competence are not to do with theoretical decisions about the right level for exercising power, but the fact that the European Union introduces common standards which undermine national identity (as discussed in Section One). Second, this model is likely to act as a brake on unnecessary integration because national parliamentarians are the least integrationist actors involved in the European decision-making process, having no 'hidden agenda' about increasing their own powers against those of any other institutions. This means that there is a good chance of reversing unpopular legislation.

But there are some concerns about this model.

The first relates to clarity. The suggestion is that the deliberations of this body should be based on constitutional principles which would be set out in a constitutional preamble to the treaty. But abstract constitutional principles

about states' rights do not provide a sufficiently objective basis on which decisions should be made. In the absence of these criteria, there is every danger that the subsidiarity committee would descend into the same sort of institutional or national horse-trading that corrodes EU legislation at the moment.

More detrimentally, this option might even impede the development of a 'delivery culture' in Brussels. Apart from this subsidiarity check, these people would have no influence on the culture or the rules of the institutions. There would be a danger that their decisions would be marginalised, or that their comments would not feed directly into the next regulation or directive drafted by the Commission. Because the motivation for these schemes is to improve the input legitimacy of the EU (making sure that the people who make the decisions are close to the people) rather than ensuring effective outcomes, it is unlikely that they will lead to a major change in the culture of the existing institutions.

Finally there is a practical objection. Sifting through every piece of proposed legislation is an enormous task which would demand an expensive bureaucracy, and the creation of a permanent new institution. The EU already has many institutions with overlapping and confusing roles. Introducing a new one might itself undermine the legitimacy of the European Union.

Revised legal-constitutional approach

These concerns underlie the growing support for a hybrid model which both creates a legal filter for all proposals and which can refer particular proposals to a political body for review before they pass into law if they are deemed to run the risk of falling short of the subsidiarity principle. In defining how this hybrid model should work, though, the key question is how it fits with the four criteria for an effective and democratic culture.

One model that is gaining ground is the idea of creating a European equivalent of the French constitutional court to perform this function. The Conseil Constitutionnel is responsible for the ultimate decisions on constitutional issues. The members are a mixture of academics, civil servants, lawyers and former politicians. Its composition reflects wider political trends in France, and its members are generally closer to, or have experience of, government realities. The CC's rulings are accompanied by extensive reasoning and justification of the principles they used, and list related academic commentary. This means that a reasonable body of practice (not jurisprudence as such) does exist, with an influence on the political debate. It is also able to give its understanding of what particular measures mean – i.e. "if provision X means Y, it is constitutional, but if it

were to mean Z, it would not be". That has obvious application to subsidiarity debates.

The advantage of this particular mixed model is that it combines the clarity and objectivity of the legal approach with the flexibility and input legitimacy of the political approach. The potential danger is that it could fall down on the question of output legitimacy given that the principles on which it should be based are theoretical rather than pragmatic.

If the European Union is going to rebuild the legitimacy that it needs to function effectively, the hybrid system that it develops for monitoring subsidiarity will need to join up the debates on process and institutional structure with the debates about effectiveness. This has to be at the heart of the debate about the division of competences.

TABLE ONE: THE SYSTEMS MATCHED

	LEGAL - CONSTITUTIONAL	POLITICAL
CLARITY	**Yes** - because competences tend to be divided up in fairly strict fashion, and 'grey areas' are deliberately avoided.	**Little** – the decisions reached in a second chamber would be highly political in character, the product of internal politics.
INPUT LEGITIMACY	**Weak –** the monitoring of subsidiarity tends to rest with unelected judges, usually from the ECJ.	**Strong –** decisions on the allocation of power made with the involvement of national parliamentarians, the most democratically legitimate of all.
OUTPUT LEGITIMACY	**Very weak –** inflexibility due to difficulty of sharing powers and reforming bad practice; also, Treaty-based automatic presumption in favour of 'ever closer union.'	**Fairly strong –** national political involvement allows failing policies to be highlighted easily; but the lack of clearly defined performance objectives makes badly conceived and badly implemented policies harder to identify.
REVERSIBILITY	**Very little –** the ECJ is inherently integrationist, and legal allocations of power are notoriously difficult to reverse.	**Probably –** though subject to political bargaining.

AGAINST THE CRITERIA FOR LEGITIMACY

REVISED LEGAL – CONSTITUTIONAL	EARNING THE RIGHT TO ACT
Reasonable – presumption that power rests with member states unless specifically delegated upwards, and area of exclusive EU competence clearly identified. Nonetheless, complexity arising from the fact that division of powers can be challenged in the ECJ by any of the institutions.	**Considerable, though not total** – all political decisions would be made on the basis of independent auditors' reports, thus allowing them to be better scrutinised; the overall system, however, because of its flexibility, resists simple description.
Some – national parliamentarians involved in the decision-making process, but the role of arbitration given to the democratically unaccountable ECJ.	**Strong** – national parliamentarians oversee the effective implementation of objectives set by national heads of government in the European Council. Independent assessments provided by auditors, but the power of arbitration rests with politically accountable parliamentarians.
Reasonable – Member States given the responsibility of enforcing in their own way all but the exclusive powers of the EU.	**Very strong** – performance assessment is central to the system. Efficiency is the guiding principle for allocating competences.
Yes , using a mechanism 'similar to the current Article 308'; but dependent on a comprehensive review process initially after 10 years, and thereafter as rarely as every 20 years.	**Yes –** initial presumption in favour of states' powers, and ongoing review of policies (based on independent reports) where there is EU-level involvement, with possible repatriation in mind.

FIGURE ONE: THE PROCESS

On the basis of the Principles: should it be done at Union-level? If yes, then, Objectives agreed in European Council.

Commission proposals, usual scrutiny by the EP and Council of Mins.

Execution by Commission, national governments and/or local / regional authorities.

ECA and national auditors measure performance against Objectives and against past performance. Results are pooled at a Conference of Auditors, which then compiles reports.

Reports are published and debated in:
- EP
- National Parls. / 2nd chamber
- CoR, local government
- Public at large

Is there a consensus that the reports are favourable?

YES, leave things unchanged.

NO, Final Report compiled and returned to the European Council.

Council may decide to scrap failing policies, or to rethink their application.

ACKNOWLEDGEMENTS

THE WAY AHEAD

The 'Next Generation Democracy' project explores the theme of legitimacy in an enlarging Europe, organised around five themes: Matching Policies to Public Priorities, Accountability, Political Competition, Participation and Representation. *Can Brussels Earn The Right to Act?* is the first output in the Matching Policies to Public Priorities theme.

The initial output of each theme will be a policy brief, which will aim to direct the thoughts of the next generation of policymakers towards solving key problems thrown up by debates about democracy, legitimacy and accountability in Europe. Policy briefs will engage key stakeholders throughout Europe, who may be from the political, academic, public, private or voluntary sectors, at local and national level.

Each publication will lead to the formation of an online working group, that will work through these issues and produce written contributions. Feedback will be encouraged, and the 'Network Europe' policy community that we create in this way will be linked by a new website, www.network-europe.net, which will be publicly available.

The policy briefs will be collected together, along with the best of the contributions from the online 'workshops' in a publication, entitled 'Next Generation Democracy: Legitimacy in Network Europe.' This will be launched at a conference which will take place in November 2002, and will be the first in a series of yearly conferences bringing together the successor generation from across Europe.

We are looking to publish responses to this series on our website, www.network-europe.net. If you would like to make a response, please contact networkeurope@fpc.org.uk.

PREVIOUS POLICY BRIEFS IN THE 'NEXT GENERATION DEMOCRACY' SERIES

Linking National Politics to Europe

By Simon Hix, March 2002

The European institutions are increasingly disconnected from the citizens they are meant to serve. Part of this results from the divorce between national politics, which tend to be the focus of popular and media attention, and European policies.

In an argument that will appeal to both pro- and anti-Europeans, Simon Hix maintains in this policy brief that the answer is to allow national parliamentarians to elect the Commission President. This would create a stronger link between national politics and EU politics, a genuine political debate about the future of the EU and the direction of EU policies, deliver new checks and balances on the EU executive, and open EU policy-making to full public scrutiny for the first time. Hix explains why an election by national parliaments would be better than an election either by a majority of governments, or by a majority in the European Parliament, or by a direct election.

"Very interesting document", *Ana Palacio, Foreign Minister, Spain*

"The Convention may choose not to endorse [Hix'] ideas, but it should at least give them serious consideration." *European Voice*

"Mr Hix concisely and combatively addresses the deficits of inter-governmental decision making…. Committed and engaged stuff." *Sunder Katwala, The Observer.*

Next Generation Democracy: Legitimacy in Network Europe

By Mark Leonard and Tom Arbuthnott, November 2001

The framework document for the *Next Generation Democracy* programme.

"A most important policy brief… It is good to see new and clear thinking on the future of the EU." *Baroness Nicholson of Winterbourne MEP*

"It certainly is an intriguing project, which I shall follow with interest." *Sir John Kerr, Secretary General, The European Convention.*

THE EUROPE PROGRAMME AT THE FOREIGN POLICY CENTRE

Network Europe

By Mark Leonard

"Let us start thinking of a 'Network Europe' with all levels of governance shaping, proposing, implementing and monitoring policy together." *Romano Prodi, President, European Commission.*

"Extraordinarily stimulating." *Jacques Delors.*

"A welcome contribution to the important debate about Europe's future." *Tony Blair.*

"A radical agenda for reform from the government's favourite foreign policy think tank." *The Independent.*

Rethinking Europe

By Mark Leonard, Tom Arbuthnott, Jiri Sedivy and Petr Drulak

Produced jointly with the Czech Institute of International Relations, this pamphlet examines the future of the EU and calls for a rethinking of the European political space.

"Will pose some fundamental questions about Europe and its future composition and functioning." *Vaclav Havel, President, Czech Republic.*

The Future of European Rural Communities

By Chris Haskins

This project, reporting in September 2002, lays out the basic principles for meaningful reform of the CAP. It examines why reform is needed, what form the reform should take, and, most importantly, how to get there.

"Is to develop a blueprint for reform of the EU's Common Agricultural Policy." *Wall Street Journal.*

The Foreign Policy Centre

BRITISH COUNCIL

CAN BRUSSELS EARN THE RIGHT TO ACT?

The European Union is underperforming in too many areas.

Both pro-Europeans and eurosceptics argue that the EU's institutions are unloved because they are unelected and remote. In this policy brief Mark Leonard and Jonathan White take a different view: the problem, they argue, is a delivery deficit. Instead of relying on federal theories to decide where power should lie, the authors suggest that policy-makers embrace the principle of Earning the Right to Act where powers are allocated according to performance - moving up and down from a national to a European level to achieve specific objectives. They argue that EU institutions must earn their powers by proving their ability to execute them effectively. Ultimately this is the only EU that can count on the sympathy of its citizens.

'Next Generation Democracy' is a The Foreign Policy Centre / British Council Brussels project in association with Weber Shandwick Public Affairs

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