The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe
Foreword

As multi-tier governance has progressively become the political frame of reference within the European Union, it is of the utmost importance that the subsidiarity, proportionality and proximity principles be applied properly.

This position, defended by the representatives of the Committee of the Regions (CoR) at the European Convention, has become all the more relevant in the context of the reflection period.

This study, which focuses on the constitutional treaty's innovative provisions with regard to the increased participation of local and regional authorities in the working of the European Union, was launched at the end of the intergovernmental conference when the 25 heads of state or government had signed the constitutional treaty.

It was finalised after the referendums in France and the Netherlands.

The latter developments in the ratification process have not, however, changed CoR's commitments and objectives with regard to the need to strengthen the mechanisms for involving local and regional authorities in drafting, implementing and assessing EU legislation.

This study is thus a further CoR contribution to the debate on European governance, and it provides an overview of the issues and challenges our institution faces now and in the future in managing the various stages of the mechanisms for applying and monitoring subsidiarity.

Among other things, the study's authors have highlighted the interinstitutional dimension and the partnership between the different tiers of power, which constitute the essential preconditions for establishing a genuine culture of subsidiarity and which enable it to consolidate its role as a promoter of subsidiarity as a means to a better Europe.

Michel Delebarre
President of the Committee of the Regions
**ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Amsterdam Protocol</td>
<td>Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam</td>
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<td>CALRE</td>
<td>Conference of European Regional Legislative Assemblies</td>
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<td>CEMR</td>
<td>Council of European Municipalities and Regions</td>
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<tr>
<td>CONST</td>
<td>Commission on Constitutional Affairs and European Governance (CoR)</td>
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<td>Constitution</td>
<td>Treaty establishing a Constitution for Europe</td>
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<td>CoR</td>
<td>Committee of the Regions</td>
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<tr>
<td>COSAC</td>
<td>Conference of Community and European Affairs Committees of Parliaments of the European Union</td>
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<td>EC</td>
<td>Treaty establishing the European Community</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EU</td>
<td>European Union</td>
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<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>Protocol No 1</td>
<td>Protocol on the role of national Parliaments in the European Union annexed to the Treaty establishing a Constitution for Europe</td>
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<td>RegLeg</td>
<td>Regions with legislative powers</td>
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<td>RLAs</td>
<td>Regional and Local Authorities</td>
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<td>Subsidiarity Protocol</td>
<td>Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing a Constitution for Europe</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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1 The Official Journal was renamed when the Treaty of Nice entered into force on 1 February 2003.
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Executive summary

1. The Committee of the Regions as the expression of cultural diversity in the European Union, where subsidiarity, proportionality and good governance meet

As is highlighted by this study, the CoR is well placed to establish a link between subsidiarity, proportionality and good governance, on the one hand, and the protection and promotion of cultural diversity in the Union, on the other, since it is itself an expression of that cultural diversity, representing the RLAs whose organisation, functions, size, resources and powers vary considerably from one country of the Union to another. It is also a challenge that the CoR has to meet by organising itself to deal with the various perceptions, expectations and fears which arise in relation to the application of the principles of subsidiarity and proportionality. It is by developing its thinking, role, structures and procedures for monitoring application of these principles that it will be able to fulfil its ambition to promote the establishment of a subsidiarity culture in the institutions, bodies and offices of the Union.

STRENGTHENING THE POSITION AND ROLE OF THE COMMITTEE OF THE REGIONS

2. Making better use of the pause in the ratification process for the Treaty establishing a Constitution for Europe

The strengthening of the CoR’s role which is the result in particular of the work of the Convention and the Constitutional Treaty signed in Rome on 29 October 2004 is not undermined by the problems associated with ratification. The mechanism for monitoring the principles of subsidiarity and proportionality could be implemented independently without waiting for ratification of the Constitutional Treaty and without necessitating any reopening of negotiations between the Member States, save for the possibility of an action being brought before the Court of Justice by the Committee of the Regions, which requires a legal basis in the Treaty (Treaties). All elements relating to ensuring constant respect could be done on the basis of the Treaties presently in force, which include the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality. The early warning mechanism could also be applied on the basis of voluntary commitments entered into by the Members States and the institutions of the Union, which could take the form of conclusions of the European Council accompanied by an interinstitutional agreement. Similarly, access by parliaments to the Court of Justice could be organised on the basis of Member States’ national provisions, since
governments are perfectly able to take responsibility for actions which their parliaments would like to bring.

Such application could be conceived and presented as experimental. In that respect it could have a dual function:

1) with a view to ratification – which is still possible, as has been demonstrated by the precedent of Denmark in relation to the Treaty of Maastricht in 1992-1993 and Ireland in relation to the Treaty of Nice in 2001-2002 –, in order to allow the drafting of interinstitutional agreements and other measures aimed at improved implementation of this mechanism;

2) with a view, in the alternative, to drawing up a new constitution – and in particular a separation between Part III and the purely constitutional provisions of the Treaty of 29 October 2004 – to amend the wording of Protocols Nos 1 and 2 and, where necessary, to insert them partially into the actual body of the Constitution itself.

THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

3. The reformed version of the principle of subsidiarity: involvement of the RLAs

The Constitution refers for the first time to the regional and local level, specifying that ‘the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level’. It falls to the CoR to insist that the consequences of this change should be drawn and that this addition should not be viewed as a mere symbolic gesture to the RLAs. This must and can be done without waiting for the entry into force of the Constitution.

4. The dynamic quality of the principle of subsidiarity

The great diversity in the composition of the CoR obliges it to take account of this dynamic quality, since some RLAs may seek stronger intervention on the part of the Union in a given field whereas others may prefer it to hold back. The Member States’ different situations in terms of problems and resources, and also differences in the organisation of powers and functions of their RLAs, may lead to considerable diversity in points of view, which the CoR must be able to convey.

5. Inseparability of the principles of subsidiarity and proportionality

A close analysis of the texts of the Treaties, their origin, the cases brought before the Court of Justice and the Court’s case-law show that it is not possible to separate the two principles, as is confirmed by a study of the principles as they manifest themselves within the Member States. The distinction between the two principles is useful in defining and developing the criteria which must be observed in order to ensure that the acts of the institutions respond to the requirements of the Treaties, depending on whether they are
legislative or executive acts falling within the exclusive competence of the Union, competences it shares with the Member States, or supplementary or supporting competences. In addition, the aspects linked to subsidiarity may be more important for legislative regions, whereas non-legislative RLAs may be more concerned with aspects relating to proportionality. In certain cases, only the criteria relating to subsidiarity will prove effective, in others those concerned with proportionality may be more relevant. Many aspects of a planned action must be examined from the point of view of both proportionality and subsidiarity.

THE PROTOCOLS ON COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

6. The Amsterdam Protocol and the Subsidiarity Protocol annexed to the Constitution

The innovations introduced by the Subsidiarity Protocol, the early warning procedure and the possibilities for bringing actions in the Court of Justice, are accompanied by a reformulation of the Community acquis codified in the Amsterdam Protocol. The absence from the Subsidiarity Protocol of the points of detail that appear in the Amsterdam Protocol does not, however, mean that these guidelines and assessment criteria are superseded; they continue to be applicable, even though they do not appear in a text having constitutional status. It would be worthwhile for them to be included – and supplemented – in an interinstitutional agreement, for which there is provision in the Constitution, and an agreement between the Commission and the CoR.

7. Refinement of the criteria set out in the Amsterdam Protocol

The additions proposed by the CoR for the analysis of Union actions in terms of the principles of subsidiarity and proportionality are entirely consistent with the wording of the Constitution and Protocol No 2. Pending the entry into force of the Constitution, therefore, it would be particularly useful to test these criteria which, when the time comes, will make it possible to adopt an act to supplement the Subsidiarity Protocol or, in the event that the Treaty of 29 October 2004 is abandoned, to propose a more suitable wording for the constitutional provisions relating to the principle of subsidiarity and for the supplementary provisions which should accompany the text for a new Constitution.

CONSTANT RESPECT FOR THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

8. Constant respect for the principles of subsidiarity and proportionality

It is in the area of ‘constant respect’ in particular that the CoR can demonstrate its capacity and deploy the expertise of the RLAs which it represents, whereas the early warning system and actions before the Court of Justice fall mainly within the remit of the
national parliaments. Constant monitoring can and should be put in place without waiting for the entry into force of the Constitution, since it does not require a new legislative basis.

9. Assessment of the application of the principles of subsidiarity and proportionality in the annual report

The concept of constant respect calls not only for a check on the way in which the principles of subsidiarity and proportionality are applied throughout the Union’s decision-making process, from the programming of initiatives to the implementation of Union actions, but also for an assessment of their application on a regular basis. The transformation of the annual report on the application of the principles of subsidiarity and proportionality into the report on ‘better lawmaking’ undoubtedly enables the Commission to relocate the question of subsidiarity and proportionality in the wider context of good governance, it also leads to a certain dilution of the precise and detailed examination of subsidiarity and proportionality. The inclusion of the regional and local dimension in the principle of subsidiarity and the new role of the CoR might merit a separate report.

10. The application of the principles of subsidiarity and proportionality outside legislative acts

The idea of constant respect makes it clear that application of the principle of subsidiarity is not limited to legislative acts but extends to all action by the Union, including implementing acts, when these are carried out either by the Commission or by other bodies, offices or agencies of the Union. In order to be effective, a culture of subsidiarity and proportionality must be shared, not only by the institutions and consultative bodies, but also by an ever increasing number of regulatory and implementing agencies. The fact that most of these agencies do not have formal decision-making legal powers poses the risk that they may be forgotten in the application of the Subsidiarity Protocol, which focuses on procedural and formal aspects. Executive action by the departments of the Commission itself should also be included in this report. The more precise definition of legislative acts in the Constitution for Europe will make it all the more necessary to take account of other action by Union institutions and bodies in the Commission’s annual report.

LEGISLATIVE ACTS AND RESPECT FOR THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

11. The new typology of competences and acts of the Union

The distinction between the Union’s exclusive competences, shared competences and complementary or supporting competences is a consolidation and a definition of known concepts in the practice of the institutions and the case-law of the Court. It will be useful for ascertaining when and how the principles of subsidiarity and proportionality come
into play. The formulation of those principles restricts the application of subsidiarity, which does not concern the Union’s exclusive competences – whereas the principle of proportionality must be observed in all the Union’s actions. The distinction between legislative acts and non-legislative acts is new not only in terms of vocabulary but also because it corresponds only in part to the distinction between lawmaking and enforcement to which the Amsterdam Protocol refers implicitly. The Constitution maintains a series of special legislative procedures besides the ordinary legislative procedure, which is simplified and clarified compared with codecision; in addition, the various mandatory or optional consultation procedures head up a series of differences in the manner in which the legislative procedure operates depending on the various fields of Union action. An in-depth political assessment of the priorities of the RLAs and CoR as regards the areas where the application of the principles of subsidiarity and proportionality is of particular concern to them may result in amendments to the current area of the CoR’s focus.

12. **Extending the role of the CoR beyond the ‘ten areas of mandatory consultation’**

The areas in which consultation is mandatory correspond to 16 legal bases providing for consultation of the CoR and the ESC, not including the Staff Regulations of officials of the Union. A single legal basis provides for consultation of the CoR only (on cultural matters). There is no overall logic to those consultations. Eleven legal bases provide for consultation of the ESC only, in which cases ‘where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter.’ The new scheme of the Constitution turns those areas into a new category favouring CoR opinions – also with a view to judicial proceedings. In cases where the ESC does not have to be consulted either, the CoR may develop its own-initiative opinions in the knowledge that judicial proceedings on that issue will be available to it only for the purpose of protecting its prerogatives. Extending the areas for consultation on the initiative of the CoR is lawful in view of the recognition of the regional and local dimension of subsidiarity, and it may be better to initiate that measure without waiting for entry into force of the Constitutional Treaty because it is not restricted by the wording of the Subsidiarity Protocol and may therefore be initiated outside the context of judicial proceedings.

13. **Establishing the arrangements for consulting the CoR and for the flow of information**

The Subsidiarity Protocol will call for measures for its implementation, as regards the role of both the parliaments and the CoR. It is especially necessary not to wait for the entry into force of the Constitution before developing and establishing the procedures concerned on the basis of the Amsterdam Protocol currently in force, in the light of the measures intensifying the regional and local dimension.
14. **Preparation of draft legislative acts: consulting widely, impact assessments and detailed statement of reasons**

Consultations conducted on a broad scale, impact assessments and statements of reasons provided for in the Subsidiarity Protocol are a consolidation of the practices in development since the adoption of the Amsterdam Protocol. The two CoR opinions show in themselves how the Committee can help to develop new methods of analysis without waiting for the Constitution to enter into force. It will be possible to formalise the development of those new practices in agreements between the CoR and the Commission and in the relevant interinstitutional agreements. If the Constitution enters into force, the instruments required for its implementation will be ready. If it does not enter into force, a sound basis will exist for a potential rewording of the Subsidiarity Protocol and for making a more comprehensive distinction between the constitutional provisions to be included in the Treaty, the provisions better placed in a protocol and those whose changing nature recommends that they be kept in interinstitutional and other agreements.

**THE EARLY WARNING PROCEDURE IN MONITORING THE PRINCIPLE OF SUBSIDIARITY**

15. **The early warning procedure going beyond the national parliaments**

Close scrutiny of the early warning system strengthens the conviction that the CoR in many cases has greater resources for analysis and reaction than the national parliaments, as a result of which it may prove to be a valuable ally to them. The early warning procedure may very well be organised on the basis of more or less informal agreements, both between the governments and national parliaments and between institutions and bodies of the Union. It can be planned either as a means of testing the early warning system ahead of the entry into force of the Constitution or as a means of strengthening the interest of the public in Europe in the event that the Constitution does not come into force.

16. **Time-limits involved in the early warning procedure**

The privileged position of the CoR as regards deadlines, compared with that of the national parliaments, has to do with three factors: 1) the six-week deadline laid down for the issue of reasoned opinions of parliaments does not apply to the CoR, 2) the role of the CoR is not limited to the principle of subsidiarity, but extends to the principle of proportionality, 3) the CoR is better placed than many national parliaments to embark on its study of draft legislation before the deadline for the early warning system starts to run, which allows it a more generous margin of manoeuvre as regards time.

17. **The early warning procedure in the context of ‘constant respect’**

The early warning procedure is only part of the system for the application of the principles of subsidiarity and proportionality, since it is limited to the draft legislative act as proposed by the Commission to the Union legislator. The CoR is better placed than the
national parliaments to ensure that the application of the principles is monitored throughout the legislative procedure, particularly when it is consulted for an opinion, since it is required to give a view on the draft measure as a whole, not just its compliance with the principle of subsidiarity. It will also be entitled to institute proceedings to safeguard its prerogatives in order to ensure that the institutions take the necessary steps to follow up its opinions. It is particularly useful in this respect that it should be able to state a view on aspects relating more specifically to the principle of proportionality, given the fact that the latter may be affected by an amendment which might seem to be of little significance at first sight. The RLAs, which the CoR represents, are particularly well placed to make the European legislator aware – by way of the CoR’s opinions – of problems in relation to proportionality to which amendments may give rise.

SUBSIDIARITY AND PROPORTIONALITY: THE ROLE OF NATIONAL AND REGIONAL PARLIAMENTS

18. Preparations for the early warning mechanism in Member States

The work done in the member states to prepare for this mechanism is moving forward despite the pause for reflection in the ratification process. It is particularly useful in this respect to consider the internal features of the early warning system. The CoR is particularly well-placed to contribute to concerted action among regional parliaments, especially since, because of its diverse make-up, it is able to represent the views of non-legislative RLAs, in particular to ensure than countries which do not have legislative regions are involved in a broader consultation of RLAs.

19. Preparations of the CoR for the early warning

The experience of national and regional parliaments in considering how to make considered responses in the short, six-week timetable of the early warning system is instructive for the CoR. That timetable makes the delegation of authority to some smaller formation of the respective parliaments, capable of acting quickly and with the authority of the full parliaments, highly desirable. Reflection on that conclusion has encouraged the CoR to delegate its authority under the early warning system, and it seems likely that its Bureau will take on that delegated role, subject – as with equivalents in national and regional parliaments – to powers of overrule and recall by the plenary.

REVIEW BY THE COURT OF JUSTICE OF THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

20. Judicial proceedings as a factor in strengthening the role of the CoR

The opening up of judicial proceedings to the CoR requires the entry into force of the Constitutional Treaty – or, if necessary, another treaty amending the legislation currently in force – before it can be used. Nevertheless, as the CoR itself stresses in its opinion,
account must be taken of the fact that the right to bring judicial proceedings is an institutional consequence of the strengthening of its role resulting from its status as the representative of the RLAs and not an isolated reform. This explains why the Subsidiarity Protocol opens up the way for it not only to bring an action for annulment on grounds of infringement of the principle of subsidiarity by a legislative act but also an action for annulment to protect its prerogatives, whilst the latter action is not available to the Economic and Social Committee (ESC). For the institutions and bodies bringing an action is a weapon of last resort and is all the more powerful for not being used. It would therefore be wrong – from both a legal and political point of view – to deny it the possibility of developing its role as the guardian of subsidiarity outside judicial review on the pretext that the ability to bring an action is not yet available to it.

21. **Prospects for developing case-law relating to subsidiarity**

There is little reason to expect the Court to go beyond a review of the manifest error of assessment made by the legislature as regards the application of the principles of subsidiarity and proportionality to a legislative act. The case-law is likely above all to develop the procedural and formal aspects of the mechanisms designed to ensure that the framers of draft legislative acts – in particular the Commission – and the legislature itself are in a position to take effective note of the diversity of views on the specific consequences of applying the principles of subsidiarity and proportionality to actions of the Union. In that sense, the action for annulment to protect the prerogatives of the CoR will play a full part in the development of effective case-law relating to the subsidiarity and proportionality of legislative acts.

22. **Formal constraints and the scope of an action for annulment**

The formal constraints, and in particular the time-limits on an action for annulment, are much stricter than those placed on the early warning system and the various consultations since they are sanctioned by actions being declared absolutely inadmissible. The fact remains that the response time for analysing legislative acts is longer since this analysis can commence as soon as the draft act is presented. The wording of the Subsidiarity Protocol leaves scope for extending the monitoring of the application of the principles of subsidiarity and proportionality beyond the ‘ten areas’ of mandatory consultation. An action for protection of the CoR’s prerogatives is not limited to cases of mandatory consultation. The provisions providing for the possibility of the CoR issuing an opinion where the ESC must be consulted and the CoR ‘considers that specific regional interests are involved’ are entirely relevant in the light of the case-law which the Court has established in the past, in particular in relation to the European Parliament. There is no prohibition on going further and interpreting Article 8 of the Subsidiarity Protocol which refers to European acts ‘for the adoption of which the Constitution provides that it be consulted’ as covering such opinions which fall within the field of mandatory ESC consultations or even some own-initiative opinions where ‘specific region interests are involved’. A mechanism enabling a decision to be taken quickly on bringing an action for annulment is indispensable, not only in order to be able to bring the action but also to make the threat of such action credible.
23. Importance of an action to protect the CoR’s prerogatives

The action to protect the CoR’s prerogatives is likely to prove to be more important in practice than the action for annulment on grounds of infringement of the principle of subsidiarity, given the limits of a judicial review restricted to a manifest error of assessment. The experience gained by the European Parliament when it still did not have the status of privileged applicant which was conferred on it by the Treaty of Nice is particularly relevant to the CoR, in particular in procedures other than codecision procedures.

24. Role of the CoR alongside other applicants

There are a number of relevant means of bringing an action for judicial review of the application of the principles of subsidiarity and proportionality. An action for annulment may be brought not only by the CoR – once the Constitution has entered into force – but also – under the present Treaties – by the Parliament, the Council, the Commission or the Member States and, often in very well-defined circumstances, physical or legal persons, which include the RLAs. In addition to an action for annulment other actions could lead to a review of the application of these principles, in the same way as references for a preliminary ruling which are of particular importance in this respect and are likely to become more widespread in the future. Therefore, the CoR has every interest in participating in a network which will disseminate information and arguments regarding actions and references for preliminary rulings initiated by the RLAs. The innovation introduced in the Statue of the Court of Justice annexed to the Constitution, whereby bodies, offices and agencies – and thus the CoR – are given the opportunity to intervene in support of actions brought by others, must be studied carefully in spite of the limits placed on intervention. It would be technically possible, if necessary, to introduce this innovation into the present Statute of the Court now, since it can be amended to that effect by the Council, without waiting for the Constitution to enter into force.

CHALLENGES FOR THE CoR

25. Embedding and Mainstreaming a Culture of Subsidiarity

The failed ratification referendums in France and the Netherlands have reinforced perceptions of a democratic deficit in the EU. The opportunity exists to embed and mainstream a subsidiarity culture in the EU that, by mobilising the expertise and addressing the concerns of RLAs, would bring Europe closer to its citizens. The challenge for the CoR whether or not the Constitution is ratified, is to seize that opportunity. The CoR represents a diversity of interests at levels of government below that of the Member States. Different types of regional and local authority have different interests in subsidiarity compliance, some focused in legislative competences, others on problems and proportionality of EU policy implementation, and therefore understand the challenges of subsidiarity monitoring in different ways. It is vital that the CoR succeeds
in providing a platform for all its component interests in order to build its sense of purpose and credibility as a subsidiarity ‘guardian’.

26. **Subsidiarity monitoring as a continuing process**

Subsidiarity monitoring is a process which needs to accompany all stages of EU law-making. It requires of the CoR intensive engagement or RLA views with the Commission in the drafting of and at the publication of proposals, but also requires further monitoring of amendments to Commission proposals by Council and Parliament. The pre-legislative phase is the most important in subsidiarity monitoring, and remains so whether or not the Constitution ultimately is adopted. Ensuring subsidiarity concerns are taken aboard through effective processes of consultation with RLAs improves the quality of legislation and acts pre-emptively to remove concerns from the table before legislation is formally published. Logically enough doing so also saves the resources which might otherwise be invested in opinions and challenges on subsidiarity infringements. Impact assessment is a vital tool in ensuring that a subsidiarity culture is mainstreamed in EU legislation, and the control of the Commission’s assessment methodologies and findings must be an important priority for the CoR and the RLAs it represents. Subsidiarity monitoring by the CoR needs to be developed throughout the legislative process so that amendments by Council and Parliament which infringe subsidiarity can be identified and challenged.

27. **Bringing actions before the Court of Justice**

Under the Constitution the CoR’s right to appeal to the ECJ on subsidiarity infringements is not formally connected with the early warning system, though in practice CoR appeals will have more credibility if they connect with and are reinforced by subsidiarity concerns initially expressed by national parliaments in the early warning phase. Taking an appeal to the ECJ is a ‘nuclear option’ which should only be considered in extremis, on matters of fundamental importance, and where the legal basis for a challenge is absolutely clear.

**ORGANISING THE CoR FOR AN EU SUBSIDIARITY CULTURE**

28. **A culture of subsidiarity**

The CoR has called vigorously for a mainstreaming of a culture of subsidiarity in the European Union, and has been established in the Constitution and in debates on European Governance as a guardian of subsidiarity. It has therefore entered into an intensive debate about how as an organisation it can meet the challenge of fixing the subsidiarity principle ‘firmly in the minds of political decision-makers at European, national, regional and local level’. The CoR is taking steps to mainstream subsidiarity in the EU, in particular by hosting an annual subsidiarity conference designed as a meeting place for all those institutions – local, regional, national and European – whose cooperation and commitment is required to transform the aspiration of a culture of subsidiarity into practice.
29. Monitoring subsidiarity and proportionality, with or without the ratification of the Constitutional Treaty

Subsidiarity and proportionality monitoring is not conditional on the entry into force of the Constitution, and the enhanced attention focused on subsidiarity in recent years is not a product alone of the constitutional debate. The CoR is therefore committed to developing its subsidiarity monitoring role irrespective of the fate of the Constitution and has begun to organise itself so it can better perform that role. In developing its subsidiarity monitoring role the CoR has taken steps to improve the evidence base on understandings of subsidiarity in order to deliver effective arguments on the infringement of subsidiarity. At the heart of these steps is the establishment of an electronic subsidiarity monitoring network, constructed with the cooperation of RLAs and their associations and connected to other relevant databases, and designed as an instrument of information and consultation and to inform CoR decision-making.

30. Mobilising wider viewpoints

Central to an effective subsidiarity monitoring role is the mobilisation by the CoR of wider viewpoints. It is developing an intensive practice of cooperation with RLA associations and will need to develop new lines of communication to national parliaments and regional parliaments with legislative powers if it wishes to connect its concerns to those of national and regional parliaments in the early warning process under the Constitution. Its right of ex-post appeal to the ECJ – which is not available to individual RLAs – means it is likely to be asked to act on subsidiarity infringements perceived by particular RLAs or RLA groupings. Its practices of cooperation will be important in developing shared understandings of subsidiarity which prevent frivolous appeals, and there are opportunities to develop a relationship of mutual benefit with legislative regions on early warning and ex-post appeal.

31. Equipping the CoR for the early warning system

The CoR’s existing modus operandi will not be suitable for the short timeframes needed for the early warning system or appeal to the ECJ under the Constitution. It is therefore debating how to equip itself best to meet such timescales, considering the delegation of the authority of the plenary to a special Subsidiarity Commission or alternatively the CoR Bureau. Whichever route is chosen, care will need to be taken to connect the work of the delegated body to the plenary, which needs to retain the right to overrule delegated decisions, and the CoR’s policy Commissions, which will still deal with the main workload in reviewing, and suggesting improvements of legislation.

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Foreword

1. The Committee of the Regions (CoR) started, at a very early stage, to study the possible consequences of the draft Treaty establishing a Constitution for Europe, in particular by organising the first conference on subsidiarity in Berlin on 27 May 2004, adopting the decision of its Bureau of 20 June 2004 to instruct the Commission on Constitutional Affairs and European Governance (CONST) to draw up an own-initiative opinion on the application and monitoring of the principles of subsidiarity and proportionality in accordance with the fifth paragraph of Article 265 of the Treaty establishing the European Community (TEC), and by issuing in November 2004 a call for tenders for a study on the monitoring of the principles of subsidiarity and proportionality under the Constitution for Europe (‘the Constitution’). In doing so it demonstrated its foresight, its determination and its commitment to the proper functioning of the institutions of the European Union in its role as the representative of the Regional and Local Authorities (RLAs) of the Union’s Member States.

2. The initiation to tender which led to this study was prepared in the light of the new provisions on the participation of RLAs in the functioning of the EU and the Treaty establishing a Constitution for Europe signed by the Heads of State and Government of the 25 Member States on 29 October 2004. The study was to be drawn up to examine the consequences of the Treaty’s Subsidiarity Protocol relating to the application of principles of subsidiarity and proportionality. One of the main aims of this study was to present an analysis and make recommendations on the way in which the CoR could ensure that the new provisions on subsidiarity and proportionality contained in the Constitution are used to optimum effect in the interest of the RLAs across the EU.

3. Following the voters’ rejection of ratification of the Treaty in France on 29 May 2005 and in the Netherlands on 1 June 2005 it is highly unlikely that the Constitution will enter into force in its present wording. It is almost certain that it will not be able to enter into force on the date originally planned, namely 1 November 2006. The first question to be answered in this study is therefore:

*Is the still any reason to present this study on subsidiarity in the light of the Constitution for Europe?*

4. The answer is a clear and resounding yes. There are a number of fundamental reasons why it is vital for the CoR to reflect on and develop its thinking, its role, and its structures and procedures in order to monitor the application of the principles of subsidiarity and proportionality, without or without the Constitution.

5. The method used to draw up this study is undergirded, on the one hand, by a legal analysis of the content of the Subsidiarity Protocol and the relevant provisions of the Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004, the content of the Treaties and other relevant provisions currently in force, and the relevant

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2 To be precise, the three candidate countries at that time – Bulgaria, Romania and Turkey – also participated in the ceremony, thereby demonstrating their willingness to be bound by the new treaty if they become members of the EU.
case-law and legal literature, in so far it concerns issues relevant to the CoR, and, on the other, by an analysis of practice based on interviews with the practitioners concerned and on the documents produced by the institutions, the RLAs and the associations concerned. The study was conducted by two academics, Professor Jacques Ziller, Professor of Comparative Public Law and Community Law at the Université de Paris 1 Panthéon-Sorbonne, currently seconded to the European University Institute, Florence, and Professor Charlie Jeffery, Professor of Politics at School of Social and Political Studies at the University of Edinburgh.

6. Preparations had been made for the study before the CoR adopted its opinion entitled ‘Guidelines for the application and monitoring of the subsidiarity and proportionality principles’ (‘Opinion 220-2004 [subsidiarity guidelines]’), the draft of which was adopted by CONST on 4 October 2005. However, the final wording of the study takes full account of this opinion, in particular by making detailed reference to it in the conclusions to the chapters. These conclusions also refer to Opinion 121-2005 on ‘Better Lawmaking 2004’ and ‘Better Regulation for Growth and Jobs in the European Union’, the draft of which was adopted by CONST on the same date (‘Opinion 121-2005 [better lawmaking]’). These conclusions reiterate the points of the study reinforcing the relevant aspects of the opinion and those which go further. All these conclusions were used to draw up a note for the Second Conference on Subsidiarity held in London on 29 November 2005 and were reproduced in the summary of the study and its recommendations in the preceding pages.

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3 Rapporteur: Peter Straub (President of the Landtag of Baden-Württemberg (DE/EPP)).
4 Rapporteur: Michel Delebarre (former Minister of State - Mayor of Dunkirk (FR/PES)).
Chapter 1: General Introduction

A. – The various meanings of subsidiarity

7. One of the preconditions for taking advantage of the opportunities created by the work of the Convention – from March 2002 to July 2003 – and the Intergovernmental Conference (IGC) – from October 2003 to June 2004 – is to have greater clarity as to the various meanings of subsidiarity. We emphasise the plural ‘meanings’ with good reason. Subsidiarity is a concept which has become part of the language of Community law and of constitutional structure, but its origins lie elsewhere. Although it has been defined in the various successive treaties and protocols since 1986, this concept is open to various interpretations which can sometimes be contradictory. The House of Lords summarises these contradictions well: ‘Subsidiarity is either seen as an obstacle to the development and efficiency of the EU or as a desirable constraint on the possibility of the Commission to propose unnecessary action at EU level.’

8. These contradictions are reflected in the debates among the RLAs within the CoR. A number of opinions generated by the debate on the Constitutional Treaty and developed in the Commission on Constitutional Affairs of the CoR (CONST) have been interpreted by some members of that Commission as legitimate steps towards monitoring and controlling the scope of the Union’s powers in the RLAs’ affairs, whilst others have considered them to be overly critical of the European Commission and geared excessively to limiting rather than expanding European integration.

9. These differences in perspective must be clarified and explained if the CoR wishes to develop a clear role as regards subsidiarity. An attempt to distinguish between these perspectives will be made below (see Chapter 3). However, these differences have been emphasised more acutely than is necessary purely because of the constitutional debate. The processes involved in drawing up the Constitution within the Convention and the subsequent IGC were traditional in nature and concentrated on constitutional ideas generally associated with the nation state, in particular as regards distinguishing and ranking the powers of the various levels of public authorities.

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6 This reference concerns in particular the initial versions of the opinions on which the President of the CoR Dr Peter Straub (CdR 220/2004 rev. 1), Luc Van den Brande (CdR 221/2004 rev. 2), and José Maria Muñoz Gauza (CdR 222/2004 rev. 2) reported.
10. As a consequence an interpretation of the relations between the various levels of public authorities as a ‘zero sum game’\(^7\) has developed, that is to say where the Member States lose their power in certain policy areas, the Union necessarily gains those powers, and vice versa. This type of interpretation can be helpful in providing a summary description of the basic *structure* of a Union on several levels, but has only a tenuous link with the *practice* of European integration, which entails multiple, complex interactions between all levels of public authorities – local, regional, national and European (and various private-sector players) – in a manner which varies greatly depending on the policy areas concerned.

11. At this juncture reference should be made to the debate on subsidiarity in the European Commission’s agenda\(^8\) on governance. This agenda may be construed as an attempt to describe and understand European integration in a more practice-orientated manner and its aim is to improve the practice of European integration. One of the central themes of the agenda on governance is ‘better lawmaking’. This approach would appear more appropriate to expanding the RLAs’ contributions to developing a ‘subsidiarity culture’ than the interpretations as a ‘zero sum game’, which may be encouraged by overly narrow emphasis on the constitutional debate. The ‘better lawmaking’ view is perhaps better suited to establishing a subsidiarity agenda shared by the various groups of the RLA community represented in the CoR. This point was well emphasised by Norbert de Batselier, President of the Flemish Parliament, in February 2005:

> ‘The new Constitution and its protocols on subsidiarity and the role of the regional parliaments strengthen the impact of these parliaments on the European decision process. The idea is not to slow down the decision process, but to improve its intrinsic quality, so that the diversified situations within today’s Europe can be taken into account more thoroughly.'\(^9\)

12. In other words, a subsidiarity agenda centred on ‘better lawmaking’ could seek to avoid pointless or excessively intrusive interventions, including the means to prevent and reverse the course of such interventions, but it does not end there. Subsidiarity also concerns, perhaps primarily, the development of greater involvement of those who have relevant expertise in drafting and implementing the legislation and rules necessary to ensure improved recognition of the diversity of situations across the European Union.

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\(^7\) Zero sum game: the term, which comes from game theory, is often used in economics and political science. It contrasts with the notion of ‘positive sum game’ where all the parties win.

\(^8\) Footnote relates only to the French text.

B. - Taking account of diverse interests of regional and local authorities

13. The establishment of a common agenda should not mean that differences are broken down to a lowest common denominator in the form of unsatisfactory compromises. The CoR could become a more influential advocate of its members’ diverse opinions as regards the interpretation and practice of subsidiarity, provided that these differences are understood and respected by all its members. In other words, the CoR has little chance of success in asserting its own demands relating to the diversity of situations within the Union if it itself has difficulty in articulating the diversity of its members’ views in the debate on subsidiarity.

14. The diversity in the make-up of the CoR is quite specific since it brings together all the forms of regional and local institutions in the 25 Member States, with their very different constitutional traditions and political histories. One of the aspects of this diversity is particularly relevant to the debate on subsidiarity, namely the different forms of constitutional authority of the CoR’s members in each Member State. Since the establishment of the CoR in 1994 these differences have been reflected repeatedly in a distinction between the regions with legislative powers (originally designated ‘strong regions’) and the other RLAs. At different times these two groupings – which certainly do not typify all the differences in the CoR – have given rise to specific proposals on organisational structure reflecting their different interests and even a proposal to separate the CoR into two chambers. Such proposals have, rightly, always been rejected since the very credibility of the CoR turns on its ability to represent the Union as a whole, something which would be compromised by any organisational separation.

15. However, this does not remove the differences of interest which underlie these proposals. These differences arise from the fact that the impact of European integration on the Member States’ RLAs varies depending on their forms of constitutional authority. A schematic view may be taken of these differences in terms of powers. In brief, European integration had a tendency to reduce the power of the legislative regions, namely to reduce their ability to influence public policies applied to their territories, whilst having the effect of increasing the power of local authorities and non-legislative regions, increasing their ability to influence public policies regionally and locally.

C. – Establishing a ‘subsidiarity culture in the Union’: the challenges facing the Committee of the Regions

16. The principle of subsidiarity has had a stronger political resonance over the last five years. At the same time the regional dimensions of the principle of subsidiarity have been expressed more fully and recognised more broadly both within the constitutional debate which culminated in the Constitution for Europe and within the various initiatives

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10 Before the establishment of the CoR, the Council of European Municipalities and Regions, which was dominated by local authorities, proposed that the representatives of the local authorities be formed into an independent group within the CoR in the same way as the national delegations. The representatives of the ‘strong’ regions took this idea up again in 1995 in discussions within the CoR, and in 1996 within the IGC, arguing in favour of the CoR being separated into two chambers, one for the regions and another for the municipalities.
stemming from the European Commission’s agenda on governance. Significantly, both the Constitution and the agenda on governance envisaged a central role for the CoR in order to put the regional dimensions of subsidiarity into practice.

17. Although the CoR is playing a ‘long game’ as regards subsidiarity, it is, in one respect, facing its ‘moment of truth’. The strong resonance of the principle of subsidiarity in the recognition of the regional dimension affords the CoR an opportunity to give substance to one of its basic objectives, namely to act as the guardian of the idea that decisions must be taken as closely as possible to the citizen. Seizing this opportunity means responding to a number of challenges relating to both the basic nature and the detail of the Union’s legislative process.

D. – The need for the CoR to develop its thinking, its role, and its structures and procedures in monitoring the application of the principles of subsidiarity and proportionality

18. 1) A ‘long game’
Firstly, the CoR is involved in a ‘long game’ – to use a term familiar to political science – as regards subsidiarity. The new provisions in the Constitution are not the result of a short-term, ad hoc agenda but the most recent consequence of a long-term process to establish a ‘subsidiarity culture’ in the functioning of the European Union.

19. 2) A change of context
Secondly, the provisions added to the Constitution changed the context in which EU policymakers think about subsidiarity in two ways.

i. Recognition of the multi-level nature of the principle of subsidiarity

20. For the first time provision has been made in the Treaty itself, rather than in a mere protocol, for formal recognition of the fact that the principle of subsidiarity has an effect at several levels and extends below the level of the Member State to include the RLAs as well. It is unlikely that this advance in the notion of subsidiarity could be challenged. It is even less likely to be the case if the feeling persists that there is a democratic deficit in the Union, reinforced by the French and Dutch ‘no’ votes. The RLAs’ arguments concerning the need to ensure that decisions are taken close to citizens, which have been vigorously defended by the CoR, are likely to be even more persuasive against the background of their apparent alienation from an excessively remote Union.

ii. Strengthening the role of national parliaments

21. The Constitution has clearly strengthened the role of national parliaments in the monitoring of subsidiarity and through Protocol No 2 has brought the regional dimension in monitoring subsidiarity into line with the role of the national parliaments by:
(a) incorporating RLAs into the pre-legislative dimension of consultation and impact assessment;

b) instructing the national parliaments to consult the regional parliaments with legislative power as part of the early warning system following the publication of EU’s legislative proposals;

c) and also creating a role for the CoR, parallel to that of the national parliaments, in bringing before the Court of Justice, where necessary, an action for annulment on grounds of infringement of the principle of subsidiarity by a legislative act.

22. The national parliaments have responded enthusiastically and energetically to their new subsidiarity monitoring role and it is unlikely that this enthusiasm will wane if the Constitution is not ratified. The profile and scale of the problems relating to subsidiarity have increased because the national parliaments have started to think more systematically about subsidiarity and this has expanded the field of possible allies for the RLAs in their search for a more profound subsidiarity culture.\(^\text{11}\)

23. 3) A large number of debates

Thirdly, and without doubt most importantly, the constitutional debate on subsidiarity has not been the only major debate on this problem at European level in recent years. The European Commission proposals on governance drawn up in the early days of the Prodi Commission in 1999 also had important implications and certain practical consequences for a subsidiarity culture in the EU. Although the term ‘subsidiarity’ does not appear pre-eminently in the 2001 White Paper on governance\(^\text{12}\) or in most of the subsequent initiatives\(^\text{13}\) – on which the CoR has already had an opportunity to comment\(^\text{14}\) – some of the key terminology in the current debate on subsidiarity – impact assessments, pre-legislative consultation, structured dialogue with the RLAs, and ‘better lawmaking’ – form part of the Commission’s agenda on governance. Some of these initiatives (impact assessments and pre-legislative consultations) are reproduced directly as part of the content of Protocol No 2. It should be noted that all these initiatives will be developed whatever the fate of the Constitution. In other words, the Commission has created new opportunities for the RLAs to continue their long search for subsidiarity outside the actual field of the Constitution.

24. In addition to opening up new avenues for the RLAs as regards subsidiarity, the Constitution and the debate on governance have also raised the stakes. These opportunities must be seized. The RLAs and the institution which represents them at

\(^{11}\) The UK Chamber of Lords has produced a useful study on the way in which national parliaments have started to respond to the content of the Constitution regarding subsidiarity: House of Lords, European Union Committee, 14th Report of Session 2004-05, Strengthening national parliamentary scrutiny of the EU – the Constitution’s subsidiarity early warning mechanism, HL Paper 101 at http://www.publications.parliament.uk/pa/ld200405/ldselect/ldeucom/101/101.pdf, Chapter 6.


\(^{13}\) http://europa.eu.int/comm/governance/docs/index_en.htm#insti.

European level, the CoR, have an opportunity to lay down new standards and requirements for monitoring subsidiarity. There is an opportunity here for the Union’s policymakers at all levels of government to recognise that the RLAs are demanding that greater account be taken of them and that they be allowed to participate more fully both at the beginning and at the end of the Union’s decision-making process, under the banner of subsidiarity. It is also an opportunity to state that these demands are legitimate as they provide means of improving the quality of EU legislation and of helping citizens to have a better relationship with the EU.

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CONCLUSIONS OF CHAPTER 1

25. The CoR at the heart of the debate on subsidiarity, proportionality and good governance
In its Opinion 220-2004 [subsidiarity guidelines], the CoR

1.4 emphasises that basing European policy on the principles of subsidiarity and proportionality and developing a culture of subsidiarity could make a decisive contribution to strengthening public confidence in European cooperation and overcoming the scepticism expressed in the referendums that produced a no vote;

[...] 2.10 emphasises that the European Union needs both harmonisation and the preservation of the diversity that has evolved, and advocates a Europe in which the diversity and identities of its peoples can develop their potential to promote fruitful competition without damaging the solidarity and cohesion within the Union;

[...] 2.21 recalls the close correlation between the application of the subsidiarity principle and the principles of good governance in Europe. These principles strengthen the democratic legitimacy and transparency of the Union, and the Constitutional Treaty provides for a welcome extension of pre-legislative consultation between the European Commission and regional and local authorities (Article 2 of the Subsidiarity Protocol); [...]’

26. As is highlighted by this study, the CoR is well placed to establish a link between subsidiarity, proportionality and good governance, on the one hand, and the protection and promotion of cultural diversity in the Union, on the other, since it is itself an expression of that cultural diversity, representing the RLAs whose organisation, functions, size, resources and powers vary considerably from one country of the Union to another. It is also a challenge that the CoR has to meet by organising itself to deal with the various perceptions, expectations and fears which arise in relation to the application of the principles of subsidiarity and proportionality. It is by developing its thinking, role, structures and procedures for monitoring application of these principles that it will be able to fulfil its ambition to promote the establishment of a subsidiarity culture in the institutions, bodies and offices of the Union.

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Chapter 2
The Constitution for Europe and strengthening the position and role of the Committee of the Regions

27. The Constitution for Europe sees the CoR’s position and role being strengthened in comparison with the Treaties currently in force on account of two innovations. One, the protocol on the monitoring of the principles of subsidiarity and proportionality consolidates and expands the protocol on subsidiarity and proportionality of the Treaty of Amsterdam by introducing a new procedure for monitoring the application of these principles, involving the national parliaments and, two, the Constitution grants the CoR access to the Court of Justice by providing that it may bring an action for annulment either to apply the principle of subsidiarity to legislation for whose drafting consultation is mandatory (under the Subsidiarity Protocol) or to protect its prerogatives (under Article III-365).

28. The difficulties encountered in ratifying the Constitution following the referendums in France and the Netherlands do not undermine the strengthening of the Committee of the Region’s position but they raise questions, on the one hand, as to the possibilities of ratifying it in spite of these ‘no’ votes and, on the other, possible alternatives if the ratification of the Treaty of 29 October 2004 is abandoned once and for all.
SECTION 1
THE TWO MAJOR INNOVATIONS OF THE CONSTITUTION FOR EUROPE IN RELATION TO THE CoR

A. – The protocol on monitoring the principles of subsidiarity and proportionality

29. The first change which the Constitution for Europe makes to the CoR’s position and role arises from the provisions of the Subsidiarity Protocol on the monitoring of the principles of subsidiarity and proportionality.

30. The fact that the CoR is expressly mentioned in that Protocol as a party which may bring an action before the Court of Justice to review the compliance of European laws and framework laws with the principle of subsidiarity is the most apparent aspect of this change of role. As will be seen below, the entire mechanism for monitoring the principles of subsidiarity and proportionality also indirectly strengthens the CoR’s position and role. This mechanism grants the CoR a privileged position in comparison with national parliaments in two respects:

- first, the CoR is not formally limited in its action by the time-limit imposed on national parliaments for giving opinions on proposals for legislative acts where subsidiarity is concerned, particularly since the CoR’s opinion can relate to many issues other than compliance with the principle of subsidiarity;

- secondly, the CoR may bring proceedings before the Court of Justice without an intermediary, whilst in the case of the national parliaments the Constitution contains only a kind of invitation to the Member States to set up a mechanism whereby parliaments can ask their governments to bring an action for annulment in the event of an infringement of the principle of subsidiarity.

31. These two new elements in the CoR’s institutional position are linked only in part to the entry into force of the Treaty establishing a Constitution for Europe. Although the possibility of bringing proceedings before the Court of Justice is subject to the entry into force, in practice the right to bring an action is intended to be exercised only in very exceptional cases and some of its collateral consequences can nonetheless be anticipated. As for the early warning mechanism, it can be put in place and tested without waiting for the Constitution to enter into force. These new elements essentially reflect a development of the subsidiarity culture in which the work on the European Convention was a landmark and whose consequences go beyond the formal changes made to the Treaties.
B. – Bringing an action for annulment to protect the prerogatives of the CoR

32. The CoR is also granted, under Article III-365, the right to bring an action for annulment to protect its prerogatives not only against European laws and framework laws – as in the case of an action for annulment on grounds of infringement of the principle of subsidiarity – but also in respect of all acts ‘intended to produce legal effects vis-à-vis third parties’ of the Council, the Commission and the European Central Bank and acts of the European Parliament, the European Council and the bodies, offices or agencies of the Union.

33. It should be noted that an identical power is conferred on the Court of Auditors and the European Central Bank which are both classified as institutions in the Constitutional Treaty\(^\text{15}\). However, this is nothing new for these two institutions since they have had such power under the EC Treaty since the Treaty of Maastricht. The European Parliament, whose power to bring an action for annulment had been limited to protecting its prerogatives since the 1992 Treaty of Maastricht\(^\text{16}\), has, since the Treaty of Nice, had a right to bring actions which is equivalent to that enjoyed by the Commission, the Council and the Member States since the entry into force of the Community treaties.

34. Although the CoR’s possibilities for bringing an action are limited compared with the possibilities available to the Member States, the Council, the Commission and the European Parliament, this right granted to the CoR is not accorded to the Economic and Social Committee (ESC). It is the most concrete expression of the change made by the Constitution in the presentation of the bodies of the Union. Whilst in the present Treaty the provisions on the CoR follow those applicable to the ESC – essentially for chronological reasons since the CoR was set up after the ESC – in the Constitution for Europe the ESC precedes the CoR. This change strengthens the CoR’s position in comparison with the ESC, which reflects the fact that unlike the ESC the CoR is based on the principle of democratic representation. This change is bound to have an effect on the use and interpretation of the provisions on the CoR’s consultative power which provide that in cases where the ESC must be consulted the CoR may ‘where it considers that specific regional interests are involved, […] issue an opinion on the matter’ (Article III-388 which reproduces Article 265 EC).

35. Articles III-386 to III-388, provisions specific to the CoR in the Constitution, contain further amendments to the wording of the present Treaties, but it cannot be said that they affect the CoR’s position and role in relation to those Treaties. The most significant amendment – other than access to the Court of Justice – is the fact that Article III-386 of the Constitution for Europe mentions only the maximum number of members of the CoR and no longer fixes the precise number of members from each country, unlike Article 263 EC. However, it should be noted that the same change is made in Article III-389 in relation to the ESC. More importantly, the duration of the CoR’s mandate is

\(^{15}\) The Central Bank was not expressly classified as an institution in the present Treaties but the Court of Auditors was classified as such by the Treaty of Maastricht.

\(^{16}\) This power had been conferred earlier by the case-law of the Court of Justice and the Treaty of Maastricht enshrined the principle established by case-law.
increased from four years under Article 264 EC to five years in the Constitution (Article III-386). Consequently, the chairman’s term of office is increased from two years (Article 264 EC) to two and a half years (Article III-387 of the Constitution). Here too the same change is made to the ESC’s mandate. Therefore, the aim is clearly to bring all the mandates of the institutions and representative bodies into line with the term of the EP (Parliament, Commission, CoR and ESC).
SECTION 2
CONSEQUENCES OF THE DIFFICULTIES IN RATIFYING THE CONSTITUTION FOR EUROPE

36. The immediate result of the ‘no’ votes in the referendums in France on 29 May (54.67% of votes cast on a turnout of 69.37%) and in the Netherlands on 1 June (61.6% of votes against on a 62.8% turnout) is to prevent the governments of these countries from ratifying the Constitution for Europe for the time being. The possibility of ratifying the Treaty at a later date will depend on the political climate and the initiatives taken by the governments of the 25. The UK Government’s suspension on 6 June of the procedure to pave the way for an advisory referendum on the Treaty means that it did not wish to have the House of Commons pass a law which could prove to be pointless and is reserving its position on the future. The governments of Cyprus, Latvia, Luxembourg and Malta have continued and completed the ratification procedure following the ‘no’ votes in France and the Netherlands, whilst the governments of other countries have deferred their decisions.

37. In November 2005 the procedures authorising ratification have therefore been carried out successfully in fourteen Member States (Austria, Belgium, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain) but some have ‘encountered difficulties in proceeding with ratification’, according to the ‘Declaration on the ratification of the Treaty establishing a Constitution for Europe’. The political assessments of the Treaty’s future vary enormously. To some it is dead, to others it is on hold, and to others still there is merely a pause in the ratification procedure.

38. In spite of the contentions that it is ‘dead’ or ‘on hold’, the Treaty exists and continues to produce the effects which it started producing on 29 October 2005. The Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004, and the protocols, annexes and declarations adopted by the Final Act of the Intergovernmental Conference within which the Treaty was negotiated, require ratification by all the Member States in order to enter into force. The Treaty itself provides that it is to enter into force no later than 1 November 2006, provided that all the Member States have deposited their instruments of ratification by that date, or, failing that, it can enter into force on the first day of the second month following the deposit of the final instrument of ratification.

17 OJ No C 310/01 of 16 December 2004.
18 The 1986 Single European Act, for example, provided for its entry into force on 1 January 1987 but it was necessary to wait until 1 July 1987 on account of an unseen event. An Irish citizen by the name of Crotty brought an action before the Irish High Court seeking a declaration on the constitutionality of the law authorising ratification and the High Court ruling compelled the Irish Government to propose an amendment to the Constitution by way of a referendum. The 1992 Treaty of Maastricht provided for its entry into force on 1 January 1993 but did not finally enter into force until 1 November 1993, not only because the first referendum in Denmark produced a ‘no’ vote but also because a German citizen by the name of Brünner brought an action before the German Constitutional Court seeking a declaration on the constitutionality of the law authorising ratification, thereby delaying Germany’s ratification of the treaty. That is probably why the framers of the Treaties of Amsterdam and Nice avoided laying down a specific date of entry into force and merely provided for entry into force ‘on the first day of the second month following that in which the instrument of ratification is deposited by the last signatory State to fulfil that formality.’ In the case of the Constitution for Europe the indication of a date has a particular usefulness in that it invites the European Council to consider the matter as from 1 November 2006 if four fifths of the Member States have ratified the treaty by that date.
39. Since 29 October 2004 the situation of signatory States has been governed by the Vienna Convention on the Law of Treaties, which provides for the case in question:

**Article 18 of the Vienna Convention on the Law of Treaties – Obligation not to defeat the object and purpose of a treaty prior to its entry into force**

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

40. None of the Member States of the Union, all of which are signatories to the Treaty establishing a Constitution for Europe, has expressed its intention not to become a party to the Treaty, as envisaged in paragraph (a). The French and Netherlands referendums merely had the effect of temporarily preventing the Heads of State of those countries from ratifying the Treaty. They will have to obtain authorisation to do so through their parliaments, if necessary after renewed public consultation, or directly by way of a referendum. Neither the French Government nor the Netherlands Government has officially declared that they no longer wish to be party to the Treaty. On the contrary, a date has been set during the Austrian presidency – in the first half of 2006 and therefore before the date provided for in the ‘Declaration on Ratification’. The speech by British Foreign Secretary Jack Straw to the House of Commons on 6 June 2005 is a perfect illustration of the United Kingdom’s desire to meet its obligations under Article 18 of the Vienna Convention.

41. In order to be able to deem the entry into force of the Treaty establishing a Constitution for Europe to be unduly delayed as envisaged in paragraph (b), it is first necessary to wait for 1 November 2006 to pass – before which date the Treaty could not enter into force even if the 25 instruments of ratification had already been deposited – and for there to be clear signs that the ratification process is continuing to be seriously blocked in one or more Member States. In the meantime, the Treaty is not dead. It cannot produce its effects but it can and must be taken into account in interpreting the present Treaties in such a way as not to defeat the object and purpose of the Constitutional Treaty. In particular, this means not only that anticipating the setting-up of new mechanisms is not prohibited – it is even desirable in certain cases – but also that the effect of the innovations introduced by the Constitutional Treaty relating to the interpretation of the provisions which are simply incorporated from the present Treaties is likely to be felt from the time the Treaty is signed, whatever the vicissitudes of ratification.

42. In the autumn of 2005, and despite the pessimism that dominates, it is clear that ratification of the Treaty at a later date is not impossible. It will depend on the political climate and the initiatives taken by the governments of the 25 and the institutions and bodies of the Union.
In any event a study on the implementation and monitoring of the principles of subsidiarity and proportionality as provided for in the Constitution for Europe and its protocols is still appropriate for three sets of reasons:

i. As long as no decision has been taken to put an definitive end to the current ratification process, it will still be possible to envisage solutions which would enable the ‘no’ votes in the countries concerned to be reversed and therefore to bring about ratification of the Treaty as it stands, without renegotiation or amendment.

ii. If the Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004 is not finally ratified, it is likely that some of its content will be reproduced sooner or later in a different form. Therefore, it will be essential for the Committee of the Regions to assess whether it should request that the provisions of the Subsidiarity Protocol annexed to this Treaty be merely reproduced or whether it is appropriate and realistic to propose the adoption of reworded and supplemented provisions.

iii. Certain components, mechanisms and proposals arising from the adoption of the Treaty do not have to have a legal basis in the Treaties themselves in order to be implemented. It is therefore appropriate for the Committee of the Regions to have these components in any event because they could be implemented without waiting for the Treaty to be adopted, whether it be the Treaty of 29 October 2004 or another Treaty.

1) Possibility of ratification as the Treaty establishing a Constitution for Europe now stands

44. A treaty amending the existing Treaties – the Treaty establishing the European Community (TEC), the Treaty on European Union (TEU) and the Treaty establishing the European Atomic Energy Community (EURATOM) – or a treaty replacing them, such as the 2004 Constitutional Treaty, which amends the earlier treaties, can enter into force only when it has been ratified by all the Member States, as provided for in Article 48 TEU. There have been two ‘no’ votes in referendums in France and the Netherlands, but a referendum or parliamentary authorisation of ratification does not per se constitute an act of ratification.19

45. Ratification by a Member State is the consequence of depositing an instrument to that effect signed by the Head of State. In all the Member States ratification, which is an act of the executive, must be authorised by Parliament. In some countries a specific qualified majority is necessary, whilst in others a simple majority is sufficient. In some countries it is possible or mandatory – under certain conditions – to replace parliamentary authorisation by a referendum or to hold a referendum prior to such authorisation. The

19 Moreover, in June 2005 the Federal German President announced that he could not ratify the Constitutional Treaty immediately because he had to await the outcome of the actions brought by parliamentarian Peter Gauweiler against the authorisation of ratification granted by the Bundestag and the Bundesrat on which the Federal Constitutional Court still has to rule. Similarly, the President of Slovakia has decided to wait until the Slovak Constitutional Court has ruled on actions brought by members of the Slovak parliament before ratifying the treaty.
results of the referendum are legally binding in certain cases but merely politically binding in others. In the case of France, the Netherlands and the United Kingdom, holding a referendum was not mandatory and in the case of the latter two the result is not legally binding since a referendum is optional and, moreover, not provided for in the Constitution. If the results of the referendum are clear, it nonetheless has binding effect on account of the political circumstances. A significant change of circumstances is required at least for the parliament to be able to authorise ratification.

46. Therefore, the question from a legal point of view is what possibilities are available to bring about final ratification of a treaty by a Member State in which there has been a ‘no’ vote and the question from a political point of view is whether a change in the political climate allows the ratification procedure, suspended because of a ‘no’ vote, to be resumed.

47. Since before the results of the referendum in France reference was made to the two relevant precedents regarding amendments to European treaties, namely the ratification of the Treaty of Maastricht by Denmark in 1993 and that of the Treaty of Nice by Ireland in 2002. The precedents of the 1992 Treaty of Maastricht and the 2001 Treaty of Nice demonstrate that a ‘no’ vote in a Member State does not automatically put an end to the ratification process. It is often said that the case of France and the Netherlands is different, but these instant claims have never been backed up by any argument other than that they are founding members, which is merely a historical fact and one which is now very remote. Some commentators point to the turnouts in the referendums of 29 May and 1 June, but it is clear that they have not made the effort to check the turnout in the two Danish referendums, which was considerably higher.

48. In both cases the government and the Member State concerned (Denmark in 1992 and Ireland in 2001) immediately declared that it shared the view of all the other governments that the ratification process should continue in the Member States in which it had not yet been carried out,\(^\text{20}\) which was also consistent with the official French position in the days following the referendum. At the same time, the Danish and Irish governments had none the less started to explore the possibilities of bringing about ratification of the proposed Treaty without reopening negotiations, which, by contrast, neither the French nor the Netherlands government have done.

\(\text{(a) The Danish precedent}\

49. Since the Danish government was not sure that it had the 5/6ths parliamentary majority necessary under its constitution for sovereign powers to be transferred to an international organisation, it was compelled to organise a referendum before the parliamentary vote authorising ratification of the Treaty of Maastricht. The solution envisaged after the ‘no’ vote of 2 June 1992 in Denmark (52.07% of votes cast on a 82.9% turnout) was the adoption of a ‘Decision of the European Council’ and a number

\(^{20}\) Moreover, in 1992 Denmark was the first State to organise a ratification procedure, although certain countries had begun preparations, such as France, where consultation with the Constitutional Council and the constitutional reform which it deemed necessary had already taken place.
of declarations\textsuperscript{21} at the Edinburgh summit on 11 and 12 December 1992\textsuperscript{22}. This solution opened the way for a second referendum on 18 May 1993 which this time produced a ‘yes’ vote (56.77% of votes cast on a 85.5% turnout).

50. This ‘Decision of the Heads of State or Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union’\textsuperscript{23} was merely the legal reaffirmation of the provisions already included in the Treaty of Maastricht and the protocols annexed to it and of the consequences which were to ensue from it. The ‘Decision’ merely reiterates four points which are clear on reading the Treaty of Maastricht and its protocols.

\textit{i.} The additional rights and protection associated with European citizenship do not take the place of national citizenship and the Member States remain entirely sovereign as regards the criteria and procedures for granting their nationality.\textsuperscript{24} Strictly speaking, the wording of the Treaty of Maastricht leaves no doubt in this regard if the effort is taken to read it carefully.\textsuperscript{25}

\textit{ii.} Denmark is not required to participate in monetary union because it has an opt-out clause.\textsuperscript{26} Furthermore, the Danish government had already stated its intention to invoke this clause at the Edinburgh summit.\textsuperscript{27}

\textsuperscript{21} See annexes.

\textsuperscript{22} The majority of this summit was given over to establishing the practical consequences of the principle of subsidiarity. The ‘no’ vote in the referendum in Denmark in June and the hard-won referendum in France in September had been interpreted by the UK presidency as further signs of the need to give substance to the principle which had been introduced in the Treaty of Maastricht in a wording to which the British Prime Minister had made a decisive contribution at the Maastricht summit in December 1991.

\textsuperscript{23} OJ C 348 of 31 December 1992, p. 1

\textsuperscript{24} ‘SECTION A Citizenship: The provisions of Part II of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.’

\textsuperscript{25} The Treaty of Maastricht introduced into the Treaty of Rome establishing the European Economic Community, renamed the European Community, a new Article 8 (which became Article 17 following the renumbering resulting from the Amsterdam Treaty):

‘Article 8
1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.’

Moreover, annexed to the Treaty of Maastricht were declarations by certain Member States concerning the definition of nationality under their national law in continuation of the declarations annexed to the Community treaties since the 1957 Treaty of Rome.

\textsuperscript{26} ‘SECTION B Economic and Monetary Union
1. The Protocol on certain provisions relating to Denmark annexed to the Treaty establishing the European Community gives Denmark the right to notify the Council of the European Communities of its position concerning participation in the third stage of Economic and Monetary Union. Denmark has given notification that it will not participate in the third stage. This notification will take effect upon the coming into effect of this decision.
2. As a consequence, Denmark will not participate in the single currency, will not be bound by the rules concerning economic policy which apply only to the Member States participating in the third stage of Economic and Monetary Union, and will retain its existing powers in the field of monetary policy according to its national laws and regulations, including powers of the National Bank of Denmark in the field of monetary policy.
3. Denmark will participate fully in the second stage of Economic and Monetary Union and will continue to participate in exchange-rate cooperation within the European Monetary System (EMS).’

\textsuperscript{27} The only innovation introduced by the decision in comparison with the Union Treaty, to which this protocol is annexed, is the statement that ‘Denmark has given notification that it will not participate in the third stage’ of Economic and Monetary
iii. Denmark is in no way required to become a member of the WEU\(^{28}\) and does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications (second pillar) but is not opposed to the development of such a policy among the other Member States;\(^{29}\)

iv. The ‘decision’ states that Denmark will participate without restriction in the policies provided in the third pillar, ‘Justice and Home affairs’. This is the precise opposite of an exemption.

Finally, the ‘final provisions’ of this ‘decision’ provide for its entry into force at the same time as the Union Treaty and the possibility for Denmark to reconsider should it wish to do so. This too merely reiterates what necessarily follows from the Treaty of Maastricht and its protocols, which had been put to a referendum on 2 June. The fixing of a date for entry into force gives the impression that it is a binding instrument, but it merely reiterates provisions which in any event could enter into force only because the Union Treaty containing it and the protocols annexed to it were themselves entering into force.

51. One could commend the legal astuteness in creating an instrument which was original and not provided for in the treaties in force at that time, namely a decision of the European Council, or more precisely ‘of the Heads of State or Government, meeting within the European Council’, which has the dual advantage of containing nothing new in comparison with the treaty in question while at the same time having the formal appearance of a binding act. One could also criticise the masquerade in which the Heads of State and Government meeting in Edinburgh engaged to make it appear as if they had granted new concessions to Denmark when they had done nothing more than reaffirm the concessions already granted a year earlier.\(^{30}\) It should be noted that the sleight of hand worked, since the politicians, journalists and sometimes even learned writers speak of the exemptions gained by Denmark in December 1992 without realising that these exemptions had in fact been obtained a year earlier at the Maastricht summit in December 1991. However, the fact remains that this reaffirmation clarified these points for those voters who would not have been properly informed of the fact that the Treaty of Maastricht contained these exemptions.

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28 The Western European Union, an organisation to promote military cooperation set up in 1948 by the Brussels Treaty, whose newly established cooperation with the European Union is organised by the Treaty of Maastricht.

29 In a ‘Declaration on Defence’ annexed to the ‘Decision’, ‘The European Council takes note that Denmark will renounce its right to exercise the Presidency of the Union in each case involving the elaboration and the implementation of decisions and actions of the Union which have defence implications.’ This is not a new requirement on Denmark, as demonstrated by its mention in a mere declaration, because there is nothing to prevent a Member State from declining to preside over a meeting of the European Council or the Council of Ministers. On the contrary, rules on replacement are set out in the Council’s Rules of Procedure.

30 It should also be noted that the Edinburgh European Council did not mention the protocol on the acquisition of property in Denmark annexed to the Treaty of Maastricht by which Denmark was exempted from observance of the principle of non-discrimination in relation to the acquisition of second homes.
52. In addition, a ‘declaration’ of the European Council annexed to the decision explains that the Treaty ‘does not prevent any Member State from maintaining or introducing more stringent protection measures compatible with the EC Treaty […] in the field of working conditions and in social policy […] in order to attain a high level of consumer protection […] in order to pursue the objectives of protection of the environment’ and that it ‘permit[s] each Member State to pursue its own policy with regard to distribution of income and maintain or improve social welfare benefits.’ As a matter of fact, this declaration reiterates what had been introduced into the EC Treaty by the Single European Act through Article 100a(3) and (4) (Article 95 according to the post-Amsterdam numbering31). The declaration on defence referred to above is likewise non-binding.

53. That leaves the unilateral declarations by Denmark. They too in no way change the content or the wording of the Treaty of Maastricht or the protocols which accompany it.32 Nor do they modify Danish constitutional law in any way. They merely reiterate the provisions of the Danish Constitution which had precisely led to a referendum being held.

Article 95 (formerly Article 100 A) EC:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.
4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.
6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.
In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.
When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.
7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.
8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.
9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.
10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.’

Moreover, they could not, as they are a unilateral act of a single State in a system which does not allow reservations contrary to the ordinary law of multilateral treaties.
Article 20 of the Constitution provides that where powers are transferred to an international organisation authorisation to ratify the relevant treaty can be granted only by the parliament deciding by a 5/6ths majority or by a referendum with a turnout of 30% of registered voters. The government undertakes to take this course of action where it would like Denmark’s position to change in the areas in which it can invoke exemptions (monetary and economic union and the second pillar). This too is a response to voters’ fears that they have not been sufficiently informed of what is contained in the Treaty of Maastricht and the Single European Act.

54. Since this ‘decision’ and the declarations – both those of the European Council and those of the Danish government – in no way changed the content of the Treaty of Maastricht, they consequently did not require ratification by the other Member States. A significant number of them had completed their procedures in the meantime, in particular France, where authorisation to ratify had been obtained by a hair’s breadth in the referendum on 20 September 2002 with 51.05% of votes cast in favour and a turnout of 69.69%. In Denmark it would appear that it was the change in the political climate, which restored lost credibility to the government and the parties supporting a ‘yes’ vote, that persuaded a majority of voters to vote in favour of the Treaty accompanied by this decision and these declarations during a new referendum on 18 May 1993. A comparison of the turnout in 1992 (82.9%) and 1993 (85.5%) shows that this ‘yes’ vote was not necessarily down to a change of opinion by the opponents of the Treaty. It may simply be the result of a certain number of non-voters being mobilised in favour of the Treaty.

(b) The Irish precedent

55. The ruling by the High Court of Ireland in the Crotty case in 1986, which obliged Ireland to amend its Constitution to ratify the Single European Act, also led the Irish government to put ratification of the Maastricht, Amsterdam and Nice Treaties to a constitutional referendum. Following the ‘no’ vote in referendum on 7 June 2001 no amendment was made to the Treaty of Nice, just as no amendment was made to the Treaty of Maastricht in the case of Denmark.

56. During the Seville summit of 21 and 22 June 2002 the European Council and the Irish government adopted declarations stating that the Common Foreign and Security Policy (CFSP) would not prejudice Ireland’s policy of military neutrality. Here too these declarations in no way changed the content of the Treaty of Nice and therefore did not require ratification by the other Member States. For Ireland’s part, the wording put to a referendum on 19 October 2002 differed from that of June 2001 in that it not only authorised ratification of the Treaty of Nice (Article 29.4.7 of the Constitution of Ireland) but also provided for approval by the two houses of parliament for Ireland to be able to

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33 The technique chosen in Ireland in relation to the Single European Act and thereafter was to incorporate into the constitution an Article expressly authorising ratification of each of the Treaties without laying down a general clause relating to future amendments to these Treaties. It is the same technique that was used in France in relation to the Maastricht and Amsterdam Treaties and the Treaty of 29 October 2004. The position is different in Denmark and this explains why the Treaty of Nice was not put to a referendum.

34 Bulletin EU 6-2002 Annexes to the Presidency conclusions.

35 See annexes.
exercise the options provided for under various articles of the Treaty\(^{36}\) (Article 29.4.8), and prohibited Ireland from participating in a common defence policy (Article 29.4.9).

(c) The relevance of the Danish and Irish precedents

57. These two precedents have three aspects in common.

i. The governments of the States where the referendums resulted in ‘no’ votes stated that they agreed that the ratification process should continue pending a resolution in their case.

ii. The questions which rejection had raised appear relatively simple to identify.

iii. The response to this rejection did not require amendments to the draft Treaty and there was scope within domestic law for putting exactly the same question to the electorate within a short period.

Depending on whether or not one considers that these three factors apply to the situation in 2005, the Danish and Irish precedents will or will not be deemed to be relevant.

58. Following the referendum on 29 May, the French Head of State and Government declared that the ratification process should continue. The position of the Netherlands government is less clear but has not been expressed officially, or so it would seem. In any event, although some members of the government have issued statements about ‘the death’ of the Treaty, the Netherlands government has not opposed the ratification process continuing in other countries. The statement by the British Foreign Secretary to the House of Commons on 6 June carefully avoids preventing the continuation of the ratification process since the British government even reserves the right to resume the referendum process which it has suspended. The meeting of the European Council on 16 and 17 June did not result in a general freeze of the ratification process and uncertainty will remain until the countries wishing to hold a referendum – such as Portugal and Poland – have actually held a vote. Luxembourg held a referendum on 10 July 2005 with 56.52% of votes in favour. So there have been two ‘no’ votes, in France and the Netherlands, and two ‘yes’ votes, in Spain and Luxembourg.

59. As for the second point, the existence of highly contradictory reasons for the rejection in France and the Netherlands, within these countries and between the two countries, could obviously make it more difficult, but not impossible, to identify means of responding. Neither the exit polls nor the more in-depth studies which are to be carried out by sociologists will enable a definite answer to be given to this question.\(^{37}\) In the case

\(^{36}\) 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1

\(^{37}\) In October 2005 the polls conducted immediately after the referendums are still not available, in particular the poll by the CSA institute entitled ‘Le vote au référendum sur le traité constitutionnel européen: explications du vote et perspectives politiques’ which was carried out on 29 May 2005 by France 3 / Radio France / Le Parisien / Aujourd’hui en France in association with la Tribune, Marianne, Liaisons sociales et la Vie and is published at http://www.csa-fr.com. Cevipof Book No 42 of September 2005, edited by Annie Laurent and Nicolas Sauger and entitled ‘Le référendum de ratification du Traité constitutionnel européen: Comprendre le “Non” français’, brings together contributions which essentially deal with
of France it is notable that the no campaigners’ arguments essentially relate to provisions which already exist in the present Treaties. This situation is reminiscent of some of the criticism to which the declaration reiterating the wording of Article 100a EEC responded in relation to Denmark. It is very difficult to identify precise arguments directed against the innovations introduced by the Constitution for Europe. In the case of the Netherlands the reasons for the ‘no’ vote are even more difficult to relate to a precise innovation of the Treaty, other than perhaps the fears which could be linked to judicial cooperation in civil and criminal matters and which could be the subject of declarations of the same kind as those which Ireland produced in relation to the Treaty of Nice.

60. As regards the third point, the advisory nature of the Netherlands referendum in theory leaves the Parliament and the government a great deal of room for manoeuvre provided, of course, that there is a significant change in the political climate. In the case of France it is unlikely that the government will choose the normal parliamentary route to obtain authorisation to ratify the Treaty of 29 October 2004 despite the ‘no’ vote in the referendum, but there may be additional amendments to the French Constitution which could be put to a new referendum at the same time as the Treaty or simultaneously brought before both chambers of Parliament meeting in congress to revise the Constitution.

61. Therefore, it is clear that the possibility of continuing the ratification process or otherwise depends primarily on the political will of the members of the European Council who are themselves largely influenced by the situation within their respective countries.

2) The possibility of incorporating the relevant provisions on the monitoring of subsidiarity and proportionality in a different form

62. In the absence of ratification of the Treaty of 29 October 2004, the possibility of incorporating some of the innovations of the Constitutional Treaty in different forms – whether they are referred to as a new treaty or new protocols is of little importance – has also been raised and is quite conceivable both legally and politically.

63. Legally, a distinction must be drawn between three types of provisions based on their binding force and their novelty. Politically, the distinction is different. Beyond the issue of how to maintain the momentum which the adoption of the draft Treaty establishing a Constitution for Europe had created, the development of new practices based on the ideas expressed in it requires that a distinction be drawn between two types of provisions of the Constitution depending on whether or not they appear to have been rejected by the votes on 29 May and 2 June and depending on whether they constitute concessions granted by certain Member States in return for other concessions in the ‘package deal’ resulting from an intergovernmental conference.

38 It is clear that it would be easy to find sixty deputies or sixty senators to bring proceedings before the Constitutional Council which would not accept such an abuse of procedure.
(a) The provisions requiring a new treaty

64. The Constitution contains provisions which are not compatible with the present wording of the founding treaties and the protocols annexed to them. That is the case, for example, with the binding nature of the Charter of Fundamental Rights and a number of consequences of abolishing the pillar structure of the Union and more generally all the provisions which change the procedure for adopting Community acts, in particular those which replace unanimity in the Council by qualified majority voting or those which grant a codecision power to the Parliament where it presently only has the right to be consulted. It is also the case as regards the creation of an EU Minister for Foreign Affairs, but not necessarily as regards a President of the European Council.

65. A new treaty amending the present Treaty would be necessary in order to implement these innovations. The name given to such a treaty (constitution, protocol, decision etc.) is unimportant. What is important is that such amendment would be subject to the present procedure for amending Community Treaties laid down in Article 48 TEU which requires an initiative on the part of a Member State or the Commission, a conference of representatives of the governments of the Member States (IGC), the unanimous adoption of the provision by those governments, and its ratification by all the Member States in accordance with their constitutional requirements.

66. Only two innovations concerning monitoring of the principles of subsidiarity and proportionality would appear to fall within this category of provision.

67. i. On the one hand, the possibility of the Committee of the Regions bringing an action for annulment to review the principle of subsidiarity – as provided by Article 8 of the Subsidiarity Protocol – certainly requires amendment of the Treaties. As regards the right of the Committee of the Regions to bring an action to protect its prerogatives (Article III-365(3)), the matter is more debatable. The Court granted Parliament such a right to bring an action, without it being laid down in the Treaties, in 1990. On the other hand, since this right has been laid down in the EC Treaty – by an amendment to the Treaty of Maastricht which entered into force on 1 November 1993 – there could be an attempt conversely to use this legislation to contend that at present an express provision of the Treaties is necessary for an institution or body of the Union to have a right to bring an action for annulment to protect its prerogatives. Nonetheless, it should be noted that Article 245 EC permits amendment of the Statue of the Court of Justice by a unanimous decision of the Council at the request of the Court and after consulting the Commission – with the exception of the provisions on the status of the members of the Court. It is

The technical legal problem that arises can be attributed to the fact that the institutions and bodies do not have legal personality – only the Community has this status – and therefore are unable to rely on the fourth paragraph of Article 230 EC under which ‘Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.’
certainly unlikely – but not entirely impossible – that the Council will agree to granting the CoR access to the Court. It is easier to anticipate the Constitutional Treaty by amending Article 37 of the Statute to open up to the CoR the possibility of intervening, which will be examined in Chapter 9.

68. ii. On the other, the requirement on an institution or a State to re-examine its proposed legislation – laid down in Article 7 of the Subsidiarity Protocol – can follow only from an amendment to the Treaty in so far as the possible decision to maintain the proposal, for which reasons must be stated, could be the subject of an action for annulment before the Court. However, no legislative basis is required for the institutions to enter into a moral commitment to re-examine their proposals.

(b) Provisions which can be implemented on the basis of legislation adopted by the institutions of the Union or by Member States without the need for ratification

69. A significant number of provisions need to be laid down in legislation in order to be mandatory, even though they are not incompatible with the present wording of the Treaties. This is the case in particular as regards the non-procedural aspects of the new nomenclature of acts and certain minor institutional provisions.

70. With regard to the innovations concerning the monitoring of the principles of subsidiarity and proportionality, the early warning mechanism could be established on the basis of two types of legislation which do not need to be in the form of a treaty.

43 The situation is a little more complex for proposals by the Member States, that is to say in the rare cases where they have a right of initiative. Breach of their obligations could nevertheless lead to the annulment of the legislation finally adopted by the institutions, thus sanctioning this obligation.

44 On the basis of the EC Treaty, in conjunction with the Amsterdam Protocol on subsidiarity which establishes the category of legislative acts, it would certainly even be possible to adopt a regulation or an inter-institutional agreement in order to designate a number of present regulations ‘European laws’ and a number of directives ‘European framework laws’. The matter of ‘European regulation’ is more difficult on account of the confusion which would arise between ‘regulation’ within the meaning of the treaty and ‘regulation’ in the new sense.
71. i. As Community law now stands, there is nothing to prevent a national parliament from adopting a resolution on a draft Community act. The question arises only in the law of the Member States. The question whether or not the country’s permanent representation to the Communities and the Union is required officially to communicate such a resolution is also a matter of national law and is secondary once a parliament is resolved to make its position public. The Member States could undertake, where necessary by means of a declaration in the European Council, to lay down rules authorising such resolutions and to have them notified to the Community institutions.

72. ii. As regards the notification of draft Community or Union acts to the national parliaments, it would likewise be sufficient for the Member States to enter into voluntary commitments under which their permanent representation would send such documents directly to the parliaments without delay. These commitments could be expressed during a meeting of the European Council, for example.

73. iii. As regards consideration of possible opinions issued by national parliaments, an interinstitutional agreement could be sufficient – subject, once again, to any disputed aspect.

74. iv. As for the possibilities of bringing an action to protect subsidiary on behalf of national and regional parliaments, since the Protocol can only be regarded as an invitation to the Member States – and not an obligation or even less an authorisation, which is not necessary – there is nothing to prevent them from introducing such measures without any basis in European legislation.

75. Some Member States have already adopted the national measures to implement the early warning mechanism and the mechanism for notifying actions, whilst at the same time making the applicability of the new legislation subject to the entry into force of the Constitutional Treaty, as France did by the constitutional amendment of February 2005 and Germany did by the law of May 2005 (see Chapter 8). If this entry into force is delayed significantly, there is nothing to prevent national legislation from being amended to make it immediately applicable and there is in any event nothing to prevent the government from undertaking to bring an action at the request of its parliament pending completion of the procedure for amending national law.

In most cases it is governed by the regulations of parliamentary assemblies. The case of France is exceptional because the 1958 constitution prohibited the adoption of resolutions by the chambers of parliament as they were considered to be a source of government instability in the Fourth Republic. The amendment of the constitution in 1992 to ratify the Treaty of Maastricht allowed resolutions to be adopted on ‘draft or proposed acts of the European Communities and the European Union containing provisions of a legislative nature’ (Article 88-4 of the Constitution). This could pose a problem in the early warning procedure because the scope of ‘provisions of a legislative nature’ in the French constitution is not identical to that of legislative acts in Community law. That is why the 2005 amendment for the purpose of ratifying the Treaty establishing a Constitution for Europe laid down a new Article (88-5) permitting the adoption of resolutions issuing reasoned opinions in the early warning procedure. The constitution provides that this Article is to apply only from the entry into force of the Constitutional Treaty although in theory the French assemblies may be unable to draw up resolutions on all the draft legislative acts within the framework of the present Treaties. Nevertheless, the present wording of Article 88-4 provides that the government ‘may also submit to them other draft or proposed acts and any document from a European institution’, thereby opening up to them the possibility of adopting resolutions. If the Member States and the institutions decided to test the early warning mechanism on a voluntary basis, the governments would undertake automatically and immediately to communicate draft legislative acts to the parliamentary assemblies and the matter would be resolved in practice.
76. This may appear extremely complicated because the various factors to be taken into account have been broken down in the reasoning set out. In practice, two acts are sufficient:

- the adoption by the Member States, during a meeting of the European Council, of a commitment to put in place the procedures needed to allow their parliaments to play the role provided for in the Protocol, in the form of conclusions of the presidency or declarations, and

- the adoption, on the same occasion, by the Commission, the Parliament and the Council, of a commitment to adopt an interinstitutional agreement on the procedure for considering the opinions issued by national parliaments. Both these types of instruments could simply reproduce the early warning system provided for in the Protocol.

(c) Provisions which do not need a new legislative basis

77. Apart from the fact that it proclaims important principles in terms of values, the Constitution for Europe is largely a work of codification and reorganisation of present Treaties. This codification and reorganisation could change the interpretation which the Court places on a number of provisions, in particular following the abolition of the pillars and because the Constitution places greater importance on the individual than the economy.

78. One of the most significant consequences of this work from a legal point of view is the abolition of the pillars which results in all the acts adopted in the field of freedom, security and justice being subject to review by the Court of Justice. However, many provisions of the Constitution already appear as such in the Treaties – apart from the designation of the acts. It should be noted that in substantive terms the difference between legislative and non-legislative acts has appeared in the Treaties since the Treaty of Maastricht which established the notion of the Council acting in its capacity as legislator, by the amendment of Article 207(3) (formerly Article 151) EC. This notion is reinforced by the Treaty of Amsterdam though the extension of the scope of codecision and the simplification of the codecision procedure and with the adoption of the Subsidiarity Protocol annexed to the Treaty of Amsterdam the term ‘legislative act’ actually appears in the Treaties.

79. It is clearly not necessary to make a detailed comparison of the Treaties in their present form and of the wording of the Constitution and of the Subsidiarity Protocol before adopting a definitive position, but it should already be noted that the principles of subsidiarity and proportionality appear in the EC Treaty and the TEU and have already been relied upon before the Court of Justice, and that the Protocol annexed to the Treaty of Amsterdam imposes a number of duties on the institutions – and in particular the Commission – as regards drafting and stating of reasons for its legislative proposals.

46 It is clearly necessary to check all the other protocols annexed to the Treaty of 29 October 2004, since some of them could have an unnoticed impact on the monitoring of subsidiarity and proportionality.
(d) **Provisions that can be regarded as a reason for the voters’ rejection of the Constitution in countries where the referendum produced a ‘no’ vote**

80. Until proper and detailed studies of the reasons for the rejection of the Constitutional Treaty by the majority of voters in the referendums of 29 May and 2 June are produced, the only evidence available by which to gain an idea of the reasons for the rejection is an analysis of the campaign arguments put forward in favour of a ‘no’ vote. No objections appear to have been raised to the content of the Subsidiarity Protocol. On the contrary, in both France and the Netherlands the general tone of the campaigns was rather the insufficient account taken of national features and subsidiarity. If the European Council decided to adopt a set of declarations on implementing the content of the Subsidiarity Protocol, it would be difficult to raise objections in the name of the voters who voted against ratification of the Treaty. It should be noted in particular that the mechanism for monitoring subsidiarity and proportionality was intended to respond to the concerns of two sets of voters who could have voted against ratification, namely those who consider that the workings of the Union are not sufficiently democratic and those who consider that the Union interferes excessively in citizens’ everyday lives.

(e) **Provisions which can be regarded as concessions granted by some Member States and inseparable from other concessions granted by other Member States**

81. The question of reciprocal concessions between States is quite different in relation to the Treaty establishing a Constitution for Europe from in relation to previous treaties simply because this time the draft was drawn up by the European Convention.

82. A number of amendments to the draft Convention were adopted within the framework of the IGC, and in particular during the conclave of foreign ministers in Naples on 28 and 29 November 2003 and during meetings in May and June 2004 both at the level of foreign ministers and of Heads of State and Government on 18 June. This is obviously the case as regards the composition of the Commission and the rules on majority voting in the Council. However, the problem of subsidiarity, and in particular the content of the Subsidiarity Protocol, clearly is not covered by such amendments.

83. The final wording of Protocol No 2, as annexed to the Treaty of 29 October 2004, differs from the wording of the Protocol as adopted by the Convention on 13 June 2003, presented to the Salonica European Council on 20 June, and submitted together with the full draft Treaty to the President of the European Council on 18 July 2003.⁴⁷

84. However, the differences in the wording are purely formal. They were made by lawyers of the General Secretariat of the Council – in consultation with Member States’ legal experts – and by the lawyer-linguists who finalised the wording of the Treaty and its annexes during the summer of 2004. The essential change lay in the structuring of the wording of the Protocol in the form of articles rather than the previous numbered paragraphs. Certain phrases were amended slightly for stylistic reasons, as had been done

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⁴⁷ OJ No C 169/01, 18 July 2003.
in relation to the entire draft Convention before the IGC started its work. Moreover, certain language versions were revised more thoroughly to ensure consistency between the texts. In any event, on this occasion there was no change to the substance of the wording of the Subsidiarity Protocol or the other provisions relevant to the monitoring of subsidiarity and proportionality.

85. Within the Convention, and in particular Working Group I on subsidiarity chaired by Iñigo Mendez de Vigo, there were discussions and different positions which were subsequently reconciled. However, it does not appear possible to identify a particular feature of the Protocol as representing a concession by a Member State or group of Member States which was linked to other concessions. Quite to the contrary, the fact that the Protocol essentially incorporated the working group’s ideas clearly demonstrates that the mechanism for monitoring subsidiarity should be considered independently.

86. The mechanism for monitoring the principles of subsidiarity and proportionality could therefore be implemented independently without the need for any reopening of negotiations between the Member States, with the exception of the possibility of an action being brought before the Court of Justice by the Committee of the Regions, which requires an explicit basis in the Treaty (Treaties).

87. In response to possible criticism of seeking to apply provisions of legislation which has not yet entered into force and, moreover, has been rejected by the voters of two countries, such application could be seen and presented as experimental. In that respect it could have a dual function:

- with a view to ratification which is still possible, to allow the drafting of interinstitutional agreements and possible acts to improve implementation of this mechanism;

- with a view to the drafting of a new constitution, and in particular a separation between Part III and the purely constitutional provisions, to amend the wording of Protocols Nos 1 and 2 and to insert them partially into the actual body of the Part I.

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48 Document No CIG 50/03. This related to the French version of the draft Convention. The amendments made to it included abolishing the Legislative Council, moving the Article on the principle of primacy, supplementing a number of legal bases to add acts (laws, regulations, decisions) which sometimes did not appear in the wording adopted by the Convention, grouping certain articles together, and changing the numbering system. These changes were also made to the English version during the work of the IGC, but the other language versions were not amended until the summer of 2004 during the drafting of the final text.
88. **Making better use of the pause in the ratification process for the Treaty establishing a Constitution for Europe**

In its Opinion 220-2004 [subsidiarity guidelines] the CoR

‘1.2 welcomes the announcement by the European Council of 16-17 June 2005 of a period of reflection in the ratification process and considers it necessary to use this period to consider how the Union might bring its policies more into line with public expectations and improve communications with the public; and emphasises that representatives of regional and local authorities in particular, who are especially close to the citizens, can play a decisive role in this, not least by formulating proposals and initiatives;

[...]

1.4 emphasises that basing European policy on the principles of subsidiarity and proportionality and developing a culture of subsidiarity could make a decisive contribution to strengthening public confidence in European cooperation and overcoming the scepticism expressed in the referendums that produced a no vote;

1.5 therefore appeals to the EU’s institutions and bodies to implement immediately, as far as is legally possible, the principles of subsidiarity and proportionality and the monitoring thereof provided for in the Constitutional Treaty, regardless of whether that Treaty has been ratified.’

89. The strengthening of the CoR’s role which is the result in particular of the work of the Convention and the Constitutional Treaty signed in Rome on 29 October 2004 is not undermined by the problems associated with ratification. Quite to the contrary, since the arguments put forward in the referendum campaign in the Netherlands in no way challenged the innovations introduced by the Constitution as regards the monitoring of subsidiarity but rather illustrated the need to show citizens that diversity is respected in the Union.

90. This study shows that the mechanism for monitoring the principles of subsidiarity and proportionality could be implemented independently without waiting for ratification of the Constitutional Treaty and without necessitating any reopening of negotiations between the Member States, save for the possibility of an action being brought before the Court of Justice by the Committee of the Regions, which requires a legal basis in the Treaties (Treaties).

91. All elements relating to ensuring constant respect for the application of the principles of subsidiarity and proportionality, the consultations with a view to the Commission drawing up draft legislation, impact assessment studies, the compilation of statements of reasons, and improvement of the Commission’s annual report, in particular by involving the CoR, could be done on the basis of the Treaties presently in force, which include the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality.
92. The early warning mechanism could also be applied without waiting for the entry into force of the Constitutional Treaty, on the basis of voluntary commitments entered into by the Members States and the institutions of the Union, which could take the form of conclusions of the European Council accompanied by an interinstitutional agreement. Similarly, access by parliaments to the Court of Justice could be organised on the basis of Member States’ national provisions, since governments are perfectly able to take responsibility for actions which their parliaments would like to bring.

93. To avoid criticism of seeking to apply provisions of legislation which has not yet entered into force, such application could be conceived and presented as experimental. In that respect it could have a dual function:

- with a view to ratification – which is still possible, as has been demonstrated by the precedent of Denmark in relation to the Treaty of Maastricht in 1992-1993 and Ireland in relation to the Treaty of Nice in 2001-2002 –, in order to allow the drafting of interinstitutional agreements and other measures aimed at improved implementation of this mechanism;

- with a view, in the alternative, to drawing up a new constitution – and in particular a separation between Part III and the purely constitutional provisions of the Treaty of 29 October 2004 – to amend the wording of Protocols Nos 1 and 2 and, where necessary, to insert them partially into the actual body of the Constitution itself.

94. Within this framework the CoR could develop its advisory function along the lines it followed after the entry into force of the Constitutional Treaty despite the fact that it does not have the right to bring an action to protect its prerogatives. It would be helpful to explore with the Member States and the institutions the possibility of amending the Statute of the Court of Justice by means of a Council decision, as permitted by the Treaty of Nice, in order to grant it new possibilities as regards intervention, for example.
Chapter 3

The principles of subsidiarity and proportionality

95. The definition in legal terms of the principles of subsidiarity and proportionality and their consequences by the Treaty of Maastricht and the Amsterdam Protocol, then by the Constitution for Europe and its Subsidiarity Protocol, does not end the debate on the content and consequences of these principles. What matters for the RLAs and the CoR is not so much the philosophy and origin of these principles as their practical consequences, the more so as perceptions differ depending on whether the vantage point is that of the legislative regions or that of non-legislative regions and local authorities. Consideration of these perceptions must form part of any useful legal analysis aimed at understanding the scope of the Subsidiarity Protocol and the procedure for monitoring the application of the subsidiarity and proportionality principles which it establishes and at gauging what will depend on the entry into force of the new provisions adopted with the Constitutional Treaty, on the one hand, and what can already be pursued by the CoR in its role as guardian of subsidiarity, on the other.
SECTION 1
PERCEPTION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY BY THE DIFFERENT CATEGORIES OF REGIONAL AND LOCAL AUTHORITY

96. As has already been emphasised in the introductory chapter, among the various categories of RLA represented in the CoR, the distinction between legislative regions, on the one hand, and non-legislative RLAs, on the other, has particular relevance to the way in which the principles of subsidiarity and proportionality are understood.

A. - Legislative regions

97. The functions of the legislative regions within the Member States fall into three categories:

- the exercise of exclusive legislative competences at regional level;

- the exercise of competences shared with the national authorities;

- responsibilities for the implementation of regional laws and certain national laws (although these responsibilities may subsequently be delegated to the local authorities).

European integration can have a significant impact on these functions.

98. i. Competences which are exclusive to or shared internally within the Member States are transferred, either as exclusive competences of the Union (for example, the fisheries policy) or as competences shared between the Union and its Member States (for example, environmental policy). In neither of these two cases do the legislative regions generally have direct access to the decision-making process at Union level for matters which their national constitution assigns to their own area of competence. In these areas, European integration means a loss of power for them.

99. ii. In their capacity as the legislative authority in many fields, the legislative regions are often responsible for the transposition of European law into national law and for the correct implementation of that law. Here too, they lack direct access to the formulation of the legislation and regulatory provisions which they have to implement, and they may have to contend with conditions of implementation which are more restrictive than those which would be imposed on them for the implementation of policies adopted within the Member State. Again, European integration can limit the power of legislative regions in the effects they can exert on public policies applicable to their territory.

Of course, in some cases, the regional authorities have gained access to the EU decision-making process, but in the context of a position which they have negotiated with the central government of the Member State concerned. In addition, they have the possibility of consultative influence on the Union’s legislative process through the CoR.
B. - Non-legislative regions and local authorities

100. The situation is in part very different for non-legislative regions and local authorities. Their functions in the national context are not legislative as such – although some of them enjoy extensive fiscal autonomy – but are centred on coordination and implementation within the regional and local context of policies decided at higher levels of government, often within narrowly defined frameworks which only leave them a limited margin of manoeuvre for regional and local decisions. To the extent that European competences have had an impact on these functions, two types of effect have been apparent.

101. i. In the first instance, the Union as a legislator may allow little autonomy for the non-legislative regional authorities and local authorities in their implementing function and may even impose stricter implementing rules than would be imposed at national level. The result may be less scope for the non-legislative RLAs to have an impact on public policies applicable to their territory.

102. ii. But in other respects, the development of the interest of these RLAs in the European decision-making procedure has often revealed new possibilities for political participation and learning, the effect of which has been to increase the impact of the non-legislative RLAs on the public policies applicable to their territories. An obvious example is the structural funds, the implementing rules for which have revealed a more extensive role for the non-legislative RLAs than that afforded them by national constitutional provisions governing regional policies, agricultural policies and vocational training policies. The transnational networks and partnerships developed within the framework of the structural funds have also opened up new opportunities for political learning, alliance-building and lobbying at European level. These participation and networking sectors for the implementing authorities are strongly emphasised in the European Commission’s Governance White Paper, for which they provided the inspiration in a good many cases. These unprecedented opportunities for contributing to new forms of European governance have had the effect of increasing the possibilities open to non-legislative RLAs to influence the policies applicable to their territory.

103. It should be noted that these distinctions between legislative authorities and non-legislative authorities, on the one hand, and between an increase and a reduction in powers, on the other, are neither absolutely hard-and-fast nor inflexible. We have indicated them here as models – or ideal types, to use the language of political sociology. There are of course grey areas, areas of confusion and exceptions. Nevertheless the core idea which emerges is that the deepening of integration since the 1980s has had consequences for the RLAs, which are differentiated according to their constitutional status in the Member States, and that these differentiated consequences have had an effect on the approach of the different groups of RLA to the principle of subsidiarity.

104. a) Since the legislative regions feel that they stand to lose power as European legislation increases, they have invoked subsidiarity in seeking a fuller explanation of
those losses, where they arise, and have sought ways of challenging and rejecting them, along with better and more systematic access to the decision-making process at European level, whenever their powers are at stake, and less restrictive conditions for the implementation of European policies.

105.  

b) The non-legislative RLAs do not lose their powers in the same way because of European integration (in fact the impact of Community competences on their functions may open up for them new political relations and networks which did not previously exist within their Member State). Their concerns relate mainly to their role in implementation and focus as much, or even more, on the proportionality of European legislation – are European laws too peremptory, has their impact been properly examined? – as on the principle of subsidiarity – are decisions taken at the right level of government, is Union action justified?

106.  

These differences of perspective with regard to subsidiarity will be a recurring theme in this study. They have direct implications for the procedures of impact studies, for assessing whether or not the principle of subsidiarity has been breached and for the processes of internal opinion-forming within the CoR on subsidiarity questions and on the nature of the dialogue the CoR maintains with the European Commission, organised groups and national parliaments. The challenge is to find a *modus operandi* on subsidiarity which can satisfy groups of CoR members with differing concerns and interests.
SECTION 2
FORMULATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY
IN THE CONSTITUTION FOR EUROPE

107. The existence in the Constitution for Europe of a specific procedure for monitoring the principle of subsidiarity promotes a tendency to dissociate the principle of proportionality from that of subsidiarity. We shall return to look at this question in more detail, since it is a key element in the context of bringing actions before the Court of Justice.

108. It should nevertheless be emphasised at the outset that, as Article I-11 is worded, compliance with both principles, subsidiarity and proportionality, is always required. The essential difference is not between subsidiarity and proportionality, it is between the principle of conferral on the one hand (paragraph 2) – which governs the limits and distribution of competences – and the principles of subsidiarity and proportionality (paragraphs 3 and 4) on the other hand, which govern the exercise of those competences. See Table 1 (point 110) Comparison of the provisions of the Constitutional Treaty and the current Treaty (the new provisions are underlined).

109. The present institutional practice hardly makes any distinction between the principle of subsidiarity and the principle of proportionality and there is, in particular, a very strong link in the case-law of the Court of Justice between subsidiarity and proportionality. The wording of Article 5 EC leads many readers to think that its three paragraphs relate to different aspects of the principle of subsidiarity. This explains in part why the point of view of the RLAs differs depending on whether they are legislative regions or non-legislative RLAs, the former having a tendency to prioritise aspects which relate to subsidiarity in the strict sense of the second paragraph of Article 5 EC, the latter being more interested in aspects covered by the principle of proportionality alluded to in the third paragraph.
110. Table 1. Comparison of the provisions of the Constitutional Treaty and the current Treaty

(The new provisions are underlined)

<table>
<thead>
<tr>
<th>Article I-11 Fundamental principles</th>
<th>Article 5 (formerly Article 3b) EC</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.</td>
<td>The Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein.</td>
<td>This paragraph is merely an announcement of what follows in the article.</td>
</tr>
<tr>
<td>2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.</td>
<td></td>
<td>The words ‘under the principle of conferral’ do not introduce anything new but name the principle stated in the first paragraph of the EC Treaty text. The indication that it is the Member States and not the Treaty or the Constitution which confer competence on the Union was insisted on by the British. It is purely symbolic and has no legal consequence. The last sentence, which is similar to the Tenth Amendment of the United States Constitution, does not change anything from the legal point of view but clarifies the situation, which in the context of the EC Treaty was only evident to lawyers.</td>
</tr>
<tr>
<td>3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.</td>
<td>In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.</td>
<td>The wording ‘under the principle of subsidiarity’ does not change anything in relation to the wording ‘in accordance with the principle of subsidiarity’. The use in the French versions of different words for ‘only’ and ‘achieved’ in the two texts is merely a matter of style. The use of ‘but’ instead of ‘and … therefore’ does not seem to be of any material consequence either. The addition of ‘either at central level or at regional and local level’ is clearly a crucial innovation for the RLAs.</td>
</tr>
</tbody>
</table>
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

Reference to the Subsidiarity Protocol is not essential from a legal point of view, since the Protocol has the same value as the Constitutional Treaty. It is nevertheless useful as a reference aid. It would be essential if the content of the Protocols were included in instruments of a different type to the Treaties.

| The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. |
| Reference to the Subsidiarity Protocol is not essential from a legal point of view, since the Protocol has the same value as the Constitutional Treaty. It is nevertheless useful as a reference aid. It would be essential if the content of the Protocols were included in instruments of a different type to the Treaties. |

Any action by the Community shall not exceed what is necessary to achieve the objectives of this Treaty.

The words ‘under the principle of conferral’ do not introduce anything new but name the principle stated in the third paragraph of the EC Treaty text. In the same way the reference to the ‘content and form of Union action’ does not alter the content of the principle. It is a useful clarification incorporating part of the *acquis* of the Amsterdam Protocol.

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

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Reference to the Subsidiarity Protocol is not essential from a legal point of view, since the Protocol has the same value as the Constitutional Treaty. It is even more useful than the similar reference appearing in paragraph 3, since it is a reminder that the Subsidiarity Protocol is not concerned exclusively with the application of the principle of subsidiarity.

Comparison with paragraph 3 shows that the national parliaments are not specifically called upon to monitor compliance with the principle of proportionality. It would have been more consistent with the wording of the Constitution as a whole to stipulate that ‘the institutions, bodies, offices and agencies’ of the Union must apply the principle of proportionality, since there is no doubt that it applies to all of them in as much as its observance by all of them falls clearly within the scope of the ‘constant respect’ discussed in Chapter 5 of this study.
A. – Clarification of the principles of conferral, subsidiarity and proportionality in Article I-11

111. The wording of Article I-11 manifestly corresponds to the concern for clarification with which the Convention was imbued and which prompted it to name principles that appeared in the Treaties with no particular designation and, in other cases, to name and set down unwritten principles of law, such as the principle of primacy formalised by the Court of Justice since the Costa v ENEL judgment of 1964,\textsuperscript{50} which is now enshrined in Article I-6 of the Constitution. Thus the statement that the principle of subsidiarity is applicable ‘in areas which do not fall within its exclusive competence’ acquires new technical significance in the Constitutional Treaty. The separation between exclusive competence and other types of competence was in fact already known from legal precedent and literature well before the Treaty of Maastricht, and Article 5 EC makes explicit reference to it.

112. But there was no comprehensive catalogue of competences exclusive to the Community, and there was little agreement among practitioners or in legal literature as to the precise content of such a catalogue, as evidenced by successive adjustments to Article I-13 both during the work of the Convention and during the IGC. Some Community law specialists said without hesitation that, in the field of the common market/internal market, the mere fact that the Community ‘legislated’ in a sector by adopting harmonisation directives automatically brought that sector into the area of exclusive Community competence, whereas others maintained that, as for example in German constitutional law, the fact that the Community (or the Federation in Germany) exercised a shared competence did not change the nature of that competence but merely gave cause for the application of the primacy principle.

113. Article I-13 clearly takes the second option, which is of particular interest in that the principle of subsidiarity continues to apply to action in the field of the internal

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\begin{table}[h]
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\begin{tabular}{|l|}
\hline
\textbf{Areas of exclusive competence} \\
\hline
1. The Union shall have exclusive competence in the following areas: \\
(a) customs union; \\
(b) the establishing of the competition rules necessary for the functioning of the internal market; \\
(c) monetary policy for the Member States whose currency is the euro; \\
(d) the conservation of marine biological resources under the common fisheries policy; \\
(e) common commercial policy. \\
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope. \\
\hline
\end{tabular}
\caption{Article I-13}
\end{table}

\textsuperscript{50} Case 6/64 Costa v ENEL [1964] ECR 1159.
market. This is, moreover, a dimension to which the CoR must pay particular attention, since there is no obligation for it to be consulted in these areas even though they are areas where the effects of Community action are often felt by the RLAs in the exercise of their competences.

114. Apart from the fact that the principle of subsidiarity as set out in Article I-11 is not intended to be applied to the exercise of exclusive competences, unlike the principle of proportionality, it would be unwise to infer from the text of the Constitution that the Convention had wanted to separate the principles of proportionality and subsidiarity, let alone set them in opposition to one another. On the contrary they are clearly complementary, just as they complement the conferral principle, which is apparent from the provision in Article I-11 that the two principles shall be applied as laid down in the Protocol on subsidiarity.

115. The main interest in the apparent dissociation between subsidiarity and proportionality in the text of Article I-11 is that it hints at greater substance for the principle of subsidiarity. Whereas the principle of proportionality is set out in detail and is backed by complex and abundant case-law from the Court of Justice, case-law on the principle of subsidiarity is quite meagre. A separation between the two could add more weight to arguments centring on the principle of subsidiarity, including those arising in a legal context.

116. The first difference between the two principles concerns the type of competence. It would appear that the principle of subsidiarity, as defined in Article I-11, is only applied within the framework of the exercise of shared competences, in order to ascertain whether and to what extent these competences must be exercised by the Union or by the Member States. In the case of exclusive competences, the principle of proportionality clearly applies. The question of the level at which the measures are to be taken does not arise. Nevertheless questions of their suitability and of their necessity in order to achieve the objectives of the Union may arise in the same way as their proportionality in the strict sense. These three aspects will be monitored – as in German law – under the principle of proportionality. This shows that it is not possible to separate the principles of proportionality and subsidiarity completely from one another, and even less to treat them as opposed to one another.

117. The second difference between the principles of subsidiarity and proportionality, which seems to emerge in particular from Protocol No 2, concerns the Union’s instruments of action. The principle of subsidiarity seems destined to be applied in the main to legislative processes, in particular the decision whether or not to legislate and the choice of the type of legislative act, European law or framework law, which will be most appropriate for action by the Union. The principle of proportionality, for its part, applies not only to legislative acts but perhaps even more, from a quantitative point of view, to executive acts as a whole, whether they be enactments of law or, more especially, individual decisions for the implementation of legislative acts. This is already clearly established in institutional practice and in the case-law of the Court of Justice.
B. - The regional and local dimension of the principle of subsidiarity in Article I-11

118. The Constitution calls for respect for the regional and local level twice:

i. in Article I-11: ‘the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level’, and

ii. in Article I-5(1): ‘The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. 51

This is a significant change from the current Treaties, in which the RLAs only appear in the context of the provisions on economic and monetary union, because their budgets need to be taken into account in combating excessive deficits.

119. The limited number of such references was regretted by the Committee of the Regions during the work of the European Convention and the IGC, and it was right to do so since the role of the CoR was to promote the interests of the RLAs unrelentingly during the development of the constitutional process. 52 With the detachment afforded by a study of the text as a whole, it is possible to discern one positive consequence of the paucity of these references in the Constitutional text.

120. The fact that respect for the powers and competences of the RLAs is mentioned only in Articles I-5 and I-11 draws attention to the close link between this concept and the monitoring of the principle of subsidiarity. The Committee of the Regions, which is, moreover, again designated as the representative of the RLAs, is the only body of the Union which emerges as having a specific role in the Subsidiarity Protocol, alongside the national parliaments, with whom it shares the task of verifying that the institutions of the Union are applying the principle of subsidiarity correctly. This gives a constitutional foundation to the ambition of the Committee of the Regions to act as guardian of subsidiarity. It falls to the CoR to insist that the consequences of this change be drawn and that this addition should not be regarded as a mere symbolic gesture to the RLAs. This must and can be done without waiting for the entry into force of the Constitution.

121. Here it is worth stressing the dynamic nature of the principle of subsidiarity, 53 as the Amsterdam Protocol does, a fact constantly reiterated by the Committee of the

51 This provision is repeated in the Preamble of the Charter of Fundamental Rights of the Union, according to which: ‘The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels’.

52 See in this connection the study of the Committee of the Regions, The regional and local dimension in the European constitutional process, Brussels, 2004, to which the authors of the present study contributed extensively.

53 It may be noted that the principle of proportionality also has a dynamic nature. A strictly judicial view would suggest only a limit to the exercise of powers under court supervision, but its observance by the institutions in the exercise of their legislative and regulatory powers may also contribute to the intensification of Union action, if necessary, as well as to its limitation.
Regions, most recently in its Opinion ‘Guidelines for the application and monitoring of the subsidiarity and proportionality principles’. The role of guardian of subsidiarity is not limited to preventing the legislator from going further than is necessary; it may also consist in drawing the legislator’s attention to needs which cannot be satisfied at national, regional or local level but fall within the area of Union competences. This role may expand in the years to come, in particular as a result of enlargement.

122. Finally, consideration of the competences of the RLAs in Articles I-5 and I-11 has no consequences for the manner in which they are distributed and exercised within the Member States. What is important is to remind the Union’s institutions of the need to respect this distribution of competences. This reminder is not limited to the Commission and Parliament, which could be viewed as the institutions which drive forward the Union’s action, whereas the Council as the representative of the Member States could be seen in the guise of a moderator. We use the conditional because it is often the governments of the Member States that cause Community legislation to become overloaded, either indirectly by pressing the Commission to use its power of initiative or directly by demanding amendments to the Commission’s proposals. The reminder to respect the RLAs’ competences is also addressed to the Member States, as members of the Council:

i. respect for the RLAs of countries in which they have most autonomy by those in which they might have less, but also

ii. respect for the RLAs by the central government of their own countries, so that it does not undermine the powers conferred on the RLAs in the country’s internal system through its participation in the Union’s legislative functions in the Council.

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SECTION 3
THE LINKS BETWEEN SUBSIDIARITY AND PROPORTIONALITY

A. - The principle of proportionality in German law, a source of indirect but crucial inspiration for Article 3b of the Treaty of Maastricht

123. It is not surprising that there should be a certain confusion between the principles of subsidiarity and proportionality, in as much as the introduction of the principle of subsidiarity in the Treaty of Maastricht is generally thought to be a consequence of comments made to European Commission President Jacques Delors by the leaders of the German Länder at meetings which took place in 1987. But, while it can be said that the German federal system is imbued with the spirit of the principle of subsidiarity, it is not in fact a clearly defined constitutional principle. The principle of proportionality, on the other hand, is one of the fundamental principles of German public law.

124. In German law, the term ‘proportionality’ (Verhältnismäßigkeit) was used for the first time in 1802 by Von Berg in relation to limitations of the power of the State resulting from the relationship between the subject of an intervention and its extent. It was only a century later that this reasoning was taken up by the Higher Administrative Court of Prussia with the famous Kreuzberg decision (Preussisches Oberverwaltungsgericht, 14 June 1882). The resulting case-law defined the concepts and raised the principle to the status of a general principle of German public law. German constitutional case-law locates the legal basis for the principle of proportionality in the principle of the rule of law (Rechtsstaatsprinzip, Article 20 of the Basic Law) and in the ‘essence of basic rights’ (Wesensgehalt der Grundrechte, Article 19(2)).

125. In German law, the principle of proportionality results from the association of three different elements which, in accordance with German constitutional case-law, have been brought together since the famous ‘pharmacies’ judgment (Apothekenurteil) of 1958 to establish the principle of proportionality in the wider sense.
i. The suitability (Geeignetheit) of the measure. A course of action is deemed appropriate to achieve an objective ‘if the desired outcome can be perceptibly pursued by means of that action’.  

ii. The necessity (Erforderlichkeit) of the measure. The means of action may be deemed necessary in order to attain the objective provided no other means of action is available of equal efficacy but with a less onerous effect on the sphere of the individual. This concept can be summed up in the phrase ‘obligation of the least severe means of action’.

iii. The proportionality of the measure in the strict sense (Verhältnismäßigkeit im engeren Sinne). Proportionality in the strict sense means that a measure adopted by the public authorities must never result in any excessive aggravation of the situation of the person concerned or become intolerable for him. In other words, the means and the end must not be disproportionate. Hence the objective and the means must be compared and their respective importance gauged. The end result of this may be an obligation on the public authorities to refrain from adopting the measure which is the subject of this comparative assessment, even though it may already have passed the tests of suitability and necessity. The comparative assessment inherent in the application of the parameter of proportionality in the strict sense is necessarily influenced in the end by the onerous nature of the planned measure: the more necessary it is to intervene perceptibly in the legal sphere of the individual, the more relevant must be the general interest that the public authorities wish to promote by the measure in question.

126. One cannot fail to be struck by the similarity between the second and third stages of the proportionality test in German law and the second and third paragraphs of Article 5 EC, which also contain:

- the principle of necessity: ‘the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...];’

- the principle of proportionality in the strict sense: ‘Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’

- the principle of suitability, which occurs again in part in the second paragraph: ‘and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community’. It occurs again in the first paragraph according to which ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’, which reiterates the principle of conferral or speciality, a basic principle of the Treaty establishing the European Community, and also a basic principle of law of international organisations.

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127. It should also be noted that the principle of proportionality has long been used by the Court of Justice of the European Communities, on the one hand, to indicate to national courts seeking preliminary rulings from it how they can assess the conformity of national legislation and regulations with Community law and, on the other hand, to rule on the lawfulness of decisions by Community institutions. In this context, the principle of proportionality is applied in the field of competences exclusive to the Community as well as in that of shared competences. With some qualification, it can be said that the Court has focused mainly on the monitoring of ‘proportionality in the strict sense’, leaving a wide margin of discretion to the political authorities as regards evaluation of the ‘necessity’ and ‘suitability’ of their measures, provided the Treaties contain the necessary legal bases for Community action in the field in question.

**B. - The links between the principles of subsidiarity and proportionality in Article I-11 and the Subsidiarity Protocol**

128. The fact that the wording of Article I-11 of the Constitution differs slightly from that of Article 5 EC does not mean that the Constitution makes a clearer distinction between the two principles. In any case it may be noted that the obligations imposed on the institutions in the matter of constant respect relate as much to the principle of proportionality as to the principle of subsidiarity: ‘Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution’.

129. The only differences that arise between the two principles in the Constitution and its Protocols relate to certain procedural aspects:

- first, the early warning procedure is explicitly concerned with the principle of subsidiarity and does not apply to the principle of proportionality;

- second, Article 8 of the Subsidiarity Protocol, when it provides for the possibility of actions brought by the CoR or the notification of actions by the Member States on behalf of their national parliaments, expressly relates to the principle of subsidiarity and not the principle of proportionality.

130. Hence the only question that matters is whether these procedural differences are significant to the extent of prohibiting the consideration of matters involving the principle of proportionality, both within the early warning procedure and in the context of any action brought before the Court of Justice. Before answering this question it must be stated that the wording of Article I-11(3), while defining the principle of subsidiarity, also makes reference to the principle of proportionality, using the wording that the Union shall act only if and ‘insofar as’ the objectives of the proposed action cannot be sufficiently achieved by the Member States.
131. In the context of the early warning procedure, it is impossible to see how a national parliament could be prevented from expressing an opinion not only on the principle of subsidiarity but also on the principle of proportionality. It would be particularly ill-advised for the authors of draft legislative acts to refuse to respond on the principle of proportionality on the pretext that it is not covered by the Protocol. Assuming that there were grounds for declaring such opinions inadmissible, which must be qualified by the fact that the early warning procedure does not have any legal status, an opinion which ignored the principle of subsidiarity could be deemed inadmissible, not an opinion which also dealt with other aspects.

132. As regards the possibility of bringing actions before the Court of Justice, the problem arises essentially for the CoR. Indeed, a very strict reading of the Protocol indicates that no action for annulment can be brought except to ensure respect for the principle of subsidiarity, not proportionality. It should be noted in this context that the key issue, when the time comes to bring an action for annulment, would be to develop an argument which is extremely sound on the point of subsidiarity but at the same time, within the context of subsidiarity, includes a number of elements which have more to do with proportionality. We are in the realm of hypothesis here. It may be added that the link between the principle of proportionality and the principle of subsidiarity is quite clear in the current case-law of the Court of Justice, and it is likely that this link will be maintained in the future.

133. A key argument in favour of keeping the separation between the principle of subsidiarity and the principle of proportionality as slight as possible must be borne in mind. During the preparations for the Edinburgh summit in December 1992, which was to be devoted largely to defining the procedure for the application of the principle of subsidiarity, the UK Presidency had insisted that respect for the principle of subsidiarity should be examined before the examination of any draft Community act in substance. The eleven other Member States were firmly opposed to this proposal and, since the Edinburgh summit, it has been clearly accepted that respect for the principle of subsidiarity is linked to the substance of the draft measure and not just to the decision to take an action or not. That is clearly apparent in the conclusions of the Edinburgh summit itself, in the Amsterdam Protocol and the practice of the institutions. This position is obviously linked to the idea that subsidiarity is also a matter of proportionality. If application of the principle of subsidiarity were separated more rigorously from application of the principle of proportionality than is currently the case, we should probably end up by reintroducing the distinction which was rejected at the time of the Edinburgh summit. It was a question of dissociating any examination of principle based solely on the compliance of the action in question with the principle of subsidiarity – determining whether, given the criteria laid down by the Treaties, an action was justified or not – from an examination of the form of the content of that action to which effect

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62 We do not share the view of the Delegation of the French National Assembly for the European Union: ‘– finally, the early warning procedure only concerns subsidiarity, never proportionality, even if the Protocol does relate to the application of the two principles. The national parliaments must scrupulously comply with this constraint in order not to have their reasoned opinions declared inadmissible.’ Report of the French National Assembly: Assemblée Nationale, Rapport d’information déposé par la délégation de l’assemblée nationale pour l’Union européenne, sur l’application du principe de subsidiarité, No 1919, Filed with the Presidency of the National Assembly on 16 November 2004 (p. 22), http://www.assemblee-nationale.fr/12/pdf/europe/rap-info/1919.pdf
would be given at a later stage if it could be concluded from the first examination that action was valid in principle. The early warning procedure may seem to introduce this dissociation, but that only applies to the monitoring exercised by the national parliaments, not to the conduct of the legislative procedure or the monitoring undertaken by the CoR.

C. - The link between the principles of subsidiarity and proportionality and the formulation of the legal bases for Union action

134. As was previously noted, the existence of a new right for the CoR to bring legal proceedings shows more clearly the link between the principle of subsidiarity and the principle of proportionality, on the one hand, and the formulation of the legal basis on which the legislator will rely in practice, on the other. Indeed, the fact that it might be possible in certain cases to choose between a legal basis involving the mandatory consultation of the CoR and another legal basis not imposing that obligation may lead the CoR to demand from the outset – if it considers it appropriate – a change in the legal basis of all acts founded on provisions that do not require its consultation. Although the Subsidiarity Protocol restricts the CoR’s right to bring actions in monitoring the principle of subsidiarity to European legislative acts ‘for the adoption of which the Constitution provides that it be consulted’, the CoR may be able in certain circumstances to institute proceedings before the Court of Justice against an act which had been based on an Article not requiring the CoR to be consulted, whereas in its view another legal basis should have been selected.
SECTION 4
OBLIGATIONS STEMMING FROM THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

135. This section discusses in greater detail the duties for the institutions laid down by Protocols 1 and 2 and by the other basic texts of Union law.

A. - The source of the obligations for the institutions

136. The duties and obligations of the institutions with regard to compliance with the principle of subsidiarity and the principle of proportionality will not be limited to those laid down by the Constitution. It is quite probable that secondary legislation and the case-law of the Court of Justice will specify these duties in detail. In this connection it may be noted that, in Article IV-438, the Constitution states that all the Community acquis, i.e. both Community secondary legislation and the case-law of the Court of Justice, shall be preserved by the European Union. Community law currently in force would not be affected, except to the extent that it is incompatible with the innovations made by the Constitution, and this also goes for secondary legislation and case-law. On the point of subsidiarity and proportionality, the innovations of the Constitution, in particular Protocols 1 and 2, will not invalidate current secondary legislation and case-law. On the other hand, the Constitution and the Protocols will probably give rise to the adoption of new acts of secondary legislation and further development of the case-law relating to the principles of subsidiarity and proportionality.

137. As regards secondary legislation, the key question from the legal point of view is linked to the differences in wording between the Amsterdam Protocol and the Protocol on Subsidiarity. In its various positions on the draft Constitution and the Constitutional Treaty, the CoR has itself repeatedly expressed its disappointment that the detailed criteria contained in the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality were not adopted in their entirety in the Subsidiarity Protocol. The Praesidium of the Convention, in its commentary on the draft text of the Protocol on the protection of subsidiarity and proportionality, noted that ‘the present text has been reduced and simplified, to make it compatible with the nature of a protocol annexed to a constitution’. Some commentators have stressed that it may be expected ‘that provisions not covered by the current text will be the subject of an act of secondary legislation’; we shall return to this point in subsequent chapters. At all events, the provisions of the Amsterdam Protocol which have not been incorporated into the Subsidiarity Protocol continue to apply as part of the Community acquis, since they are

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not contradicted either by the Constitution or by the Subsidiarity Protocol. However, they must be applied in terms of the new definition of legislative acts and the new formulation of the principle of subsidiarity, which includes respect for the competences of regional and local authorities.

138. Although the Protocol itself does not contain any legal basis for the drafting of an act intended to give effect to it, it is clear that the more precise definition of the criteria for the application of the principle of subsidiarity – as found in the Amsterdam Protocol – could be included, in particular, in an institutional act, as envisaged in the discussions conducted between the CoR and Commission. In any events, the wording of the Subsidiarity Protocol in no case excludes the possibility of the more detailed criteria of the Amsterdam Protocol being followed in practice. In addition, whether or not there is an act of secondary legislation embodying these criteria, it is possible and even probable that, should the case arise, the Court of Justice would refer in the first instance to the criteria of the Amsterdam Protocol in order to apply the Subsidiarity Protocol.

139. The considerations above show the importance of exploiting to the full the potential of the Amsterdam Protocol in the current period until the entry into force of the Constitution. In the event that the Treaty of 29 October 2004 does not come into force, the question will need to be examined from the perspective of incorporating the provisions on subsidiarity into a special act or treaty. Is it better to include all the criteria of the Amsterdam Protocol – although this may result in a text which is ponderous and too detailed to be considered as truly constitutional – or is it better to draw up a simplified protocol? This could, in the event, be a single protocol combining the provisions of Protocols 1 and 2, but this time containing an explicit legal basis for the adoption of a European law governing its implementation. This legal basis could also contain some indications guaranteeing the inclusion of the most useful criteria of the Amsterdam Protocol.

B. - The obligations linked to the application of the principles of subsidiarity and proportionality

140. It is already on the European Commission that the duties regarding the application of the principles of subsidiarity and proportionality weigh most heavily under the current Treaties and their Protocols – in particular the Amsterdam Protocol. As guardian of subsidiarity and proportionality and as the representative of the RLAs, the CoR should be involved both in performing some of the tasks – such as consultations or the preparation of impact studies – and in monitoring the way in which the Commission discharges these duties. Alongside the institutions which have obligations to act or refrain from acting, it should not be forgotten that other institutions or bodies also have rights, which is the case of the CoR, in particular, as guardian of subsidiarity: the right to issue an opinion on its own initiative and the right to bring an action before the Court of Justice.
### 141. Table 2 The obligations linked to the application of the principles of subsidiarity and proportionality

The table lists relevant obligations for the application of the principles of proportionality and subsidiarity in chronological order. New obligations introduced by the Constitution and the Subsidiarity Protocol are italicised.

<table>
<thead>
<tr>
<th>Obligation</th>
<th>Body intended</th>
<th>Source</th>
<th>Possible sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Constant monitoring of the principles of subsidiarity and proportionality</td>
<td>European Council, Council, Parliament, Court of Auditors, Court of Justice and Central Bank</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
<td>Political</td>
</tr>
<tr>
<td>2. Adherence to the objectives of the Treaty in the application of the principles of subsidiarity and proportionality</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Founding Treaties and Constitution, Amsterdam Protocol and Subsidiarity Protocol</td>
<td>Political and judicial (possibility of annulment of the legislative act)</td>
</tr>
<tr>
<td>3. Observance of the distribution of competences between the Member States and the Union</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Founding Treaties and Constitution, Amsterdam Protocol</td>
<td>Political and judicial (possibility of annulment of the legislative act)</td>
</tr>
<tr>
<td>4. Extend Community action within the limits of its competences when the circumstances so require and, conversely, to limit it and to end it when it is no longer justified.</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Founding Treaties and Constitution, Amsterdam Protocol</td>
<td>Political</td>
</tr>
<tr>
<td>5. Apply the guidelines laid down in paragraphs 5 to 8 of the Amsterdam Protocol</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Amsterdam Protocol (will continue to apply pursuant to Article IV-438)</td>
<td>Political</td>
</tr>
<tr>
<td>6. Extensive consultation prior to the proposal of legislative acts taking into account, where appropriate, the regional and local dimension</td>
<td>Commission</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
<td>Political and judicial (possibility of annulment of the legislative act)</td>
</tr>
<tr>
<td>7. Give reasons for choices regarding consultation</td>
<td>Commission</td>
<td>Subsidiarity Protocol</td>
<td>Political and judicial (possibility of annulment of the proposed legislative act or of the act itself if there is no exceptional urgency)</td>
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<tr>
<td>8.</td>
<td>Give reasons for drafts of legislative acts in relation to the principles of subsidiarity and proportionality</td>
<td>Commission and other authors of draft legislative acts</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Political and judicial (possibility of annulment of the legislative act in the absence of sufficiently well developed reasons)</td>
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<tr>
<td>9.</td>
<td>Demonstrate that draft legislative acts are consistent with the principles of subsidiarity and proportionality; in the form of a statement containing the relevant facts backed up by qualitative and, wherever possible, quantitative indicators.</td>
<td>Commission and other authors of draft legislative acts (if problems of subsidiarity are relevant)</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Political and judicial (possibility of annulment of the legislative act in the absence of sufficiently well developed reasons)</td>
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<tr>
<td>10.</td>
<td>The statement should cover aspects facilitating an assessment of its financial impact and, where it concerns a European framework law, its implications on the regulations to be implemented by the Member States, where appropriate including regional legislation.</td>
<td>Commission and other authors of draft legislative acts (if problems of subsidiarity are relevant)</td>
<td>Subsidiarity Protocol</td>
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<td></td>
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<td></td>
<td>Political and judicial (possibility of annulment of the legislative act in the absence of impact study documentation)</td>
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<tr>
<td>11.</td>
<td>Take account of the need to ensure that all financial or administrative burdens on the Union, national governments, regional or local authorities, economic operators and citizens are as low as possible and proportionate to the objective to be achieved.</td>
<td>Commission and other authors of draft legislative acts (if problems of subsidiarity are relevant)</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
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<td>Political</td>
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<tr>
<td>12.</td>
<td>Forward its draft European legislative acts and amended drafts to the national parliaments at the same time as to the legislator of the Union, accompanied by the necessary documents (subsidarity statement, record of consultations and impact studies, reasons for choices regarding consultation)</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Subsidiarity Protocol and Protocol on national parliaments</td>
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<td></td>
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<td>Political and judicial (possibility of annulment of the legislative act in the event of failure to forward the draft acts and relevant documents)</td>
</tr>
<tr>
<td>13.</td>
<td>Take account in its draft legislative acts of any reasoned opinions issued by the national parliaments in connection with subsidiarity</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Subsidiarity Protocol</td>
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<td></td>
<td></td>
<td></td>
<td>Political</td>
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<tr>
<td>14.</td>
<td>Review its draft legislative acts in the event that the quorum of reasoned opinions from the national parliaments (2/3 or 3/4) is attained</td>
<td>Commission and other authors of draft legislative acts</td>
<td>Subsidiarity Protocol</td>
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<td></td>
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<td></td>
<td>Political and judicial (possibility of annulment if the complainants can show that the Commission has not reviewed its draft text)</td>
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<tr>
<td>15.</td>
<td>Seek the opinion of the CoR and/or the ESC when that is mandatory</td>
<td>Council</td>
<td>EC Treaty and Constitution</td>
</tr>
<tr>
<td>16.</td>
<td>Issue opinions within the time-limits laid down (where stated by the Council) or within a reasonable time frame</td>
<td>CoR ESC</td>
<td>EC Treaty and Constitution</td>
</tr>
<tr>
<td>17.</td>
<td>Allow sufficient time for the bodies to issue their opinions, and take due account of them</td>
<td>Parliament and Council</td>
<td>EC Treaty and Constitution</td>
</tr>
<tr>
<td>18.</td>
<td>State reasons for the legislative act</td>
<td>Parliament and Council</td>
<td>EC Treaty and Constitution</td>
</tr>
<tr>
<td>19.</td>
<td>Transpose the legislative act</td>
<td>Member States</td>
<td>EC Treaty and Constitution</td>
</tr>
<tr>
<td>20.</td>
<td>Comply with legislative acts and adopt all the measures necessary for their implementation, except in the event of annulment or declaration as unconstitutional by the Court of Justice</td>
<td>All institutions, bodies, offices and agencies of the Union, its Member States and their RLA</td>
<td>All institutions, bodies, offices and agencies of the Union, its Member States and their RLA</td>
</tr>
<tr>
<td>21.</td>
<td>Each year present to the European Council, the European Parliament, the Council and the national parliaments a report on the principles of conferral, subsidiarity and proportionality</td>
<td>Commission</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
</tr>
<tr>
<td>22.</td>
<td>Forward the report to the CoR and the ESC</td>
<td>Commission</td>
<td>Amsterdam Protocol and Subsidiarity Protocol</td>
</tr>
</tbody>
</table>
142. Obligations 2 to 5 and 8 to 14 apply to the Commission and to any other author of a draft legislative act, whether it be an institution or a group of Member States. The number of cases in which such draft texts arise will necessarily be limited. The subsidiarity statement and impact studies may prove to be without relevance in certain cases, particularly in the case of draft legislative texts emanating from the Court of Justice, the ECB and the EIB, the sole purpose of which may be to amend their statutes and which will have no impact in the Member States.

143. Sanctions in respect of these obligations are primarily political and arise from the accountability of the various institutions and bodies involved. In addition, the political accountability of the Commission and the Council is subject to the debates, hearings and inquiries of the European Parliament and its standing or ad hoc committees. The accountability of the Commission could in the last instance give rise to a motion of censure of the European Parliament. Cases of judicial sanctions are much more limited. The quasi-judicial sanction in the form of a decision or a report of the European Ombudsman should not be forgotten either.

C. – Present institutional practice in relation to subsidiarity and proportionality

1) The perspective of the Commission departments

144. The perspective of the Commission departments on the application of the principles of subsidiarity and proportionality is conveyed in a very representative manner by the following extracts from the contribution of an official from its legal service to a recent work devoted to the principle of subsidiarity. This testimony is particularly useful because the legal service, together with the Secretariat General of the Commission, is the only department to have a complete overview of all areas of Community action and because it falls to that department to check that the departments responsible for the individual sectors have discharged their duties in stating reasons for draft legislation.

145. ‘…’ the principle of subsidiarity is a constant factor for practitioners of Community law in the conduct of action by the European Community. Every proposal for an act of the Commission is subject to an assessment in relation to subsidiarity. Six years of experience enable me to review its application. Nevertheless, the subsidiarity principle seems to have been given new impetus and is destined in the future to take on new forms.

146. ‘…’ applying the subsidiarity principle is not an easy matter. It requires a careful balance to be struck between objectives which are difficult to reconcile: to ensure the functioning of the internal market while at the same time guaranteeing legal security for the

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65 Claire-Françoise Durand, Chief Adviser to the Director General of the Legal Service of the European Commission.
67 Note by the authors of this study.
enterprises, but only to the extent necessary. [...] the subsidiarity principle and its application in fact call for a political assessment on a case-by-case basis. This political dimension, which is inherent in the observance of the principle, moreover explains the difficulty of judicial supervision.

147. It is necessary, for every action planned, to answer two questions. The first is as follows: “is it more appropriate to take this action at Community level than at Member State level?” The issue here is the true principle of subsidiarity, sometimes described as the principle of necessity for action.

148. A second aspect may be conveyed by a second question: “what must be the degree of intensity of the action?” This involves the proportionality principle [...] according to which the Community must act only to the extent necessary for the action.

149. These two parameters are coloured in the Treaty on European Union by the objective and requirement that decisions be taken as closely as possible to the citizen, i.e. respecting the principle of closeness or proximity. This concept of closeness determines the manner in which the subsidiarity principle must be applied.

150. Since 1993, the Commission has imposed on itself the rule of including in the explanatory statement for each proposal for an act a justification of it in relation to subsidiarity. This requirement applies to all proposals, whether they fall under the heading of exclusive competences or that of shared competences. Observance of the two principles of necessity and proportionality are the subject of an assessment, based on a questionnaire sent to all departments of the Commission, which details how compliance with the principle is assured in respect of the act in question.

151. The substance of this questionnaire was subsequently incorporated into the Protocol on Subsidiarity included in the Treaty of Amsterdam. The questionnaire and the Protocol detail the tests which must be applied to each act. Test for comparative effectiveness: it is more effective to act at Community level than at national level or, more precisely, are there at national level enough alternatives and possibilities for action which would enable the objective to be achieved? Test of value added by Community action: because of its scale and its effects, because of its objective and its cross-border nature, does Community action offer added value?

152. The Commission responds in very precise terms to these questions on the basis of factual, often quantitative data, going as far as to evaluate inaction.

153. While the test for the intensity of the action only concerns actions involving shared competences, the test for proportionality applies to the exercise of any Community competence, whether it be exclusive or shared.

68 The original says ‘égalité’ [equality] but that is clearly a typographical error [note by the authors of this study].
154. **What are the legislative techniques used at Community level to ensure that action is simply suited to its purpose and is not excessive?** That is a constant preoccupation in the drafting of Commission proposals.

155. **The techniques are well known.** Lay down the “essential requirements” of the objective to be achieved while leaving it to the national authorities to work out the implementation. For technical standards, detailed technical specifications are even entrusted to standardisation bodies. Lay down the guiding principles […]; the principle of mutual recognition; the establishment of minimum standards. […]

156. **With regard to the form of the act itself, the Amsterdam Protocol clearly states that preference should be given to directives rather than regulations.** The Commission’s work programme for 2001 in the field of the environment and the internal market, which envisages the drafting of twenty-one proposals for acts, plans eighteen directives and three regulations. This shows that the instruction of the Amsterdam Protocol is being followed.

157. **A final significant element in the quest for proportionality in planned measures: the analysis of the impact of the measures on enterprises.** The author then mentions ‘pilot projects aimed at assessing in concrete terms the incidence of the legislation on enterprises in terms of benefits or burdens in the day-to-day pursuit of their activities’.

158. This testimony, which dates from 2001-2002, refers constantly, explicitly or implicitly, to the ‘new modes of governance’ cited and described by the Commission White Paper on Governance of 2000 as ways of satisfying the demands of subsidiarity in respect of forms of legislative acts, use of recommendations, voluntary agreements, co-regulation etc. It is also interspersed with examples showing how, when the Commission makes every effort to uphold the principle, pressure from national governments and the intervention of the European Parliament lead to the adoption of more onerous acts. 

2) **The perspective of the services of the Council**

159. The perspective of the General Secretariat of the Council, for its part, is conveyed well by the pages devoted to the principles of subsidiarity and proportionality in the Manual of Institutional Law in the European Union by Jean-Paul Jacqué, Director of the Legal Service of the Council. Here too, the legal service has the advantage of being the only entity to have a cross-departmental view; moreover, it is in practice on the basis of the opinion of this service that COREPER takes its final decision on the choice of legal basis for acts which it submits to the Council for adoption, when the choice of the appropriate legal basis is in doubt.

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69 One example quoted in particular is that of keeping animals in zoos (p. 369), which is mentioned in the report of the French National Assembly on the application of the subsidiarity principle: Assemblée Nationale, Rapport d’information déposé par la délégation de l’assemblée nationale pour l’Union européenne, sur l’application du principe de subsidiarité, No 1919, filed with the Presidency of the National Assembly on 16 November 2004 (p. 15)

The arrangements for the application of the principle arise from the Protocol, the Edinburgh Conclusions and the institutional agreement on the implementation of subsidiarity. The most important question is doubtless that of knowing whether every proposal must be checked for subsidiarity prior to any examination of its substance. The answer is negative [...] This principle is restated in paragraph 11 of the Protocol. In this context, according to the Edinburgh Conclusions, it is open to any Member State, subject to the Rules of Procedure, to require that the examination of any proposal giving rise to problems in the field of subsidiarity be raised in the Council. The examination will relate in this case not only to subsidiarity but to the proposal as a whole. If the majority needed for the adoption of the proposal is not present, either the proposal may be amended, or its examination may be continued in order to bring it into conformity with Article 5, or the discussion may be suspended. This does not affect the right accorded by the Rules of Procedure to Members of the Council or to the Commission to request a vote, or the obligation to seek the opinion of the European Parliament when the Treaty so requires. Thus the examination of subsidiarity may be conducted at any time at Council level without creating any additional obstacles to the decision-making and without separating this examination from that of the substance.

The other aspect concerns the statement of reasons for acts. According to the Protocol, the Commission must state reasons for each of its proposals in relation to subsidiarity. Within the framework of the legislative procedure, the Council and Parliament must examine the conformity of proposals with the terms of Article 5. These procedures are set out in the Edinburgh Conclusions. They serve to ensure that the verification of the subsidiarity principle takes effect under satisfactory conditions. [...] 

The examination of proportionality follows that of subsidiarity. Subsidiarity serves to establish whether the competence must be exercised. Proportionality comes into play, once the decision has been taken to exercise the competence, in order to determine the scope of the legislation. The main concern is to avoid excessive Community regulation and to examine as a consequence whether there are not other ways of achieving the Community objectives involving constraints for those affected which are less onerous than under the legislation proposed. [...] 

The proportionality principle concerns both the content of the planned action and the form it will take. As regards form, paragraph 6 of the Protocol states that “directives should be preferred to regulations and framework directives to detailed measures”. As regards content, according to paragraph 7 of the Protocol, Community measures should leave as much scope for national decision as possible and, where appropriate, “Community measures should provide Member States with alternative ways to achieve the objectives of the measures”. The aim is to offer the authorities required to transpose directives the greatest possible freedom compatible with the objectives pursued to achieve the purposes of the legislator. This is to a large extent a reaction to the frequently observed tendency, one which is nevertheless difficult to counteract, to adopt texts as detailed as regulations in the form of directives.”
164. The last sentence quoted cryptically refers to a long-standing phenomenon well known to practitioners and analysts\textsuperscript{71} of the Community decision-making procedure: when the Commission presents proposals relatively unencumbered with detail, the accumulation of amendments demanded by Member States’ representatives in the Council working groups, on the one hand, and amendments adopted in the European Parliament, on the other, end up overburdening the text. Amendments from Member States are generally motivated either by the desire to protect national interests – as perceived by government departments – or, more often, by the fear that differences in implementation from one Member State to another may work to the disadvantage of their own economic operators and citizens. In this respect, it may be feared that enlargement will only strengthen the tendency. Conversely, it is possible that the increase in the number of delegations to working groups may ultimately work in the Commission’s favour, requests for amendments becoming too numerous and too irreconcilable even to be considered.

165. This evidence demonstrates the attention paid by both the Commission and the Council to compliance with the procedure to ensure consideration of the various aspects of subsidiarity and proportionality in the drafting and adoption of Community acts. They demonstrate that – notwithstanding the refinements which may be introduced into these procedures, with particular reference to impact studies – the means of ensuring better compliance with the proportionality and subsidiarity principles is not an accumulation of new texts on compliance, but the introduction of new ways – external to the Union legislator – of looking at the proposals. It is in that respect that the Subsidiarity Protocol innovates, by placing the national parliaments centre stage and by highlighting the role of the CoR through the recognition of its right to bring actions before the Court of Justice.

166. It is not necessary to wait for the entry into force of the Constitution to usher in these new ways of looking at things, in particular those the CoR may bring. It is possible and worthwhile to anticipate the consequences associated with granting the CoR the right to institute proceedings for annulment by arranging the place which will arise for it at a later stage from its status as a plaintiff.

CONCLUSIONS OF CHAPTER 3

167. The reformed version of the principle of subsidiarity: involvement of the RLAs
In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.2 welcomes the new definition of the subsidiarity principle and its involvement in ex-post monitoring of compliance with that principle; […]’

‘2.5 stresses that the resolute application of the reformed subsidiarity principle, i.e. deeper involvement of regional and local players, may be a key factor in defining the European institutions’ policies and actions in more concrete terms, given that regions and local authorities are particularly close to the grassroots and can therefore forward to the European institutions requests and suggestions on the tangible economic and social development needs voiced by local and regional authorities. Moreover, local and regional authorities can help in promoting the idea of Europe among citizens; […]’

‘2.13 is pleased to point out that the inclusion of the local level in the subsidiarity principle has made clear that compliance with that principle is not simply a matter of respecting the legislative powers of the national and regional levels, and that instead the European Union must also ensure that the prerogatives of cities, municipalities and regions are safeguarded within the context of local and regional self-government; […]’

168. From the point of view of the CoR and the RLAs, there is a marked difference between the wording of the principle of subsidiarity as it appears in Article 5 (formerly Article 3b) EC, dating from the Treaty of Maastricht, and the wording in Article I-11 of the Constitution: indeed the Constitution refers for the first time to the regional and local level, specifying that ‘the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level’. It falls to the CoR to insist that the consequences of this change should be drawn and that this addition should not be viewed as a mere symbolic gesture to the RLAs. As this study shows, this must and can be done without waiting for the entry into force of the Constitution, having regard to the fact that the signature of the Constitutional Treaty on 29 October 2004 is a clear expression of the will of the Member States in this respect.

169. The dynamic quality of the principle of subsidiarity
In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.8 recalls in this context that the main aim of the subsidiarity principle, as a dynamic political principle guiding action where competence is shared between the institutions and bodies involved in the public life of the Union, is to ensure that decisions in Europe are taken at the level that achieves the best effect and is as close to the citizen as possible;

‘2.9 notes that subsidiarity is a dynamic principle, which in some areas can lead to “more Europe”, and in others, to less (CdR 302/1998, paragraph 1.15); […]’
170. The Amsterdam Protocol recognised that subsidiarity ‘is a dynamic concept’ and the fact that this dynamism is inherent in the principle stems from the way it is formulated, which has remained unchanged since the Treaty of Maastricht. The great diversity in the composition of the CoR obliges it to take account of this dynamic quality, since some RLAs may seek stronger intervention on the part of the Union in a given field whereas others may prefer it to hold back. The Member States’ different situations in terms of problems and resources, and also differences in the organisation of powers and functions of their RLAs, may lead to considerable diversity in points of view, which the CoR must be able to convey.

171. **Inseparability of the principles of subsidiarity and proportionality**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.18 refers in this context to the existing ECJ case-law that, when assessing the compatibility of a legislative proposal with the subsidiarity principle, aspects of proportionality must also be taken into consideration and that these two principles cannot entirely be separated from one another; […]’

172. In its Opinion 121-2004 [Better Lawmaking], the CoR

‘2.1.7. considers that the impact of Community intervention could be reinforced via the avenues opened up by proportionality insofar as the choice of recommended instruments and the scope and intensity of the legislative proposal are the key criteria; […]’

173. The distinction between the principles of subsidiarity and proportionality, which is already present in the wording of Article 5 EC, may appear strengthened by the wording of Article I-11 of the Constitution and by the fact that the Subsidiarity Protocol restricts the early warning system and the right of the national parliaments and the CoR to bring actions before the Court of Justice to issues involving the principle of subsidiarity. A closer analysis of the texts of the Treaties, their origin, the cases brought before the Court of Justice and the Court’s case-law show that it is not possible to separate the two principles, as is confirmed by a study of the principles as they manifest themselves within the Member States.

174. The distinction between the two principles is useful in defining and developing the criteria which must be observed in order to ensure that the acts of the institutions respond to the requirements of the Treaties, depending on whether they are legislative or executive acts falling within the exclusive competence of the Union, competences it shares with the Member States, or supplementary or supporting competences. In addition, the aspects linked to subsidiarity may be more important for legislative regions, whereas non-legislative RLAs may be more concerned with aspects relating to proportionality. In certain cases, only the criteria relating to subsidiarity – according to the Treaties and Protocols – will prove effective, in others those concerned with proportionality may be more relevant. Many aspects of a planned action must be examined from the point of view of both proportionality and subsidiarity.

175. As guardian of subsidiarity and proportionality, the CoR can and must – without waiting for the entry into force of the Constitution – develop its own system for monitoring the application of these principles, taking into account the limits of its human
and financial resources in setting its priorities, but taking full advantage of the expertise of the RLAs which it represents in order to offer a new way of looking at these matters which is complementary to that of the Commission and of the European legislator – Parliament and the Council together.
Chapter 4
The Protocols on compliance with the principles of subsidiarity and proportionality

176. ‘Protocol No 2 on the application of the principles of subsidiarity and proportionality’ annexed to the Constitution for Europe is not without precedent, quite the contrary. It follows very closely the ‘Protocol on the application of the principles of subsidiarity and proportionality’ adopted concurrently with the Treaty of Amsterdam. And that Protocol in turn had its precedents, dating back to the conclusions to the Edinburgh European Council of 12-13 December 1992.

177. The importance of the Subsidiarity Protocol is nevertheless quite special, as it is one of the two Protocols which were adopted by the Convention itself in June-July 2003, the other one being the Protocol on the role of the national parliaments in the European Union. These Protocols had been presented to the European Council in Thessaloniki on 20 June 2003, at the same time as the first two parts of the text of the Constitution. This fact needs to be stressed, particularly in the context of the hypotheses regarding the separation of the Constitutional Treaty into two texts – Parts I, II and IV of the Constitution for Europe on the one hand and Part III on the other – in order to secure ratification of the Constitution after a new vote in France and the Netherlands or a simultaneous vote in all the Member States. If such separation were to occur, as was advocated by a certain number of Convention members in June 2003, the question would arise whether the two Protocols would again be appended to the Treaty containing Parts I, II and IV, or even whether they would be incorporated into the Treaty itself. Whatever happened, it would be essential for the CoR in this case to insist that the Subsidiarity Protocol accompany the Treaty establishing a Constitution for Europe, together with Protocol No 1, and that it be dissociated from the other Protocols appended to Part III.
SECTION 1
COMPARISON OF THE AMSTERDAM PROTOCOL AND THE SUBSIDIARITY PROTOCOL

178. The Subsidiarity Protocol is the result of the work of the Convention Working Group on Subsidiarity chaired by Inigo Mendez de Vigo, and it should be noted that this was Working Group No 1, which demonstrates the priority accorded by the Convention to this problem. The Working Group may be considered to represent well the majority of sensitivities present in the Convention; it also included delegates from the CoR to the Convention. The Amsterdam Protocol was one of the starting points for this work. The final report of Working Group No 1, presented in September 2002, served as a basis, with that of Working Group No 4 on the role of the national parliaments presented one month later, for the draft Protocol presented by the Praesidium in February 2003 at the same time as the Protocol on the role of the national parliaments. After an analysis of reactions to this draft text by the Secretariat of the Convention and their discussion in the Praesidium, the text was discussed at the plenary session on 17-18 March 2003 and subjected to minor revision.

179. The two Protocols, on subsidiarity and proportionality and on the national parliaments, were not discussed at the IGC, but their wording was reviewed by the Legal Service of the Council and the legal experts of the IGC. The only amendments resulting from this work are stylistic adjustments, articles instead of numbered paragraphs and the addition of Article 3 defining the term ‘draft legislative acts’.

180. It would be unwise to attach too much importance to this preparatory work. It is extremely useful in order to understand the formulations adopted and to convey the priority given to monitoring subsidiarity and proportionality during the constitutional debates, but neither the Convention documents nor those of the Italian and Irish IGC Presidencies would be given the status of ‘preparatory work’ in the constitutional law of many Member States. It is particularly significant, on the other hand, that no declaration, among the fifty annexed to the Final Act signed in Rome on 29 October 2004, relates to Article I-11 of the Constitution or to the Subsidiarity Protocol.

72 CONV 71/02, 30 May 2002, Mandate of the Working Group on the principle of subsidiarity.
74 CONV 353/02 22 October 2002, WGIV 17, Final report of Working Group IV on the role of national parliaments.
75 CONV 579/03, 27 February 2003, Draft Protocols on: the application of the principles of subsidiarity and proportionality, the role of national parliaments in the European Union.
76 CONV 610/1/03, 12 March 2003, Reactions to the draft Protocol on the application of the principles of subsidiarity and proportionality.
78 CONV 724/1/03, 28 May 2003, Draft Constitution, Volume I – Revised text of Part I.
79 The extent of these stylistic adjustments varies from language to language because all the translations, completed in haste during the work of the Convention, were revised in detail during the summer of 2004 in order as far as possible to ensure consistency between the different language versions, which all have the same legal force.
181. Should problems arise in interpreting the text of the Constitution for Europe, the Convention and IGC documents may prove useful as indicators for the solution to a problem. However, they rank behind the three traditional priority instruments in the case-law of the Court of Justice:

- comparison of the language versions, which in principle all have the same force;

- teleological interpretation, i.e. conformity with the aims of the Treaties, in other words the development of European integration in accordance with the procedures specific to the Community and Union Treaties;

- interpretation in accordance with the principle of ‘effectiveness’, i.e. the choice of interpretation most likely to have practical effects in achieving the objective and purpose of the provision examined.

182. The use of these methods is particularly important in understanding the precise scope of the right to bring an action for annulment on grounds of infringement of the principle of subsidiarity, as laid down in the second paragraph of Article 8 of the Subsidiarity Protocol.

### Table 3 Article 8 of the Subsidiarity Protocol in five languages

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<tbody>
<tr>
<td>German version</td>
<td>Nach Maßgabe des genannten Artikels können entsprechende Klagen in Bezug auf Europäische Gesetzgebungsakte, für deren Erlass die Anhörung des Ausschusses der Regionen nach der Verfassung vorgeschrieben ist, auch vom Ausschuss der Regionen erhoben werden.</td>
<td>In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.</td>
<td>De conformidad con los procedimientos establecidos en dicho artículo, el Comité de las Regiones también podrá interponer recursos contra actos legislativos europeos para cuya adopción la Constitución requiera su consulta.</td>
<td>Conformément aux modalités prévues au dit article, de tels recours peuvent aussi être formés par le Comité des régions contre des actes législatifs européens pour l’adoption desquels la Constitution prévoit sa consultation.</td>
<td>In conformità alle modalità previste dallo stesso articolo, tali ricorsi possono essere proposti anche dal Comitato delle regioni avverso atti legislativi europei per l’adozione dei quali la Costituzione richiede la sua consultazione.</td>
</tr>
<tr>
<td>English version</td>
<td>In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.</td>
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</tr>
<tr>
<td>Spanish version</td>
<td>De conformidad con los procedimientos establecidos en dicho artículo, el Comité de las Regiones también podrá interponer recursos contra actos legislativos europeos para cuya adopción la Constitución requiere su consulta.</td>
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<td>Conformément aux modalités prévues au dit article, de tels recours peuvent aussi être formés par le Comité des régions contre des actes législatifs européens pour l’adoption desquels la Constitution prévoit sa consultation.</td>
<td>In conformità alle modalità previste dallo stesso articolo, tali ricorsi possono essere proposti anche dal Comitato delle regioni avverso atti legislativi europei per l’adozione dei quali la Costituzione richiede la sua consultazione.</td>
</tr>
<tr>
<td>French version</td>
<td>Conformément aux modalités prévues au dit article, de tels recours peuvent aussi être formés par le Comité des régions contre des actes législatifs européens pour l’adoption desquels la Constitution prévoit sa consultation.</td>
<td>Conformément aux modalités prévues au dit article, de tels recours peuvent aussi être formés par le Comité des régions contre des actes législatifs européens pour l’adoption desquels la Constitution prévoit sa consultation.</td>
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</tr>
<tr>
<td>Italian version</td>
<td>In conformità alle modalità previste dallo stesso articolo, tali ricorsi possono essere proposti anche dal Comitato delle regioni avverso atti legislativi europei per l’adozione dei quali la Costituzione richiede la sua consultazione.</td>
<td>In conformità alle modalità previste dallo stesso articolo, tali ricorsi possono essere proposti anche dal Comitato delle regioni avverso atti legislativi europei per l’adozione dei quali la Costituzione richiede la sua consultazione.</td>
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<td>In conformità alle modalità previste dallo stesso articolo, tali ricorsi possono essere proposti anche dal Comitato delle regioni avverso atti legislativi europei per l’adozione dei quali la Costituzione richiede la sua consultazione.</td>
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183. Anyone wishing to restrict the right of action to cases where consultation of the CoR is mandatory, it seems, will find it plain sailing since, of the five language versions, only the French one leaves scope for interpretation with the wording ‘prévoit sa consultation’ [provides for its consultation] and not ‘requiert sa consultation’ [requires its consultation], and there are sufficient indicators in the Convention documents to show that the concern was to give the CoR a right of action in fields in which it must be consulted. But the equal status of the language versions means that the French version has the same binding force as the others and that the margin which it seems to leave can be exploited. Indeed it is better suited to the purpose of the Protocol, which is to increase the powers of the CoR as representative of the RLAs, whose role is recognised by Articles I-
5 and I-11, particularly in the matter of subsidiarity. It must be read in conjunction with the third paragraph, second sentence, of Article III-388, which states that the CoR may issue an opinion on texts on which the ESC must be consulted ‘where it considers that specific regional interests are involved’; these opinions are distinct from the opinions on its own initiative referred to in the next sentence of the same article. A teleological approach on the basis of the principle of effectiveness in this case suggests that Article 8 of the Protocol be given the broadest possible interpretation, which is most conducive to protection of the ‘specific regional interests’.

184. It is worth making a detailed comparison between the Amsterdam Protocol, on the one hand, and the Subsidiarity Protocol annexed to the Constitution for Europe, on the other. In order to do this, it is also necessary to take into account other provisions of the Constitution which incorporate the underlying principles of the Amsterdam Protocol and in some cases even parts of its wording (see comparative table, paragraph 187 ff.). The Subsidiarity Protocol, like the Constitution as a whole, is the outcome of an exercise of clarification and codification undertaken first by the Convention, then by the legal experts in the IGC. To this work should be added the innovations proposed by the Convention Working Group on subsidiarity: involvement of the national parliaments in an early warning system and proceedings before the Court of Justice, and a right for the CoR to bring actions in the Court of Justice. In addition to numerous minor modifications which seek to strengthen the mechanisms for monitoring subsidiarity, which are not limited to the early warning procedure, the comparison reveals two main changes.

185. *i.* The provisions of the Amsterdam Protocol laying down guidelines for the application of the principles of subsidiarity and proportionality (paragraphs 5, 6 and 7) were not included in the Subsidiarity Protocol, as the CoR has expressed with regret on several occasions. That does not necessarily mean that these provisions of the Amsterdam Protocol will lapse when the Constitution comes into force; there is no contradiction between the provisions of the Amsterdam Protocol, on the one hand, and the text of the Constitution and the Subsidiarity Protocol, on the other. The Praesidium of the Convention has indeed stressed that the only reason why it did not include these provisions was that it felt that they were not compatible with the nature of a protocol annexed to a constitutional text. 80 It would thus be possible – and no doubt advisable – to include them in a possible text to implement the Protocol.

186. *ii.* The Subsidiarity Protocol establishes a new procedure for monitoring the application of the principles, where the national parliaments are called on to play a major role, in the same way as the Committee of the Regions, which acquires the right to bring actions for annulment before the Court of Justice. If the right to bring an action cannot be exercised as long as the Constitution is not in force or another amendment of the Treaties does not permit it, that in no way prevents the other parts of the monitoring system being set up, such as the early warning procedure, particularly as the other aspects of ‘constant respect’ for the principles of subsidiarity and proportionality form part of the continued application of the Amsterdam Protocol.

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The first column shows the various provisions of the Amsterdam Protocol in the exact sequence of that Protocol. The second column follows the sequence of the Amsterdam Protocol in presenting the corresponding provisions (or the absence of such provisions) of the Protocol annexed to the Constitution for Europe. The differences between the two texts are underlined. The third column gives brief comments on the provisions.

<table>
<thead>
<tr>
<th>Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community by the Treaty of Amsterdam</th>
<th>Corresponding texts in the Subsidiarity Protocol or other parts of the Constitution for Europe</th>
<th>Comments</th>
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<tr>
<td>[Preamble] THE HIGH CONTRACTING PARTIES,</td>
<td>[Preamble] THE HIGH CONTRACTING PARTIES,</td>
<td>The two Protocols both retain the status of a treaty annexed to the Treaty establishing the Community, but have the same legal force as that Treaty. Only the new provisions of the Subsidiarity Protocol may in certain cases require the entry into force of the Constitution for Europe or a treaty incorporating its content. Protocol No 2 forms part of a group of treaties signed by the Member States, thus expressing a will that may serve for the interpretation of the texts currently in force even before the Constitution is ratified.</td>
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DETERMINED to establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions; RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution, and to establish a system for monitoring the application of those principles,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union; WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union; The different wording in the French versions of the Protocols is merely a matter of style.

TAKING ACCOUNT of the Interinstitutional Agreement of 25 October 1993 between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity. [Article IV-438 - Succession and legal continuity preservation of the Community acquis] The interinstitutional agreement of 1993 and its successors form part of the Community acquis and continue to apply to the extent that the Constitution for Europe does not provide otherwise.

HAVE CONFIRMED that the conclusions of the Birmingham European Council on 16 October 1992 and the overall approach to the application of the principle of subsidiarity agreed by the European Council meeting in Edinburgh on 11-12 December 1992 will continue to guide the action of the Union’s institutions as well as the development of the application of the principle of subsidiarity, and, for this purpose, [Article IV-438 - Succession and legal continuity preservation of the Community acquis] The conclusions of the European Councils of 1992 form part of the Community acquis and continue to apply to the extent that the Constitution for Europe does not provide otherwise.
### Paragraph 1.

In *exercising the powers conferred on it*, each institution shall ensure that the principle of subsidiarity is complied with.

**Protocol Article 1**

Each institution shall ensure *constant* respect for the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution.

The Subsidiarity Protocol deletes the phrase *‘in exercising the powers conferred on it’*, but adds, on the initiative of the Convention, the word *‘constant’*. These refinements strengthen the monitoring obligation.

The other changes are purely a matter of style.

It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

**Article I-11(4):**

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

The Amsterdam Protocol repeated Article 5 EC unnecessarily in defining proportionality, but not subsidiarity. The wording of the Subsidiarity Protocol is more consistent from the stylistic point of view.

### Paragraph 2.

The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty.

Paragraph 2 of the Amsterdam Protocol essentially states the obvious; it was only justified by the desire to stress that that Protocol, adopted well after the Treaties of Rome and Maastricht, did not have the aim or effect of amending the Treaties. Protocol No 2, which was adopted at the same time as the Constitution, has no need for this type of clarification.
particularly as regards the maintaining in full of the *acquis communautaire*

<table>
<thead>
<tr>
<th>Article IV-438 - Succession and legal continuity preservation of the Community acquis</th>
<th>In the Amsterdam Protocol, the reference to maintaining in full of the Community <em>acquis</em> was useful as a statement that the principle of subsidiarity must not be used to reduce it. The Constitutional Treaty not only preserves the <em>acquis</em> but develops it by adding some new legal bases in Part III.</th>
</tr>
</thead>
<tbody>
<tr>
<td>and the institutional balance;</td>
<td>Whereas the Amsterdam Protocol had neither the aim nor the effect of altering the institutional balance, the Subsidiarity Protocol clearly does alter that balance by virtue of the new role of the national parliaments and the CoR.</td>
</tr>
<tr>
<td>it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law,</td>
<td>The Amsterdam Protocol indicated that it should not be understood as an invitation to the Court of Justice to amend its case-law in the matter of subsidiarity. It may be contended, however, that Protocol No 2, by offering the CoR a right to bring actions for annulment and by inviting the Member States to notify possible actions on behalf of their parliaments, seems to invite the Court of Justice to develop that case-law.</td>
</tr>
<tr>
<td>and it should take into account Article F(4) of the Treaty on European Union, according to which ‘the Union shall provide itself with the means necessary to attain its objectives and carry through its policies’</td>
<td>It may be noted that the scope of Article 6 TEU (formerly Article F(4) of the Treaty of Maastricht) was more extensive than that of Article I-54, since it was not limited to the budgetary aspects of the Union’s resources. The extension to the three pillars of the flexibility clause (Article I-18) is much more operational than Article 6 TEU in respect of instruments of action, and that is why Article I-54 concerns the Union’s resources.</td>
</tr>
</tbody>
</table>

[Articles I-5 Relations between the Union and the Member States and I-6 Union law reiterate the principles of sincere cooperation and primacy and states the principle of respect by the Union of the national identities of its Member States]
### Paragraph 3.
The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.

**[Article I-11 Fundamental principles]**

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

Paragraph 3 of the Amsterdam Protocol is an explanation of the text of Article 5 (formerly 3b) EC, which sets out the principles of conferral, subsidiarity and proportionality. It is an introduction to the subsequent paragraphs of the Protocol, which is rendered superfluous by the clarification introduced by the Convention as regards competences.

**[Article IV-438 - Succession and legal continuity]**

4. The case-law of the Court of Justice of the European Communities and of the Court of First Instance on the interpretation and application of the treaties and acts repealed by Article IV-437, as well as of the acts and conventions adopted for their application, shall remain, mutatis mutandis, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.

Article IV-438 ensures the continuity of the case-law of the Court of Justice. It does not prevent that case-law from evolving, in particular to take account of the new balances created by the Constitution and its Protocols.

The criteria referred to in the second paragraph of Article 3b of the Treaty shall relate to areas for which the Community does not have exclusive competence.

**[Article I-11 Fundamental principles]**

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence […]

The clarification introduced by the Amsterdam Protocol, according to which the principle of subsidiarity only applies to competences shared between the Union and the Member States, is consolidated by Article I-11. It is thus no longer necessary to mention it in the Subsidiarity Protocol.

The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level.

The loss of the indication that the principle of subsidiarity ‘provides a guide’ is rather welcome since the notion of ‘guide’ is difficult to reconcile with the binding nature of the principle.
**Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.**

The loss of the indication that the action of the Community can be ‘expanded’ or ‘restricted’ is also welcome insofar as the concepts of action and competence could lead to confusion. It is the intensity of the action which can be increased or limited depending on the circumstances. The fact that the Protocol no longer mentions the dynamic quality of the concept ‘which should be applied in the light of the objectives set out in the Treaty’ has no legal effect; on the contrary, the Constitution accords pre-eminent status to the objectives and values of the Union, which should guide the legislator in all its choices, hence in particular in its application of the principle of subsidiarity, whether it be to increase or to reduce the range and intensity of the Union’s action.

<table>
<thead>
<tr>
<th>Paragraph 4.</th>
<th>Protocol Article 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality;</td>
<td>Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.</td>
</tr>
<tr>
<td>The content of paragraph 4 of the Amsterdam Protocol has been adopted completely into the Subsidiarity Protocol in the wording of Article 5. This Article is more complete and is formulated in a way which seems more restrictive than the Amsterdam Protocol. The Convention draft only referred to proposals from the Commission; the IGC rightly extended the obligation to ‘any draft legislative act’ whoever its author might be.</td>
<td></td>
</tr>
</tbody>
</table>

The reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.
The CoR has made known its disappointment that the content of paragraphs 5, 6 and 7 of the Amsterdam Protocol was not incorporated into the Subsidiarity Protocol. The Praesidium of the Convention replied that they gave explanations which had no place in a protocol of a constitutional nature. This argument is correct, but its scope is limited by two considerations: the repetition of certain provisions in Protocols 1 and 2 demonstrates that the work of constitutionalising the relevant principles of the Amsterdam Protocol was unfinished, and the large number of Protocols annexed to the Constitutional Treaty by the IGC diminishes the constitutional nature of the Protocols themselves.

On the other hand, the loss of the content of paragraphs 5, 6 and 7 of the Amsterdam Protocol is an additional argument in favour of adopting an instrument for the implementation of the Subsidiarity Protocol once the Constitution has come into force, in order to specify the procedures and criteria to be applied.

**Paragraph 5.**
*For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the*

The content of paragraph 5 may be regarded both as an explanation of the statement of the principle of subsidiarity as it appears in Article 5 EC, which would thus serve no purpose in Protocol No 2, and as a very useful formulation of the institutional practice that has developed since the Edinburgh summit, which should be incorporated into an instrument for the application of the Protocol.
Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests;

- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

Paragraph 6.

The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding

Article I-38 Principles common to the Union’s legal acts

1. Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.

Paragraph 6 of the Amsterdam Protocol may be viewed as an explanation of the principle of proportionality as stated in Article 5 EC in its formal aspects. In this sense its sole purpose is to specify the legal bases, which leave the European legislator to choose between different instruments. It may be considered that Article I-38(2), stipulating that the type of act shall be selected ‘in compliance with the applicable procedures and with the principle of proportionality’, serves the same purpose as paragraph 6 of the Amsterdam Protocol. Hence it is desirable that an
**Article I-33 - The legal acts of the Union**

2. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

Paragraph 7.

**Relations between the Union and the Member States**

1. The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

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**NB** This is a question on which opinion is divided. For example, the report of the French National Assembly on the application of the subsidiarity principle has the following to say: ‘But Commissioners do not always have the means of preventing a certain drift away from subsidiarity. Thus, after presenting a proposal for a Council directive imposing minimum standards for the keeping of animals in zoos, the Commission had finally decided, applying the principle of subsidiarity, to replace its proposal for a directive by a proposal for a recommendation, which is non-binding. Yet that did not prevent the European Parliament and the Council, in the end, from adopting a directive on the subject’. See Assemblée Nationale, No 1919, filed with the Presidency of the National Assembly on 16 November 2004, p.15. [http://www.assemblee-nationale.fr/12/europe/rap-info/i1919.asp](http://www.assemblee-nationale.fr/12/europe/rap-info/i1919.asp).
**Paragraph 8.**
Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

**Article I-5 Relations between the Union and the Member States**

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

**Paragraph 9.**
Without prejudice to its right of initiative, the Commission should:

- except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;

**Protocol Article 2**

Before proposing European legislative acts, the Commission **shall** consult widely. **Such consultations shall, where appropriate, take into account the regional and local dimension of the**

The phrase ‘without prejudice to its right of initiative’ essentially states the obvious; it was only justified by the desire to stress that this Protocol, which was adopted well after the Treaties of Rome and Maastricht, should not have the purpose or the effect of amending the Treaties. Protocol No 2, which was adopted at the same time as the Constitution, does not need to make any such statement.

The second subparagraph of paragraph 9 of the Amsterdam Protocol is incorporated into Article 2 of the Subsidiarity Protocol, with a series of changes which strengthen it: - the Commission ‘shall’ and not ‘should’ consult widely,
**action envisaged.** In cases of exceptional urgency, the Commission shall not conduct such consultations. *It shall give reasons for its decision in its proposal.*

which is more binding:
- the reference to the regional and local dimension of action envisaged;
- the only exception is that of ‘exceptional’ urgency and not ‘particular’ urgency or confidentiality;
- the Commission must give reasons for its decision regarding such consultations. It is not necessary to wait for the entry into force of the Constitution to apply these principles.

<table>
<thead>
<tr>
<th>Protocol Article 5</th>
<th>The third subparagraph of paragraph 9 of the Amsterdam Protocol is incorporated into Article 5 of the Subsidiarity Protocol, with a series of changes which strengthen it:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- justify the relevance of its proposals with regard to the principle of subsidiarity;</td>
<td>Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.</td>
</tr>
<tr>
<td><strong>whenever necessary,</strong> the explanatory memorandum accompanying a proposal will give details in this respect.</td>
<td>Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.</td>
</tr>
<tr>
<td>The financing of Community action in whole or in part from the Community budget shall require an explanation;</td>
<td><em>This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation.</em></td>
</tr>
<tr>
<td><strong>[4th sentence: see text alongside paragraph 4 of the Amsterdam Protocol]</strong></td>
<td>- the call for the justification of draft legislative acts is extended because ‘any draft’ legislative act must be accompanied by a statement, and not only ‘whenever necessary’;</td>
</tr>
<tr>
<td>- <strong>take duly into account</strong> the need for any burden, whether financial or administrative, falling upon the Community, national governments, local</td>
<td>Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national</td>
</tr>
<tr>
<td></td>
<td>The fourth subparagraph of paragraph 9 of the Amsterdam Protocol is also included in Article 5 of Protocol No 2, supplemented by a reference to the regional authorities, which was absent from the Amsterdam Protocol. The</td>
</tr>
</tbody>
</table>
authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved; governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

difference between ‘take duly into account’ and ‘take account of’ should not be of any great consequence.

- submit an annual report to the European Council, the European Parliament and the Council on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.

Protocol Article 9

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article I-11 of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.

The fifth subparagraph of paragraph 9 of the Amsterdam Protocol is included in a separate article, Article 9, and provides logically for the forwarding of the report to the national parliaments as well.

**Paragraph 10.**
The European Council shall take account of the Commission report referred to in the fourth indent of point 9 within the report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with Article D of the Treaty on European Union.

The Constitution for Europe has deleted the obligation to present a written annual report ‘on the progress achieved by the Union’. It now only provides for the reports of the President of the European Council to Parliament at the end of each meeting (Article I-22(2d)).

**Paragraph 11.**
While fully observing the procedures applicable, the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 3b of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

The duty of constant respect includes the principles stated in paragraph 11 of the Amsterdam Protocol. This type of clarification is of a kind more suited to an interinstitutional agreement than a constitutional text.
### Paragraph 12.
In the course of the procedures referred to in Articles 189b and 189c of the Treaty, the European Parliament shall be informed of the Council’s position on the application of Article 3b of the Treaty, by way of a statement of the reasons which led the Council to adopt its common position. The Council shall inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is deemed to be inconsistent with Article 3b of the Treaty.

The duty of constant respect includes the principles stated in paragraph 12 of the Amsterdam Protocol. This type of clarification is of a kind more suited to an interinstitutional agreement than a constitutional text.

### Paragraph 13.
Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty.

Paragraph 13 of the Amsterdam Protocol was implemented by the Laeken mandate and the work of the European Convention.

### Protocol Article 3
For the purposes of this Protocol, ‘draft European legislative acts’ shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of an European legislative act.

The definition of ‘draft European legislative acts’ did not appear in the draft Protocol of the Convention. It was added on a proposal from the IGC experts and usefully clarifies the scope of the Protocol. The Amsterdam Protocol used the concept of Community legislative act, a category which is not defined by the EC Treaty and which prefigured the new typology of Community acts adopted by the Constitution, which includes the European law and European framework law (see Chapter 6 Section 1 of this report).
### Protocol Article 4

The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

### Protocol Article 6

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

### Protocol Article 7

The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by Articles 4, 6 and 7 of the Subsidiarity Protocol regulate the early warning procedure, which is entirely new. It would be possible to put such a procedure in place without waiting for the entry into force of the Constitution for Europe, by way of an interinstitutional agreement as far as the Union institutions are concerned and, by way of an undertaking of the governments of the Member States within the framework of the European Council, as far as the national parliaments are concerned.
Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III–264 of the Constitution on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft European legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

**Protocol Article 8**

The Court of Justice already has jurisdiction under the current Treaties to give rulings on actions for infringement by an act of a Community institution of the principle of subsidiarity brought in accordance with the procedure laid down in Article 230 EC (the content of which is presented in Article III-365 of the Constitution), in particular by the Member States.

There is nothing at the present time to stop the governments of Member States bringing such an action at the request of their Parliament, or one of its chambers, or a regional or local authority 'in accordance with their legal order'.
In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

For the Committee of the Regions to enjoy a right to bring actions, a treaty or revision protocol is indispensable should the Constitution for Europe not enter into force. It could be a revision of the Amsterdam Protocol or a revision of the Statute of the Court of Justice which is also in the nature of a Protocol annexed to the Treaties. The latter can, moreover, be revised by the Council on a proposal from the Court of Justice without being subject to the procedure for treaty revision.
SECTION 2
THE PHASES IN THE PROCEDURE FOR MONITORING COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

188. The Subsidiarity Protocol, in addition to the statement in Article 1 on the duty of ‘constant respect’, provides for a procedure which is generally described as comprising four phases:

1. the pre-legislative phase
2. the early warning phase
3. the legislative phase
4. the post-legislative phase.

189. A detailed examination of the procedure shows that there are more phases, some of which are essential to the legislative process of the Union (1-2-3-6), whereas others are not necessarily used (4, 5, 7) since they depend, on the one hand, on the will of the national parliaments, which may or may not issue opinions and, on the other hand, on the institution of an action for annulment by the various possible applicants.

1. preparation of a proposal for a legislative act
2. adoption of a draft legislative act by its author
3. forwarding of the draft legislative act to the national parliaments
4. reasoned opinions issued by national parliaments in the context of the early warning procedure
5. process of taking reasoned opinions into consideration
6. the adoption of the European legislative act
7. action for annulment of a legislative act
8. annual report on the application of Article I-11.

A graphic presentation in the table below (paragraph 191) serves to illustrate phases 1 to 5.

190. Each of these phases merits a special examination both in order to identify exactly what are the roles of the various institutions and authorities of the Member States and, in particular, to see in each phase what is the possible role of the CoR. Special attention will be paid to the differences between the Subsidiarity Protocol and the Amsterdam Protocol in the analysis of subsequent chapters, in order to examine to what extent it would be possible to anticipate the entry into force of the Constitution in the current situation in applying the various phases in this procedure.
191. Table 5 Graphic presentation of the procedure for subsidiarity monitoring
KEY:

Publication
Debate in EP

COMMISSION
Annual work programme

COMMISSION
Preparation of a proposal
for a legislative act
(competent DGs)

No consultation if
reasons given for
particular urgency

Extensive
consultation

COMMISSION
Preparation of draft
legislative act and statement
of reasons
(competent DGs and legal
service)
Adoption of draft legislative
act
(Commission acting
collectively)

Draft forwarded to
NATIONAL
PARLIAMENTS

6 WEEKS

No opinion

Reasoned opinions

COMMISSION
Examination of reasoned
opinions

No reaction
(if less than one third
and no points to which
Commission would wish
to react)

Reaction
if at least one third
and there are points
to which Commission
would wish to react

COMMISSION
maintains or alters the draft

Draft is forwarded to the
Member States

CONSULTATION OF CO/R
AND/OR ESC IF
MANDATORY OR
APPROPRIATE

CONSULTATION OF CO/R
AND/OR ESC IF
MANDATORY OR
APPROPRIATE

CONSULTATION OF PARLIAMENT
(ordinary legislative
procedure)

CONSULTATION OF PARLIAMENT
(ordinary legislative
procedure)

Opinion of CoR

Possibility for the
Commission to amend or
withdraw its draft

Own initiative opinion of CoR
192. **The Amsterdam Protocol and the Subsidiarity Protocol annexed to the Constitution**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.5 stresses that the resolute application of the reformed subsidiarity principle, i.e. deeper involvement of regional and local players, may be a key factor in defining the European institutions’ policies and actions in more concrete terms. […]

[…]

2.14 regrets, however, that the criteria contained in the Subsidiarity Protocol annexed to the Amsterdam Treaty for checking the compatibility of a European Union legislative proposal with the subsidiarity principle were not reproduced in full in the new Subsidiarity Protocol, and encourages the European Commission, when applying the subsidiarity principle in future, to highlight whether:

- the area in question contains trans-national aspects that cannot adequately be addressed by measures taken by Member States or their regional and local authorities;
- measures taken by Member States or their regional and local authorities alone, or the absence of Community measures, would violate the requirements of the Treaty or would in some other way significantly harm the interests of the Member States or their regional and local authorities;
- measures at Community level would, due to their scope or their effect, have significant advantages over measures taken by Member States or their regional and local authorities; […]

2.17 regrets therefore that the provisions on the proportionality principle are less comprehensive and clear than those on subsidiarity, and all the more so since the constitution recognises the autonomy of regional and local self-government (Article I-5 and Part II preamble) and the local and regional level is responsible for implementing more than 70% of EU legislative acts.’

193. The point-by-point comparison of the Amsterdam Protocol currently in force, on one hand, with the Subsidiarity Protocol and the other relevant provisions of the Constitution undertaken in this study indeed clearly shows that the new Protocol is not a simple clone of the existing one. The innovations of the early warning procedure and the possibilities for bringing actions in the Court of Justice are accompanied by a reformulation of the Community acquis codified in the Amsterdam Protocol. The absence from the Subsidiarity Protocol of the points of detail that appear in the Amsterdam Protocol does not, however, mean that these guidelines and assessment criteria are superseded; they continue to be applicable, even though they do not appear in a text having constitutional status. It would be worthwhile for them to be included – and supplemented – in an interinstitutional agreement, for which there is provision in the Constitution, and an agreement between the Commission and the CoR, as recommended in Opinion 220-2004 [Subsidiarity Guidelines].

194. **Refinement of the criteria set out in the Amsterdam Protocol**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.15 believes that, when monitoring subsidiarity, account should be taken of the extent to which economies of scale and added value can be achieved through cross-border and trans-national effects when EU measures are taken;
2.16 stresses that where European legislation is necessary under the subsidiarity principle, it should be drafted in such a way as to retain the greatest possible scope for national, regional and local decision-making, and that the volume of European legislation must be limited, even more than has hitherto been the case, to what is strictly necessary to achieve the Treaty objectives (proportionality principle); in particular, if jobs are to be protected and created, citizens and businesses must not be saddled with unnecessary red tape; therefore also welcomes the European Commission’s measures to update and simplify the Community acquis, and calls for these to be stepped up;

2.17 regrets therefore that the provisions on the proportionality principle are less comprehensive and clear than those on subsidiarity, and all the more so since the constitution recognises the autonomy of regional and local self-government (Article I-5 and Part II preamble) and the local and regional level is responsible for implementing more than 70% of EU legislative acts;

3.6 expects to be given the opportunity to make its contribution in connection with the drafting of the European Commission’s annual report to the European Council on the application of the subsidiarity principle; in particular, its opinion on the European Commission’s annual report on the application of Article I-11 of the Constitution (subsidiarity and proportionality) should be enclosed with the Commission’s report;

In its Opinion 121-2005 [Better Lawmaking], the CoR

‘2.3.4. believes that impact assessments must play a substantial role in reducing the administrative burdens of EU legislation on local and regional authorities and that, consequently, preliminary assessments must include an impact assessment of legislative acts at local and regional level, in financial terms; […]’

195. The additions proposed by the CoR for the analysis of Union actions in terms of the principles of subsidiarity and proportionality are entirely consistent with the wording of the Constitution and Protocol No 2. Not only are they fully compatible with the Amsterdam Protocol, to which they are a natural complement, but they will remain compatible with the Subsidiarity Protocol, to which they form a necessary supplement, with the formulations of the Amsterdam Protocol which have not been included. Pending the entry into force of the Constitution, therefore, it would be particularly useful to test these criteria which, when the time comes, will make it possible to adopt an act to supplement the Subsidiarity Protocol or, in the event that the Treaty of 29 October 2004 is abandoned, to propose a more suitable wording for the constitutional provisions relating to the principle of subsidiarity and for the supplementary provisions which should accompany the text for a new Constitution.

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* *  
*
Chapter 5
Constant respect for the application of the principles of subsidiarity and proportionality

196. As we saw in the previous chapter, the Subsidiarity Protocol explicitly embodies the principle of ‘constant respect’ for the application of the principles of subsidiarity and proportionality. Since attention quite naturally focuses on the early warning procedure and the possibility of bringing actions for the annulment of acts on grounds of infringement of the principle of subsidiarity, there is a risk that this statement of principle, another innovation of the Subsidiarity Protocol, may be overlooked. Since the Protocol must be considered in its entirety, including the promotion of the role of the CoR as guardian of subsidiarity, it is important to examine the content of the principle of constant respect more closely. This is all the more important since – although it is embodied in the Subsidiarity Protocol – there is nothing to prevent the application of the principle as of now, without waiting for the entry into force of the Treaty of 29 October 2004 or other possible reforms of the current Treaties. On the contrary this would be an excellent way of testing the operation of the principle, with a view to preparing texts to supplement the Protocol or to reformulate the constitutional provisions. More importantly, it could help to increase the involvement of the RLAs in the framing of Union policies, hence bringing the Union closer to the citizens.
Section 1

‘Constant respect’: A duty for the ‘institutions’, a greater role for the Committee of the Regions

197. Article 1 of Protocol No 2 on the application of the principles of subsidiarity and proportionality provides that:

**Subsidiarity Protocol, Article 1**

| Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution. |

198. A similar provision already appears in the Protocol adopted at the time of the Treaty of Amsterdam:

**Amsterdam Protocol, paragraph 1**

| In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty. |

199. As we noted above (Chapter 4), the Subsidiarity Protocol deletes the words ‘in exercising the powers conferred on it’ but adds, on the initiative of the Convention, the word ‘constant’. These changes strengthen the duty of care. The other changes are purely stylistic. The change of wording between the Amsterdam Protocol and the Subsidiarity Protocol of the Constitution for Europe does not necessarily have any legal consequence. The change results essentially from consideration of the way in which the principles of subsidiarity and proportionality are now defined in Article I-11. The appearance of the concept of ‘constant respect’ in the Subsidiarity Protocol should nevertheless be stressed.

200. The advantage of the concept of ‘constant respect’ is that it makes the institutions aware that the duty to respect the principles of subsidiarity and proportionality is not limited to a specific stage in the decision-making process or to a specific category of act. And there is no need to wait for the entry into force of the Constitution in order to insist on this interpretation, in the sense that the introduction of the term ‘constant respect’ in the Protocol is to be regarded from the legal point of view not as an innovation *per se*, but as an interpretative clarification.

201. Certainly, Article 1 of the Subsidiarity Protocol states that ‘each institution’ must ensure constant respect for these principles. The CoR has not been designated as an institution in the Constitution. It is nevertheless in the interests of the CoR to draw attention to the fact that Article 1 imposes an obligation on the Commission, the Council, the European Parliament, the Court of Justice, the ECB and even the Court of Auditors, because they have powers which may give rise to questions as regards respect for the principles of subsidiarity and proportionality. The CoR for its part, as it has only consultative powers, is hardly likely to breach these principles.
202. It could also be argued, since the institutions have a duty to comply with the principles of subsidiarity and proportionality, that the Committee of the Regions has a role in verifying compliance with these principles by the institutions. This must be seen in relation to the fact that, generally, the CoR has a right of initiative, i.e. it has the power to issue opinions on its own initiative.

A. - The possibility for the CoR to issue opinions on compliance with the principles of subsidiarity and proportionality

203. The Committee of the Regions may – if it so wishes and if it considers it appropriate – issue opinions at any time in the decision-making process and on any act whatsoever. Of course, the practical possibility of issuing opinions is limited by the CoR’s resources, and we merely indicate the existence of this facility.

204. The concept of ‘constant respect’ means that compliance with the principle of subsidiarity and the principle of proportionality arises at different times:

   i. from the moment a plan for action is entered in the Commission work programme, and throughout the decision-making process, i.e. also during the preparation of a proposal for an act by the Commission – or by other institutions where they have a the power to propose acts;

   ii. at the time the Commission adopts its own proposal in final form;

   iii. it then arises for the Union’s legislator and the executive of in the process of the adoption of laws, framework laws and regulations.

   iv. it also arises in the process of implementation, where implementation is entrusted to the Commission but also when implementation is entrusted to the Member States – which is the situation most commonly found and is moreover reflected in Article I-37(1) of the Constitution, Implementing acts:

   **Article I-37 Implementing acts**
   
   1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

205. The Constitution for Europe does not alter the definition of the principle of subsidiarity with respect to the current Treaties, since it is still a principle applicable to the exercise of powers shared between the Union and its Member States, the question being who is to act: the Union or the national, regional or local authorities of the Member States?

206. However, the reference in Article I-11 of the Constitution to the regional and local levels of the Member States clearly shows that the principle of subsidiarity has more general scope, although in no case does it permit the institutions of the Union to interfere
in the internal distribution of powers between the central, regional and local levels in the Member States, or the exercise of those powers. Neither Parliament nor the Council, any more than the Commission or the Court of Justice, have the power to adopt binding decisions in order to ensure compliance with the principle of subsidiarity within the Member States, but the duty of ‘constant respect’ obliges them to take an interest in the consequences of Community action at all levels of public authority, not only that of the central government of the Member States, and this also applies to the CoR, which is particularly well placed because of its composition.

B. - Acts to which the duty of ‘constant respect’ applies

207. The duty of ‘constant respect’ is imposed in respect of any type of act: whether they be legislative and regulatory acts or individual implementing decisions.

208. We shall see below that the Constitution lays emphasis in the application of the principle of subsidiarity on legislative acts – in the early warning procedure and actions for annulment on grounds of infringement of subsidiarity – but that does not mean that the principle is not applicable to regulatory acts or implementing acts. Put simply, in practice, it is more the principle of proportionality that needs to be applied where implementing acts are concerned than the principle of subsidiarity because, on the basis of the abundant case-law of the Court of Justice, the scope of the principle of proportionality is much more precise than that of subsidiarity. There is no reason, either in the Constitution for Europe and its Subsidiarity Protocol or in the current texts, to limit the applicability of the principle of subsidiarity from the outset to texts of a legislative nature as regards ‘constant respect’; it can be said simply that verification of this principle seems to be a much more frequent requirement in legislative texts than in regulatory texts.

209. This reasoning may also be applied on the basis of the current texts. The concept of the legislative act has been known in Community law since the Treaty of Maastricht, although the nomenclature of acts has not changed: it still rests on the distinction between directives, regulations and decisions – as regards acts with binding force provided by the EC Treaty (Article 249). The Treaty of Maastricht instructs the Council to define the cases in which it acts as a legislator (Article 207 EC), with a view to the application of the new provisions of the EC Treaty on access to documents. The Treaty of Amsterdam and the Protocol on the application of the principles of subsidiarity and proportionality refer to the concept of legislative texts, but without giving a definition of what a legislative text is.

210. The importance of the principle of ‘constant respect’ to the observance of the principles of subsidiarity and proportionality should not be underestimated. There is indeed, given the innovation of the early warning system, a risk that the examination of subsidiarity may tend to be limited to the early warning procedure, whereas this procedure concerns only one phase – an important one, but by no means the only one – in the decision-making process. Whatever the fate of the Constitutional Treaty, the CoR has
an interest in ensuring that the duty of ‘constant respect’ be systematically applied to compliance with these principles by the various institutions.
SECTION 2
THE ANNUAL REPORT OF THE COMMISSION ON THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

211. Like the principle of constant respect, the obligation to submit an annual report on the application of Article I-11 of the Constitution is an integral part of the system for monitoring subsidiarity and proportionality instituted by the Subsidiarity Protocol.

**Subsidiarity Protocol Article 9**

*The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article I-11 of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.*

212. The Amsterdam Protocol, in paragraph 9, after the exhorting the Commission to consult widely and to justify its proposals, makes the following provision:

**Amsterdam Protocol paragraph 9**

*Without prejudice to its right of initiative, the Commission should:*

* […]*

*– submit an annual report to the European Council, the European Parliament and the Council on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.*


214. It does not seem that the annual report aroused any great enthusiasm or even much attention on the part of the European Parliament as regards monitoring the application of the principle of subsidiarity, which may be explained by the fact that the Commission’s approach was, in part, to give a quantitative sense to the application of the principle of subsidiarity, supplying statistics on the number of proposals withdrawn, and, in part, to comment on the quality of the legislation – in particular its drafting quality – which is certainly not devoid of links with the principle of subsidiarity, but leaves the impression that the consideration of subsidiarity has been watered down in a wider and vaguer

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82 Document COM (93) 545, 24 November 1993.
84 CSE (95) 580; CSE (96) 7, 27 November 1996; COM (97) 626, 26 November 1997; COM (98) 715, 1 December 1998; COM(1999) 526 final, etc.
whole. It may be noted, moreover, that the term ‘subsidiarity’ does not appear once in the ‘First report on the implementation of the Framework Action: “Updating and simplifying the Community acquis”’ of 2003.85

215. In February 2000, the President of the Commission stated in an answer to a parliamentary question:86

‘As the Commission’s annual report to the Council on Better Lawmaking indicates, the Commission each year withdraws the proposals which have become obsolete, including for reasons of subsidiarity (in 1999 it withdrew 90 proposals). It proposes the simplification of a number of existing Community rules, largely in application of the proportionality principle. Since the 1992 Edinburgh European Council, the Commission has presented some 60 simplification proposals, 30 of which have been adopted by the legislative authority.

The Commission is also striving to improve the application of the subsidiarity and proportionality principles by strict application of the protocol annexed to the EC Treaty. Specifically, it proposes Community action only where this is necessary or more effective than action by the Member States; it uses alternatives to legislation and leaves scope for self-regulation, for example in the fields covered by the social protocol; it proposes measures which leave as broad as possible a decision-making margin at national level; it chooses as simple a form of action as possible; it is revising its system of evaluating the impact of proposals and strengthening the cost/benefit analysis of its initiatives; it has improved the arrangements for prior consultation of the parties concerned.’

216. Significantly, in its Resolution on the report ‘Better lawmaking’ of 2002, the European Parliament:

‘8. Regrets that the 2002 report focused solely on the main policy objectives for 2002;
9. Emphasises that the relevance of the Commission’s choices is also to be examined in the light of other political actions relevant to the application of the principles of subsidiarity and proportionality, and that they should be addressed in future reports;
10. Recognises that other aspects of lawmaking explored in the report (such as legal drafting, simplification or codification) are also important and interesting, but asks again that the Commission focus more closely on the raison d’être of the report, in order to produce a clear, relevant and meaningful review of how and with what measure of success the principles of subsidiarity and proportionality have been applied by the Community;
11. Considers that the report’s new focus should therefore result in the Commission concentrating on the truly European issues assigned to it by the Treaties and refraining from intervening in fields which are clearly better dealt with by levels of government closer to citizens, while indicating which fields it considers more appropriate for the adoption of laws at national level;’

217. The annual report of the Commission to the European Council, Parliament and the Council must be forwarded to the CoR and the ESC. It could become a much more important instrument for monitoring compliance with the principles of subsidiarity and proportionality without waiting for the entry into force of the Constitution for Europe, as is demonstrated in particular by Opinion 121-2005 on ‘Better Lawmaking 2004’ and ‘Better Regulation for Growth and Jobs in the European Union’.87

87 Rapporteur: Michel Delebarre (Former Minister of State – Mayor of Dunkirk (FR/PES)).
SECTION 3
CONSTANT MONITORING OF COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY BY THE INSTITUTIONS, BODIES, OFFICES AND AGENCIES OF THE UNION

218. The idea of constant respect makes it clear that application of the principle of subsidiarity is not limited to legislative acts but extends to all action by the Union, including implementing acts when these are carried out by either the Commission or other bodies, offices or agencies of the Union (see the following chapter for the definition of implementing acts as opposed to legislative acts). In order to be effective, a culture of subsidiarity and proportionality must be shared, not only by the institutions and consultative bodies, but also by an ever increasing number of regulatory and implementing agencies. Certainly the agencies in question do not have any formal decision-making power; they merely prepare decisions, which usually take the form of an act issued by the Commission. But the mere fact that these agencies are organised in a manner such as to represent the relevant public or private authorities and bodies of the Member States poses the risk that the decision-making power of the Commission and the Council may be constrained by a series of arguments which would then be difficult to refute in the process of applying the test of subsidiarity and proportionality.

219. The fact that most of these agencies do not have formal legal decision-making powers poses the risk that they may be forgotten in the application of the Subsidiarity Protocol, which focuses on procedural and formal aspects. The CoR does not have the resources to act as an all-encompassing guardian of subsidiarity and proportionality, but it can and must take account of the existence of the agencies, particularly by demanding that the annual report also cover action taken by them. Executive action by the departments of the Commission itself should also be included in this report. The more precise definition of legislative acts in the Constitution for Europe will make it all the more necessary to take account of other action. It is necessary to anticipate this definition by determining, in consultation with the Commission and its agencies, the fields in which the CoR, as the representative of the RLAs, can contribute value added to the dissemination of the subsidiarity culture. From the point of view of the CoR, a first task will consist in identifying those agencies which, by dint of their field of action and the definition of their tasks and powers, are the most relevant to the RLAs.

220. For information, we reproduce below the links page providing online access to the agencies of the European Community—these would need to be supplemented to include agencies of the Union which will be subject to Community law once the Constitutional Treaty comes into force (for the moment these are EUROPOL and the future European armaments agency, but others may also come into being).

221. ‘A Community agency is a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own

88 http://europa.eu.int/agencies/index_en.htm, as at 24 January 2006
legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task which is specified in the relevant Community act.

There are currently eighteen bodies answering the definition of Community agency, even though differing terms are used to designate them (Centre, Foundation, Agency, Office, Observatory); this may lead to some confusion, particularly as the same terms may be used to designate other bodies which do not answer the said definition.

At present, the 18 European Community agencies are:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Description</th>
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<tbody>
<tr>
<td>CEDEFOP</td>
<td>European Centre for the Development of Vocational Training</td>
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<tr>
<td>EUROFOUND</td>
<td>European Foundation for the Improvement of Living and Working Conditions</td>
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<tr>
<td>EEA</td>
<td>European Environment Agency</td>
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<td>ETF</td>
<td>European Training Foundation</td>
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<tr>
<td>EMCDDA</td>
<td>European Monitoring Centre for Drugs and Drug Addiction</td>
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<td>EMEA</td>
<td>European Medicines Agency</td>
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<tr>
<td>OHIM</td>
<td>Office for Harmonisation in the Internal Market (Trade Marks and Designs)</td>
</tr>
<tr>
<td>EU-O_SHA</td>
<td>European Agency for Safety and Health at Work</td>
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<tr>
<td>CPVO</td>
<td>Community Plant Variety Office</td>
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<tr>
<td>CdT</td>
<td>Translation Centre for the Bodies of the European Union</td>
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<tr>
<td>EUMC</td>
<td>European Monitoring Centre on Racism and Xenophobia</td>
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<td>EAR</td>
<td>European Agency for Reconstruction</td>
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<td>EFSA</td>
<td>European Food Safety Authority</td>
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<td>EMSA</td>
<td>European Maritime Safety Agency</td>
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<td>European Aviation Safety Agency</td>
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<td>European Network and Information Security Agency</td>
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<td>ECDC</td>
<td>European Centre for Disease Prevention and Control</td>
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<td>ERA</td>
<td>European Railway Agency</td>
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CONCLUSIONS OF CHAPTER 5

222. **Constant respect for the principles of subsidiarity and proportionality**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.3 stresses that the changes under the Constitutional Treaty [whereas hitherto the Committee of the Regions has only served as a consultative body to the legislative instances of the European Union] have given it an important role to play in monitoring the application of subsidiarity, thus strengthening its institutional role within the EU;

2.4 will make every effort to prepare itself to fulfil this new role and to work together even more closely than in the past with the relevant institutions and the regional and local authorities it represents;

…

2.12 stresses that under point 1 of the Protocol on the application of the principles of subsidiarity and proportionality attached to the Constitutional Treaty, all European institutions are required to abide by these principles, and that they are to apply throughout the legislative process, i.e. also during deliberations in the European Parliament and the Council of Ministers; it is therefore very important that, in view of its new responsibilities, the Committee should receive or develop the means to monitor compliance with the subsidiarity principle throughout the entire legislative process and, where appropriate, to bring actions before the ECJ;

[…]

3.9 stresses that, on the basis of its existing consultative role, it has the right to examine the compatibility of an EU legislative proposal with the principles of subsidiarity and proportionality and to make its views known to the European institutions and national parliaments; […]’

223. Alongside the procedural innovations contained in the Subsidiarity Protocol, the appearance of the concept of ‘constant respect’ should be developed, something that is demonstrated in this study and is well understood by the CoR. It is in the area of ‘constant respect’ in particular that the CoR can demonstrate its capacity and deploy the expertise of the RLAs which it represents, whereas the early warning system and actions before the Court of Justice fall mainly within the remit of the national parliaments. Constant monitoring can and should be put in place without waiting for the entry into force of the Constitution, since it does not require a new legislative basis to be implemented.

224. **Assessment of the application of the principles of subsidiarity and proportionality in the annual report**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘1.4 emphasises that basing European policy on the principles of subsidiarity and proportionality and developing a culture of subsidiarity could make a decisive contribution to strengthening public confidence in European cooperation and overcoming the scepticism expressed in the referendums that produced a no vote;

[…]’

2.2 welcomes the new definition of the subsidiarity principle and its involvement in ex-post monitoring of compliance with that principle; it also recognises that, together with other institutions and national parliaments, it will receive the Commission’s annual report on the application of Article I-11 of the Constitution (subsidiarity and proportionality - Article 9) – (CdR 354/2003 paragraph 1.12);’
225. In its Opinion 121-2005 [Better Lawmaking], the CoR

‘2.5.2. lastly, intends to regularly evaluate the actions outlined in the action plan on Better lawmaking, particularly as regards its annual consultation on the report of the European Commission, and hopes that the European Commission will introduce a computerised system to facilitate access to information on the ongoing legislative process and therefore ensure that local and regional authorities receive better information on all the various stages of legislation.’

226. The concept of constant respect calls not only for a check on the way in which the principles of subsidiarity and proportionality are applied throughout the Union’s decision-making process, from the programming of initiatives to the implementation of Union actions, but also for an assessment of their application on a regular basis. The annual report on the application of the principles of subsidiarity and proportionality, presented by the Commission to the Council since the Treaty of Maastricht, has become an obligation for the Commission with the Amsterdam Protocol. The present study poses the question to what extent the transformation of this report ‘on the application of the principles of subsidiarity and proportionality’ into a report on ‘better lawmaking’ is a good thing. While it enables the Commission to relocate the question of subsidiarity and proportionality in the wider context of good governance, it also leads to a certain dilution of the precise and detailed examination of subsidiarity and proportionality. The inclusion of the regional and local dimension in the principle of subsidiarity and the new role of the CoR might merit a separate report. It is not necessary to wait for the entry into force of the Constitution to make a move in this direction, given that the report in question is already provided for in the Amsterdam Protocol.

227. The application of the principles of subsidiarity and proportionality outside legislative acts

This study also shows that the idea of constant respect makes it clear that application of the principle of subsidiarity is not limited to legislative acts but extends to all action by the Union, including implementing acts, when these are carried out either by the Commission or by other bodies, offices or agencies of the Union. In order to be effective, a culture of subsidiarity and proportionality must be shared, not only by the institutions and consultative bodies, but also by an ever increasing number of regulatory and implementing agencies. The fact that most of these agencies do not have formal decision-making legal powers poses the risk that they may be forgotten in the application of the Subsidiarity Protocol, which focuses on procedural and formal aspects. The CoR does not have the resources to act as an all-encompassing guardian of subsidiarity and proportionality, but it can and must take account of the existence of the agencies, particularly by demanding that the annual report also cover action taken by them. Executive action by the departments of the Commission itself should also be included in this report. The more precise definition of legislative acts in the Constitution for Europe will make it all the more necessary to take account of other action. It is necessary to anticipate this definition by determining, in consultation with the Commission and its agencies, the fields in which the CoR, as the representative of the RLAs, can contribute value added to the dissemination of the subsidiarity culture.

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Chapter 6
Legislative acts and respect for the principles of subsidiarity and proportionality

228. The Constitution for Europe establishes the concept of legislative act, to which the procedures defined in Protocols Nos 1 and 2 in particular refer. The concept of legislative act is a procedural innovation of the Constitution for Europe. However, it has already featured both in the practice of the Union and in the Treaties. The current scope of legislative acts is broader than in the Constitution: the new definition of such acts stems from a different reasoning which does not feature in the existing Treaties. Those differences are of major significance for the scope of the early warning procedure and actions for annulment which may be brought, pursuant to Protocol No 2, by national parliaments and the CoR. As regards continuous monitoring and the pre-legislative phase, however, those differences are of minor significance.
SECTION 1
THE CONCEPT OF LEGISLATIVE ACT IN COMMUNITY AND UNION LAW

A. – The concept of legislative text in the Treaties currently in force

229. The Treaty of Maastricht uses the expression ‘Community law’ in Article 109e (now Article 116 EC) on economic and monetary union. That expression was introduced without any accompanying definition in the Treaties of what is meant by ‘Community law’, and furthermore the names of Community acts were not altered. In reality, the change that took place could be considered to be really of a linguistic nature, given that it had been normal practice within the institutions, in policy-making, in legal literature and indeed in Europe’s press to speak of ‘Community law’ at least since the mid-1980s. Other provisions of the Treaties – even those pre-dating the Treaties of Maastricht, Amsterdam or Nice – refer to the concept of ‘Community rules’ or of ‘rules adopted by the Community institutions’. The concept of Community law must not be contrasted, in formal terms, with the concept of Community rules.

230. More significantly, the Treaty of Maastricht established the concept of the European ‘legislature’ for the purpose of applying the new Article on the right of access to documents enshrined in Article 191a of the EC Treaty (now Article 255 EC):

Article 207 EC (formerly Article 151) (our emphasis)


For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.

It is worth noting that this is not an overall, comprehensive definition of the concept of the Council acting in its legislative capacity; it is a practical definition designed to make it possible to set apart acts to which the right of access to Council documents applies. This approach differs entirely from that taken in the Constitution for Europe, where the legislature is contrasted with the executive, an approach also taken in the Member States’ constitutions. That approach has major implications for the scope and number of acts to be covered by the concept of the legislative act.
231. The Treaty provision cited above is implemented by the Council’s Rules of Procedure\(^{89}\) which contain the following definition:

**Article 7 of the Council’s Rules of Procedure**

**Cases where the Council acts in its legislative capacity**

The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).

Where legislative proposals or initiatives are submitted to it the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions or declarations, other than those referred to in Article 9.

The main criterion for defining a legislative act for the purposes of Article 207(3) EC is therefore the ‘rules which are legally binding in or for the Member States’, which is further clarified by the exclusion from that definition: ‘discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)’ are not legislative acts.

232. As the following assessment of the concept of legislative act will show, that concept has a broader scope than the concept provided for in the Constitution, if only because Article 7 of the Council’s Rules of Procedure makes no distinction between legislative acts and implementing acts\(^{90}\) – which is normal in the case of a provision laid down for the purpose of applying the principle of access to documents.

233. It is also worth noting that the second subparagraph of Article 7 of the Council’s Rules of Procedure is consolidated and reinforced in Article I-33(2) of the Constitution, which provides: ‘When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.’

234. The concept of Community legislature gained importance when the codecision procedure was extended to many subject areas and was subject to various amendments, making it the procedure most frequently used for adopting Community legislation, which may take the form of directives, regulations or, at times, decisions. There are now clearly two types of legislature: the Council and the European Parliament on the one hand act jointly under the codecision procedure, and the Council on the other hand acts alone whenever the codecision procedure does not apply.


\(^{90}\) The concept of administrative acts does not extend to implementing acts; it is merely a subcategory.
235. The increased importance of the concept of Community legislation can also be attributed to the Amsterdam Protocol on monitoring compliance with the principles of subsidiarity and proportionality, in paragraphs 4, 7 and 9 thereof. The Protocol neither amends nor defines the concept of Community legislation; it does, however, set out the conditions governing its drafting in order to facilitate the monitoring of its compliance with the principles of subsidiarity and proportionality.

**Amsterdam Protocol**

**Paragraph 4**

*For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.*

**Paragraph 7**

*Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.*

**Paragraph 9**

*Without prejudice to its right of initiative, the Commission should: – except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;*

...  

236. It must be pointed out that the Protocol annexed to the Treaty of Amsterdam makes no formal distinction between legislative acts – which would be of greater importance – and regulatory acts – which would be of lesser importance in the hierarchy of rules, as is the case in the respective national constitutions. Nevertheless it should be borne in mind that the practice of the Community institutions – the Commission and Council alike – and the case-law of the Court of Justice make a distinction between the instruments that can be referred to as basic acts and those referred to as implementing acts, which corresponds roughly to the standard use in national law of the distinction between laws and regulations. However, the term ‘regulation’ is not used officially, if only to avoid confusion with the concept of the Community regulation which is a directly applicable instrument under Article 249 EC.

237. Given that legislative acts falling within the scope of Article 207 EC and the Amsterdam Protocol must be acts of the Council or Parliament, the legislative instruments of the Commission, whether adopted directly pursuant to the Treaties – as is the case in competition matters – or on the authority of the legislature, within the ‘comitology’ procedures, cannot be deemed to be legislative acts. Article 202 EC lays down provisions on the use of implementing powers:
Article 202 EC (formerly Article 145)

To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

– ensure coordination of the general economic policies of the Member States;

– have power to take decisions;

– confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.

The rule therefore provides that the Commission has the implementing power, provided that the power is not exercised by the Member States, which is the general principle. The Council may derogate from that rule by reserving the right to exercise those powers directly, a measure that it rarely opts for. Usually, the Council (and the European Parliament) choose from the implementing procedures established by the ‘Comitology’ Decision of 28 June 1999.91

238. The case-law of the Court of Justice set out the criteria enabling the Council, where necessary, to delegate legislative implementing powers to the Commission. It held in Köster92 that ‘it cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council ... It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision ...’. The legislature may, of course, go further than determining those basic elements and may deal with all the details of the matter concerned, but, conversely, it may also delegate substantially. The Court attributed very limited scope to the concept of essential elements: in the 1992 case of Germany v Commission,93 it held that the basic rules were the rules intended to give concrete shape to the fundamental guidelines of Community policy, thus leaving very substantial room for the implementing power. Attributing very broad scope to the power to delegate is problematic as institutional balance may be undermined, as the European Parliament has commented on a number of occasions. Moreover, it could affect the powers of consultative bodies – the CoR and the ESC primarily – which are not entitled to bring actions for annulment. The Constitution introduces an important change in allowing the CoR to institute proceedings for the purpose of protecting its prerogatives.

239. The system of serial references (from the Protocol to Article 207(3) EC and from Article 207(3) EC to the Council’s Rules of Procedure), whereby legislative acts are ultimately defined in the context of the existing Treaties, is far from transparent, and so, with the exception of a limited number of practicians, people are generally unaware of the

very broad scope of the concept of the legislative act in the existing system, which is broader than under the Constitution for Europe. Symptomatically, the Working Group on national parliaments took the view that the existing definition was restrictive and might lead to some proposed legislation being excluded from the scope of the Protocol.\footnote{Paragraph 15 of the Report: ‘15. The Amsterdam Treaty Protocol on the role of national parliaments contains a provision (Article I.2) which states that “Commission proposals for legislation as defined by the Council in accordance with Article 207(3) of the Treaty establishing the European Community shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate”. The Group considers that the definition of legislative proposals should be set out more clearly to ensure that all proposals for legislation are covered. As indicated in the above, the Working Group also considers that all Commission proposals for legislation should be transmitted directly to national parliaments at the same time that they are transmitted to the Council and that the relevant provisions of the Protocol should be amended accordingly’ (our emphasis). Final report of Working Group IV on the role of national parliaments, Brussels, 22 October 2002, CONV 353/02, WG IV 17.} The definition in the Council’s Rules of Procedure refers \textit{inter alia} to ‘framework decisions or decisions, on the basis of the relevant provisions of the Treaties’; it therefore includes legislative acts coming under the ‘third pillar’ and thus has a very broad scope. Only the implementing acts of the Commission are excluded. The Subsidiarity Working Group itself addresses that issue very indirectly in the penultimate paragraph of its report.\footnote{Conclusions of Working Group I on the Principle of Subsidiarity, Brussels, 23 September 2002, CONV 286/02, WG I 15.}

\begin{quote}
The Group also believes that a simplification of the legislative acts available to the Union, and a clarification of their effects, would promote the application and monitoring of the principle of subsidiarity given particularly that it would make it easier to determine responsibility as regards the implementation of such acts by the Community or by the Member States. Differentiation in the Treaty between acts of a legislative nature and acts of an executive nature would be desirable in this respect. The Group also considers that such simplification would promote application of the principle of proportionality by allowing greater recourse to acts adapted to the intensity of the action required.
\end{quote}

240. It should be noted that, in its report, the Working Group does not define further what is meant by legislative acts – which was not requested of it – nor does it explain how acts of a legislative nature and acts of an executive nature differ: the latter would not be subject to the early warning mechanism. In the end, none of the Praesidium’s mandates in the Working Group took into account the links between the scope of the early warning mechanism and of actions for annulment on grounds of infringement of the principle of subsidiarity as laid down by the Subsidiarity Protocol.

B. – Innovations introduced in the Constitution for Europe as regards the typology of acts of secondary legislation

241. The Constitution for Europe took a further step forward in two respects in its definition and naming of secondary legislation.

\subsection*{1) A change in the vocabulary used}

242. First of all, the vocabulary is different. Acts of secondary legislation under the Community Treaties are based on the current distinction set out in Article 249 EC between three types of binding instrument:

\begin{itemize}
\item \textbf{decisions,}
\item \textbf{acts of a legislative nature,}
\item \textbf{acts of an executive nature,}
\end{itemize}
– directives (legal instruments which are not *directly* applicable and therefore require transposition into the law of the respective Member States); 96

– regulations (Community *legal* instruments which are applicable in all Member States by virtue of their publication in the Official Journal and in respect of which Member States are not entitled to adopt implementing measures), 97 and

– decisions, a *term* which can cover a whole range of measures – either legislative or non-legislative – and may, in practice, be equivalent to a directive or a regulation addressed to a limited number of addressees (Member States or institutions of the Union). 98

243. The Constitution, for its part, makes a distinction between European laws and framework laws, European regulations and European decisions based on criteria that differ from the criteria applied in Community law, that is to say, it takes into account the author of the legal instrument and the democratic importance of the institution which adopted it, rather than whether its transposition into national law is necessary.

**Article I-33 – The legal acts of the Union**

<table>
<thead>
<tr>
<th>I. To exercise the Union’s competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.</td>
</tr>
<tr>
<td>A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.</td>
</tr>
<tr>
<td>A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.</td>
</tr>
</tbody>
</table>

...  244. European laws and European framework laws are acts which are, in principle, adopted in accordance with the ordinary legislative procedure, that is to say, by the European Parliament and the Council. Some European laws and framework laws may be adopted using another procedure, but they may equally be adopted using the ordinary legislative procedure at a later stage, once the European Council has decided to do so, on the basis of Article IV-444 establishing the simplified revision procedure.

96 ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

97 ‘A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.’

98 ‘A decision shall be binding in its entirety upon those to whom it is addressed.’
245. The term ‘European regulation’ no longer means that the instrument is directly applicable; it takes on the meaning – which is customary in most Member States – of an implementing regulatory measure. The new regulation may well have the characteristics of a former directive, which would be adopted for the purpose of implementing a European law – that is to say, a legislative act that requires transposition into the law of the respective Member States – or it may also be consonant with the existing definition of a regulation, that is to say, a directly applicable act, but in each instance it is an implementing measure, thus setting it apart from a law and a framework law.

2) The shift in perspective

246. The Constitution is innovative not only in its change in vocabulary. More essentially, there has also been a shift in perspective on the main criteria for assessing acts of secondary legislation.

247. In Community law, the single important factor to be borne in mind is the application of the act in the national law of the respective Member States, which enables a distinction to be made between a directive – which requires transposition – and a regulation – which does not require transposition. As well as directives and regulations, there are also decisions, measures defined by those to whom they are addressed, which may or may not need to be transposed.

248. In the system established by the Constitution, as in most national constitutions, the primary criterion is the distinction between legislative acts and implementing acts: laws and framework laws on the one side, and regulations on the other.

3) Implementing acts

249. Implementing acts contrast with legislative acts and are provided for in Article I-37 of the Constitution.

**Article I-37 – Implementing acts**

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article I-40, on the Council.

3. For the purposes of paragraph 2, European laws shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

4. Union implementing acts shall take the form of European implementing regulations or European implementing decisions.
Accordingly, there can be three types of implementing act:

i. They may be ‘non-legislative’ acts of the Union’s institutions, provided for in Article I-35:

**Article I-35 – Non-legislative acts**

1. The European Council shall adopt European decisions in the cases provided for in the Constitution.

2. The Council and the Commission, in particular in the cases referred to in articles I-36 and I-37, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt European regulations and decisions.

ii. They may be delegated European regulations, provided for in Article I-36:

**Article I-36 – Delegated European regulations**

1. European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power.

2. European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
   (a) the European Parliament or the Council may decide to revoke the delegation;
   (b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

iii. They may also be acts establishing measures to be taken in national law, whether they are national or regional laws, national or regional regulations or other forms of measures to be taken pursuant to European framework laws.

4) *The legislative act in the Constitution and in the existing Treaties*

Before analysing in further detail the definition of the legislative act in the Constitution for Europe, it is necessary to point out that the system of the existing Treaties does not provide as clear a definition of acts of a legislative nature (‘legislative texts’, ‘legislation’) that are subject to the procedures laid down in the Amsterdam Protocol on proportionality and subsidiarity. Whether, in practice, that shortcoming is to the advantage or to the detriment of the CoR can be addressed from two points of view.
255. From a quantitative point of view, the fact that the Constitution clearly states what legislative acts are should effectively limit the number of acts that can be examined by the CoR, whereas under the existing Treaty rules that number is more difficult to establish.

256. From a qualitative point of view, the definition of legislative acts in the Constitution could ultimately ensure that the mechanism for monitoring compliance with the principles of proportionality and subsidiarity did not operate in some cases, where the institutions acted on the basis of non-legislative acts.

257. This remains a relatively theoretical comparison since, within the existing framework of the Amsterdam Protocol, the CoR has no formal grounds for demanding the application of the mechanism for monitoring proportionality. Conversely, under the Constitution and the Subsidiarity Protocol, one of the implications of the CoR’s right to bring actions for annulment could specifically be, where appropriate, to challenge the European institutions’ choice of a non-legislative instrument, because in choosing that decision or regulation they would be ensuring that it evaded monitoring for subsidiarity compliance.

C. – The definition of a legislative act as opposed to regulatory acts, implementing acts and non-binding acts

258. The definitions of the acts in Article I-33 caused a great deal of ink to flow, not just during the work of the Convention and the IGC but also after the adoption of the Treaty establishing a Constitution for Europe. It would appear that very little attention was paid to the practical implications of those definitions, which are connected with the allocation of the Union’s possibilities for action between the various types of act, as set out for the most part in Part III of the Constitution. Such allocation was mainly carried out under the supervision of the Praesidium of the Convention, which made comments in that regard in its first report to the Convention.99

D. Breakdown between legislative and non-legislative acts of the Council

30. It emerges from the draft of Article 25(1) of Part I of the Constitution and from the comments accompanying it that the general rule for the adoption of legislative acts is the codecision procedure. Paragraph 2 of that Article indicates that, as an exception to that rule, the Council alone may also adopt legislative acts. The cases in which the Council has sole legislative power must be explicitly laid down in the Constitution.

Since the list of these exceptions has not yet been drawn up by the Convention, the working party of experts was unable to take account of this when drawing up this report.

31. Similarly, if the Convention were to consider that, in the context of a particular policy or action, the Council should at the same time have legislative competence under draft Article 25(2) (adoption of a law or framework law) and non-legislative competence under draft Article 26 (adoption of a regulation or

99 Report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission, Brussels, 17 March 2003, CONV 618/03.
decision), the cases in which the Council would have legislative competence and those in which it would have non-legislative competence would have to be precisely indicated in the context of that policy or action.

32. More generally, the working party of experts would like to draw the Convention’s attention to the need to make a precise breakdown between the Council’s legislative and non-legislative competences as provided for in draft Articles 25(2) and 26 of the Constitution.

In this respect it notes that the exercise by the Council of legislative competences would lead, at this stage in the Convention’s proceedings, to two procedural consequences: firstly, the Council is obliged to meet in public (draft Article 25(3)); secondly, under the draft Protocol on Subsidiarity, the ‘early warning mechanism’ applies to legislative proposals only.

259. It should be noted in particular that the working party of experts drew the Convention’s attention to the fact that ‘under the draft Protocol on Subsidiarity, the “early warning mechanism” applies to legislative proposals only.’ The extent to which that fact was taken into account in the breakdown finally undertaken, in part by the Praesidium itself and in part by the experts on the basis of a supplementary mandate which had been conferred on it on 29 April 2003, cannot be ascertained from the Convention documents available on the Convention’s website. As a result of that breakdown, the scope of the legislative acts covered by the Amsterdam Protocol has turned out to be broader than the scope of the legislative acts under the Constitution for Europe.

260. In the Constitution for Europe, legislative acts are defined in a strictly formal manner: a legislative act is a European law or a European framework law. Other acts, irrespective of to whom they are addressed, their content and scope, cannot be legislative acts. Neither the early warning procedure nor an action for annulment on grounds of infringement of the principle of subsidiarity, both of which are defined in the Subsidiarity Protocol, can be applied to them.

1) Laws and framework laws in the legal bases of the Constitution

261. The Constitution points to the instrument that the institutions may use in the articles that establish the powers and methods of action of the Union; these are predominantly the provisions of Part III, but there are also articles in Part I and Part IV which point to the instruments to be used for their application. In some cases, the European institutions have no choice between European laws and framework laws, such as when an Article provides only for the possibility of using a European law or a European framework law. In other cases, the Constitution allows the Community institutions a choice between a European law and framework law; the text refers to ‘European law or European framework law’. All of those possibilities are set out in the table on the allocation of the possibility of using legislative acts by subject area, at paragraph 264.

262. It is essential not to restrict the assessment to laws and framework laws alone; all other types of act provided for in the Constitution must also be taken into consideration, since the principle of continuous monitoring applies to them too. It should be noted in
particular that where the Constitution uses the expressions ‘European regulations and decisions’ (or ‘regulations and decisions’), these are indeed acts undoubtedly of an executive nature in that they are either delegated regulations or decisions implementing European laws or regulations. However, there are a number of ‘autonomous’ European regulations and European decisions of the European Council and Council alike which are not typically executive and call for even greater attention as regards their observance of the principle of subsidiarity, even though they are not subject to the procedure under the Subsidiarity Protocol.

263. It is worth reiterating that Part III of the Constitution is not a radical departure from the existing Treaties, although it does specifically make a clear distinction between legislative and non-legislative acts. One of the striking differences is that, unlike the existing Treaties, the Constitution does not use the catch-all term ‘measures’ to refer to acts; on the contrary, it states clearly that they are laws, framework laws, regulations or decisions. By contrast, in the existing Treaties, a ‘measure’ may equally take the form of a directive, a regulation or a decision, indeed a non-binding act. Even if it does not enter into force, the Constitution can be regarded as a useful guide to acts to be used by way of preference.
### 264. Table 6 – Allocation of the possibility of using legislative acts by subject area

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**Choice of European law or framework law**

(These provisions underlined signify mandatory consultation of the CoR)

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| III-424 | – Adjustment of the Union’s policies in the outermost regions |
265. The allocation by subject area between framework laws and laws reflects the current allocation between directives and regulations in so far as Part III of the Constitution provides for the use of the legislative act. The legislative act contained in the Constitution does not necessarily reflect the current scheme of the legislative act, which also includes situations where the Constitution provides for recourse to non-legislative acts. It is apparent from looking at that allocation between the various types of law that the possibility of choosing between a law and a framework law is important. It should be recalled that, under the principle of proportionality, the framework law should be favoured, where it is possible to choose. The Constitution provides for five cases where the legislature may have recourse only to the European law and where the Committee of the Regions must be consulted, whilst there are twelve cases of mandatory consultation where it has a choice between the law and the framework law.

266. In its organisation by chapter, the Constitution highlights much more clearly than the existing Treaties the lack of coherence in the legal bases requiring mandatory consultation of the CoR, which neither the Convention nor the IGC sought to amend. It is common knowledge that no grounds were given for excluding from the mandatory opinion the new legal bases on tourism, civil protection and administrative cooperation, although it would have been possible at the IGC to do so. As for the rest, the experts from the three institutions who drew up the text of Part III had no mandate to amend the current mandatory consultation system. In that regard the IGC could, again, have gone further but took the conservative option.

267. It is also clear from looking at the legal bases that there is a distinct lack of cases of mandatory consultation of the CoR, even though this regularly creates problems for the RLAs in matters of subsidiarity and proportionality, in particular in the internal market.
### 268. Table 7 – Non-legislative acts

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<td>– Adoption of the guidelines necessary to ensure balanced progress in all the sectors affected by the internal market</td>
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**Commission regulations and/or decisions**

| III-232 | – Management of the Common Agricultural Policy |

**Delegated European regulation**

| I-36 | – By decision of the Union legislature; may not relate to the essential elements of a given field |

**Laws or framework laws, regulations and/or decisions**

| III-291 | – Detailed rules and procedures for the association of the overseas countries and territories |
| III-424 | – Adjustment of the Union’s policies to the characteristics of the outermost regions |

**European decisions of the Council of Ministers**

<p>| I-32 | – Composition of the Committee of the Regions and of the Economic and Social Committee |
| I-44 | – Establishment of enhanced cooperation |
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| III-210 | – Transition to the ordinary legislative procedure in social matters |
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| III-168 | – Prohibitions and authorisations of derogating State aid |
| III-230 | – Granting of aid in agricultural matters |
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<td>III-172</td>
<td>Approval or rejection of national protection measures on grounds of security, health, etc.</td>
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</table>
269. A detailed examination of the legal bases providing for the use of legislative acts clearly shows the logic followed by the legal experts of the three institutions who prepared Part III and certainly gives the impression at first sight that there is nothing to prevent the regulations and/or decisions provided for in Part III of the Constitution being regarded as implementing acts. It will be noted none the less that the European regulations of the Council on competition, which are non-legislative acts, are not only clearly binding but may even be closely connected with the interests of the RLAs.

270. Furthermore, it is apparent from examining the legal bases providing for the use of non-legislative acts that a number of forms of action are of major relevance to the RLAs, such as administrative cooperation with regard to an area of security, which may involve the State police as well as municipal police authorities in the countries where they exist; moreover, in a federal State such as Germany, policing falls to the individual Länder.

271. In a number of cases, non-legislative acts are designed to amend the legislative procedure, and they are particularly important because they could provide the Council or the European Council with the opportunity to add instances in which the CoR must be consulted without the need to amend the Constitution. Clearly, the fact that this power is held in some cases by the European Council and in others by the Council of Ministers can only be explained by the logic of established law; where the existing Treaties have already provided for powers to amend decision-making procedures, those powers are attributed to the Council of Ministers, whereas the innovations introduced in the Constitution relate to the powers of the European Council.

2) The difference between European laws and European framework laws and monitoring compliance with the principles of subsidiarity and proportionality

272. The difference between European laws and European framework laws is very important from the point of view of monitoring compliance with the principles of subsidiarity and proportionality. It could be presumed – as the regions with legislative power most often do – that the instrument of the framework law corresponds with the principle of subsidiarity better than the instrument of the European law, since the framework law leaves precisely to the authorities of the Member States the choice of form and content of the implementing measures, both at national and at other levels. In that sense, it is apparent from the definition of the framework law as a ‘legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave [to the national authorities] the choice of form and methods’ that it is an act better suited to compliance with the principle of subsidiarity.

273. Special attention should be paid to Articles I-38 and I-33(2) of the Constitution, which limit the institutions’ freedom of choice and give priority to the legislative act over other types of act.
Article I-38 – Principles common to the Union’s legal acts

1. Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.

2. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Constitution.

274. Examination of the legal bases shows that the expression ‘does not specify the type of act to be adopted’ in fact means ‘leaves to choice the type of act to be used’. Use of the term ‘measures’, which makes it possible under the existing Treaties to use any act whatsoever, has changed. The term ‘measures’ features in the Constitution as a supplementary element to the indication of the type of act – law, framework law, regulation or decision – which contains those measures. Conceivably, the preference for adopting a framework law should have been made clear in that article. Conversely, from the wording of Article I-38 it may be argued that the principles of proportionality and subsidiarity cannot be separated.

275. The flexibility clause contained in Article I-18, which states that ‘If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures’, must be added to the aforementioned provision. The measures in question may take the form of laws, framework laws, regulations or decisions if binding acts are necessary to attain the objective in question.

276. Article I-33 of the Constitution supplements Article I-38. It is taken up from the Council’s Rules of Procedure, which it consolidates – giving them constitutional status – and broadens, applying them not only to Council positions but also to Parliament’s legislative resolutions. The provision, which was introduced to combat the tendency of adopting non-legally-binding acts – acts not covered by the guarantees of judicial review – in effect slightly restricts the scope of the principle of proportionality, which is often invoked for the purpose of using recommendations or other non-binding acts instead of directives, regulations or decisions. A further effect of that provision is that it favours recourse to the law or framework law where the Constitution provides for the adoption of ‘measures’ and therefore broadens the scope of the procedure for monitoring compliance with the principle of subsidiarity introduced by the Subsidiarity Protocol.

Article I-33 – The legal acts of the Union

2. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

277. In any event, the reference in Article I-38(1) to ‘compliance with the applicable procedures’ of course applies to the procedure for monitoring the application of the
principles of subsidiarity and proportionality established in Protocol No 2, and therefore means that the reasons on which the legislative act is based must set out why a law is preferred to a framework law or vice versa, not only in the light of the principle of proportionality but also in the light of the principle of subsidiarity.

278. The obligation to state the reasons on which acts are based and to refer to any ‘proposals, initiatives, recommendations, requests or opinions required by the Constitution’ makes it possible to monitor the choices made at all stages of the procedure, from the initiative – which initially involves ‘self-monitoring’ by the institution itself – to any action brought before the Court of Justice.
SECTION 2
THE LEGISLATIVE PROCEDURE AND RESPECT FOR THE PRINCIPLES OF SUBSIDIARITY AND
PROPORTIONALITY

A. – Ordinary legislative procedure and special legislative procedures

279. In the system proposed by the Convention and accepted in the Constitution for Europe, classification as a legislative act depends in principle on whether an act is adopted jointly by Parliament and the Council under the ordinary legislative procedure. However, there are many more instances in the Constitution where it is established that laws or framework laws are not adopted under the ordinary legislative procedure but instead under other procedures in which the European Parliament is given only a consultative role. Furthermore, in the ordinary legislative procedure it is essential to make the distinction between the provisions requiring consultation of the CoR and those which do not. In the case of the latter provisions, the CoR may still adopt an opinion on its own initiative, but the other institutions are not required to wait for that opinion to be issued, and moreover the CoR cannot bring an action for annulment before the Court of Justice, except in highly unlikely cases where the content of the act finally adopted is detrimental to the CoR’s own prerogatives. As will be shown below, it is necessary to set apart those acts for which consultation of the Economic and Social Committee is mandatory and those where the CoR considers that the interests of the RLAs are involved.

Article I-34 – Legislative acts

1. European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396. If the two institutions cannot reach agreement on an act, it shall not be adopted.

2. In the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.

3. In the specific cases provided for in the Constitution, European laws and framework laws may be adopted at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

1) Allocation of the right of legislative initiative

280. Article 3 of the Subsidiarity Protocol indicates that draft legislative acts may have different authors in the Constitution text. Examining the text closely, there is an extremely limited number of cases in which the Commission does not have a monopoly on the power of initiative; it enjoys no power of initiative whatsoever only in respect of
acts of the institutions relating to the European Parliament and the Court of Justice, which is the logical consequence of the principle of the separation of powers.

### Table 8 – Legislative initiative

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Subject area</th>
<th>Legal basis</th>
<th>Legislative procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>– all areas other than below</td>
<td>Always specified</td>
<td>Ordinary and special</td>
</tr>
<tr>
<td>Commission or group of Member States</td>
<td>– judicial cooperation in criminal matters</td>
<td>III-270 and 271</td>
<td>Ordinary (plus suspensive veto of the European Council); mandatory consultation of the Commission upon initiative from a group of Member States</td>
</tr>
<tr>
<td>Court of Justice</td>
<td>– establishment of specialised courts attached to the General Court</td>
<td>III-359, III-381</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the Court</td>
</tr>
<tr>
<td>Commission or Central Bank</td>
<td>– amendments and implementing measures of the Statute of the ECB and of the ESCB</td>
<td>III-187</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the ECB</td>
</tr>
<tr>
<td>Commission or European Investment Bank</td>
<td>– amendment of the Statute of the European Investment Bank</td>
<td>III-393</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the EIB</td>
</tr>
</tbody>
</table>
2) Factors common to all legislative procedures

281. Protocol No 2, which sets out the organisation of the legislative procedure, is supplemented by the provisions of the Constitution relating to procedures, and by Article I-39 which lays down the conditions for publication and entry into force of the acts of the Union.

Article I-39 – Publication and entry into force

<table>
<thead>
<tr>
<th>1. European laws and framework laws adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. In other cases they shall be signed by the President of the institution which adopted them. European laws and framework laws shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. European regulations, and European decisions which do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.</td>
</tr>
</tbody>
</table>

3) The ordinary legislative procedure

282. The ordinary legislative procedure under the Constitution is the direct extension of the current codecision procedure resulting from entry into force of the Treaty of Nice. The Convention introduced two types of change. First, the European Parliament now adopts its position on proposed legislative acts before the Council, which underlines and reinforces its role as legislator, and secondly, the efforts to simplify and clarify as introduced in the Treaty of Nice are continued. The procedure provides for the possibility of three successive readings, the third of which is preceded by the conciliation procedure. Article III-396 sets out the details of that procedure, including the time-scales involved.

283. The legislative procedure is applicable to European laws and framework laws where the Constitution does not provide details of adoption arrangements in the legal bases specifying the methods of action, or where it refers to Article III-396. Those inconsistencies in the drafting can be explained by the fact that the logic adopted for the new legislative acts in Part III was very broadly applied in accordance with settled law in the Convention (in the work of the group of legal experts of the institutions), and that the IGC proved particularly conservative, going back on some of the changes made at the wish of the Convention, for instance where the number of cases of decisions by unanimity had been reduced, in particular as regards the area of security and freedom. The ordinary legislative procedure likewise underpins the budgetary procedure; the
Union’s budget takes the form of a European law, as is true of most Member States in their respective ‘finance laws’ (see Article I-54 of the Constitution).

284. Under the ordinary procedure, the Commission usually has the initiative, but it may also belong to a group of Member States in the context of judicial cooperation in criminal matters.

285. Lastly, one special feature that should be flagged up is the suspensive veto of the European Council, provided for in Article III-136 in respect of coordinating social security systems, and in Article III-270 in respect of judicial cooperation in criminal matters, which was introduced by the IGC and may lead the European Council to suspend the legislative procedure at the request of a Member State.
### Article III-396

<table>
<thead>
<tr>
<th>1.</th>
<th>Where, pursuant to the Constitution, European laws or framework laws are adopted under the ordinary legislative procedure, the following proposals shall apply.</th>
</tr>
</thead>
</table>

#### First reading

| 3. | The European Parliament shall adopt its position at first reading and communicate it to the Council. |
| 4. | If the Council approves the European Parliament’s position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament. |
| 5. | If the Council does not approve the European Parliament’s position, it shall adopt its position at first reading and communicate it to the European Parliament. |

#### Second reading

| 7. | If, within three months of such communication, the European Parliament: |
| (a) | approves the Council’s position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council; |
| (b) | rejects, by a majority of its component members, the Council’s position at first reading, the proposed act shall be deemed not to have been adopted; |
| (c) | proposes, by a majority of its component members, amendments to the Council’s position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments. |

#### Third reading

| 8. | If, within three months of receiving the European Parliament’s amendments, the Council, acting by a qualified majority: |
| (a) | approves all those amendments, the act in question shall be deemed to have been adopted; |
| (b) | does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee. |

#### Conciliation

| 9. | The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. |

#### Special provisions

| 15. | Where, in the cases provided for in the Constitution, a law or framework law is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply. |

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.
286. However, it should be noted that, like the existing Treaties, the Constitution does not go into the details of the preparation of Council positions and of Parliament’s legislative resolutions; it merely refers to the formal adoption of those acts in meetings of the Council and in the plenary sittings of Parliament. In practice, most compromises between the institutions and between the Member States are drawn up on the one hand in the committees in the European Parliament and in particular by the rapporteurs of the draft texts, and on the other hand in Council working groups – or, if need be, in COREPER – in which case the chairmen of those working groups, assisted by the Secretariat-General of the Council, and the Commission’s representatives in the working group and COREPER meetings play a particularly important role.

4) Special legislative procedures and consultation procedures

287. There are still many special legislative procedures. It should be pointed out that they also involve cases where consultation of the CoR and the ESC is mandatory.

Table 9 – Special legislative procedures and consultation

<table>
<thead>
<tr>
<th>Decision</th>
<th>Consultation</th>
<th>Subject area</th>
<th>Legal basis</th>
</tr>
</thead>
</table>
| Council, followed by Parliament | Commission | – Regulations governing the European Parliament  
– Exercise of the EP’s right of inquiry  
– Regulations governing the Ombudsman | – III-330  
– III-333  
– III-335 |
| Parliament, followed by Council acting unanimously | CoR and ESC | – Structural Funds and Cohesion Fund, first provisions to be adopted after entry into force of the Constitution | – III-223 |
| Parliament, followed by Council acting unanimously | | – Multiannual financial framework  
– Union’s budget  
– Judicial cooperation in civil matters: family law | – I-55  
– I-56  
– III-269 |
| Parliament, followed by Council acting unanimously, and ratification by the Member States | | – Establishment of own resources  
– Adding to the rights connected with European citizenship  
– Uniform procedure for election to the European Parliament | – I-54  
– III-129  
– III-330 |
| Council alone acting unanimously | Parliament and ESC | – Harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation  
– Approximation of the laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market  
– Some areas of social policy | – III-171  
– III-173  
– III-210 |
| Council alone | Parliament and ECB | – Replacing the Protocol on the excessive deficit procedure  
– Tasks and amendments, and measures implementing the Statute of the ECB and of the ESCB | – III-184  
– III-185  
– III-187 |
288. As has already been pointed out as regards allocating the legal bases between the various types of act, a chapter-based layout highlights more clearly than the existing Treaties the lack of coherence in the legal bases requiring mandatory consultation of the CoR, which neither the Convention nor the IGC sought to amend. It is common knowledge that no grounds were given for excluding from the mandatory opinion the new legal bases on tourism, civil protection and administrative cooperation, although it would have been possible at the IGC to do so. As for the rest, the experts from the three institutions who drew up the text of Part III had no mandate to amend the current mandatory consultation system. In that regard, the IGC could, again, have gone further but took the conservative option. It would make sense to extend consultation of the CoR in view of the new role of guardian of subsidiarity given to it under Protocol No 2. That can, of course, be done by having reference to the provisions on consultation of the CoR, under which it is requested to issue an opinion where the ESC has to be consulted and the CoR considers that the interests of the RLAs are involved.

289. Going beyond the scope of the special legislative procedures, there are many cases where consultation of the CoR and ESC is mandatory. They must also be consulted on employment guidelines, which are non-legislative acts adopted after consultation of the two bodies (Article III-219).

| Council alone acting unanimously | Parliament | – Diplomatic and consular protection | III-127 |
| Council alone acting unanimously | Parliament | – System of own resources | I-54 |
| Parliament | – Language arrangements for the protection of European intellectual property rights | III-176 |
| Parliament | – European Public Prosecutor’s Office | III-274 |
| Parliament | – Police cooperation: right of pursuit | III-277 |
| Council alone acting unanimously | EIB or Commission (the one being consulted where the other has taken the initiative) | – Amendment of the Statute of the European Investment Bank | III-393 |

| CoR only | Subject area | Legal bases |
| CoR and ESC | – Culture | III-280 |
| CoR and ESC | – Cooperation between Member States and support of their action in the field of employment | III-207 |
| CoR and ESC | – Social policy | III-210 |
| CoR and ESC | – Implementing measures relating to the European Social Fund | III-219 |
| CoR and ESC | – Economic, social and territorial cohesion: measures outside the Funds | III-221 |
| CoR and ESC | – Structural Funds and Cohesion Fund (as from the second set of provisions) | III-223 |
| CoR and ESC | – ERDF implementing measures | III-224 |
| CoR and ESC | – Environment policy | III-234 |
| CoR and ESC | – Common transport policy | III-236 |
| CoR and ESC | – Sea and air transport | III-245 |
| CoR and ESC | – Trans-European networks | III-247 |
| CoR and ESC | – Framework programme and supplementary research and technological | III-251 and |
development programmes
– Energy
– Public health
– Education, youth, sport
– Vocational training
ESC only
– Freedom of movement for workers
– Freedom of establishment
– Liberalisation of a given service
– Approximation of the provisions laid down by law, regulation or administrative action for the establishment and functioning of the internal market
– Equal opportunities and equal treatment of women and men in matters of employment and occupation
– Common agricultural policy and common fisheries policy
– Consumer protection
– Undertakings for the execution of research, technological development and demonstration programmes
– Industry

Institutions concerned
– Staff Regulations of officials of the Union

290. Many other instances of consultation are provided for in the Constitution, some of which are mandatory, others merely optional, although the provisions of the Constitution are not always entirely clear on that matter.

Table 11 – Consultation of bodies other than the CoR and the ESC

<table>
<thead>
<tr>
<th>Mandatory consultation</th>
<th>Legal bases</th>
</tr>
</thead>
</table>
| Court of Justice or Commission | Establishment of specialised courts attached to the General Court  
The Commission is consulted when the Court of Justice has initiated the draft legislative act | III-359 III-381 |
| ECB or Commission | Amendments and measures implementing the Statute of the ECB and of the ESCB  
The Commission is consulted where the ECB has initiated the draft legislative act | III-187 |
| Court of Auditors | Rules on establishing and implementing the budget and on presenting and auditing accounts | III-412 |
| Institutions concerned | Staff Regulations of officials of the Union | III-427 |

<table>
<thead>
<tr>
<th>Other forms of consultation</th>
<th>Legal bases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic and Financial Committee</td>
<td>'In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market ...'</td>
</tr>
<tr>
<td>Employment Committee</td>
<td>'... to promote coordination between Member States on employment and labour market policies.'</td>
</tr>
<tr>
<td>Management and labour</td>
<td>on the direction and content of action in the social policy field</td>
</tr>
<tr>
<td>Social Protection</td>
<td>'... to promote cooperation on social protection policies between ...'</td>
</tr>
</tbody>
</table>
Committee | Member States and with the Commission.
--- | ---
Committee of experts on transport matters | – on transport matters | III-244
Committee on common commercial policy | – already provided for in the Treaty of Rome of 1957 (Article 113) and plays a fundamental role in particular in GATT/WTO negotiations | III-315
Panel of experts | – responsible for giving ‘an opinion on candidates’ suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court’, which is one of the new features of the Constitution with regard to the Statute of the Court of Justice. | III-357

291. These tables clearly do not present an exhaustive list of committees and other groups of experts, which can be set up as required by acts of secondary law, whether legislative or not. That is one of the aspects that the Committee of the Regions would do well to monitor in connection with the prospects available to it through its right to institute proceedings for the purpose of protecting its own prerogatives.

**B. – Preparing a proposal for a legislative act: the obligation to consult widely**

292. Apart from setting out the principle of continuous monitoring, which applies to the preparation of any proposal for a legislative act, irrespective of its author, the Subsidiarity Protocol lays down special provisions for Commission proposals, which in practice are the most common form of proposal. The Protocol annexed to the Treaty of Amsterdam already contained similar provisions.

| Article 2 of the Subsidiarity Protocol | Paragraph 9 of the Amsterdam Protocol |
--- | ---
Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for the decision in its proposal. | Without prejudice to its rights of initiative, the Commission should: |
|  | – except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents; |
|  | – ... |

293. The wording of Article 2 of the Subsidiarity Protocol is not only more dense and compact than that of the Amsterdam Protocol; it also contains new features not included in the latter Protocol.

1) **An obligation incumbent on the Commission**

294. First, Article 2 provides that the Commission ‘shall’ consult widely, whereas the Amsterdam Protocol provided that the Commission ‘should’ consult widely.

295. The Subsidiarity Protocol therefore creates an obligation incumbent on the Commission, from which there can be no derogation except in cases ‘of exceptional
urgency’. The Subsidiarity Protocol not only removes the exceptional case of confidentiality, which was provided for in the Amsterdam Protocol; it transforms what was merely a request into an obligation. Clearly, the mandatory nature of that provision primarily holds new political significance, but it must be stated that it also entails possible legal sanctions, which increases its significance should an action be brought for annulment of a legislative act, the Commission’s failure to consult could be a ground for annulment, whereas the Amsterdam Protocol did not provide for that possibility in the event of an action being brought.

296. One clear practical consequence is that a Commission proposal should include, in its statement of reasons, a list of the institutions, bodies, authorities, associations and experts consulted in order to ensure that consultations have been conducted sufficiently ‘widely’. The Committee of the Regions could be the ideal body for monitoring such consultation. It would be unfortunate if the task of monitoring the scope of such consultations were allowed to rest on a court action, which might be initiated belatedly, and indeed the very existence of an action is not automatic. Furthermore, it is rather unlikely that the Court of Justice would undertake a detailed check of how widely the consultations had been carried out; it would most likely confine itself to declaring unlawful, as appropriate, the manifest error of assessment at issue.100

297. One of the issues that is not resolved in the wording of the Protocol is the form that such consultations must take. It is doubtful whether, by merely distributing green papers and opening internet sites, sufficient consultation measures have been taken. In spite of the benefit afforded by new communication resources, their limitations are all too clear and they consequently cannot be a substitute for structured consultations. As regards taking into account the regional and local dimension of subsidiarity, now established in the Constitution, it is clear that such consultations must first and foremost include the CoR, as the representative of the RLAs, and secondly the various RLA associations.

2) The Commission’s obligation to state the reasons for its choices as regards consultation

298. Under Article 2, the Commission ‘shall give reasons for the decision’ in its proposal for an act. It may be inferred from a restrictive interpretation that the statement of reasons must explain why the Commission does not consult widely only in cases of urgency. The definition of urgency is narrower than in the Amsterdam Protocol which referred to cases of ‘particular’ urgency and confidentiality; Protocol No 2, by contrast, mentions only cases of exceptional urgency. The question whether such a case of exceptional urgency exists could, if necessary, be assessed by the Court of Justice.

299. However, it could be inferred from a broad interpretation that the Commission is obliged, in respect of every legislative act, to state the reasons for its decision to consult some institutions, bodies, authorities or associations rather than others. Whilst it is

100 Traditionally, the Court confines itself to establishing a manifest error of assessment where the institutions are entrusted with assessing the facts determining the scope of Community action, in particular in economic (Case 29/77 Roquette Frères [1977] ECR 1835, followed by consistent case-law) and political matters.
unlikely that the Court of Justice would look into the actual scope of the consultations conducted, it is, however, quite conceivable, in the light of the Court’s current case-law on statements of reasons, for it to insist that the Commission’s reasons be as specific as possible and accordingly explain the choices made with regard to consultation.

3) The possibility of bringing an action if insufficient reasons are given for the Commission’s choices

300. The obligation incumbent on the Commission to state the reasons for its choice as regards consultation in its proposal for a legislative act could give rise to an action for annulment as soon as the Commission has forwarded its final proposal to the Union legislature, there being no need to wait for conclusion of the legislative procedure. The Protocol, after all, clearly states that the Commission must ‘give reasons for the decision’ in its proposal; Commission decisions are among the acts subject to review by the Court. Furthermore, the actual proposal for a legislative act is considered to be an ‘act’ of the Commission, which the Court could regard – in the light of the Subsidiarity Protocol – as an act ‘other than a recommendation or opinion’, if it considered it necessary to protect the interests at issue without waiting for the legislative procedure to be concluded. Obviously, actions for annulment are subject to the usual restrictions laid down in Article III-365 of the Constitution.

301. i. The Council and Parliament could, if appropriate and if they so desired, bring an action for annulment within two months following a decision not to proceed with such consultation, but it is difficult to envisage what might bring them to take such a measure.

302. ii. It is easier to envisage how a Member State might challenge a Commission decision not to proceed with consultation measures, again within the two months following transmission by the Commission of its proposal. Under the Constitution Member States are free to decide whether or not to proceed with such an action. The constitution of any Member State – or other acts of its national law – could quite conceivably require the Member State to initiate an action if either the national parliament or one of its chambers so requests, or even if the constituent regional or local institutions so request.

303. iii. In theory, it is conceivable that the regional and local authorities of the Member States might likewise bring an action in the light of the Commission’s decision not to conduct such consultation. However, Article III-365 maintains the restrictions applying specifically to the right of natural and legal persons other than Member States to institute such proceedings. Accordingly, regional and local authorities must show that bringing an action of that kind is of ‘direct and individual concern’ to them. It can be shown with relative ease that regional and local authorities and their associations have a direct interest in being consulted on a draft legislative act, but that would not be the case for every type of act; the act in question would have to be of concern to them. However, it is rather unlikely that situations could be found in which a local authority could demonstrate an individual interest in being consulted, that is to say, an interest relating to
that authority alone as opposed to all the regional and local authorities of the Member States; situations could conceivably arise in which an association of regional and local authorities could have an individual interest because the scope of the proposed act was of direct concern to it.

304. iv. One of the main innovations of Article III-365 is that it makes it possible for the CoR also to bring actions for annulment for the purpose of protecting its prerogatives. Nevertheless, attempting to apply that provision to that situation where an action is brought for the annulment of an actual proposal for a legislative act would be a step too far; where the CoR has to be consulted in the legislative procedure, the Court would undoubtedly take the view that a right of action could not be conferred on the CoR until the legislative procedure was ended; in other circumstances, there are no specific CoR prerogatives to be protected; otherwise, the reference to ‘consulting widely’ would effectively remove the distinction between those areas subject to mandatory consultation of the CoR and those which are not.

305. The restrictions imposed on the possibilities for instituting legal proceedings do not affect the binding nature of the obligations incumbent on the Commission to consult widely pursuant to the Subsidiarity Protocol. They highlight the fact that it would be wrong to confine the monitoring of consultation measures to scrutiny by the courts. The Committee of the Regions is in a better position to monitor how widely consultations are conducted, especially as it can do so outside the confines of litigation and even before the Commission has adopted its proposal; as long as there has been no formal adoption of its proposal, there is nothing to prevent the Commission from conducting additional consultations. Such ‘friendly’ monitoring by the CoR of the consultations undertaken by the Commission could very easily take place under the Amsterdam Protocol, there being no need to wait for entry into force of the Constitution to turn what is currently a mere ‘request’ into an ‘obligation’.

4) The obligation incumbent on the Commission to forward its consultation documents to national parliaments

306. Protocol No 1 on the role of national parliaments introduces a new feature, providing for the obligation to forward Commission consultation documents to national parliaments.

**Protocol No 1 – Article 1**

*Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.*

307. The Constitution refers to legislative programming in Article I-26 on the Commission (‘It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.’), and in Article III-258 (‘The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice’). The documents drawn up as part of the
Commission’s obligation under Protocol No 2 to ‘consult widely’ should also be forwarded to them, whether or not they bear the title of green paper, white paper or communication. Obviously, the Committee of the Regions should be sent all those documents on the basis of its agreement with the Commission.

5) The drafting of proposals for legislative acts by bodies other than the Commission

308. Article 3 of Protocol No 2 (on subsidiarity and proportionality) and the second paragraph of Article 2 of Protocol No 1 (on national parliaments) give an identical definition of ‘draft legislative acts’:

Article 2, second paragraph, of Protocol No 1 and Article 3 of the Subsidiarity Protocol

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Subject area</th>
<th>Legal basis</th>
<th>Legislative procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission or group of Member States</td>
<td>– Judicial cooperation in criminal matters</td>
<td>III-270 and 271</td>
<td>Ordinary, plus suspensive veto of the European Council; mandatory consultation of the Commission upon initiative from a group of Member States</td>
</tr>
<tr>
<td>European Parliament</td>
<td>– Uniform electoral rules</td>
<td>III-330(1)</td>
<td>Ordinary; mandatory consultation of the Commission, except for the uniform electoral rules; mandatory approval of the Commission for the right of inquiry</td>
</tr>
<tr>
<td></td>
<td>– Regulations governing Members of the European Parliament</td>
<td>III-330(2)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– Exercise of the EP’s right of inquiry</td>
<td>III-333</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– Regulations governing the Ombudsman</td>
<td>III-335</td>
<td></td>
</tr>
<tr>
<td>Commission or Court of Justice</td>
<td>– Establishment of specialised courts attached to the General Court</td>
<td>III-359</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the Court</td>
</tr>
<tr>
<td></td>
<td>– Amendment of the provisions of the Statute of the Court of Justice</td>
<td>III-381</td>
<td></td>
</tr>
<tr>
<td>Commission or Central Bank</td>
<td>– Amendments and implementing measures of the Statute of the ECB and of the ESCB</td>
<td>III-187</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the ECB</td>
</tr>
<tr>
<td>Commission or European Investment Bank</td>
<td>– Amendment of the Statute of the European Investment Bank</td>
<td>III-393</td>
<td>Ordinary; mandatory consultation of the Commission upon initiative from the EIB</td>
</tr>
</tbody>
</table>

309. In addition to the usual situation, in which proposals are tabled by the Commission, there are therefore five other categories of draft legislative act.
310. It is clear from an assessment of Part III of the Constitution that it does not really introduce any new features on legislative initiative, since all the provisions establishing an initiative for parties other than the Commission are taken from the existing Treaties.

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Constitution</th>
<th>Existing Treaties</th>
<th>New features of the Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member States</td>
<td>III-270 and 271</td>
<td>34 EU</td>
<td>Group of Member States instead of ‘any Member State’</td>
</tr>
<tr>
<td>European Parliament</td>
<td>III-330(1)</td>
<td>Fourth paragraph of Article 189 of the EC Treaty</td>
<td>The Council is to act unanimously on the rules relating to the taxation of former Members (III-330(2))</td>
</tr>
<tr>
<td></td>
<td>III-330(2)</td>
<td>Fifth paragraph of Article 189 of the EC Treaty 193 of the EC Treaty 195 of the EC Treaty</td>
<td></td>
</tr>
<tr>
<td></td>
<td>III-333</td>
<td>225a and 245 of the EC Treaty</td>
<td>Establishment of courts</td>
</tr>
<tr>
<td></td>
<td>III-335</td>
<td>107 of the EC Treaty</td>
<td></td>
</tr>
<tr>
<td>Court of Justice</td>
<td>III-359 and III-381</td>
<td>266 EC</td>
<td></td>
</tr>
<tr>
<td>Central Bank</td>
<td>III-187</td>
<td>Establishment of courts</td>
<td></td>
</tr>
<tr>
<td>European Investment Bank</td>
<td>III-393</td>
<td>Establishment of courts</td>
<td></td>
</tr>
</tbody>
</table>

311. It will be observed primarily that the number of subject areas in which the initiative for a legislative act may differ from that of the Commission is very restricted. Two categories of legislative act come into play here.

312. i. Most cases involve acts which set out the detailed rules for the organisation and operation of some institutions or bodies; it is therefore logical for the relevant initiative also to originate from the institution or body concerned. It should be noted in that regard that an initiative of that kind is not established for the CoR, or indeed for the ESC or the Court of Auditors, simply because the settled law is that of the existing Treaties.

313. ii. The one true exception involves the possibility for a group of Member States to take the legislative initiative in the context of judicial cooperation in criminal matters, in accordance with a system introduced into the Treaty on European Union by the Treaty of Amsterdam.

314. Secondly, it is clear that the problems related to subsidiarity are entirely different in the two categories of act. Judicial cooperation in criminal matters covers a much broader area than institutional provisions. It very often covers areas of action coming under government control in the Member States. However, in so far as the Union’s competence also extends to cross-border police cooperation, it also covers an area of close concern to the RLAs of many Member States, in particular as regards the impact of European laws on their resources. In the case of institutional provisions, there are also circumstances where the powers of the RLAs may be relevant, for example as regards uniform electoral rules: for instance, the rules may present inconsistencies between European Parliament and local mandates. It would therefore be wrong to consider that
draft legislative acts originating from parties other than the Commission do not call for a thorough examination of their conformity with the principle of subsidiarity.

315. As regards institutional provisions, the distinction between exclusive and shared competences is more difficult to apply specifically because such provisions are not contained in Article I-13 of the Constitution. The uniform electoral procedure (Article III-330(1)) is a good example. Although a true uniform electoral procedure can be considered to be within the exclusive competence of the Union, the restriction applying to the establishment of principles common to all Member States, as is the case for the current texts, clearly shows the matter falling within the scope of the shared competences.

316. In any event, the Constitution provides that the Commission may initiate draft acts in those areas, except where the initiative is attributed to the European Parliament. Where the Commission does not initiate the act concerned, it is consulted. As a result, the Commission cannot oppose an initiative other than its own, which it may do by withdrawing its proposal if it alone has the initiative.

317. Pending entry into force of the Constitution, the similarities between the existing and future provisions can be invoked to extend to possible initiatives of parties other than the Commission the application of all the mechanisms for monitoring subsidiarity and proportionality provided for in the Amsterdam Protocol and the Subsidiarity Protocol, with the exception of actions for annulment brought by the CoR.

C. – Justification for proposals for legislative acts: Detailed statement on subsidiarity and proportionality

318. Article 5 of the Subsidiarity Protocol contains in-depth provisions on the detailed statement on subsidiarity and proportionality which serves to justify proposals for legislative acts.

<table>
<thead>
<tr>
<th>Article 5 of the Subsidiarity Protocol</th>
<th>Amsterdam Protocol</th>
</tr>
</thead>
</table>
| Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. | Paragraph 4  
For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; ...  
Paragraph 9  
Without prejudice to its right of initiative, the Commission should:  
...  
– justify the relevance of its proposals with regard to the principle of subsidiarity; ...  
Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.  
Paragraph 9  
Whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect. |
This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the national legislation.

Paragraph 9
The financing of Community action in whole or in part from the Community budget shall require an explanation; ...

The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

Paragraph 4
... the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

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

Paragraph 9
Without prejudice to its right of initiative, the Commission should:

Paragraph 9
...– take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved; ...

319. As has already been pointed out in the comparison of the two protocols, the substance of paragraph 4 of the Amsterdam Protocol is reproduced in full in Article 5 of the Subsidiarity Protocol. That Article is more comprehensive and its wording appears to have a more binding impact than the Amsterdam Protocol. The draft Convention made provision only for Commission proposals; the IGC rightly broadened the obligation to ‘any draft legislative act’ irrespective of its author.

320. The CoR did not fail to convey its disappointment that the substance of paragraphs 5, 6 and 7 of the Amsterdam Protocol had not been reproduced in the Subsidiarity Protocol. The Praesidium of the Convention replied that these involved explanations which had no business being included in a protocol of a constitutional nature. That argument is reasonable but must be qualified by two considerations: the repetition of some provisions in Protocols Nos 1 and 2 demonstrates that the work involved in putting the relevant principles of the Amsterdam Protocol on a constitutional footing is incomplete, and the increase in the number of protocols annexed to the constitutional Treaty by the IGC reduces the constitutional nature of the protocols themselves. On the other hand, the fact that the substance of paragraphs 5, 6 and 7 of the Amsterdam Protocol is not reproduced militates further in favour of adopting an instrument implementing the Subsidiarity Protocol, once the Constitution has entered into force, for the purpose of setting out the procedures and criteria to be implemented.

321. The third indent of Article 9 of the Amsterdam Protocol is reproduced in Article 5 of the Subsidiarity Protocol, accompanied by a series of amendments strengthening the force of the provision:
– the aim of justifying draft legislative acts must not only be to ensure their compliance with the principle of subsidiarity;

– the request for justification of proposals for legislative acts is extended because ‘any draft’ act should contain a detailed statement, and not only ‘whenever necessary’;

– the request for justification of proposals for legislative acts is extended because it now includes a study of the impact on national and regional legislation and rules; the third indent of paragraph 9 of the Amsterdam Protocol, also reproduced in Article 5 of Protocol No 2, is supplemented by a reference to regional authorities which was absent from the Amsterdam Protocol. The difference between ‘should ... take duly into account’ and ‘shall take account of’ should not bear any significance.

322. One of the significant new features of the Subsidiarity Protocol is that it introduces the legislative and financial impact studies as part of the justification for proposals for legislative acts: ‘This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation.’ Great significance is thus attached to the new impact assessment methods established by the Commission in 2004 which the CoR welcomed both positively and with a critical eye, as shown in Opinion 121-2005 on ‘Better Lawmaking 2004’ and ‘Better Regulation for Growth and Jobs in the European Union’.

**Opinion 121-2005**

1.3. **Extended impact assessment and expertise**

*The Committee of the Regions*

1.3.1. welcomes the introduction in 2004 of a new method of impact analysis for the European Commission’s major initiatives and the use of an instrument which enables the study of the economic, environmental and regulatory effects of a proposal and provides for consultation with interested parties and relevant experts;

1.3.2. nevertheless, considers it vital to take the regional impact of the European Commission’s key initiatives into progressively greater account in order to better coordinate Community action;

1.3.3. in connection with the measures proposed by the European Commission, is particular sensitive to:

– the impact that certain measures may have on the finances of regional and local authorities
– better impact assessments with due regard to the costs for companies
– a review of pending proposals, possible changes made to them or their withdrawal
– stepping up the simplification procedure to increase competitiveness
– pilot projects which focus on reducing the administrative workload
– considering alternatives to legislation (co-regulation and self-regulation)
– the use of external experts
– wider consultation of citizens, businesses and NGOs via the internet

...
2.3. **Recommendations on the impact assessment**

The Committee of the Regions

2.3.1. proposes that the introduction of a new impact assessment method for the European Commission’s major initiatives should lead to the local and regional dimension being taken into account to the greatest possible extent in the ex ante phase of the legislative process;

2.3.2. asks the European Commission to entrust it with drawing up prospective analyses falling within its remit, and, in particular, all major initiatives with a territorial impact;

2.3.3. considers that a preliminary assessment on its part would be particularly important in terms of the application of non-regulatory instruments (co-regulation and self-regulation) and all information and coordination activities carried out at local and regional level;

2.3.4. believes that impact assessments must play a substantial role in reducing the administrative burdens of EU legislation on local and regional authorities and that, consequently, preliminary assessments must include an impact assessment of legislative acts at local and regional level, in financial terms;

2.3.5. recommends that in reviewing the protocol for cooperation signed with the European Commission, the extended impact assessments should be used in order to define detailed evaluation and quality criteria for those who are to carry them out, and in order to establish a real strategy for consulting the grass roots at regional and local level;

2.3.6. invites the European Commission to foster a more proactive role in the pre-legislative phase of Community action in the form of outlook opinions on future Community policies, which would focus on the impact on local and regional authorities, and in the form of reports on the local and regional impact of certain directives;

2.3.7. renews its recommendation to the European Commission to create an independent expert advisory group to monitor impact assessments, assure objectivity and encourage good practice, and to keep it briefed on its work so it can strengthen its political role during later phases of the decision-making process;

2.3.8. asks to be informed of the progress of the working group on managing and monitoring impact assessments that was created within the European Parliament, so that it can take part in the interinstitutional cooperation group which was set up by the European Parliament and, with the help of the European Commission and the Council, develop a set of common criteria to evaluate the quality of impact assessments and quantify the costs arising from legislative proposals.

323. The CoR’s role as guardian of subsidiarity, as established in the Subsidiarity Protocol, not only means that the CoR should be involved with impact assessments in accordance with the guidelines set out in Opinion 121-2005; it also means that, whatever the degree of its involvement in those impact assessments, it can and must carry out independent assessments of all draft legislative acts, for the purpose of giving an opinion, in terms of their conformity with the principles of subsidiarity and proportionality. The draft subsidiarity analysis grid annexed to Opinion 220-2004 on ‘Guidelines for the application and monitoring of the subsidiarity and proportionality principles’ will be particularly relevant here in so far as it will be intended and used not only as an administrative instrument exclusively for ensuring the quality of the preparatory work of the services of the Secretariat General of the CoR but also to raise a series of questions to
which CoR members themselves, and of course the rapporteurs of draft opinions, will be invited to respond.

**Draft Subsidiarity Analysis Grid**

1. Commission document reference

2. Legal basis

3. Justification and objective of the action:
   - Is this action based on the Community’s exclusive competences or on shared competences with the Member States?
   - Are the objectives of the proposed action in keeping with the Union’s obligations?
   - Does action at Community level bring added value?
   - Has the potential inadequacy of action by Member States been demonstrated?
   - Could the aim of the proposed action adequately have been achieved at local or regional level?

4. Local and regional dimension:
   - Has the regional and local dimension of the proposed actions been taken into consideration?
   - What implications have been detected for regulation at local and regional level?

5. Choice of instruments:
   - Is the proposed instrument (directive, regulation, etc.) the most appropriate one?

6. Legislative and administrative simplification:
   - Is the proposed action in keeping with the criteria for legislative and administrative simplification, both at Community and at Member State level?
   - What implications – positive or negative – does the proposed action have for local and regional authorities?

7. Financial evaluation:
   - Evaluation of the financial statement relating to the European Commission’s proposal.
   - Evaluation of the impact on local and regional finances.

8. External consultation:
   - Has the consultation process taken account of the local and regional dimension of the proposed actions?
   - Were local and regional authorities consulted about the European Commission’s initiative? Was this consultation relevant?

9. Impact assessment:
   - Was an impact assessment of the European Commission’s initiative carried out?
   - Was territorial impact taken into account?

10. Proportionality:
   - Is the action suitable, necessary and appropriate?
   - Are the legal form and the scope and extent of the action appropriate?
   - Are the financial costs and the administrative burden appropriate?

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102 The version cited is the version adopted by the CONST on 4 October 2005.
103 ‘This draft analysis grid has been drawn up as part of measure B32 of the CoR’s administrative reform, whose aim is gradually to introduce into the structure of CoR opinions an evaluation of compliance with the subsidiarity principle and the expected impact on administration and local and regional finances, in accordance with Rule 51 of the CoR’s Rules of Procedure. The operation of this analysis grid is being assessed on the basis of a few test opinions and should be rolled out in the course of 2005. The grid will be backed up by a political assessment contained within the body of the opinion and including implementing provisions.’
324. The draft subsidiarity analysis grid is also a very useful benchmark for checking that draft legislative acts have been justified by their authors. After all, it sets out all the factors to be taken into account in the Commission’s justification. It will be recalled here that, although there are few reasons for considering that the Court of Justice will rule on the validity of assessments made by the Commission and the European legislature as regards both subsidiarity and proportionality, it will not fail – if it receives a request to that effect – to check that the justification is sufficient. Points 7, 8 and 9 of the analysis grid are therefore particularly important as they make it possible to assess compliance with procedural requirements that may be regarded as essential within the meaning of Article III-365 of the Constitution (Article 230 EC) and with the Court’s case-law, that is to say, with procedural requirements whose observance or infringement may alter the final content of the decision. Assessing whether an action for annulment should be brought is irrelevant at this stage of the analysis because it is necessary only to highlight the importance of those elements which must form part of the evaluation of the Commission’s justification. The CoR does not need to confine itself to respecting formally the justification. It can and must convey its point of view on the substance, in particular if its view differs from that of the Commission, in order to make clear to the legislature the point of view of the RLAs.

325. It should be pointed out that the obligation to state reasons for acts in the light of the principles of subsidiarity and proportionality – bearing in mind that the obligation applies to all authors of draft texts – could lead authors either to follow the practice adopted by the Commission or to develop a practice of their own. Here again, there is a key difference between initiatives of a group of Member States and those of the institutions. In the case of the former, which relate to policy areas – in practice, these are police cooperation and judicial cooperation in criminal matters – the subsidiarity issues differ fundamentally from Commission initiatives only in one – more formal than real – respect: in the case of initiatives originating from Member States, there could be considered to be an assumption on their part that the proposed action cannot be carried out at their level. In the case of the institutions, however, they are expected, as a first reflex, to consider that the principles of subsidiarity and proportionality are irrelevant, in terms of proposals with an essentially institutional focus. There is a lack of clarity here, in particular because the interests of the RLAs can be involved in a number of circumstances, as already mentioned in relation to police cooperation and the uniform procedure for election to the European Parliament. These are issues on which the CoR can already comment within the framework of the existing Treaties.

D. – Adoption of draft legislative acts by their authors

326. Each institution, body, office or agency has its own procedure for adopting draft legislative acts. Quite apart from the obligation to state the reasons for draft legislative acts, laid down in the Subsidiarity Protocol, the Constitution provides for the justification of acts of the institutions, which must be undertaken upon their adoption.
1) The procedure for adopting draft legislative acts

327. Adoption is usually by the Commission, which acts by a majority of its members on the basis of a quorum determined by its Rules of Procedure (Article III-351). Since the IGC did not accept the system proposed by the Convention, where a distinction was made between commissioners with the right to vote and other members of the Commission, there is no reason to consider that entry into force of the Constitution is likely to result in major changes to the Rules of Procedure or to practice. Under the existing Treaties, draft acts are usually adopted, during one of its weekly Wednesday meetings, by a vote of the Commissioners present; any absence must be authorised by the President. Those meetings are prepared at meetings of the Commissioners’ chefs de cabinet. A written procedure can be used if the proposal receives the consent of the services concerned and a favourable opinion from the Commission’s Legal Service.

328. For all other types of draft legislative act, special procedural rules apply. The main distinction sets apart draft legislative acts prepared by a group of Member States from initiatives from the European Parliament, the Court of Justice, the ECB or the EIB. For the latter initiatives, the decision-making procedure is that established in the rules of the institution or body concerned. The situation is more complicated for draft texts prepared by groups of Member States. First, the Constitution does not define the concept of ‘group of Member States’ and there is no explanation as to how many Member States are needed to make up such a group. In the absence of a formal act implementing the Constitution or of an informal decision by the European Council, this will take the form of a proposal presented by at least two Member States through their permanent representation to the Union. However, there is little point in speculating on that definition, given that the Commission also has power of initiative, which it has not been reluctant to exercise thus far on the basis of conclusions and programmes of the European Council.

2) Obligation to justify legislative acts

329. The obligation to justify draft legislative acts in the light of the principles of subsidiarity and proportionality must be repositioned within the more general framework of the obligation to justify acts of the Union, established in Article I-38.

Article I-38 – Principles common to the Union’s legal acts

1. Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.

2. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Constitution.

Paragraph 2 reproduces the content of Article 253 EC and will therefore continue to be rooted in current practice and existing case-law. According to the Court, the statement of reasons must ‘disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question’. A great many judgments of the Court relate essentially to the exercise of discretionary power by Member States and institutions as part of their implementing powers. Among the principles also applicable to legislative acts, it will be noted in particular that the statement of reasons must be included in the act itself and must be adopted by the author of the act. For example, the Court held that a declaration adopted by the Council could not serve as a statement of reasons for a measure adopted under the codecision procedure since in that case Parliament was the joint author. Similarly, the Court of First Instance points out that ‘the factual and legal elements which provide the legal basis for the measure and the considerations which have led to its adoption’ must be included in the statement of reasons.

As commented by Jean-Paul Jacqué, Head of the Council Legal Service: ‘In those circumstances, the care taken by the legislature in stating the reasons for the measures it adopts, which sometimes exceed the length of the enacting terms, is apparent. However, the interinstitutional agreement on the quality of legislation recalls that recitals, which must be confined to setting out concisely the reasons for the enacting terms, “shall not contain normative provisions or political exhortations”. Such clarification is necessary as there is a great temptation to allow in the statement of reasons – on the ground that they would not in any case be binding – elements on which agreement could not be obtained when considering the enacting terms. That practice is all the more likely to mislead over the content of the text because the court uses the reasons to determine the scope of the text.’ The benefit in adopting sound legislative practice is clear from the detailed statement provided for in Article 5 of the Subsidiarity Protocol and which must be annexed to the proposal for a legislative act.

Apart from the legal aspects – the guarantee of transparency and the method for exercising judicial review – the obligation to state reasons has a key function, namely to require the institution which has drawn up an act consciously and proactively to carry out a number of checks on any provisions which might be worded inadequately. Paragraphs 5, 6 and 7 of the Amsterdam Protocol must be considered in that light. That consideration may, on the one hand, explain the choice made by the Convention not to reproduce their wording expressly in the Subsidiarity Protocol. However, more importantly, it in particular explains the insistence of the Committee of the Regions that the criteria laid down in the Amsterdam Protocol should continue to be applied even when the Constitution and its Subsidiarity Protocol come into force.

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E. – Adoption of European legislative acts

333. The two protocols are silent on the adoption phase for European legislative acts, which can easily be explained by their function as a supplement to the actual text of the Constitution. The rules applicable to the adoption of legislative acts are none the less extremely important in ensuring effective compliance with the principle of subsidiarity.

334. Such adoption is subject to the corresponding procedure for each of the legal bases used: the ordinary legislative procedure, the procedure based on the adoption by the Council of a Commission proposal following an opinion of the European Parliament, or any other procedure. Consultation of the CoR and of the ESC, or indeed any other mandatory consultation, is also one of the key elements of the legislative procedure, which vary depending on the circumstances.

335. All of those adoption procedures are summarised in the table on legislative procedures provided for in the Constitution for Europe (paragraph 337). It will be noted that, except for the new names for acts and some consequences of removing the pillars, the Constitution has almost no new features as compared with the existing Treaties, especially because the IGC went back on a number of changes adopted by the Convention, thus significantly increasing the number of cases of adoption by a qualified majority of the Council.

336. It must also be recalled that anticipating a qualified majority vote in the Council does not necessarily mean that there will be a vote in the Council, since both the Commission and the Presidency of the Council try to encourage consensus. In fact, qualified majority voting even has an unexpected effect in that it helps to reduce transparency in the decision-making process, to encourage the members of the Council, the Commission and the rapporteurs of legislative drafts in Parliament to reach a compromise informally, which increases accordingly the risk of producing compromise texts that are unclear and may not fully meet the subsidiarity and proportionality criteria.
### Legislative procedures provided for in the Constitution for Europe

(NB: the subject areas and legal bases which are underlined correspond to cases where an opinion from the CoR is mandatory)

**Table 14 – Cases in which the ordinary legislative procedure is applied**

<table>
<thead>
<tr>
<th>Initiative from Commission</th>
<th>Approval of Parliament, followed by Council</th>
<th>Consultation</th>
<th>Subject areas</th>
<th>Legal bases</th>
</tr>
</thead>
<tbody>
<tr>
<td>+ suspensive veto of the European Council</td>
<td>– Coordination of social security systems</td>
<td>– Judicial cooperation in criminal matters <em>(possible initiative by a group of Member States)</em></td>
<td>III-136 III-270 and 271</td>
<td></td>
</tr>
<tr>
<td>‘institutions concerned’</td>
<td>– <em>Staff Regulations of officials of the Union</em></td>
<td></td>
<td>III-427</td>
<td></td>
</tr>
<tr>
<td><strong>CoR only</strong></td>
<td>1. action to encourage cooperation in cultural matters</td>
<td></td>
<td>III-280</td>
<td></td>
</tr>
<tr>
<td>CoR and ESC</td>
<td>2. cooperation between Member States and support of their action in the field of employment</td>
<td></td>
<td>III-207</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. cooperation in social policy matter</td>
<td></td>
<td>III-210</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. implementing measures relating to the European Social Fund</td>
<td></td>
<td>III-219</td>
<td></td>
</tr>
<tr>
<td></td>
<td>5. economic, social and territorial cohesion: specific measures outside the Funds</td>
<td></td>
<td>III-221</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6. tasks, objectives and organisation of the Structural Funds and the Cohesion Fund</td>
<td></td>
<td>III-223</td>
<td></td>
</tr>
<tr>
<td></td>
<td>7. implementing measures relating to the ERDF</td>
<td></td>
<td>III-224</td>
<td></td>
</tr>
<tr>
<td></td>
<td>8. environmental action programmes</td>
<td></td>
<td>III-234(3)</td>
<td></td>
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<tr>
<td></td>
<td>9. common transport policy</td>
<td></td>
<td>III-236</td>
<td></td>
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<tr>
<td></td>
<td>10. sea and air transport</td>
<td></td>
<td>III-245</td>
<td></td>
</tr>
<tr>
<td></td>
<td>11. guidelines and measures concerning trans-European networks</td>
<td></td>
<td>III-247</td>
<td></td>
</tr>
<tr>
<td></td>
<td>12. multiannual framework programme and supplementary research and technological development programmes</td>
<td></td>
<td>III-251 and III-252</td>
<td></td>
</tr>
<tr>
<td></td>
<td>13. measures necessary for energy policy</td>
<td></td>
<td>III-256</td>
<td></td>
</tr>
<tr>
<td></td>
<td>14. joint public health measures</td>
<td></td>
<td>III-278</td>
<td></td>
</tr>
<tr>
<td></td>
<td>15. action to encourage cooperation in education, youth and sport</td>
<td></td>
<td>III-282</td>
<td></td>
</tr>
<tr>
<td></td>
<td>16. action on vocational training</td>
<td></td>
<td>III-283</td>
<td></td>
</tr>
<tr>
<td>ESC only</td>
<td>– freedom of movement for workers</td>
<td></td>
<td>III-134</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– freedom of establishment</td>
<td></td>
<td>III-138</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– liberalisation of a given service</td>
<td></td>
<td>III-137</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– approximation of the provisions laid down by law, regulation or administrative action which</td>
<td></td>
<td>III-172</td>
<td></td>
</tr>
</tbody>
</table>
have as their purpose the establishment and functioning of the internal market
– equal opportunities and equal treatment for women and men in matters of employment and occupation
– common agricultural and fisheries policy
– consumer protection
– undertakings for the execution of research, technological development and demonstration programmes
– industry

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Approval</th>
<th>Consultation</th>
<th>Subject areas</th>
<th>Legal bases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Justice</td>
<td>(or initiative from the Court and consultation of the Commission, as required)</td>
<td></td>
<td>– establishment of specialised courts attached to the General Court</td>
<td>III-279</td>
</tr>
<tr>
<td>ECB</td>
<td>(or initiative by the ECB and consultation of the Commission, as required)</td>
<td></td>
<td>– amendment of the provisions of the Statute of the Court of Justice</td>
<td>III-381</td>
</tr>
<tr>
<td>Court of Auditors</td>
<td>– rules for establishing and implementing the budget and for presenting and auditing accounts</td>
<td></td>
<td></td>
<td>III-412</td>
</tr>
</tbody>
</table>

**Table 15 – Cases in which special legislative procedures are applied**

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Approval</th>
<th>Consultation</th>
<th>Subject areas</th>
<th>Legal bases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>Parliament, followed by Council acting unanimously</td>
<td>Parliament CoR and ESC</td>
<td>– tasks, objectives and organisation of the Structural Funds and Cohesion Fund (for the first provisions to be adopted after entry into force of the Constitution)</td>
<td>III-223</td>
</tr>
<tr>
<td>Ratification by the Member States</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------------------</td>
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<td></td>
</tr>
</tbody>
</table>
| Commission | Council, acting unanimously | Parliament and ESC | – harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation  
– approximation of the laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market  
– some areas of social policy | III-171  
III-173  
III-210 |
| Commission | Council | Parliament and ECB | – replacing the Protocol on the excessive deficit procedure  
– prudential tasks of the ECB  
– amendment of the ECB Statute | III-184  
III-185  
III-187 |
| Commission | Council | Parliament | – diplomatic and consular protection | III-127 |
| Commission | Council, acting unanimously | Parliament | – system of own resources  
– language arrangements for the European intellectual property rights  
– European Public Prosecutor’s Office  
– police cooperation: right of pursuit | I-54  
III-176  
III-274  
III-277 |
– exercise of the EP’s right of inquiry  
– regulations governing the European Ombudsman | III-330  
III-333  
III-335 |
| Court of Justice | Parliament, followed by Council | Commission (as an alternative to the ordinary procedure, as required) | – establishment of special courts attached to the General Court  
– amendment of the provisions of the Statute of the Court of Justice | III-359  
III-381 |
| ECB | Commission (or initiative from the Commission and consultation of the ECB, as required) | – amendment of the ECB statute | III-187 |
| Commission | Council, acting unanimously | Parliament, EIB | – amendment of the statute of the European Investment Bank  
initiative from the EIB and consultation of the Commission | III-393 |
338. As for the CoR, one of the crucial elements in the procedure for adopting European legislative acts is, of course, whether or not there is an obligation to consult it. If the legal basis chosen for a draft legislative act comprises the obligation to consult the CoR, it could reasonably be argued that in all cases where reasoned opinions would be issued by the national parliaments, a reasonable period would have to be allowed for the CoR to take those opinions into account.

339. Aside from that somewhat formal aspect, and if no amendments are made to the legislative timetable, it is particularly important for the CoR to have a mechanism for assessing subsidiarity which enables it not only to consider the reasoned opinions of the national parliaments but also, where appropriate, to enter into discussions with those parliaments, in particular, of course, with parliaments that have issued such reasoned opinions, but also with the parliaments or chambers of parliaments that play a part in representing the interests of the RLAs in the Member States.

340. Protocols Nos 2 and 1 have no bearing on the procedure for adopting legislative acts other than as regards the obligation to comply with the time-limits which they prescribe, that is to say the six-week period, in particular as regards the provisions of Article 4 of Protocol No 1, for placing various drafts on the Council’s agenda.
CONCLUSIONS OF CHAPTER 6

341. The new typology of competences and acts of the Union
In its Opinion 220-2004 [Subsidiarity Guidelines], the CoR

‘2.7 welcomes the fact that, for the first time, as the Committee has repeatedly demanded, the Treaty establishing a Constitution for Europe is introducing clear categories of competences (exclusive, shared, and complementary, Article I-12) and clearer divisions of competences between the Union, the Member States and their regional and local authorities (Article I-13 to I-18);’

342. The typology of Union competences described in Part I makes a distinction between the Union’s exclusive competences, shared competences and complementary or supporting competences. This involves consolidation and a definition of known concepts in the practice of the institutions and the case-law of the Court. Apart from the fact that such typology must enable citizens to have a better understanding of the scope and limits of the Union’s powers to act, it has a technical function: it will be useful for ascertaining when and how the principles of subsidiarity and proportionality come into play, bearing in mind that the formulation of those principles restricts the application of the former principle, which does not concern the Union’s exclusive competences – whereas the principle of proportionality must be observed in all the Union’s actions.

343. The Constitution also contains a new typology of acts, based on the distinction between legislative acts and non-legislative acts, which is equally as important for the citizen and which also has technical consequences the scope of which has not been assessed thus far. The distinction between legislative acts and non-legislative acts is new not only in terms of vocabulary but also because it corresponds only in part to the distinction between lawmaking and enforcement to which the Amsterdam Protocol refers. It is therefore necessary to examine carefully the implications arising from those new categories of act and from the diversity in the decision-making procedures.

344. The Constitution maintains a series of special legislative procedures besides the ordinary legislative procedure, which is simplified and clarified; in addition, the various mandatory or optional consultation procedures head up a series of differences in the manner in which the legislative procedure operates depending on the various fields of Union action. An in-depth political assessment of the priorities of the RLAs and CoR as regards the areas where the application of the principles of subsidiarity and proportionality is of particular concern to them may result in amendments to the current area of the CoR’s focus. In particular, an assessment of that kind will show the extent to which limiting the areas where consultation of the CoR is mandatory is in keeping with its role as guardian of subsidiarity and proportionality as a representative of the RLAs.
345. **Extending the role of the CoR beyond the ‘ten areas of mandatory consultation’**

In its Opinion 220-2004 [Subsidiarity Guidelines], the CoR

‘3.10 believes that in its assessment of the subsidiarity principle the CoR should not confine itself to the ten areas of mandatory consultation, but should be able to “make its own destiny”;’

346. The definition both of early warning mechanisms and of court action provided for in the Subsidiarity Protocol initially focuses measures for monitoring compliance with the principles of subsidiarity and proportionality on the preparation of legislative acts. A detailed examination of the legal bases for Union action in the Constitution shows that the areas in which consultation is mandatory correspond to 16 legal bases providing for consultation of the CoR and the ESC, not including the Staff Regulations of officials of the Union. A single legal basis provides for consultation of the CoR only (on cultural matters).

347. Close study – aided by the reorganisation resulting in Part III of the Constitution – confirms that there is no overall logic to those consultations, which can be explained only by the successive revisions of the Treaty. Eleven legal bases provide for consultation of the ESC only, the definition of the consultative power of the CoR reproducing the wording of the existing Treaty, namely that, on consultation of the ESC, ‘where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter.’ The new scheme of the Constitution turns those areas into a category favouring CoR opinions – also with a view to judicial proceedings. In addition to the cases where the ESC is not consulted either, the CoR may, of course, develop its own-initiative opinions in the knowledge that judicial proceedings on that issue will be available to it only for the purpose of protecting its prerogatives. Extending the areas for consultation on the initiative of the CoR is lawful in view of the recognition of the regional and local dimension of subsidiarity, and it may be better to initiate that measure without waiting for entry into force of the Constitutional Treaty because it is not restricted by the wording of the Subsidiarity Protocol and may therefore be initiated outside the context of judicial proceedings.

348. **Establishing the arrangements for consulting the CoR and for the flow of information**

In its Opinion 220-2004 [Subsidiarity Guidelines], the CoR

‘3.16 therefore invites the Council of Ministers and the European Parliament, given their future obligation under the Constitutional Treaty (Article III-388) to consult it in the areas of mandatory consultation and in the light of its new responsibilities for monitoring subsidiarity, to consider embarking on negotiations about a cooperation agreement; in view of its responsibility for subsidiarity, this agreement should in particular contain the arrangements for consulting the Committee and for the information flow between it and the Parliament or the Council of Ministers within the co-decision procedure;’

349. The Subsidiarity Protocol will call for measures for its implementation, as regards the role of both the parliaments and the CoR. It is especially necessary not to wait for entry into force before developing and establishing the procedures concerned on the basis of the Amsterdam Protocol currently in force, in the light of the measures intensifying the regional and local dimension.
Preparation of draft legislative acts: consulting widely, impact assessments and detailed statement of reasons

In its Opinion 220-2004 [Subsidiarity Guidelines], the CoR

'1.6 considers it indispensable that, in accordance with the new Protocol on the application of the principles of subsidiarity and proportionality, more account be taken of the European Union’s regional and local dimension through extensive consultations prior to the adoption of all legislative acts and that, for every European framework law, a “subsidiarity statement” must be drawn up in which the European Commission is to assess the regulatory and financial consequences of the proposed framework law for regional and local authorities (CdR 121/2005, point 2.1.2).

2.5 stresses that the resolute application of the reformed subsidiarity principle, i.e. deeper involvement of regional and local players, may be a key factor in defining the European institutions’ policies and actions in more concrete terms, given that regions and local authorities are particularly close to the grassroots and can therefore forward to the European institutions requests and suggestions on the tangible economic and social development needs voiced by local and regional authorities. Moreover, local and regional authorities can help in promoting the idea of Europe among citizens;

2.14 regrets, however, that the criteria contained in the Subsidiarity Protocol annexed to the Amsterdam Treaty for checking the compatibility of a European Union legislative proposal with the subsidiarity principle were not reproduced in full in the new Subsidiarity Protocol, and encourages the European Commission, when applying the subsidiarity principle in future, to highlight whether:

- the area in question contains trans-national aspects that cannot adequately be addressed by measures taken by Member States or their regional and local authorities;

- measures taken by Member States or their regional and local authorities alone, or the absence of Community measures, would violate the requirements of the Treaty or would in some other way significantly harm the interests of the Member States or their regional and local authorities;

- measures at Community level would, due to their scope or their effect, have significant advantages over measures taken by Member States or their regional and local authorities;

2.15 believes that, when monitoring subsidiarity, account should be taken of the extent to which economies of scale and added value can be achieved through cross-border and trans-national effects when EU measures are taken;

2.16 stresses that where European legislation is necessary under the subsidiarity principle, it should be drafted in such a way as to retain the greatest possible scope for national, regional and local decision-making, and that the volume of European legislation must be limited, even more than has hitherto been the case, to what is strictly necessary to achieve the Treaty objectives (principle of proportionality); in particular, if jobs are to be protected and created, citizens and businesses must not be saddled with unnecessary red tape; therefore also welcomes the European Commission’s measures to update and simplify the Community acquis, and calls for these to be stepped up;
3.1 stresses that the planning phase of a legislative act offers it, along with local and regional authorities, the greatest number of opportunities to effectively bring the local and regional dimension to bear; and points out that involving it at an early stage and taking its views into account could obviate the need for cases to be brought before the Court of Justice of the European Union for infringements of the subsidiarity principle;

3.2 welcomes the fact that the European Commission, before publishing legislative proposals, must first examine their financial and administrative impact, and expects the impact on local and regional authorities to be included in the subsidiarity sheet, as it often falls to this level of government and administration to regulate and implement new EU initiatives; it requests the European Parliament to similarly consider the impact of its changes to legislative proposals (CdR 354/2003 point 1.21);

...

3.4 proposes that, even during the consultations provided for in Article 2 of the Subsidiarity Protocol, the Commission produce subsidiarity sheets with reasoned statements on the principles of subsidiarity and proportionality and on the impact assessment;

351. In this regard the benefit of the draft ‘subsidiarity analysis grid’ annexed to Opinion 220-2004 (Subsidiarity Guidelines) should also be recalled.


‘... Whereas new methods of European governance, such as extended impact assessments and the partnership approach of target-based tripartite contracts and agreements – to the success of which the Committee can make an active contribution – can bring added value;

...

1.1.2 notes the progress described in the European Commission’s 12th annual review on Better lawmaking and emphasises the importance that should be attached to a more in-depth analysis of the methods of consultation and interinstitutional dialogue, prospective studies and impact assessments;

...

1.1.5 regrets, however, that the European Commission has not given sufficient weight to its previous recommendations on the importance of consulting local and regional government in the early stages of drafting legislation, and hopes that the European Commission will in the future carry out reasonable assessments of the impact that certain measures could have on the financial requirements of local and regional authorities;

...

109 Rapporteur: Michel Delebarre (former Minister of State – Mayor of Dunkirk (FR/PES).
1.2.1 welcomes the fact that the European Commission has long advocated developing strong “interaction with regional and local government and civil society”, at an early stage of policy framing, by introducing ongoing and systematic dialogue, with the added impetus of extensive consultation with regional authorities on areas for which they are responsible for transposition or implementation, including both itself and the relevant associations;

...

1.3.1 welcomes the introduction in 2004 of a new method of impact analysis for the European Commission’s major initiatives and the use of an instrument which enables the study of the economic, environmental and regulatory effects of a proposal and provides for consultation with interested parties and relevant experts;

...

1.3.3 in connection [with] the measures proposed by the European Commission, is particularly sensitive to:

- the impact that certain measures may have on the finances of regional and local authorities
- better impact assessments with due regard to the costs for companies
- a review of pending proposals, possible changes made to them or their withdrawal
- stepping up the simplification procedure to increase competitiveness
- pilot projects which focus on reducing the administrative workload
- considering alternatives to legislation (co-regulation and self-regulation)
- the use of external experts
- wider consultation of citizens, businesses and NGOs via the internet.

...

2.1.2 recalls that under the Protocol on the application of the principles of subsidiarity and proportionality, included in the Constitutional Treaty, account can be taken of the European Union’s regional and local dimension through extensive consultations prior to the adoption of all legislative acts and that, for every European framework law, a “subsidiarity statement” must be drawn up in which the European Commission is to assess the regulatory and financial consequences of the framework law for regional and local authorities ...

2.1.3 wishes to exploit the space opened up by the Protocol on the application of the subsidiarity and proportionality principles in order to play a vital role between local and regional authorities and the European institutions for consultations, in line with the Protocol of cooperation with the European Commission;

2.1.4 intends to strengthen its action during the pre-legislative phase which will become crucial with respect to the need for greater efficiency and transparency and stronger democratic legitimacy of the EU, and therefore repeats its wish to be able to be involved in “consultation ‘upstream’ of decision-making” and in the implementation of “co-regulation” instruments which ought to be “an effective way of achieving EU objectives”;

...
2.1.10 confirms its intention to prepare itself to monitor compliance with the principle of subsidiarity, by on the one hand, drawing up a subsidiarity screening system to be appended to its opinions and, on the other hand, by gradually developing a network of local and regional authorities in order to monitor subsidiarity;

...

2.3.1 proposes that the introduction of a new impact assessment method for the European Commission’s major initiatives should lead to the local and regional dimension being taken into account to the greatest possible extent in the ex ante phase of the legislative process;

...

2.3.3 considers that a preliminary assessment on its part would be particularly important in terms of the application of non-regulatory instruments (co-regulation and self-regulation) and all information and coordination activities carried out at local and regional level;

...

2.4.1 notes, with great interest, the Council’s concerns about reinvigorating the Lisbon process and the content of the communications submitted by the European Commission with a view to establishing better regulation to pursue this process, as it considers that simplification and improvement of the regulatory framework are crucial at both national and EU level;

...

353. Consultations conducted on a broad scale, impact assessments and statements of reasons provided for in the Subsidiarity Protocol are a consolidation of the practices in development since the adoption of the Amsterdam Protocol. The two CoR opinions cited here show in themselves how the Committee can help to develop new methods of analysis without waiting for the Constitution to enter into force. It will be possible to formalise the development of those new practices in agreements between the CoR and the Commission and in the relevant interinstitutional agreements. If the Constitution enters into force, the instruments required for its implementation will be ready. If it does not enter into force, a sound basis will exist for a potential rewording of the Subsidiarity Protocol and for making a more comprehensive distinction between the constitutional provisions to be included in the Treaty, the provisions better placed in a protocol and those whose changing nature recommends that they be kept in interinstitutional and other agreements.

* *

**
Chapter 7  
The early warning procedure in monitoring the principle of subsidiarity

354. The early warning procedure, together with the right of the Committee of the Regions to institute proceedings, is the major innovation of the Subsidiarity Protocol. Unlike the Protocol, the implementation of the procedure does not necessarily require the entry into force of the Treaty establishing the Constitution for Europe. If found politically expedient, it can be introduced experimentally on the basis of agreements between institutions and Member States. This could provide an opportunity both to test the operational nature of the provisions, as they appear in Protocols Nos 1 and 2, and to prepare the supplementary texts necessary for their application as well as, where appropriate, their revised formulation in the event that a revision of the texts signed on 29 October 2004 is undertaken in order to secure ratification of the Constitution for Europe, including in those countries where the referendums held had a negative outcome. It is thus necessary and worthwhile to study this procedure paying close attention to constitutional formulations, both as regards the forwarding of texts to the national parliaments and the issue and consideration of any reasoned opinions from them.
SECTION 1
THE FORWARDING OF DRAFT LEGISLATIVE ACTS TO THE NATIONAL PARLIAMENTS

355. The third phase in the procedure for monitoring the principles of subsidiarity and proportionality is governed by the provisions of both the Subsidiarity Protocol and Protocol No 1 (national parliaments). The wording of the relevant provisions is not absolutely identical. The purpose of Protocol No 1 is to eliminate the formal filter because, within the framework of the current Treaties, acts of institutions and bodies of the Community and the Union are forwarded to the Member States by the General Secretariat of the Council – this is the case in particular for Commission proposals to the Council.

<table>
<thead>
<tr>
<th>Subsidiarity Protocol Article 4</th>
<th>Protocol No 1 Article 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.</td>
<td>Draft European legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments. [...] .</td>
</tr>
<tr>
<td>The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.</td>
<td>Draft European legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council.</td>
</tr>
<tr>
<td>The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.</td>
<td>Draft European legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament.</td>
</tr>
<tr>
<td>Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.</td>
<td>Draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council.</td>
</tr>
</tbody>
</table>

356. Apart from mere differences of syntax, it may be noted that the Subsidiarity Protocol is more complete in that it mentions drafts ‘and amended drafts’ as well as ‘legislative resolutions’ of Parliament – i.e. its votes on the texts in the context of the legislative procedure. It is thus the text of Article 4 of Protocol No 2 that should be used for a complete description of the procedure, adding Articles 5 to 8 of Protocol No 1.
Protocol No 1

Article 5
The agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States’ governments.

Article 6
When the European Council intends to make use of Article IV-444(1) or (2) of the Constitution, national Parliaments shall be informed of the initiative of the European Council at least six months before any European decision is adopted.

Article 7
The Court of Auditors shall forward its annual report to national Parliaments, for information, at the same time as to the European Parliament and to the Council.

Article 8
Where the national Parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component chambers.

357. The provisions in question can be summarised in the form of a table which shows the unfinished nature of the texts adopted by the IGC for the two Protocols. Apart from repetitions between the two Protocols, the particular aspect to be noted is the fact that the Court of Auditors itself forwards its report to the national parliaments, and the Commission forwards its own acts, whereas in other cases it is still the Council, i.e. in practice the General Secretariat of the Council, which takes this action.

Table 16 Forwarding of documents to the national parliaments

<table>
<thead>
<tr>
<th>Author</th>
<th>Type of document</th>
<th>Forwarded by</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>- Draft legislative acts</td>
<td>Commission</td>
</tr>
<tr>
<td></td>
<td>- Amended drafts of legislative acts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Annual report on the application of the principles (Prot. 2 Art. 9)</td>
<td></td>
</tr>
<tr>
<td>European Parliament</td>
<td>- Draft legislative acts</td>
<td>European Parliament</td>
</tr>
<tr>
<td></td>
<td>- Amended drafts of legislative acts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Legislative Resolutions</td>
<td></td>
</tr>
<tr>
<td>Council</td>
<td>- Position on draft legislative acts</td>
<td>Council</td>
</tr>
<tr>
<td>Council</td>
<td>- Agendas</td>
<td>Not stated, but the Council is</td>
</tr>
<tr>
<td></td>
<td>- Results of meetings</td>
<td>clearly intended</td>
</tr>
<tr>
<td></td>
<td>- Minutes of meetings at which draft legislative acts are discussed</td>
<td></td>
</tr>
<tr>
<td>European Council</td>
<td>- Initiative to apply Article IV-444(1) or (2)</td>
<td>Not stated, but the General</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Secretariat of the Council is</td>
</tr>
<tr>
<td></td>
<td></td>
<td>clearly intended</td>
</tr>
<tr>
<td>Group of Member States</td>
<td>- Draft legislative acts</td>
<td>Council</td>
</tr>
<tr>
<td></td>
<td>- Amended drafts of legislative acts</td>
<td></td>
</tr>
<tr>
<td>- Court of Justice</td>
<td>- Draft legislative acts</td>
<td>Council</td>
</tr>
<tr>
<td>- European Central Bank</td>
<td>- Amended drafts of legislative acts</td>
<td></td>
</tr>
</tbody>
</table>

175
358. It might be possible to merge the provisions of the two Protocols into a single Protocol – where appropriate placing the provisions of Protocol No 1 on interparliamentary cooperation into a separate text. This merger could be achieved within the framework of a provisional instrument pending the entry into force of the Constitution for Europe – in that case omitting the second paragraph of Article 8 of Protocol No 2 on the right of the Committee of the Regions to bring actions before the Court of Justice. In the event that the Constitution for Europe in its current version were to be abandoned, it would be advisable to carry out this procedure, or even to insert the provisions into a new treaty text.

359. Whatever the case may be, it seems that it will be necessary to adopt acts specifying the arrangements for the application of the two Protocols, both as regards the forwarding of drafts to the national parliaments and as regards the other provisions of the procedure for monitoring the principles of subsidiarity and proportionality. In addition, and this is perhaps even more important, the need which thus emerges for an act implementing the Subsidiarity Protocol would enable some specification of what is and what is not meant by drafts, amended drafts, positions etc. which should be forwarded. The form of this act is not laid down in the Constitution, or in Protocols Nos 2 and 1.

360. Contrary to the approaches already familiar from Community practice, in which the procedures for cooperation between different institutions have to be laid down and which have given rise to the development of interinstitutional agreements – as enshrined in Article III-397 of the Constitution – there are no interinstitutional agreements to organise relations between the Union’s institutions, on the one hand, and the national parliaments, on the other. This would not pose any problem if there was only one procedure for adopting legislative acts or acts to implement the Constitution.

361. But in view of the fact that the Constitution identifies the cases in which its provisions are specified either by a European law or by a decision of the European Council, or again by other acts laid down in the Constitution, and since the two Protocols do not make explicit provision for any act of secondary legislation for their implementation, it is not possible to invent implementing acts where there is no provision for them. It is not possible to resort to the flexibility clause of Article I-18, i.e. measures adopted unanimously by the Council on a proposal from the Commission after obtaining the consent of the European Parliament, because that Article refers explicitly to cases arising ‘if action by the Union should prove necessary’. The term ‘action’ could not be deemed to include the application of the institutional provisions in the Constitution.

362. The alternative to such an act would thus be a combination of an interinstitutional agreement, as provided by Article III-397, which codifies present practice, with an agreement between the governments of the Member States and the Communities, which could take the form of a text included in the conclusions of a meeting of the European Council.
Article III-397

The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Constitution, conclude interinstitutional agreements which may be of a binding nature.

363. The CoR must therefore consider its own position in the matter, so that the agreement organising the procedures for the forwarding of legislative proposals would make provision for the precise details of the procedures for forwarding these acts to the CoR.
SECTION 2
REASONED OPINIONS OF THE NATIONAL PARLIAMENTS

364. As for the forwarding of draft legislative acts and other relevant documents to the national parliaments, the early warning procedure by which the national parliaments may issue reasoned opinions on compliance with the principle of subsidiarity is governed not only by the provisions of the Subsidiarity Protocol (Article 6) but also by Protocol No 1 (national parliaments, Articles 3 and 4). The provisions of the two Protocols are complementary and must be considered together: the Subsidiarity Protocol is more detailed on the content of the reasoned opinion and on the link with the legislative regions, whereas Protocol No 1 is more specific on the six week period.

<table>
<thead>
<tr>
<th>Subsidiarity Protocol</th>
<th>Protocol No 1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 6, first paragraph</strong></td>
<td><strong>Article 3, first paragraph</strong></td>
</tr>
<tr>
<td>Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.</td>
<td>National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Article 6, second and third paragraphs</strong></th>
<th><strong>Article 3, second and third paragraphs</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.</td>
<td>If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the reasoned opinion or opinions to the governments of those Member States.</td>
</tr>
</tbody>
</table>

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned. |

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the reasoned opinion or opinions to the institution or body concerned.
A. - The six-week period

365. Two questions merit closer examination as regards the period laid down by Protocols Nos 2 and 1: the timing of the deadline and the consequence of failing to meet it.

1) Timing the six-week deadline

366. The timing of the six-week period laid down in Article 6 of the Subsidiarity Protocol and Article 4 of Protocol No 1 should in principle be subject to the same rules as those already developed in the practice and case-law of the Community legal system as regards the timing of deadlines laid down in the current Treaties. Of relevance here are, on the one hand, the timing of deadlines for the codecision procedure, in particular, and for other opinion procedures laid down in the current Treaties and, on the other hand, rules relating to the timing of deadlines for the institution of proceedings (the two-month deadline for annulment proceedings laid down in Article 230 EC).

367. Given the consequence of expiry of the six-week deadline, to which we shall return later, it hardly seems appropriate to try to apply to the early warning procedure the case-law applicable to the calculation of time-limits for annulment proceedings. The method of calculating times for these periods is explained in detail in the context of the discussion in Chapter 9 of the review by the Court of Justice of the application of the principles of subsidiarity and proportionality.

368. Much more relevant are the rules applied in practice for the timing of deadlines imposed in Community decision-making procedures, particularly in the codecision procedure, since the entry into force of the Treaty of Amsterdam. Indeed Article 251 (formerly 189b) EC provides for a period of three months, which can be extended by one month, to enable the European Parliament and the Council to consider on second reading drafts which had not been adopted in the same terms on first reading, and for a period of six weeks, which can be extended by two weeks, for the convening of the Conciliation Committee if there was no agreement on second reading.

**Article 251 EC (formerly Article 189b)**

1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council. The Council, acting by a qualified majority after obtaining the opinion of the European Parliament:

   — if it approves all the amendments contained in the European Parliament’s opinion, may adopt the proposed act thus amended;

   — if the European Parliament does not propose any amendments, may adopt the proposed act;

   — shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position. If, within three months of such communication, the European Parliament:
a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position;
b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted;
c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

4. The Conciliation Committee, which shall be composed of the Members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the Members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee’s proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted.

6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

369. In the absence of any case-law applicable to these considerations, it seems appropriate once again to quote Jean-Paul Jacqué, who is well acquainted with the practice, owing to his time as Director of the Legal Service of the Council: According to the Treaty, the period of three months commences on the date the common position is forwarded. For the Council, the period begins as soon as it is possible to ascertain that the common position has been physically received by Parliament in all the official languages. For Parliament, forwarding has only taken place once the President announces the communication of the common position in plenary sitting (Rule 74 of the Rules of Procedure). Communication can take place only after he has received the documents containing the common position itself, the reasons which led the Council to adopt its common position and all declarations in the Council minutes (Article 151(3) of the Treaty requires that these statements be made public, cf. also the Council’s Rules of Procedure, Article 7(1)). The difference in position on the timing of the deadlines could in extreme cases result in discrepancies extending to one month. The act could then be adopted following implicit approval by the European Parliament in accordance with Article 251(2(b) because the period calculated from the forwarding date would have expired, whereas for Parliament, because of its own timing procedure, the period would still be current. Up to now this difference in interpretation has not had any practical

consequences, but there is nothing to say that in the future Parliament’s position on its power to determine time-limits unilaterally may not give rise to disputes’. This commentary highlights three key points which merit consideration as regards the six-week period for the early warning procedure:

i. the period only runs from the forwarding in all the official languages of the Union

ii. of all relevant documents relating to the draft, and

iii. there may be a discrepancy between the method of timing deadlines of the institution forwarding the documents and that of the recipients.

2) All the official languages of the Union

370. Article 4 of Protocol No 1 specifies that draft legislative acts are ‘made available to national Parliaments in the official languages of the Union’, which clearly applies to the early warning procedure.

371. That means in the first instance that the official deadline could only be calculated from the time when all the language versions of the draft legislative act were available. In other words, in practice, the period for adopting a position on a draft legislative act will be longer than six weeks, particularly from the point of view of the CoR, which should have the capacity to analyse the draft in the first languages in which it becomes available.

372. One question is not readily resolved by the texts: that of the languages in which the drafts must be forwarded to the national parliaments. Should the versions in all the languages be sent to them or only the versions in the official language or languages of the Member State in question? It is less a question of a practical nature than one of principle: forwarding in all the official languages of the Union is preferable in order to draw attention to the possibility of differences between the language versions. It should be pointed out here that translation differences are a common occurrence in legislative texts, and indeed they are to be found in the Treaties themselves. Whatever the case may be and whatever solution is adopted by the national parliaments, the CoR will have an interest in comparing several language versions, in particular the English, French, German, Italian, Polish and Spanish versions of the texts, in order to determine any differences which may have a greater significance than appears at first sight. Although it is the role of the lawyer-linguists at the Commission and the Council to vet consistency between different language versions, experience has shown that they can overlook differences which might be detected by a fresh look from others, such as the members of the CoR and the officials and experts who assist them.

3) All the relevant documents relating to the draft

373. It seems quite normal to reason by analogy and to take the view that, as with the codecision procedure, the deadlines for the early warning procedure must be calculated
from the forwarding of all the relevant documents relating to the draft, including the reasons for it and hence, in particular, the detailed statement referred to in Article 5 of the Subsidiarity Protocol. The obligation to forward the documents in all the languages of the Union is clearly applicable to all of these documents, and they should also include a list of the bodies consulted and a summary of the impact studies, perhaps even a record of the consultations, including a summary of their results and the complete impact studies.

4) The problem of a possible discrepancy between the timing of the institution forwarding the documents and that of the recipients

374. Clearly the problem discussed by J.-P. Jacqué in the passage quoted above (paragraph 369) is specific to the codecision procedure, in so far as it concerns the forwarding of a Council common position and hence of the items associated with it. But this example illustrates the problems that can arise with parliamentary assemblies, because the deadline can only start to run once the institution is in possession of all the documents necessary for it to take its decision. That demonstrates, if proof were needed, the value of adopting an act for the application of the Constitution and its Protocols specifying all these elements, but also the value of organising a trial run of the procedure before the entry into force of the Constitution, in order to determine exactly what practical problems need to be resolved.

375. The current Treaty mentions other time-limits for opinion procedures, in particular for the opinions of the European Parliament on international agreements (Article 300 EC), and for the opinions of the CoR (Article 265 EC) and of the Economic and Social Committee (Article 262 EC). The relevance of these cases in relation to the six-week period laid down for the early warning procedure is limited for three reasons:

   i. it is the Council which may, if considered necessary, lay down the time-limit, which must not be less than one month, whereas the six-week period is specified by the Protocols, which have constitutional status;

   ii. the opinions required in these cases have no binding force, whereas those of the national parliaments in the early warning procedure may oblige the authors of a draft measure to review it;

   iii. the consultative bodies do not – under the EC Treaty – have the right to bring actions for annulment in order to protect their prerogatives and, because of that, there cannot be any case-law on the matter; as regards the European Parliament, the abundant case-law on the subject of consultative opinions is relevant to the Committee of the Regions with a view to its future right to bring actions for the protection of its prerogatives, but it does not seem to be of any value as regards the timing of periods for the early warning procedure.

376. In any event, the timing of the six-week period should not be a cause of major concern to the CoR: the main consequence of the expiry of this time-limit is that the authors of draft legislative acts will not be required to take account of reasoned opinions
issued after the deadline has expired, and that its expiry acts as a cut-off point in making the count of reasoned opinions. Since it is not a time-limit for bringing an action for annulment, it is likely that a certain flexibility will be adopted by the institutions in its application. It would be unwise for the institutions, especially the authors of legislative proposals – i.e. nearly always the Commission – to shelter behind the formalism of the time-limit in order to avoid taking account of reasoned opinions which might arrive a few hours or even a few days after the expiry of the deadline.

5) The consequence of the expiry of the six-week deadline

377. The comparison of Protocols Nos 2 and 1 reveals a certain inconsistency between the texts; whereas the technical consequence of the time-limit is specified with regard to the Council, it is not where Parliament is concerned.

378. Article 4 provides that the six-week time-limit must apply to the date on which a draft legislative act is placed on the provisional agenda of the Council for its adoption or for adoption of a position under a legislative procedure. It may be noted that there is nothing to prevent the inclusion of the draft legislative act on the agenda of the Council simply for deliberation, not immediately followed by the adoption of the act. It would no doubt have been useful to include a similar provision for the inclusion of legislative acts on the agenda of Parliament. In practice, it is hardly likely that a vote will be taken on a draft legislative act in plenary sitting less than six weeks after the forwarding of the draft to the national parliaments, since a discussion and a vote in committee are required before a proposal is discussed in plenary. The important question is how the European Parliament’s committees will approach the issue of forwarding drafts to national parliaments. The most likely eventuality is that they will wait for the expiry of the six-week deadline before adopting a final position, otherwise they would risk having to reconsider a text after it had been presented in plenary sitting.

379. Article 4 of Protocol No 1 provides for the possibility of exceptions to placing a draft on the provisional agenda in cases of urgency. However, the fact that this exception is not mentioned in the Subsidiarity Protocol diminishes its scope. The question which doubtless merits particular attention is the urgency issue: urgency cannot be invoked in order to cut short the six-week period, but it may lead the Commission to reduce consultations in the pre-legislative phase. The CoR should perhaps devote some study to the consequences of urgency in its own process of formulating opinions and examine the way in which the European Parliament will take urgency into account in its procedure for the deliberation of legislative proposals.

380. For a proper understanding of the significance of the six-week period, it should also be noted that Article 4 of Protocol No 1 adds a ten-day period between the placing of a legislative act on the Council’s provisional agenda and its adoption of a position. These ten additional days do not formally mean that the six-week period within which the national parliaments should issue their reasoned opinions is extended, but it does mean that the ten days are regarded as a minimum necessary for the Council to examine the
consequences of the reasoned opinions. Here too, there is the possibility of an exception in urgent cases.

381. It should be noted that the consequence of the six-week period stipulated by the Subsidiarity Protocol may be that the draft is amended by its author – in most cases, the Commission. When the Council or Parliament adopt a position on a draft, the draft must be that presented by the Commission, hence the fact that the Commission may amend its draft following a reasoned opinion has the effect of preventing the adoption of a draft in its original version by the Council and Parliament.
A. - The form of reasoned opinions

382. Protocols Nos 2 and 1 make no provision as to the form in which reasoned opinions may be sent to the Presidents of Parliament, the Council and the Commission with regard to the compliance of a draft legislative act with the principle of subsidiarity.

383. The form will clearly be determined by the national law of each Member State, in certain cases by constitutional provisions, but usually by the rules of procedure of each assembly or parliament. It will probably be a parliamentary resolution, to which the voting procedures laid down for the adoption of such resolutions will apply. Some countries may apply stricter voting procedures than others; in particular, all parliaments will not necessarily be able to adopt such a resolution by a simple majority of those in attendance; some may require an absolute majority of those in attendance or of the assembly members.

384. The Protocols are similarly silent on the form that forwarding should take and, here again, there is a need for an act to specify these procedures and also a system for acknowledgement of receipt by the Presidents of the three institutions to which the documents may be forwarded.

385. Protocol No 2 also provides that ‘it will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers’. We shall have occasion to return to this provision. At all events, it is the national law of the Member States concerned which will determine the rules for this consultation.

B. - The content of reasoned opinions

386. As regards the content of reasoned opinions, the only stipulation given by either Protocol No 2 or Protocol No 1 is that the reasoned opinion must concern the compliance of a draft European legislative act with the principle of subsidiarity. Protocol No 2 specifies that the reasoned opinion must state ‘why [the national Parliament] considers that the draft in question does not comply with the principle of subsidiarity’. This clarification is in reality unnecessary because, by definition, a ‘reasoned’ opinion must contain the reasons which have led an institution to take one decision as opposed to another.
387. The authors of the Protocols – both the Convention and the IGC – limited the early warning procedure to the principle of subsidiarity. We have already seen the connection between the principle of subsidiarity and the principle of proportionality: the two principles are intimately linked and it is likely that in a fair number of cases the arguments prompting the view that the principle of proportionality is not being complied with are the same as those leading to the conclusion that the principle of subsidiarity is not complied with.

388. In any event, the fact that a reasoned opinion also contains observations on possible non-compliance with the principle of proportionality is in our view without formal consequence.\textsuperscript{111} It should nevertheless be pointed out here that there is an important consequence of the limitation of reasoned opinions to compliance with the principle of subsidiarity as stated in Article I-11: this principle only applies to the exercise of powers shared by the Union and not to the exercise of exclusive powers – unlike the principle of proportionality, which applies to the exercise of all powers. Because of this, reasoned opinions citing the principle of subsidiarity may only be issued in respect of acts whose legal basis places them under the heading of shared powers. It should be borne in mind, however, that in those cases where different legal bases are possible – and if one of the possible legal bases falls under the heading of shared powers while the other falls under that of exclusive powers – a draft legislative act on a legal basis relating to exclusive powers could nevertheless be challenged precisely because the choice of an unsatisfactory legal basis would enable the act to evade application of the principle of subsidiarity.

C. - Forwarding of reasoned opinions

389. Protocols Nos 2 and 1 provide for two possible cases in the forwarding of reasoned opinions.

390. In the first case, reasoned opinions are always forwarded to the Presidents of the European Parliament, the Council and the Commission. That is a logical provision, since they are the three institutions which normally intervene in the legislative procedure. It may be noted that there is no provision for exceptions in cases where

\begin{enumerate}[i.]
\item the draft does not originate in a proposal from the Commission;
\item the draft is not adopted by the ordinary legislative procedure and is therefore not subject to approval by Parliament.
\end{enumerate}

\textsuperscript{111} As previously stated, we do not share the view of the Delegation of the French National Assembly for the European Union: ‘– finally, the early warning procedure only concerns subsidiarity, never proportionality, although the Protocol does relate to the application of the two principles. The national parliaments must comply scrupulously with this constraint in order not to have their reasoned opinions declared inadmissible.’ Report of the French National Assembly: Assemblée Nationale, \textit{Rapport d’information déposé par la délégation de l’assemblée nationale pour l’Union européenne, sur l’application du principe de subsidiarité, N° 1919}, filed with the Presidency of the National Assembly on 16 November 2004 (p. 22), http://www.assemblee-nationale.fr/12/pdf/europe/rap-info/1919.pdf.
391. Where the author of a draft act is not the Commission, Parliament or the Council, the Protocol stipulates that reasoned opinions be forwarded either to the Governments of Member States which have presented a draft legislative act or to the institutions or bodies of the Union which may also be authors of such drafts. Here again, it is worth pointing out the value of an act covering the application of the procedure which would specify the detailed arrangements for and consequences of the forwarding of reasoned opinions to the authors of draft measures.

D. - The position of the Committee of the Regions in the early warning procedure

392. Neither the Subsidiarity Protocol nor Protocol No 1 mention the forwarding of reasoned opinions of the national parliaments to the CoR. It would be useful to secure the adoption, within the framework of an interinstitutional agreement, of a principle stipulating that reasoned opinions are also to be forwarded to the CoR, at least in all cases involving an act which has a legal basis requiring mandatory consultation of the CoR. But this is only a formal aspect. It is more important that the CoR make the necessary arrangements to obtain information at the earliest possible stage on the national parliaments’ plans with regard to reasoned opinions so that it can decide on its own position.

393. The Protocols only apply to reasoned opinions issued by national parliaments; they do not apply to the opinions of institutions or bodies of the Union, for which provision is made in the specific legal bases of the Constitution. The main consequence is that the CoR is not formally bound by the six-week period as regards the issue of its own opinion, whether it be an opinion requested within the ten fields in connection with which the CoR must be consulted or whether it be an opinion issued by the CoR on its own initiative in another field. The CoR should reflect on reasons which could lead it to adopt a position within the six-week period or immediately afterwards or, conversely, might prompt it to exploit the fact that its own opinions are not covered by the six-week requirement.

394. It may be noted here too that the limitation of opinions to the application of the principle of subsidiarity, hence to the exclusion of any assessment of the principle of proportionality, does not apply to the CoR at this stage in the procedure either. In the event that the authors of legislative acts and the legislator decided to adopt a rigid and absolutely formal approach to reasoned opinions relating to proportionality, the natural role of the Committee of the Regions, acting in the spirit of constant respect, would be to supplement reasoned opinions issued by the national parliaments referring to the principle of subsidiarity with any arguments that might be applicable relating to the principle of proportionality.
395. Article 7 of the Subsidiarity Protocol is devoted entirely to the manner in which the reasoned opinions issued by national parliaments, forwarded within the context of the early warning procedure, are taken into account.

**Subsidiarity Protocol, Article 7**

The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III–264 of the Constitution on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft European legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

396. Article 7 does not take into account the possibility of other opinions on the same drafts, namely the opinions required by the Constitution from the CoR and the ESC. That does not mean that these opinions lose their significance, quite the contrary.

397. The fact that the CoR is given a right to bring actions in the Court of Justice of the European Union to protect its own prerogatives increases the weight of its opinions in cases where the Constitution stipulates an obligation to consult it. These opinions play a very important role, all the more so as Article 8 of Protocol does not accord national parliaments a right to the to institute proceedings themselves, but merely contains an invitation to the Member States to organise the possibility of bringing cases before the Court of Justice on their behalf.

398. Article 7 of the Protocol develops, on the one hand, the manner in which opinions are issued and, on the other hand, the manner in which they are taken into consideration.
A. - Issue of opinions by the national parliaments

399. As regards the manner in which opinions are issued, the central point in the system is the fact that each Member State, or more precisely, ‘each national Parliament’ in the words of the Protocol, has two votes, which enables each chamber of the parliament to have one vote in Member States that have a bicameral system (Belgium, Germany, Spain, France, Ireland, Italy, the Netherlands, Austria, Poland, the United Kingdom); in the other countries, the Parliament has two votes.

400. Much attention was devoted by the working group chaired by Iñigo Mendez de Vigo, then by the European Convention itself and finally by the IGC, to the threshold beyond which the Commission or other authors of a draft legislative act must review their draft. This threshold is fixed by the Protocol at one third of all the votes, except for drafts relating to the area of freedom, security and justice (Article III-164), where it is a quarter of the votes. Nevertheless, in view of the fact that the author of the draft is only under an obligation to review the draft (‘yellow card’) and not to amend or abandon it (‘red card’), the exact number of votes does not have any critical importance.

401. Instead, what will be of critical importance is the force of the arguments presented by the various national parliaments having issued a reasoned opinion, and the distribution of the various opinions, particularly in terms of the representativeness of the various Member States: if 2/3 of the votes represent all the unicameral parliaments, that gives a different weight to the case where the 2/3 includes many bicameral parliaments, particularly those in which the two chambers do not have the same political majority etc. The CoR has no need to concern itself unduly with the manner in which the threshold is attained, except for those countries in which one of the chambers has the role of representing the RLAs.

402. The only obligation imposed by the Protocol on the institutions of the Member States – in this case the national parliaments or the chambers of those parliaments – is to provide reasons for their opinions when they contest the compliance of a draft legislative act with the principle of subsidiarity. The consequence of this obligation is simply that, if an opinion of a national Parliament objecting to a draft legislative act is not backed by reasons, it would not be taken into account in calculating the threshold of 1/3 or 1/4 of the votes of national parliaments.

B. - The obligations of authors of draft legislative acts

403. As far as the authors of draft legislative acts are concerned, the Protocol lays down different obligations.

1) The consideration of opinions

404. In the first instance, the first paragraph of Article 7 provides that authors of draft legislative acts ‘shall take account of the reasoned opinions’ in any case and however
many there might be. On the basis of earlier case-law of the Court of Justice concerning opinions of the European Parliament (the Isoglucose case),\(^{112}\) it may be concluded that once reasoned opinions, whatever their number, have been issued, in the deadlines for the legislative procedure account must be taken of the existence of these opinions; if the provisional timetable for the legislative procedure is extremely tight, the production of reasoned opinions by the national parliaments should result in a review of the timetable in order to ensure that serious consideration can be given to the opinions, not only by the authors of draft legislative acts, but also by Parliament, the Council and the Commission as parties to the legislative procedure.

405. That is a point on which the CoR should reflect, to the extent that it will enable it to take more time to produce its own opinions. In addition, as we shall see later, the possibility of bringing an action for the protection of its own prerogatives means that the CoR will be well placed to restrain an excessively quick legislative procedure when reasoned opinions from parliaments need to be considered. In this sense, the CoR will become a natural ally to the national parliaments.

**2) The obligation to review drafts**

406. When the threshold of one third or, where applicable, one quarter of the votes of the national parliaments is reached, the obligation incumbent on the institutions is heavier: they are obliged to review their drafts.

407. The first consequence of this obligation is clearly to prolong the legislative procedure, in so far as the stages in the procedure have already been fixed in the agendas of Parliament and the Council.

408. The obligation to review drafts is also linked to the obligation to state reasons for the decision which the author of the draft will take, i.e. to maintain the draft, to amend it or to withdraw it. Whatever decision is taken on the matter by the author of the draft, he must give detailed reasons for it, responding to the arguments presented in the reasoned opinions of the national parliaments.

409. It is particularly important for the CoR to examine closely the arguments presented by the national parliaments in all cases where the threshold of one third or one quarter of the votes of the parliaments is reached. At this juncture, the CoR can give its own opinion on the best way to take these arguments into account. The CoR will have to form its own opinion on the reasons which may argue in favour of maintaining a draft legislative act – particularly if the silence of the other national parliaments may be clearly interpreted as support for the measure in its current form – or its amendment to take account of the objections put forward by the national parliaments. It is clear that the number of situations in which a draft will be completely withdrawn should be reduced to the extent that the provisions of the Protocol as a whole result in better consideration of

the various aspects relating to subsidiarity and proportionality in the preparation of the draft.

410. The obligation on the authors of draft legislative acts to review their drafts and to state reasons for the decision they take following that review may become subject to judicial review by the Court of Justice as a result either of an action for annulment on the grounds stated in Article 8 or of any other action to challenge a legislative act, in particular an action brought by a Member State or other plaintiff or one brought by the CoR for the protection of its own prerogatives.

C. - The absence of a link between early warning and court proceedings

411. The last point to note in connection with Article 7 is that, contrary to the statements made in the work of the Convention, there is no link in the final text of the Protocol between the fact of a national Parliament having issued a reasoned opinion and the possibility of instituting proceedings for annulment on grounds of non-compliance with the principle of subsidiarity.

412. The two stages, early warning and proceedings for annulment, are entirely separate from one another. In the same way, any action for annulment brought by the CoR is in no way subordinated to the prior issue of reasoned opinions by the national parliaments as part of the early warning procedure, or to a negative opinion of the CoR itself on the compliance of the draft with the principle of subsidiarity.

413. The fact remains that the case for any action will be stronger if it was preceded by negative opinions which were not followed. This would only apply, however, if the draft legislative act had not been varied during the legislative procedure by one or more amendments which would have changed its nature in terms of the principle of subsidiarity.
CONCLUSIONS OF CHAPTER 7

414. The early warning procedure going beyond the national parliaments
In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.16 therefore invites the Council of Ministers and the European Parliament, given their future
obligation under the Constitutional Treaty (Article III-388) to consult it in the areas of mandatory
consultation and in the light of its new responsibilities for monitoring subsidiarity, to consider embarking
on negotiations about a cooperation agreement; in view of its responsibility for subsidiarity, this agreement
should in particular contain the arrangements for consulting the Committee and for the information flow
between it and the Parliament or the Council of Ministers within the co-decision procedure.’

415. In its provisions on the early warning system, the wording of the Subsidiarity
Protocol focuses mainly on the role played by the national parliaments in applying the
principle of subsidiarity, to the extent that it may be wondered whether these provisions
and those of Protocol No 1 on the role of the
national parliaments should not be merged.
The internal consistency of the Subsidiarity Protocol would then require the role of the
CoR to be stressed, even though it is there implicitly – it was not necessary to stipulate
that it be consulted in the Protocol itself as this is provided by Article III-388 of the
Constitution. Close scrutiny of the early warning system strengthens the conviction that
the CoR – although not mentioned formally – in many cases has greater resources for
analysis and reaction than the national parliaments, as a result of which it may prove to be
a valuable ally to them. The early warning procedure may very well be organised on the
basis of more or less informal agreements, both between the governments and national
parliaments and between institutions and bodies of the Union. It can be planned either as
a means of testing the early warning system ahead of the entry into force of the
Constitution or as a means of strengthening the interest of the public in Europe in the
event that the Constitution does not come into force.

416. Time-limits involved in the early warning procedure
In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.12 points out that, unlike national parliaments, it is not bound by a deadline for lodging complaints
about non-compliance with the principles of subsidiarity and proportionality under the early warning
system;

3.13 therefore decides, in the light of the deadlines that apply within the early warning system and to
complaints by the CoR, to vest the Bureau with the power to check that legislation proposed by the
Commission in areas where consultation of the CoR is mandatory is compatible with the principles of
subsidiarity and proportionality, and with the task of making its views known to the European institutions
and national parliaments;’

417. The privileged position of the CoR as regards deadlines, compared with that of the
national parliaments, has to do with three factors which must be taken into account.
Indeed, to begin with, the six-week deadline laid down for the issue of reasoned opinions
of parliaments does not apply to the CoR, which may issue opinions at any time in the
legislative procedure – subject to observance of the deadlines specified for it by the Council in cases where its consultation is mandatory. Secondly, the role of the CoR is not limited to the principle of subsidiarity, on which the early warning procedure concentrates, but extends quite naturally to the principle of proportionality. Finally, in a less formal perspective, the CoR is better placed than many national parliaments to embark on its study of draft legislation before the deadline for the early warning system starts to run, which allows it a more generous margin of manoeuvre as regards time. An internal system centred on the Bureau should provide the flexibility necessary for more rapid reaction when that is necessary, while permitting wider involvement of CoR members when time allows.

418. **The early warning procedure in the context of ‘constant respect’**
In its Opinion 220-2004 [subsidiary guidelines], the CoR

‘3.14 stresses that guaranteeing the substantive content of opinions on all legislative proposals remains the responsibility of the commissions and their rapporteurs …;’

3.15 points out, however, the need to follow up its assessment of the application procedures for the principles of subsidiarity and proportionality throughout the legislative process; in particular, rapporteurs will need to pay attention to whether discussions in the Parliament and the Council of Ministers have led to changes in the text that make the proposal incompatible with the subsidiarity or proportionality principle …;’

419. The early warning procedure is only part of the system for the application of the principles of subsidiarity and proportionality, since it is limited to the draft legislative act as proposed by the Commission to the Union legislator. Although the parliaments will be informed of the legislative resolutions by which the European Parliament adopts or rejects a draft and amends it, and also the positions of the Council which have the same effect, there is no provision to reopen the process of reasoned opinions from national parliaments once the legislative procedure has been set in motion. The CoR is better placed than the national parliaments to ensure that the application of the principles is monitored throughout the legislative procedure, particularly when it is consulted for an opinion, since it is required to give a view on the draft measure as a whole, not just its compliance with the principle of subsidiarity. It will also be entitled to institute proceedings to safeguard its prerogatives in order to ensure that the institutions take the necessary steps to follow up its opinions. It is particularly useful in this respect that it should be able to state a view on aspects relating more specifically to the principle of proportionality, given the fact that the latter may be affected by an amendment which might seem to be of little significance at first sight. The RLAs, which the CoR represents, are particularly well placed to make the European legislator aware – by way of the CoR’s opinions – of problems in relation to proportionality to which amendments may give rise.

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Chapter 8
Subsidiarity and Proportionality:
the Role of National and Regional Parliaments

SECTION 1
NATIONAL PARLIAMENTS AND SUBSIDIARITY

420. The Protocol on the Application of the Principles of Subsidiarity and Proportionality has transformed the EU’s subsidiarity landscape by creating new roles for national parliaments in subsidiarity monitoring, and by defining regional roles in subsidiarity monitoring alongside those national parliament roles.

421. The immediate origins of those new roles lay in the declaration on the future of the Union attached to the Treaty of Nice in March 2001, which had signalled the need to examine more fully the role of national parliaments in European integration. The December 2001 Laeken Declaration, which set the scene for the Convention on the Future of Europe, then called for the exploration of a fuller role for national parliaments as a means of contributing to the legitimacy of a European project under democratic challenge, and raised the prospect of national parliaments focusing ‘on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity’. 113

422. That prospect was addressed in detail at the Convention

423. i. by the Working Group on ‘The role of national parliaments’, which recommended that “A mechanism should be set up to allow national parliaments to convey early on in the legislative process their views on the compliance of a legislative proposal with the principle of subsidiarity” 114.

424. ii. by the Working Group on ‘The Principle of Subsidiarity’ at the Convention which endorsed the establishment of ‘an “early warning system” allowing national parliaments to participate directly in monitoring compliance with the principle of subsidiarity’ and an also proposed an enhanced possibility for national parliaments to refer matters ‘to the Court of Justice on grounds of non-compliance with the principle of subsidiarity’. 115

A. - The Regional Dimension

425. Those Working Groups laid the basis for the Constitution’s Protocol on the Application of the Principles of Subsidiarity and Proportionality, which set out the detail of the ‘early warning system’ and enhanced access to the Court of Justice. The Protocol also became the vehicle, in a somewhat unstructured way, for putting into practice some of the arguments widely endorsed at the Convention, especially in its special plenary debate on regions on 7 February 2003, for strengthening the regional dimension of the principle of subsidiarity:

426. 1) The Protocol took forward the recommendation of the Convention Working Group on Subsidiarity that the CoR should also have access to the Court of Justice, alongside national parliaments, in matters of subsidiarity compliance (but limited to matters on which it has to be consulted).

427. 2) The Protocol – reflecting the tone of discussion in the Convention’s special debate on regions on 7 February 2003, and in particular the intervention of the UK Government representative, Peter Hain\(^{116}\) - opened up the possibility for national parliaments to involve regional parliaments with legislative powers in the early warning process.

428. 3) The Protocol required the European Commission to include regional and local dimensions to pre-legislative impact assessment and processes of pre-legislative consultation. Elsewhere, in its follow-up initiatives to the Governance White Paper the Commission had clarified that it foresaw such pre-legislative consultation as an interaction of the Commission with national and European associations of regional and local government, and that it saw the CoR as a kind of gatekeeper, identifying those associations it should consult.\(^{117}\)

429. The provisions in the Protocol collectively create a curiously imbalanced set of access points for regions to engage in subsidiarity monitoring.

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430. Pre-legislative consultation is to be carried out through representative associations of RLAs which the CoR has ‘accredited’. Regional parliaments with legislative powers

\(^{116}\) Contribution by Mr Peter Hain – Europe and the Regions, CONV 526/03, p. 4.

can be included in the early warning system, but the CoR is not (though, as the final section of this study stresses, the CoR can act ‘as if’ it were part of the early warning system). The CoR is included in ex-post monitoring arrangements through a new right of appeal to the Court of Justice, but regional parliaments with legislative powers are not. A number of challenges arise from these provisions on subsidiarity:

431. *i.* The first concerns the CoR’s role in shaping pre-legislative consultation of representative associations of regional and local authorities. There is an opportunity here for the CoR to build a role as a ‘clearing house’ for feeding in and coordinating RLA concerns at the pre-legislative stage.

432. *ii.* The second is for the CoR to be well-placed to align itself with national parliamentary debates and concerns on subsidiarity. National parliaments have more authority than the CoR; CoR arguments are likely to have more potency if they are meshed with those of national parliaments both in the early warning stage and at the stage of post-legislative appeal.

433. *iii.* The third concerns the role of parliaments of regions with legislative power in the early warning process. There is, again, an obvious interest on the part of the CoR in aligning itself with legislative region inputs into early warning and more generally harnessing the capacities of one of its most powerful sets of members to collective CoR positions. This will be all the more the case if the CoR decides to act ‘as if’ it were part of the early warning system (see section 5 in this report). The concern for alignment with parliaments of regions with legislative power is likely to be mutual given that legislative regions will have no direct access to the Court of Justice under the Constitution, but that the CoR has. Legislative regions may well seek to mobilise the CoR to act on their behalf in referring matters to the Court, and have begun thinking how they might do this.\(^{118}\)

434. These are ‘alignment’ objectives which will have particular urgency if the Constitution is eventually adopted. But there are strong arguments to pursue those alignments even in the absence of the Constitution. These are issues developed at fuller length in the final section of this report, which deals in detail with the ways in which the CoR might maximise its impact in subsidiarity monitoring (and which takes forward the discussion of the pre-legislative consultation stage addressed above).

435. The remainder of this chapter provides a necessary backdrop for the final chapter of the study by exploring how both national parliaments and regional parliaments with legislative power have been developing their views on how to implement the Protocol on

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\(^{118}\) This ‘mutuality’ is suggested in the draft CoR opinion on The Role of Regional Parliaments with Legislative Powers in the Democratic Life of the Union under the rapporteurship of Luc Van den Brande in CdR 221/2004 rev. 2. It was also proposed in the ‘Declaration of Milan’ of the Conference of the Presidents of the European Legislative Assemblies (CALRE) at October 2004, see Le principe de subsidiarité dans l’Union européenne: sa consécration dans le traité instituant une constitution pour l’europe et les perspectives pour les régions disposant de pouvoirs législatifs et, en particulier, pour leur parlement at http://www.calre.net/sc/sc030305/documents/1_wgsubsidi/subsidiarietat.doc. It was also proposed in the ‘Declaration of Milan’ of the Conference of the Presidents of the European Legislative Assemblies (CALRE) in October 2004 at http://www.calre.net/documents/italian%20presidency/milano/Declaration/def/en/Decl_Milano_def_20EN.doc, and in research commissioned by CALRE from the L’Institut d’Estudis Autonòmics in Catalonia. See Le principe de subsidiarité dans l’Union européenne: sa consécration dans le traité instituant une constitution pour l’europe et les perspectives pour les régions disposant de pouvoirs législatifs et, en particulier, pour leur parlement at http://www.calre.net/sc/sc030305/documents/1_wgsubsidi/subsidiarietat.doc.
the Application of the Principles of Subsidiarity and Proportionality should the Constitution be adopted.

**B. - National Parliaments and the Subsidiarity Protocol**

436. Not all national parliaments have engaged in detail with the Subsidiarity Protocol. Some have considered in detail how they would put into operation mechanisms for using the early warning system. An additional prompt was given in a ‘test run’ of the early warning system organised by the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) in March-April 2005.\(^{119}\) In rather fewer cases national parliaments have set out how they might activate the enhanced right of appeal to the Court of Justice in the Subsidiarity Protocol. We present below summary information on early warning and ex-post appeal where it is available.

437. **Austria:** It is expected that responsibility for subsidiarity monitoring will lie with the EU Affairs Committee of both Nationalrat and Bundesrat. Each committee is authorised to act on behalf of the whole chamber.

438. **Denmark:** The Folketing has established a detailed procedure which envisages parallel assessment of subsidiarity compliance by sectoral committees and the European Affairs Committee. Following consultation with the sectoral committee(s) concerned and open electronic consultation, the European Affairs Committee decides whether a reasoned opinion is issued.

439. **Finland:** The Committee to Assess EU Scrutiny Procedures recommended in 2005\(^ {120} \) that the Grand Committee (which has the delegated authority of the Eduskunta on most EU matters) take on responsibility for subsidiarity control. Working in consultation with sectoral committees the Grand Committee would refer issues to the plenary, with the final decision to issue a reasoned opinion endorsed in what would typically be a ‘rubber stamp’ process by the plenary. The same procedure of Grand Committee referral and plenary endorsement would apply for ex-post appeal to the Court of Justice.

440. **France:** The National Assembly’s Delegation for the European Union reported in November 2004 on national parliaments and subsidiarity.\(^ {121} \) It recommended that discussions on adoption of reasoned opinions could be launched by deputies individually or collectively, or by subsidiarity rapporteurs nominated from within the Delegation. It envisaged a number of options for delegation of the decision to issue a reasoned opinion to sectoral committees and/or the Delegation for the European Union. Provision would be made for discussion ‘on the floor’ of the Assembly, but there would not have to be such


discussion. The Delegation also recommended that a majority in the Assembly, or in recess the National Assembly Bureau, would decide on referrals to the Court of Justice. The French Constitution was amended on 28 February 2005 in order to adapt it to the innovations of the Constitutional Treaty. New Article 88-5 deals with the mechanisms of the Subsidiarity Protocol. As of its entry into force, each chamber (Sénat and Assemblée Nationale) will be able to adopt reasoned opinions according to its own internal regulation. Reasoned opinions will be transmitted to the Presidents of the European Parliament, of the Council and of the European Commission by the President of the Chamber that issues it. Each House will be able to introduce an appeal which will be transmitted to the European Court of Justice by the Government.

441. Germany: A law was passed through both chambers of parliament in May 2005 setting out the procedures for both early warning system and appeal to the Court of Justice that will take effect if the Constitution is ratified.\(^\text{122}\) Both chambers, the directly elected Bundestag, and the Bundesrat, which represents regional governments in national parliamentary business, have equal rights. The law will be applicable as of entry into force or the Constitutional Treaty. Both decide under their own authority procedures for issuing reasoned opinions under the early warning system and for appeal to the Court of Justice. The law allows the Bundestag to delegate its decision-making authority on these matters to its Committee on European Union Affairs. The Bundesrat already possesses the option of delegating its authority to a ‘Europe Chamber’ established in 1993 to expedite quick responses, where necessary, to EU business.

442. Lithuania: Provisions\(^\text{123}\) have been established which place initial responsibility for subsidiarity review in the hands of the sectoral committees of the Seimas. A sectoral committee’s conclusion that there is a subsidiarity concern triggers further deliberation by the Committee on European Affairs or Committee on Foreign Affairs, on which basis a debate in the Seimas plenary may be called. Only with the support of the Seimas plenary can a reasoned opinion be issued.

443. Netherlands: A Joint Committee of both Chambers of the States General was established in June 2003 to report on subsidiarity. It recommended\(^\text{124}\) the creation of a Subsidiarity Review Committee including members from the European Union committees of both Chambers which would be responsible for subsidiarity review (in consultation with sectoral committees), and for recommendations to both Chambers on issuing a reasoned opinion. Both Chambers would vote separately on the recommendations of the Subsidiarity Review Committee. The Joint Committee assumes that the Dutch government will act as ‘postbox’ for any parliamentary decision to mount an appeal to the Court of Justice.

\(^{122}\) Gesetz zu dem Vertrag vom 29. Oktober 2004 über eine Verfassung für Europa, Bundesrat Drucksache 339/05.


444. **The UK:** The Select Committee on Modernisation of the House of Commons reported recommendations on the early warning system in May 2005.\(^\text{125}\) It recommended the delegation of the responsibility for judging whether an issue is problematic on subsidiarity grounds and for drafting a reasoned opinion to the European Scrutiny Committee of the House of Commons. Reasoned opinions would not normally, though could, be debated in the plenary in order to meet the six-week deadline; they would typically be transmitted to the relevant EU institution on the basis of a ‘rubber stamp’ vote in the plenary. The House of Lords European Union Committee recommended in its report of April 2005 on the early warning system\(^\text{126}\) that the decision on whether issues required debate in the plenary under the early warning system should be taken by the European Union Committee. The Committee recommended that the plenary should normally vote on whether to issue a reasoned opinion, but could delegate the exercise of its vote to the European Union Committee to cover periods of parliamentary recess.

445. In the other member states not mentioned above there has been no formal statement of procedure as yet, though a COSAC ‘forecast’\(^\text{127}\) suggests that in another set of member states (Cyprus, the Czech Republic, Hungary, Latvia, Malta, Portugal and Slovenia):

446. i. the respective parliamentary European Affairs Committees will be responsible for subsidiarity review (though in Cyprus, Latvia and Portugal in consultation with sectoral committees and in the Czech second chamber and Hungary the plenary may be involved).

447. ii. in Latvia and Slovenia the European Affairs Committees will be responsible for issuing reasoned opinions, in the Czech second chamber and Hungary the plenary alone, and in the other cases a mixed responsibility of European Affairs Committee and plenary.

448. A number of points emerge from this survey. The first is that in most cases a special procedure is being foreseen for the early warning system. This has largely to do with the timescales involved: the subsidiarity review process and, where relevant, the drafting and issuing of a reasoned opinion, need to be undertaken within six weeks of the publication of a legislative proposal. This is a tight timescale, especially if parliamentary practice is to involve sectoral committees and, in particular, plenary debate. There is a particular problem in that European and national legislative timetables do not coincide and that subsidiarity review may need to happen in national parliamentary recess.

449. For these reasons of quick response and/or to provide cover for the parliamentary plenary when in recess, in the great majority of cases subsidiarity review will be led by European Affairs Committees, and in over half of cases those Committees will either as a

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matter of course, or unless objections are raised, or in periods of recess, have responsibility for issuing reasoned opinions delegated to them by the plenary.

450. Fewer parliaments have made, or envisaged specific mechanisms for ex-post appeals to the Court of Justice. Those which have been keen to stress the autonomy of parliamentary decision-making from government, with the governments concerned acting merely as ‘postboxes’ for parliamentary appeals.

C. - The COSAC Test Run of the Early Warning System

451. Further insights into the operation of the early warning system were opened up in the ‘test run’ of the system organised in spring 2005 by COSAC.128 Most national parliaments through at least one of their parliamentary chambers conducted a pilot early warning process in March-April 2005 on the legislative proposals contained in the European Commission’s 3rd Railway Package.129 Three issues were of particular significance in the test run.

452. 1) Most parliaments involved in the test run found problems on subsidiarity grounds with the Railway Package. 37 parliamentary chambers participated in the test run and 31 reported back to COSAC. Of those 20 had concerns, 14 found breaches of subsidiarity, and 11 issued reasoned opinions.130

453. 2) The difficulty posed by the six-week timetable. In the test run correspondents cited difficulties in organising consultation with interested parties, sectoral committees and regional parliaments with legislative power in that timescale or in carrying out the procedure if parliament was in recess. The Swedish Riksdag in the test run131 and the French National Assembly in its report on the early warning system132 stressed the point that, in addition to procedural devices to expedite the early warning process, parliaments had to be prepared to ‘hit the ground running’ by having clear understanding of issues ‘upstream’ of legislation: “There is a strategic interest in stating one’s view as far upstream as possible, even before the transmission of draft legislative acts. That is where the real challenge is located and national parliaments can really seize their chance by developing a permanent exchange with European Commissioners and their services in the pre-legislative phase.”133

128 See the documents collected at http://www.cosac.org/en/info/earlywarning/pilotproject/.
133 Ibid., p. 24.
454. **3) The difficulty of knowing the views of other national parliaments** in the context of a six-week timetable. Most parliaments would exhaust the full six weeks in their subsidiarity review processes. Clearly some parliaments, for tactical reasons, were concerned in the COSAC test run to be aware of other parliaments’ views (bearing in mind the threshold of one third of national parliaments that needs to be reached to compel the European legislator to reconsider legislation on subsidiarity grounds). A number of parliaments drew the conclusion that a forum for ongoing communication between national parliaments such as the IPEX web portal is vital for the early warning system to operate effectively. IPEX (the Inter-Parliamentary EU Information Exchange) is currently under development and intended to establish coordinated criteria for structuring parliamentary information on EU matters, connect relevant European and national legislative databases, and offer a common search language and methods.\(^\text{134}\)

455. The point about inter-parliamentary coordination was made all the more compelling by significant number of reasoned opinions issued by the participating parliaments in the test run. There was widespread concern that the European Commission had not taken sufficient steps to justify the need for EU action. However the reasoned opinions were addressed at, and divided between four different Regulations/Directives under the Railways Package.\(^\text{135}\) On no single item of legislation would they have crossed the threshold required of one third of national parliaments. Fuller inter-parliamentary awareness and tactical coordination of responses might have produced a different outcome. Significantly COSAC’s commitment to undertake a second test run made at its May 2005 meeting was justified by the need ‘to facilitate a more efficient exchange of views between national parliaments within the subsidiarity early warning mechanism’.\(^\text{136}\)

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SECTION 2
PROVISIONS FOR REGIONAL PARLIAMENTS WITH LEGISLATIVE POWERS IN THE EARLY WARNING SYSTEM

456. Parliaments of regions with legislative power are explicitly envisaged in the Subsidiarity Protocol (Article 6) as contributors to the early warning process, assuming the national parliaments concerned establish procedures for involving them: “It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.”

457. There are eight member states with regions with legislative power: Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and the UK, though in Finland, Portugal and the UK only special status regions qualify for the description. As with national parliaments it is in some cases unclear how the involvement of regional parliaments in the early warning system would work, though in Spain, Portugal and in Italy no direct involvement of the regional parliaments is foreseen. In all the other cases regional parliaments individually will have some form of access to the early warning process, though in two – Austria and Germany – there will also be collective rights of access via national second chambers which represent the elected authorities of legislative regions at the national level. The following provides a summary of discussions and proposals hitherto:

A. – Summary of Proposals in Member States

458. **Austria**: In Austria the second chamber of the national parliament, the **Bundesrat**, is a regional chamber, consisting of representatives of the regional parliaments – **Landtage**. Since Austria’s accession to the EU the **Bundesrat** has had a role in Austrian EU policy formulation modelled on, but less extensive than, the **Bundesrat** in Germany. As a national parliamentary chamber it has direct access to the early warning system (and ex-post appeal) as described above. Consideration is also being given as to how individual **Landtage** might have their concerns represented through the **Bundesrat**. There is recognition that many of the **Landtage** lack the resources and capacity to carry out effective scrutiny of legislative proposals in the six-week early warning period (not least since they will need to be in the position to feed their opinion into the national parliamentary review process some time before the conclusion of the six-week period if they are to influence the national parliamentary position). They will therefore need to work closely with, and be guided by their regional governments, which do have fuller

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administrative capacities. They will also need to have early access to emerging views in the national parliament. The collective Liaison Office of the Länder, with branches in Vienna and Brussels, would play a significant role in flagging the key issues on which to concentrate subsidiarity review, though particular areas of legislation will be reviewed, according to established procedures, by a ‘lead Land’. It is not considered feasible for any individual Landtag to require the Bundesrat, to issue a reasoned opinion (or indeed, an ex-post appeal to the Court of Justice). The Länder are likely to establish a procedure for ‘applying’ to the Bundesrat to issue a reasoned opinion in the early warning process or an ex-post appeal to the Court of Justice. Given the time pressure of the six-week period, this application process would need to be delegated to the President of any Landtag acting on behalf of that Landtag.

459. **Belgium:** Belgium is a special case in which federal and regional/community governments have equality of status in EU matters. That status has produced a complex coordination system which gives the lead role in defining the Member State’s position in some fields to the federal governments, in others to the regional/community governments, though in practice involves all governments in a process of mutual accommodation in all areas of EU policy. This Belgian specificity has been transformed to the new terminology of national parliaments in the Subsidiarity Protocol in a Declaration on the Constitution which clarifies that.

| Not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and Regions act, in terms of competences exercised by the Union, as components of the national parliamentary system or chambers of the national parliament. |

A number of working groups are now engaged in developing a cooperation agreement to implement the Declaration. This will confirm that references in the Constitution to ‘national parliaments’ apply in Belgium also and equally to regional/community parliaments, that EU information flows to regional/community parliaments are improved and guaranteed, and that all Belgian parliaments can act autonomously in issuing reasoned opinions. The agreement will be concluded whether or not the Constitution is ratified as the regional/community parliaments are keen to develop their subsidiarity monitoring roles – e.g. through better information flows – come what may.

460. **Finland.** The Province of Åland has a far-reaching autonomy in many fields of legislative and administrative competence, and defines Finnish EU policy in areas falling under that competence. The Åland regional parliament, like the Finnish Eduskunta, can mandate its government in EU matters. In that sense the Subsidiarity Protocol does not imply additional powers, but merely adjustments in administrative procedure. Consequently Åland regional parliament will be informed of EU legislative matters on the same basis and at the same time as the Eduskunta, will contribute to the subsidiarity

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141 [http://www.calre.net/documents/Working%20groups/subsidiarity/National%20docs/Belgium/Finalact_decI_Belg.doc](http://www.calre.net/documents/Working%20groups/subsidiarity/National%20docs/Belgium/Finalact_decI_Belg.doc)
142 Information supplied by officials in the Flemish government.
review of the Grand Committee of the *Eduskunta*, and will be able to insist that its concerns are represented by the Grand Committee in decisions to issue reasoned opinions.

461. **Germany**: In Germany the second chamber of the national parliament, the *Bundesrat*, is a regional chamber, consisting of representatives of regional governments. It already possesses extensive rights of input into German EU policy formulation, including the right to define the German position in a number of policy fields. As a national parliamentary chamber it has direct access to the early warning system (and ex-post appeal) as described above. Additional consideration has been given as to how individual *Landtage* might initiate action by the *Bundesrat* in the early warning process and in ex-post appeal. In line with earlier legal research commissioned by the Land government of Baden-Württemberg the Länder have made a ‘gentleman’s agreement’ that the *Bundesrat* will respond to the initiative of any individual Land on early warning or ex-post appeal, unless any other Land opposes that initiative on grounds that its ‘own, fundamental interests’ would be affected.\(^{144}\) In principle this agreement gives all sixteen German regional parliaments individually the ability to take action under the Subsidiarity Protocol. However, it should be noted that this agreement was made by regional governments and does not mention the phrase regional parliament or *Landtag*; one can expect the subsidiarity process to be absorbed into Germany’s characteristic intergovernmental coordination on EU affairs, with regional parliaments limited to a subordinate role.

462. **Italy**: Italy remains in the process of introducing far-reaching constitutional reforms whose outcome will in principle significantly strengthen sub-national tiers of government. Those reforms are not complete, and make it rather difficult to draw out clear implications for the role of regional parliaments in subsidiarity review. An indication is given in a note of a meeting convened in November 2004 on the coordination of national and regional parliaments in EU affairs.\(^ {145}\) This note suggests a steep learning curve – one of its recommendations was for regional parliaments to establish European Affairs Committees where they do not yet exist. Other recommendations of potential relevance to the Subsidiarity Protocol were at a level of generality which suggests at best an indirect and non-systematic access of Italian regional parliaments to national parliament EU scrutiny:

1. An annual meeting of national and regional parliaments on EU legislation;

2. Incorporation of regional concerns in national European Affairs Committee work;

3. Access of regional parliaments to IPEX and support for a regional-level equivalent to IPEX to facilitate exchange.

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144 [http://www.berlin.de/rbmskzl/mpk/ergebnisse050414.html](http://www.berlin.de/rbmskzl/mpk/ergebnisse050414.html)

145 [http://www.calre.net/documents/Working%20groups/subsidiarity/National%20docs/Italy/seminar%20nov%2004%20Italy%20EN.doc](http://www.calre.net/documents/Working%20groups/subsidiarity/National%20docs/Italy/seminar%20nov%2004%20Italy%20EN.doc)
None of these recommendations suggest direct engagement with early warning. They might best be seen as a starting point from which to develop more focused procedures. Separate provisions specify that regions may request that the national government appeals to the Court of Justice on subsidiarity grounds, and that a majority of regions can require such an appeal, though these provisions are not consequent on the Subsidiarity Protocol.

463. **Portugal**: The Azores and Madeira have regional parliaments with legislative power. Their governments are included in a national coordination system on EU affairs alongside national government departments (the Interministerial Commission for Community Affairs). No specific provisions apply for this system to extend to the early warning process or to include regional parliaments in that process.

464. **Spain**: The Spanish Autonomous Communities have traditionally had only restricted rights of access to Spain’s EU decision-making process, with a number of consultative mechanisms but none of the possibilities available in Austria, Belgium, Finland or Germany for regions to determine the Member State’s position in specified fields. Following agreement in the national-regional Conference of Ministers for European Matters, new provisions were published in February 2005 which establish for the Autonomous Communities the right to establish the position of the Spanish Member State in a number of fields, including their representation in the Council, and to delegate officials to the Permanent Representation in Brussels. This is a long-awaited breakthrough, but appears to make no separate provisions for regional involvement in the early warning system, and remains in any case government-dominated.

465. **The United Kingdom**: The UK has three regions with legislative power: Scotland, Wales and Northern Ireland (though the regional parliament in the latter has been out of operation since October 2002). The UK has a flexible constitutional system which has very quickly established significant roles for the Scottish and Welsh governments in UK EU policy formulation, including de facto shared control of the Member State’s position in some policy fields. In addition, the Scottish Parliament in particular has established perhaps the most effective parliamentary scrutiny of regional government policy of any legislative region in the EU. 146 The relative openness of the UK’s EU policy processes was confirmed in the pioneering statement by the UK government at the European Convention in January 2003 that it would include UK regional parliaments with legislative power in the early warning system. Accordingly the proposals discussed above on UK national parliament preparations for the early warning process make specific reference to the consultation of regional parliaments. 147 Indeed, the Scottish and Welsh regional parliaments were the only regional parliaments consulted by the respective national parliaments in COSAC’s test run of the early warning system.


spring 2005. There is however no sense that the UK’s regional parliaments can require the national parliament to represent their views, in particular if the regional parliament view should differ from that of the national parliament.

466. The Scottish Parliament, reflecting its activist role in EU matters, has considered how it could operationalise the early warning system:

i. It is clear that it lacks the resources to conduct in-house assessment of all EU legislative proposals, so proposes that the Scottish Government presents a check-list assessing the subsidiarity implications of proposals, with the Parliament, through its European and External Relations Committee scrutinising the Government’s assessments.

ii. The Scottish Government would be expected to grade that check-list on a traffic light system, with ‘green’ items raising no concerns, ‘amber’ items for review by the Parliament’s European and External Relations Committee, and ‘red’ items matters that clearly raise subsidiarity concerns with the Scottish Government likely, and on which the Scottish Parliament is likely to seek the issuing of a reasoned opinion by the UK parliament.

iii. Bearing in mind the pressures of the six-week review period, the European and External Relations Committee held out the prospect of the Committee itself conducting subsidiarity review, and taking decisions on reasoned opinions (though leaving open options for subject committee involvement and debate in plenary). Confirming the point, the Welsh Assembly noted that it had one week in which to respond to the national parliament in the COSAC test run, and also foresaw a need for special procedures, including decision ‘out of Committee’, i.e. under the delegated authority of the Committee Convenor.

B. - Analysis

467. A number of issues emerge from this review.

468. 1) The scope of regional parliaments’ input to the provisions set out in the Subsidiarity Protocol is patchy. Only in Belgium, the Province of Åland and the German Länder do individual regional parliaments have the possibility that their reasoned opinions (and/or ex-post appeals) are forwarded direct to the European legislator. In Austria and the UK access of regional parliaments is indirect, described by terminology of ‘consultation’ and ‘request’ and is not guaranteed. In Italy, Spain and the Portuguese special status regions there are no provisions for such access.

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2) It is clear that the six-week timescale creates serious difficulties for individual regional parliaments to organise their review procedures in a way which fits with the national parliamentary timetable. As much or more investment needs to be made in pre-legislative monitoring and consultation as in the early warning process which starts after proposals have been published, and their key provisions set firm. Pre-legislative monitoring needs to work both as a preventive measure (addressing problematic issues before they get set firm) and as a prerequisite for hitting the ground running in the early warning phase (having established views on the issue which can be fed quickly into the early warning process). As the Welsh European and External Affairs Committee put it: “The lack of time highlights the need to identify early on issues that might breach the principle of subsidiarity. This will make it easier for the complex issues to be addressed early on and maybe eliminate the need to invoke the formal procedure. But if not, it will help Members [of the Committee] come quickly to a view in the limited time available.”

Two examples of good practice recommend themselves:

i. The role of the Austrian Länder Liaison Office in Brussels in identifying potentially problematic issues in the annual Work Programme of the European Commission, and thereby prompting follow-up work by the nominated ‘lead Land’ in the policy field concerned, including active participation in consultation processes and hearings and exchange of views with national authorities.

ii. The establishment of a Brussels Office by the Scottish Parliament (i.e. separate from the Scottish Government office) to ensure that any thoughts on the problems of proposed EU legislation are addressed earlier by the European Commission through effective and direct pre-legislative consultation.

3) Regional parliaments and their European Union scrutiny committees are generally poorly resourced and lack the infrastructure for comprehensive subsidiarity monitoring. In most of the cases discussed above regional parliaments will be reliant on or subordinate to their regional governments in subsidiarity review. There follows a concern that characteristically intergovernmental – and often intransparent and poorly accountable – processes of regional engagement in EU decision-making will get replicated in the early warning system. It was not the intention of the Subsidiarity Protocol to strengthen the role of governments and intergovernmentalism. Regional parliaments need to take steps to underpin the roles the Subsidiarity Protocol opens up, including: a) establishing a division of labour between parliament and government and ensuring each understands the other’s role; and b) boosting their capacities to engage in subsidiarity review which reduce their dependence on regional governments. One means of doing the latter is to improve the structures and resourcing for European Affairs

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151 Ibid.
Committees within regional parliaments. Another is to build new sources of expertise, for example by establishing an independent intelligence presence in Brussels, or by working more systematically in cooperation with other regional parliaments. We address this latter possibility in the next section.
SECTION 3
INTER-REGIONAL COOPERATION: CALRE AND THE CoR

473. The Conference of European Regional Legislative Assemblies (CALRE) is the obvious mechanism for inter-parliamentary exchange at the regional level, especially as a recent survey shows that national parliament networks in COSAC are not keen to open out their organisation to regional parliaments.\textsuperscript{154} CALRE’s membership covers 74 legislative regions in the Member States surveyed above. It established a Working Group on Subsidiarity in December 2004 in response to the Subsidiarity Protocol with a number of objectives\textsuperscript{155} designed to prepare regional parliaments for a fuller role in subsidiarity review, including:

\begin{enumerate}
\item Better networking on subsidiarity among regional parliaments with legislative powers
\item Better internal structures for subsidiarity review
\item Better \textit{relations} with national parliaments and the European Parliament
\item Better \textit{coordination} with the CoR on subsidiarity
\end{enumerate}

474. The Working Group is scheduled to report at the CoR’s subsidiarity ‘summit’ in London in November 2005. Among the initiatives of the Working Group are: a subsidiarity seminar held in June 2005; the mounting of a subsidiarity test-run for regional parliaments like that conducted by COSAC for national parliaments in June-July 2005; and the establishment of a web forum for the collection and exchange of information on subsidiarity (which remains rudimentary at the time of writing).\textsuperscript{156}

475. CALRE’s concerns are closely intertwined with the CoR. The reason for the intertwining of those concerns is clear from Table One above: there is a mutuality of interest given the access of (some) CALRE members to the early warning process, from which the CoR is in principle excluded, and the right of the CoR and not CALRE members to launch ex-post subsidiarity appeals to the Court of Justice. This mutuality of interest has been strongly emphasised in the CoR opinion under draft by Luc Van den Brande on \textit{The role of regional parliaments with legislative powers in the democratic life of the union}.\textsuperscript{157} Unsurprisingly CALRE has stressed in its annual Declarations during the whole period of debate on what became the Constitution the desirability of working better with and through the CoR, seeking:

\begin{flushright}
155 http://www.calre.net/sc/cf030305/documents/1_wgsubsidiary/1b_WGsubs_Programme_EN.doc
\end{flushright}
i. in 2002 a ‘structure’ in the CoR to reflect its role as a mouthpiece for the legislative regions

ii. in 2003 a ‘revision’ of the presence of regional legislative assemblies in the CoR

iii. and in 2004 a ‘reinforcement’ and ‘institutionalisation’ of its relationship with the CoR ‘in particular with permanent communication in relation to respect of competencies and subsidiarity, as well as upstream and downstream legislation’

476. The ‘prize’ of this cooperation is to open up access for CALRE members to the Court of Justice via CoR on the basis of:

a) ‘the possibility for the regional legislative Assemblies themselves to propose to the Committee of the Regions that an appeal be presented to the European Court of Justice when they consider that said Principle of Subsidiarity has been violated in relation to questions that affect the Region itself;

b) the possibility for the Committee of the Regions to request a report from the regional legislative Assembly in question, before presenting the appeal to the Court of Justice for violation of said Principle of Subsidiarity’.

477. The outcome hitherto has been more modest, but has borne fruit in the agreement between the two organisations that CALRE will contribute to the subsidiarity portal under development by CoR, and that it subsidiarity test run will be reported at the CoR’s subsidiarity summit in November 2005.

161 Ibid.
CONCLUSIONS OF CHAPTER 8

478. **Preparations for the early warning mechanism in Member States**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

“2.23 invites regional parliaments to continue to liaise with it and to take internal measures that facilitate rapid decision-making and effective exchange of information on subsidiarity matters within the framework of the early-warning system”

Given that the entry into force of the TCE is not an indispensable precondition for putting in place the components of the early warning system, the work done in the member states to prepare for this mechanism – which are examined in this study – is moving forward despite the pause for reflection in the ratification process. It is particularly useful in this respect to consider the internal features of the early warning system, especially because the Subsidiarity Protocol contains an invitation – addressed to national parliaments – to consult regional parliaments with legislative power. The CoR is particularly well-placed to contribute to concerted action among regional parliaments because of its capacity to represent the views also of non-legislative regions among its membership.

479. **Preparations of the CoR for the early warning**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

“3.12 decides, in the light of the deadlines that apply within the early warning system and to complaints by the CoR, to give the Bureau the task of checking that legislation proposed by the Commission in area where consultation of the CoR is mandatory is compatible with the principles of subsidiarity and proportionality and to make its views known to the European institutions and national parliaments.”

The experience of national and regional parliaments in considering how to make considered responses in the short, six-week timetable of the early warning system is instructive for the CoR. That timetable makes the delegation of authority to some smaller formation of the respective parliaments, capable of acting quickly and with the authority of the full parliaments, highly desirable. Reflection on that conclusion has encouraged the CoR to debate delegating its authority under the early warning system, and it seems likely that its Bureau will take on that delegated role, subject – as with equivalents in national and regional parliaments – to powers of overrule and recall by the plenary.

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Chapter 9
Review by the Court of Justice of the application of the principles of subsidiarity and proportionality

SECTION 1
THE CASE-LAW OF THE COURT OF JUSTICE CONCERNING THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

480. In comparison with the extensive and long-standing case-law of the Court of Justice concerning the principle of proportionality, the case-law on subsidiarity appears rather limited in terms of both quantity and quality. However, it is necessary to take care when making the contrast and to compare only what is comparable. The case-law relevant to reviewing compliance with these two principles by the Community legislature clearly shows the entirely foreseeable and logical limits of judicial review which cannot substitute for political review but merely supplement it and clarify it in certain respects.

A. The choice of relevant case-law

1) Restriction to case-law relating to Community acts

481. First, the principle of subsidiarity as laid down in Article I-11 of the Constitution and Article 5 EC is intended to be relied on only in relation to acts of Community institutions, whereas the principle of proportionality applies also the measures taken by authorities of the Member States.

482. This may include measures adopted to fulfil obligations imposed on them by the treaties or acts of secondary law. In that case, the principle of proportionality could be used by the Court of Justice, in the same way as an action for failure to act brought by the Commission (or another Member State) against the Member State whose implementing measures are at issue, to examine whether these measures are appropriate to the objectives of the Treaties and Community policies. Application of the principle of proportionality to such cases would involve reversing its use since it would be necessary to examine whether the national measures were sufficient to attain Community objectives and not whether they went beyond what was necessary.
483. It can also be used by the national courts of the Member States to examine whether or not national, regional or local public authorities have gone beyond what is necessary in terms of the law and Community policies, but this does not fall within the jurisdiction of the Court of Justice. The question may be referred to it by means of a request for a preliminary ruling to determine the precise scope of the obligations imposed by Community law but in its replies to national courts it does not use the principle of proportionality so much as that of the ‘effectiveness’ of the interpretation applied to attain Community objectives.

484. The case-law on the principle of proportionality concerns instead measures taken by the authorities of the Member States – whether they be national, regional or local – in derogation from the general obligations under Community law. It concerns in particular derogations from the ‘fundamental freedoms’ and their corollaries within the framework of the internal market, namely freedom of movement of goods, services, workers and capital, freedom of establishment, and competition rules. A considerable number of decisions of the Court based on the application of the principle of proportionality concern such derogations and the Court is particularly precise in its assessment of their proportionality to the aims sought by these authorities. It has to balance, on the one hand, fundamental Community freedoms and, on the other, the objectives of public interest as perceived by the Member State. To quote Article 30 (formerly Article 36) EC – which makes it possible for the Member State to restrict the free movement of goods – this relates to ‘public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property’. These grounds can justify such derogations provided, however, they do not constitute ‘a means of arbitrary discrimination or a disguised restriction on trade between Member States’. The role of guardian of the Treaties assigned to the Court of Justice means that it is particularly strict in relation to the authorities of the Member States as regards the application of measures derogating from the principle of proportionality. Moreover, it would be interesting to assess the extent to which the widespread impression that subsidiarity is not being respected by the Community is due to the consequences of such decisions by the Court of Justice.

485. In this regard it should be noted that although some of the Court’s decisions applying the principle of proportionality to the assessment of measures adopted by the national authorities or RLAs are taken in actions ‘for failure to act’ brought by the Commission against Member States which it deems to have failed to fulfil their Community obligations, most of these decisions are the result of requests for preliminary rulings made to the Court of Justice by national courts dealing with disputes between individuals or of actions brought by individuals against the – national, regional or local – authorities of their Member States. However, in an action for failure to fulfil obligations brought against it, a Member State cannot plead the invalidity of the Community act from which its obligations are derived, since it can bring an action for annulment to do that. Therefore, the principles of proportionality and subsidiarity cannot effectively be relied on by a Member State as against a directive which does not transpose the principles correctly.
486. In any event, this type of decision by the Court of Justice does not concern the application of the principle of proportionality to Community acts and is therefore of very little use in monitoring application of the principle of proportionality as laid down in Article I-11 of the Constitution and Article 5 EC.

2) Community legislative acts and implementing acts

487. In theory, the principles of subsidiarity and proportionality as defined in Article I-11 of the Constitution and Article 5 EC are both intended to be applied to normative acts such as implementing acts, legislative acts and non-legislative acts.

488. However, general practice, which is reflected in the new early warning system being restricted only to the monitoring of subsidiarity by the national parliaments, tends to link this principle to legislative acts, whilst the principle of proportionality undoubtedly applies to all these types of acts, irrespective of whether they are legislative, normative or implementing acts.

489. In the case-law on acts of Community institutions most of the Court of Justice’s judgments concern Commission decisions taken in the exercise of its executive power and in particular decisions relating to competition. This may involve authorisation of mergers and concentrations, proceedings against undertakings on grounds of infringements of competition rules, or the prohibition of State aids – a particular sensitive topic for the RLAs since the Community notion of State aid encompasses aids granted by any public authority, whether it be the national government, RLAs or other independent public entities. It is not possible to determine a general body of thought as to the Court’s attitude from studying this case-law. The apparent rigorousness of the judicial review of Commission decisions varies from sector to sector, depending on the degree of technical and economic difficulty of the assessments which the Commission has to carry out, the speed of the changes which occur in these sectors, and also the degree of political and social sensitivity of the consequences of the decisions which the Commission has to take.

490. Once again it would be interesting to assess the extent to which the widespread feeling that subsidiarity is not being respected is due to the consequences of such decisions by the Court of Justice, in particular as regards State aids.

491. It is true that this type of case-law, which applies the principle of proportionality both in actions for annulment brought by Member States – and above all by the individuals concerned – and in requests for a preliminary ruling, is more relevant than the case-law applying the principle of proportionality to measures of national, regional or local authorities. This case-law concerns the application of the principle of proportionality to acts of Union institutions, in this case the Commission. However, the fact remains that it normally concerns implementing acts, whilst the principle of subsidiarity has yet to be invoked against legislative acts.
3) Restriction to case-law relating to Community normative acts

492. In order to compare what is comparable in the case-law of the Court of Justice concerning the principle of proportionality and the principle of subsidiarity, it is therefore prudent merely to consider acts applying the principle of proportionality to normative or legislative acts.

493. a) Although recognised by Article 207 EC and the Council’s Rules of Procedure, the notion of legislative acts does not have disputed scope, unlike the notion of normative act which is central in an action for annulment. It appears in the fourth paragraph of Article 230 EC as ‘decisions in the form of regulations’.

Fourth paragraph of Article 230 EC

‘Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.’

494. This provisions, which has been included in the Treaty of Rome from the outset and which is reproduced with significant amendment in Article III-365 of the Constitution, has two consequences relevant to our discussion of case-law.

495. i. First, this provision places serious limits on the ability of both individuals and RLAs to bring actions for annulment against normative acts since these possible applicants must show that the contested act is not only of ‘direct’ but also ‘individual’ concern to them, and not in their capacity as members of a group of addressees, such as all RLAs having a certain type of powers. Consequently, actions for annulment against normative acts are generally admissible only where they are brought by ‘privileged applicants’, namely the Member States, the Council, the Commission and, since the entry into force of the Treaty of Nice on 1 February 2003, the European Parliament. Previously the European Parliament had been able to bring an action for annulment to protect its prerogatives but the very nature of this type of action meant that the assessment of the proportionality of the act under examination was of little relevance. It should also be noted that in matters of police and criminal justice cooperation only the Commission and the Member States can bring an action for annulment against a framework decision.

496. In general, there is no reason for the Commission, the Council or the Parliament to bring an action for annulment against an act adopted under the codecision procedure since they have all given their approval to adoption. Therefore, in practice actions brought by institutions are limited to cases in which the legal basis could lead to one of the three institutions being circumvented, in most cases the Parliament, which can hardly be expected to base its legal action on the principle of subsidiarity. Before the entry into force of the Treaty of Nice it could in any event argue only over the choice of legal bases and compliance with procedures.
497. The Member States do sometimes bring an action for annulment against a legislative act where they have had an opportunity to give their views on it in the Council. A typical case in this respect is the action for annulment which Germany brought – and won in 2000 – against the directive on tobacco advertising. However, the mechanics of Community decision-making, which favour consensus, mean that the cases in which Member States feel sufficiently strong in their minority position to contest an act are rare. In such cases they normally plead infringement of the principles of subsidiarity and proportionality but their position is much more solid if they can act on the basis of Union powers. From this point of view, the innovation making provision for actions by the national parliaments is likely to have a significant effect, in particular on Council decision-making, by increasing the number of potential privileged applicants.

498. ii. Second, this provision is one of the major reasons why the case-law relating to proportionality primarily concerns implementing acts. The justification for the restrictions imposed by the fourth paragraph of Article 230 EC on individuals bringing an action for annulment is that in theory individuals are protected by their ability to bring actions against implementing acts, that is to say, on the one hand, actions before national courts – as regards implementing measures taken by the national, regional and local authorities of the Member States – and, on the other, actions for annulment against implementing decisions.

499. Although it is possible to plead the illegality of a normative act in relation to the Treaty to demonstrate the illegality of an implementing measure, the review of the proportionality of that measure is clearly very closely linked to its implementation in the specific case which may be brought before the Court. All this explains why there can be only a limited number of cases in which the Court will have to rule on the proportionality of a normative act.

500. b) Review by the Member States’ courts of implementing measures taken by national, regional and local authorities is in theory likely to lead the Court to rule on compliance with the principle of proportionality by a Community normative act. This could form the subject of a request to the Court for a preliminary ruling on the validity – in relation to the Treaty – of a normative Community act on which the implementing measures in the Member State are based. It is not a matter which can be resolved by national courts which are required, according to the Court’s case-law, to refer to it any doubts they may have as to validity. However, practice shows that the national courts refer very few questions on validity for a preliminary ruling – probably largely on account of the lack of knowledge of the parties concerned and their lawyers, or even of the judges, and also partly because of the actual logic of the mechanism laid down in Article 234 EC.

164 Case 314/85 Foto Frost [1987] ECR 4199. The Court goes beyond the letter of Article 234, which requires that references for a preliminary ruling be made only by courts of final instance, but remains within the spirit of it by prohibiting the national courts of all levels from themselves declaring a Community act invalid. They remain free to dismiss the arguments of the parties concerned and to state that a Community act is valid.
501.  c) The logical conclusion to be drawn is that there is no reason for the number of Court decisions applying the principle of proportionality to normative acts to be higher than the number of decisions applying the principle of subsidiarity to such acts except that the principle of proportionality has been known about and used by the Court of Justice and applicants since the 1950s, whilst reliance on the principle of subsidiarity postdates the entry into force of the Treaty of Maastricht on 1 November 1993.165

B. Simultaneous arguments on proportionality and subsidiarity

502.  Both in an action for annulment and an action in response to a request for a preliminary ruling it is possible, and tactically sound, to accumulate grounds, that is to say categories of legal argument. Once he has demonstrated the Court’s jurisdiction and the admissibility of the action he is bringing, a good lawyer will then present arguments relating to the form of the acts – based, where possible, on the fact that a decision-making procedure has not been complied with in all respects – before setting out arguments concerning failure to comply with the letter and spirit of the Treaties and a number of fundamental principles, such as the principle of subsidiarity.

503.  It is therefore entirely normal that the question of compliance with the principle of proportionality should also be raised in cases where the question of compliance with the principle of subsidiarity is raised. It is also normal that the principle of proportionality should be relied on more systematically than the principle of subsidiarity since subsidiarity has the reputation of not being a great deal of use in bringing about the annulment of an act – or confirmation of its invalidity in an answer to a request for a preliminary ruling.

C. Absence of annulments on grounds of infringement of the principle of subsidiarity

504.  It is often noted that the Court has never annulled a Community act on grounds of infringement of the principle of subsidiarity. However, it would be entirely wrong therefore to conclude that there is no point in relying on the principle of subsidiarity or that it has a political character whereas the principle of proportionality has a legal character. The fact that the Court annuls Community implementing acts for failure to comply with the principle of proportionality and considers that national, regional or local measures are contrary to Community law for that reason does not mean that it is prepared readily to annul Community acts of a normative or legal character.

165 It would be possible to carry out a statistical study of the cases in which the principle of proportionality is discussed to assess the validity of a normative act, but given the frequency with which this principle is relied on before the Court of Justice and the difficulties in defining ‘normative act’, the cost-benefit ratio of such a study would appear to be extremely low. This is also confirmed by the observations of writers who have carried out an exhaustive study on the principle of proportionality, namely Nicholas Emilioa, The Principle of Proportionality in European Law, London, 1996, and Diana Urania Galetta, Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo, Milan, 1998.
505. In general, the interest of the Court’s case-law on the validity of Community acts goes beyond the choice which it has to make, namely annulment or confirmation of validity. As is the case with national case-law on reviewing the constitutionality of laws and the legality of regulations, in these cases the Court’s case-law serves to temper the legal consequences of the procedures and principles laid down in the Treaties. Therefore, it is essentially in the grounds of decisions concerning application of the principles of proportionality and subsidiarity that it will be possible to find material for developing the law.

D. Judicial review and non-judicial review

506. For a proper understanding it is essential not to confuse judicial review and non-contentious review. The Court is extremely careful in its assessment of the choices made by the Community legislature whose responsibility it is, first and foremost, to assess the economic, social and political consequences to be drawn from the principles of proportionality and subsidiarity. The Court concentrates on reviewing the decision-making process in order to ensure compliance with the rights and prerogatives of the various parties involved in this process – including citizens – and to enable all interested parties to understand the reasoning followed by the legislature and therefore to present different arguments in order to persuade it or any authorities with political control to change a decision. Consequently, it generally limits its review to that of a manifest error, as it is called on to do by the available means of redress laid down in the Treaties. Conventionally, the Court confines itself to examining whether there has been a manifest error of assessment, whilst the institutions are responsible for assessing the facts determining the extent of Community action, in particular in economic,\textsuperscript{166} social and political terms.

507. Furthermore, a comparative study of the application of the principle of proportionality in the Member State\textsuperscript{167} shows that the German courts are different from those of other countries of the Union in the systematic, thorough and detailed manner in which they apply the principle of proportionality in all areas of judicial review of decisions by public authorities of any kind – the legislature, administration, Federal authorities, Land authorities or local authorities. There is also a great deal of controversy over this in Germany. Some learned writers and a large number of politicians and practitioners consider that the courts are going too far down this path. As for the principle of subsidiarity, it should be observed that it does not appear in German case-law\textsuperscript{168} – in part precisely because the principle of proportionality is particularly evident and effective in it. It is only recently that the principle of subsidiarity has started to be used in Italian case-law, namely that of the Council of State, but there it is used as a principle for

interpreting the division of powers between the municipalities, provinces and regions in the face of a rather imprecise constitutional text.

508. Use of the principle of proportionality in case-law is particularly developed where the aim is to prevent excessive limitations on citizens’ fundamental rights and this is the case in all the countries in which this principle appears more or less explicitly in case-law. However, these situations differ from those which arise in connection with the principle of subsidiarity where the issue is not so much the effect of a public decision as the level at which it must be taken.

509. The Court’s case-law could be criticised and deemed to be excessively timid or even insuffciently coherent. However, it is important to remember that it arises from an assessment by the Community court of its role as it appears to be derived from the Treaties:

- the role of the Court, to simplify it in non-legal terms, is to safeguard compliance with the rules of the game by the various players – institutions, Member States, public and private authorities, and individuals – and to prevent them from misusing their powers or using them incorrectly. However, it may not itself take part in the game;

- the Court is an institution of the Union, not a third party unconnected with the Union and its Member States. It therefore feels it has a responsibility to help attain the Union’s objectives and is wary of limiting the actions of these institutions other than in cases of manifest error.

510. From that point of view the Constitution for Europe makes two important changes. One, by making an action for annulment available to the national parliaments and the Committee of the Regions it strengthens the Court’s role as the guardian of the rules of the game and, two, by emphasising the respect by the Union of the national identify of its Member States ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’, it adds to, or even alters, the role of the Court, which is no longer solely responsible for helping attain the Union’s objectives but also for ensuring mutual respect between the Union, on the one hand, and the national, regional and local authorities of the Member States, on the other. However, the fact remains that the changes made with regard to means of redress are minor and cannot therefore be expected to alter radically the Court’s present case-law on applying the principles of proportionality and subsidiarity.
E. Content of the relevant case-law of the Court

1) Summary of case-law

511. The relevant case-law of the Court concerning subsidiarity and proportionality of Community legislative acts can be summarised with ease:

- while reserving the right to annul an act in the event of a manifest error of assessment on the part of the Community legislature, the Court does not become involved in a discussion of the reasons which led the legislature to choose one solution over another where the economic, social and political circumstances applicable to the legislature’s choice are complex and fluctuating, as is normally the case;

- however, the Court closely reviews compliance with the formal aspects of safeguarding the principle of subsidiarity which must appear clearly in the reasons stated for a legislative act and also, in particular since the Amsterdam Protocol entered into force, the presence of arguments in accordance with the guidelines laid down by that Protocol;

- nevertheless, the Court is prepared to examine very closely arguments relating to the intensity of an action, which is covered more by the principle of proportionality, at least where the circumstances are not too complex or subject to change.

2) Indicative judgments

512. The CoR refers, in particular in its Opinion 220-2004, to the judgment of 10 December in Case 491/01 British American Tobacco\textsuperscript{169} given in response to a request for a preliminary ruling from the Administrative Court of the United Kingdom. This is a good example because it shows both how the principles of subsidiarity and proportionality are examined in the same case and the limits within which the Court wishes to keep its monitoring of the European legislature. The Court was asked to rule on the conformity with the Treaty, and in particular with the principle of subsidiarity, of Directive 2001/37/EC concerning the manufacture, presentation and sale of tobacco products. The following paragraphs of the Court’s reasoning clearly illustrate its thinking (emphasis added):

\textquote{It is to be noted, as a preliminary, that the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition (see, to that effect, the tobacco advertising judgment, paragraphs 83 and 95). As regards the question whether the Directive was adopted in keeping with the principle of subsidiarity, it must first be considered whether the objective of the proposed action could be better achieved at Community level.}

\textquote{As the Court has stated in paragraph 124 above, the Directive’s objective is to eliminate the barriers raised by the differences which still exist between the Member States’ laws, regulations and}
administrative provisions on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection, in accordance with Article 95(3) EC.

182 Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case (see paragraph 61 above).

183 It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level.

184 Second, the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity in that, as paragraphs 122 to 141 above make clear, it did not go beyond what was necessary to achieve the objective pursued.

185 It follows from the foregoing conclusions concerning Question 1(f) that the Directive is not invalid by reason of infringement of the principle of subsidiarity.

513. Another Court judgment perfectly illustrates the problems raised by proportionality and subsidiarity and is particularly relevant since it involves an action for annulment. It is the judgment of 5 October 2002 in the case of Germany v the European Parliament and the Council of the European Union. It concerned an action brought by the German government against Directive 98/43/EC on the advertising and sponsorship of tobacco products. The applicant’s principal arguments related to the choice of an inappropriate legal basis, breach of the principles of proportionality and subsidiarity, failure to comply with the obligation to state reasons, breach of fundamental rights, infringement of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and infringement of Article 190 of the EC Treaty (now Article 253 EC). The directive was annulled on the ground that it had no proper legal basis and extensive comments have been made on this judgment from that perspective. In fact, the judgment examines only the plea relating to the legal basis – following a reasoning which is both customary and logical – and concludes that ‘since the Court has upheld the pleas alleging that the choice of Articles 100a, 57(2) and 66 as a legal basis was inappropriate, it is unnecessary to consider the other pleas put forward by the applicant. The Directive must be annulled in its entirety.’ In his opinion Advocate General Geelhoed goes further. He declines to review the application of the principle of subsidiarity because he considers, by long and complex reasoning, that the contested decision is an expression of the exercise of an exclusive Community power, but concludes that the principle of proportionality has been breached following a reasoning which should be cited as an example of the problems raised by Community legislation (emphasis added).

‘148 This test can be employed both to determine whether the Advertising Directive complies with the general principle of proportionality under Community law, which is my immediate concern in this section, and to assess whether it permissibly limits the exercise of fundamental rights such as freedom of expression. However, this test will not necessarily lead to identical results in the two contexts because of the different factors placed in the balance.’

514. ‘149 It follows from my analysis above that it is perfectly legitimate for the Community legislator to pursue simultaneously internal market and public health objectives. Thus, no doubt is cast on the legal basis of the Advertising Directive if health protection plays a part in the analysis of the proportionality of that measure. The theoretical possibility of adopting less restrictive internal market measures, for example the obligatory lifting of national restrictions on tobacco promotion, cannot, therefore, be used to show that the Directive is not the least restrictive manner of achieving the legislator’s objectives, because this would ignore its parallel health protection aim. On the other hand, it is also clear that health protection cannot function independently as an objective. Therefore, however great may be the health benefits of restricting most forms of advertising, even in exclusively domestic contexts, this will only satisfy the first condition of proportionality if the Directive contributes to achieving internal market objectives; otherwise it must be condemned for failing to meet an essential objective which is also a condition of the exercise of competence in the first place. My discussion above of the legal basis of the Directive turns on what I regard as the Community legislator’s manifest error regarding the achievement of either free movement of goods and freedom to provide services or undistorted conditions of competition in the tobacco advertising and sponsorship sector. By the same token, I would regard the Directive as an ineffective means of achieving the objectives pursued, which fails, thus, to satisfy the first element of the test of proportionality. Should the Court decide not to follow my recommendation on the issue of competence, whether it be on the basis of a different appreciation of the general rules governing competence or of their application, I would, none the less, rely upon my discussion of that issue to demonstrate, in the alternative, that the Directive is disproportionate in the wider sense of that term, in that it fails to satisfy the first of the three requirements of proportionality. It is not useful to speculate further on the different potential approaches on the Court’s part to the complex question of competence and on their implications for that of proportionality, as this could simply result in my working on the basis of hypothetical positions which may ultimately represent neither my own view of the issue of competence nor the Court’s.’

515. One of the most recent cases in which infringement of the principles of subsidiarity, proportionality and equal treatment, the right to property, the freedom to pursue an economic activity, and the obligation to state reasons was pleaded illustrates even more clearly the way in which the Court reasons when it examines the principles of subsidiarity and proportionality. That is the judgment of 12 July 2005 in the case of Nutri-Link\(^\text{172}\) in which the legality of Directive 2002/46/EC on food supplements was contested on the basis of a request for a preliminary ruling made by the Administrative Court of the United Kingdom in connection with a dispute concerning regulations adopted by the United Kingdom and National Assembly for Wales (emphasis added).

\(\text{‘99 By part (c) of its question, the national court is asking whether Articles 3, 4(1) and 15(b) of Directive 2002/46 are invalid by reason of an infringement of the principle of subsidiarity.}\)

100 In both these cases, the claimants in the main actions submit that the provisions interfere unjustifiably with the powers of the Member States in a sensitive area involving health, social and economic policy. The claimants in Case C-154/04 add that the Member States are the best placed to determine, on their respective markets, the public health requirements which would justify a barrier to the free marketing of food supplements on their national territory.

101 In that regard, it is appropriate to recall that the principle of subsidiarity is set out in the second subparagraph of Article 5 EC, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

\(\text{172 Joined Cases C-154/04 and C-155/04 The Queen, on the application of Alliance for Natural Health, Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores, Health Food Manufacturers Ltd v Secretary of State for Health, National Assembly for Wales, not yet published.}\)
102 Paragraph 3 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty, states that the principle of subsidiarity does not call into question the powers conferred on the Community by the Treaty, as interpreted by the Court of Justice.

103 As the Court has already held, the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition (British American Tobacco (Investments) and Imperial Tobacco, paragraph 179).

104 In deciding whether Articles 3, 4(1) and 15(b) of Directive 2002/46 comply with the principle of subsidiarity, it is necessary to consider whether the objective pursued by those provisions could be better achieved by the Community.

105 In that regard, it must be stated that the prohibition, under those provisions, on marketing food supplements which do not comply with Directive 2002/46, supplemented by the obligation of the Member States under Article 15(a) of the directive to permit trade in food supplements complying with the directive (see, by analogy, British American Tobacco (Investments) and Imperial Tobacco, paragraph 126), has the objective of removing barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of food supplements, whilst ensuring, in accordance with Article 95(3) EC, a high level of human-health protection.

106 To leave Member States the task of regulating trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned.

107 It follows that the objective pursued by Articles 3, 4(1) and 15(b) of Directive 2002/46 cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community. Consequently, that objective could be best achieved at Community level.

108 It follows from the foregoing that Articles 3, 4(1) and 15(b) of Directive 2002/46 are not invalid by reason of an infringement of the principle of subsidiarity.

Part (d) of the question

109 By part (d) of its question, the national court is asking whether Articles 3, 4(1) and 15(b) of Directive 2002/46 are invalid by reason of an infringement of the principle of proportionality.

110 The claimants in the main actions maintain that those provisions constitute a disproportionate means of achieving the intended objective. The arguments put forward in support of that claim are those set out at paragraphs 54, 62, 70 and 71 of this judgment.

111 However, it is clear from the analysis set out at paragraphs 55 to 60, 63 to 70 and 72 to 92 of this judgment that Articles 3, 4(1) and 15(b) of Directive 2002/46 are measures appropriate for achieving the objective which they pursue and that, given the obligation of the Community legislature to ensure a high level of protection of human health, they do not go beyond what is necessary to attain that objective.

112 It follows that Articles 3, 4(1) and 15(b) of Directive 2002/46 are not invalid by reason of an infringement of the principle of proportionality.
The Court’s reasoning demonstrates a rather detailed review of the proportionality of the directive.

First of all, it must be stated that Article 4(7) of Directive 2002/46 – as is clear from its actual wording and from the legislative history of the directive – is intrinsically linked to Article 4(6) of the directive, as was confirmed at the hearing by the Parliament, the Council and the Commission.

It follows that the power of the Member States laid down in Article 4(7) of Directive 2002/46 to continue to apply, in compliance with the rules of the Treaty, existing national restrictions or bans on trade in food supplements containing vitamins and minerals or vitamin and mineral substances not included on the positive lists is merely the corollary of a Member State’s ability under Article 4(6) to allow in its territory until 31 December 2009 the use of such constituents on the conditions set out in that provision.

As the Advocate General has observed at point 22 of his Opinion, the purpose of Article 4(7) of Directive 2002/46 is solely to provide that Member States other than a State which allows on its territory, within the limits and in compliance with the conditions set out in Article 4(6), the use in the manufacture of food supplements of vitamins, minerals or vitamin or mineral substances not included on the positive lists, do not have to allow imports into their own territory of food supplements containing such ingredients.

The argument of the claimants in the main actions which is founded on Article 4(7) of Directive 2002/46 thus does not give grounds for concluding that the prohibition at issue is unnecessary.

Next, as regards Article 11(2) of Directive 2002/46, when that provision is read in conjunction with the 8th recital to the directive, it becomes clear that its purpose is to preserve, until specific Community rules are adopted, the application, in compliance with the Treaty, of national rules concerning nutrients other than vitamins and minerals or other substances with nutritional or physiological effect used as ingredients in food supplements.

Article 11(2) of Directive 2002/46 is thus directed solely at food supplements containing nutrients or substances not falling within the material scope of the directive. Consequently, it is of no relevance for the purpose of ascertaining whether the prohibition in Articles 3, 4(1) and 15(b) of the directive is necessary.

Second, the claimants in the main actions maintain that the prohibition is disproportionate.

They submit in that regard that the positive lists are inadequate. That is because the list of substances in Annex II to Directive 2002/46 was compiled on the basis not of the criteria pertaining to safety and bioavailability set out in the 11th recital in the preamble to the directive but of lists identifying ingredients authorised in the manufacture of food for particular nutritional purposes. It follows that the prohibition affects a large number of nutrients which are none the less suitable for a normal diet and are currently manufactured and marketed in certain Member States and which have hitherto not been shown to represent a risk to human health. The prohibition in Directive 2002/46 is also unjustified and disproportionate in the case of vitamins and minerals in natural forms, although they are usually found in the normal diet and are better tolerated by the body than vitamins and minerals from synthetic sources.

It must be stated, at the outset, that if the various recitals in the preamble to Directive 2002/46 are read together, it is apparent that the directive concerns food supplements containing vitamins and/or minerals derived from a manufacturing process using ‘chemical substances’ (11th recital), and not food supplements whose ingredients include ‘amino acids, essential fatty acids, fibre and various plant and herbal extracts’ (6th recital), whose conditions for use consequently remain ‘until … specific Community rules are adopted’ within the scope of ‘national rules’, ‘without prejudice to the provisions of the Treaty’ (8th recital).

Next, it must be noted that the positive lists correspond, as the claimants in Case C-155/04 have observed, to the list of substances included in the categories ‘vitamins’ and ‘minerals’ in the Annex to Commission Directive 2001/15/EC of 15 February 2001 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses (OJ 2001 L 52, p. 19).
65 As is stated in the 4th recital in the preamble to Directive 2001/15, the selection of the substances identified in the annex to the directive took into account criteria of safety and availability for use by humans, criteria referred to in the 11th recital to Directive 2002/46.

66 As is clear when the 10th and 11th recitals to Directive 2002/46 are read together, the fact that a certain number of chemical substances used as ingredients in food supplements marketed in some Member States are currently not authorised at European level is explained by the fact that the substances at issue in the main actions had not, at the time when the directive was adopted, received a favourable evaluation, from the point of view of the criteria of safety and bioavailability, from the competent European scientific authorities.

67 The information provided by the claimants in the main actions in their written observations about certain vitamin or mineral substances not included on the positive list in Annex II to Directive 2002/46 is not such as to cast doubt on the merits of that explanation. It is apparent from it that at the time when the directive was adopted those substances had not yet been evaluated by the Scientific Committee on Food or that, at the very least, the committee continued to entertain serious doubts, in the absence of adequate and appropriate scientific data, regarding their safety and/or their bioavailability.

68 In those circumstances and in view of the need for the Community legislature to take account of the precautionary principle when it adopts, in the context of the policy on the internal market, measures intended to protect human health (see, to that effect, Case C-157/96 National Farmers’ Union and Others [1998] ECR I-2211, paragraph 64, and Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraph 100, and Case C-41/02 Commission v Netherlands [2004] ECR I-0000, paragraph 45), the authors of Directive 2002/46 could reasonably take the view that an appropriate way of reconciling the objective of the internal market, on the one hand, with that relating to the protection of human health, on the other, was for entitlement to free movement to be reserved for food supplements containing substances about which, at the time when the directive was adopted, the competent European scientific authorities had available adequate and appropriate scientific data capable of providing them with the basis for a favourable opinion, whilst giving scope, in Article 4(5) of the directive, for obtaining a modification of the positive lists by reference to scientific and technological developments.

69 It is also necessary to state in that regard that, by virtue of Article 7 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1), the Community legislature is entitled to adopt the provisional risk management measures necessary to ensure a high level of health protection and may do so whilst awaiting further scientific information for a more comprehensive risk assessment, as is stated in the 10th recital to Directive 2002/46.

70 Contrary to the contention of the claimants in Case C-154/04, a negative list system, which entails limiting the prohibition to only the substances included on that list, might not suffice to achieve the objective of protecting human health. Reliance in this instance on such a system would mean that, as long as a substance is not included on the list, it can be freely used in the manufacture of food supplements, even though, by reason of its novelty for example, it has not been subject to any scientific assessment apt to guarantee that it entails no risk to human health.”
517. A detailed analysis of the reasoning followed by the Court shows that the expertise necessary to analyse compliance with the principles of subsidiarity and proportionality is more technical than purely legal. Leaving aside the question of the extent to which an action raising questions concerning proportionality is admissible under Protocol No 2, it would therefore appear that the CoR does in fact have available to it, through its members, the necessary expertise on matters which concern the RLAs. This is particularly important to bear in mind as regards the CoR’s possibility to intervene in support of other applicants where the question of the admissibility of arguments relating to proportionality does not arise.
SECTION 2
ACTION FOR ANNULMENT BROUGHT AGAINST A LEGISLATIVE ACT ON GROUNDS OF FAILURE TO COMPLY WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

518. Article 8 of the Subsidiarity Protocol provides for an action for annulment against a legislative act on grounds of failure to comply with the principle of subsidiarity. It should be noted that the first paragraph of the Article could perfectly well have been included in Protocol No 1 on the role of national parliaments in the European Union.

**Subsidiarity Protocol, Article 8**

> The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

519. This right to bring an action must be placed in a broader context, namely that of all actions provided for in the Constitution. In this case, it should be observed that the only two changes that the Constitution makes to the system of actions which exists in the EC Treaty are, firstly, the grant to the CoR of the right to bring an action for annulment to protect its prerogatives – provided for in Article III-365(3) – and, secondly, the relaxation of the conditions under which a natural or legal person may institute proceedings against a regulatory act which is of direct concern to him or her and does not entail implementing measures, provided for in Article III-365(4).

**A. Action notified by a Member State on behalf of its parliament or a chamber**

520. It is first necessary to determine the precise scope of the first paragraph of Article 8 of the Protocol. There is no real argument for claiming that the Constitution would create an obligation on the Member States to notify actions to the Court of Justice on behalf of their national parliaments, since this would run counter in particular to Article I-5, under which the Union is to respect the ‘fundamental structures, political and constitutional’ of its Member States. It is clear from the wording of the Constitution for Europe as a whole, and in particular Article I-5, and from the work of the European Convention, of the working groups on subsidiarity and on national parliaments, and the Praesidium, that the Protocol does not seek to impose on the Member State an obligation automatically to notify any action at the request of its parliament or a chamber of parliament.
521. It should be noted that in its second report on the principle of subsidiarity \(^{173}\) the British House of Lords makes sizeable observations on whether or not the system of actions provided for in Article 8 for the national parliaments is subject to the conditions laid down in Article III-365 of the Constitution, even though the Protocol refers specifically to it.

522. The wording of Article 8 of the Subsidiarity Protocol does not permit the Court to grant an action brought by a parliament or a chamber of parliament without it being formally notified by a Member State, that is to say by the executive power empowered to represent that State internationally. It should further be noted that parliaments do not normally have legal personality on the same basis as the State or regional and local authorities or their public local bodies. They are only able to enter into contracts and bring proceedings concerning relations with their employees and protection of their real estate assets.

523. The Protocol calls on the Member States – that is to say in practice their governments – to take the steps necessary to arrange a procedure permitting:

- the government to notify actions on behalf of its parliament or chambers of that parliament, either automatically or by choice based on an assessment by the government of the expediency of such action, and

- the various national institutions to make arrangements, where necessary, to coordinate the positions of the various chambers of parliament and the government.

524. The reference to the fact that Members States are to notify an action ‘*in accordance with their legal order on behalf of their national Parliament or a chamber of it*’ simply means, in our view, that formally there will be, from the point of view of the Court of Justice, an action brought by a Member State and that it is for each Member State to provide for:

- either an obligation to bring such an action, as is already the case in Belgium,

- or account to be taken of the chambers’ arguments in the decision whether or not to bring such an action. In this case any challenge to this decision could not be referred to the Court of Justice of the Union but only, if necessary, to the courts of the Member States, and in particular to their constitutional courts.

525. The Member States will, naturally, be left entirely free as to how they arrange this system. If a government declines to notify an action brought by a chamber of its parliament or one of its parliaments, it is only having regard to the provisions of the constitution and national law of that State that it will be possible to resolve the matter. In some cases it may be that the decision lies with the constitutional court, in others it will

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be for the institutions to exercise their political powers. One of the main factors to take into account is political in nature. It could appear paradoxical for the government of a Member State to submit an action brought by a chamber of its parliament against a legislative act whilst itself adopting a position in the favour of that act.

526. Such an interpretation gives rise to the thought that only the CoR will, in any event, be able bring proceedings against a legislative act before the Court of Justice to establish whether the principle of subsidiarity has been complied with where, in spite of the requests of the national parliaments, the governments of the Member State do not wish to bring an action before the Court. This is an extremely important factor in the position of the CoR which it should examine in all these respects, in particular the political aspects.

B. – Actions for annulment based on review of the principle of subsidiarity

527. The first paragraph of Article 8 is worded in such a way as to possibly give the impression that there are three specific means of bringing an action for review of subsidiarity:

i. an action brought by a Member State;

ii. an action notified by a Member State on behalf of its national parliament or a chamber of that parliament;

iii. an action brought by the CoR against legislative acts for the adoption of which the Constitution provides that it be consulted.

528. The argument relating to failure to comply with the principle of subsidiarity can already be presented in any action for annulment under the present Treaties. Therefore, it is necessary to add to the cases expressly provided for in Protocol No 2 the cases included in an ‘ordinary’ action for annulment which makes it possible for two categories of applicants to dispute an act’s conformity with the principles of subsidiarity and proportionality on the basis of Article III-365, that is to say privileged applicants, namely the Member States, the Commission, the Council and the Parliament (Article III-365(2)) and any natural or legal person who has an interest in bringing proceedings (Article III-365(4)).

529. The question whether the argument relating to subsidiarity could be put forward by the ECB, the Court of Auditors or the CoR in an action for annulment to protect their prerogatives can be viewed in two ways:

530. i. It may be considered that there can be a link between subsidiarity and the protection of the prerogatives of these institutions and bodies in so far as the principle of subsidiarity – a dynamic principle – operates both in a ‘decentralising’ manner to avoid action by the Union and in a ‘centralising’ manner to impose such action. The ECB and
the Court of Auditors could probably find cases in future where the principle of subsidiarity has not been complied with because the Union failed to take sufficient action.

531. The view may be taken that Article III-365 should have been supplemented to take account of cases one and two and in particular the action brought by the CoR, which also gains the right to bring an action for protection of its prerogatives under Article III-365(3). In any event, to answer the question put by the House of Lords, it is clear that the rules laid down in Article III-365 also apply to actions for establishment of compliance with principle of subsidiarity which could be ‘notified’ by a Member State on behalf of its national parliament and also to any action brought by the CoR.

532. ii. The view may also be taken that Protocol No 8 merely defines a specific case of an action for protection of prerogatives brought by the Committee of the Regions. The fact that it has the possibility to bring an action for annulment to review compliance with the principle of subsidiarity therefore means that monitoring this principle is a general prerogative of the CoR.

C. - Cases where an action for annulment may be brought

533. If the rules laid down in Article III-365 apply to an action for annulment on grounds of infringement of the principle of subsidiarity, they must be subject to the conditions relating to cases of where an action for annulment may be brought, which are laid down in Article III-365(2), namely ‘lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.’ The notion of ‘cases where an action may be brought’ means that only actions based on arguments which can be covered by one of these categories can be granted by the Court of Justice. Review of compliance with the principle of subsidiarity could be pleaded in any of those four cases and in a manner which differs depending on the case concerned.

1) Lack of competence

534. The ground of lack of competence results in the annulment of an act because the Constitution does not confer on the institution which adopted the act the power necessary to bring proceedings. In three cases, actions have thus been brought against Community acts based on the argument that the principle of subsidiarity in the case concerned would lead to the Community not having the power to take action. The Court has not accepted this reasoning and dismissed these actions. This ground is nevertheless relevant to subsidiarity in two respects.

535. First, a legislative act which was adopted in an area in which the Constitution does not provide a legal basis for action by the Union could be annulled. In reality the

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first question which will arise will be the interpretation of the Article put forward as the legal basis for the legislative act – or that of the scope of the flexibility clause laid down in Article I-18 – in order to establish whether these provisions can cover the envisaged action. The case-law of the Court of Justice in the case concerning the tobacco advertising directive clearly illustrates this situation, as is explained in the previous section. Germany, which had been outvoted in the Council, brought an action for annulment against the directive of the Council and the Parliament, arguing that this directive could not be based on Article 95 EC which establishes harmonisation in relation to the internal market. The Court of Justice found in Germany’s favour and annulled this directive on the grounds that it was founded on an inappropriate legal basis and no other legal basis was available.

536. Second, it is technically possible for the Union to have the power to legislate in the envisaged area but for this power not to be conferred on the institution taking the decision. The question arises in particular where the various legal bases which could be relied on lay down different decision-making procedures and where there is a choice between a legal basis founded on the normal legislative procedure and another basis conferring decision-making power on the Council alone or on the Commission alone. Lack of competence could be considered as an argument for bringing an action where there are several possible legal bases for an action but the institutions have chosen a legal basis which is regarded as incorrect by the applicant. In practice, this type of argument is considered to relate to a breach of the Treaties.

537. It is unlikely that the CoR could find itself in the situation of being the only possible applicant in an action against a legislative act which has been founded on an incorrect basis. It is much more likely that there will be occasions, as in the case of the tobacco advertising directive, where a particular Member State that has been outvoted will bring an action or notify an action on behalf of its parliament to dispute the legal basis on which a legislative act has been based. In this context, the CoR could be persuaded to bring an action against a legislative act at the same time as a Member State or a parliament. The use of an inappropriate legal basis could easily be regarded as an infringement of the principle of subsidiarity.

2) Infringement of an essential procedural requirement

538. The second case where an action for annulment may be brought under Article III-365(2) is infringement of an essential procedural requirement. This case is particularly important with regard to the Subsidiarity Protocol and the powers of the CoR. There is no doubt that the obligation to consult the CoR, on the one hand, and compliance with the earlier warning procedure, on the other, constitute ‘procedural requirements’ within the meaning of Article III-365 since they are requirements laid down by the Constitution itself, such as the obligation to give reasons and to ‘consult widely’.

539. This case means that it will be possible to contest and annul a legislative act even if the act in question does not, in substantive terms, entail an infringement of the principle
of subsidiarity. The mere fact that the procedures have not been complied with and, for example, that the CoR has not been consulted, should result in the act being annulled. All the Court’s case-law concerning the obligation to consult the European Parliament – before it was given powers of this kind by the Treaty of Maastricht (codecision) – demonstrates the importance of this type of procedural requirement. As regards the institutions, this does not constitute an obligation to accept the opinions issued by the CoR or the ESC, or, where appropriate, the national governments, but rather an obligation to request such an opinion where the Constitution so provides and to take the time necessary to allow the authors of opinions to give their opinions and also the time necessary to take account of the content of these opinions.

540. The procedural requirements with which the institutions must comply in the legislative procedure also include the obligation to state reasons for legislative acts, as with other acts of the institutions. It should be noted in this regard that existing case-law on the principle of subsidiarity relates to precisely this matter. Normally, the Court of Justice establishes whether such grounds have been stated and whether they are more or less complete and specific to the act concerned, but does not assess the content of this statement since it considers that the Community institutions must have a broad margin of discretion.

3) Infringement of the Constitution or of any rule of law relating to its application

541. The third case where an action for annulment may be brought is the most important. Two comments must be made in this regard.

542. First, the notion that infringement of the Constitution covers any rule of law relating to its application covers:

- the Constitution,

- all secondary law, including existing secondary law, which will continue to apply as acquis communautaire, as provided for in IV-438 of the Constitution,

- the rules of law and principles laid down by the case-law of the Court of Justice.

543. This means that infringement of the principle of subsidiarity can result not only from an infringement of the principle as set out in Article I-11 but also from an infringement of the principle of subsidiarity as may be set out and specified in a law. One of the problems that arise is whether the legislative act to be taken into account at the time of the action can be deemed to repeal the previous wording of a directive or regulation. The problem could arise in particular where there was a conflict between an expression of the principle of subsidiarity as included in a framework law, on the one hand, and in a new law, on the other. The problem of order of precedence would be even more acute where there is a conflict between an expression of the principle of subsidiarity in a European law or framework law – or in a previous directive or previous regulation
covered by the definition of law or framework law in the Constitution – and a rule of the new Constitution.

544. It would appear that infringement of the principle of subsidiarity by a regulation could not be pleaded in an action notified on behalf of a national parliament since the Subsidiarity Protocol provides that the procedure applies only to legislative acts. An action for annulment, however, is available generally to other applicants – Members States, institutions and applicants who satisfy the conditions laid down in Article III-365(4) – to contest, where necessary, a new regulation which fails to comply with the principle of subsidiarity. As far as the CoR is concerned, the matter is resolved as it will be entitled to bring an action for annulment to protect its prerogatives.

545. The second observation is that infringement of the Constitution or of any rule of law relating to its application means in particular compliance with the two principles of subsidiarity and proportionality. We refer in that regard to the observations in section 2.6 below.

4) Misuse of powers

546. The notion of misuse of powers means, in everyday language, that a person or an authority has used for his or its own purposes a power conferred on him or it for another purpose. Article III-365(2) should not be construed in this sense. As laid down in the case-law of the Court of Justice, the notion of misuse of powers is essentially to be understood as a misuse of procedure. There is a misuse of procedure where an institution uses a legal basis granting it the power to wield a particular instrument for a purpose other than that for which that instrument was given to it.

547. The notion of misuse of power could be particularly important in connection with the Constitution for Europe, in the light of Article 1(3), entitled The Union’s objectives, since it will be necessary in all cases for the powers granted to the Union to be used to develop these objectives. It is conceivable that a number of questions will arise and there could be differences of interpretation as to the use of a particular legal basis in accordance with the Union’s objectives as set out in Article 1(3). It is possible that case-law relating to the conformity of legislative acts with the Union’s values as laid down in Article 1(3) of the Constitution will be established in the event of a manifest error of assessment. It is therefore possible – but by no means certain – that the arguments which will be developed in the future in connection with review of the principle of subsidiarity will relate to the consistency, in terms of subsidiarity, of the Union’s objectives and acts.

548. One of the major problems in relation to proceedings concerning misuse of powers is that it is for the applicant to furnish the relevant evidence and that the evidence must be objective, something which is difficult to prove outside cases of misuse of procedure. The Court accepts this ground if it ‘appears, on the basis of objective, relevant and consistent factors, [that the measure has been taken] with the exclusive

purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.\footnote{Joined Cases C-133/93, C-300/93 and C-362/93 Crispoltini [1994] ECR I-4863.}

549. The question remains whether there is a margin of discretion here which the Court of Justice will wish to use or whether it will merely be an argument which should apply as between the various institutions and the CoR in assessing the conformity of a draft legislative act with the principle of subsidiarity. It could also be noted that taking account of the Union’s objectives and values could work either towards reducing the intensity of Community action or have the opposite effect, that is to say increasing that intensity. The existence of these objectives and values also adds to the potentially centralising or potentially decentralising nature of the principle of subsidiarity. This thought helps remind us that monitoring of the principle of subsidiary must in no way be reduced to a position of scepticism vis-à-vis Union action and must, on the contrary, involve constructive dialogue aimed at identifying actions more appropriate to attaining its objectives.

D. - The time-limits for an action for annulment

550. Article III-365(6), which lays down the conditions relating to the time-limit for an action for annulment, merely reproduces the present wording of the sixth paragraph of Article 234 EC and all the case-law relating to that condition will therefore remain applicable.

551. The action must be lodged with the registry of the Court of Justice or the Court of First Instance before the time-limit expires. There are various ways of calculating the time-limit depending on whether the act is one which is notified to the possible applicant or one which is published, as is the case with legislative and regulatory acts. The time-limit runs from the day on which the act is published in the Official Journal of the European Union (Series L in the case of acts with mandatory effect). Publication is deemed to have been effected on the day the copy of the Official Journal reproducing the act is actually available in all Community languages from the Office for Official Publications of the European Communities. This is normally the date which appears on the edition of the Official Journal that reproduces the act, unless the applicant furnishes proof to the contrary. Whether or not the wording has been changed in comparison with provisional draft versions which may have been made public, in particular on the Internet, is of no relevance. The expiry of the time-limit for an action means the right to bring an action for annulment is barred by lapse of time. It is not possible to extend the time-limit by asking the institution which framed the act to reconsider it and then by contesting its decision not to.\footnote{Case T-514/93 Cobrecaf SA v Commission [1995] ECR I-621.}

552. Unlike the six-week time-limit laid down in Protocol No 2 for issuing the reasoned opinions of the national parliaments, the two-month time-limit for an action for
annulment must be complied with absolutely and there will be no possibility of exceeding that time-limit. Once the time-limit has passed it is no longer possible to bring an action against the legislative act which therefore becomes applicable once and for all. However, the fact remains that it is possible subsequently to envisage the constitutionality of such an act being challenged by a request for a preliminary ruling from a court or tribunal of Member State. It is important to bear this case in mind. Expiry of the time-limit of two months after publication of the legislative act does not mean that it is entirely immune from an action. We will return later to the significance of a request for a preliminary ruling and the rules governing such a request.

553. The two-month time-limit may appear to be particularly short, but the entire duration of the decision-making procedure must naturally be added to the period of reflection on the arguments which may be presented, where appropriate, against a legislative act. These arguments may already be developed once the draft is presented. In particular, they will be developed by the national parliaments in the early warning procedure or in the consultation with the CoR itself, where such consultation is mandatory. The two-month time-limit is therefore less important to developing the substance of the arguments or from the point of view of the means necessary for the legal assessment of the conformity of an act with the principle of subsidiarity than it is as a procedural requirement. From the point of view of the CoR the procedural requirement essentially concerns the mechanism by which the decision will be taken, where appropriate, to bring an action. It is clear that the CoR’s internal decision-making mechanism will have to provide for a way of overcoming the difficulties arising from its session timetable. The fact that an argument can already be developed before the final adoption of the act by the legislature should allow a decision-making mechanism based on various situations to be developed, thus leaving it to particular body of the CoR to decide whether actually to submit an application – which will be formally signed by the President of the CoR – if one of the situations under consideration within this mechanism materialises.
SECTION 3
POSSIBILITIES OPEN TO THE COMMITTEE OF THE REGIONS FOR BRINGING AN ACTION BEFORE THE COURT OF JUSTICE

554. One of the main innovations from the point of view of the CoR and the RLAs is the fact that the Constitution grants the CoR the right to bring an action to protect its prerogatives (Article III-365(3)) and the possibility, under the Subsidiarity Protocol, to bring an action against legislative acts for the adoption of which the Constitution provides that it be consulted. It should be stressed that these two possibilities for bringing an action are very closely linked and that there are other significant possibilities for bringing an action to review the principles of proportionality and subsidiarity, including actions which can be brought already, without waiting for the Constitution for Europe to enter into force.

A. - Action for annulment brought by the CoR to protect subsidiarity against a legislative act

Second paragraph of Article 8 of the Subsidiarity Protocol

In accordance with the rules laid down in [Article III-365], the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

555. An initial condition for an action for annulment is that it must relate to legislative acts. However, that does not mean that all actions against a non-legislative act are prohibited. In accordance with the principle of ensuring constant respect, the CoR should not merely establish that laws and framework laws comply with the principle of subsidiarity but also ensure respect for European regulations and decisions in order to establish that they conform to these principles. In reality this should not be too difficult in quantitative terms since it will be quite easy to lay down criteria governing which types of regulation are to be examined by the CoR. If the CoR considers that a regulation has been adopted instead of a European law or framework law, it will be able to bring an action against that regulation in order to safeguard, through the Court, compliance with the choice of the most appropriate legal basis, by virtue of the principle of subsidiarity as laid down in Article I-11.

556. A second condition specific to any action brought by the CoR is that it may relate only to ‘European legislative acts for the adoption of which the Constitution provides that it be consulted’. This therefore means that European laws and framework laws which will be adopted on bases providing for its mandatory consultation and those providing for mandatory consultation of the ESC, if one draws the appropriate conclusions from the fact that Article III-388 provides that where CoR must be consulted, it may ‘where it considers that specific regional interests are involved … issue an opinion on the matter.’
It would appear that anyone wishing to restrict the right to bring an action to situations in which the CoR must be consulted should have an easy time of it because of the five language versions only the French leaves scope for interpretation (‘provides for its consultation’ and not ‘requires its consultation’) and that the Convention documents contain sufficient indications that the aim was to grant the CoR a right to bring actions in the areas in which it must be consulted. However, the equal force of the language versions means that the French version has precisely the same mandatory force as the others and the scope it appears to leave can be exploited. Indeed, it is more consistent with the objective of the Protocol which is to increase the powers of the CoR as the representative of the RLAs and whose role is recognised by Articles I-5 and I-11, in particular as regards subsidiarity. It must be read in conjunction with the second sentence of the third paragraph of Article III-388 which provides that the CoR may issue an opinion on provisions on which the ESC must be consulted ‘[w]here it considers that specific regional interests are involved’. This opinion is different from the opinions issued on its own initiative provided for in the following sentence of the same article. In this case a teleological interpretation based on effectiveness results in a broader interpretation being placed on Article 8 of the Protocol and enables ‘specific regional interests’ to be protected more fully. An action for protection of prerogatives could be the instrument for ensuring, in due course, recognition of such an interpretation.

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558. The Constitution also provides for mandatory consultation of the CoR on employment policy (Article III-206), but the Council may only adopt ‘guidelines’ which do not take the form of a legislative act and therefore cannot form the subject of an action for annulment brought by the CoR.

559. At this juncture it should be emphasised that the CoR does have the power to bring an action for protection of its prerogatives under Article II-365. This means that the CoR’s ability to bring an action is not limited merely to examining legislative acts which have in fact been adopted on a legal basis providing for its consultation. In all cases where the possibility of adopting a legislative act on at least two different legal bases exists, the CoR will have an interest in establishing whether it considers that the correct legal basis has been chosen and will therefore be able, where applicable, to contemplate bringing an action where, in its view, the legal basis chosen was wrong.

560. It should also be borne in mind that this reasoning applies not only in the case of an action before the Court of Justice but also in relation to discussions with the institutions during the adoption phase of the legislation. The CoR could naturally intervene by means of an opinion in this phase by requesting a change in relation to the legal basis proposed for the act. One of the difficulties which may arise in this regard is the fact that under Article III-172 measures relating to ‘the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’ are to be adopted after consultation of the ESC but without mandatory consultation of the CoR. There are situations under the present Treaties where, given a choice between the legal basis corresponding to the future Article III-172 – Article 95 of the EC Treaty – and another basis, the Commission has preferred to use the Article relating to harmonisation of legislation for the purpose of the establishment and functioning of the internal market.

561. A third detail must be mentioned in relation to the acts which the CoR could contest by means of an action for annulment. An action for annulment to establish the conformity of legislative acts with the principle of subsidiarity is directed at European laws and framework laws once they have been adopted finally in the procedure laid down for that purpose. Such an action cannot be used against decisions taken during the procedure for drafting or adopting such acts. The same does not apply to an action for protection of prerogatives where it is sufficient that a decision – which may be a procedural decision which has become final – exists for the CoR to be able to bring an action. There is a significant limit to the possibilities available for bringing an action for annulment since the preparatory acts cannot be contested independently of the final act which they have prepared. According to case-law, where the preparation of an act is carried out in several stages, in particular following a procedure within one of the

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institutions, only measures which definitively establish the institution’s position following that procedure,\textsuperscript{178} apart from intermediate measures whose objective is to prepare the final decision and cases where the institution reserves the right to review its position […]. Nevertheless, care must be taken in extending this case-law to the cases of interest to us because it essentially concerns measures taken by the Commission in the exercise of its decision-making powers whilst any actions brought by the CoR would fall within the scope of reviewing the legislative procedure which is different in nature and involves several institutions.

562. Article III-365 of the Constitution for Europe, which also reproduces Article 230 EC, lays down a very precise period within which an action for annulment may be brought. ‘The proceedings provided for in this Article shall be instituted within two months of the publication of the act, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the plaintiff’s knowledge, as the case may be’. In the case of an action against a legislative act which infringes the principle of subsidiarity, it is the publication of the act in the Official Journal of the European Union which sets the period in train. This is particularly important in practice since it means that in actual fact the CoR will have over two months in which to form an opinion on the compliance or otherwise of a legislative action with the principle of subsidiarity and on the desirability of bringing an action. Not only does publication in the OJ not immediately follow the adoption of the act – there is always a period of at least two days between the two – the changes made in the course of a legislative procedure are not necessarily likely to change the assessment of an act in terms of subsidiarity.

563. On the contrary, where there are doubts as to subsidiarity close attention will inevitably be paid to the draft legislative act which poses a problem. Where in the end the European institution adopts a European legislative act which is contrary to the principle of subsidiarity, it is very likely that either a number of parliaments or the CoR, or both, will be moved in the course of the legislative procedure to assert that the act does not comply with the principle of subsidiarity. In these circumstances the two-month period is one which should be used essentially to allow a decision to be taken within the CoR as to the desirability or otherwise of bringing such an action. If the decision-making procedure chosen by the CoR required a decision of its plenary assembly to bring an action, that could create problems. However, these problems could largely be overcome by a procedure which allowed the plenary to adopt a conditional position permitting, if necessary, the body responsible for pursuing the matter of subsidiarity to take a decision one way or the other, depending on the European institutions’ final decision.

564. Article III-365, to which Article 8 of the Subsidiarity Protocol refers, provides, as we have seen, that actions may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers. As has been noted, legislative acts could be contested very broadly by reference to the principle of subsidiarity on the basis of arguments alleging an infringement of the Constitution or of any rule of law relating to its application, but other cases for bringing an action for

\textsuperscript{178} Case 78/63 Hubert English Special Edition 1964, p. 367.
annulment are not automatically ruled out. In particular, the issue of lack of competence can be very important where there are possible choices between different legal bases.

B. – Action for annulment to protect the CoR’s prerogatives

565. Article III-365 of the Constitution will give the CoR the same possibility to bring an action as was already available to the Court of Auditors and the European Central Bank, that is to say the possibility to safeguard its prerogatives. It should be noted that to date neither the Court of Auditors nor the Central Bank has brought such an action to protect their prerogatives with the result that there is no case-law relevant to the CoR other than concerning the prerogatives of the European Parliament.

Article III-365

3. The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

566. The CoR’s situation is somewhat similar to that of the European Parliament before the Treaty of Nice granted it the possibility of being a full privileged applicant on a par with the Member States, the Council and the Commission. Just like the CoR the European Parliament has prerogatives which are expressed in the procedure for adopting Community acts. It is these acts which are of interest to use here and not issues relating to strictly institutional prerogatives which would not affect the adoption of a legislative act. The CoR’s situation clearly differs from that of the European Parliament and the Court of Auditors in that it does not have official status as a Union ‘institution’ and does not have a position comparable with the European Parliament in the legislative procedure. From the case-law of the Court of Justice concerning the exercise of the European Parliament’s consultative power it is possible to infer principles which could apply to the CoR, in particular as regards the time-limits of the legislative procedure which allow the consultation procedure to be taken seriously. One of the consequences of this situation is that it is at the European Parliament’s legal service that the CoR has the best chances of finding relevant expertise which goes beyond a mere analysis of case-law.

567. There can be no certainty that all the case-law on the Parliament’s prerogatives relating to consultation would necessarily be applied by the Court of Justice in an action brought by the CoR. One of the essential points on which the CoR should develop its thinking is the link between an action for protection of its prerogatives and an action for

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179 1. The Court of Justice of the European Union shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

180 2. For the purposes of paragraph 1, the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.
annulment on grounds of infringement of the principle of subsidiarity as a means of guaranteeing use of the legal bases which the CoR deems to be most appropriate in the legislative procedure.

**C. - Possibilities for the CoR to intervene and adopt positions in support of actions brought by other applicants**

568. Under the European Constitution – as is already the case under Community law – it is possible for a number of institutions, bodies, offices and agencies, and physical and legal persons to ‘intervene’ in proceedings instituted by others.

569. This is a possibility which should be studied closely by the CoR. It is entirely possible that in future actions for annulment will be brought by Member States or notified on behalf of Member States’ parliaments or brought by physical or legal persons which fulfil the requirements necessary to have an interest in bringing proceedings under Article III-365(4). The CoR will therefore have to ask itself whether it is appropriate for it – technically and legally and above all politically – formally to support arguments put forward by the applicants and even to develop and reinforce certain points of those arguments.

570. The possibilities of ‘intervening’ in a action for annulment in certain other actions should be distinguished from another possibility whose effects can be similar to actual ‘intervention’, that is to say the ‘submission of observations’ in connection with a request for a preliminary ruling from a court or tribunal of a Member State.

1) Actual intervention

571. The possibility of intervention is provided for in Article 40 of Protocol No 3 on the Statute of the Court of Justice of the European Union, annexed to the Constitution for Europe. This Protocol essentially reproduces – but also amends and adapts to the Constitution – the present Protocol on the Statute of the Court of Justice which was altered significantly after the entry into force of the Treaty of Nice.

**Protocol No 3, Article 40**

*Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court of Justice. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.*

*Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court of Justice where one of the fields of application of that Agreement is concerned.*

*An application to intervene shall be limited to supporting the form of order sought by one of the parties.*
572. Article 40 of Protocol No 3 is particularly interesting because it clarifies the CoR’s position as a body of the Union. The CoR may intervene in cases before the Court of Justice. There is no limitation on the nature of these cases, except where – as will be seen below – the question referred for a preliminary ruling does not concern a case before the Court of Justice of the Union but a case before a court or tribunal of a Member State and cannot therefore be subject to interventions.

573. The condition on the CoR being able to intervene in a case before the Court is that it must be able to ‘establish an interest in the result of a case submitted to the Court of Justice’. As far as the monitoring of subsidiarity and proportionality is concerned it will be easy for the CoR to show that it has an interest in the outcome of the case wherever there is an action – for annulment or otherwise – aimed at establishing compliance with the principle of subsidiarity by a legislative act adopted on a legal basis providing for mandatory consultation of the CoR and wherever a legal basis providing for such consultation should have been chosen as the basis for a Union action. It is sufficient to refer to the second paragraph of Article 8 of the Subsidiarity Protocol, which provides for the possibility of an action by the CoR, to establish such interest. The matter is more difficult in the case of optional consultation, but the wording of Article III-388 makes it possible to envisage such interest also being shown in the case of mandatory consultation of the ESC.

574. Intervention is useful because it makes it possible to go beyond this situation. Even where consultation of the CoR is not mandatory, there will be a number of situations where the CoR may try to show that it has an interest in the outcome of the case, either on its own behalf or as the representative of the RLAs. That will certainly be the case wherever the case before the Court of Justice relates to compliance by the Union institutions with one of the points of the procedure laid down by the Subsidiarity Protocol. In particular, the CoR’s intervention should be possible wherever either the extent of the consultations carried out by the Commission or the reasons which it has put forward to prove the conformity of an act with the principle of subsidiarity are contested.

575. Moreover, it is possible to extend this reasoning to the review of the principle of proportionality since, as has been seen, all the institutions have a duty to ensure respect for the principles of subsidiarity and proportionality. The CoR, as the representative of the RLAs, may therefore decide to intervene in support of an argument relating to the principle of proportionality or the principle of subsidiarity.

576. The CoR’s intervention may be ‘limited to supporting the form of order sought by one of the parties’. The term ‘form of order’ is a technical term meaning the request made by the applicant, for example, the partial annulment of a legislative act. The intervener cannot seek new forms of order, for example complete annulment of the act when the applicant is seeking only a partial annulment.

577. The Court of Justice has conceded that the intervener’s interest may differ from that of the party bringing the action. Thus, while supporting the same form of order, partial annulment for example, the intervener may put forward arguments of its own
which are along the same lines as those of the applicant but which have not been put forward by it. This makes it possible, for example, to add matters relating to proportionality in an action essentially concerning subsidiarity – or vice versa – subject to the limitations examined elsewhere on the possibility of bringing an action based on an argument other than subsidiarity.

578. The actions brought by a Member State or another Union institution are not limited to verifying subsidiarity. In particular it is possible in certain cases for an action to be brought by the Commission or by the Parliament, and, less likely, by the Council. The CoR will have every interest in considering intervention in support of that institution to reinforce a particular interpretation of a provision of the Constitution. If it does intervene, the CoR may, where appropriate, expound arguments which are not the same as those put forward by the institutions themselves, but is not obliged to do so. It may simply intervene to support not only the form of order but also the arguments put forward.

579. In the case of an action notified by a Member State on behalf of a national parliament, and where that action is limited to an action by the national parliament, it may be more difficult for the CoR to expound arguments based on proportionality if the parliament has not done so. However, it is likely that actions by parliaments, if they become widespread, will also be accompanied by a definition of position, or even a separation action, by the Member States themselves.

580. A third possible situation is an action brought by an RLA or an association of RLAs. Subject to the limitations concerning the interest of legal persons in bringing proceedings, it will be particularly worthwhile for the CoR to follow such actions very closely in order to intervene, in particular where an action for annulment relates to an act which – in the view of the CoR – was not adopted on the appropriate legal basis. In this case an entire strategy will have to be developed in future to consolidate the CoR’s position as a consultative body.

581. Intervention is not limited to an action for annulment. It can take place in any action, be it an action for failure to comply with obligations under the Treaty, by which the Commission (or a Member State) requests a declaration by the Court that a Member State has failed to comply with Community law, an action for declaration of failure to act, by which an applicant may request, in certain very well-defined circumstances, a declaration by the Court that a Community institution has failed to adopt an act which it is required to adopt under the Treaty, or an action for damages by which an applicant may, also in very well-defined circumstances, request compensation for damage caused by a Community act.

582. Where the CoR is unable to exercise its own right to bring an action, that is to say where there is no legislative act or act founded on a legal basis providing for its consultation, the CoR’s intervention is an extremely useful means of submitting to the

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Court arguments to which it would like an answer. It is also a useful instrument in terms of forming ‘strategic alliances’ with Union institutions and the RLAs.

583. Intervention could also be useful where the CoR is itself able to bring an action. The advantage of intervening compared with bringing an action itself is that intervention comes, by nature, after the action has been brought and therefore is not restricted by the same time-limits. There is both a technical and a political advantage. An application for leave to intervene must be presented to the Court by a straightforward letter within a period of three months following the publication in the Official Journal of the notice of this action. The President of the Court then fixes the date for presenting a statement in intervention. This procedure can take around two months since the President of the Court has to notify the application for leave to intervene to the main parties, that is to say those which brought the action and those against which it has been brought, and to request their observations, in particular on the communication of the documents in the file. It is only after the President of the Court has granted the application for leave to intervene that all the statements and the documents making up the file are forwarded to the intervener.

584. This set of rules show that, where appropriate, intervention can have a strictly technical purpose and that the CoR will thus be informed of all the documents submitted in an action without having to wait for the entire procedure to conducted. Furthermore, the period of three months after the publication of the notice summing up the action means that the CoR will have significantly more time to decide to intervene than it has to decide to bring an action. This will have to be taken into account in the procedure laid down by the CoR. It may allow different departments of the CoR, where necessary, to alter a decision not to bring an action by intervening in support of an action brought by another party.

585. There is also a clear political advantage for the CoR to give priority, where it can, to intervention over an action on its own behalf. Intervention allows it to avoid being isolated as an applicant and therefore to avoid, were an action unsuccessful, its position being weakened in relation to the Union institutions. Furthermore, and this will evidently be for the political bodies of the CoR to decide, a strategy for bringing actions before the Court of Justice will enable solid long-term alliances to be developed. Finally, the cost of an intervention is much less than that of an action since intervention can be limited to a number of points.

586. It should be noted that the provisions of Protocol No 3 on the Statute of the Court of Justice are much more favourable to the CoR as regards the possibility of intervention than the Statute of the Court of Justice in its present version following the Treaty of Nice. Article 40 of the present Statute provides for the possibility of intervention by the Member States and the institutions of the Community, on the one hand, and by any person who can establish an interest in the result of any case submitted to the Court, on the other. The clarification in Protocol No 3 that this possibility is also available to bodies, offices and agencies of the Union is useful because the bodies, offices and agencies of the Union, with the exception of the ECB and EIB, do not have legal personality. It should also be pointed out that under the present Treaty it is already
possible to amend the Statute of the Court of Justice by a decision of the Council taken ‘unanimously at the request of the Court of Justice and after consulting the European Parliament and the Commission, or at the request of the Commission and after consulting the European Parliament and the Court of Justice’, with the exception of the provisions on the status of judges (Article 245 EC). It is therefore entirely possible for the CoR to obtain the status of intervener without waiting for the Constitution to enter into force, if it manages to convince the Commission or the Court of Justice to make a request to that effect.

2) Definitions of position on references for a preliminary ruling

587. The issue of possible definitions of position in connection with a reference for a preliminary ruling is different from that of intervention. Article III-369 of the Constitution reproduces the provisions of Article 234 EC, with the addition of a fourth paragraph to take account of the expansion of the Court’s jurisdiction to the entire area of freedom, security and justice.

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<td>The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:</td>
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<td>a) the interpretation of the Constitution;</td>
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<td>b) the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.</td>
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Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.

588. A reference for a preliminary ruling does not seek to bring a case per se before the Court of Justice but rather to ask it to consider a question which must be answered in order to resolve a case before a national court. This can be a question on the interpretation of the Treaty or secondary law, or a question concerning the validity of acts adopted on the basis of the Treaty.

589. Most of the references for a preliminary ruling made thus far to the Court of Justice of the European Communities have concerned the interpretation of the Community Treaties and secondary law. Very often they ask whether Community law can be interpreted as permitting specific national legislation or a national administrative regulation or decision or, conversely, as not permitting them. It has been a means favoured by a number of applicants to bring the Court to rule on the validity of national law, or of decisions taken within a Member State in relation to Community law, even though that is not the official purpose of the reference for a preliminary ruling.
590. It is quite likely that the adoption of the Constitution for Europe will lead to the development of the second category of references for a preliminary ruling, that is to say references by which a court of a Member State would ask the Court to rule on the validity of an act of the Union. This type of question would make it possible to refer to the Court a question concerning the conformity of a European law or framework law, or a European decision or regulation, with the Constitution for Europe and, more particularly, the conformity of a European implementing regulation with a European law or framework law. In this context it is very likely that the question of the conformity of legislative and non-legislative acts of the Union with the principles of subsidiarity and proportionality will be raised with increasing frequency. It should be noted that according case-law,\textsuperscript{182} all courts are required to refer to the Court their doubts as to the validity of a Community measure that applies to a case brought before them – and not only courts of final instance, as Article 234 EC appears to indicate.

591. As a reference for a preliminary ruling does not involve submitting a case to the Court, it is not possible to apply to it Article 40 of the Statute, and thus the possibilities for intervention. However, there is a practice based on the Statute of the Court of Justice whereby a number of persons, institutions and bodies may submit observations on a question referred for a preliminary ruling within the framework of that request. In this practice it is primarily the Member States that submit such observations.

592. The procedure for referring a question for a preliminary ruling is set out in Article 23 of Protocol No 3 on the Statute of the Court of Justice. Under the second paragraph of this article, \textquoteleft[t]he decision [to refer a question for a preliminary ruling] shall then be notified by the Registrar of the Court of Justice to the parties, to the Member States and to the Commission, and to the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute\textquoteleft. This wording is in fact very restrictive as regards the CoR.

593. At first sight, it would not appear possible for the CoR to submit observations in connection with a reference for a preliminary ruling. Whilst the Member States and the Commission may submit observations without limitation, the CoR is in the same position as the other institutions, including the Parliament and the Council, that is to say it may submit observations only where it has adopted the act the validity or interpretation of which is being contested.

594. In connection with the CoR it would be interesting to consider the prospect of amending the Protocol on the Statute of the Court of Justice to provide, where appropriate, for the possibility of submitting observations to the Court in connection with references for a preliminary ruling concerning the validity of a legislative act with regard to the principle of subsidiarity in parallel with the possibility of the CoR bringing an action for compliance with the principle of subsidiarity and intervening in support of

\textsuperscript{182} Case 314/85 Foto Frost [1987] ECR 4199. The Court goes beyond the letter of Article 234 which prohibits national courts of any level from themselves declaring a Community act invalid. They remain free to reject arguments of the parties and to state that a Community act is valid.
other applicants in actions for annulment, actions for failure to comply with obligations under the Treaty, and actions for damages.

595. However, even in the absence of such prospects, the CoR must not lose interest in references for preliminary rulings since they remain an important means of guaranteeing the constitutionality of Community legislative acts. It can also, as part of a network upholding the principle of subsidiarity, draw the attention of national and regional parliaments, or even Member States’ governments through their RLAs, to important issues and thus indirectly to prompt Member States to submit observations.
596. **Judicial proceedings as a factor in strengthening the role of the CoR**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.3 stresses that the changes under the Constitutional Treaty have given it an important role to play in monitoring the application of subsidiarity, thus strengthening its institutional role within the EU;

2.4 will make every effort to prepare itself to fulfil this new role and to work together even more closely than in the past with the relevant institutions and the regional and local authorities it represents;

[...]

2.19 makes it clear with respect to its right to bring actions on subsidiarity issues that its main aim is to secure an effective contribution from the local and regional level to ensure better application of the subsidiarity principle from the drafting stage of legislative proposals by the European Commission to their adoption by the European Parliament and the Council of Ministers;

[...]

3.11 is aware that it will be politically strengthened by the right to bring proceedings in defence of its rights;’

597. The opening up of judicial proceedings to the CoR requires the entry into force of the Constitutional Treaty – or, if necessary, another treaty amending the legislation currently in force – before it can be used. Nevertheless, as the CoR itself stresses in its opinion, account must be taken of the fact that the right to bring judicial proceedings is an institutional consequence of the strengthening of its role resulting from its status as the representative of the RLAs and not an isolated reform. This explains why the Subsidiarity Protocol opens up the way for it not only to bring an action for annulment on grounds of infringement of the principle of subsidiarity by a legislative act but also an action for annulment to protect its prerogatives, whilst the latter action is not available to the ESC.

For the institutions and bodies bringing an action is a weapon of last resort and is all the more powerful for not being used. It would therefore be wrong – from both a legal and political point of view – to deny it the possibility of developing its role as the guardian of subsidiarity outside judicial review on the pretext that the ability to bring an action is not yet available to it.

598. **Prospects for developing case-law relating to subsidiarity**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘2.18 refers in this context to the existing ECJ case-law that, when assessing the compatibility of a legislative proposal with the subsidiarity principle, aspects of proportionality must also be taken into consideration and that these two principles cannot entirely be separated from one another;

[...]

3.18 notes that the European Court of Justice has up until now been very restrictive in its handling of the monitoring of compliance with the subsidiarity principle. Essentially, the Court of Justice mainly checks whether the institutions have met their requirement to make a statement on compliance with the subsidiarity principle. However, the Court of Justice does not look into matters of substantive law, except in cases where there has been a clear violation. As the principle of subsidiarity and the monitoring thereof
have increased considerably in importance as a result of the Constitutional Treaty, it remains to be seen whether the ECJ will step up its checks;’

599. It is clear that making available actions for annulment on grounds of infringement of the principle of subsidiarity is likely to give rise to new and interesting developments in the case-law of the Court of Justice if only because very different points of view will be put before it during such actions. However, as this study shows, it would be an illusion to expect the Court to go beyond a review of the manifest error of assessment made by the legislature as regards the application of the principles of subsidiarity and proportionality to a legislative act. The case-law is likely above all to develop the procedural and formal aspects of the mechanisms designed to ensure that the framers of draft legislative acts – in particular the Commission – and the legislature itself are in a position to take effective note of the diversity of views on the specific consequences of applying the principles of subsidiarity and proportionality to actions of the Union. In that sense, the action for annulment to protect the prerogatives of the CoR will play a full part in the development of effective case-law relating to the subsidiarity and proportionality of legislative acts.

600. **Formal constraints of an action for annulment**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.19 notes that under Article III-365, it must lodge an appeal on the grounds of violation of the subsidiarity principle no later than two months after the entry into force of a legislative act;’

601. The formal constraints, and in particular the time-limits on an action for annulment, are much stricter that those placing limits on the early warning system and the various consultations since they are sanctioned by actions being declared absolutely inadmissible. The fact remains that the response time for analysing legislative acts is longer since this analysis can commence as soon as the draft act is presented. Only the final decision on whether or not to bring an action is covered by draconian time-limits.

602. **Scope of an action for annulment by the CoR**

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.10 believes that in its assessment of the subsidiarity principle the CoR should not confine itself to the ten areas of mandatory consultation, but should be able to “make its own destiny”;

[...] 3.20 welcomes the fact that its right to bring actions to protect its prerogatives and to ensure that legislative acts about which it must be consulted comply with the subsidiarity principle give it new judicial legitimacy;

3.21 considers that it can bring a case before the Court of Justice of the European Union for violation of the subsidiarity principle even when it has not adopted a critical opinion on the application of the subsidiarity principle but has limited itself to an opinion under its mandatory or optional consultative role;’
The wording of the Subsidiarity Protocol – over and above the explicit intentions of the Convention – leaves scope for extending the monitoring of the application of the principles of subsidiarity and proportionality beyond the ‘ten areas’ of mandatory consultation. An action for protection of the CoR’s prerogatives is not limited to cases of mandatory consultation. The provisions providing for the possibility of the CoR issuing an opinion where the ESC must be consulted and the CoR ‘considers that specific regional interests are involved’ are entirely relevant in the light of the case-law which the Court has established in the past, in particular in relation to the European Parliament. There is no prohibition on going further and interpreting Article 8 of the Subsidiarity Protocol which refers to European acts ‘for the adoption of which the Constitution provides that it be consulted’ as covering such opinions which fall within the field of mandatory ESC consultations or even some own-initiative opinions where ‘specific region interests are involved’. Far from waiting for the Constitution to enter into force, the CoR has an interest in developing a selective and targeted policy on opinions on drafts whose legal basis does not provide for its mandatory consultation. This will enable it to enhance its credibility with the institutions and, in addition, consolidate a practice which could serve as an argument in any future action to persuade the Court of Justice to protect its right to assert its opinion.

Importance of an action to protect the CoR’s prerogatives

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘welcomes the fact that its right to bring actions to protect its prerogatives and to ensure that legislative acts about which it must be consulted comply with the subsidiarity principle give it new judicial legitimacy;’

The action for annulment to protect the CoR’s prerogatives is likely to prove to be more important in practice than the action for annulment on grounds of infringement of the principle of subsidiarity, given the limits of a judicial review restricted to a manifest error of assessment. The CoR therefore has every interest in investing in the necessary expertise to use not only the action but also the situation created by such an action. Neither the Court of Auditors nor the European Central Bank has any experience of such actions and in any event the prerogatives which they are likely to want to protect are essentially different from those of the CoR. The experience gained by the European Parliament when it still did not have the status of privileged applicant which was conferred on it by the Treaty of Nice is much more relevant to the CoR, in particular in procedures other than codecision procedures.
The CoR’s internal organisation for using the right to bring an action

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.22 is determined to use the right to bring actions before the European Court of Justice as a last resort and only when all other means of exerting influence have been exhausted;

3.23 decides that, as a rule, the Bureau shall take decisions on lodging appeals, on the grounds of violations of the subsidiarity principle, with the Court of Justice of the European Union. If it is possible to do so by the relevant deadline, the plenary assembly shall take the decision on a proposal from the Bureau. However, in view of the significance of bringing such an action for the Committee, the plenary assembly at all times reserves the right to review the decision of the Bureau. The practical arrangements remain to be worked out as part of a review of the CoR’s Rules of Procedure;’

A mechanism enabling a decision to be taken rapidly on bringing an action for annulment is indispensable, not only in order to be able to bring the action but also to make the threat of such action credible. Since the evidence demonstrating that an action should be brought will generally emerge well before the publication of the act likely to be contested, there is sufficient scope for effectively bringing the matter before the plenary assembly even if it means taking a conditional decision the actual implementation of which will depend on the Bureau. Once the action has been brought, it can naturally be withdrawn if the plenary assembly decides to do so. The opposite is not possible given the rigid nature of the time-limits on actions for annulment.

Role of the CoR alongside other applicants

In its Opinion 220-2004 [subsidiarity guidelines], the CoR

‘3.24 notes that it will carefully consider any requests stemming from its networking with regional and local authorities and their associations to bring actions about EU legislative acts under internal procedures to be established;’

There are a number of relevant means of bringing an action for judicial review of the application of the principles of subsidiarity and proportionality. An action for annulment may be brought not only by the CoR – once the Constitution has entered into force – but also – under the present Treaties – by the Parliament, the Council, the Commission or the Member States and, often in very well-defined circumstances, physical or legal persons, which include the RLAs. In addition to an action for annulment other actions could lead to a review of the application of these principles, in the same way as references for a preliminary ruling which are of particular importance in this respect and are likely to become more widespread in the future. Therefore, the CoR has every interest in participating in a network which will disseminate information and arguments regarding actions and references for preliminary rulings initiated by the RLAs. The innovation introduced in the Statue of the Court of Justice annexed to the Constitution, whereby bodies, offices and agencies – and thus the CoR – are given the opportunity to intervene in support of actions brought by others, must be studied carefully in spite of the
limits placed on intervention. It would be possible, if necessary, to introduce this innovation into the present Statute of the Court now, since it can be amended to that effect by the Council, without waiting for the Constitution to enter into force.

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Chapter 10
Operational Challenges for the CoR
during the Different Phases of the Legislative Process

610. The political resonance of the principle of subsidiarity has strengthened in the last five or so years. At the same time the regional dimensions of the principle of subsidiarity have been more fully articulated and more widely recognised in the course of both the constitutional debate which culminated in the Constitution for Europe and the various initiatives which have rolled out from the European Commission’s Governance agenda. Significantly both the Constitution and the Governance agenda have envisaged pivotal roles for the CoR in operationalising the regional dimensions of the subsidiarity principle.

611. Though the CoR is playing a ‘long game’ on subsidiarity, it now faces something of a ‘moment of truth’. The strong resonance of the subsidiarity principle and the recognition of its regional dimension present an opportunity for the CoR to realise one of its founding aims: to act as ‘guardian’ of the idea that decisions should as far as possible be made as close as possible to the citizen. To take that opportunity means meeting a number of challenges, both of a more fundamental kind, and in the detail of the EU’s legislative process.
SECTION I
FUNDAMENTAL CHALLENGES

A. Seizing the Moment and Ensuring Unity of Purpose

612. There are two challenges of a more fundamental kind that face the CoR.

613. i. First, to *seize the moment* and persuade EU decision-makers – at EU and Member State levels of government – *that subsidiarity has to be taken seriously*. The idea of a subsidiarity ‘culture’ is an attractive one in a period when the EU is perceived to be at a critical point. The current difficulties in the ratification process of the Constitution echo a theme which has resonated since the ratification debates which followed Maastricht: the EU has a ‘democratic deficit’. To many citizens it is remote and lacks transparency and accountability. They lack a sense of ownership of the EU. That problem has been amplified by EU enlargement. Greater diversity adds complexity and makes transparency harder to achieve. The CoR’s long-standing argument for greater ‘proximity’ in the decision-making process – i.e. greater involvement in decision-making for elected authorities at local and regional levels which are by definition ‘closer’ to the citizen – gains in credibility in this situation. There is a window of opportunity to make that argument count. That opportunity is not dependent on the fate of the Constitution. The Union under the Treaty of Nice is arguably a less transparent and more complex organisation than under the Constitution. If the Constitution fails, Nice remains. The importance of persuading EU decision-makers to take subsidiarity, including its regional dimensions, seriously is no less pressing for that. That challenge of persuasion will require the CoR to overturn widely held perceptions that it is an ineffective body. The first challenge for the CoR is to be seen to be more effective, credible, authoritative, a body that brings added value to the European integration process. That in turn requires a purposeful, focused and creative response to the current window of opportunity.

614. ii. The second *fundamental challenge* follows directly: to *ensure unity of purpose across the CoR’s membership on subsidiarity*. The main strength of the CoR is also its main weakness: the diversity of opinion it represents from all forms of regional and local government across an increasingly diverse Union. That diversity brings unrivalled expertise on how EU policies work on the ground and could work better. But diversity is also a difficult basis from which to build focus and authority. Commentators at the outset of the CoR were concerned that diversity would not work against focus.183 That (some of

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the same) commentators still raise the same concerns should be food for thought. The problem was, and remains a tendency to seek consensus in ways which bridges differences in ‘lowest common denominators’ rather than building platforms which allow the identification, and mutual support, of the interests of different groupings in CoR. There has been one enduring divide in the CoR which has never been fully reconciled: that between legislative regions and the rest of the CoR membership. As the Introduction to this study stressed, that divide plays out too in understandings of, and priorities under, the subsidiarity principle. Unless mechanisms are found to work across these differences of interest on subsidiarity the CoR runs the danger of compromising its effectiveness as a subsidiarity monitoring body and, consequently, failing to take the opportunity that now exists to embed a subsidiarity culture in EU decision-making.

**B. Bridging Differences of Interest in the CoR**

615. The political salience of the divide between legislative regions and the rest of the CoR has waxed and waned. It was an issue in the debates before and at the establishment of the CoR, with the competing European ‘peak’ associations of local government (Council of European Municipalities and Regions) and of regional government (Assembly of the European Regions) each trying to shape the CoR’s organisational form and to set its policy agenda. The CEMR even wanted to organise local government members formally as a fully resourced group within CoR equivalent to national delegations.  

616. Representatives of ‘strong’ regions took the point even further in 1995 in the CoR’s deliberations on the 1996 IGC, arguing for the separation of the CoR into two ‘chambers’, one for regions, one for municipalities. Towards the end of the 1990s the regional-local divide had seemingly faded from view, but reappeared in the constitutional debate after the Nice IGC. The creation of the group of Regions with Legislative Power (RegLeg, representing legislative region governments) and the further development of CALRE (representing legislative region parliaments) underlined the distinction of legislative region interests as they sought special recognition in the Constitution. They did so amid open criticism of the inability of the CoR, because of the sheer breadth of interests it had to reconcile, to pursue their concerns adequately.

617. Non-legislative RLAs were not prompted to organize in new ways by the constitutional debate, though the Governance Working Groups of organizations like

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Eurocities and the Council of European Municipalities and Regions (CEMR) did introduce local authority perspectives on the constitutional debate.

618. It is important to understand the differences of perspective legislative regions and non-legislative RLAs have brought to the constitutional debate and to understandings of subsidiarity. **Two kinds of difference** are important:

619. i. First, as discussed at the outset of this study, the possession of legislative powers under domestic constitutional law brings for legislative regions a particular **understanding of the distribution of competences in the EU and of subsidiarity**. While legislative regions share similar concerns with non-legislative RLAs on questions of the intensity of regulation by the European legislator (seeking adequate justification of the proportionality of regulatory requirements), they have a different perspective on the question of whether or not the European legislator should become active in the first place; legislative powers at the regional level can be transferred into EU competence and ‘lost’ to the legislative regions. This is not to say that legislative regions do not support the Europeanisation of regional competences, or that all legislative regions concerns are the same. But there are particular kinds of sensitivity when the location of a legislative power is at stake which are not faced by non-legislative RLAs.

620. ii. Second, legislative regions and non-legislative RLAs have **different ‘opportunity structures’ for influencing EU legislation**. Alongside opportunities for direct engagement with the European decision-making process, including the CoR, legislative regions in most cases have more powerful channels of influence over the EU policy positions of their Member State central governments than do non-legislative RLAs. In particular since the debates on the ratification of the Treaty of Maastricht, legislative regions have established mechanisms for co-determining in some policy fields the position of their Member State in EU negotiations. In Belgium and Germany (and the Åland Islands in Finland) formal rights had been established for the regional level to shape and in some cases determine the member state’s policy on EU matters falling under the domestic competence of the regions by the time the CoR was in operation. Similar rights were established in Austria on its accession to the EU in 1994. Less formalised and generally less far-reaching practices of central-regional coordination in EU policy have also been established in Spain (though with a more formalised system of access emerging), and in the UK (as well as the Portuguese autonomous regions). There is currently debate one establishing similar mechanisms in Italy. The main mechanisms for legislative region involvement in Member State EU policy are set out in Table 19 (see n° 621).

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621. **Table 19 Legislative Regions and EU Policy Formulation within the Member State**

<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Belgium</th>
<th>Germany</th>
<th>Austria</th>
<th>Spain</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full information on EU developments</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Decisions have binding effect on centre in fields of regional competence</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Participate in meetings to instruct Permanent Representative</td>
<td>√</td>
<td>X</td>
<td>√</td>
<td>?</td>
<td>√</td>
</tr>
<tr>
<td>Represent member state in Council of Ministers in fields of regional competence</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>X</td>
<td>√</td>
</tr>
<tr>
<td>Contribute to member state decision-making in Convention/IGC</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>X</td>
<td>?</td>
</tr>
<tr>
<td>Run Presidency of EU Council jointly with the centre</td>
<td>√</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

622. The extent of involvement varies, with the Belgian regions having the fullest powers and the UK and Spain the least extensive. Nonetheless all have real possibilities to pursue their objectives through the vehicle of the member state. There have been indications for some time that legislative regions have come to prioritise this member state ‘route’ into Europe over the CoR.\(^{189}\)

623. The same does not apply for non-legislative RLAs. Though in some cases (e.g. Austria, Denmark and the Netherlands) there are quite systematic practices of consultation of non-legislative RLAs,\(^{190}\) and in most there are informal mechanisms for exchange of views between local and central government,\(^{191}\) nowhere do non-legislative RLAs have the same level of ‘grip’ on Member State policy. As a result non-Member State ‘routes’ into Europe, such as the CoR or peak associations like CEMR have a higher priority for non-legislative RLAs than they do for legislative regions.

624. These two contrasts suggest that the CoR faces a difficult task in building unity of purpose. Different groupings of its members have different subsidiarity-related interests; and legislative regions have more extensive opportunities to pursue their interests outside the CoR than do non-legislative RLAs. Diversity of interest and differences of opportunity structure have in a general sense helped to prevent the CoR from fulfilling its potential; legislative regions have felt their interests to be neglected in a consensual

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\(^{189}\) Ibid.

\(^{190}\) As set out in the report Subsidiarity. Contributions of the Heads of Delegations of the Committee of the Regions, which was prepared for the CoR’s first subsidiarity conference in Berlin in May 2004.

\(^{191}\) For example the Central-Local Partnership Working Group on European Affairs in the UK.
decision-making process in the CoR (in which they are numerically in a clear minority), and have been inclined to pursue their concerns outside the CoR as a result.

625. This pattern has caused irritation among non-legislative RLAs, perhaps understandably, and produced some scepticism about the efforts of the CoR leadership to re-integrate legislative regions more fully in the work of the CoR. There is though much to be gained from a fuller engagement of legislative regions in the CoR. They bring more administrative capacity and political weight than most non-legislative RLAs (perhaps with the exception in some cases of some of the larger cities). Their ‘grip’ over Member State central governments is an asset (and would especially be so on subsidiarity matters in the early warning system if the Constitution is adopted).

626. As the various statements of CALRE and indeed RegLeg\textsuperscript{192} have made clear, they also see new opportunity structures in the CoR in its role in ex-post subsidiarity appeal in the Constitution’s Subsidiarity Protocol. There is in other words the basis for a new ‘bargain’. As the November 2004 RegLeg Edinburgh Declaration put it: The legislative regions ‘offer the expertise of their administrations to the CoR and look forward to playing an active part in the CoR.’\textsuperscript{193} The challenge – and opportunity – for the CoR is to make that bargain work in a way which addresses the different interests of its different groupings of members.

627. Discussion of how the CoR might meet these fundamental challenges is taken forward in Chapter 11. Next we survey the operational challenges the CoR faces in developing an effective subsidiarity monitoring practice during the different phases of the legislative process.

\textsuperscript{192} Declaration of Edinburgh Adopted by the 5\textsuperscript{th} Conference of Presidents of Regions with Legislative Powers, 29-30 November 2004, at \url{http://www.regleg.org/default.asp}, see under ‘Summits’.

\textsuperscript{193} Ibid.
SECTION 2
OPERATIONAL CHALLENGES DURING THE DIFFERENT PHASES OF THE LEGISLATIVE PROCESS

628. The central point is perhaps self-evident, but bears reiteration: subsidiarity monitoring is a process, not a single decision point. That process starts in the pre-legislative phase, where the onus is on mobilising RLA expertise to improve proposals or head off inappropriate measures. Both new practices of impact assessment and the early warning phase foreseen in the Constitution open up a window for response to the formal publication of legislative proposals. But the CoR is clearly not restricted to action in response to the initial publication of proposals and may wish to monitor – and make suggestions for the improvement of – proposals as they are amended by Parliament and Council during the legislative process. And, if its advice is unheeded the CoR may wish, under the Constitution, to take recourse to an appeal at the Court of Justice.

629. The operational challenges for each of these phases are, logically enough, distinct. Their sequential relationship does, though, suggest a need for an ongoing monitoring capacity which retains an oversight over the whole legislative process. Our concern here is to set out the distinct, sequential challenges, while in Chapter 11 we discuss how they may be met organisationally.

A. The Pre-Legislative Phase

630. The pre-legislative phase is by some way the most important of all the phases. If problems are resolved at this stage, before formal publication of proposals, then valuable resources would not need committing later. Pre-emptive action, based in effective dialogue with the Commission, is clearly preferable to resource-intensive action in issuing early warning, subsequent legislative monitoring, or ultimately ECJ appeal.

631. Importantly this all remains the case whether or not the Constitution is adopted. Pre-legislative engagement to improve the quality of legislation by ensuring full account is taken of subsidiarity concerns is, simply, good practice that needs to be developed whatever the fate of the Constitution.

632. But it remains likely that in some cases RLA concerns will not be fully taken on board by the Commission. In those cases the pre-legislative phase remains important as a phase for information exchange among RLAs and other actors who may share subsidiarity concerns, and between these and the Commission, and for gathering evidence to deploy in subsequent arguments, for example on the quality of impact assessment or in the early warning system.
633. Regarding the early warning system, it was stressed in Chapter 8 that both national and regional parliaments were concerned not to be working from a standing start when facing a six-week timetable, and that therefore

634. \textit{i.} upstream, pre-legislative evidence-building was a basic prerequisite for achieving a considered opinion in the timescale of the early warning period

635. \textit{ii.} pre-legislative dialogue with institutions with shared concerns could open up possibilities for concerted action during early warning and improve chances of a Commission re-think being triggered.

636. Similar considerations apply for the CoR in terms of gathering evidence and of connecting its concerns with those of other actors. This places an onus on its capacities for evidence-gathering and for building shared viewpoints and coalitions of interest among others engaged in subsidiarity monitoring.

\textbf{1) Structured Dialogue}

637. To repeat, though, working with the Commission to produce subsidiarity-compliant proposals is the most important aspect of subsidiarity monitoring. The initiative in introducing a Structured Dialogue with the Commission on its forthcoming legislative programme is therefore very important. The Structured Dialogue is one of the measures taken in follow-up to the Governance White Paper (and, though endorsed by the obligation on the Commission in the Constitution’s Subsidiarity Protocol to consult RLAs in the pre-legislative phase, is not dependent on the fate of the Constitution). Detailed proposals on the Structured Dialogue were set out in a Commission paper of December 2003.\textsuperscript{194} The Dialogue was to be:

- additional to existing practices of consultation
- focused on the Commission’s annual work programme and in particular major policy initiatives with a territorial impact
- carried out through annual meetings (general dialogues on the annual work programme of the Commission and/or sectoral dialogues on proposals associated with particular Commissioners)
- and carried out through consultations with ‘national and European associations’ of RLAs selected for relevance to the subject matter of each Dialogue by the CoR (though with the Commission reserving the right to include other participants).

638. The first Structured Dialogue took place on 10 May 2004, and the second on 24 February 2005. The first lasted for an hour,\textsuperscript{195} the second for three hours.\textsuperscript{196} Sectoral


dialogues are now on stream, with a Maritime Policy dialogue set to take place in December 2005. A third general dialogue will take place on 17 November 2005. A number of issues have emerged concerning these first experiments in Structured Dialogue.

639. The first concerns their agendas. They have tended to operate through a roster of time-limited speeches. There is not that much ‘dialogue’, but rather the rehearsal of pre-prepared and often rather general statements (five interregional associations insisted in June 2004 that future dialogues ‘must allow for genuine two way communication and a real exchange of views’197). There is also limited time available. Both points suggest that the proceedings themselves are not that fruitful (indeed, there were calls at the February 2005 Dialogue for more emphasis on focused, sectoral meetings198), but should perhaps be seen as a symbolic ‘tip of the iceberg’ underneath which a much fuller – and much less structured- practice of consultation needs to take place. To put it another way: periodic set-piece meetings should not crowd out the more subtle practices of dialogue that RLAs have already developed with the Commission. Not everything unfolds according to timings set out in the Commission’s annual work plan, and a more flexible and contingent practice of dialogue and consultation will remain necessary, not least – as a research paper commissioned by the Catalan parliament makes clear, because different types of RLA have different sets of interests in the design of legislation.199 In other words, associations of RLAs and even individual RLAs will maintain their own lines of communication with the Commission irrespective of the Structured Dialogue.

640. A second issue – perhaps reaffirming the point about the dangers of over-structuring consultation dialogue – is the requirement for consultation to happen with ‘national and European associations’ of RLAs. This is a rather strange terminology for the EU’s federal states where in a sense the member state itself is the ‘national association’ of regional authorities. There is no ‘national association’ of regions analogous to those of local authorities in Austria, Belgium or Germany. In fact only by virtue of an ad hoc decision did the Austrian Länder convene themselves to attend the first Structured Dialogue. Because the Belgian and German regions did not do so, they ‘could not’ be invited to attend.200 Such a rigid interpretation seems unrealistic and likely only to strengthen the use of the possibility – available to Austrian, Belgian and German regions – to send delegates through member state channels to the Commission working groups that develop legislative proposals. There is an advantage to be had for RLAs more generally for this privileged access to the Commission that some – some of the RegLeg regions – have.

A third issue is the CoR’s role as gatekeeper to the dialogue process. This has not been controversial. The CoR has been open and transparent in its nominations for participation. But the process of organising nominations has prompted the CoR to develop a more systematic practice of dialogue with associations of RLAs and to establish a more systematic database on how sub-state government organises itself collectively.\textsuperscript{\textcolor{red}{201}} This is clearly a positive step, enabling the development of cooperation and information exchange in other areas too, as reflected in a growing roster of (and a growing substantive work programme in) CoR Cooperation Agreements.\textsuperscript{\textcolor{red}{202}} The capacity for collective action among RLAs has clearly been enhanced by the CoR taking on a wider coordination role in pre-legislative consultation.

### 2) Impact assessment

Much of the focus in discussion of the early warning phase – including in this study – has focused on the modalities of taking action in the short, six-week time envelope set out in the Subsidiarity Protocol. We return to this issue below. But one vital prerequisite for any decision to take early warning action under the Subsidiarity Protocol of the Constitution, but also for developing a subsidiarity monitoring practice independent of the Constitution, is an understanding of impact assessment. The CoR’s engagement with the Commission’s impact assessment process opens up a more general possibility for an ‘early warning’ of problems in how the Commission has formalised its legislative proposals.

Impact assessment – the attachment to any legislative proposal of ‘a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality’ – is required under paragraph 4 of the Subsidiarity Protocol to the Constitution. It is also now standard practice, independent of the Constitution, for all items on the Commission’s work programme,\textsuperscript{\textcolor{red}{203}} following up the commitment in the 2001 Governance White Paper that: “Proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at EU level and whether regulatory intervention is needed. If so the analysis must also assess the potential economic, social and environmental impact.”\textsuperscript{\textcolor{red}{204}}

An improved practice of impact assessment by the Commission is a logical outcome – or at least aspiration – of pre-legislative consultation. While the Commission has developed a very detailed methodology of impact assessment as a means of justifying the decision to take action and the proportionality of action, the CoR and others have quite rightly set out their own expectations on impact assessment. It would be unwise to rely solely on the views of the Commission; it is important to balance those views on impact with RLA perspectives, expressed by the CoR or RLAs separately.

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\textsuperscript{\textcolor{red}{201}} See \url{http://www.cor.eu.int/en/activities/list_of_association.htm}.
\textsuperscript{\textcolor{red}{202}} See \url{http://www.cor.eu.int/en/activities/association.htm}.
645. The CoR for its part has developed a process of subsidiarity/proportionality evaluation through its Subsidiarity Monitoring Unit, and is now seeking to mainstream the use of a ‘Subsidiarity Analysis Grid’ into the opinions it delivers on legislative proposals. This will cover:205

- The legal basis of EU action
- The justification and objective of the action
- The local and regional dimension
- The choice of legislative instrument
- Legislative and administrative simplification issues
- Financial evaluation
- External consultation
- Impact assessment
- Proportionality

646. Individual RLAs may well develop their own analysis methodologies. The Scottish Parliament for example has a draft analysis grid focused on:206

- Which level of government is most appropriate for legislation
- Which type of instrument is most appropriate
- Whether EU action causes disproportionate costs
- Whether EU policy in the field concerned has consistently failed, suggesting other levels of government or types of instrument would be more appropriate

647. Though this draft grid was produced in the context of the ‘traffic light’ system proposed for the Scottish Parliament under the early warning system, its assumptions hold for a more general process of subsidiarity monitoring by setting out a checklist on the Commission’s own impact assessment. Other RLAs, or RLA associations, will have their own concerns and practices in this respect. The point is that there are a number of different sources and perspectives on subsidiarity compliance. Mobilising these to build a systematic evidence base on the justification and impact of EU action has to be a priority for the CoR as it seeks to embed a subsidiarity culture in the EU.

B. The Early Warning Phase

648. As already mentioned, the CoR’s engagement with the Commission’s impact assessment process opens up a more general possibility for an ‘early warning’ of problems in how the Commission has formalised its legislative proposals. In other words, systematic impact/subsidiarity assessment should be part of the standard practice of the CoR in developing its opinions, drawing on the wider perspectives and expertise of the RLA community. Should the Constitution be implemented, however, the early warning

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system will give CoR concerns on the justification and impact of EU action fuller ‘grip’. Though the CoR is not bound to act within the timeframe of the early warning system in developing its opinions on subsidiarity compliance there are two reasons why acting ‘as if’ part of the early warning system could be beneficial:

i. It can establish an early marker of concern which, if unheeded through the legislative process, could provide a reference point for a subsequent (threat of) appeal to the ECJ

ii. By connecting with national/regional parliament debates, the CoR could reinforce the credibility of its concerns

649. Even without ratification of the Constitution there may be a case for developing an early warning practice, perhaps based on a sifting of legislative proposals and marking them under a ‘traffic light’ system (green = no concerns; amber = some issues of concern, need a more rigorous assessment; red = clear subsidiarity concerns) such as that proposed by the Scottish Parliament (see Chapter 8). This could help embed a practice of systematic subsidiarity monitoring and help prioritise CoR concerns.

650. But we focus here mainly on the issues surrounding the six-week timescale of the early warning system. These emerged clearly in the discussion in Chapter 8 of how national and regional parliaments were approaching the early warning system. We need only to reiterate those issues, and their implications for the CoR here:

- There needs to be a capacity for swift action in a timeframe which will often be outside the pattern of regular CoR meetings, and may need a special committee to be established or empowered to take action on behalf of the plenary
- There needs to be good quality information and advice to help justify any opinions the CoR issues in analogy to the considered opinions of national parliaments
- There needs to be good intelligence on the concerns and priorities of other players in the early warning system, so that CoR concerns can be connected with others; this suggests an open line to COSAC and its information exchange processes, but also to CALRE, RegLeg and the early warning activities of regional parliaments within member states
- The system of engagement with the early warning process needs to be adequately resourced

C. The Legislative Phase

651. One of the understated features of a systematic process of subsidiarity monitoring has to be that of keeping track of legislation as it is reshaped subsequent to the Commission’s initial draft. The CoR’s traditional opinion-giving process on legislative proposals (with or without the Constitution) and any decision to act ‘as if’ party of the early warning system (under the Constitution) are both based on the assessment of the Commission’s initial draft. However – and although Parliament and Council are also
committed to subsidiarity compliance – Parliament and Council may well make amendments which raise new or unforeseen subsidiarity concerns.

652. One of the key challenges in mainstreaming a subsidiarity culture will be for the CoR to keep a fuller watching brief on the wider legislative process, and to have a system in place to flag up problems, and to raise concerns with the relevant body in response.

653. This is in part an administrative challenge: that of ensuring sufficient resources are devoted to an ongoing subsidiarity monitoring process. It is in part also a problem of credibility. The Council has never responded to CoR opinions, because it (or at least some member states) feels no obligation to. The Parliament, though with a positive relationship to the CoR in developing opinions on shared interests, has rarely shown a willingness to respond to CoR opinions. The challenge is to change this indifference and unresponsiveness.

654. In a sense that will be easier should the Constitution come into force. The CoR’s right to appeal to the ECJ on subsidiarity infringements (and also if its own consultation rights have been infringed) is not formally connected with the early warning process. It may be an advantage to mount an appeal having flagged a problem at the outset, but it is not necessary. The CoR could conceivably be happy with a Commission proposal, yet feel sufficiently moved by later amendments by Council or Parliament to appeal to the ECJ. It is that possibility that would give its ongoing subsidiarity monitoring more teeth.

655. Without the Constitution those teeth are not there. To get Council and Parliament to listen will depend on the credibility of CoR arguments and, conceivably, its capacity to enlist similar concerns of other actors in making its case. These twin imperatives of credibility and alliance-building form two of the key themes in Chapter 10 and are taken up there in more detail.

D. Judicial Review (The Post-Legislative Phase)

656. The post-legislative phase is entirely dependent on the adoption of the Constitution. The CoR currently has no rights of appeal to the ECJ if it feels, despite its efforts through the legislative process, real subsidiarity infringements remain. So the following discussion, exceptionally, is restricted to a Constitution scenario, although some of the following might apply if the CoR were given a right of ‘intervention’ by reform of the Court’s statute, as discussed in Chapter 9.

657. The challenges are remarkably similar to those of early warning under the Constitution, though with one key exception: it may be that early warning opinions are issued with reasonable frequency, as a means of highlighting problem issues, and prompting negotiation with the Commission in resolving them. Appeals to the ECJ are likely to be rare, a ‘nuclear option’ used only when all else has failed on issues perceived to be of fundamental importance. There is a tactical issue here: the ECJ has not been keen to develop a jurisprudence on substantive subsidiarity compliance or on the claims of
RLAs in the EU decision-making process. To force it out of that track will require a landmark case with as watertight a legal argument as possible. The stakes will be high.

658. In playing that high stakes game, the following operational challenges will be vital:

i. There is a limited timescale for lodging an appeal to the ECJ (two months following entry of legislation into force). As in the early warning phase, the CoR would need a capacity for swift action in a timeframe which will often be outside the pattern of regular CoR meetings, and may need a special committee to be established or empowered to take action on behalf of the plenary

ii. There needs to be information and legal advice of the highest standards in justifying any appeals, this ideally connected to an evidence base of wider concern on the issue, ideally among national, not just regional parliaments. Connecting a case to concerns expressed by member state institutions will enhance its legitimacy.

iii. The system of consideration and preparation of ECJ appeals would need to be adequately resourced to meet these challenges.

659. As was noted in Chapter 8, regional parliaments with legislative power organised in CALRE are keen to develop ways of accessing the CoR’s right of appeal to the ECJ under the Constitution. While bearing in mind that legislative regions are one among a number of interests in the CoR, there may well be advantage to be had in mobilising CALRE resources, in particular the access to member state level debates, in strengthening the CoR’s capacities for post-legislative appeal.
CONCLUSIONS OF CHAPTER 10

660. **Embedding and Mainstreaming a Culture of Subsidiarity**

In its Opinion 220-2004 the CoR 220-2004 [subsidiary guidelines] the CoR

‘1.3 emphasises that basing European policy on the principles of subsidiarity and proportionality and developing a culture of subsidiarity could make a decisive contribution to strengthening public confidence in European cooperation and overcoming the scepticism expressed in the referendums that produced a no vote’

‘2.13 is pleased to point out that the inclusion of the local level in the subsidiarity principle has made clear that compliance with that principle is not simply a matter of respecting the legislative powers of the national and regional levels, and that instead the European Union must also ensure that the prerogatives of cities, municipalities and regions are safeguarded within the context of local and regional self-government’

The failed ratification referendums in France and the Netherlands have reinforced perceptions of a democratic deficit in the EU. The opportunity exists to embed and mainstream a subsidiarity culture in the EU that, by mobilising the expertise and addressing the concerns of RLAs, would bring Europe closer to its citizens. The challenge for the CoR whether or not the Constitution is ratified, is to seize that opportunity. The CoR represents a diversity of interests at levels of government below that of the member states. Different types of regional and local authority have different interests in subsidiarity compliance, some focused in legislative competences, others on problems and proportionality of EU policy implementation, and therefore understand the challenges of subsidiarity monitoring in different ways. It is vital that the CoR succeeds in providing a platform for all its component interests in order to build its sense of purpose and credibility as a subsidiarity ‘guardian’.

661. **Subsidiarity Monitoring as a Continuing Process**

In its Opinion 220-2004 the CoR 220-2004 [subsidiary guidelines] the CoR

2.19 makes it clear with respect to its right to bring actions on subsidiarity grounds that its main aim is to secure an effective contribution from the local and regional level to ensure better application of the subsidiarity principle from the drafting stage of legislative proposals by the European Commission to their adoption by the European Parliament and the Council of Ministers.’

‘3.1 stresses that the planning phase of a legislative act offers it, along with local and regional authorities, the greatest number of opportunities to effectively bring the local and regional dimension to bear; and points out that involving it at an early stage and taking its views into account should obviate the need for cases to be brought before the Court of Justice of the European Union for infringements of the subsidiarity principle’

‘3.2 welcomes the fact that the European Commission, before publishing legislative proposals, must first examine their financial and administrative impact, and expects the impact on local and regional authorities to be included in the subsidiarity sheet, as it often falls to this level of government and administration to implement new EU initiatives’

[...]

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‘3.14 points out, however, the need to follow up its assessment of the application procedures for the principles of subsidiarity and proportionality throughout the legislative process’.

Subsidiarity monitoring is a process which needs to accompany all stages of EU law-making. It requires of the CoR intensive engagement or RLA views with the Commission in the drafting of and at the publication of proposals, but also requires further monitoring of amendments to Commission proposals by Council and Parliament. The pre-legislative phase is the most important in subsidiarity monitoring, and remains so whether or not the Constitution ultimately is adopted. Ensuring subsidiarity concerns are taken aboard through effective processes of consultation with RLAs improves the quality of legislation and acts pre-emptively to remove concerns from the table before legislation is formally published. Logically enough doing so also saves the resources which might otherwise be invested in opinions and challenges on subsidiarity infringements. Impact assessment is a vital tool in ensuring that a subsidiarity culture is mainstreamed in EU legislation, and the control of the Commission’s assessment methodologies and findings must be an important priority for the CoR and the RLAs it represents. Subsidiarity monitoring by the CoR needs to be developed throughout the legislative process so that amendments by Council and Parliament which infringe subsidiarity can be identified and challenged.

662. **Bringing Actions before the Court of Justice**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

‘3.11 points out that, unlike national parliaments, it is not bound by a deadline for lodging complaints about non-compliance with the principles of subsidiarity and proportionality under the early warning system.’

[…]

‘3.20 is determined to use the right to bring actions before the European Court of Justice as a last resort and only when all other means of exerting influence have been exhausted.’

Under the Constitution the CoR’s right to appeal to the ECJ on subsidiarity infringements is not formally connected with the early warning system, though in practice CoR appeals will have more credibility if they connect with and are reinforced by subsidiarity concerns initially expressed by national parliaments in the early warning phase. Taking an appeal to the ECJ is a ‘nuclear option’ which should only be considered in extremis, on matters of fundamental importance, and where the legal basis for a challenge is absolutely clear.

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Chapter 11
Organising the CoR for an EU Subsidiarity Culture

663. Chapter 10 has set out the challenges the CoR faces in taking up the opportunity to mainstream a subsidiarity culture in the EU legislative process. This chapter reviews how the CoR might organise itself to do so to best effect.

664. It should be stressed at the outset that much of what follows is already under discussion or has already, in part, been implemented. The first ‘summit’ Conference on Subsidiarity in Berlin in May 2004 provided an important prompt for rethinking how the CoR does its subsidiarity business.\(^{207}\) The unit for Subsidiarity Monitoring in the Secretariat General has taken that work forward at an official level, developing some of the necessary infrastructure for a systematic subsidiarity monitoring process.\(^{208}\) Subsequent debate within the CoR in developing views on subsidiarity, legislative regions and the Constitution has also taken the debate from Berlin further at a political level (though the impasse over ratification of the Constitution has naturally had the effect of damping down some of the forward thinking).

665. This chapter reviews and develops the themes under discussion since the Berlin conference. It does so with two guiding assumptions:

i. Subsidiarity monitoring is not conditional on the adoption of the Constitution. Though some initiatives cannot be formally introduced until the Constitution (or some successor body of constitutional or other law) comes into force, the enhanced interest in subsidiarity in recent years is not a product of the constitutional debate alone, and can and should be used as a catalyst for developing best practice in raising awareness of subsidiarity issues and – as a result – in improving EU legislation.

ii. Subsidiarity monitoring needs to be viewed in an overarching way as a system of practices reaching across all phases of the legislative process.

666. We therefore develop a view of CoR organisational practice which includes but is not restricted to Constitution-related innovations, and do so through three overarching themes, rather than matching organisational structures to the different phases of the legislative process as discussed in the previous chapter: 1) Building the evidence base; 2) Alliance-building beyond the CoR and 3) Capacity-building within the CoR.


\(^{208}\) Note for general information on the establishment of a CoR subsidiarity monitoring network, CdR 475/2004.
SECTION 1
BUILDING THE EVIDENCE BASE

667. Subsidiarity is not, as earlier chapters in this study have stressed, easily concretised as a set of watertight legal norms. Its meaning even among RLAs, as Chapter 9 has shown, is loaded in different ways, reflecting the differences of function of RLAs at different levels of government and in different member state contexts. It is an essentially contested concept. What this means for CoR practice is the imperative of a strong evidence base. Arguments on subsidiarity and proportionality need to be well-grounded to have meaning and credibility across the range of different perspectives that exist on subsidiarity.

668. The need for a powerful evidence base applies throughout the legislative process: in bringing accurate information and good arguments to the Commission in pre-legislative consultation, in reviewing and where necessary challenging the Commission’s impact assessments, in underpinning any objections under the early warning system, in challenging subsidiarity-infringing amendments made by Council or Parliament, and ultimately in developing the grounds for appeal to the ECJ.

669. The need for a powerful evidence base is not just a need of the CoR. RLAs individually and through their associations also have an interest in ensuring subsidiarity arguments are backed by sound evidence. In this respect the proposals in the CoR to establish an electronic network for subsidiarity monitoring are especially important.

670. The internet-based monitoring network, attached to the CoR website, is designed to be:209

i. An information repository to ‘coordinate mutual access to EU policies at local and regional level by exhibiting studies and assessments and presenting links to other subsidiarity related websites and information’

ii. An interactive consultation platform for use in coordinating RLA input into pre-legislative consultation, identifying problem issues, and generating information for the CoR’s subsidiarity analysis grid for cross-checking the Commission’s own impact assessment

iii. A political resource available to CoR members and the Secretariat General in subsidiarity monitoring and opinion formation throughout the legislative process

A number of issues arise from these proposals.

209 Ibid., p. 4.
1) **Adding value and avoiding duplication**

671. The CoR should seek to add value and connect currently unconnected resources; a mutual information link to the IPEX information network under development by COSAC would seem sensible, as national parliaments are likely to have additional, complementary perspectives on subsidiarity. But the CoR should seek to avoid duplicate activity among the RLA community by establishing itself as a ‘one stop shop’ for all RLAs on subsidiarity information. An important role in developing the database could be played by the designated national subsidiarity coordinators, building on the informal paper produced for the Berlin subsidiarity conference in May 2004.210

2) **Developing the service at different phases in the legislative process**

672. An information network might act more as a ‘passive’ reference resource during pre-legislative consultations (though it could be used as an agenda-setting tool for Structured Dialogue by identifying the issues on which a critical mass of concern existed). But it would act as a catalyst for action on the publication of legislative proposals either in the course of drawing up ‘normal’ opinions in the CoR or in informing debate in the context of the early warning system. Developing this more active role – which could include the generation of information for subsidiarity analysis grids – would require an initial filtering, or ‘sifting’ or legislative proposals to focus attention on those most needing detailed scrutiny. The CoR Subsidiarity Unit foresees a ‘traffic light’ system like that proposed by the Scottish Parliament:

a. Subsidiarity compliant = green light, no further proceedings

b. Partially non-compliant = yellow light, possible consultation of the subsidiarity network

c. Non-compliant = red light, consultation of the subsidiarity network recommended.211

3) **Integrating network consultation into the political work of the CoR**

673. The traffic light system is entirely sensible, and may well be consistent with the timetable for ‘normal’ CoR opinions, whereby its findings could be used by the rapporteur concerned. But it would be difficult to make it work within a six-week early warning period under the Constitution. Network partners would need to have the capacity to respond to a ‘red light’ well within the six-week timeframe. It is questionable that many could, not least given the difficulties that far better resourced national parliaments had in responding to the COSAC test run. This would imply a more active role by the CoR in soliciting input.

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211 Ibid., p. 5.
SECTION 2
ALLIANCE-BUILDING BEYOND THE COR

674. It has been a repeated theme in this study that the CoR/RLA voice on subsidiarity matters will be stronger when it is part of a chorus (especially if the chorus also includes national parliaments). To make decisions about whether and how to align the CoR with other voices requires information on the priorities of those other voices. The subsidiarity monitoring network will prove a valuable tool in providing such information and will serve as valuable underpinning for the development of shared understandings and priorities between CoR and RLA associations. But there are other means as well.

675. 1) The CoR’s role in coordinating RLA input into the Commission’s Structured Dialogue has been a catalyst for a much more systematic overview of the terrain of RLA associations across the EU, and for enhanced cooperation with some of the European-level associations. The CoR is in a privileged position at the hub of these RLA organisational structures. It has the opportunity to coordinate and set collective agendas under its increasingly important rubric ‘Cooperation with Associations’.\(^{212}\) ‘Cooperation’ includes the maintenance and updating of information on the structure, purpose and activities of around 130 associations, and has led beyond cooperation in the Structured Dialogue to a range of initiatives which directly or indirectly strengthen the CoR’s capacity to monitor subsidiarity: \(^{213}\)

a. Joint task forces which have informed CoR opinions

b. RLA association input into CoR hearings

c. Joint action plans on programmes of cooperation with six European associations

d. Among these joint action plans agreement with CALRE to develop joint action to respond to the new measures on subsidiarity in the Constitution (on this see further below). \(^{214}\)

676. 2) It is conceivable that these joint activities might solidify as a form of **standing group on subsidiarity** exchange, with CoR at their hub, and using regular meetings of the Secretary Generals of the associations as a forum. Such an external body might serve as a valuable adjunct to internal opinion-formation within the CoR, not least by giving voice to different sets of territorial perspectives on subsidiarity (e.g. legislative regions vs. cities vs. peripheral regions)


3) Should the Constitution or some successor arrangement be adopted, there will be an additional onus on the CoR to develop effective **lines of intelligence and cooperation with national and regional parliaments** on early warning complaints and post-legislative appeals to the ECJ. It is likely that the interaction with national parliaments will be largely informal, based primarily on intelligence gathering. Interaction with regional parliaments with legislative powers is likely to be more intensive (as suggested by the CoR-CALRE action plan): a) because regional parliaments with legislative powers are one of the interest groupings in CoR; and b) because of a mutuality of interest. The regional parliaments with legislative powers are directly involved in the early warning process, and directly engaged in subsidiarity opinion-formation with their national parliaments, but the CoR is not. And the CoR has an ex-post right of appeal to the ECJ, while the regional parliaments with legislative powers do not. There is clearly a basis here for concerted action which would likely be intensified further should the Constitution come into force.

4) The CoR’s **annual subsidiarity conference** held first in Berlin in May 2004, and next in London in November 2005 provides a ‘summit’-style umbrella for these various joint activities. Its value lies in the inclusion of all those involved in the implementation of the subsidiarity principle including, alongside the CoR and RLA associations, representatives of national parliaments and the European Parliament and Commission. Through this diversity of participation the annual conferences serve as important arenas for raising awareness of and mainstreaming subsidiarity concerns. It will be important though to ensure committed, quality input from the national and European levels to move beyond any temptation to lip-service.

5) Finally, though it is easy to evoke a relationship of tension and opposition in the discussion of subsidiarity, perhaps the most important ally of the CoR is the **European Commission**. It needs to be remembered that of the EU-level institutions the Commission has by far the most intensive and responsive relationship with the CoR. And it needs to be remembered that most of the current mechanisms for considering subsidiarity in EU legislation were introduced by the Commission, in particular in follow-up to the Governance White Paper in 2001. Nurturing the relationship with the Commission while retaining the right to criticise it has to be one of the most important priorities of the CoR.

This sketch suggests the possibility for the CoR to place itself at the hub of a system of interactions between different organisations whichconcerts RLA viewpoints, but also connects them to national and European-level institutions. There are two effects. First, and at the very least, the CoR will be at the centre of information flows, empowered by the knowledge of others’ priorities to best define its strategy for achieving its goals. Second there is the opportunity to build coalitions of interest, connecting concerns of different groupings of RLAs, aligning these with national parliaments and the European Parliament, ensuring coordination with the Commission.
681. These two effects also play out through the legislative process, offering opportunities to strengthen arguments and build allies in pre-legislative consultation, on impact assessment, in the early warning phase, in monitoring amendments to legislation and in mounting appeals to the ECJ.
SECTION 3
CAPACITY-BUILDING WITHIN THE CoR

682. However, to maximise those effects requires some thinking about the CoR’s capacities. The CoR is not richly resourced and already is stretched in carrying out its routine business of giving opinions on EU legislative proposals. If it is to ‘seize the moment’ and embed a subsidiarity culture that has genuine resonance throughout the EU legislative process it needs to ensure it can devote sufficient capacities to the task.

683. This is partly a question of resources. Running a subsidiarity monitoring network, developing cooperation with associations, holding annual subsidiarity conferences consumes resources of staff time and logistical costs. If the CoR is to develop its work more strongly under the watchword of subsidiarity, it will need to spend more resources on it, and that means – unless a general budget increase is won, which is not so likely – spending less on other things. The question is how much the CoR wishes to prioritise its subsidiarity role, and what the consequent opportunity costs are for its other roles.

684. It is also a question of mainstreaming. Though some of the subsidiarity innovations of the Constitution might require organisational changes (see below), it is possible to ensure a more systematic practice of subsidiarity monitoring simply by including it in the standard business of the CoR and its Commissions. The development of the subsidiarity analysis grids as a mechanism for Commissions to check impact assessment, and the joint working of Commissions with European associations of RLAs in areas of shared concern show that this mainstreaming is taking place with growing effect. Integrating subsidiarity work alongside other work produces economies of scale, limiting some of the opportunity costs noted above.

685. But finally, it is a question of ensuring the modus operandi of the CoR is fit for the purpose of systematic subsidiarity monitoring throughout the legislative process. If the Constitution comes into force, that modus operandi quite clearly will not be fit for purpose given the timescales of the early warning system (if the CoR acts ‘as if’ it were part of the system) and of appeal to the ECJ. Given those timescales there can be no guarantee that meetings of the Plenary or particular Commissions would fall conveniently to allow the kind of careful debate that would be needed.

686. As most national and regional parliaments have discovered when thinking about how to carry out their subsidiarity monitoring functions under the Constitution, some kind of specialist body would be needed at the very least to prepare recommendations, or even to act with the full authority of the parliament-in-plenary. Logically enough the CoR has also considered the establishment of some kind of delegated authority to some body smaller than the plenary. Below we explore some of the issues this raises.
A. What kind of delegated subsidiarity body?

B. Who should sit on a delegated body?

687. Debate in the CoR has focused on two alternatives: the establishment of a small, specialist Subsidiarity Commission; and the delegation of subsidiarity tasks to the Bureau. The Bureau is in some ways a logical choice. It has wide representation across the various interests in CoR and meets regularly (seven times per year), though not regularly enough necessarily to manage a six-week turnaround under early warning or a two-month turnaround for ECJ appeal. But it could establish a sub-group to meet as and when required (it is, in any case, with over 50 members rather large a body for the kind of work needed in building up a sustained subsidiarity ‘methodology’). It is well-placed to speak for the CoR as a whole, though as the main body in setting and implementing the CoR’s work programme may find it difficult to find the space for what, under the Constitution, would be an intensive new task. A Subsidiarity Commission with a small, specialist, but representative membership has also been discussed. This would be a more direct analogy for the EU Affairs Committees to which early warning tasks would be delegated by national and regional parliaments. It would have a single subsidiarity monitoring task and would quickly build up focused expertise. But one concern with such a body would be how its smallness would ensure representativeness, and how it would connect with the routine business of the CoR and its specialist policy Commissions.

B. Who should sit on a delegated body?

688. This is a central question and concerns the differing perspectives different groupings of CoR members have on subsidiarity matters (see Chapter 10). The CoR’s voice will be strongest when it speaks with unity of purpose, but without achieving that common purpose through compromises achieved at a lowest common denominator or by the alienation of some groupings which then use other channels to achieve their goals. Though it is an oversimplification of the diversity of views in the CoR there is an important issue around the RegLeg/CALRE grouping. These do have distinctive subsidiarity interests based in the interaction of EU competence with their domestic legislative powers. They also have alternative routes for pursuing their interests through member state channels. It will be a concern for CoR to ensure that the profile and clout of the legislative regions is harnessed to wider CoR objectives. There is clearly no basis at present for developing groupings like RegLeg or other key territorial constituencies like cities as formal, organised groups within CoR. But finding a mechanism for mutual exchange and appreciation of the distinctive subsidiarity interests of such constituencies at least informally seems a precondition for maximising the CoR’s influence in subsidiarity monitoring. There might be opportunities to develop this kind of exchange through a subsidiarity ‘standing group’ attached to meetings of CoR and the European RLA associations. Such a group could provide a forum for preparing requests by European associations – such as CALRE has mooted – for the CoR to mount an appeal on their behalves to the ECJ.
C. How would the work of a delegated body connect with the routine work of the CoR?

689. One issue here is that of delegated authority. There need to be mechanisms for review of decisions taken under the authority of the plenary, for the revocation of those decisions if necessary, and ultimately for the ‘recall’ of the delegated body. These are standard practices and should cause no difficulty in the form of new standing orders. A second issue is how to connect the delegated body to the main working bodies of the CoR, its Commissions. This would require a clear understanding of division of labour. The point of the delegated body would be to have an ability to act in short timeframes in early warning and ex-post appeal. Outside of these timeframes a particular legislative proposal would be discussed by the relevant Commission: a) in developing, in the normal way, any CoR opinion (which of course would have a much wider reach than just subsidiarity issues); and b) in an enhanced role in monitoring the progress of legislation through the EU institutions. Some thought may be needed on how the latter role – which has not been a systematic priority of Commissions hitherto – should be developed in the light of a more systematic subsidiarity monitoring process. But broadly there is an obvious division of labour, with the delegated body acting at the early warning and ex-post stages, and the Commissions responsible during the legislative process itself. There would need to be work on the connection of different stages to ensure a) that the delegated body provides a subsidiarity briefing (a version of the subsidiarity analysis grid, but with more detail on problematic issues) to the relevant Commission and b) that the relevant Commission provides in a timely manner a briefing for the delegated body on any subsidiarity issues that emerged during the legislative process that might inform any decision to mount an appeal to the ECJ.
CONCLUSIONS OF CHAPTER 11

690. **A Culture of Subsidiarity**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

‘2.21 calls on the European Commission, the European Parliament, the Council of Ministers, and national and regional parliaments to create a real subsidiarity culture in the Union and to work together towards fixing that principle firmly in the minds of political decision-makers at European, national, regional and local level, and to conduct ongoing dialogue about specific measures for applying the principles of subsidiarity and proportionality

[...]’

3.6 proposes, for the purposes of developing a culture of subsidiarity in the European Union, that an annual subsidiarity conference be held involving the European Commission, the Council of Ministers, the European Parliament, the Court of Justice of the European Union as well as national parliaments and regional assemblies, at which progress, hindrances and developments in the application of the subsidiarity and proportionality principles are to be discussed and assessed’.

The CoR has called vigorously for a mainstreaming of a culture of subsidiarity in the European Union, and has been established in the Constitution and in debates on European Governance as a guardian of subsidiarity. It has therefore entered into an intensive debate about how as an organisation it can meet the challenge of fixing the subsidiarity principle ‘firmly in the minds of political decision-makers at European, national, regional and local level’. The CoR is taking steps to mainstream subsidiarity in the EU, in particular by hosting an annual subsidiarity conference designed as a meeting place for all those institutions – local, regional, national and European – whose cooperation and commitment is required to transform the aspiration of a culture of subsidiarity into practice.

691. **Monitoring Subsidiarity and Proportionality, with or without the Ratification of the Constitutional Treaty**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

‘1.4 appeals to the EU’s institutions and bodies to implement immediately, as far as is legally possible, the principles of subsidiarity and proportionality and the monitoring thereof provided for in the Constitutional Treaty, regardless of whether that Treaty has been ratified.’

[...]’

‘3.16 intends, even before the Constitutional Treaty for Europe enters into force, to use the subsidiarity monitoring instruments in a test phase, in particular by setting up an electronic network with regional and local authorities and their associations’.

Subsidiarity monitoring is not conditional on the entry into force of the Constitution, and the enhanced attention focused on subsidiarity in recent years is not a product alone of the constitutional debate. The CoR is therefore committed to developing its subsidiarity monitoring role irrespective of the fate of the Constitution and has begun to organise itself so it can better perform that role. In developing its subsidiarity monitoring role the CoR has taken steps to improve the evidence base on understandings of subsidiarity in order to deliver effective arguments on the infringement of subsidiarity. At the heart of
these steps is the establishment of an electronic subsidiarity monitoring network, constructed with the cooperation of RLAs and their associations and connected to other relevant databases, and designed as an instrument of information and consultation and to inform CoR decision-making.

692. **Mobilising wider Viewpoints**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

'2.22 invites national parliaments, which, like the Committee itself, have been given a right to bring actions before the Court of Justice of the European Union, to enter into continuous dialogue with it in order to develop joint strategies for the efficient application of the Subsidiarity Protocol and to effectively and transparently pursue at national level the consultation of representatives of the local and regional level, in particular regional parliaments with legislative powers, provided for in the Constitutional Treaty.

'2.23 invites regional parliaments to continue to liaise with it and to take internal measures that facilitate rapid decision-making and effective exchange of information on subsidiarity matters within the framework of the early warning system.

'3.23 notes that it will carefully consider any requests stemming from its networking with regional and local authorities and their associations to bring actions about EU legislative acts within the framework of its internal procedures.

Central to an effective subsidiarity monitoring role is the mobilisation by the CoR of wider viewpoints, and the alignment of its concerns with those of other institutions. It is developing an intensive practice of cooperation with RLA associations and will need to develop new lines of communication to national parliaments and regional parliaments with legislative powers if it wishes to connect its concerns to those of national and regional parliaments in the early warning process under the Constitution. Its right of ex-post appeal to the ECJ – which is not available to individual RLAs – means it is likely to be asked to act on subsidiarity infringements perceived by particular RLAs or RLA groupings. Its practices of cooperation will be important in developing shared understandings of subsidiarity which prevent frivolous appeals, and there are opportunities to develop a relationship of mutual benefit with legislative regions on early warning and ex-post appeal.

693. **Equipping the CoR for the Early Warning System**
In its Opinion 220-2004 the CoR 220-2004 [subsidiarity guidelines] the CoR

'3.12 decides, in the light of the deadlines that apply within the early warning system and to complaints by the CoR, to give the Bureau the task of checking that legislation proposed by the Commission in area where consultation of the CoR is mandatory is compatible with the principles of subsidiarity and proportionality and to make its views known to the European institutions and national parliaments.

'3.13 stresses that the substantive content of opinions on all legislative proposals remains the responsibility of the commissions and their rapporteurs.

'3.22 decides that, as a rule, the Bureau shall take decisions on lodging appeals, on the grounds of violations of the subsidiarity principle, with the Court of Justice of the European Union. If it is possible to do so by the relevant deadline, the plenary assembly shall take the decision on a proposal by the Bureau; in view of the significance of bringing such an action for the Committee, the plenary assembly at all times reserves the right to review the decision of the Bureau.'
694. The CoR’s existing modus operandi will not be suitable for the short timeframes needed for the early warning system or appeal to the ECJ under the Constitution. It is therefore debating how to equip itself best to meet such timescales, considering the delegation of the authority of the plenary to a special Subsidiarity Commission or alternatively the CoR Bureau. Each has advantages and disadvantages. But whichever route is chosen, care will need to be taken to connect the work of the delegated body to the plenary, which needs to retain the right to overrule delegated decisions, and the CoR’s policy Commissions, which will still deal with the main workload in reviewing, and suggesting improvements of, legislation.
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2. PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution, and to establish a system for monitoring the application of those principles,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe:

**Article 1**

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution.

**Article 2**

Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

**Article 3**

For the purposes of this Protocol, ‘draft European legislative acts’ shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act.

**Article 4**

The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

**Article 5**

Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.
Article 6

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

Article 7

The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III-264 of the Constitution on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft European legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

Article 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

Article 9

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article I-11 of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.
THE HIGH CONTRACTING PARTIES,

DETERMINED to establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions;

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

TAKING ACCOUNT of the Interinstitutional Agreement of 25 October 1993 between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity,

HAVE CONFIRMED that the conclusions of the Birmingham European Council on 16 October 1992 and the overall approach to the application of the subsidiarity principle agreed by the European Council meeting in Edinburgh on 11-12 December 1992 will continue to guide the action of the Union’s institutions as well as the development of the application of the principle of subsidiarity, and, for this purpose,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community:

1. In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

2. The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the acquis communautaire and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(4) of the Treaty on European Union, according to which ‘the Union shall provide itself with the means necessary to attain its objectives and carry through its policies’.

3. The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

4. For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

5. For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests;

- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

6. The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

7. Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States’ legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

8. Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

9. Without prejudice to its right of initiative, the Commission should:
- except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;

- justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect. The financing of Community action in whole or in part from the Community budget shall require an explanation;

- take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved;

- submit an annual report to the European Council, the European Parliament and the Council on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.

10. The European Council shall take account of the Commission report referred to in the fourth indent of point 9 within the report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with Article D of the Treaty on European Union.

11. While fully observing the procedures applicable, the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 3b of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

12. In the course of the procedures referred to in Articles 189b and 189c of the Treaty, the European Parliament shall be informed of the Council’s position on the application of Article 3b of the Treaty, by way of a statement of the reasons which led the Council to adopt its common position. The Council shall inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is
deemed to be inconsistent with Article 3b of the Treaty.

13. Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty.

ANNEX C

Relevant provisions of the Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004 - Principles of subsidiarity and proportionality

PART I

TITLE I – DEFINITION AND OBJECTIVES
OF THE UNION
ARTICLE I-5 Relations between the Union and the Member States

1. The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

UNION COMPETENCES – ARTICLE I-11
Fundamental principles

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

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

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

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

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

ARTICLE I-18 Flexibility clause

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the
consent of the European Parliament, shall adopt the appropriate measures.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments’ attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Constitution excludes such harmonisation.

**ARTICLE I-38**

**Principles common to the Union’s legal acts**

1. Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.

2. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Constitution.

**PART II**

**THE CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION**

**PREAMBLE**

This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

**TITLE VII – GENERAL PROVISIONS**

**GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER**

**ARTICLE II-111**

**Field of application**

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

**PART III**

**THE POLICIES AND FUNCTIONING OF THE UNION**

**TITLE III – INTERNAL POLICIES AND ACTION**

**CHAPTER IV – AREA OF FREEDOM, SECURITY AND JUSTICE**

**SECTION 1 – GENERAL PROVISIONS**

**ARTICLE III-259**

National Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

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218 Section 4: judicial cooperation in criminal matters; section 5: police cooperation.
PART I
TITLE I – DEFINITION AND OBJECTIVES
OF THE UNION
ARTICLE I-32
The Union’s advisory bodies

1. The European Parliament, the Council and the Commission shall be assisted by a Committee of the Regions and an Economic and Social Committee, exercising advisory functions.

2. The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.

3. The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas.

4. The members of the Committee of the Regions and the Economic and Social Committee shall not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Union’s general interest.

5. Rules governing the composition of these Committees, the designation of their members, their powers and their operations are set out in Articles III-386 to III-392.

The rules referred to in paragraphs 2 and 3 governing the nature of their composition shall be reviewed at regular intervals by the Council to take account of economic, social and demographic developments within the Union. The Council, on a proposal from the Commission, shall adopt European decisions to that end.

PART III
THE POLICIES AND FUNCTIONING OF THE UNION
TITRE VI – THE FUNCTIONING OF THE UNION
CHAPTER I – PROVISIONS GOVERNING THE INSTITUTIONS
SUBSECTION 5 – THE COURT OF JUSTICE OF THE EUROPEAN UNION
ARTICLE III-365

1. The Court of Justice of the European Union shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

2. For the purposes of paragraph 1, the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence,

216 Section 4: judicial cooperation in criminal matters; section 5: police cooperation.
infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.

3. The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

4. Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.

5. Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

6. The proceedings provided for in this Article shall be instituted within two months of the publication of the act, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the plaintiff’s knowledge, as the case may be.

SECTION 2 – THE UNION’S ADVISORY BODIES

SUBSECTION 1 – THE COMMITTEE OF THE REGIONS

ARTICLE III-386

The number of members of the Committee of the Regions shall not exceed 350. The Council, acting unanimously on a proposal from the Commission, shall adopt a European decision determining the Committee’s composition.

The members of the Committee and an equal number of alternate members shall be appointed for five years. Their term of office shall be renewable. No member of the Committee shall at the same time be a member of the European Parliament.

The Council shall adopt the European decision establishing the list of members and alternate members drawn up in accordance with the proposals made by each Member State.

When the mandate referred to in Article I-32(2) on the basis of which they were proposed comes to an end, the term of office of members of the Committee shall terminate automatically and they shall then be replaced for the remainder of the said term of office in accordance with the same procedure.

ARTICLE III-387

The Committee of the Regions shall elect its chairman and officers from among its members for a term of two and a half years.

It shall be convened by its chairman at the request of the European Parliament, of the Council or of the Commission. It may also meet on its own initiative.

It shall adopt its Rules of Procedure.

ARTICLE III-388

The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Constitution so provides and in all other cases in which one of these institutions considers it appropriate, in particular those which concern cross-border cooperation.

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time-limit which shall not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time-limit, the absence of an opinion shall not prevent further action.

Where the Economic and Social Committee is consulted, the Committee of the Regions shall be informed by the European Parliament, the Council or the Commission of the request for an opinion. Where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter. It may also issue an opinion on its own initiative.

The opinion of the Committee, together with a record of its proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.
Relevant provisions of the Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004 – Consultative powers of the Committee of the Regions

PART III
THE POLICIES AND FUNCTIONING OF THE UNION
CHAPTER III – POLICIES IN OTHER AREAS
SECTION 1 – EMPLOYMENT

ARTICLE III-206
1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.
2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission, shall each year adopt guidelines which the Member States shall take into account in their employment policies. It shall act after consulting the European Parliament, the Committee of the Regions, the Economic and Social Committee and the Employment Committee. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article III-179(2).
3. Each Member State shall provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.

ARTICLE III-207
European laws or framework laws may establish incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Such European laws or framework laws shall not include harmonisation of the laws and regulations of the Member States.

SECTION 2 – SOCIAL POLICY

ARTICLE III-209
The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

ARTICLE III-210
1. With a view to achieving the objectives of Article III-209, the Union shall support and complement the activities of the Member States in the following fields:
   a) improvement in particular of the working environment to protect workers’ health and safety;
   b) working conditions;
   c) social security and social protection of workers;
   d) protection of workers where their employment contract is terminated;
   e) the information and consultation of workers;
   f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;
   g) conditions of employment for third-country nationals legally residing in Union territory;
   h) the integration of persons excluded from the labour market, without prejudice to Article III-283;
   i) equality between women and men with regard to labour market opportunities and treatment at work;
   j) the combating of social exclusion;
   k) the modernisation of social protection systems without prejudice to point (c).
2. For the purposes of paragraph 1:
   a) European laws or framework laws may establish measures designed to encourage cooperation between Member States through...
initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
b) in the fields referred to in paragraph 1(a) to (i), European framework laws may establish minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such European framework laws shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
In all cases, such European laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

ARTICLE III-219
1. In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.
2. The Commission shall administer the Fund. It shall be assisted in this task by a Committee presided over by a member of the Commission and composed of representatives of Member States, trade unions and employers’ organisations.
3. European laws shall establish implementing measures relating to the Fund. Such laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

SECTION 3 – ECONOMIC, SOCIAL AND TERRITORIAL COHESION
ARTICLE III-220
In order to promote its overall harmonious development, the Union shall develop and pursue its action leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.
Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.

ARTICLE III-221
Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article III-220. The formulation and implementation of the Union’s policies and action and the implementation of the internal market shall take into account those objectives and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing financial instruments.
The Commission shall submit a report to the European Parliament, the Council, the Committee of the Regions and the Economic and Social Committee every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.
European laws or framework laws may establish any specific measure outside the Funds, without prejudice to measures adopted within the framework of the Union’s other policies. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

ARTICLE III-223
1. Without prejudice to Article III-224, European laws shall define the tasks, the priority objectives and the organisation of the structural funds, which may involve grouping the Funds, the general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments.
A Cohesion Fund set up by a European law shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure. In all cases, such European laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.
2. The first provisions on the Structural Funds and the Cohesion Fund to be adopted following those in force on the date on which the Treaty establishing a Constitution for Europe is signed shall be established by a European law of the Council. The Council shall act unanimously after obtaining the consent of the European Parliament.

**ARTICLE III-224**

European laws shall establish implementing measures relating to the European Regional Development Fund. Such laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. With regard to the European Agricultural Guidance and Guarantee Fund, Guidance Section, and the European Social Fund, Articles III-231 and III-219(3) respectively shall apply.

**SECTION 5 – ENVIRONMENT**

**ARTICLE III-233**

1. Union policy on the environment shall contribute to the pursuit of the following objectives:
   a) preserving, protecting and improving the quality of the environment;
   b) protecting human health;
   c) prudent and rational utilisation of natural resources;
   d) promoting measures at international level to deal with regional or worldwide environmental problems.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional steps, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:
   a) available scientific and technical data;
   b) environmental conditions in the various regions of the Union;
   c) the potential benefits and costs of action or lack of action;
   d) the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for the Union’s cooperation may be the subject of agreements between the Union and the third parties concerned. The first subparagraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements.

**ARTICLE III-234**

1. European laws or framework laws shall establish what action is to be taken in order to achieve the objectives referred to in Article III-233. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

2. By way of derogation from paragraph 1 and without prejudice to Article III-172, the Council shall unanimously adopt European laws or framework laws establishing:
   a) provisions primarily of a fiscal nature;
   b) measures affecting:
      i) town and country planning;
      ii) quantitative management of water resources or affecting, directly or indirectly, the availability of those resources;
      iii) land use, with the exception of waste management;
   c) measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply. The Council, on a proposal from the Commission, may unanimously adopt a European decision making the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

   In all cases, the Council shall act after consulting the European Parliament, the Committee of the Regions and the Economic and Social Committee.

3. European laws shall establish general action programmes which set out priority objectives to be attained. Such laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on paragraph 1 involves costs deemed
disproportionate for the public authorities of a Member State, such measure shall provide in appropriate form for:
a) temporary derogations, and/or
b) financial support from the Cohesion Fund.
6. The protective measures adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Constitution. They shall be notified to the Commission.

SECTION 7 – TRANSPORT
ARTICLE III-236
1. The objectives of the Constitution shall, in matters governed by this Section, be pursued within the framework of a common transport policy.
2. European laws or framework laws shall implement paragraph 1, taking into account the distinctive features of transport. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Such European laws or framework laws shall establish:
a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
b) the conditions under which non-resident carriers may operate transport services within a Member State;
c) measures to improve transport safety;
d) any other appropriate measure.
3. When the European laws or framework laws referred to in paragraph 2 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

ARTICLE III-237
Until the European laws or framework laws referred to in Article III-236(2) have been adopted, no Member State may, unless the Council has unanimously adopted a European decision granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.

ARTICLE III-245
1. This Section shall apply to transport by rail, road and inland waterway.
2. European laws or framework laws may lay down appropriate measures for sea and air transport. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

SECTION 8 – TRANS-EUROPEAN NETWORKS
ARTICLE III-246
1. To help achieve the objectives referred to in Articles III-130 and III-220 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.
2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union.

ARTICLE III-247
1. In order to achieve the objectives referred to in Article III-246, the Union:
a) shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest;
b) shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation;
c) may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in point (a), particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund, to the financing of specific projects in Member States in the area of transport infrastructure.
2. European laws or framework laws shall establish the guidelines and other measures referred to in paragraph 1. Such laws shall be
adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Guidelines and projects of common interest which relate to the territory of a Member State shall require the agreement of that Member State.

SECTION 9
RESEARCH AND TECHNOLOGICAL DEVELOPMENT AND SPACE

ARTICLE III-251
1. European laws shall establish a multiannual framework programme, setting out all the activities financed by the Union. Such laws shall be adopted after consultation of the Economic and Social Committee. The framework programme shall:
   a) establish the scientific and technological objectives to be achieved by the activities provided for in Article III-249 and lay down the relevant priorities;
   b) indicate the broad lines of such activities;
   c) lay down the maximum overall amount and the detailed rules for the Union’s financial participation in the framework programme and the respective shares in each of the activities provided for.
2. The multiannual framework programme shall be adapted or supplemented as the situation changes.
3. A European law of the Council shall establish specific programmes to implement the multiannual framework programme within each activity. Each specific programme shall define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary. The sum of the amounts deemed necessary, fixed in the specific programmes, shall not exceed the overall maximum amount fixed for the framework programme and each activity. Such a law shall be adopted after consulting the European Parliament and the Economic and Social Committee.
4. As a complement to the activities planned in the multiannual framework programme, European laws shall establish the measures necessary for the implementation of the European research area. Such laws shall be adopted after consulting the Economic and Social Committee.

ARTICLE III-252
1. For the implementation of the multiannual framework programme, European laws or framework laws shall establish:
   a) the rules for the participation of undertakings, research centres and universities;
   b) the rules governing the dissemination of research results.
Such European laws or framework laws shall be adopted after consultation of the Economic and Social Committee.
2. In implementing the multiannual framework programme, European laws may establish supplementary programmes involving the participation of certain Member States only, which shall finance them subject to possible participation by the Union. Such European laws shall determine the rules applicable to supplementary programmes, particularly as regards the dissemination of knowledge as well as access by other Member States. They shall be adopted after consultation of the Economic and Social Committee and with the agreement of the Member States concerned.
3. In implementing the multiannual framework programme, European laws may make provision, in agreement with the Member States concerned, for participation in research and development programmes undertaken by several Member States, including participation in the structures created for the execution of those programmes. Such European laws shall be adopted after consultation of the Economic and Social Committee.
4. In implementing the multiannual framework programme the Union may make provision for cooperation in the Union’s research, technological development and demonstration with third countries or international organisations. The detailed arrangements for such cooperation may be the subject of agreements between the Union and the third parties concerned.

ENERGY
ARTICLE III-256
1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim to:
   a) ensure the functioning of the energy market;
   b) ensure security of energy supply in the Union, and
   c) promote energy efficiency and energy saving and the development of new and renewable forms of energy.
2. Without prejudice to the application of other provisions of the Constitution, the objectives in paragraph 1 shall be achieved by measures enacted in European laws or framework laws. Such laws or framework laws shall be adopted
after consultation of the Committee of the Regions and the Economic and Social Committee. Such European laws or framework laws shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article III-234(2)(c).

3. By way of derogation from paragraph 2, a European law or framework law of the Council shall establish the measures referred to therein when they are primarily of a fiscal nature. The Council shall act unanimously after consulting the European Parliament.

SECTION 1 – PUBLIC HEALTH

ARTICLE III-278

1. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities. Action by the Union, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover:
   a) the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education;
   b) monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States’ action in reducing drug-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article I-12(5) and Article I-17(a) and in accordance with Article I-14(2)(k), European laws or framework laws shall contribute to the achievement of the objectives referred to in this Article by establishing the following measures in order to meet common safety concerns:
   a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
   b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
   c) measures setting high standards of quality and safety for medicinal products and devices for medical use;
   d) measures concerning monitoring, early warning of and combating serious cross-border threats to health.

Such European laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. European laws or framework laws may also establish incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, as well as measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

6. For the purposes of this Article, the Council, on a proposal from the Commission, may also adopt recommendations.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.
SECTION 3 – CULTURE
ARTICLE III-280
1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas:
   a) improvement of the knowledge and dissemination of the culture and history of the European peoples;
   b) conservation and safeguarding of cultural heritage of European significance;
   c) non-commercial cultural exchanges;
   d) artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Constitution, in particular in order to respect and promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article:
   a) European laws or framework laws shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions; 
   b) the Council, on a proposal from the Commission, shall adopt recommendations.

SECTION 5 – EDUCATION, YOUTH, SPORT AND VOCATIONAL TRAINING
ARTICLE III-282
1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and complementing their action. It shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
   The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
   Union action shall be aimed at:
   a) developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;
   b) encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;
   c) promoting cooperation between educational establishments;
   d) developing exchanges of information and experience on issues common to the education systems of the Member States;
   e) encouraging the development of youth exchanges and of exchanges of socio-educational instructors and encouraging the participation of young people in democratic life in Europe;
   f) encouraging the development of distance education;
   g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.
2. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.
3. In order to contribute to the achievement of the objectives referred to in this Article:
   a) European laws or framework laws shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee; 
   b) the Council, on a proposal from the Commission, shall adopt recommendations.

ARTICLE III-283
1. The Union shall implement a vocational training policy which shall support and complement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
   Union action shall aim to:
   a) facilitate adaptation to industrial change, in particular through vocational training and retraining;
   b) improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market;
c) facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people;
d) stimulate cooperation on training between educational or training establishments and firms;
e) develop exchanges of information and experience on issues common to the training systems of the Member States.

2. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

3. In order to contribute to the achievement of the objectives referred to in this Article:
a) European laws or framework laws shall establish the necessary measures, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee;
b) the Council, on a proposal from the Commission, shall adopt recommendations.

To this end the Union and the Member States shall act taking account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Constitution and from the approximation of provisions laid down by law, regulation or administrative action of the Member States.

ARTICLE III-427

The Staff Regulations of officials and the Conditions of employment of other servants of the Union shall be laid down by a European law. It shall be adopted after consultation of the institutions concerned.

ANNEX F

Correspondence table between the articles of the Constitution for Europe and the provisions of the treaties currently in force

For a systematic comparison (in French) of the Treaty establishing a Constitution for Europe with the treaties currently in force see Sénat de la République française, Service des Affaires européennes, CONSTITUTION EUROPEENNE - Comparaison avec les traités en vigueur, available at http://www.senat.fr/rap/rapport_constitution/rapport_constitution.html

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ANNEX G

DENMARK AND THE TREATY ON EUROPEAN UNION
(Official Journal of the European Communities 1992 C 348, p. 1)

The European Council recalled that the entry into force of the Treaty signed in Maastricht requires ratification by all 12 Member States in accordance with their respective constitutional requirements, and reaffirmed the importance of concluding the process as soon as possible, without re-opening the present text, as foreseen in Article R of the Treaty.

The European Council noted that Denmark has submitted to Member States on 30 October a document entitled ‘Denmark in Europe’, which sets out the following points as being of particular importance:
- the defence policy dimension,
- the third stage of economic and monetary union,
- citizenship of the Union,
- cooperation in the fields of justice and home affairs,
- openness and transparency in the Community’s decision-making process,
- the effective application of the principle of subsidiarity,
- promotion of cooperation between the Member States to combat unemployment.

Against this background, the European Council has agreed on the following set of arrangements, which are fully compatible with the Treaty, are designed to meet Danish concerns, and therefore apply exclusively to Denmark and not to other existing or acceding Member States:

a) Decision concerning certain problems raised by Denmark on the Treaty on European Union (Annex I). This Decision will take effect on the date of entry into force of the Treaty on European Union;
b) the Declarations in Annex 2.

The European Council has also taken cognizance of the unilateral Declarations in Annex 3, which will be associated with the Danish act of ratification of the Treaty on European Union.


ANNEX I

DECISION OF THE HEADS OF STATE OR GOVERNMENT, MEETING WITHIN THE EUROPEAN COUNCIL, CONCERNING CERTAIN PROBLEMS RAISED BY DENMARK ON THE TREATY ON EUROPEAN UNION

The Heads of State or Government, meeting within the European Council, whose governments are signatories of the Treaty on European Union, which involves independent and sovereign States having freely decided, in accordance with the existing Treaties, to exercise in common some of their competences,

- desiring to settle, in conformity with the Treaty on European Union, particular problems existing at the present time specifically for Denmark and raised in its memorandum ‘Denmark in Europe’ of 30 October 1992,
- having regard to the conclusions of the Edinburgh European Council on subsidiarity and transparency,
- noting the Declarations of the Edinburgh European Council relating to Denmark,
- taking cognizance of the unilateral declarations of Denmark made on the same occasion which will be associated with its act of ratification,
- noting that Denmark does not intend to make use of the following provisions in such a way as to prevent closer cooperation and action among Member States compatible with the Treaty and within the framework of the Union and its objectives,

Have agreed on the following decision:

SECTION A
Citizenship

The provisions, of Part Two of the Treaty establishing the European Community relating to citizenship of the Union, give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

SECTION B
Economic and monetary union
1. The Protocol on certain provisions relating to Denmark attached to the Treaty establishing the European Community gives Denmark the right to
notify the Council of the European Communities of its position concerning participation in the third stage of economic and monetary union. Denmark has given notification that it will not participate in the third stage. This notification will take effect upon the coming into effect of this decision.

2. As a consequence, Denmark will not participate in the single currency; will not be bound by the rules concerning economic policy which apply only to the Member States participating in the third stage of economic and monetary union, and will retain its existing powers in the field of monetary policy according to its national laws and regulations, including powers of the National Bank of Denmark in the field of monetary policy.

3. Denmark will participate fully in the second stage of economic and monetary union and will continue to participate in exchange-rate cooperation within the European Monetary System (EMS).

SECTION C
Defence policy
The Heads of State or Government note that, in response to the invitation from the Western European Union (WEU), Denmark has become an observer to that organization. They also note that nothing in the Treaty on European Union commits Denmark to become a member of the WEU. Accordingly, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between Member States in this area.

SECTION D
Justice and home affairs
Denmark will participate fully in cooperation on justice and home affairs on the basis of the provisions of Title VI of the Treaty on European Union.

SECTION E
Final provisions
1. This Decision will take effect on the date of entry into force of the Treaty on European Union; its duration shall be governed by Articles Q and N(2) of that Treaty.

2. At any time Denmark may, in accordance with its constitutional requirements, inform other Member States that it no longer wishes to avail itself of all or part of this Decision. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.

ANNEX 2
DECLARATIONS OF THE EUROPEAN COUNCIL
DECLARATION ON SOCIAL POLICY, CONSUMERS, ENVIRONMENT, DISTRIBUTION OF INCOME
1. The Treaty on European Union does not prevent any Member State from maintaining or introducing more stringent protection measures compatible with the EC Treaty:
- in the field of working conditions and in social policy (Article 118A(3) of the EC Treaty and Article 2(5) of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom),
- in order to attain a high level of consumer protection (Article 129A(3) of the EC Treaty),
- in order to pursue the objectives of protection of the environment (Article 130T of the EC Treaty).

2. The provisions introduced by the Treaty on European Union, including the provisions on economic and monetary union, permit each Member State to pursue its own policy with regard to distribution of income and maintain or improve social welfare benefits.

DECLARATION ON DEFENCE
The European Council takes note that Denmark will renounce its right to exercise the Presidency of the Union in each case involving the elaboration and the implementation of decisions and actions of the Union which have defence implications. The normal rules for replacing the President, in the case of the President being indisposed, shall apply. These rules will also apply with regard to the representation of the Union in international organizations, international conferences and with third countries.

ANNEX 3
UNILATERAL DECLARATIONS OF DENMARK, TO BE ASSOCIATED TO THE DANISH ACT OF RATIFICATION OF THE TREATY ON EUROPEAN UNION AND OF WHICH THE 11 OTHER MEMBER STATES WILL TAKE COGNIZANCE
DECLARATION ON CITIZENSHIP OF THE UNION
1. Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in
the sense of citizenship of a nation State. The question of Denmark participating in any such development does, therefore, not arise.

2. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark’s constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States.

3. Nationals of the other Member States of the European Community enjoy in Denmark the right to vote and to stand as a candidate at municipal elections, foreseen in Article 8b of the European Community Treaty. Denmark intends to introduce legislation granting nationals of the other Member States the right to vote and to stand as a candidate for elections to the European Parliament in good time before the next elections in 1994. Denmark has no intention of accepting that the detailed arrangements foreseen in paragraphs 1 and 2 of this Article could lead to rules detracting from the rights already given in Denmark in that matter.

4. Without prejudice to the other provisions of the Treaty establishing the European Community, Article 8e requires the unanimity of all the members of the Council of the European Communities, i.e. all Member States, for the adoption of any provision to strengthen or to add to the rights laid down in Part Two of the EC Treaty. Moreover, any unanimous decision of the Council, before coming into force, will have to be adopted in each Member State, in accordance with its constitutional requirements. In Denmark, such adoption will, in the case of a transfer of sovereignty, as defined in the Danish Constitution, require either a majority of five sixths of members of the Folketing or both a majority of the members of the Folketing and a majority of voters in a referendum.

DECLARATION ON COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS
Article K9 of the Treaty on European Union requires the unanimity of all the members of the Council of the European Union, i.e. all Member States, for the adoption of any decision to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6). Moreover, any unanimous decision of the Council, before coming into force, will have to be adopted in each Member State, in accordance with its constitutional requirements. In Denmark, such

FINAL DECLARATION
The Decision and Declarations above are a response to the result of the Danish referendum of 2 June 1992 on ratification of the Maastricht Treaty. As far as Denmark is concerned, the objectives of that Treaty in the four areas mentioned in sections A to D of the Decision are to be seen in the light of these documents, which are compatible with the Treaty and do not call its objectives into question.
IRELAND AND THE TREATY OF NICE

Seville European Council Presidency Conclusions 21 and 22 June 2002
(Press releases DOC/02/13, 24/06/2002

The Taoiseach announced that his Government intended to organise a referendum in autumn 2002, to enable Ireland to ratify the Treaty of Nice. He presented the ‘National Declaration by Ireland’ reaffirming that the provisions of the Treaty on European Union relating to foreign and security policy did not undermine its traditional policy of military neutrality and that this would continue to be the case after ratification of the Treaty of Nice (see Annex III). The European Council adopted a Declaration taking cognisance of the National Declaration by Ireland (see Annex IV). The European Council welcomed the Irish Government’s determination to have the Treaty of Nice approved, this being a condition for enlargement to take place within the scheduled timescale.

ANNEX III
NATIONAL DECLARATION BY IRELAND

1. Ireland reaffirms its attachment to the aims and principles of Charter of the United Nations, which confers primary responsibility for the maintenance of international peace and security upon the United Nations Security Council.

2. Ireland recalls its commitment to the common foreign and security policy of the European Union as set out in the Treaty on European Union, adopted at Maastricht, amended at Amsterdam and approved on each occasion by the Irish people through referendum.

3. Ireland confirms that its participation in the European Union’s common foreign and security policy does not prejudice its traditional policy of military neutrality. The Treaty on European Union makes clear that the Union’s security and defence policy shall not prejudice the specific character of the security and defence policy of certain Member States.

4. In line with its traditional policy of military neutrality, Ireland is not bound by any mutual defence commitment. Nor is Ireland party to any plans to develop a European army. Indeed, the Nice European Council recognised that the development of the Union’s capacity to conduct humanitarian and crisis management tasks does not involve the establishment of a European army.

5. The Treaty on European Union specifies that any decision by the Union to move to a common defence would have to be taken by unanimous decision of the Member States and adopted in accordance with their respective constitutional requirements. The Government of Ireland have made a firm commitment to the people of Ireland, solemnized in this Declaration, that a referendum will be held in Ireland on the adoption of any such decision and on any future treaty which would involve Ireland departing from its traditional policy of military neutrality.

6. Ireland reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European security and defence policy, requires (a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations, (b) the agreement of the Irish Government and (c) the approval of Dáil Éireann, in accordance with Irish law.

7. The situation set out in this Declaration would be unaffected by the entry into force of the Treaty of Nice. In the event of Ireland’s ratification of the Treaty of Nice, this Declaration will be associated with Ireland’s instrument of ratification.

ANNEX IV
DECLARATION OF THE EUROPEAN COUNCIL
1. The European Council takes cognisance of the National Declaration of Ireland presented at its meeting in Seville on 21-22 June 2002. It notes that Ireland intends to associate its National Declaration with its act of ratification of the Treaty of Nice, should the people of Ireland in a referendum decide to accept the Treaty of Nice.

2. The European Council notes that the Treaty on European Union provides that any decision to move to a common defence shall be adopted in accordance with the respective constitutional requirements of the Member States.

3. The European Council recalls that under the terms of the Treaty on European Union the policy of the Union shall not prejudice the specific character of the security and defence policy of certain Member States. Ireland has drawn attention, in this regard, to its traditional policy of military neutrality.

4. The European Council acknowledges that the Treaty on European Union does not impose any binding mutual defence commitments. Nor does the development of the Union’s capacity to conduct humanitarian and crisis management tasks involve the establishment of a European army.

5. The European Council confirms that the situation referred to in paragraphs 2, 3 and 4 above would be unchanged by the entry into force of the Treaty of Nice.

6. The European Council recognises that, like all Member States of the Union, Ireland would retain the right, following the entry into force of the Treaty of Nice, to take its own sovereign decision, in accordance with its Constitution and its laws, on whether to commit military personnel to participate in any operation carried out under the European Security and Defence Policy. Ireland, in its National Declaration, has clearly set out its position in this regard.
ANNEX I

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