

# **Opinion of the Joint Committee Application Subsidiarity concerning the parliamentary procedure for European draft legislative acts**

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# **1. Backdrop**

## **1.1 European Convention**

At its meeting on December 14 and 15 2001 in Liege, the European Council concluded that it was high time to thoroughly adjust the structure of the European Union, in view of the imminent enlargement of the Union to 25 Member States. Recent attempts had borne insufficient fruit, which is why an unusual method was considered for revising treaties. This new method materialised in the so called Convention, a public consultation body consisting of members of national parliaments and the European Parliament, representatives of the European Commission and the national governments. Some experience had already been acquired during the drafting of the charter of Fundamental Rights. One of the instructions to the Convention was to make proposals for enhancing the involvement of citizens in the European project and European institutions.

The Convention submitted its final text on July 10 2003. Heads of government subsequently negotiated on the basis of the text and the Intergovernmental Conference reached an agreement regarding a Convention to adopt a Constitution for Europe on June 18 2004 , hereinafter to be referred to as *the Constitution for Europe*.

The Convention i.a. addressed the question as to how citizens could become more closely involved in European Institutions and how the democratic processes in the European Union could be enhanced. The Convention believed that national parliaments could play an important role in this respect. In the draft text for the Constitution for Europe, the Convention proposed to strengthen the role of the national parliaments and to improve the application and review of the principle of subsidiarity and proportionality. These proposals led to two protocols attached to the proposal for a draft convention to adopt a Constitution for Europe, namely:

- Protocol concerning the role of the national parliaments in the European Union and
- Protocol concerning the application of the principles of subsidiarity and proportionality.

These protocols, for the first time in the history of the European integration process, formally involve the national parliaments of the European Union in the European legislative process. This involvement (exclusively) concerns the process of reviewing European draft legislative acts against the principles of subsidiarity and proportionality. This is also referred to as the subsidiarity and proportionality review.

## **1.2 Joint Committee Application Subsidiarity**

In the final stages of the European Convention, on June 10 2003 the committee European Affairs of the Dutch House of Representatives and the committees European Cooperation organisations and Foreign Affairs and the special committee for the JHA-council of the Senate consulted jointly and simultaneously with the prime minister, the minister of Foreign Affairs and the parliamentary state secretary for Foreign Affairs<sup>1</sup>. It was during this consultation that MP Van Dijk et al. submitted a resolution (28473, 13) and Member of the Senate Van de Beeten et al. announced a concurrent resolution (28473, 158g). This resolution was submitted in the plenary meeting of the Senate on June 17 2003. Said resolutions call

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<sup>1</sup> This was formally a simultaneous memorandum consultation of the permanent committee for European Affairs in Parliament and a public oral consultation of the committees for European Cooperation organisations, Foreign Affairs and the special committee for the JHA council of the Senate with aforementioned members of the cabinet.

upon the presidents of both Chambers to set up a joint committee. It was considered that the proposals made by the Convention to strengthen the role of national parliaments, particularly in the subsidiarity and proportionality review require a detailed revision of the procedure of both Chambers of the States General. Adjusting the constitution was not precluded beforehand. The joint committee which was to be set up, was to submit proposals on the necessary and desired adjustments to the procedures of the States General. Both resolutions were adopted unanimously in the respective chambers

The joint committee was inaugurated on November 18 2003 and now calls itself Joint Committee Application Subsidiarity, hereinafter to be referred to as the Joint Committee. The committee is a reflection of equal representation of members of the Senate and the House of Representatives:

Dr. J.J. van Dijk (chair)	House of Representatives
Prof. E.C.M. Jurgens (deputy chair)	Senate
Mr. J.C. van Baalen	House of Representatives
Mrs. A. Broekers-Knol	Senate
Mr. E.P. van Heemst	House of Representatives
Mrs. L.W.S.A.L.B. van der Laan	House of Representatives
Mr. P.H.R.M. van der Linden	Senate
Dr. A.A.G.M. van Raak	Senate

The designated registrars are:

Mrs. W.A.J.M. van Dooren	Senate
Mr. F.H. Mittendorff	House of Representatives

Chapter 2 provides further details on the working method of the joint committee. Chapter 3 will discuss the content of both protocols. Based on the content of the protocols, chapter 4 will offer a proposal as to how Dutch parliament can implement the subsidiarity and proportionality review.

## **2. Mandate and working method of the committee**

### **2.1 Mandate**

The committee has defined the following mandate:

- Draft proposals for Dutch parliament to be able to better perform its monitoring task. This will enhance the democratic legitimacy of the European institutions, and particularly the Council of Ministers;
- Draft specific proposals to prepare Dutch parliament for the implementation of both protocols as soon as the Convention has been ratified.

### **2.2 Working method**

In its work, the committee followed an international and a national route. Both routes are described below.

#### **2.2.1 National**

The national route was followed along three lines.

- First, the committee held an internal debate based on a questionnaire which had been drafted by the committee proper. (This questionnaire has been enclosed with this Opinion as *annex 1*).
- Furthermore, the committee asked messrs. prof. C.A.J.M. Kortmann, prof. dr. M.P.C.M. Van Schendelen and prof. L.A. Geelhoed for an opinion. (This opinion has been enclosed as *annex 2a, 2b and 2c* to this opinion.)
- Finally, on May 11 2004 the committee met with community-based organisations. The following organisations participated in this hearing: IPO-VNG (Interprovincial Consultative Body-Association Dutch Municipalities), Europa decentraal, CNV (Christian National Trade Union), VNO/NCW (Employers' Organisation), Vrije Universiteit, University of Amsterdam, University of Maastricht, University of Leiden, Koninklijke Nederlandse Academie voor de Wetenschappen (Royal Dutch Academy of Sciences), HBO-Raad (Polytechnics Council), Stichting Natuur en Milieu (Foundation for Nature and Environment). The report of the hearing has been enclosed as *annex 3* to this opinion.

#### **2.2.2 International**

An international study was conducted in the 25 national parliaments of the Member States and the (then) accessing member states of the European Union. This study was based on a questionnaire which had been drafted by the Joint Committee and was forwarded to the parliaments via the European Centre for Parliamentary Research and Development (ECPRD). Parliaments were requested to outline the current state of affairs concerning the parliamentary implementation of the subsidiarity review. Parliaments are also requested to outline how they believe the subsidiarity review should be implemented in the future. 18 Member States responded to the study. (The questionnaire and the (schematic) outline of the results have been enclosed as *annex 4* to this opinion)

### **3. Analysis of the Protocols concerning the role of national parliaments in the European Union and concerning the application of the principles of subsidiarity and proportionality as well as the competences of the Union**

#### **3.1 Introduction**

The current Treaty establishing the European Community defines subsidiarity as follows in article 5:

#### PART ONE - THE PRINCIPLES

##### Article 5

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

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.

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

The *Constitution for Europe* provides the competences of the Union in Part I, Title III. The fundamental principles thereof have been incorporated in article I-11 and read as follows (text version CIG87/04 dated August 6 2004).

#### TITLE III 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.

The *Constitution for Europe* does not entail a material change to the already existing subsidiarity review, although the *Constitution for Europe* does contain a slightly amended wording and an additional criterion particularly for implementing the proportionality review.

A specification of the implementation has been incorporated in the following two protocols to the *Constitution for Europe*  
(text version CIG 87/04 add.1)

# 1. PROTOCOL ON THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,  
RECALLING that the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State;  
DESIRING to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft European legislative acts as well as on other matters which may be of particular interest to them,  
HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe and to the Treaty establishing the European Atomic Energy Community:

## TITLE I INFORMATION FOR NATIONAL PARLIAMENTS

### 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.

### ARTICLE 2

Draft European legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments. 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. 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. Draft European legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament. 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.

#### ARTICLE 3

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. 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. 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.

#### ARTICLE 4

A six-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft European legislative act during those six weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft European legislative act on the provisional agenda for the Council and the adoption of a position.

#### 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.

## TITLE II INTERPARLIAMENTARY COOPERATION

### ARTICLE 9

The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

### ARTICLE 10

A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.

## 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 appraisal 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.

In the future, the European Commission will have to attach a subsidiarity and proportionality statement to every draft legislative act. Such a statement shall include an extensive explanatory note so that compliance with the principles of subsidiarity and proportionality can be appraised (by national parliaments).

Currently, one tends to refer to the principle of subsidiarity, for the sake of brevity, which then also encompasses the principle of proportionality. The protocols, nonetheless, specify that national parliaments can only apply to the European Commission directly if they object against subsidiarity. Objections against proportionality could be further addressed in the course of the negotiations.

### **3.2 Analysis of the Protocols: the procedural organisation of the subsidiarity and proportionality review**

The European Commission produces different types of documents. Pursuant to protocol 1, the following documents are to be forwarded to the national parliaments:

- consultation papers (green and white papers and communications);
- the annual legislative programme
- draft legislative acts;

- texts concerning the policy strategy which the Commission might submit to the European Parliament and the Council

The protocol stipulates that the consultation papers are to be forwarded directly to the national parliaments upon publication. The three other types of documents are to be forwarded to the national parliaments at the same time as their submission to the European Parliament and the Council.

The protocol concerning the national parliaments also determines that the national parliaments can forward a reasoned opinion, on the question whether the draft legislative act is in compliance with the principle of subsidiarity, to the president of the European Parliament, the Council and the European Commission. This defines the limits of the scope of the subsidiarity review. The review can only be applied to draft legislative acts and not to other types of documents the Commission produces, as stated above.

The procedure to be followed has been laid down in protocol 2, which will be elaborated below, insofar as possible, on the basis of the Dutch parliamentary system.

As stated in protocol 1, the European Commission sends draft legislative acts and amended drafts at the same time to the national parliaments and the legislator of the Union, i.e. the Council of Ministers and the European Parliament.

The Commission has an obligation to provide a statement of reasons. It shall justify its draft acts 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 shall also contain several other elements such as the assessment of the proposal's financial impact, the implications for the rules to be adopted by member states, including – where necessary – regional legislation. These elements will not be considered any further since they are not part of the subsidiarity review. The reasons for concluding that an objective of the Union can be better accomplished by the Union shall be substantiated with qualitative or, if possible, quantitative indicators. The Commission shall take account of the fact that all financial and/or administrative burdens are to be minimised and must be commensurate with the objective to be achieved. Minimising burdens applies to the Union, the national governments, the regional or local authorities, business and citizens.

Subsequently, the national parliaments or the individual chambers of a national parliament can, within a period of six weeks as from the date the draft legislative act of the Commission is forwarded in all community languages, submit a reasoned opinion to the presidents of the European parliament, the Council of Ministers and the Commission. This opinion shall contain the reasons why the draft legislative act concerned would not comply with the principle of subsidiarity.

The European Parliament, the Council and the Commission must take the reasoned opinions into account. The following procedure, also called the “early warning mechanism”, has been included in the protocol to that effect.

#### *Yellow card*

The protocol stipulates that every national parliament has two votes. In bicameral systems, the individual chambers each have one vote. The Commission shall reconsider its proposal if aforementioned reasoned opinions represent at least one third of the votes of the national parliaments. This threshold amounts to at least one fourth if the draft legislative act originates from the Commission or of a group of Member States in the framework of the space of freedom, safety and justice.

A total of 50 votes may be cast in the current Union of 25 Member States. The threshold of one-third is reached if 17 votes are cast against the draft legislative act concerned. The threshold of one-fourth is reached with 13 votes against. On the basis of the reconsideration, the Commission can decide to maintain, amend or withdraw its proposal. The Commission shall justify its decision.

#### *Red card*

Should the Commission, nonetheless, decide to maintain the proposal, an appeal can be brought to the Court of Justice. Pursuant to the protocol, the Court is competent to take cognizance of any appeal claiming that a draft legislative act infringes the principle of subsidiarity. There are no arrangements as to whether the government can at some point independently decide whether or not to bring the appeal to the Court. This element has not been addressed in the Convention.<sup>2</sup>

On the basis of the text of the Protocol one may conclude that the procedural organisation is a matter of the Member States themselves, since “The Court of Justice is competent to take cognizance of any appeal (...) which (...) is *forwarded by the Member States in accordance with the national rule of law* on behalf of their national parliament to a chamber of that parliament”. This conclusion is endorsed by staff of mr. Ponzano, former deputy member of the Convention on behalf of the Commission. Mr. Crum also argued, in the framework of the WRR project (Advisory Council on Government Policy) that the Convention was reticent to propose provisions regarding the organisation of the relations between national governments and parliaments. The main reason is that this is deemed to be a matter of the Member States themselves. Another reason is that decision-making would become almost impossible in this body<sup>3</sup> should national parliaments have too much control over the actions of their governments in the Council of Ministers (as for instance in the Danish model).

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<sup>2</sup> At the plenary session on March 17 and 18 2003 the Convention did, however, discuss the possibility of national parliaments filing an appeal directly to the Court. There were diverging opinions. Many members of the Convention suggested that parliaments should be able to address the Court directly, without the intervention of a Member State. Others objected against such a solution and argued that the Member States should have a monopoly on representation before the Court.

<sup>3</sup> WRR-papier series 'De Nederlandse stem in de Europese Conventie': Dr. B. Crum, "Vertegenwoordigende democratie in Europa. Een verkenning van de institutionele mogelijkheden." Paper voor de WRR-Conferentie 'De Nederlandse stem in de Europese Conventie', 21 mei 2003, Den Haag

In the organisation of the appeal procedure before the Court, the arrangement of the relation between the national government and the parliaments is a matter of the Member States themselves.

The question as to whether, in this respect, the government will act as a letterbox or whether the government shall have an independent power of consultation, will also have to be addressed per individual Member State. The Joint Committee shall elaborate this in paragraph 4.8.

## 4 Opinion of the Joint Committee Application Subsidiarity

### 4.1 Introduction

In this chapter, based on the information in previous chapters, the committee shall respond to the mandate detailed in chapter 2:

- Draft proposals for Dutch parliament to be able to better perform its monitoring task. This will enhance the democratic legitimacy of the European institutions, and particularly of the Council of Ministers;
- Draft specific proposals to prepare Dutch parliament for the implementation of both protocols as soon as the Convention has been ratified.

In the second paragraph, the committee shall offer its views on both protocols from the perspective of the Dutch parliamentary system. In the third paragraph, we shall make a specific proposal in order to detail the implementation of the subsidiarity and proportionality review by the Dutch parliament. Subsequently, several practical issues shall be addressed such as the cooperation with other authorities and civil society organisations (paragraph 4), the composition of a Subsidiarity Review Committee (paragraph 5), the frequency of meetings (paragraph 6), staff support (paragraph 7), the red card procedure (paragraph 8) and the interparliamentary cooperation (paragraph 9). Finally, the permanent parliamentary committees are offered a questionnaire with which the subsidiarity and proportionality review can be carried out.

### 4.2 The appraisal of protocols

The committee welcomes the protocols, as incorporated in the *Constitution for Europe*. Both protocols grant national parliaments an important position in the European decision-making process, by offering the parliaments the opportunity to give their opinion on the Commission's draft legislative acts very early on in the procedure. The national parliaments shall offer their views on two questions:

1. to which extent does the proposed measure comply with the ideas on subsidiarity;
2. to which extent are the measures proportional to the problem the EU wishes to address?

The first question will first involve looking at the EU competences. In this case three situations are to be differentiated:

1. in the case of the exclusive competences of the European Union: it is evident that the Union is competent. One shall then entirely focus on the issue of proportionality;
2. in the case of a proposal based on the additional competences of the EU: in this case the EU has no competence to submit draft legislative acts.
3. in the case of a shared competence. In this case the question regarding subsidiarity is of eminent importance. It shall be a political consideration.

In the first and third situation, there will be a – political- emphasis on proportionality.

Carrying out the subsidiarity and proportionality review within six weeks requires a streamlined organisation – given the expected flow of documents. The committee will present several proposals and recommendations in this chapter.

Before rendering its opinion, the committee feels it is appropriate to make a few comments on the impact of both protocols.

European cooperation has far reaching consequences for Dutch legislation. For years rumour has had it that 60% of Dutch legislation would originate from Brussels. It is hardly interesting

to check whether this figure is accurate: it is, however, interesting that the European legislator has significant influence on the boundaries of the national legislation. A second conclusion is that many national politicians are faced with European draft legislative acts only after the Council has concluded its decision-making process. Members of the Senate and the House of Representatives are hardly ever involved in decision-making procedures which can still be influenced. The Joint Committee applauds the fact that this protocol could change this situation. It will lead to greater involvement of all MPs with Europe: no-one shall be able to shy away from the European decision-making procedure. This is not only a conclusion, but also one of the Joint Committee's objectives. This chapter describes how this will take shape.

#### **4.3 The organisation of the subsidiarity review**

The Joint Committee believes that a Subsidiarity Review Committee should be set up in Dutch parliament to implement the subsidiarity review, for the following reasons:

1. The complexity of the European legislative procedure
2. The time pressure on issuing an opinion within six weeks
3. The desire to be able to, insofar as possible, submit a unanimous opinion to Brussels; Members of the Senate and House of Representatives should take part in such a committee.

The following issues are relevant in the procedure concerning the Subsidiarity review:

1. what should be the relation between the Subsidiarity Review Committee and the permanent committee European Cooperation Organisations (Senate) and the permanent parliamentary committee European Affairs (House of Representatives)?
2. what should be the involvement of the various special committees?
3. which preparations should staff make?
4. how can the procedure evolve in a transparent and effective way?

The following premises shall be taken into account when answering these questions.

First and foremost, the Joint Committee is of the opinion that the subsidiarity review ((incl. proportionality review) may not be nor become merely an official activity and responsibility. This means that the Joint Committee believes that the (members of the) Subsidiarity Review Committee must take a decision on every proposal.

Second, the Joint Committee is aware that there are very many draft legislative acts and that they will be submitted regularly – on a weekly basis. The proposals cover a vast area and it is almost impossible for the members to develop sufficient expertise in all fields in order to be able to carry out the subsidiarity review independently.

Third, the Joint Committee considers the subsidiarity review as an instrument to enhance the involvement of all MPs regarding European issues. The subsidiarity review should, therefore, not only be carried out by the Subsidiarity Review Committee, but the spokespersons for the subject concerned must also be involved in the process. Finally, the Subsidiarity Review Committee expects the political debate to concentrate particularly on the proportionality review.

On the basis of these considerations, the committee proposes the following procedure:

<b>Time</b>	<b>Action</b>	<b>Objective</b>	<b>By whom</b>	<b>Deadline</b>
Day 1	Publication of the draft legislative act and forwarding to national parliaments	Starting the subsidiarity review	European Commission	
Day 2	Receipt of draft legislative act	Put procedure into effect	Staff Subsidiarity Review Committee	Day 3
Day 3	Reporting the receipt of the draft legislative act to the members of the Subsidiarity Review Committee and convening a committee meeting. The staff will carry out the subsidiarity review pursuant to the legal basis and write a preliminary opinion to that effect.		Staff Subsidiarity Review Committee	Day 4
Prior to day 6	Meeting Subsidiarity Review Committee (or decision-making by means of letter, given the two-weekly meeting frequency)	Endorsement of preliminary opinion. Taking decision on the question as to which permanent committee will draft a preliminary opinion on this draft legislative act and endorsement of preliminary opinion	Members Subsidiarity Review Committee	Prior to day 6
Prior to day 8	Informing the permanent parliamentary committee concerned	Drafting a technical opinion. The committee can issue different opinions: - an unequivocal positive or negative appraisal; - further action to be taken by the Subsidiarity Review Committee, such as hearing etc...	Members of the permanent parliamentary committee concerned	Prior to day 20
Prior to day 26	Issue opinion to the Subsidiarity Review Committee	Appraisal of the opinion of the permanent parliamentary committee. This may lead to further action or to endorsement of the opinion of the committees concerned	Members of the Subsidiarity Review Committee	Prior to day 35
Prior to day 35	Putting the opinion of the Subsidiarity Review Committee to the members of the Senate and House of Representatives	Organising support among members of parliament	Staff of the Committee takes care of reporting to the Registry of the Chambers. Members organise support.	Prior to day 39
Prior to day 42	Voting in Senate and House of Representatives	Ascertaining consent on opinion of the Subsidiarity Review Committee	Registry of both Chambers	Prior to day 42
Prior to day 42	Forwarding opinion to the European Commission	Communicating the position of the Dutch Parliament to Brussels	Staff of Subsidiarity Review Committee	Prior to day 42



The gist of this procedure is that the preparatory work is conducted jointly by both Chambers. The final decision is taken independently by the individual Chambers. A joint letter will be sent should both chambers have reached the same opinion, which is what the Joint Committee hopes will happen.

It may strike the outsider that the permanent committees European Affairs and European Cooperation Organisations do not have a specific role in this procedure, except when it concerns a subject that pertains to the regular scope of the relevant committee. This perspective coincides with the premises specified earlier, namely that the subsidiarity review should be a process that affects all members of Dutch parliament. In order to avoid that the procedure becomes an entirely national process, in which one loses sight of links with other European issues and other national parliaments, the Joint Committee believes that the members of the Subsidiarity Committee should preferably be closely involved in current European debates. It seems evident that the members of the Committee should be members of the Permanent Parliamentary Committee European Affairs or European Cooperation Organisations, respectively.

The Presidium or the “College van Senioren” (group of the leaders of all political parties represented in parliament) is ordinarily in charge of the attribution of the different dossiers to the permanent parliamentary committees. This task shall have to be mandated to the Subsidiarity Review Committee in this procedure, because if it has to be done by the Presidium or the “College van Senioren” another week will be lost: time we cannot do without given the tight schedule.

#### **4.4 Transparency**

The protocol on subsidiarity will not only require greater involvement from the members of parliament in European issues, but will also require greater involvement from civil society organisations and local and regional authorities since they will also want to benefit from the possibility to give their opinion on the draft legislative acts at an early stage. Since the period within which these organisations must draft their responses is very short, it is necessary to be transparent about the way the parliament organises this procedure. We therefore advocate:

1. posting the draft legislative acts on the website of the Subsidiarity Review Committee. Per legislative act the procedure to be followed will be indicated;
2. Keeping a large number of civil society organisations and local and regional authorities abreast, by email/newsletter, of the new proposals to be addressed in the procedure. Should umbrella organisations be involved, these organisations shall be responsible for informing their constituencies. The Committee could also raise awareness regarding the existing websites which are being consulted by many organisations, such as the website of “Europa Decentraal”, for instance.

#### **4.5 The composition of the committee**

Paragraph 4.3 discussed setting up a Subsidiarity Review Committee, without identifying the ideal composition of such a committee, only indicating that the proposed Subsidiarity Review Committee should preferably consist of people who are also members of the Permanent Parliamentary Committee European Affairs (House of Representatives) or the permanent committee European Cooperation Organisations (Senate). The measures are to be appraised in view of already existing national and European legislation. The special committees shall mainly focus on national legislation, whereas ECO and European Affairs will concentrate on European legislation. An additional reason for the Subsidiarity Review Committee to issue an opinion in the final stages of the procedure, is that the committee will also appraise the consistency of the opinions. We must avoid divergence in the implementation of subsidiarity and proportionality in different draft legislative acts.

Several important elements come into play in the composition of the Subsidiarity Review Committee. In practice, the Subsidiarity Review Committee will meet every two weeks, since the Commission will submit new legislative acts on a weekly basis. The attribution of draft legislative acts to special committees will often occur in writing. A written procedure shall, however, not be followed for determining the final opinion. The Committee is required to meet every two weeks in order to adequately monitor and steer the procedure.

Second, it will have to be an effective and efficient committee. This has the following consequences: for the committee to be effective, it must assume that its opinion has sufficient support in the Senate and House of Representatives, which means that all political parties must be involved in the work of the Subsidiarity Review Committee. Third, the procedure shall evolve efficiently, which means that the committee shouldn't be too large.

Besides these issues, the question arises whether the delegations from the Senate and the House of Representatives should be equally large. There are several, at times conflicting, considerations to make in this respect. On the one hand, the House of Representatives has 150 members and the Senate has 75: one may therefore argue that the House of Representatives should delegate twice as many members as the Senate. An additional argument could be that the House of Representatives has political primacy in the chronology of debate. There are the following counter-arguments. Since European legislation must be completely transposed, the Senate and the House of Representatives have equal role to play: both chambers must be able to grant their approval as is the case with Dutch legislation. Second, if there is a bicameral system, the protocols stipulate that both Chambers have one vote. On the basis of all these considerations, we propose an equal representation, i.e. parity in the composition of the Subsidiarity Review Committee.

Since we have provided the various ingredients for the composition of the Subsidiarity Review Committee, we shall now proceed to the proposal proper. The Joint Committee proposes that political parties with more than 20 seats in the House of Representatives are entitled to 1 seat in the Subsidiarity Review Committee. In the Senate the threshold is 10 seats. Other parties will get 1 seat, provided they are represented in both Chambers. They shall consult with other parties in order to ensure a well balanced representation of the Senate and the House of Representatives. Given the current composition of the Chambers this implies the following:

Party	Seats Senate	Seats House of Representatives	Seats JC
CDA	23	44	1+1
PvdA	19	42	1+1
VVD	15	27	1+1
SP	4	8	1
Groen Links	5	8	1
LPF	1	8	1
D66	3	6	1
Christen Unie	2	3	1
SGP	2	2	1
OSF	1		0
Groep Lasrak		1	0
Groep Wilders		1	0
Total	75	150	12

#### 4.6 Frequency of meetings

At the moment, the European Commission takes weekly decisions on new draft legislative acts. It is to be expected that the Commission will continue to follow said practice. Nonetheless, the Joint Committee proposes that the Subsidiarity Review Committee meet every two weeks. The attribution of proposals to the special committees can, if necessary, occur in writing, but this is not an option for the opinions. Provided the planning is followed scrupulously, it should be possible to follow a two week cycle. The Subsidiarity Review Committee does, however, face a problem here since the parliamentary recess of the Senate, but particularly of the House of Representatives, does not coincide with the swift decisiveness of the European Commission. There is only one solution: The Subsidiarity Review Committee will have to keep up its frequency of meetings throughout the parliamentary recess periods. The Subsidiarity Review Committee shall provide a final opinion on the opinion submitted by the Permanent Parliamentary Committee. It is neither always possible nor desirable to do so in writing, which is why the committee should continue to meet in these cases. Should the agenda not provide for such opinions, the meeting can be cancelled. The members of the Subsidiarity Review Committee must be aware of this: the Subsidiarity Review Committee shall have to continue to meet during the parliamentary recess. But the Subsidiarity Review Committee is not the only committee to follow this frequency of meetings. The special committees will feel the implications of such a new responsibility since they will have to prepare their opinion and this work will have to continue during parliamentary recess.

We should, however, put things into perspective. The procedure shall only enter into force once the draft legislative act is available in all EU languages. In practice the acts are only available four weeks after the decision-making procedure in the Commission has been finalised. Until then, the Subsidiarity Review Committee can work with the English language documents, which alleviates some of the pressure and makes some of the aforementioned bottlenecks somewhat less difficult to overcome. Furthermore, the Dutch parliament has a detached post in Brussels, which could facilitate the flow of information on new draft legislative acts into the procedure at an earlier stage.

## 4.7 Support

It is difficult to assess what the implications of the new responsibility could be in terms of support. At the moment, a subsidiarity review of sorts is being implemented by the interministerial working group Assessment New Commission Proposals (BNC). This opinion is made available to all MPs and all other relevant partners. The local and regional authorities are involved in the process if the proposal could have implications for them. The opinions are submitted to the Chambers in the form of so called BNC-files. These files appear on average three months after a new draft legislative act has been issued. If only for this reason, the Subsidiarity Review Committee does not wish to wait for the BNC-file. But there is also another stronger matter of principle and that is to want to operate independently from the BNC files since they comprise the opinion of the Dutch government. In the framework of the separation of powers and independent positions, the Subsidiarity Review Committee must organise its own procedure. The Dutch government can, however, be requested to offer its views on the subsidiarity review as quickly as possible (within 2 weeks).

The BNC secretariat has been requested to provide further information in order to be able to realistically assess the work load for the staff organisation. Based on this information and pursuant to our approach, namely a more significant role for the permanent parliamentary committees, the Joint Committee makes the following recommendations:

- greater emphasis on European legislation in the work portfolio of current staff of the permanent parliamentary committees and the Registry of the Senate;
- employing additional staff for the permanent parliamentary committees. Some committees require half an FTE (Health, Wellbeing and Sports, Foreign Affairs, Defence, Government Expenditure, Education Culture and Sciences, Home Affairs, Social Affairs and Employment) others require a full FTE (Economic Affairs, Finance, Housing, Spatial Planning and Environment, Agriculture, Nature and Fisheries, Transport, European Affairs, European Affairs and Justice). This is a provisional assessment based on the number of draft legislative acts that have been presented over the past few years.<sup>4</sup>
- two staff members for monitoring the website and for providing content support to the Subsidiarity Review Committee.

In order to further specify such numbers, the committee suggests to start the procedure shortly, despite the fact that the *Constitution for Europe* will not yet have entered into force. Hence, as soon as the Convention has entered into force, there will be enough experience data to provide adequate support<sup>5</sup>. Any bottlenecks that may have appeared can thus be solved before the Constitution for Europe enters into force.

## 4.8 The red card procedure

This procedure has been detailed in paragraph 3.2 . and gives national parliaments the possibility to address the European Court of Justice through the national governments. The joint committee believes that Dutch constitutional relations imply that the government would merely act as a letterbox since it would receive the request of the national parliament and subsequently forward it to the Court. It is no longer up to the government give its views on the request. Should the Dutch government, nonetheless, provide its views, it can no longer be considered as a request of the parliament.

The question, however, is what the implications of the procedure will be, since a judge is requested to decide on the question whether the Commission has taken sufficient account of

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<sup>4</sup> These numbers are partly based on experience data of the BNC Committee.

<sup>5</sup> An evaluation of an ongoing pilot regarding the procedure for BNC-files in the Senate and subsequently the evaluation of the pilot procedure hereby proposed can lead to adjustments for practical reasons.

the principle of subsidiarity. If the judge wants to avoid putting himself in the position of politicians, he can merely answer the question on the basis of the description of competences as incorporated in the Treaty. We can assume that the Commission will have considered this carefully in its original draft legislative act. However, the situation is different for the proportionality review. This involves a political opinion, in which respect the judge will tend to be reticent.

#### **4.9 Interparliamentary cooperation.**

If one third of the national parliaments present a negative opinion concerning the draft acts, the Commission will have to reconsider its proposals. It is therefore important to maintain close contact with other national parliaments regarding their opinions and views.

The secretariat of the COSAC (the Conference of Community and European Affairs Committees of the parliaments of the European Union) is interested in playing a coordinating and mobilising role in this respect. The Joint Committee is of the opinion that such an approach would be taking things a bit too far. The Joint Committee believes it is of the utmost importance that all national parliaments can formulate their views and opinions independently. It is, however, wise to allow every parliament to understand the views and opinions of other parliaments, which is why the committee is in favour of using a website to this effect. By means of a safe structure, national parliaments themselves can define the content of the website and thus make information available on the ideas behind the draft legislative acts. An interparliamentary working group has been set up to develop proposals concerning the interparliamentary exchange of information via the internet (IPEX). The proposals will be discussed at the periodical conference of presidents of parliaments, as well as in the COSAC.

#### **4.10 Conclusions**

The work schedule of the European Commission is published annually in November and announces the main draft legislative acts for the following calendar year. During the Convention, Dutch MPs Van der Linden (Senate) and Timmermans (House of Representatives) submitted a statement proposing to discuss the work schedule in all parliaments of the European Union and the European Parliament with their governments and the Commission, respectively, during the same period. This statement was widely endorsed and was subsequently discussed on several occasions in the COSAC. The plenary meeting of the COSAC in November 2004 will propose to send a letter to all presidents of parliament calling upon them to undertake the necessary action to implement this statement, by fine-tuning positions regarding a proposal for a period in which such a work schedule discussion could take place.

The Joint Committee feels that in The Netherlands, such a work schedule should be discussed by the Dutch Parliament. The following possibilities can be considered:

- a plenary debate in the House of Representatives, followed by a plenary debate in the Senate on the following Tuesday;
- a joint meeting of the committees for European Affairs and European Cooperation Organisations.

In order to enhance transparency and to alleviate the work of the Subsidiarity Committee, the Joint Committee proposes to consult with the SDU in order to allocate European parliamentary numbers to new European commission draft legislative acts, which will make it easier to file such documents and to check parliamentary discussion to that effect. This can prove particularly helpful in the stage of national execution and implementation.

#### **4.11 The implementation of the subsidiarity and proportionality review**

This paragraph will discuss the material implementation of the subsidiarity and proportionality review.

The objective is to provide a guideline which identifies the elements of subsidiarity and proportionality to be considered for forming an opinion as to whether both principles have been fulfilled.

As stated above, the draft Constitution will not have a material effect on the existing content of the subsidiarity and proportionality review, although the draft constitution does contain a slightly amended wording. The subsidiarity protocol offers an additional criterion, particularly, for implementing the proportionality review, i.e. restricting the financial and administrative burden and the proportionality of said burden as compared to the intended objective. This means that the review will continue to be governed by the protocol attached to the Treaty of Amsterdam concerning the application of the principle of subsidiarity and proportionality, which comprises content criteria for the implementation of both principles. The questions formulated below to verify whether both principles are being fulfilled, have indeed been derived from said protocol.

The provisions concerning the competences of the Union and the subsidiarity and proportionality review provide a hierarchy of principles: first the principle of attribution, then the principle of subsidiarity and finally the principle of proportionality. Based on this hierarchy, the following questions can be raised in order to determine whether or not the principles have been complied with.

1. Attribution of competences: does the Constitution provide for an attribution of competences for the objective to be pursued in the intended draft legislative act?
  - No, end of review (i.e. the outcome of the review is negative)
  - Yes, proceed to question 2
2. Applicability of subsidiarity, in a strict sense:  
Does the intended act pertain to the *exclusive competence* of the European Union?
  - No, proceed to question 3
  - Yes, proceed to question 4.
3. An act of the Union is only justified if both aspects of the principle of subsidiarity have been complied with:
  - the objective of the considered act cannot be sufficiently accomplished by the Member States in the framework of their national constitutional system, and
  - the objective can therefore better be accomplished by the Union.The following guidelines can be followed in order to verify whether this requirement has been met:
  - a. Does the issue at hand concern *transnational* aspects which cannot be arranged satisfactorily by means of acts of the Member States
  - b. Do the individual acts of the Member States or the lack of action of the Union *violate the requirements of the Constitution* (such as the need to counteract distortion of competition or prevent disguised restrictions on trade or to strengthen economic or social cohesion) or could this otherwise substantially damage the interests of the Member States?
  - c. Will an act at *community* level, given the scale or the implications thereof, have *clear advantages* over a national act? (i.e. is acting at Union level more effective as compared to:
    - i. joint or separate national acts,
    - ii. acting in other international forums (such as rules agreed upon in international forums which are already binding for most of the Member States),
    - iii. completely refraining from action ( self regulation, agreements - codes – between parties in the market or both sides of industry)

If the review of aforementioned elements leads to a mostly negative outcome, one can in principle suffice with the conclusion “negative”.

In case of doubt or of a positive outcome, the proportionality principle will have to be reviewed (question 4 and further)

4. Since the possibility and desirability of some sort of act on the part of the Union has been identified, the question must be addressed as to whether a general legally binding regulation is *justified*. One must, furthermore, consider whether the proposal is feasible, enforceable or fraud-proof:
  - No, a Recommendation of the Commission or a Council resolution would be more appropriate
  - Yes, proceed to question 5
5. Can the form of action on the part of the Union be impeded *as simply as possible* without a satisfactory achievement of the objective and an efficient implementation? (Preference for outline law above law).
6. Does the measure taken by the Union, given the nature and scope of the act, leave as much *space as possible for national resolutions*, in accordance with the measure's objective and the requirements of the Constitution?
7. Have all, *financial or administrative* burdens been minimised and are they commensurate with the objective to be attained? This means limiting the burdens for the European Union, the national governments, regional or local authorities, business and citizens.





