

NOTE

from : Praesidium
to : Convention

Subject : **Draft Protocols on:**
– **the application of the principles of subsidiarity and proportionality**
– **the role of national parliaments in the European Union**

INTRODUCTION

The Praesidium has agreed to present these two draft Protocols jointly to the Convention to enable it to have an overview of the essential aspects of the role of national parliaments in European democratic life. Convention members will find below:

- a presentation of each of these Protocols,
- in Annex I, the draft text proposed by the Praesidium for the Protocol on the application of the principles of subsidiarity and proportionality,
- in Annex II, technical comments on the aforementioned Protocol,
- in Annex III, the draft text proposed by the Praesidium for the Protocol on the role of national parliaments,
- in Annex IV, technical comments on the aforementioned Protocol.

Protocol on the application of the principles of subsidiarity and proportionality

The declaration adopted at the Laeken European Council referred to the expectations of European citizens, who wanted "a clear, open, effective, democratically controlled Community approach" and not "European institutions inveigling their way into every nook and cranny of life". The Laeken declaration stressed the need for a better division and definition of competence in the European Union and raised the question of the role that could be played here by national parliaments in the context of better compliance with the principle of subsidiarity: "Should [the national parliaments] focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?".

Working Group I sought to answer the questions contained in the Laeken declaration concerning the principle of subsidiarity. It adopted a number of proposals, which are contained in its final report (CONV 286/02), and it established a number of principles ("golden rules") and guidelines for improving the application of the principle of subsidiarity while ensuring that the improvements did not hold up or overload the process of decision-making in the institutions. The Working Group also took the view that the principle of subsidiarity was an essentially political one, the initial responsibility for which should rest with political bodies. The Working Group produced a number of proposals, which are based on three main themes:

- reinforcing the way in which the Institutions involved in the legislative process take into account and apply the principle of subsidiarity,
- setting up a political early warning system to strengthen the national parliaments' monitoring of the principle of subsidiarity. Under this system, each national parliament would be able, within six weeks of a legislative proposal being issued by the Commission, to send the European institutions a reasoned opinion setting out its concerns as regarding any infringement of the principle of subsidiarity,
- expanding the scope for referral to the Court on grounds of failure to comply with the principle of subsidiarity.

These proposals were discussed at length at the plenary session on 3 and 4 October 2002 (see CONV 331/02). The discussions focussed on the early warning system and its operating procedures as well as the conditions of referral to the Court. The President noted in conclusion that there was broad agreement with the proposals in the Working Group's report. He also identified a number of issues or questions that called for further examination:

- whether the right of early warning should be conferred on the parliament as such or to each of its two chambers in the case of bicameral States,
- what should be the threshold number of national parliaments that would oblige the Commission to reconsider its proposal,
- whether a link needed to be established between activation of the early warning system and the right of referral to the Court.

After looking at these questions again, the Praesidium agreed to propose that:

- the power to activate the early warning system should be given to each national parliament, which was also to be responsible for making the internal arrangements for consultation of each chamber in the case of bicameral parliaments and/or, where appropriate, regional parliaments with legislative powers,
- the threshold should be set at one third of the national parliaments, as suggested by the Working Group,
- the Court of Justice should have jurisdiction to hear and determine actions brought by Member States on grounds of infringement of the principle of subsidiarity, if necessary at the request of their national parliaments and/or regional parliaments with legislative powers. The Committee of the Regions should also have the same right as regards legislative acts on which it was consulted.

Protocol on the role of national parliaments in the European Union

The Laeken declaration stated that "the European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses", but also that "the European project also derives its legitimacy from democratic, transparent and efficient institutions". It was furthermore pointed out that "the national parliaments also contribute towards the legitimacy of the European project" and it was recalled that the declaration on the future of the Union, annexed to the Treaty of Nice, had stressed the need to examine their role in European integration.

It is in this vein that Convention Working Group IV on the role of national parliaments was set up. The Group's discussions have fallen under three distinct headings: the role of parliaments in scrutinising governments, the role of national parliaments in monitoring the application of the principle of subsidiarity (subject discussed in the first place by Convention Group I), and the role and function of interparliamentary mechanisms and relations. The Group adopted a number of specific recommendations, mainly concerning measures to be taken by the Union's institutions in order to facilitate scrutiny by the Member States' national parliaments of their own governments in matters relating to Union activities (CONV 353/02). These recommendations, which more specifically concern national parliaments' access to information, met with broad support from the Convention in the plenary debate devoted to Working Group IV's report on 28 October 2002 (CONV 378/02).

The implementation of a number of Group IV's recommendations makes it necessary to amend the Protocol on the role of national parliaments in the European Union, annexed to the Treaty of Amsterdam. The amendments in question relate primarily to the information intended for national parliaments concerning legislative proposals and other documents. The specific recommendations made by Group IV in these areas were that:

- the Commission should send all legislative proposals and consultative documents directly to national parliaments, at the same time that they are transmitted to the European Parliament and the Council,

- the Commission should send its Annual Policy Strategy and annual legislative and work programme simultaneously to national parliaments, the European Parliament and the Council,
- the Court of Auditors should send its annual report simultaneously to national parliaments, the European Parliament and the Council,
- records of Council proceedings should be sent to national parliaments (and the European Parliament) at the same time as they are sent to governments.

The draft amended Protocol takes into account the measures recommended by Group IV. Certain technical amendments are also proposed in order to adapt the text of the Protocol to the Convention proceedings (recommendations of Working Group IX concerning simplification with regard to the names of acts; references to articles in Part One or Part Two of the Constitution). A paragraph introducing a reference to the Protocol on the application of the principles of subsidiarity and proportionality has also been inserted in order to show the common logic linking the two protocols.

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**[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 enshrined in Article 8 of the Constitution, and to establish a system for monitoring the application by the institutions of those principles.

HAVE AGREED UPON the following provisions, which shall be annexed to the Constitution:

1. Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 8 of the Constitution.
2. Before proposing legislative acts, the Commission shall consult widely, except in cases of particular urgency or confidentiality. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.
3. The Commission shall send all its legislative proposals and its amended proposals to the national parliaments of the Member States at the same time as to the Union legislator. The European Parliament and the Council shall send their legislative resolutions and common positions respectively, upon adoption, to the national parliaments of the Member States.

4. The Commission shall justify its proposal with regard to the principle of subsidiarity. Any legislative proposal should contain a detailed statement making it possible to appraise compliance with the principle of subsidiarity. This statement should contain some assessment of the proposal's financial impact and, in the case of a 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 must be substantiated by qualitative and, wherever possible, quantitative indicators. The Commission 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.
5. Any national parliament of a Member State may, within six weeks from the date of transmission of the Commission's legislative proposal, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. It will be for each national parliament to make the internal arrangements for consulting each chamber in the case of bicameral parliaments and/or, where appropriate, regional parliaments with legislative powers.
6. The European Parliament, the Council and the Commission shall take account of the reasoned opinions of the national parliaments.

Where at least one third of national parliaments issue reasoned opinions on the Commission proposal's non-compliance with the principle of subsidiarity, the Commission shall review its proposal. After such review, the Commission may decide to maintain, amend or withdraw its proposal. The Commission shall give reasons for its decision.

7. The national parliaments of the Member States may also, during the period between the convening of the Conciliation Committee meeting and the holding of that meeting, issue a reasoned opinion stating why they consider either that the Council's common position does not comply with the principle of subsidiarity or that the European Parliament's amendments do not so comply. At the Conciliation Committee meeting, the European Parliament and the Council shall take the fullest account of the opinions expressed by the national parliaments of the Member States.

8. Under Article [current Article 230] of the Constitution, the Court of Justice shall have jurisdiction to hear actions brought by Member States on grounds of infringement of the principle of subsidiarity, where appropriate at the request of their national parliaments, in accordance with their respective constitutional rules. Under the same Article of the Constitution, the Committee of the Regions may also bring such actions as regards legislative acts on which it was consulted.

9. The Commission shall submit each year to the European Council, the European Parliament and the Council a report on the application of Article 7(3) of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.

**COMMENTS CONCERNING THE DRAFT
PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF
SUBSIDIARITY AND PROPORTIONALITY**

The proposed text is based on passages already contained in the current Protocol on the application of the principles of subsidiarity and proportionality, as introduced by the Amsterdam Treaty. However, the present text has been reduced and simplified, to make it compatible with the nature of a protocol annexed to a constitution.

Paragraph 1 sets forth the principle in paragraph 1 of the current Protocol, whereby the institutions ensure observance of the principles of subsidiarity and proportionality, as laid down in Article 8 of the Constitution.

Paragraph 2 incorporates the substance of present paragraph 9 and states that the consultations the Commission must conduct before proposing legislative acts should, where appropriate, take into account the regional and local dimension of the action envisaged.

In accordance with the Working Group's conclusions, paragraph 3 requires that all legislative proposals be sent to the national parliaments at the same time as to the Union legislator (Parliament and Council). The same applies to the European Parliament's legislative resolutions and the Council's common positions.

Paragraph 4 concerns how the Commission justifies its proposals. It will do so by means of an explanatory statement, the content of which is detailed in that paragraph.

Paragraph 5 authorises any national parliament, within six weeks, to send a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. The Praesidium has opted for a system whereby it will be for each national parliament to make the internal arrangements for consulting each chamber in the case of bicameral parliaments and/or, where appropriate, regional parliaments with legislative powers.

Paragraph 6 introduces a threshold (one third) and spells out its affects. Where it is exceeded, the Commission will be obliged to review its proposal. It can maintain it, amend it or withdraw it. It must give reasons for its decision.

In accordance with the conclusions of Working Group I, paragraph 7 gives the national parliaments the possibility of intervening again, between the convening of the Conciliation Committee meeting and the holding of that meeting, and sets out the arrangements for such intervention.

Paragraph 8 deals with the Court of Justice. Actions for infringement of the principle of subsidiarity will be brought by the Member States, where appropriate, at the request of their national parliaments. The Committee of the Regions may also bring such proceedings as regards legislative acts on which it was consulted.

Paragraph 9 incorporates in unchanged form a provision already contained in paragraph 9 of the current Protocol, laying down that the Commission will submit an annual report to the European Council, the European Parliament and the Council on the application of the principles of subsidiarity and proportionality. This report will likewise be forwarded to the Committee of the Regions and the Economic and Social Committee.

DRAFT
[PROTOCOL] ON THE ROLE OF NATIONAL PARLIAMENTS
IN THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

RECALLING that the way in which individual national parliaments scrutinise their own governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State.

DESIRING, however, to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them.

HAVE AGREED UPON the following provisions, which shall be annexed to the Constitution:

- I. Information for Member States' national parliaments
 1. All Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to Member States' national parliaments.
 2. The Commission shall send all its proposals for legislation directly to Member States' national parliaments at the same time as to the European Parliament and to the Council.
 3. The Member States' national parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether the Commission's legislative proposal complies with the principle of subsidiarity, according to the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

4. A six-week period shall elapse between a legislative proposal being made available by the Commission to the European Parliament, the Council and the Member States' national parliaments in their languages and the date when it is placed on a Council agenda for adoption or for adoption of a position under the legislative procedure set out in Article [X in Part II of the Treaty establishing a constitution for Europe], subject to exceptions on grounds of extreme urgency, the reasons for which shall be stated in the act or common position.
5. The agendas for and the outcome of Council meetings shall be transmitted directly to Member States' national parliaments.
6. The Commission shall send Member States' national parliaments, for information, any instrument of legislative planning or policy strategy that it submits to the European Parliament and to the Council, at the same time as to those institutions.
7. The Court of Auditors shall send its annual report to the Member States' national parliaments, for information, at the same time as to the European Parliament and to the Council.
8. The European Parliament and the national parliaments shall together examine how interparliamentary cooperation may be effectively promoted within the European Union.
9. The Conference of European Affairs Committees, set up on 16 and 17 November 1989, may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. Such contributions shall in no way bind national parliaments or prejudice their position.

COMMENTS ON THE DRAFT PROTOCOL ON THE ROLE OF NATIONAL PARLIAMENTS

The introduction to the protocol reproduces the present text, spelling out that "the way in which" national parliaments scrutinise their own governments is a matter for the internal organisation of each Member State, and replacing the words "to the Treaty on European Union and the Treaties establishing the European Communities" with "to the Constitution". The present text reads as follows:

"THE HIGH CONTRACTING PARTIES,

RECALLING that scrutiny by individual national parliaments of their own government in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State.

DESIRING, however, to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them.

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaties establishing the European Communities:"

Paragraph 1 reproduces the text in the first paragraph of Part I of the Amsterdam Protocol: "All Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national parliaments of the Member States", adapting it in line with Working Group IV's recommendation that Commission documents be forwarded directly to the national parliaments.

Paragraph 2 is based on the second paragraph of the Amsterdam protocol: "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", and takes on board Working Group IV's recommendation that the Commission should forward all its proposals directly to the national parliaments at the same time as to the European Parliament and to the Council.

Paragraph 3 is a reference to the role of national parliaments in relation to the early-warning system with regard to subsidiarity, described in the Protocol on the application of the principles of subsidiarity and proportionality.

Paragraph 4 reproduces the wording of paragraph 3 of the Amsterdam Protocol: "A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 251 or 252 of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position", adapting the text to take account of Working Group IX's recommendations on the decision-making procedure for the adoption of legislative acts of the Union. Specific reference to proposals for measures to be adopted under Title VI of the Treaty on European Union is also left out, in accordance with Working Group X's recommendations on reform of legal instruments in this area, and Working Group IX's general recommendations on the same subject, since the "legislative proposal" in the amended text is intended to cover those measures also.

Paragraphs 5 to 7 take on board Working Group IV's recommendations that national parliaments should be sent the outcome of Council proceedings (and also its agendas), the annual policy strategy together with the Commission's annual legislative and work programme and the Annual Report of the Court of Auditors.

Paragraph 8 (new) reflects the desire expressed by the European Parliament on several occasions to promote interparliamentary cooperation jointly with the national parliaments.

Paragraph 9 reproduces, in simplified form (since the references to specific fields in the present text are superfluous), the central concept of paragraphs 4 to 7 of the present protocol, allowing COSAC (the Conference of European Affairs Committees) to submit any contribution which it deems appropriate for the attention of the European Parliament, the Council and the Commission. The following is the text of the Amsterdam Protocol concerning COSAC:

"4. The Conference of European Affairs Committees, hereinafter referred to as COSAC, established in Paris on 16-17 November 1989, may make any contribution it deems appropriate for the attention of the institutions of the European Union, in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter.

COSAC may examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice which might have a direct bearing on the rights and freedoms of individuals. The European Parliament, the Council and the Commission shall be informed of any contribution made by COSAC under this point.

COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights.

Contributions made by COSAC shall in no way bind national parliaments or prejudice their position."