

from :	Secretariat
to :	Convention
Subject:	Reactions to the draft Protocol on the application of the principles of subsidiarity and proportionality – Analysis

Members of the Convention will find attached an analysis of comments on or proposed amendments to the draft Protocol on the application of the principles of subsidiarity and proportionality (CONV 579/03).

**ANALYSIS OF COMMENTS ON OR PROPOSED AMENDMENTS TO THE  
DRAFT PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF  
SUBSIDIARITY AND PROPORTIONALITY  
(CONV 579/02)**

**I. Summary analysis of amendments by subject**

The Praesidium's proposal to the Convention is based on the report from Working Group I (CONV 286/02) and the report on discussions in the plenary (CONV 331/02). On the whole, the Protocol on subsidiarity was well received by Convention members. Few radically questioned the Praesidium draft. In fact, very many Convention members saw no need to comment on or amend the draft Protocol.

The main amendments proposed concern the following six subjects:

- (a) the term "national parliament", with an active minority continuing to prefer an arrangement whereby, in States with bicameral parliaments, each of the two chambers should be able to trigger the early-warning system directly. There are a number of amendments along these lines, some of which include an ingenious device to ensure that the preferred arrangement does not place States with unicameral parliaments at a disadvantage (two votes for a unicameral parliament and one vote for each chamber of a bicameral parliament);
- (b) the one-third threshold has generally been well received. However, a sizeable number of Convention members want the threshold raised to two thirds, while another group suggest including a second, two-thirds threshold which, if exceeded, would have serious consequences for the continuation of the legislative procedure;
- (c) the Conciliation Committee: many Convention members have doubts as to the wisdom of allowing a second opportunity to apply the early-warning system when the Conciliation Committee is convened. They wonder how this arrangement would work in practice, pointing out that the interval between the convening of the Committee and the holding of its meeting is sometimes very short. They suggest that this point should simply be dropped;
- (d) the arrangements for actions before the Court of Justice: two separate points are addressed:
  - direct referral by national parliaments: many Convention members ask that parliaments should be able to bring actions directly to the Court of Justice;
  - how to treat regions with legislative powers: many Convention members suggest that such regions should also be able, directly or indirectly, to refer any infringement of the principle of subsidiarity to the Court of Justice;
- (e) some of the provisions concerning the Committee of the Regions are also under debate. Some Convention members, particularly the observers from the Committee of the Regions, would like to see that Committee's subsidiarity watchdog powers extended and aligned on those of national parliaments. Others, fewer in number, query the case for its involvement;
- (f) lastly, many Convention members suggest that the annual report by the Commission concerning the application of the principle of subsidiarity should be addressed to national parliaments in the same way as to the European Parliament and the Council.

## **II. Detailed analysis of amendments by subject**

### **Scope and name of the Protocol**

- A number of Convention members suggest that the principle of proportionality should appear throughout the Protocol, on a par with the principle of subsidiarity:
  - Kuneva (*SUB 27*) + Andriukaitis + Gričius + Sivickas (*SUB 33*) + Teufel (*SUB 43*) + Kiljunen (*SUB 49*) + Vanhanen (*SUB 50*) + Hain (*SUB 55*) + Lequiller (*SUB 62*) + Azevedo + Nazaré-Pereira (*SUB 65*)
- Some Convention members propose replacing "Protocol" by "Supplementary Act", which they consider better suited to a constitution:
  - Paciotti (*SUB 40*)
- Others suggest a complete recast:
  - Kirkhope (*SUB 39*)

### **Commission consultation on and forwarding of proposed legislative acts (points 2 and 3)**

- One Convention member suggests specifying that, where any consultation requirement relates to the regional and local dimension of action, consultation should take place via the Committee of the Regions and the various representative bodies:
  - Wuermeling (*SUB 19*)
- Some Convention members propose incorporating, in full, paragraph 2 of the current Protocol:
  - Palacio (*SUB 45*) + Muñoz Alonso (*SUB 57*)
- One Convention member suggests that the Commission should have to give reasons for its decision, where it does not hold the necessary consultations because of an urgent case or for reasons of confidentiality:
  - Figel (*SUB 48*)
- Others ask that the possibility not to hold prior consultations in urgent or confidential cases should not be included:
  - Bonde + Seppanen (*SUB 54*)
- The Convention observers from the Committee of the Regions suggest that the latter should be consulted where a proposal has local or regional implications:
  - Chabert + 5 Convention observers (*SUB 74*)

### **Commission's justification for legislative proposals (point 4)**

Several observations relate to the Commission's grounds for its proposal with regard to the principle of subsidiarity:

- Extending the grounds to the principle of proportionality:
  - Duff + 16 members of the Convention (*SUB 42*) + Teufel (*SUB 43*)
- Strengthening the obligation to provide justification for the financial impact
  - de Vries + de Bruijn (*SUB 13*) + Wuermeling (*SUB 20*) + Duff + 16 members of the Convention (*SUB 42*)

- The inclusion of information on "the exclusive or shared nature of the competence being exercised"
  - Marinho (*SUB 16*)
- Very substantial reinforcement of the obligation to provide justification:
  - Teufel (*SUB 43*)
- Opposition to asking the Commission to provide information on the rules to be put in place by Member States and "where necessary, the regional legislation":
  - Einem + 6 members of the Convention from the Socialist Group (*SUB 15*) + Hübner (*SUB 51*)
- Inclusion in the Commission's grounds for the consequences of not taking action in the area under consideration:
  - Hübner (*SUB 51*)
- One member of the Convention (observer) proposes that the Commission should be assisted by an independent body in the drafting and preparation of a legislative act:
  - Jacobs (*SUB 44*)

### **Concept of national parliament (point 5)**

The question of the concept of national parliament has been debated at length both within the Working Group and in plenary, with opinions being divided as regards Member States with bicameral parliaments. Several Members of the Convention are looking again at the solution put forward by the Praesidium, under which it would be for each national parliament to make arrangements for consulting each chamber in the case of bicameral parliaments and/or, where appropriate, regional parliaments with legislative powers. The amendments tabled relate to:

- The right of each of the chambers in the case of bicameral national parliaments to produce a reasoned opinion:
  - Zieleniec (*SUB 6*) + Dini + Basile (*SUB 18*) + Wuermeling + Altmaier (*SUB 23*) + Meyer (*SUB 38*) + Teufel (*SUB 43*) + Vanhanen (*SUB 50*) + Stuart + 11 members of the Convention (*SUB 52*) + Lequiller (*SUB 62*) + Fischer (*SUB 67*)

To determine the threshold beyond which the Commission has to revise its proposal, some members of the Convention propose that the opinions delivered by single chamber parliaments should count as two and that those delivered by one chamber autonomously should count as one:

- Zieleniec (*SUB 6*) + Stuart + 11 members of the Convention ( *SUB 52*) + Lequiller (*SUB 62*)

### **Reasoned opinions of national parliaments (point 6)**

- Several members of the Convention propose that the Parliament and the Council should also have to indicate how they have taken account of the reasoned opinions of national parliaments:
  - de Vries + de Bruijn (*SUB 14*)
- Others ask that it should be specified that during the 6-week period, neither the Parliament nor the Council should be able to initiate their internal legislative procedure:
  - Duff + 16 members of the Convention (*SUB 42*)

- One member of the Convention wants an enlargement of the scope of the opinions of national parliaments "to the allocation of competences laid down in the Constitution" and of which the principle of subsidiarity is only one aspect:
  - Lamassoure (*SUB 56*)

### **Questions relating to the fixing and details of the threshold beyond which the Commission has to re-examine its proposal (point 6)**

In accordance with the conclusions of Working Group I, taken up in the draft Protocol (point 6), the threshold has been set at one-third of parliaments.

- Some members of the Convention reject the very principle of the proposed arrangement:
  - Voggenhuber + Nagy (*SUB 31*) + Duhamel + 4 members of the Convention from the Socialist Group (*SUB 34*)
- Some members of the Convention propose a different threshold. They would set the threshold at:
  - two thirds: Brok + 37 members of the Convention from the EPP Group (*SUB 3*) + Kaupi (*SUB 58*)
  - one quarter: de Vries + de Bruijn (*SUB 11*) + Bonde + Seppanen (*SUB 54*)
- Some members of the Convention suggest that the calculation of whether a threshold has been exceeded should only take into account "similar" reasoned opinions:
  - Duff + 16 members of the Convention (*SUB 42*)
- The setting of a second threshold. A number of members of the Convention propose that if the threshold of two thirds of national parliaments is crossed, then the Commission should be obliged to withdraw or amend its proposal, or that the legislative procedure should not be able to continue:
  - Andriukaitis + Gričius + Sivickas (*SUB 33*) + Stuart + 11 members of the Convention (*SUB 52*)
- The consequences of exceeding the one-third threshold are also addressed, in the sense of making them harder, particularly by strengthening the obligation on the Commission to provide a justification for its decision (either to maintain, amend or withdraw its proposal):
  - Schlüter (*SUB 32*) + Andriukaitis + Gričius + Sivickas (*SUB 33*) + Stuart + 11 members of the Convention (*SUB 52*) + Bonde + Seppanen (*SUB 54*) + Hain (obligation to amend or withdraw the proposal) (*SUB 55*)

### **Conciliation Committee (point 7)**

- A large number of members of the Convention are not in favour of the proposal by Working Group I included in the draft Protocol, which gives national parliaments the possibility to intervene again between the convening of the Conciliation Committee and its meeting. In particular, these members are:
  - Michel + 6 Belgian members of the Convention (*SUB 1*) + Van Eekelen (*SUB 8*) + de Vries + de Bruijn (*SUB 12*) + Voggenhuber + Nagy (*SUB 30*) + Duhamel + 8 members of the Convention from the Socialist Group (*SUB 35*) + Duff + 16 members of the Convention (*SUB 42*) + Hain (*SUB 55*) + Lamassoure (*SUB 56*) + Hjelm-Wallén + 3 Swedish members of the Convention (*SUB 60*) + Lennmarker (*SUB 82*)

- Others consider that the notion of a threshold should also be introduced in the conciliation phase. When the one-third threshold is exceeded, the Council and/or the European Parliament should be obliged to review their position:
  - Van der Linden + 2 Netherlands members of the Convention (*SUB 7*) + Andriukaitis + Gričius + Sivickas (*SUB 33*) + Vanhanen (*SUB 50*) + Stuart + 11 members of the Convention (*SUB 52*)
- Some members ask that national parliaments should be allowed a minimum period (4 weeks) to issue a reasoned opinion:
  - Stuart + 11 members of the Convention (*SUB 52*) + Azevedo + Nazaré Pereira (*SUB 65*)
- Some members consider that national parliaments should be able to intervene when the Conciliation Committee is convened where "significant amendments" have been made to the Commission's original proposal:
  - Tiilikainen + Peltomäki (*SUB 47*) + Vanhanen (*SUB 50*)

### **The question of recourse to the Court of Justice of the European Communities (point 8)**

Point 8 of the draft Protocol provides that actions brought to the Court of Justice for infringement of the principle of subsidiarity should be introduced by "Member States... where appropriate at the request of their national parliaments".

- Many members of the Convention suggest that the right to bring an action before the Court of Justice might be exercised directly by national parliaments or by each of the chambers for those in favour of that solution:
  - Brok + 37 members of the Convention from the EPP Group (*SUB 4*) + Teufel (*SUB 43*) + Stuart + 11 members of the Convention (*SUB 4*) + Bonde + Seppanen (*SUB 54*) + Fischer (*SUB 67*)
- Some suggest that the right to bring an action be reserved for Member States only:
  - Kuneva (*SUB 27*)
- Some suggest that that right also be open to the Conference of European Affairs Committees (COSAC):
  - Haenel (*SUB 37*)
- Many Convention members propose extending the right to bring an action before the CJEC by authorising regions with legislative powers to bring actions, either directly, or through their Member State. The members in question are, in particular:
  - Michel + 6 Belgian Convention members (*SUB 1*) + Brok + 37 Convention members of the EPP Group (*SUB 4*) + MacCormick + Voggenhuber + Lichtenberger (*SUB 29*) + Borrell + Carnero + Lopez Garrido (*SUB 36*) + Duff + 16 Convention members (*SUB 42*) + Teufel (*SUB*) + Farnleitner (*SUB 53*) + Bonde + Seppanen (*SUB 54*) + Chabert (observer) + 4 Convention members who are observers from the Committee of the Regions (*SUB 80*)
- Several Convention members want review by the Court of Justice to be limited to checking compliance with "procedures" (and therefore not to deal with substance):
  - Van der Linden + 3 Netherlands Convention members (*SUB 7*)
- A number of Convention members are not in favour of the Committee of the Regions also having the right to bring on action, on the grounds that it is an advisory body and not a legislative body:
  - de Vries + de Bruijn (*SUB 13*) + Kuneva (*SUB 27*) + Kaufmann (*SUB 63*)

- Some Convention members propose that the right of the Committee of the Regions to bring an action should not be limited to legislative acts for which its opinion has been requested, but should be more general:
  - Wuermeling (*SUB 21*)
- Others point out that it is necessary to cover cases in which the Committee of the Regions "should have been consulted" and was not:
  - MacCormick + Voggenhuber + Lichtenberger (*SUB 29*)
- Some point out that current Article 230 already authorises Member States to bring an action on grounds of infringement of the subsidiarity principle, including, if they so wish, at the request of their national parliament. The first sentence of paragraph 8 is therefore otiose:
  - Tiilikainen + Peltomäki (*SUB 47*) + Kiljunen (*SUB 49*) + Svensson (*SUB 83*)
- Some reject the principle of bringing an action before the CJEC on the grounds that the subsidiarity principle is political in nature:
  - Hjelm-Wallén + 3 Swedish Convention members (*SUB 60*)
- Some propose an ad hoc judicial control mechanism on the model of the French Constitutional Council:
  - Floch (*SUB 61*)

### **Committee of the Regions**

Several Convention members tabled comments relating to the Committee of the Regions. These concern:

- Widening its powers throughout the procedure so as to place it on a strictly equal footing with national parliaments:
  - Hain (*SUB 55*) + Chabert (observer) + 6 Convention members who are observers from the Committee of the Regions (*SUB 79*)

### **Annual report (paragraph 9)**

Many Convention members propose that national parliaments (in addition to the European Parliament and the Council) should also receive the Commission's annual report on the application of the subsidiarity and proportionality principles:

- de Vries + de Bruijn (*SUB 14*) + Andriukaitis + Gricius + Sivickas (*SUB 33*) + Belohorska + Figel + Migas (*SUB 46*) + Kiljunen + Vanhanen (*SUB 49*) + Stuart + 11 Convention members (*SUB 52*) + Bonde + Seppanen (*SUB 54*) + Floch (*SUB 61*) + Lequiller (*SUB 62*) + Azevedo + Nazaré Pereira (*SUB 65*) + Lopes + Lobo (*SUB 66*)

**List of amendments and observations:**

- SUB 1 *Michel, de Gucht, di Rupo, Van Lancker, Chevalier, Nagy, Dewael*
- SUB 2 *Kohout*
- SUB 3 *Brok, Almeida Garrett, Alonso, Altmaier, Attalides, Azevedo, Basile, Brejc, Cisneros, Cushnahan, Cristina, Fogler, Follini, Frendo, Giannakou, Kauppi, Kelam, Kelemen, Korhonen, Krasts, Kroupa, Kutzkova, Lamassoure, Lennmarker, Lequiller, Maij-Weggen, Miladenow, Nazaré-Pereira, Paks, Rack, Santer, Stylianidis, Szájer, Tajani, Van der Linden, Van Dijk, Wittbrodt, Zile.*
- SUB 4 *Brok, Almeida Garrett, Alonso, Altmaier, Attalides, Azevedo, Basile, Brejc, Cisneros, Cushnahan, Demetriou, Cristina, Farnleitner, Fogler, Follini, Frendo, Giannakou, Kauppi, Kelam, Kelemen, Korhonen, Krasts, Kroupa, Kutzkova, Lamassoure, Lennmarker, Lequiller, Maij-Weggen, Miladenow, Nazaré-Pereira, Paks, Rack, Santer, Stylianidis, Szájer, Tajani, Teufel, Tusek, Van der Linden, Van Dijk, Wittbrodt, Wuermeling, Zielienic, Zile.*
- SUB 5 *Wittbrodt, Fogler*
- SUB 6 *Zielienic*
- SUB 7 *Van der Linden, Timmermans, van Dijk, van Eekelen (only point 8)*
- SUB 8 *van Eekelen*
- SUB 9 *de Vries, de Bruijn*
- SUB 10 *de Vries, de Bruijn*
- SUB 11 *de Vries, de Bruijn*
- SUB 12 *de Vries, de Bruijn*
- SUB 13 *de Vries, de Bruijn*
- SUB 14 *de Vries, de Bruijn*
- SUB 15 *Einem, McAvan, Marinho, Beres, Paciotti, Thorning-Schmidt*
- SUB 16 *Marinho*
- SUB 17 *Marinho*
- SUB 18 *Dini, Basile*
- SUB 19 *Wuermeling*
- SUB 20 *Wuermeling*



SUB 21	<i>Wuermeling</i>
SUB 22	<i>Wuermeling, Altmaier</i>
SUB 23	<i>Wuermeling, Altmaier</i>
SUB 24	<i>Wuermeling, Altmaier</i>
SUB 25	<i>Wuermeling, Altmaier</i>
SUB 26	<i>Wuermeling, Altmaier</i>
SUB 27	<i>Kuneva</i>
SUB 28	<i>MacCormick</i>
SUB 29	<i>MacCormick, Voggenhuber, Lichtenberger</i>
SUB 30	<i>Voggenhuber, Nagy</i>
SUB 31	<i>Voggenhuber, Nagy</i>
SUB 32	<i>Schlüter</i>
SUB 33	<i>Andriukaitis, Gricius, Sivickas</i>
SUB 34	<i>Duhamel, Einem, Berès, Carnero, Paciotti</i>
SUB 35	<i>Duhamel, Einem, McAvan, Marinho, Van Lancker, Berès, Carnero, Paciotti, Thorning-Schmidt</i>
SUB 36	<i>Borrell, Carnero, López-Garrido</i>
SUB 37	<i>Haenel</i>
SUB 38	<i>Meyer</i>
SUB 39	<i>Kirkhope</i>
SUB 40	<i>Paciotti</i>
SUB 41	<i>Pieters</i>
SUB 42	<i>Duff, Helminger, Kreitzberg, Gricius, Hasotti, Kacin, Akçam, Dybkjaer, Van Eekelen, Lord MacLennan of Rogart, Uzun, Matsakis, Vassiliou, Szent-Iványi, Eckstein-Kovács, Ozal</i>
SUB 43	<i>Teufel</i>
SUB 44	<i>Jacobs</i>
SUB 45	<i>Palacio</i>
SUB 46	<i>Belohorska, Figel, Migas</i>
SUB 47	<i>Tiilikainen, Peltomäki</i>
SUB 48	<i>Figel</i>
SUB 49	<i>Kiljunen</i>
SUB 50	<i>Vanhanen</i>

SUB 51	<i>Hübner</i>
SUB 52	<i>Stuart, Haenel, Costa, Kristensen, Heathcoat-Amory, Liepina, Oleksy, Piks and Hänni, Krasts, d'Oliveira Martins and Lord Tomlinson</i>
SUB 53	<i>Farnleitner</i>
SUB 54	<i>Bonde, Seppänen</i>
SUB 55	<i>Hain</i>
SUB 56	<i>Lamassoure</i>
SUB 57	<i>Muñoz Alonso</i>
SUB 58	<i>Kauppi</i>
SUB 59	<i>Dewael</i>
SUB 60	<i>Hjelm-Wallén, Petersson, Lebkberg, Kvist</i>
SUB 61	<i>Floch</i>
SUB 62	<i>Lequiller</i>
SUB 63	<i>Kaufmann</i>
SUB 64	<i>Costa, d'Oliveira Martins</i>
SUB 65	<i>Azevedo, Nazaré-Pereira</i>
SUB 66	<i>Ernâni Lopes, Lobo Antunes</i>
SUB 67	<i>Fischer</i>
SUB 68	<i>The Earl of Stockton</i>
SUB 69	<i>The Earl of Stockton</i>
SUB 70	<i>The Earl of Stockton</i>
SUB 71	<i>The Earl of Stockton</i>
SUB 72	<i>The Earl of Stockton</i>
SUB 73	<i>The Earl of Stockton</i>
SUB 74	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 75	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 76	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 77	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 78	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 79	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 80	<i>Chabert, Dammeyer, Dewael, du Granrut, Martini, Valcarce-Sisó</i>
SUB 81	<i>Dewael</i>
SUB 82	<i>Lennmarker</i>
SUB 83	<i>Svensson</i>