

CONV 625/03

CONTRIB 279

COVER NOTE

from Secretariat

to The Convention

Subject : **Reports of the Select Committee on the European Union of the House of Lords,
presented by Lord Tomlinson and Lord Macleannan**
"The Future of Europe: Constitutional Treaty
- draft Articles 24-33
- National Parliaments and Subsidiarity - the proposed Protocols"

The Secretary-General of the Convention has received from Lord Tomlinson and Lord Macleannan, alternate members of the Convention, the reports of the Select Committee on the European Union of the House of Lords that they submit in their names as a contribution to the work of the Convention.

HOUSE OF LORDS

SESSION 2002–03
12th REPORT

SELECT COMMITTEE ON
THE EUROPEAN UNION

**THE FUTURE OF EUROPE:
CONSTITUTIONAL TREATY—DRAFT
ARTICLES 24–33**

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TWELFTH REPORT

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By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLES 24-33

CONV 571/03 Draft of Articles 24 to 33 of the Constitutional Treaty

PART 1: INTRODUCTION

1. This is our second Report on the draft Treaty Articles now being discussed in the Convention on the Future of Europe.¹

2. The text of the new Constitutional Treaty is appearing in stages. In our first Report² on the Treaty we considered Articles 1 to 16 (Titles I–III, Definition and objectives of the Union, Union citizenship and fundamental rights and Union competences and actions). In paragraph 2 of that Report we drew attention to the unsatisfactory nature of a procedure which required us to review groups of Articles without sight of the full text of the Treaty. We repeat that comment now.

3. In this Report we consider the second batch of Articles prepared by the Praesidium. This comprises Articles 24–33 (Title V—Implementation of Union Action), which set out the instruments available to the Union’s institutions for the exercise of their competences. There is new terminology (“European laws” and “European framework laws”) and an attempt to separate legislative from executive functions and to establish a hierarchy of measures with the creation of a new level of EU legislation, “delegated acts”.

4. The format of this Report follows that of our Report on Articles 1–16. Each Article is followed by an Explanatory note³ (the text of which has been prepared by the Convention Secretariat) and a Commentary added by the Committee.

5. **We make this Report to the House for information.**

¹ See Appendix 1 for membership of the European Union Committee, and of Sub-Committee E (Law and Institutions) which undertook the detailed scrutiny work.

² *The Future of Europe: Constitutional Treaty—Draft Articles 1-16*, 9th Report, 2002-03, HL Paper 61.

³ The Convention document uses the term “Technical comment”.

Article 24: The legal acts of the Union

- 1 In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part Two, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

A European law shall be a legislative act having general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act which shall be binding, as to the result to be achieved, on the Member States to which it is addressed, but shall leave the national authorities entirely free to choose the form and means of achieving that result.

A European regulation shall be a non-legislative act having general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It shall be binding in its entirety and directly applicable in all Member States.

A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions adopted by the institutions shall have no binding force.

- 2 When considering proposals for legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the Constitution.

Explanatory note

“This Article lists the instruments which the Institutions may use to implement competences. The list is an exhaustive one, which applies to all areas covered by the Constitution in accordance with the provisions of Part Two. In the case of the common foreign and security policy, the common defence policy and the policy on police matters and crime, the report from Working Group IX had envisaged maintaining their specific characteristics while harmonising the legal instruments. Those characteristics will be the subject of Articles 29, 30 and 31.

The definitions of the new instruments are in line with the proposals of Working Group IX, the acts themselves having been classified into two groups: legislative and non-legislative.

The definitions of laws and framework laws reproduce the current definitions of regulations and directives under Article 249 of the TEC.¹

The full titles are European law and European framework law. The Working Group's conclusions proposed “European Union law and European Union framework law”. The titles proposed here take account of the need to distinguish Union laws from national laws, which was the priority for the Working Group, but is without prejudice to the name which the Convention will give to the European entity.

The definition of a European regulation reproduces the current definition of regulations in Article 249² applied, as a non-legislative act, to the implementation of legislative acts and certain specific provisions of the Constitution.

The definition of a European decision – again in line with Working Group IX's conclusions corresponds to the definition in Article 14 ECSC.¹ Unlike the definition in Article 249,² it is not necessary to indicate those to whom it is addressed. One aim of this broader definition is to make decisions the legal instrument in the CFSP area, in place of “the joint action” and the “common position”.

Paragraph 2 limits the use of non-standard acts, which is in line with Working Group IX's conclusions. The Working Group considered that non-standard acts (resolutions, conclusions, declarations, etc.), while they had no binding force, nonetheless afforded the Institutions a degree of flexibility which should be safeguarded. However, the Working Group suggested including in the Treaty a rule whereby the legislator (Parliament/Council) should refrain from adopting non-standard acts on a given subject when legislative proposals or initiatives on the same subject had been submitted to it. Such a rule already appears in Article 7³ of the Council's Rules of Procedure. The aim is to avoid the impression that the Union legislates through a multiplicity of non-standard instruments.”

¹ The second and third paragraphs of Article 249 specify that “a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

² See footnote 4.

COMMENTARY

6. Title V of the Constitution is based on the recommendations of Working Group IX on Simplification. Their recommendations were essentially threefold: to reduce the number of Union legal instruments; to give the instruments names more readily understandable to the public; and to introduce a hierarchy of legislation. In giving effect to those recommendations the draft also makes a distinction between “legislative” and “non-legislative” measures in an attempt to establish a clear line between the legislature (the Council and the European Parliament) and the executive (the Commission). But that distinction is blurred because, as Articles 26 and 28(2) show, sometimes the Council or the European Central Bank may constitute the executive.

7. Article 24 lists six types of instrument, of which one, the “European regulation”, is new. The Article also introduces new terminology: “European law”, “European framework law”, and “European decision”. These terms replace “regulation”, “directive” and “decision” respectively. Only “recommendations” and “opinions” have remained unchanged.

8. The definitions of “European laws” and “European framework laws” follow those in Article 249 TEC for regulations and directives respectively but both have the additional feature of being expressly classified as being “legislative acts”. In this context, as Article 25 explains, a “legislative act” is one made by the legislature (the Council and the Parliament or, exceptionally, the Council acting alone).

9. “European laws” will be, as “regulations” currently are, directly applicable, having the force of law without national legislatures normally having either the need or the right to intervene.⁴ The main difference in future will be that while at the moment the Commission, when authorised by or under the Treaty, can make regulations, it will not be able to make “European laws”. The Commission will, however, be able to make “delegated regulations” (under Article 27) and “European implementing regulations” (under Article 28). These measures would, according to Article 26, be “European regulations” as defined in Article 24. But for the fact that they are stated to be “non-legislative acts”, “European regulations” have the same legal effects as “European laws”, having, in words similar to Article 249 TEC, general application and being binding in their entirety and directly applicable in all Member States.

10. The authors of the new Constitution contend that this new categorisation of measures and terminology will add to transparency. But what added value, if any, there might be in trying to distinguish some generally applicable and legally binding rules as “legislative acts” and some as “non-legislative acts” is at first sight obscure. The reality is that at present there is no single Union legislature and Union legislation is made by the Council, the Parliament and the Commission. Further, there is no neat separation of powers. It may be that the scheme of Articles 24-26 is seeking to distinguish the Legislature from the Executive in the new Constitution of the Union. But what seems clear is that if that is the objective any separation will remain blurred, at least so long as the Treaty provides for the Council to take executive action (which we imagine will continue to be the case at least as regards the CFSP for some time) and for the Commission to have a virtual monopoly of the right of initiative as regards Union legislation and the extensive power to make directly applicable secondary legislation. **In the meantime creating a new category of “regulation” and categorising some Union legislation “legislative acts” and some “non-legislative acts” does not seem helpful.**

11. A further difficulty is created by the use of the term, in English, “European law”. This hardly adds to the clarity. While the German and French texts may translate well into “*europäisches Gesetz*” and “*loi européenne*”⁵ the term does not work in English. In English, “laws” derive from many sources (including Parliament, the courts, local authorities, the judges and, not least, the Union). Calling a rule “a law” does not indicate its origin or status compared with other

¹ The second paragraph of Article 14 ECSC specifies that “decisions shall be binding in their entirety”.

² The fourth paragraph of Article 249 TEC specifies that “a decision shall be binding in its entirety upon those to whom it is addressed”.

³ The second paragraph of Article 7 of the Council's Rules of Procedure specifies that “Where legislative proposals or initiatives are submitted to it, the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions or declarations other than those referred to in Article 9” (the declarations referred to in Article 9 are those entered in Council minutes relating to the adoption of legislative acts).

⁴ Member States may exceptionally need or have the right to intervene. This will not change: see Article 28(1).

⁵ It is interesting that 50 years on the word “*loi*” is now being proposed. It is understood that it was deliberately avoided in the original Treaty of Rome lest its use put at risk ratification of the Treaty by national parliaments, according to an observation made by the late Professor J.D.B. Mitchell in *Legal Problems of an Enlarged European Community* (1972) at p 89.

laws. “European law” and “European laws” in current parlance simply means law made by or emanating from the Union. Yet another problem, at least in the English language, is the recognition that European law is not restricted to European legislation but also includes principles laid down by the Court of Justice. The new Constitution recognises this (see, for example, Article 5(3) of the new Treaty). **The term “a European law” in Article 24 raises difficulties which need further consideration.**

12. “European framework laws” replaces “directives”. The terminology is not entirely new in the sense that “framework decisions” are currently used in the Third Pillar (TEU Title VI—Police and Judicial Cooperation in Criminal Matters). But it is expressly provided there that they shall not entail direct effect (Article 34(2)(c)). Whether, with the collapse of the Pillar system in the new Treaty, “European framework laws” will replace both First Pillar directives and Third Pillar “framework decisions” remains to be seen. There is to be a special provision (Article 31) dealing with Police and criminal justice policy. Whether framework decisions/laws in this sector should continue not to have direct effect (*ie* confer rights on individuals which national courts will protect) is a sensitive issue. **Working Group IX (on Simplification) recognised that the new Treaty might continue to provide that instruments adopted in the area of police and judicial cooperation in criminal matters be characterised as not having direct effect. We agree.**

13. The term “European decision” is also not trouble-free. It is said to have been derived from Article 14 ECSC and the definition of “decision” in Article 24(1) is significantly different from that currently in Article 249 TEC. First, European decisions are expressed to be “non-legislative” acts. As already mentioned that does not mean that they are devoid of (general) legal effect but, it would appear, merely that they emanate from the Council or the Commission (as the executive?). As we have indicated above (para 10) it is very confusing to say that something is a “non-legislative act” when it results in a binding legal rule to which sanctions are or may be attached. Second, the words “upon those to whom it is addressed”, currently in the Article 249 TEC definition of “decision”, are not necessary for the definition of “European decision”. This is the influence of Article 14 ECSC. Under the ECSC Treaty, “decision” covered acts providing general rules of law (*ie* “regulations” in EC terms) as well as those which were individually addressed to specific persons. And later Articles of the ECSC Treaty distinguished between “general decisions” and “individual decisions”. The intention in adopting the ECSC definition in preference to Article 249 TEC appears to be to enable *inter alia* European decisions to replace the “joint actions” and “common positions” currently used in the Common Foreign and Security Policy (CFSP). A European decision will, however, be “binding in its entirety”, except where it specifies those to whom it is addressed when it will only be binding on them. What “binding in its entirety” will mean in this context is uncertain. In the ECSC context it meant that a general decision could establish a legal principle, impose abstract conditions for its implementation and set out the legal consequences entailed thereby.¹ Whether and when “European decisions” might have a general normative effect is unclear. Such an effect might not always be appropriate for “European decisions” in CFSP, where if no addressee is specified the decision is presumably intended only to be binding on those party to it (*ie* the Member States under the CFSP).

14. The final paragraph of Article 24(1) reproduces the last paragraph of Article 249 TEC with the addition of the words “adopted by the institutions”. As mentioned above, “recommendations” and “opinions” have not changed.

15. Article 24 is intended to limit the number of types of legal instrument available to EU institutions. But, as the Explanatory note to Article 24(2) suggests, the list in Article 24(1) may not be exhaustive, at least as regards measures not intended to have binding effect. Further, instruments under the CFSP and Police and criminal justice policy are to have their own “specific characteristics”. **Limiting the number of types of act to a few (six in Article 24(1)) may be a useful simplification but corraling what are essentially different types of acts (particularly under the CFSP) under one name is far from desirable and could be counterproductive.**

¹ Case 13/57 *Eisen- und Stahlindustrie v High Authority* [1957-8] ECR 265, at p 275.
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Article 25: Legislative acts¹

- 1 European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council in accordance with the rules of the legislative procedure referred to in Article X (Part Two of the Constitution). If the two institutions cannot reach agreement on an act, it shall not be adopted.
Specific provisions shall apply in the cases referred to in Article Z (ex-third pillar).
- 2 In the specific cases provided for by the Constitution, European laws and European framework laws shall be adopted by the Council.
- 3 When acting under any procedure for the adoption of a European law or a European framework law, the European Parliament and the Council shall meet in public.

Explanatory note

“As proposed in Working Group IX's report and accepted by the plenary, the general decision-making rule is that laws and framework laws are to be adopted under the codecision procedure, as currently referred to in Article 251 TEC.

Neither the discussions in the Working Group nor those in the plenary could settle the name of that procedure. The Working Group's report notes the proposal that it should be called “legislative procedure” but also that some members preferred “codecision procedure”. The Praesidium proposes the name “legislative procedure” as this is more comprehensible to members of the public and in order to emphasise that this procedure is the general rule for the adoption of legislative acts.

The report of Working Group IX recommends that decision-taking procedures should be listed and their key elements outlined in Part One of the Constitutional Treaty, whereas a detailed description of the way they operate should be given in Part Two. The procedure as outlined in Article 25 is therefore limited to the key elements: Commission initiative, joint decision of the Parliament and the Council, parity between the two institutions and transparency. The detailed rules are to be laid down in Part Two of the Treaty.

In accordance with Working Group X's conclusions, specific procedural rules are laid down for the area covered by the present third pillar. They concern the right of initiative which could also be exercised by the Member States in accordance with rules to be determined in Article 31.

Working Group IX recommended generalising qualified-majority voting in the Council in all cases where the legislative (former codecision) procedure applies. This rule will need to be reflected in the adjustments to Part Two of the Constitution. The majorities in the Council and in Parliament, which, moreover, change from stage to stage of the legislative procedure, are aspects of the latter's detailed rules.

Paragraph 2 recognises that there are exceptions to the general rule that legislative acts are adopted by the codecision procedure. Those exceptions must be expressly specified in Part Two of the Constitution. The Praesidium intends to submit the list of exceptions for consideration by the Convention so that it can take it into account in the debate on these draft Articles.

Only the institution that takes the decision is mentioned, namely the Council. The question has arisen as to whether the Parliament's role (consultation) and the Commission's initiative should not also be mentioned.

The Praesidium has elected not to do so in order to highlight the exceptional nature of this procedure and avoid giving the impression that it might be an alternative for the adoption of legislative acts. Acts will of course be adopted in accordance with the provisions of Part Two, particularly in the case of legislative initiative and opinions.

It should also be noted that the Working Group's report proposes that Article 251 should be simplified and its wording amended in order to make clear the parity between Parliament and Council.

Lastly, the codecision procedure is the only procedure that need be considered here. In all other cases (decision taken by the Council acting unanimously or by a qualified majority, alone or after receiving the Parliament's opinion or its assent), the procedure corresponds to each institution's general decision-making rules or to special voting rules laid down in given legal bases.”

¹ Article 29 will stipulate that legislative acts cannot be used for the CFSP.

COMMENTARY

16. The principal aim of Article 25 is to establish co-decision as the normal legislative procedure subject to limited exceptions. Though co-decision is now well-established, making it the universal rule, albeit with some exceptions, is controversial. But the debate is likely to focus on those areas/matters that should continue to be the exceptions. We note that a list of exceptions is to be produced to assist the discussion of this Article in the Convention Plenary.

17. Successive Treaty amendments have seen the growth of co-decision. The Maastricht Treaty introduced the co-decision procedure into the legislative processes of the Community, thus according the Parliament an enhanced role as legislator alongside the Council. The Amsterdam Treaty extended substantially the range of matters to which co-decision applied. The number of policy areas subject to the procedure was extended from 15 to 38. The Amsterdam Treaty also simplified the procedure itself and gave the Parliament a definitive veto, though the position (currently set out in Article 251 TEC) remains somewhat complex. Further extension of the co-decision procedure was discussed in the run-up to the Nice Inter-Governmental Conference (IGC) but extension of co-decision was not as great as some parties (the Commission and the Parliament) had wished. Another 12 matters were added by the Nice Treaty, but there was no amendment of the procedure itself.

18. The main areas where co-decision currently applies are the Single Market, Transport, Environment, Freedom of Movement, Equal Pay for men and women, Public Health, Customs cooperation, Vocational Training, Development Aid, Countering fraud, Research, Transparency and Access to Information. Co-decision is therefore well-established in the First (EC) Pillar. There are, however, some notable exceptions (such as Article 37—Agriculture, Article 94—approximation of laws, Article 161—administration of regional aid, and Article 279—the Budget). Most significantly, co-decision does not apply in the Second (Common Foreign and Security Policy) or the Third (Police and Judicial Cooperation in Criminal Matters) Pillars.

19. Article 25 provides for, but itself does not list, exceptions. The Third (Police and Judicial Cooperation in Criminal Matters) Pillar is an acknowledged special case. There is no reference to CFSP, presumably because it is not envisaged that it will involve “European laws” and “European framework laws”. But First Pillar measures (for example under Article 301 TEC) may be used to give effect to Second Pillar policies.

20. Article 25(1) presumes that in all matters subject to co-decision the Commission will have the sole right of initiative (note the words “on the basis of proposals from the Commission”). Whether, if co-decision is to apply generally, the Commission should have such a monopoly needs consideration. In particular, Member States currently have the right of initiative in certain Justice and Home Affairs matters (Title IV TEC) and under the Third Pillar. The Explanatory note acknowledges that the special rule on the Third Pillar might preserve Member States’ right of initiative.

21. As the Praesidium notes, only the “essential components” of the procedure are set out in Article 25 (*ie* parity between the Parliament and the Council, the legislative initiative of the Commission and the transparency of the procedure). The detail of the co-decision procedure, currently contained in Article 251 TEC, is to be set out in Part Two of the new Treaty.¹ What appears to be assumed is that the present complex procedure will largely remain. It is noteworthy that the Convention Working Group IX did not offer any proposals for its amendment save making the composition of the Conciliation Committee more flexible in order to maintain the parity of the Council and the Parliament.

22. Further, Article 25 is silent on the question of whether decisions in the Council on proposals subject to co-decision will be subject to qualified majority voting (QMV). Convention Working Group IX (Simplification) recommended that “co-decision should become the general rule for the adoption of legislative acts” and that “the logic of the co-decision procedure requires qualified majority voting in the Council in all cases”.² The Group recognised, however, that there would be exceptions to the QMV/co-decision rule “where the special nature of the Union requires autonomous decision-making, or in areas of great political sensitivity for the Member States”.³

¹ Doc CONV 571/03. Introduction at p 2.

² Final Report, Doc CONV 424/02, at pp 14-15.

³ *Ibid*, at p 15. It is also significant that Working Group X (Freedom, Security and Justice) also anticipated that QMV and co-decision would become the standard legislative procedure in the new Treaty (Final Report Doc CONV 426/02). Accordingly the Group recommended that QMV should be applicable to minimum rules defining certain crimes and penalties, criminal procedure, and police and judicial cooperation (pp13-15). (Unanimity would be retained for “co-operation in criminal matters concerning core functions” such as the creation of Union bodies with operational powers, approximation of substantive criminal laws, rules on action by police authorities, joint investigation teams and law enforcement agencies (p14).

23. It is proposed that the co-decision procedure should in future be known as the “legislative procedure”. According to the Praesidium, this is “a name which is more fitting for its status as the general rule for the adoption of legislation and more comprehensible for citizens”.¹ In one way this is helpful. The Treaty currently uses the somewhat awkward (and inaccessible) phrase, “in accordance with the procedure referred to in Article 251”, to refer to what is more familiarly called “co-decision”. But while the term “legislative procedure” may be meaningful in other languages it is not helpful in the English text. There will be other ways in which European laws will be made. The procedure for making those laws will also be “legislative” in the normal sense of the word. To call one particular procedure by which laws are made “legislative” to the exclusion of other legislative procedures is a recipe for confusion. Accordingly we disagree with the Praesidium. **“Co-decision” would be a better and far more accurate term to describe the type of legislative procedure in question.**

24. **Article 25(3) is especially welcome.** The Committee has previously urged greater openness in the Council of Ministers.² Some improvements were agreed at the Seville European Council. But a general rule in the Treaty requiring “any procedure for the adoption of a European law or a European framework law” to be public would be a major step forward. We assume that “any procedure” would include meetings of the Conciliation Committee in the co-decision procedure.³

Article 26: Non-legislative acts

The Council and the Commission as well as the European Central Bank, shall adopt European regulations or European decisions in the cases referred to in Articles 27 and 28 and in cases specifically laid down in the Constitution.

Explanatory note

“This Article covers all non-legislative acts, in particular (last sentence) cases where the Council and the Commission adopt non-legislative acts directly on the basis of the Treaty.

Where acts are adopted by the Commission, there can be no question as to whether an act is legislative or non-legislative in nature, since it is not able to adopt legislative acts. However, when an act is adopted by the Council, a question arises as to whether it is:

— *a legislative act that is exceptionally adopted by a procedure other than codecision;*

or

— *a non-legislative act adopted by the Council directly on the basis of the Treaty.*

The issue has repercussions in cases where the current Treaty explicitly provides which instrument (currently a regulation or a directive) is to be used. With a legislative act, these will need to be replaced by law and framework law; with a non-legislative act, the terms regulation or decision will need to be used. In practice the legal bases in the Treaties rarely specify the instrument to be used and when they do, there can be no doubt as to its nature, as it is always a legislative act. Of course, if acts adopted directly on the basis of the Constitution were classified as “non-legislative”, codecision would not apply in any case.

Conversely, where provisions do not specify any particular instrument, the issue would have no repercussions, since the procedure is determined by each specific legal basis. In any case, once the list of exceptions to the legislative procedure has been decided on, the other legal bases providing for the Council to take the decision would result in non-legislative acts.

The European Central Bank also adopts non-legislative acts in carrying out its task as is now already the case in accordance with Article 110.⁴”

¹ Doc CONV 571/03. Introduction at p.2.

² See our Reports *The Convention on the Future of Europe* 30th Report, Session 2001-02, HL Paper 163; and *Review of Scrutiny of European Legislation* 1st Report, Session 2002-03, HL Paper 15.

³ The problems of exercising effective Parliamentary scrutiny when a co-decision measure becomes subject to the conciliation process, and our recommendations for change, are set out in our Report *Review of Scrutiny of European Legislation*, 1st Report, 2002-03, HL Paper 15, at paras 32-35.

⁴ Paragraph 1 of Article 110 specifies that: “In order to carry out the tasks entrusted to the ESCB, the ECB shall, in accordance with the provisions of this Treaty and under the conditions laid down in the Statute of the ESCB:

— make regulations to the extent necessary to implement the tasks defined in Article 3(1), first indent, Articles 19(1), 22 and 25(2) of the Statute of the ESCB and in cases which shall be laid down in the acts of the Council referred to in Article 107(6);

COMMENTARY

25. Working Group IX proposed a three level hierarchy of Union legislation¹:

- Legislative Acts (“acts adopted on the basis of the Treaty and containing essential elements in a given field”);
- Delegated Acts (“these acts would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator”); and
- Implementing Acts (“acts implementing legislative acts, “delegated legislation” or acts provided in the Treaty itself”).

26. In advocating this tripartite division, the Group sought to clarify which matters should fall to the legislator and which to the executive (though it recognised that a clear legislator/executive distinction might not be possible to attain). The Group also sought to produce a system which would enable the legislator to produce legislation whose democratic legitimacy was beyond dispute but would retain a degree of flexibility to respond “rapidly and effectively to the challenges and demands of the real world”.²

27. The establishment of a hierarchy of Community/Union acts (a so-called “hierarchy of norms”) is not new. The question of the classification of Community acts was raised at the time of Maastricht and a Declaration was annexed to the Treaty on European Union (TEU) requesting the 1996 IGC (Amsterdam) to examine “to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act”. When we ourselves considered this issue in 1996 we doubted whether the form of Community legislation was capable of denoting its importance any more than was the case within the UK’s legal system. There was a case for setting clear criteria for the use of directives and regulations. But the replacement of regulations, directives and decisions by instruments with new names and descriptions was not the solution.³ We have commented above on the new terminology being put forward in the Praesidium’s text. We consider below (when commenting on Articles 27 and 28) the “hierarchical status” of the different forms of act being proposed.

28. Article 26 paves the way into Article 27 (Delegated regulations) and Article 28 (Implementing acts). It also envisages implementing measures being taken under other Articles of the new Treaty, presumably in relation to particular subject matter.

29. We have commented above on the inaptness of the title “non-legislative acts”. It is clear that “European regulations” will be subordinate legislation directly applicable in the Member States. “European decisions” may also give rise to generally, if not directly,⁴ applicable rules. European decisions will be “binding in their entirety”. If they are not directly applicable, that will simply mean that they may need implementation. But what is the difference between a European implementing regulation and a European implementing decision? Neither Article 26 nor Article 28(4) explains. Both are binding in their entirety and both may, but will not necessarily, require implementation. Both are presumably capable of producing direct effects (*ie* of conferring rights on individuals which national courts will protect). Neither is “legislative”.

— take decisions necessary for carrying out the tasks entrusted to the ESCB under this Treaty and the Statute of the ESCB;
— make recommendations and deliver opinions”.

¹ Final Report, Doc CONV 424/02, at pp 8-11.

² Final Report, Doc CONV 424/02, at p 8.

³ See *1996 Inter-Governmental Conference*, 21st Report, 1994-95, HL Paper 105, at para 291.

⁴ Whether European decisions will be directly applicable is not clear. Commentators took the view that ECSC general decisions were akin to EC regulations and were directly applicable – see the analysis of Prof Eberhard Grabitz in *Thirty years of Community law* (1981) at p 84. But whereas the definitions of “European law” and “European regulation” in Article 24 expressly say that such measures are “directly applicable in all Member States” those words do not appear in the definition of “European decision”.

Article 27: Delegated regulations

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

The objectives, content, scope and duration of the delegation shall be explicitly defined in the laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the law or framework law.

- 2 The conditions of application to which the delegation is subject shall be explicitly determined in the law or framework law; they shall consist of one or more of the following possibilities:

- the European Parliament and the Council may decide to revoke the delegation;
- the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law;
- the provisions of the delegated regulation are to lapse after a period set by the law or framework law. They may be extended, on a proposal from the Commission, by decision of the European Parliament and of the Council.

For the purposes of the preceding paragraph, the European Parliament shall act by a majority of its members, and the Council by a qualified majority.

Explanatory note

“This paragraph takes on board Group IX’s recommendations on delegated acts. The component parts of the definition are as follows:

- *It is always the legislator (via the law or framework law) who decides on a case-by-case basis whether recourse is to be had to delegation.*
- *It is also the legislator who decides on a case-by-case basis on the scope of the delegation as well as on the objectives and content.*
- *It is imperative that the essential features of the issue in question be covered in the legislative act. They may in no circumstances be the subject of the delegated act*

Control mechanisms are determined by the legislator on a case-by-case basis by reference to an exhaustive list laid down in Article 27 itself.”

COMMENTARY

30. As mentioned above Working Group IX proposed creating a new category of act, “delegated acts”, whose purpose would be to supplement or amend certain non-essential elements of legislative acts. As the Praesidium explains, “the aim is to encourage the legislator to concentrate on the fundamental aspects, preventing European laws and European framework laws from being over-detailed. The legislator may decide to delegate the more technical aspects, while subjecting this delegation to stringent conditions enabling it, if necessary, to retrieve its power to legislate”.¹

31. Article 27(1), however, raises the question as to what is “essential” and what “non-essential”. We are sympathetic to the view that Community legislation can become overloaded with technical detail (matters which would not be dealt with as primary legislation in any national parliament) and may not be able to respond quickly and flexibly to technical and market development. There is a need to distinguish between core policy decisions and technical issues. In practice the legislator (the Council and the Parliament or, exceptionally, the Council acting alone) will decide in the particular case whether there should be any delegation under Article 27 and/or 28. What is “essential” (or “fundamental” or “important”) is a subjective and imprecise concept. Similarly there will be differing views on what is “technical” in relation to any subject area. Under Article 27 the legislator is given a discretion, but is not under any obligation, to delegate. This is entirely sensible, both politically and in practical terms, but it shows the nonsense of the “legislative”/“non-legislative” split. If a technical/detailed rule is

¹ Doc CONV 571/03, at p 3.
CONV 625/03

formulated by the Council and the Parliament and contained in the basic act it is part of a “legislative act”, but if it is devised by the Commission and included in a delegated act it will be characterised “non-legislative”.

32. The basic instrument, a European law or European framework law, must specify the terms of the delegation and the “conditions of application”, *ie* one or more of the means of exercising control over the Commission listed in Article 27(2). The decision of the legislator (the Council and the European Parliament) whether to “delegate” to (under Article 27) and/or to “confer implementing powers” on (Article 28) the Commission will have to be taken case by case. Whether the use of “delegated regulations” will improve the efficiency of Union law-making will have to be seen. Further, how the creation of the new category of measures, “delegated acts”, will affect the balance of power as between the Commission and the Member States and, in co-decision cases, the European Parliament is unclear. Any assessment may need to await any reform of “comitology” procedures (see Article 28 below). **In the meantime we welcome the overall objective of Article 27.**

Article 28: Implementing acts

- 1 Member States shall adopt all measures of national law necessary to implement the Union's legally binding acts.
- 2 Where uniform conditions for the implementation of the Union's binding acts are needed, those acts may confer implementing powers on the Commission or in specific cases and in the cases provided for in Article [CFSP], on the Council.
- 3 Implementing acts of the Union may be subject to control mechanisms which shall be consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure.
- 4 Implementing acts of the Union shall take the form of European implementing regulations or European implementing decisions.

Explanatory note

"The first sentence clearly sets out the principle that competence for the implementation of Union acts belongs to the Member States. The second sentence concerns the exception to this principle, namely implementation by the institutions of the Union where uniform implementing conditions are necessary. It essentially repeats and clarifies the third indent of Article 202 TEC.¹

Article 28 maintains the status quo as regards the adoption of implementing acts: as a general rule they are adopted by the Commission and exceptionally by the Council. The specific case of the CFSP is dealt with by means of a reference to the Article concerned.

As regards the means of monitoring the implementing acts (committee procedure), the text proposed takes Article 202 as its starting point. The proposed decision-making procedure is codecision. It should be remembered that the present procedure is unanimity within the Council plus ordinary consultation of the European Parliament. Although Group IX discussed the decision-making procedure, it made no recommendations on the subject.

However, the Group pointed out that if the concept of the delegated act were to be adopted, the procedures for monitoring the implementing acts would need to be simplified and, in particular, the Council call-back procedure under the regulatory committee procedure abolished.

In that context and on such premises the Group recommended resolving the problem by introducing a new category of acts (to be found in various guises in the Constitutions of a number of Member States).

Distinction between delegated acts and implementing acts

Working Group IX recommended the introduction of a new category of delegated acts in response to the frequent criticism of the excessive detail in Community legislation and the inflexibility and slowness of procedures. Group IX's report states that "the excessive detail in Community legislation has often been criticised within the Convention. This excessive detail has been considered inappropriate, in particular in certain economic areas in which an ability to adapt to a changing environment is very important. The Community legislator is thus confronted with a dual requirement: that of producing legislation whose democratic legitimacy is beyond dispute, something which can only be guaranteed by legislative procedures, and that of responding rapidly and effectively to the challenges and demands of the real world and therefore retaining a degree of flexibility.

At present there is no mechanism which enables the legislator to delegate the technical aspects or details of legislation whilst retaining control over such delegation. As things stand, the legislator is obliged either to go into minute detail in the provisions it adopts, or to entrust to the Commission the more technical or detailed aspects of the legislation as if they were implementing measures, subject to the control of the Member States, in accordance with the provisions of Article 202 TEC."

To remedy this situation, the Group proposed "a new type of "delegated" act which, accompanied by strong control mechanisms, could encourage the legislator to look solely to the essential elements of an act and to delegate the more technical aspects to the executive, provided that it had the guarantee that it would be able to retrieve, in some way, its power to legislate."

Some thought that the problem could be resolved more simply by giving the legislator (the European Parliament and the Council) a right of call-back over implementing acts (Article 202 TEC). In its conclusions, the Working Group rejected that option for the following reasons:

- *implementing acts fall in principle within the competence of the Member States and are only exceptionally adopted by the Commission (or in certain cases by the Council)*
- *for the same reason, implementing acts adopted by the Commission are subject to monitoring by committees made up of representatives of the Member States*
- *implementing acts are consequently not matters which concern the legislator.*

In that context and on such premises the Group recommended resolving the problem by introducing a new category of acts (to be found in various guises in the Constitutions of a number of Member States)."

COMMENTARY

33. In its introduction to this Title of the new Treaty, the Praesidium describes Article 28 as “a clarification of Article 202 TEC, which currently governs implementing powers exercised at Community level”.² It is more than that. Article 28 deals with two things: the obligation on Member States to implement Union laws and, second, the conferring of implementing powers on the Commission or the Council to make (*pace* Article 27) delegated legislation.

34. Article 28(1) is new and appears to impose an express duty on Member States to implement Union law. In effect it consolidates existing Community law under which Member States are, by virtue of the duty of cooperation and the principle of the supremacy of Community law, obliged to implement Community law. Where provisions of Community law are not directly applicable (*eg* an EC directive), Member States are required by the Treaty to adopt legislative measures where necessary to achieve compliance with the Treaty. Where measures are directly applicable (*eg* an EC regulation) they may have to remove or qualify any contradictory or inconsistent national measures.

35. Under Article 202 TEC the Council can “confer” power on the Commission or “reserve” them to itself. The latter is, however, in practice exceptional. Article 28(2), as the Explanatory note says, reflects the *status quo* under Article 202 TEC. It also anticipates the need for a special provision to deal with implementation of CFSP.

36. Article 28(3) raises two questions. The first relates to the meaning of “implementing acts of the Union”. This appears to refer solely to implementing measures to be taken pursuant to Article 28(2) and presumably does not extend to measures taken by Member States pursuant to Article 28(1). The Commission can, and regularly does, bring proceedings against Member States where there is a failure to implement Community obligations. Giving the Commission greater powers here would be objectionable, as it might undermine/interfere with the discretion of a Member State to implement in the way it considers most appropriate, and would offend the principle of subsidiarity. In the last resort it is for the Court of Justice to determine whether a Member State has exceeded the bounds of its discretion.

37. The second question concerns the reference in Article 28(3) to “control mechanisms”. This would seem to be a reference to “comitology”, the system of procedures involving committees, made up of representatives from Member States and chaired by the Commission, whereby the Member States can exercise some control over implementing powers delegated to the Commission by the Council. What is new is that the control mechanisms must be “consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure”. Comitology procedures are currently governed by Council decision (made by Council decision under Article 202 TEC, and supported by inter-institutional agreements between the Council and the Parliament). As the Convention Secretariat has pointed out, Working Group IX did not address the possibility of amending this legal basis. The Praesidium proposes that it be subject to the legislative (co-decision) procedure. **We have for some time argued that the Parliament should have a greater role in comitology.³ That will now extend to establishing the ground rules for comitology. We therefore welcome this.**

38. As the Praesidium’s Explanatory note makes clear, the introduction of the new category of measure, “delegated acts”, will have implications for “comitology” and the Praesidium envisages a weakening (at least from the standpoint of the Member States) of the regulatory committee procedure. We have under scrutiny a Commission proposal to amend the current arrangements.⁴ This is described as a transitional measure but it would also involve a strengthening of the position of the Commission. **The future of comitology under the new Treaty is something to which we will want to return.**

39. Article 28(4) refers to “European implementing regulations” and “European implementing decisions”. This might suggest two further categories of legislative instrument. But it seems clear from Article 26 that “European

¹ In accordance with the third indent of Article 202 TEC, the Council “shall [...] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament”.

² Doc CONV 571/03, at p 4.

³ See our earlier Reports: *Delegation of Powers to the Commission: Reforming Comitology*, 3rd Report, 1998-99, HL Paper 23; and *Review of Scrutiny of European Legislation*, 1st Report, 2002-03, HL Paper 15.

⁴ Doc 15878/02: Proposed Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. Currently held under scrutiny in Sub-Committee E (Law and Institutions).

implementing regulations” and “European implementing decisions” are merely types of “European regulations” and “European decisions” as defined in Article 24.

Article 29: [Common foreign and security policy]

Article 30: [Common defence policy]

Article 31: [Police and criminal justice policy]

COMMENTARY

40. The instruments listed and defined in Article 24 (European laws, European framework laws, European decisions etc) are intended to apply in all areas of the Constitution, including those which currently fall under the Second (CFSP) and Third Pillars (Cooperation in police and criminal matters). But as the Praesidium notes, what are now Second and Third Pillar matters could, as recommended by Working Group IX, be subject to special rules (to be specified in Articles 29, 30 and 31) in the light of the conclusions of the other Working Groups (*ie* Group VII on External Action, VIII on Defence, and X on Freedom, Security and Justice) and discussions in the Convention. The text of Articles 29, 30 and 31 “will be presented with the relevant chapters of Part Two of the Constitution in order to facilitate overall comprehension”.¹

Article 32: Principles common to acts of the Union

- 1 Unless the Constitution contains a specific stipulation, the institutions shall decide, in compliance with the procedures applicable, on the type of act to be adopted in each case, in accordance with the principle of proportionality set out in Article 8.
- 2 European laws, European framework laws, European regulations and European decisions shall state the reasons on which they are based and shall refer to any proposals or opinions required by this Constitution.

Explanatory note

“It is helpful to refer to the proportionality principle in this context since it constitutes the criterion which determines the choice of instrument. The intention is to provide a transparent reply to the question of how a decision is taken on the intensity of action by the Union.

The second paragraph draws on the wording of the current Article 253 TEC.²”

COMMENTARY

41. Article 32(1) merely sets out a particular application of the principle of proportionality (the general principle is defined in Article 8(4)).

42. The requirement to state the reasons is currently contained in Article 253 TEC and relates to all “regulations, directives and decisions” adopted by the EP and the Council (*ie* by co-decision) and by the Council or the Commission. The obligation to give reasons, whether in relation to a legislative or non-legislative act and whether the act has general application or is restricted to a particular addressee or group, is an important safeguard against misuse or abuse of power. Adequacy of reasoning is a matter on which the Court of Justice frequently has to rule. In applying Article 253, the Court of Justice has consistently held that the reasoning required by Article 253 must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise

¹ Doc CONV 571/03, at p 5.

² Article 253 stipulates that “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.”

judicial review. This does not mean that the Community authority in question is necessarily required to go into every relevant point of fact and law.¹

Article 33: Publication and entry into force

- 1 European laws and European framework laws adopted in accordance with the legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. In other cases they shall be signed by the President of the Council. European Union laws and European Union framework laws shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.
- 2 European regulations of the Commission or of the Council and European decisions which do not specify those to whom they are addressed or which are addressed to all Member States shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.
- 3 Other decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.

Explanatory note

“This Article corresponds to the text of the current Article 254 TEC, which has been revised in the light of the earlier draft articles. Although the preliminary draft Constitution makes no provision for such an article, it needs to be introduced since the conditions for entry into force of laws (promulgation and publication) are fundamental constitutional factors for legal security.”

COMMENTARY

43. Article 33 provides for the promulgation, publication and entry into force of acts. As the Explanatory note indicates such provisions are essential to ensure legal certainty.

44. Article 254 TEC requires “regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251” (*ie* by co-decision) to be published in the Official Journal of the Union, along with “regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States”. Other directives and decisions are only required to be notified to those to whom they are addressed, though they may be, and often are, published. Article 33 adapts the current Article 254 to the new legal instruments (“European laws”, “European framework laws” etc).

¹ Case C-122/94 *Commission v Council* [1996] ECR I-881, at para 29.
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APPENDIX 1

Membership of the European Union Committee and Sub-Committee E (Law and Institutions)

The members of the European Union Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
Earl Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds

The members of Sub-Committee E (Law and Institutions) are:

Lord Brennan
Lord Fraser of Carmyllie
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Plant of Highfield
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

HOUSE OF LORDS

SESSION 2002–03
11th REPORT

SELECT COMMITTEE ON
THE EUROPEAN UNION

**THE FUTURE OF EUROPE: NATIONAL
PARLIAMENTS AND SUBSIDIARITY —
THE PROPOSED PROTOCOLS**

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ELEVENTH REPORT

11 MARCH 2003

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: NATIONAL PARLIAMENTS AND SUBSIDIARITY – THE PROPOSED PROTOCOLS

Abstract

The Convention on the Future of Europe is examining the role of national parliaments and the principle of subsidiarity.

This report examines the Convention's proposals. We stress the importance of national parliaments as a means to reconnect the

PART 1: INTRODUCTION

1. The Convention on the Future of Europe is examining, among other matters, the role of national parliaments in the European Union and the principle of subsidiarity. These issues are important not least because of concerns that the European Union is disconnected from its citizens; and because of a sense that national parliaments have a role to play in solving this problem. Our Committee has been keeping the work of the Convention under review and as part of that ongoing scrutiny we examine here the role of national parliaments in the European Union; and the question of subsidiarity.

2. The purpose of this report is to examine the proposals concerning national parliaments and subsidiarity which are being discussed in the Convention. We do so with reference to several reports on the EU and national parliaments including two reports from the Convention itself: the report of the Working Group on the role of National Parliaments;¹ and that of the Working Group on Subsidiarity.² We also refer to the proposed Protocols on national parliaments and subsidiarity issued by the Convention's Praesidium³. Secondly, the House of Commons European Scrutiny Committee has produced a report on 'Democracy and Accountability in the EU and the Role of National Parliaments',⁴ and another on 'European Scrutiny in the Commons'.⁵ We ourselves have recently published a 'Review of Scrutiny of European Legislation'.⁶

3. This report also examines, and attempts to explain, the concept of subsidiarity and the role that national parliaments can play in this regard. This topic is covered in Part 3 below. We intend to produce separate reports

¹ CONV 353/02.

² CONV/286/02.

³ CONV 579/03, printed in Appendix 2.

⁴ 33rd Report of session 2001-02, HC 152-xxxiii-I.

⁵ 30th Report of session 2001-02, HC 152-xxx.

⁶ 1st Report of session 2002-03, HL Paper 15 – awaiting debate.

on the Convention's proposed Treaty Articles¹; CFSP and defence; and the Convention's proposals for a Social Europe.

4. We have not taken extensive evidence, as the primary purpose of this report is to draw together existing material. We did, however, hear from Gisela Stuart MP, a member of the Convention's Praesidium and chair of the Working Group on National Parliaments. We are very grateful to Ms Stuart for making herself available to us on this occasion, as she and the other UK national parliamentarians on the Convention have done before. A transcript of her evidence is printed with this report. **We make this report to the House for information although we hope that the House will soon have a further opportunity for another debate on the Convention and that this report would inform any such debate.**

¹ The first such report has been published, on Articles 1-16 (9th Report, HL Paper 61, 25th February).
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PART 2: NATIONAL PARLIAMENTS

SCRUTINY: THE COUNCIL

5. There is general agreement that the primary role of national parliaments in the European legislative process is to scrutinise their national governments and hold them to account. National parliaments are not co-legislators in the process of making EU law, as are the European Parliament and the Council of Ministers, nor would we wish national parliaments to have such a role. But it follows from this that national parliaments should influence their Ministers in the Council, and should do so effectively¹. The Working Group asserted that more openness and transparency in the work of the Council was essential to better achieve this goal² and accordingly proposed that the Council should act in public as much as necessary. Gisela Stuart stressed this issue to us but was “realistic” about the possibility of extending reforms already agreed at Seville.³ She was cautious about proposals for a separate legislative council.⁴ **We agree with the case for greater openness in the Council when it is legislating, as do the Commons Committee and the UK Government⁵.**

6. In addition, the Working Group recommends that records of Council proceedings should be sent, within 10 days, to national parliaments⁶. Gisela Stuart told us that making use of such information would be “quite a challenge” for national parliaments, although the problems giving rise to the Group’s recommendations did not arise in the United Kingdom⁷. **We accordingly support the provision in the proposed protocol on national parliaments for the direct transmission of Council Agendas and outcomes to national parliaments. The protocol should make clear that this transmission must be prompt. Council Agendas should be transmitted in advance and as soon as available, to allow for effective national parliamentary scrutiny.**

NATIONAL PARLIAMENTS

7. The Convention’s National Parliaments Working Group, the Commons Committee and our Committee are all agreed that national parliaments have a distinct role to play in the EU, and that enhancing their material involvement would help to strengthen the democratic legitimacy of the Union. The Commons has argued that national parliaments are closer to the citizens than any EU institution, including the European Parliament⁸. In this sense, enhancing their role can help remedy the ‘disconnection’ between the EU and its citizens, a point clearly stressed by the Government in this House during the recent debate on the Convention⁹. The remedy will only be effective as long as national parliaments improve their responsiveness’ to their citizens.

8. The Working Group and Gisela Stuart in her evidence to our Committee acknowledged that the different systems for national parliamentary scrutiny reflected different constitutional relations between governments and national parliaments in various Member States, and that it would not be appropriate to prescribe at European level the best system¹⁰. In the UK the scrutiny system is based firmly, though not exclusively, on documents, and it is normally a Government Explanatory Memorandum which triggers consideration of a proposal. The Commons Committee’s main role is to assess the legal and political importance of each document and to decide which should be debated, but not to concern itself with the merits of documents¹¹.

¹ Working Group IV Report, para. 6.

² Working Group IV Report, para. 8.

³ Q 12.

⁴ Q 14. This proposal has been floated by Working Group IX on simplification in its report (CONV 424/02) p 22 “To reinforce clarity, it is not sufficient to simplify procedures or instruments; the institutions must sit in public when they are exercising legislative functions, ie when they are defining the fundamental policy choices of the Union’s actions.”

⁵ 33rd Report, 2001-02, para. 23. See also our own report on article 25(3) (12th Report, 11 March 2003, HL Paper 71, paragraph 24). The Government’s case was set out in a joint letter with the German Government (25 February 2002 reported in the Guardian on 26 February 2002). The Prime Minister has also said “Councils should vote on and declare national positions on legislation in the open”, (speech in Cardiff 28 November 2002). (<http://www.pm.gov.uk/output/page6710.asp>).

⁶ Working Group IV Report, para. 7.

⁷ Q 17.

⁸ 33rd Report, 2001-02, para. 3.

⁹ Baroness Symons of Vernham Dean HL Deb. 7 Jan 2003, col 980.

¹⁰ Working Group IV Report, para. 9, see also Q 19.

¹¹ 30th Report, 2001-02, paras. 8, 9 and 33.

9. Our system is similar to the Commons' but with two important differences. First, the full Committee does not examine every document (the Chairman conducts a sift) and we do examine the merits of proposals¹. Secondly we have Sub-Committees which examine sectoral policy issues in the European context. **While we do not argue that there is any one model of scrutiny that can fit all national parliaments, we have suggested that our system, of involving Members with expertise in policy areas in the work of European scrutiny, could provide a model from which a national parliament wishing to scrutinise European legislation in depth and on the basis of genuine expertise might be able to learn some lessons.**².

10. We underline the constitutional importance of national parliamentary scrutiny³; and we were pleased to hear Gisela Stuart say that "scrutiny is a process by which at times you can challenge the outcome and change decisions"⁴. **We would wish to see the proposed protocol strengthened by more direct reference to the importance of effective scrutiny.**

11. The Convention's Working Group identified a number of basic factors that have an impact on the effectiveness of scrutiny including:

- The timeliness, scope and quality of information;
- The possibility for a national parliament to formulate its position with regard to a proposal for an EU legislative measure or action;
- Regular contacts and hearings with Ministers before and after Council meetings;
- Active involvement of sectoral/standing committees in the scrutiny process;
- Regular contacts between national parliamentarians and MEPs;
- Availability of support staff, including the possibility of a representative office in Brussels.⁵

We agree that these are all important factors and we are working to enhance our own activity in these areas. The Cabinet Office's undertaking that it will press for the electronic transmission of documents from Brussels is accordingly welcome⁶.

12. In its final report, the Convention's Working Group on Subsidiarity recommends greater direct involvement of national parliaments in the scrutiny of the application of subsidiarity. These proposals are dealt with in Part 3 below.

THE SCRUTINY RESERVE

13. Possibly the most potent weapon in the armoury of the UK's scrutiny committees is the scrutiny reserve. This constrains Ministers from agreeing in Council to legislative proposals if the Committees have not completed scrutiny of them. Exceptions are provided for special reasons. The protocol annexed to the Amsterdam Treaty allows a minimum of six weeks for such national parliamentary scrutiny.

14. The Commons Committee has advocated a toughening up of the scrutiny reserve by either incorporating it into EU procedures or building in more time in the legislative procedure⁷. Peter Hain has told the House of Commons that the Government endorsed the proposal that the scrutiny reserve be given a clearer status in the Council's Rules of Procedure; and he looked for guidance on how that should be carried through⁸. The Commons Committee intend normally to call a Minister to give evidence when a scrutiny reserve has been overridden without good cause⁹. We have recommended that, in those cases where a Minister overrides a reserve, the Minister should come to Parliament and give an explanation by way of Ministerial Statement. We have also recommended the creation of a new procedure (which would be used exceptionally) requiring a positive resolution of the House

¹ 1st Report, 2002-03, para. 16.

² 1st Report, 2002-03, para. 103.

³ 1st Report, 2002-03, para. 12.

⁴ Q 19.

⁵ Working Group IV Report, para 10.

⁶ House of Commons Committee, 30th Report, 2001-02, para. 45.

⁷ 33rd Report, 2001-02, para. 47.

⁸ Evidence to the European Scrutiny Committee, 20 November 2002, HC 103-I Q 42.

⁹ 30th Report, 2001-02, para. 53.

before the lifting of a scrutiny reserve¹. We have also urged the Convention to consider a revision of the co-decision procedure to allow a greater opportunity for national parliamentary scrutiny².

15. One great threat to the effectiveness of the scrutiny reserve is the tendency of Ministers to make ‘preliminary agreements’ or adopt ‘general approaches’ at Council before the scrutiny reserve has been lifted. The National Parliaments Working Group does not believe such agreements should be reached in the six-week period between a legislative proposal being made public and it being placed on a Council agenda for decision³. For Gisela Stuart, this would provide an opportunity for all national parliaments to conduct effective and challenging scrutiny.⁴ There was a “common consensus” in the Convention that such agreements should not happen.⁵

16. Our Committee has argued that the reserve should be ‘sacred’ for the six weeks, and that the House’s Scrutiny Reserve Resolution be amended to make clear that the Government should not participate in any form of agreement during that period⁶. We have pursued this matter in a previous report and in the House⁷. **We continue to recommend that no form of agreement should be reached in Council during the six week period allowed for parliamentary scrutiny.**

17. We note that the proposed protocol in effect repeats the existing provisions in the Protocol annexed to the Amsterdam Treaty. Although arrangements under this provision currently work reasonably well, problems do continue to arise and we are currently uncertain whether the six week period is meaningful for all national parliaments. **All national parliaments should endeavour to operate a strong and effective scrutiny system. We also recommend that the Treaty should formally recognise the status of scrutiny reserves in the Council.**

SCRUTINY AT AN EARLY STAGE

18. The Working Group was in agreement with our Committee when it concluded that national parliaments needed to conduct pre-legislative scrutiny. This includes scrutiny of the Commission’s Annual Work Programme, Annual Policy Strategy and Green and White papers. The Group recommended that such consultative documents be sent directly to national parliaments⁸. We have stressed that scrutiny at such an early stage is essential, and this year started reporting on the Commission’s Annual Work Programme⁹. We are considering national parliamentary scrutiny of the Council’s strategic agenda. Gisela Stuart said she would support such scrutiny and would even wish to see it extended by regular sessions with Commissioners or “European weeks” in national parliaments across the EU.¹⁰ In order for such ‘upstream’ scrutiny to be effective, we have called on the Government to undertake always to draw to the Committee’s attention any matters under discussion or consideration by the Commission which might merit detailed scrutiny when a proposal comes forward – a sort of ‘early warning system’¹¹. **We recommend that the proposed protocol on national parliaments be amended to stress the importance of national parliamentary scrutiny at an early stage, including at the stage of the Council’s Strategic Agenda and the Commission’s Annual Work Programme; and before the formation of legislation proposals.**

MEPs

19. The Working Group believed that national parliaments needed a greater exchange of information, both with other parliaments and with MEPs¹². This would help strengthen the link with citizens and improve scrutiny of European proposals. Gisela Stuart too argued forcefully for greater cooperation between national parliaments and the European Parliament¹³. The Working Group suggested more *ad hoc* contact between national parliamentarians

¹ 1st Report, 2002-03, paras. 71-74.

² 1st Report, 2002-03, para. 35.

³ Working Group IV Report, para. 17.

⁴ Q 19.

⁵ Q 28.

⁶ 1st Report, 2002-03, para. 71.

⁷ 23rd report Session 2001—02, (HL Paper 135); HL Deb 14 October 2002, Col 672.

⁸ Working Group IV Report, para. 14.

⁹ 1st Report, 2002-03, para. 30.

¹⁰ Q 22.

¹¹ 1st Report, 2002-03, para. 31.

¹² Working Group IV Report, para. 29.

¹³ Q4.

and MEPs, to complement regular contacts¹. The Commons has suggested joint meetings to scrutinise the Commission and its annual programmes, officials and expert witnesses, and to debate issues². The first such meeting has been held. We have undertaken to ensure that relevant UK MEPs have the opportunity to give evidence to our inquiries³. **We will be pursuing these recommendations in the coming months. We welcome the proposed protocol's emphasis on joint working between national parliaments and the European Parliament to improve inter-parliamentary co-operation.**

COSAC

20. The Convention's Working Group concluded that a greater exchange of information between national parliaments about methods and experiences of scrutiny would be beneficial, and that this was the primary role of COSAC⁴. The Working Group saw merit in clarifying the mandate of COSAC; in strengthening its role as an inter-parliamentary consultative mechanism; and in making it more efficient and focused⁵. The Group believed that the role of COSAC should be expanded, though it should be used primarily as a forum for bringing together national parliamentarians⁶.

21. We have been arguing for some time that COSAC needs to be reformed. We have called for COSAC to re-focus on the primary question of how national parliamentary scrutiny is conducted. Our Committee and the Commons Committee are at one in pressing for COSAC's main role to be redefined. COSAC should assist national parliamentarians to improve their scrutiny of government activities in the EU, by sharing best practice and information and acting as a strategic body on behalf of national parliaments⁷. We are working in particularly close operation with our colleagues in the Commons and with our Danish colleagues to reform COSAC in order to achieve a better exchange of information between national parliaments⁸. **Recent attempts by COSAC to reform itself, however, are not wholly encouraging. The possibility remains that a new structure may need to be considered by the IGC in order to meet the objectives which COSAC should, in our view, be achieving.**

¹ Working Group IV Report, para. 34.
² 33rd Report, 2001-02, paras. 140 and 141.
³ 1st Report, 2002-03, para. 132.
⁴ Working Group IV Report, para. 11.
⁵ Working Group IV Report, para. 30.
⁶ Working Group IV Report, para. 31.
⁷ 33rd Report, 2001-02, para. 150.
⁸ 1st Report, 2002-03, para. 133.

PART 3: SUBSIDIARITY

BACKGROUND

22. The Convention proposes to strengthen national parliaments' scrutiny of the application of subsidiarity in EU legislative proposals. The Working Group on Subsidiarity has put forward a detailed practical proposal for the mechanism by which this might be done. We consider that a detailed account of the development of the principle of subsidiarity will put the significance of this proposal into context, and we accordingly provide such an account.

23. Subsidiarity has been generally understood as a principle for determining how powers should be divided or shared between different levels of government. As conventionally understood, the principle states that decisions should be taken at the lowest level consistent with effective action. In the EU, subsidiarity has gradually taken on a specific meaning which is sufficiently open-ended to appeal to both advocates and opponents of deeper integration.

24. The concept of vertical power sharing between levels of government is not new.¹ Subsidiarity emerged as an explicit principle of political thought in the 19th century, finding expression both in political liberalism and Catholic social theory. In political liberalism, subsidiarity is a 'single-edged sword' used to justify non-intervention by the state in individual affairs. In Catholic social theory², subsidiarity is potentially double-edged, in that it counsels state intervention where it is efficient and non-intervention where it is not. Both traditions of subsidiarity have found expression in the development of the European Union.

25. By the late 1970s, subsidiarity had become part of the popular lexicography of the European Parliament, where it was frequently cited, particularly by members of Christian democratic parties, as grounds for increasing the powers of the European Community. The need to transfer sovereignty to the Community was justified by reference to subsidiarity, in a context in which it was thought only common policies could match the scale of the problems perceived within the environment or industry. In the mid-1980s, subsidiarity began to feature in a range of publications which argued for new actions at Community level to free the internal market.

26. Subsidiarity found its first legal expression in an EC Treaty when it appeared in the Single European Act's article on environmental protection.³ By the mid-1980s all Member States recognised the need for the Community to have powers in the environmental field. Several, Denmark in particular, nonetheless feared that a common EC policy would act to weaken their strict national environmental standards. Thus, the Act stated that 'the Community shall take action relating to the Environment to the extent to which the objectives can be attained better at Community level than at the level of individual Member States'.

27. During the 1991 intergovernmental conference to negotiate the Maastricht Treaty, the British government saw subsidiarity as a means of limiting the EU's involvement in national affairs and holding in check future transfer of policy competences to the EU. For the German government, on the other hand, subsidiarity was welcomed as a safeguard on the powers of the German Länder to regulate in areas such as education and social policy.

28. The Maastricht Treaty made subsidiarity a general rule for all Community activity. Article 3bTEC set out different requirements for Community action and contained three legal principles of conferral; subsidiarity; and proportionality.⁴ These were carried over to Article 5 of the post-Amsterdam TEC (see below).

29. Article 3b was elaborated on at the Edinburgh European Council in 1992 following the Danish 'no' vote to the Maastricht Treaty. There the Commission committed itself to justify all new proposals on the basis of subsidiarity, both in the preamble to the text and in the accompanying explanatory memorandum. The resulting interpretation of subsidiarity places the burden of proof on the Commission to show that it could better handle

¹ The exact genealogy of the subsidiarity principle is still an object of some debate between scholars. Some develop a lineage from Aristotle through Thomas Aquinas to the Catholic social philosophers of the 19th and 20th century, while others stress the importance of Johannes Althusius, a political philosopher of the 16th century and John Stuart Mill.

² Most famously in Pope Pius XI Encyclical *Quadragesimo Anno* of 1931

³ Article 130r.

⁴ Article 3b(1) is the principle of attribution of powers, which has long been an integral part of the EU and is expressed in Article 4(1). This states that 'Each institution shall act within the limits of the powers conferred upon it by this Treaty'. Article 3b(2) is the principle of subsidiarity itself, and involves an assessment 'of the need for EU action: 'the [EU] shall take action, only if...' (the *necessity* test). Article 3b(3) incorporates the principle of proportionality into the Treaty and involves an assessment of the intensity of EU action (the *intensity* test).

issues than the Member States, an interpretation carried on to the next intergovernmental conference in Amsterdam.

30. The 1999 Amsterdam Treaty placed further emphasis on the principle of subsidiarity by including it in Article 2TEU. According to Article 2 the objectives of the Treaty shall be achieved ‘while respecting the principle of subsidiarity as defined in Article 5 of the Treaty Establishing the European Community’. Article 5 (ex Article 3b), states that:-

the ‘Community shall act within the limits of the powers conferred upon it by this Treaty’;

the second paragraph of Article 5 states that 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’;

paragraph 3 then adds the further condition that ‘any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty’.

31. The first two of these points also entail what the Commission has termed a test of comparative efficiency.¹ If it is decided that action by the Community is warranted then the third part of the formulation comes into play. This entails the application of a proportionality test, requiring the Community to consider the intensity of the Community measure.

32. The 1999 Amsterdam Treaty also significantly advanced the debate about the legal meaning of subsidiarity through an accompanying Protocol on the Application of the Principles of Subsidiarity and Proportionality. The Protocol states *inter alia* that:

the reasons for preferring Community action must be substantiated by the Commission by qualitative and quantitative indicators (paragraph 4);

forms of legislation that leave the Member States the greatest room for manoeuvre are to be preferred to more restrictive forms of action (paragraph 6);

the Commission must consult more widely and explain how its proposals comply with the requirements of subsidiarity (paragraph 9), and;

The Commission must submit an annual report on the application of Article 5 EC (paragraph 9)

33. In the 1970s and 80s, the principle of subsidiarity was used to argue for greater integration of the EC. By contrast, subsidiarity, as expressed in the treaties of Maastricht and Amsterdam, indicates a political desire in the 1990s for a ‘lighter touch’ Community approach.

34. As Jacques Delors pointed out in 1992 when he offered a prize for anyone who could define subsidiarity, the principle is still a matter of interpretation.² Only the European Court of Justice can provide a definitive interpretation of the meaning of subsidiarity in any particular case referred to it³. In any case, the Court of Justice can only be asked to intervene *after* the adoption of legislative acts.

35. The difficulty of monitoring the principle of subsidiarity prompted the European Council at Laeken in 2001 to include subsidiarity as one of the issues that the Convention of the Future of Europe was to consider.

CONVENTION ON THE FUTURE OF EUROPE: WORKING GROUP ON SUBSIDIARITY

Mandate

36. The Convention established a Working Group on Subsidiarity to complement the general discussion within the EU on the delimitation of competence between the European Union and the Member States referred to in the Nice and Laeken Declarations on the future of the EU. The Working Group was therefore mandated to consider⁴:

¹ Commission Communication to the Council and the European Parliament, Bulletin EC 10-1992, 116.

² Quoted in Paul Craig and Grainne de Burca “EU Law: Text, Cases and Materials”, 2nd edition, Oxford University Press, 1998, P. 129.

³ The Government has on a number of number of occasions had to review the compatibility of a measure with the principle of subsidiarity. For a recent example, see case C—491/01, R v Secretary of State for Health exp British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd. Judgement of 10 December 2002.

⁴ CONV 71/02: Working Group 1: Mandate.

how compliance with the principle of subsidiarity can be monitored in the most effective manner;
whether a procedure for monitoring the application of the principle should be established;
whether such a procedure should be of a political and/or legal nature; and
the criteria established in the Protocol on the application of the principles of subsidiarity and proportionality need to be extended to reflect its conclusions.

37. At the Convention plenary meeting on 15 and 16 April 2002 a large majority of speakers were in favour of more effective mechanisms for monitoring the proper application of the principle of subsidiarity. The Working Group was therefore asked to consider both further political and legal monitoring mechanisms.

Monitoring of Compliance

38. Political monitoring of subsidiarity should formally be carried out by the institutions which are part of the European legislative process. The Amsterdam Protocol on subsidiarity requires the Commission to justify its legislative proposals with regard to subsidiarity. The Commission is also required to submit to the Council and the Parliament an annual report on the application of the principle of subsidiarity. In addition, national parliaments may, if they wish, provide political monitoring of the application of subsidiarity through their scrutiny of government. The principle of subsidiarity is also subject to *ex post* judicial review by the Court of Justice.

WORKING GROUP PROPOSALS

39. The Working Group agreed three main proposals to improve the application and monitoring of the principle of subsidiarity:

- reinforcing application of the principle during the legislative process;
- setting up an early warning system for national parliaments to reinforce monitoring of compliance; and
- broadening the right of referral to the Court of Justice to national parliaments and the Committee of the Regions.

Closer monitoring of subsidiarity

40. The Convention's Working Group proposed a strengthening of the Commission's obligation to examine any legislative proposal against the principle of subsidiarity. The Group's report suggests that the Commission should attach a 'subsidiarity sheet' to every legislative proposal so that all parties affected by it may easily assess compliance of the proposal with the principle of subsidiarity.

41. The Working Group agreed that subsidiarity should be debated from the very beginning of any legislative process. As a practical suggestion for applying this proposal, the Group cited the Commission's annual legislative programme as a suitable document that could inform a preliminary debate by the European Parliament and national parliaments on the application of subsidiarity in forthcoming legislative proposals.

42. The Working Group concluded that ensuring respect for subsidiarity and proportionality was a shared responsibility and that the Commission, the European Parliament, the Council and national parliaments must all ensure compliance¹. It said that national parliaments had an essential role to play, and should be involved as early as possible in the legislative process in monitoring subsidiarity². It rejected the idea of creating new permanent or ad hoc bodies or institutions for this purpose³.

43. It is instructive to compare these proposals with those of the Commons Committee, which has argued that national parliaments should play a part in checking subsidiarity, for three reasons:

- EU institutions are not in practice keen on applying the principle;
- National parliaments do not have an inherent, institutional interest in transferring powers to the EU level;

¹ Working Group IV Report, para. 22.

² Working Group IV Report, para. 23.

³ Working Group IV Report, para. 24.

- Being generally closer to the people than any EU institution, national parliaments are more likely to reflect the views of citizens on such matters.¹

44. For these reasons, the Commons Committee has argued that national parliamentarians should have stronger rights than consultation and should look at the Annual Work Programme to see if measures are being taken at an EU level when action would be more effective at a national level². The Committee argued that subsidiarity should be monitored throughout the legislative process, and recommended a ‘subsidiarity watchdog’ to which items of legislation could be referred by national parliamentarians for compliance.

45. We note that the Working Group concluded that the principle of subsidiarity is essentially of a political nature. This was affirmed by Peter Hain in his letter to the chair of the Working Group³. It is very difficult to establish unequivocally that ‘objectives of the proposed action cannot be sufficiently achieved by the Members States and can therefore be better achieved by the Community.’⁴ Such a judgement entails a considerable degree of discretion for the European institutions.⁵

46. We agree with the Working Group’s conclusion that the monitoring of compliance with subsidiarity has a strong political content. We welcome the importance that the Working Group has attached to greater involvement of national parliaments in the monitoring of the application of subsidiarity. An opportunity has to be provided for such monitoring at the earliest possible stage of the legislative process. We accordingly undertake to continue to monitor all proposals coming before us in this light. We also note that an alternative means of controlling the application of subsidiarity would be the creation of a constitutional council. If any such proposal were to emerge – particularly during the Convention’s deliberations or at the forthcoming IGC – we would examine it in due course.

Early Warning System

47. The Working Group has proposed a number of amendments to the subsidiarity protocol that will address the lack of national parliamentary involvement. The Working Group’s report suggests the creation of an ‘early warning system’. This system would allow national parliaments to issue a reasoned opinion regarding the compliance of each proposal with the principle of subsidiarity. This opinion should be expressed by a majority and commit the whole assembly in accordance with procedures it will itself determine. The reasoned opinion should relate only to the theoretical question of compliance with subsidiarity and not with its substance in general. Such a reasoned opinion would be sent to the Presidents of the European Parliament, the Council and the Commission.

48. The Working Group has qualified this right of complaint in a number of ways. If opinions from one third of national parliaments are delivered, the Commission would re-examine a proposal, and could maintain it, amend it or withdraw it. The Commission would have final discretion to override national parliament opinion at this stage by re-submitting the proposal. Gisela Stuart has termed this ‘the yellow card’⁶.

49. The Working Group’s final report remarks that such an early warning system would allow greater national parliament involvement in the European legislative process without lengthening the EU legislative process, as national parliaments would have to give their opinion within the present six week period allowed for scrutiny.

50. The proposals have received a mixed reception. The Prime Minister interpreted the Working Group’s recommendation as “a radical strengthening of the subsidiarity principle...if a sufficient number of national parliaments object the Commission’s proposal will have to be revised”⁷. The proposal was described in the House⁸ as “groundbreaking...The Union has never had a mechanism that would allow national parliaments to make a political judgment on whether the EU’s legislative proposals suggest action at the right level”⁹. On the other hand

¹ 33rd Report, 2001-02, para. 113.

² 33rd Report, 2001-02, para. 131.

³ WD 22 – WG I: Letter from Mr Hain to Mr Mendez de Vigo.

⁴ Art 5 (ex Article 3b) TEC in SN 2790/02 Working Group 1 Working Document 1.

⁵ *Reappraising Subsidiarity’s Significance after Amsterdam*, De Burca, G, Cambridge MA: Harvard Law School, 1999.

⁶ QQ 6—10.

⁷ Speech in Cardiff on 28 November 2002 – A clear course for Europe (<http://www.pm.gov.uk.output/Page6710.asp>)

⁸ Debate on 7 January 2003 HL Deb cols 897-985.

⁹ Baroness Symons of Vernham Dean speaking on the Government HI Deb 7 Jan 2003 col 981.

the proposal was also described in the House as labour leading to “a very small brown mouse” with no practical effect¹.

51. The “yellow card” proposal raises practical questions, particularly as presented by the Praesidium. First, the proposed protocol allows each national parliament one vote, raising questions about how a bicameral parliament will operate the system, and about the involvement of regional parliaments. The Praesidium proposes to meet these difficulties by leaving them to national parliaments to sort out.

52. The principle of “one Parliament one vote” is unsatisfactory. Not only does it raise practical questions about process: it also raises the possibility of the views of one House being “crowded out” by the other. We have recently proposed that COSAC operates on the basis of two votes per Member State, specifically to provide flexibility for bicameral parliaments. **We recommend that the proposed subsidiarity protocol likewise be amended to provide two votes per Member State, with the presumption that bicameral parliaments will allocate one vote to each House.**

53. A second objection to the early warning mechanism is that it is conceivable that, as a matter of practical politics, national parliaments might register a subsidiarity objection either because they had not reached a view on a proposal and wanted to leave their options open, or because they objected to its substantive policy content. We consider that this argument is met by the requirement for national parliaments to give a “reasoned opinion” when registering a subsidiarity objection.

54. As for the objection that the “yellow card” mechanism is a “mouse” – that it is in effect a procedure with no sanctions - we note first that the Commission will be obliged to give reasons for proceeding if one third of national parliaments object to a proposal on grounds of subsidiarity. This does provide a form of accountability and hence a sanction, albeit of limited direct effect. **We nevertheless recommend that the Commission be required to communicate its reasons direct to national parliaments.**

55. We also note that the proposed protocol gives national parliaments the right to issue a “reasoned opinion” on subsidiarity if a Conciliation Committee is convened. We support this but would go further – we have already called for an opportunity for full national parliamentary scrutiny at the Conciliation stage².

Strengthening the yellow card?

56. There are also a number of options for strengthening such an early warning mechanism should that be desired. First, it has been suggested that where, for example, one third of national parliaments object to a legislative proposal on the grounds of subsidiarity, the Council must proceed by unanimity³. A second proposal came from Gisela Stuart who suggested a “red card”⁴ procedure whereby, if the Commission received reasoned opinions from two-thirds of national parliaments, the Commission would be required to withdraw its proposal. Ms Stuart also suggested that during the rest of the legislative process, national parliaments should be kept informed of any amendments to the text so they could monitor changes. Should national parliaments feel that later changes violated the principle of subsidiarity, they could use the proposed early warning mechanisms.

57. An objection to the “red card” proposal could be that it could be thought a drive to slow down the EU’s legislative process, or an attack on the Commission’s right of initiative. This can be countered by the argument that a two-thirds threshold is going to be quite hard to achieve, meaning that the “red card” will always remain a weapon of last resort.

58. **We note that the Praesidium’s proposed protocol on subsidiarity takes forward only the “yellow card” proposal and not the “red card”. We consider that this will, in most circumstances, strike the right balance, providing an individual right to be heard, rather than a collective right to block. We nevertheless recommend that the “red card” proposal be maintained. The successful marshalling of the necessary majority to activate the “red card” will, in our view, be a very rare event. The fact that so many national parliaments were concerned about a proposal might well reveal a serious concern that would need addressing. Any effective early warning system would of course require an effective mechanism to allow national parliaments to exchange information.**

¹ ibid col 934.

² 1st report session 2002-3, para 35.

³ Lord Owen speaking in the House of Lords (HL Deb 7 January 2003, col 948).

⁴ CONV 540/03 – see also QQ 6—10.

BROADER COURT OF JUSTICE REFERRAL

59. In her submission to the Convention, Gisela Stuart has also argued that any national parliament should be allowed to refer a matter to the Court for violation of the principles of subsidiarity and proportionality¹. The proposed protocol does not achieve this. It instead provides that “the Court of Justice shall have jurisdiction to hear actions brought by Member States on the grounds of infringement of the principle of subsidiarity, where appropriate at the request of their national parliaments, in accordance with their respective constitutional rules”. This looks impressive but in fact it does nothing. The Court does not need any additional jurisdiction to rule on subsidiarity at the behest of a Member State. It can do that now (and on at least one occasion has done so²). Further, there is nothing to stop a Member State having an arrangement whereby it will bring an action before the Court where its Parliament requests it to do so. We are, however, pleased to note that the proposed protocol will give the regions, through the Committee of the Regions, a right of action, at least as regards subsidiarity.

60. We agree with the Working Group that it is important that national parliaments should have the possibility of challenging a measure in the Court of Justice on subsidiarity grounds. The proposed protocol accordingly needs strengthening, as Gisela Stuart proposed, to give national parliaments the right to bring proceedings for violation of the principles of subsidiarity and proportionality.

¹ CONV 540/03.

² Case C-84/94, United Kingdom v Council [1996] ECR I-5755.

APPENDIX 2
European Union Select Committee

The members of the Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
The Earl of Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds

APPENDIX 3

The Praesidium's Proposed Protocols on National Parliaments and Subsidiarity (CONV 579/03, Brussels, 27 February)

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.

ANNEX I DRAFT [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.

ANNEX II 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.

ANNEX III 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.

ANNEX IV 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."
