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European Union Committee

14th Report of Session 2004-05

**Strengthening national
parliamentary scrutiny
of the EU—the
Constitution’s
subsidiarity early
warning mechanism**

Report with Evidence

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Abstract		7
Chapter 1: An Introduction to Subsidiarity	1	7
What is subsidiarity?	1	7
Why is subsidiarity an important principle?	6	10
The genesis of the Constitutional Treaty	11	10
Our work on subsidiarity so far	14	11
The Convention's Working Group	14	11
The Convention's final text	16	12
The Government's Response	18	12
Why are we reporting on subsidiarity again <i>now</i> ?	21	12
The principle of Subsidiarity in the Constitutional Treaty	26	13
Box 1: Article 1.11(3)		13
The early warning mechanism	27	13
What is it?	27	13
How is a "draft European Legislative Act" defined?	29	14
How are national parliaments involved collectively?	33	14
The Government's view on the significance of the mechanism	36	15
Structure of this Report	38	15
Chapter 2: Exploring subsidiarity	45	16
Where did the principle of subsidiarity come from?	45	16
The Single European Act and the Maastricht Treaty—the first appearances	47	16
A new approach: the Amsterdam Protocol	49	16
Up to date: the Constitutional Treaty	53	17
Defining the principle	60	18
How far can you go in defining a principle as malleable as subsidiarity?	60	18
Subsidiarity: permissive or constraining on EU action?	64	18
Does the treaty definition of subsidiarity set for proposed European legislation a test it is inherently likely to pass?	68	19
What is subsidiarity not?—proportionality	74	20
Has subsidiarity worked effectively thus far?—two views	77	21
No, it has been neither effective nor properly acknowledged at EU law making level	77	21
Yes, there is already respect for the principle of subsidiarity at the level of EU law-making	80	21
Box 2: Recent examples of cases where subsidiarity objections have been raised		22
Chapter 3: Making the mechanism work	85	23
What does the new Protocol hope to achieve?	85	23
Improved Communication	86	23
Improved Accountability	87	23
Improved Scrutiny	89	23
To what extent should there be a common approach among parliaments to the criteria to be applied on subsidiarity tests?	90	24

The Amsterdam Protocol Criteria	90	24
The Government's View	93	24
Should the Select Committee deal with subsidiarity issues or is it a matter for the House?	94	24
How should the House of Lords work with the House of Commons on subsidiarity issues?	103	26
How will the early warning mechanism affect the EU law making institutions?	109	26
How would the Commission and the other EU institutions react to the raising of "yellow cards"?	118	27
Is the six week period allowed to parliaments to formulate and forward objections long enough?	127	29
Will the short time frame prohibit effective scrutiny?	135	30
The importance of starting scrutiny "upstream"	142	31
Collaboration and co-ordination between National Parliaments	146	32
Critical or constructive collaboration?	147	32
How might co-operation between national parliaments most effectively occur?	156	33
Chapter 4: Monitoring the mechanism	164	35
Are National Parliaments legally obliged to monitor the subsidiarity principle?	164	35
Which other bodies are, or should be, responsible for monitoring compliance?	171	35
The Commission itself and other EU lawmaking Institutions	171	35
Her Majesty's Government	179	36
The Role of Regional Assemblies with legislative powers and the Committee of the Regions	183	37
Provisions made for Regional Assemblies in the Protocol	183	37
What do the regional assemblies hope to gain from the new Protocol provisions?	188	37
Should regional assemblies with legislative powers produce their own assessments of subsidiarity compliance?	193	38
How can the views of regional assemblies with legislative powers best be presented to the national parliament?	196	38
Involving Regional Assemblies with legislative powers in Pre-Legislative Scrutiny	197	38
Regional Assemblies and the early warning mechanism	200	39
Potential problems	205	39
How best can regional and local authorities across Europe work together?	210	40
The Committee of the Regions	214	40
Chapter 5: The role of the European court of justice	215	41
Box 3: Article 8		41
Background—Justiciability	217	41
Background—the Convention	219	42
Relationship with the yellow card	221	42
The significance of Article 8	223	43

What does Article 8 mean?	225	43
What is the executive's duty under Article 8?	228	44
Procedural problems—control of the action	238	45
Will the practice of the Court change under the Constitutional Treaty?	241	46
Political significance of Article 8	246	47
Will the Government need to amend the European Union Bill?	248	47
Chapter 6: The reaction of other national parliaments	249	48
How has the protocol been received across Europe?	250	48
What measures do other national parliaments intend to put in place to deal with their new responsibilities?	254	48
The French National Assembly	255	48
The Dutch Parliament	261	49
The Danish Folketing	265	50
Finland and Lithuania	272	51
How will the Early Warning Mechanism be implemented across the EU?	274	51
Table 1: Anticipated Models for the Early Warning Mechanism in National Parliaments		52
Conclusions	275	54
Chapter 7: Summary of Recommendations	279	55
Why are we reporting on subsidiarity <i>now</i> ?	279	55
Applying the subsidiarity principle	283	55
The benefits and drawbacks of the new Protocol	286	55
Making the mechanism work—Procedure in the House	292	56
Working within the six-week period provided by the Treaty	298	56
The early warning mechanism and the EU Institutions	302	57
Collaboration and co-ordination between national parliaments	306	57
Monitoring the mechanism	309	58
The Role of Regional Assemblies	315	58
Article 8	320	59
Appendix 1: Text of treaty article and protocol on the application of the principles of subsidiarity and proportionality		61
Appendix 2: List of witnesses		64
Appendix 3: Call for evidence		65
Appendix 4: Reports		71

ORAL EVIDENCE

Professor Stephen Weatherill, Jacques Delors Professor of European Law, Oxford University

Professor Derrick Wyatt QC, Fellow of St Edmund Hall, Oxford University

Written evidence from Professor Stephen Weatherill	1
Written evidence from Professor Derrick Wyatt QC	3
Oral evidence, 7 December 2004	7

<i>Richard Corbett MEP</i>	
<i>Ms Arielle Rouby</i>	
Oral evidence, 31 January 2005	20
<i>Andrew Duff MEP</i>	
<i>Guillaume McLoughlin</i>	
Written evidence from Andrew Duff MEP	29
Oral evidence, 1 February 2005	33
<i>Commissioner Margot Wallström. Commissioner for Institutional Relations and Communications</i>	
<i>Sten Ramstedt, Member of Commissioner Wallström's Cabinet</i>	
<i>Mark Gray, Member of Commissioner Wallström's Cabinet</i>	
Oral evidence 1 February 2005	39

WRITTEN EVIDENCE

Eileen Armstrong, Local Government Association European and International Affairs Panel	45
Brethren in Britain	48
Adam Cygan, Lecturer in Law, University of Leicester	51
Brendan Donnelly, Director, Professor Jo Shaw, Senior Research Fellow and Anna Vergés. Research Officer, The Federal Trust	53
Her Majesty's Government	60
House of Commons European Scrutiny Committee	64
Dr Denis MacShane, Minister for Europe, The Foreign and Commonwealth Office	66
President of The Conference of European Regional Legislative Assemblies	70
Former Commissioner António Vitorino, Justice and Home Affairs	71

NOTE: Pages of the report are numbered in bold type; pages of evidence are numbered in ordinary type. References in the text of the report are as follows:

- (Q) refers to a question in oral evidence
- (p) refers to a page of written evidence

ABSTRACT

Annexed to the Treaty Establishing a Constitution for Europe, signed by governments of Member States in October 2004, is a new Protocol on the Application of the principles of Subsidiarity and Proportionality. This Protocol provides a mechanism through which national parliaments may seek to influence EU lawmaking by monitoring the Union's adherence to the principle of subsidiarity and by drawing attention to breaches where necessary.

Subsidiarity is an important principle because, if applied correctly, it ensures legislative action is taken at the appropriate level in those areas in which competence is shared between Member States and the European Union. Subsidiarity can both act as a check on the need to take action at Union level and ensure that, where it is needed, effective action is taken at EU level.

The principle can also help to create a closer co-operative relationship between national parliaments and EU institutions and so strengthen the democratic legitimacy of the Union and bring decisions "closer to the citizen".

With referenda on the Constitutional Treaty already underway we believe it is now necessary both to focus both Parliamentary and public attention on subsidiarity monitoring and to advise the House on how, if the Treaty comes into force, it might fulfil its new obligations.

We conclude that the principle of subsidiarity needs to be applied more rigorously if it is to be effective. The new "early warning mechanism" could help in this process if national parliaments ensure it is executed correctly within the regrettably short six week period provided by the Treaty.

We conclude that the operation of the early warning mechanism should be kept separate from the House's existing Scrutiny Reserve and that the decision to raise a subsidiarity objection should normally be taken by the House itself. We further recommend that the Government should not support a proposal in Council which has been the subject of a yellow card in either House of Parliament without first further explaining to Parliament its reasons for doing so.

We also ask for clarification from the Government on the scope of Article 8 of the Protocol, which deals with the role of the European Court of Justice, and particularly on whether they believe it imposes any obligation on the executive to bring an action on behalf of the national parliament or a chamber of it.

Strengthening national parliamentary scrutiny of the EU—the Constitution’s subsidiarity early warning mechanism

CHAPTER 1: AN INTRODUCTION TO SUBSIDIARITY

What is subsidiarity?

1. The principle of subsidiarity requires that legislative action be taken at the appropriate level. The European Union should only act if the objectives of the proposed EU action cannot be sufficiently met by Member States and can be better achieved by the Union.
2. The principle of subsidiarity first appeared expressly in the EC Treaty at Maastricht (1992). The Amsterdam Treaty of 1997 gave further emphasis to the principle by including it in Article 2 of the Treaty of European Union (TEU). The Amsterdam Treaty was accompanied by a Protocol on the application of the Principles of Subsidiarity and Proportionality, laying down guidelines for the application of the principle and requiring the Commission to justify its legislative proposals with regard to subsidiarity.
3. The Treaty Establishing a Constitution for Europe¹ includes a new Protocol², which would provide for an “early warning mechanism” (or “yellow card”) procedure under which national parliaments could require the Commission, or other party initiating the legislative proposal³, to review a proposed piece of legislation if national parliaments considered that the principle of subsidiarity had been breached. Each national parliament has two votes—one for each Chamber in bicameral parliaments. The threshold to trigger a review is one third of the votes allocated or one quarter in cases of proposals in the field of justice and home affairs⁴; that is 13 and 10 votes respectively.
4. The Constitutional Treaty further provides that the European Court would have jurisdiction to hear challenges to a European legislative act once adopted on the grounds of subsidiarity brought by Member States on behalf of their parliaments, although the precise effect of this provision is, as we explain in Chapter 5, unclear.
5. The principle of subsidiarity only applies where the EU and the Member States have shared competence i.e. where both the EU and Member States can make the law. If the EU has exclusive competence in a matter, or none at all, then subsidiarity issues do not arise.

¹ Hereafter “the Constitutional Treaty”.

² Protocol on the Application of the Principles of Subsidiarity and Proportionality (hereafter “the Protocol”), printed in full in Appendix 1.

³ i.e. The European Central Bank, The European Parliament, The Court of Justice or The European Investment Bank.

⁴ Article 7 of the Protocol.

Why is subsidiarity an important principle?

6. Subsidiarity is perhaps often not understood, or dismissed as a dry matter of process. But its political significance in the working of the EU is illustrated by the fact that views on subsidiarity tend to be polarised. At one extreme there are those who see the subsidiarity principle as a hindrance and an obstacle to an effective European Union. At the other extreme there are those who see subsidiarity as a guardian of national interests, as a way to prevent the EU encroaching too much on the autonomy of Member States.
7. If adhered to correctly, the subsidiarity principle can both act as a check on the need to take action at Union level and ensure that, where it is needed, effective action is taken at EU level. The successful implementation of the principle should also mean that decisions are taken “as close to the citizen” as possible. Hence the effective application of the principle of subsidiarity is of relevance, if not interest, to citizens.
8. If the Union is to function efficiently and effectively it is clear that the principle of subsidiarity must be respected. Action must take place at the appropriate level; EU institutions acting in breach of the principle of subsidiarity are acting unnecessarily and wasting resources which could be put to better use elsewhere. Hence, to quote from a recent report from the French National Assembly, respecting the principle of subsidiarity can help EU lawmaking institutions “to act less, to act better”⁵.
9. Finally, monitoring the principle of subsidiarity is important because it creates a co-operative relationship between national parliaments and EU institutions. If the democratic legitimacy of the Union is to be strengthened national parliaments must be closely involved with its actions. Respecting the principle of subsidiarity is one way of cultivating this relationship.
10. The proposals in the Constitutional Treaty will need to be assessed by whether they provide for subsidiarity to overcome the polarisation of views over their value and impact. Do they deliver a practical working tool with sufficient real teeth to prevent excessively intrusive legislation? Do they enable subsidiarity to operate without preventing the EU legislative processes from functioning efficiently and effectively?

The genesis of the Constitutional Treaty

11. In response to calls from the European Council at Laeken⁷ that the EU should be more transparent and democratic, the Convention on the Future of Europe was established to prepare a new Treaty. The Convention⁸

⁵ Report number 1919 from the French National Assembly, “*Towards a more Democratic and Efficient Europe: National Parliaments and the Subsidiarity Principle*”, prepared by The National Assembly Delegation for the European Union. The Report can be found online at: <http://www.assembleenationale.fr/12/europe/rap-info/i1919.asp#TopOfPage>. Hereafter, page references to the Report are given in the main body of the text in brackets.

⁷ Held on 14 and 15 December 2001.

⁸ The convention comprised of Chairman Valéry Giscard d’Estaing, Vice-Chairmen Mr Giuliano Amato and Mr Jean Luc Dehaene, Representatives of the Heads of State or Government of the Member States, Representatives of National Parliaments, Representatives of the European Parliament, Representatives of the European Commission, Representatives of the Governments of the accession candidate countries and Representatives of the National Parliaments of the accession candidate countries. An account of the work

comprised representatives from the Governments and Parliaments of the Member States and the then Applicants, along with MEPS and Commissioners.

12. The Convention's final text was agreed on 18 July 2003 and is available on the internet.⁹ Consideration of the proposed Constitutional Treaty then passed to an Intergovernmental Conference (IGC)¹⁰, the established mechanism for agreeing Treaty change in the EU. Political agreement was reached on a text by Heads of State and Government on 18 June 2004 and after a final process of tidying up by legal experts the governments of the now 25 Member States signed a final text at a meeting in Rome on 29 October 2004¹¹. References in this report to Articles of the Constitutional Treaty are to this final text.¹²
13. The Constitutional Treaty would only take effect once ratified by all Member States, many of which will hold referenda.¹³ The European Council has set 1 November 2006 as the date by which ratification must be complete.

Our Work on subsidiarity so far

The Convention's Working Group

14. In March 2003 the Committee published a short Report on the proposed protocols on national parliaments and subsidiarity which had been prepared by working groups in the Convention¹⁴.
15. The Report examined the Convention's proposals regarding the Subsidiarity Protocol to be annexed to the then proposed Constitutional Treaty. With an eye to the history of the principle of subsidiarity, the Report examined its place in a modern and fast-expanding Europe. We welcomed the Convention's move to attach greater importance to the involvement of national parliaments in monitoring subsidiarity and supported the proposal for an "early warning mechanism" system as a means to achieve this closer relationship.

of the Convention can be found in Peter Norman's book entitled "*The Accidental Constitution: The Story of the European Convention*", published 2003, ISBN 90-77110-05-4.

⁹ <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

¹⁰ The Intergovernmental Conference comprised of Heads of State or Government assisted by their Ministers of Foreign Affairs along with Commissioner Michel Barnier, Commissioner Antonio Vitorino, MEPS Klaus Hänsch and Indigo Méndez de Vigo, the President of the Commission, Romano Prodi, the President of the European Parliament, Pat Cox and Heads of State or Government, assisted by their Ministers of Foreign Affairs.

¹¹ The full text of the Treaty can be found online: http://europa.eu.int/constitution/print_en.htm

¹² Some of our witnesses' evidence may refer to earlier versions of the Treaty.

¹³ COSAC has produced a table charting the process of ratification in Member States: <http://www.cosac.org/en/info/ratification/ratification>. COSAC is a meeting between committees of the national parliaments dealing with European affairs as well as representatives from the European Parliament. At the biannual meetings of COSAC, six members represent each parliament. COSAC was created in May 1989 in Madrid and formally recognised in a protocol to the Amsterdam treaty that was concluded by Heads of States or Government in June 1997.

¹⁴ "*The Future of Europe: National Parliaments and Subsidiarity—the Proposed Protocols*" (11th Report, session 2002-03, HL Paper 70)

The Convention's final text

16. In October of the same year the Committee published a fuller Report on the Convention's draft Constitutional Treaty¹⁵.
17. The Report includes a section on how the Constitutional Treaty and the Protocol would change subsidiarity monitoring. Our Report was broadly in support of the proposed protocols though we were in favour of adapting them to extend to issues of proportionality and urged national parliaments to work closely together to ensure subsidiarity objections are properly recorded and acted upon.

The Government's Response

18. In response to our report, the Government welcomed the Committee's views and agreed that the subsidiarity early warning mechanism would "make a valuable contribution to strengthening the principle of subsidiarity"¹⁶.
19. They agreed that it was lamentable that the mechanism did not extend to cover proportionality but noted that "there is helpful language in the draft Protocol on Subsidiarity and Proportionality". Specifically, the draft Protocol required that:
 - Each institution shall ensure constant respect for the principles of subsidiarity and proportionality (Article 1)
 - The Commission shall justify its proposal with regard to the principles of subsidiarity and proportionality (Article 4).
20. The Government were concerned to ensure that an appropriate balance was struck between the strength of the subsidiarity mechanism and the speed and efficiency of the European legislative process.

Why are we reporting on subsidiarity again now?

21. As mentioned, the Constitutional Treaty is accompanied by a new subsidiarity protocol which, significantly, provides a system through which national parliaments may seek to influence EU lawmaking by monitoring adherence to subsidiarity and drawing attention to breaches of the principle.
22. Since the likely date of the UK referendum means that the UK will be the last, or almost the last, Member State to seek to ratify the Treaty, the period of time between our referendum and the entry into force of the Constitution (if our referendum produces a "yes") is likely to be short. Hence, **we believe that it is now important to focus both Parliamentary and public attention on, and to raise the profile of, subsidiarity monitoring by national parliaments.** We hope that this Report will contribute to this process and to the debate over the effectiveness or otherwise of limits applied to the exercise of the Union's shared competences.
23. The Constitutional Treaty provides for the monitoring of subsidiarity to be a function of each Member State's parliament. In the case of a bi-cameral

¹⁵ "The Future of Europe: The Convention's Draft Constitutional Treaty" (41st Report, session 2002–03, HL Paper 169)

¹⁶ Government Response contained in the 41st Report from the Select Committee, session 2002–2003, HL Paper 169.

parliament each chamber will be involved in this process. The House will have to decide how, if the Treaty comes into force, it wishes to carry out this function.

24. **In view of the delay in establishing Parliamentary scrutiny mechanisms in the United Kingdom when the United Kingdom joined the European Community on January 1 1973¹⁷ we hope the House will ensure that this time preparations are made well in advance.** We thus concluded that it would be helpful for the House to have an early analysis of what is required together with practical suggestions for ensuring that the subsidiarity provisions in the Constitutional Treaty would be effective. We also welcome the recent inquiry by the Modernisation Committee of the House of Commons¹⁸ into this and other matters relating to scrutiny of EU business and we hope that the two Houses will be able to proceed in step.
25. **We are also of the view that, even if the Constitutional Treaty does not enter into force, the provisions relating to national parliaments and to subsidiarity can and should provide a stimulus to greater and more effective scrutiny by all national parliaments in the EU.**

The principle of Subsidiarity in the Constitutional Treaty

26. A definition of subsidiarity can be found in Article 1.11 of the Constitutional Treaty. The wording of this Article is drawn from the Subsidiarity Protocol annexed to the Amsterdam Treaty.

BOX 1

Article 1.11(3)

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

The “early warning mechanism”

What is it?

27. In order to ensure that the principle of subsidiarity is adhered to, the Protocol on the Application of the Principles of Subsidiarity and Proportionality provides a means by which national parliaments can register their objections when they identify a possible breach of the principle of subsidiarity. The “early warning mechanism” is established in Article 6 of the Protocol—

“Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the

¹⁷ For a combination of reasons the House of Lords only established its scrutiny procedures in May 1974.

¹⁸ “*Scrutiny of European Business*”, 2nd report from the House of Commons Modernisation Committee, HC 465-I(report) and –II (evidence), published 22nd March 2005. See Chapter 3 for a discussion of subsidiarity.

Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity”.

28. In other words, if a national parliament (or a chamber of a national parliament) sees in draft legislative proposals received from EU institutions a breach of the principle of subsidiarity it can send a reasoned opinion to the European Parliament, the Council and the Commission explaining why it feels the proposal is in breach of the principle.

How is a “draft European Legislative Act” defined?

29. This question is more complex than it initially seems. In the European Convention’s version of the draft Treaty, published in July 2003, Article 5 of the Protocol reads:

“Any national Parliament or any chamber of a national Parliament of a Member State may, within six weeks from the date of transmission of the Commission’s legislative proposal...”.

30. By the time the Treaty establishing a Constitution for Europe was signed in Rome on 29 October 2004 the wording of this Article had changed and now reads: “Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act”¹⁹.
31. This change in wording substantially alters the meaning of the Article. First, the measures subject to the early warning mechanism are not restricted to draft legislative acts proposed by the Commission but include those initiated by the Court of Justice, the European Central Bank, the European Investment Bank, a group of Member States, and the European Parliament. Second, it is only proposed “European legislative acts” that are subject to the mechanism. This term is defined in Article 1–34 of the Constitutional Treaty to mean “European laws and framework laws” as defined in Article 1–33²⁰.
32. All the above parties would have a responsibility to take account of reasoned opinions issued by national parliaments on any draft legislation originating from them.

How are national parliaments involved collectively?

33. The Treaty goes on to state (in Article 7 of the Protocol) that:
- “Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments, the draft must be reviewed”.
34. So, if reasoned opinions are submitted by one third of all parliaments, (including chambers of parliaments in bi-cameral systems) arguing that a proposal contains a breach of the subsidiarity principle, the institution

¹⁹ A “draft legislative act” is defined in Article 3 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which reads: “draft legislative acts shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and request from the European Investment Bank for the adoption of a European legislative act.”.

²⁰ Article 1–33 defines a European law as “a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States”. The Article defines a European framework law as “a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

concerned *must* review their draft. In the case of proposals submitted on the basis of Article III-264 of the Constitution (area of freedom, security and justice) the threshold is one quarter.

35. After such a review the institution concerned may decide to maintain, amend or withdraw the draft.

The Government's view on the significance of the mechanism

36. The Government believe that, in general, the new Protocol is to be welcomed "because there is certainly room for greater monitoring of the application of the principle of subsidiarity". (p 66)
37. The Government also believe that the proposed early warning mechanism would have a positive impact on the EU lawmaking process for two distinct reasons,
 - "It will certainly influence the Commission, because for the first time the institutions proposing legislation will have to take account of the views of all national parliaments, in addition to those of Governments" (p 67).
 - "The existence of the mechanism will indeed foster greater direct co-operation between national parliaments. This will be valuable not only for making the use of the mechanism more effective but more generally in ensuring greater national parliamentary input into the European decision-making process"(p 67).

Structure of this Report

38. In chapter 2 of this report we explore the principle of subsidiarity. We look at the history of the concept and the expression it has found in European law. We move on to consider whether it is possible to define subsidiarity and to examine whether or not the principle has worked effectively thus far. We also discuss the principle of proportionality—how it differs from subsidiarity and what provision has been made for it in the Constitutional Treaty.
39. In chapter 3 we look at how the early warning mechanism would work in practice. We consider how national parliaments might work together to maximise the potential of the Protocol and we examine how subsidiarity issues might be dealt with in the House were the Constitutional Treaty to come into force.
40. Chapter 4 deals with how the effectiveness of the early warning mechanism might be monitored. It discusses who would become responsible for monitoring subsidiarity compliance and the new obligations that would be placed on the EU law-making institutions.
41. Chapter 5 considers the role of the European Court of Justice in relation to subsidiarity and raises a number of points of constitutional importance.
42. Chapter 6 looks at the response of other national parliaments to the new Protocol.
43. Chapter 7 contains a summary of conclusions.
44. **In view of the significance of the proposed new mechanism for monitoring subsidiarity and of the issues arising for the House which we set out in this report we make this report to the House for debate.**

CHAPTER 2: EXPLORING SUBSIDIARITY

Where did the principle of subsidiarity come from?

45. The reason for introducing the principle of subsidiarity into the EU lawmaking process was to create a brake on the exercise of lawmaking powers at the Community level, in the interests of decision-making at national and sub-national level.
46. The concept of subsidiarity is not new. The principle developed in political thought in the 19th century and found expression in political liberalism and Catholic social theory. The political liberals used the principle to limit state intervention in individual lives. Socialist Catholics used it to invite state intervention where necessary and efficient and prevent interference where it was neither necessary nor efficient.

The Single European Act and the Maastricht Treaty—the first appearances

47. The Single European Act's article on environmental protection brought with it subsidiarity's first legal expression in the Treaties. By the mid-1980s Member States were recognising the need for the Community to take action in environmental matters but some, notably Denmark, were afraid of Community laws weakening their own standards. For this reason, 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"²¹.
48. The Maastricht Treaty (which entered into force in 1993) expressly extended the principle to all Community activity. Article 3b TEC set out three important legal principles concerning the existence and exercise of the community's power; of conferral, subsidiarity and proportionality.
 - The Community "shall act within the limits of the powers conferred upon it by this Treaty".
 - The Community shall take action in accordance with the principle of subsidiarity "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the proposed action, be better achieved by the Community".
 - Any action by the Community "shall not go beyond what is necessary to achieve the objectives of the Treaty".

A new approach: the Amsterdam Protocol

49. The 1999 Amsterdam Treaty placed further emphasis on the importance of subsidiarity, extending it from the Community to the Union by including it in Article 2 TEU. The Treaty required that the Union's objectives should only be achieved "while respecting the principle of subsidiarity as defined in Article 5 (formerly 3b) of the Treaty Establishing the European Community"²².

²¹ Article 130r.

²² Article 2.

50. A Protocol on the Application of the Principles of Subsidiarity and Proportionality was annexed to the 1999 Amsterdam Treaty. The Protocol helped to clarify the meaning and application of subsidiarity. The Protocol required that:
- the reasons for preferring Community action must be substantiated by the Commission using both qualitative and quantitative indicators;
 - forms of legislation that leave the Member States the greatest room for manoeuvre are to be favoured over more restrictive forms of action;
 - the Commission must consult more widely and endeavour to explain more clearly how its proposals comply with the demands of subsidiarity;
 - the Commission must submit an annual report on the application of Article 5 EC.
51. As a principle, subsidiarity has been cited as grounds for both increasing and decreasing the powers of the European Community. The 1970s and 80s saw a push from most of the then Member States for closer European integration, but since the early 1990s politicians in a number of Member States have used the principle to argue for greater national independence and less involvement by “Brussels” in affairs seen to be the prerogative of the Member States.
52. Despite these attempts to add more rigour to the principle of subsidiarity the criteria of “...can rather by reason of the scale or effects of the proposed action, be better achieved at Union level” has been able to be interpreted by the Commission to justify almost any proposal they bring forward where they can assert some level of EU “value added”. In reality it therefore has become a simple political judgement about whether the majority of Member States represented in Council support the Commission or not.

Up to date: the Constitutional Treaty

53. The proposed Constitutional Treaty seeks to strengthen the principle of subsidiarity and ensure compliance with it across the European Union. The principle is restated in Article 1–11 of the Treaty and the “early warning mechanism” is detailed in the Protocol on the Application of the Principles of Subsidiarity and Proportionality.
54. The definition of subsidiarity given by the Treaty implies that decisions must be made as close to citizens as possible. The early warning mechanism seeks to strengthen the ability of national parliaments to monitor the Union’s observance of the principle.
55. The Protocol on subsidiarity annexed to the Constitutional Treaty is intended to improve and expand the scope of the subsidiarity principle. For the first time the Treaties provide a formal means for national parliaments to raise objections to proposals that they consider do not take proper account of the principle of subsidiarity.
56. The evidence which we have received suggests that, in order for subsidiarity to be effective, the new Constitutional Treaty does indeed need to strengthen the application of the principle of subsidiarity as, at present, it is widely viewed as ineffective in its application, though it is recognised as being important to the smooth running of the European Union and crucial in

ensuring good relationships between national parliaments and the European lawmaking institutions.

57. Stephen Weatherill, Jacques Delors Professor of European Law at Oxford University, believes that the subsidiarity protocol has been revised once more in the Treaty in the hope that “National parliaments will inject fresh and potentially critical voices into the EU lawmaking process”(p 1).
58. Andrew Duff, Liberal Democrat MEP for the East of England, praises the revision of the Subsidiarity Protocol in the Treaty as it balances “an enhanced role for national parliaments with respect for the role of the EU legislature”(p 31).
59. **We believe that the application of the existing subsidiarity Protocol needs to be more rigorous if it is to be effective. We support the Constitutional Treaty’s proposed strengthening of the principle of subsidiarity and its enhanced role in the EU lawmaking process. We in particular welcome the Constitutional Treaty’s emphasis on the role of national parliaments.**

Defining the principle

How far can you go in defining a principle as malleable as subsidiarity?

60. Subsidiarity is, by nature, an elusive principle. Article 1.11(3) of the Treaty (as previously quoted) attempts to pin it down thus:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.
61. This paragraph does not define the principle of subsidiarity by reference to its aims but instead states that the Union should act when the Member States themselves cannot achieve the Union objective in question.
62. The problem is one of degree. How are we to determine when Member States cannot achieve the objective “*sufficiently*”? How are we to decide that an objective can be “*better achieved*” at Union level? Subsidiarity’s aims are clear and worthy but interpreting them can pose some complex problems.
63. From our evidence it seems that there are various working definitions of subsidiarity. Some of these working definitions resemble each other to some degree, while some clash absolutely.

Subsidiarity: permissive or constraining on EU action?

64. Former Commissioner Vitorino’s²³ written evidence suggested that the European Union should take action on behalf of Member States if:
 - “Member States alone cannot sufficiently solve the problem” (p 71).

²³ Former JHA Commissioner Vitorino responded to our call for evidence with a written paper on 29 September 2004. A new Commission was appointed on 18 November 2004. Since then Commissioner Margot Wallström has assumed responsibility for Institutional Relations and Communications, a new post. The Committee took oral evidence from her on 1 February 2005.

- “Member States alone cannot fulfil the requirements of the Treaty” (p 71).
 - “Actions by Member States alone would damage significantly their interests”(p 71).
65. The Commissioner outlines the circumstances in which the EU should intervene, not the circumstances in which it should not.
66. There are those who would take issue with this approach believing that if something can be done at a national level it *should* be. They would prefer a definition which focuses on what the Member States could achieve without Union involvement.
67. This opposition of views illustrates the point already made that subsidiarity is either seen as an obstacle to the development and efficiency of the European Union or as a desirable constraint on the ability of the Commission to propose unnecessary action at EU level. Your definition of subsidiarity will, to a large extent, depend on which view you adopt.

Does the treaty definition of subsidiarity set for proposed European legislation a test it is inherently likely to pass?

68. In his written evidence the Commissioner goes on to suggest that “services must verify that EU action will better achieve the objective of the proposal, by referring to the scale and/or effects of its action” (p 71). To satisfy this requirement services should “provide qualitative and, whenever possible, quantitative indicators, to back up their demonstration”(p 71).
69. In his written evidence Andrew Duff MEP suggests that “the implication of subsidiarity may be that decisions should be taken as close to the citizens as possible, but the constitutional test is whether there is added value in trying to achieve the intended objectives at Union level”(p 29).
70. The problem here is that “added value” is a very vague concept. This is a problem that Professor Wyatt, Professor of Law at St Edmunds Hall, Oxford University, flagged up in his written evidence, claiming that, “the definition of subsidiarity in the EC Treaty could be said to load the dice in favour of Community action” (p 4). For Professor Wyatt the Treaty definition of subsidiarity seems to set for proposed European legislation a test which it is very likely to pass.
71. The Government disagree with this assessment. It claims that whilst “It is of course true that issues which have cross-border implications will often be dealt with more effectively by EU-wide action...the principle of subsidiarity as set out in the EU Treaties does not merely address the question of whether there should be action by the EU”(p 67).
72. The Government note that the Treaty also requires that “the EU is to take action only ‘in so far as’ the objectives cannot be achieved by the Member States and if by reason of its ‘scale and effects’ such action can better be achieved at Union level” (p 67). Again, the problem with this view is that it is hard to locate the point at which Member States cannot meet objectives *sufficiently* well. Measuring the “scale and effects” of a particular issue is likewise hard to do. In general terms the Government believe the definition of subsidiarity in the Treaty “creates a presumption against European action”(p 67).

73. The Treaty definition of subsidiarity leaves the principle as a vague concept that can be moulded to suit almost any conceivable situation. In practice it is thus likely to be difficult to convince EU institutions that actions they are promoting do not pass the test. **National parliaments and EU institutions will therefore have to be stringent in ensuring that the principle is adhered to and that the objective of subsidiarity, to ensure that action is taken at the appropriate level, is met. In particular the Council of Ministers, which represents the interests of Member States, has a particular duty to ensure that the principle of subsidiarity is adhered to in practice. National parliaments have a responsibility to hold their Ministers to account in this regard.**

What is subsidiarity not?—proportionality

74. The principle of proportionality is laid out in Article 1.11(4) of the Treaty in the following way:
- “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution”.
75. In other words, even if action at EU level is justified under the principle of subsidiarity, the action taken must not be excessive. It may be hard to define what action would be “necessary” and what would be deemed “excessive” but this is the challenge meted out by the Constitutional Treaty.
76. Although the principle of subsidiarity is often taken to encompass the principle of proportionality the two are, as the Treaty clearly indicates, different principles. It is noteworthy that although the Protocol dealing with subsidiarity is entitled “Protocol on the Application of the principles of Subsidiarity and Proportionality” the remit of national parliaments is limited to subsidiarity²⁴. **The protocols laid out in the Constitutional Treaty specify that national parliaments can only trigger the early warning mechanism if they object to the proposal on grounds of subsidiarity, not on grounds of proportionality²⁵. We regret this.** However, for the sake of clarity, this Report is concerned solely with subsidiarity.

²⁴ Professor Weatherill thought that the separation of the two principles might be the result of “the accidents of choice of composition of the Convention’s Working Groups”. But the absence of a specific Convention Working Group on proportionality did not mean that the issue of extending national parliament’s remit to include proportionality was not raised and discussed in the Convention. See Summary Report of the plenary session—Brussels, 3 and 4 October 2002. Doc CONV 331/02. That national parliaments should not be able to raise proportionality objections at the same time and in the same way as subsidiarity appears to have been a conscious choice of the Convention and of the Intergovernmental Conference that adopted the Constitutional Treaty.

²⁵ This limitation on the role of national parliaments may be problematic. The difficulty is that application of the two principles, subsidiarity and proportionality, are most frequently closely related and intermixed. As Professor Weatherill confirmed, it may in practice be difficult to separate the two concepts: “I am thinking about the appropriate intensity of Community legislation, that seems to me to be an issue of subsidiarity and it is an issue of proportionality as well. I cannot find a clear demarcation between the two”. Professor Weatherill hoped that when it came to advancing objections based on alleged violation of the principle of subsidiarity there would be a relaxed view of how far subsidiarity spills over into the issue of proportionality (Q 10).

Has subsidiarity worked effectively thus far?—two views

No, it has been neither effective nor properly acknowledged at EU law making level

77. Professors Wyatt and Weatherill were both of the opinion that “so far subsidiarity has done little to shake existing cultures of lawmaking at EU level”²⁶ (p 1). Both believe that subsidiarity has so far received only token attention from EU institutions and has certainly not served as a founding principle to encourage self-restraint on the part of Community institutions in their law-making activities.
78. Professor Wyatt offered three possible reasons to explain why subsidiarity might thus far have failed to live up to its promise:
- Subsidiarity is “a principle ill-designed to achieve the objective of ensuring that decisions are taken as closely as possible to the citizen”(p 4).
 - There is political indifference towards the principle or “antipathy on the part of the Community institutions and some Member States” (p 4).
 - There is “constitutional indifference or antipathy on the part of the Court of Justice” (p 4).
79. Furthermore, Professor Weatherill also felt that subsidiarity has “done little to curb an institutional tendency at EU level to err on the side of centralisation rather than preservation of local autonomy” (p 1). In his view, subsidiarity has not so far been a powerful enough principle to combat what he sees as the centralising tendencies of the EU institutions.

Yes, there is already respect for the principle of subsidiarity at the level of EU law-making

80. The Government believe that subsidiarity has worked effectively thus far and has been successful in controlling the creation of EU legislation: “the Government believes that the principle of subsidiarity has worked as an effective tool in influencing the formulation of European legislation” (p 66).
81. MEPs Richard Corbett and Andrew Duff both noted that every proposal emerging from Brussels already has to contain recitals indicating why and how the proposal complies with the subsidiarity principle²⁷.
82. In his oral evidence session Andrew Duff took issue with the rather negative views of some of our witnesses on the acknowledgement of the principle by the EU Institutions:
- “I take the view that the assumption that some of your witnesses have made—that subsidiarity has failed, that the principle is not properly assessed and applied—is wrong. The institutions here in Brussels are of course part of the subsidiarity check” (Q 95).
83. The Government agree with this conclusion. They claim that “the institutions are applying the principle in practice as part of the policy-making and legislative process” (p 66).

²⁶ Professor Stephen Weatherill

²⁷ Andrew Duff p 30; Richard Corbett Q 43.

84. Opinion is clearly divided as to whether the past application of the principle has been effective. **We nevertheless hope that the new Protocol, if enacted, will provide a vehicle for highlighting and invigorating subsidiarity compliance across the Union.**

BOX 2

Recent examples of cases where subsidiarity objections have been raised

COM(2004)142: Proposal for a Directive of the European Parliament and of the Council on the certification of train crews operating locomotives and trains on the Community's rail network

Doc 7763/04: Commission communication on crime prevention in the European Union

Doc 9317/04 COM (2004) 334: Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions

Doc 12993/04: Proposed Regulation on mutual administrative assistance for the protection of the Community's financial interests against fraud and any other illegal activities

Doc 13852/04: Proposed Directive on certain aspects of mediation in civil and commercial matters

Doc 13856/04: European Youth Policy: Follow up to a White Paper on a New Impetus for European Youth

CHAPTER 3: MAKING THE MECHANISM WORK

What does the new Protocol hope to achieve?

85. Expectations for the new Protocol vary. Opinion is split as to whether it would provide a workable mechanism for the monitoring of subsidiarity or simply a catalyst for better communication between EU institutions and national parliaments.

Improved Communication

86. **We believe that improved communication is an important aim of the Protocol.** Commissioner Wallström, in her capacity as Commissioner for Institutional Relations and Communications Strategy, told the Committee of her desire “to create a culture of co-operation, between the EU institutions and also vis-à-vis the national parliaments—a culture where the European institutions work together” (Q126). The new Protocol would play an important role in achieving this shift in culture. **A clear benefit of the new Protocol would be that the early warning mechanism would encourage and reward effective communication between national parliaments and EU institutions and amongst national parliaments themselves.**

Improved Accountability

87. Along with better communication it is hoped that the Protocol would achieve better accountability. The Protocol should encourage the Commission and other EU institutions to present more detailed and explicit arguments as to why new EU level legislation is necessary and desirable. Article 5 of the Protocol provides that “Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality ...The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators”. The requirement for a measure to be reasoned is not new—it is a well established rule of Community law²⁸.
88. **The clear statement in the Protocol as to what that reasoning should encompass as regards subsidiarity is welcome and underlines the need for the Commission to research fully the factual circumstances and to consult widely before bringing forward legislative proposals. Identifying the trans-national/cross border element or genuine Union dimension should continue to be an important criterion.**

²⁸ Article 253 TEC provides that regulations, directives and decisions adopted by the Parliament and Council jointly (*i.e.* under co-decision procedure, described below), by the Council or by the Commission, “shall state the reasons on which they are based”. They must also refer to any proposals or opinions that the Treaty requires to be obtained. It is well established case-law that the statement of reasons required by Article 253 must show clearly and unequivocally the reasoning of the institution which enacted the measure so as: (a) to inform the persons concerned of the justification for the measure adopted; and (b) to enable the court to exercise its powers of review. The extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it is adopted.

Improved Scrutiny

89. Finally it is hoped that the Protocol would stimulate improved Parliamentary scrutiny of the EU legislative processes. The early warning mechanism should sharpen political debate on subsidiarity, highlight the mechanics of getting new EU laws in place and lead to fuller scrutiny in all national parliaments across the European Union.

To what extent should there be a common approach among parliaments to the criteria to be applied on subsidiarity tests?*The Amsterdam Protocol Criteria*

90. Supplementary criteria to regulate the application of subsidiarity were adopted in the so-called “Edinburgh Guidelines” and then in the “Amsterdam Protocol on Subsidiarity and Proportionality”. These criteria have several distinctive features:
- Community action should only be taken on issues which have distinctive European features.
 - Substantial evidence of the need for such Community action should be provided.
91. Professor Wyatt notes that “the Amsterdam criteria combine objective and potentially justiciable factors with open ended and essentially subjective criteria” (p 5). He is of the opinion that the failure of subsidiarity should not be blamed on what he sees as a mechanism possessing “considerable potential”(p 5) but rather on the antipathy of the Community institutions.
92. In summary, Professor Wyatt’s view of the criteria is that they “have been under used and have considerable potential” (p 5). He is also of the opinion that “Scrutiny by national parliaments will only be effective if they develop systematic objective criteria for the application of subsidiarity”(p 6).

The Government’s View

93. At present the Government routinely considers legislative proposals in the light of the subsidiarity principle. It does so “drawing on the criteria and guidance in the Protocol on subsidiarity to the Treaty of Amsterdam and following guidance issued by the Cabinet Office” (p 67). The Government does not intend to alter the criteria it uses for monitoring subsidiarity compliance if the Protocol comes into force: “The Government expects the same principles to provide the starting point for an analysis of draft European legislative acts after the new Treaty comes into force, even though the Protocol itself is no longer attached to the Treaty”(p 67).

Should the Select Committee deal with subsidiarity issues or is it a matter for the House?

94. The House will have to decide on how to deal with monitoring subsidiarity. It will in particular be for the House to decide whether the House itself should cast the vote or whether this responsibility should be delegated to our Committee, or indeed to some other body. Two obvious choices present themselves:

- Our Select Committee could be given the responsibility for monitoring subsidiarity compliance and could cast the vote. Particularly contentious issues could, if it was deemed necessary, be sent to the House for decision.
 - The House itself could deal with subsidiarity monitoring and cast the vote.
95. **In view of the political significance of the exercise of a vote under the early warning mechanism, we recommend that the House itself should cast the vote (subject to our conclusion in paragraph 99, below).**
96. We note that in the House of Commons the Modernisation Committee has proposed that, while the House should itself cast the vote, it would be for the European Scrutiny Committee to report to the House whether a particular legislative proposal potentially breaches the principle of subsidiarity. We consider that this represents a logical way of operating the mechanism. **We accordingly further recommend that in this House the trigger for a debate and decision on whether to cast a vote under the early warning mechanism should be a report from our Committee.**
97. Our Committee and its Sub-Committees stand ready to analyse all legislative proposals submitted, and where appropriate to make recommendations, based on evidence where possible. This would represent a logical extension of our existing scrutiny work.
98. If our recommendation that the House cast the vote is accepted, however, two important consequences have to be faced:
- it would not be possible for the House to cast a vote when it was not sitting; and
 - the House would have to make available the necessary time to decide and if necessary debate subsidiarity compliance in individual legislative proposals. Given the short timeframe provided for in the mechanism the House would have to make time available at short notice.
99. If the House does decide that it would itself exercise the right to cast the vote, it would be necessary to put arrangements in place to deal with legislative proposals during recesses. If only the House can cast the vote then the House would need to be sitting to do so, or to be recalled which seems to us unlikely. Committees on the other hand have the power to meet in recesses. **The House could therefore agree that the exercise of its vote on any legislative proposal would be delegated to the EU Select Committee in the event of a six week period expiring during a recess, unless the House had already come to a decision on the proposal in question.**
100. We further recommend to the House that the operation of the early warning mechanism should be kept separate from the House's current Scrutiny Reserve²⁹ under which we currently operate. This must of necessity be the case if the House itself, rather than our Committee, is to have the power to cast the vote. In any event separating the two will ensure that it is clear that the early warning mechanism is just one weapon in the armoury of national

²⁹ Agreed on 6 December 1999: see our Report "Review of Scrutiny of European Legislation" (35th Report, session 2001–2002, HL Paper 185).

parliaments and that other elements of effective scrutiny should not be overlooked.

101. Indeed, the Constitutional Treaty's enhanced provisions for transmission of information to national parliaments provides a welcome opportunity for all national parliaments to raise their game more generally in holding their executives to account. We recommend that the Government should not support a proposal in Council which has been the subject of a yellow card in either House of Parliament without first further explaining to Parliament its reasons for doing so.
102. The methods other national parliaments intend to adopt to monitor subsidiarity are outlined in Chapter 6.

How should the House of Lords work with the House of Commons on subsidiarity issues?

103. Under the rules of the "early warning mechanism" system each chamber will have the power to submit a reasoned opinion to the EU institutions if it believes the subsidiarity principle has been breached by a piece of proposed EU legislation.
104. In theory, the House of Commons could see no breach in a piece of proposed legislation and not submit an opinion, whilst the House of Lords, considering the same document, might decide to submit an opinion having spotted a breach.
105. In his written evidence Dr Adam Cygan stressed that "it will be imperative for the Commons and Lords to co-ordinate responses to ensure that they are all singing from the same hymn sheet" (p 51).
106. Similarly, Andrew Duff MEP said the House of Lords must "co-ordinate its response with the House of Commons, even for logistical reasons" (p 30).
107. **We disagree with the suggestion that the two Houses must co-ordinate their response in individual cases.** Each Chamber has its own EU scrutiny committee and each Chamber has the power to submit or not submit a reasoned opinion as it sees fit.
108. **However, we recognise that although each chamber has its own vote it will be desirable for the House to work with the Commons on subsidiarity issues and, where possible, for the two Houses to support each other when submitting reasoned opinions. In spite of this, it is important to note that if the two Houses do reach a different view on whether a yellow card should be raised in a particular case their votes would not cancel each other out—it will just be that the threshold is not one step closer to being reached.**

How will the early warning mechanism affect the EU law making institutions?

109. Whilst recognising that the issue of subsidiarity is currently increasing in profile and importance for Member States it is also true to say that in the EU institutions themselves itself the issue has become less and less relevant in practice in certain areas of legislation.
110. As Richard Corbett, MEP for Yorkshire and the Humber, pointed out in evidence, most legislation currently emerging from the EU updates or

reforms previous legislation. If the original legislation passed the subsidiarity test first time around it is unlikely that subsidiarity will still be an issue when the updated or revised legislation passes through the institutions for a second time. He explained the situation clearly:

“Nowadays, an increasing proportion of legislation, at least in the economic field, is about changing existing legislation, to update it, to adapt it to new technological advances, and so on. In that sense, arguments about subsidiarity will usually be less acute, because it is an area in which the Union has already legislated and it is a matter of changing it rather than embarking on a new policy area”(Q 43).

111. In spite of this, however, the new Protocol will affect the EU institutions to some degree. Previously the EU lawmaking institutions have forwarded proposals only to the governments of Member States who have then been responsible for passing them onto national parliaments. This has sometimes been a cumbersome and inefficient process.
112. Under the provisions of the Constitutional Treaty the Commission must forward all legislative proposals to national parliaments at the same time as it forwards them to the Council and the European Parliament. This would facilitate consideration by national parliaments of proposals before the Council itself deliberates on them.
113. **As the six-week timeframe is short we fully expect the EU institutions to ensure that proposals reach national parliaments at the same time as they reach national governments to give parliaments the opportunity to scrutinise them fully and do so in the light of each other’s deliberations.**
114. **We warmly welcome this new system as it will strengthen the process of parliamentary scrutiny and prompt national parliaments to investigate and act on breaches of the principle of subsidiarity in good time.**
115. The Treaty stresses that “Before proposing European legislative acts, the Commission shall consult widely”³⁰. **We recommend that the Commission should inform national parliaments when consultation on a legislative act is launched.**
116. The Treaty goes on to state that “Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”³¹.
117. **Although we recognise that the Commission has previously carried out checks on their proposals to ensure compliance with subsidiarity, the new protocol is to be warmly welcomed as it will once again highlight this responsibility.**

How would the Commission and the other EU institutions react to the raising of “yellow cards”?

118. If the Commission, or the other EU Institutions initiating the legislation, receives reasoned opinions from the requisite number of national parliaments

³⁰ Article 2 of the Protocol.

³¹ Article 4 of the Protocol.

(or chambers of national parliaments) they must review the draft. They will have the choice of either maintaining the draft as it is, amending it or withdrawing it altogether.

119. Although there is no binding legal requirement on the Commission to amend a draft, some of our witnesses suggested that in practice political pressure may make it hard for them not to. Indeed, Andrew Duff's view was that the Commission would react seriously to the raising of a yellow card: "An intervention from a national parliament at the first phase of legislation would be a dramatic and, as I have also said, an infrequent occurrence; but I am sure that you can be assured that we will see it here in Brussels" (Q 101).
120. **Even below the one-third threshold, the higher the number of objections from parliaments, the greater the political pressure would be on the Institutions concerned to review the draft.**
121. **However we would warn against too much tactical manoeuvring at this stage. National parliaments should examine each case on its own merits and not just act on a speculative calculation as to whether or not the threshold will be reached. If national parliaments do not act responsibly, the process will be devalued.**
122. Commissioner Wallström made clear that no decisions have yet been taken on how the Commission will react to the raising of yellow cards and indeed no decisions can be taken until ratification of the Constitutional Treaty: the Commission cannot be seen to pre-empt the outcome of ratification procedures in Member States by planning too far in advance.
123. However, the Commissioner stressed that the Commission would hope to use communication to overcome yellow card obstacles. In the first instance they would seek to explain and explore the proposal with the Member States who have concerns, "this would be a role for each and every one of the Commissioners: to be willing and able to go and explain, and to help in the process"(Q 140).
124. If communication fails, the Commissioner conceded that it would be very hard to ignore the dissenting voices, particularly if the complaints chime with each other—further action may have to be taken, "if we see very clearly that the reaction is on one or two particular points, it would take a lot for the Commission simply to ignore it. We will have to examine and to explain and, if we see that these concerns remain, I guess it will have to lead to adjustments" (Q 142).
125. The Government's view was that the early warning mechanism will "certainly influence the Commission. The freely expressed views of parliaments are likely in themselves to influence national governments, and in practice would be difficult for the Commission to ignore"(p 67).
126. **We share the view that the raising of a yellow card would have a significant impact on the EU institutions. We consider that if national parliaments operate the mechanism effectively it would be hard for the Commission and the Council³² to resist such sustained political pressure.** At the same time it is our view that only on rare occasions will the

³² During the six week period the Commission would be the target of such "political pressure". After this period expires national parliaments should turn their attention to the Council to enable them to continue to influence the legislation.

Commission and other law-making institutions be forced to review a proposal.³³

Is the six week period allowed to parliaments to formulate and forward objections long enough?

127. All of the evidence we have received suggests that six weeks is too short a time frame. Although we regret this we recognise that the six week period is now set in the Constitutional Treaty.
128. Within this short period of time national parliaments would have two tasks to complete. First, they must scrutinise the content of the draft proposal. Second, they must verify whether or not a proposal breaches the principle of subsidiarity. This could involve a substantial amount of work.
129. Some evidence noted, however, that the six week period is, in effect, longer than it was when it was first laid down 16 years ago³⁴. As proposals would be sent directly to national parliaments (and not filtered through government) and as they would be sent electronically, national parliaments would take receipt of proposals much sooner than some have previously been able to.
130. Richard Corbett MEP views this provision as potentially more important than the early warning mechanism itself:
- “more important than the subsidiarity mechanism as such...is the simple fact that every document will go straight to national parliaments directly without being filtered by governments, and there is a guaranteed period for national parliaments to look at European legislation before the Council deliberates” (Q 44).
131. The French National Assembly also welcomes this provision, noting that a direct relation would be established between national parliaments and EU institutions which is both desirable and long over-due; “Direct transmission to national parliaments, without transmitting via governments, is a major innovation of the draft European Constitution” (p 14).
132. **The innovation providing for draft European legislative acts to be transmitted directly to national parliaments is to be warmly welcomed.**
133. The Government has provided in Clause 3 of the European Union Bill that they will submit statements on the compliance of proposed legislative acts with the principle of subsidiarity. These will be in writing and will be formally laid before parliament. The Government would endeavour to lay such statements as early as possible in the six weeks. (p 70) The Foreign Secretary has further told the House of Commons “I wanted to introduce a duty on Ministers, and therefore officials and departments, to check EU draft legislation to see whether or not it accorded with the subsidiarity principle”.³⁵
134. **We welcome this commitment by the Government to assist parliament during the six week period. We expect the Government to**

³³ And of course the raising of yellow cards does not replace the casting of votes in the Council—see House of Commons debate 9 February 2005, column 1553.

³⁴ The six-week period is not an innovation. It was laid down first in a Protocol on the role of national parliaments in the European Union, annexed to the Treaty of Amsterdam.

³⁵ House of Commons debate, 9 February 2005, column 1528.

assist parliament as early as possible in the six week period and to provide a detailed analysis in each case of the application of the subsidiarity principle. Such an analysis should take the form of the quantitative and qualitative analysis the Commission would be required to produce by Article 5 of the Protocol³⁶.

Will the short time frame prohibit effective scrutiny?

135. One of the most serious objections to the six-week timeframe is that it might prevent national parliaments from scrutinising subsidiarity compliance at all stages of the EU legislative process. Indeed, some have argued that the Protocol would not permit national parliaments to examine amended proposals (although the provisions of the Protocol clearly do apply where a proposal is withdrawn and re-submitted).
136. The French National Assembly, for example, has inferred that the early warning right “must be availed of in a strict timeframe...national parliaments will not therefore be able to decide, via this mechanism, on the compliance of amendments voted during the legislative process and which would be considered contrary to the subsidiarity principle” (p 18).
137. On this interpretation, national parliaments can only point out breaches of subsidiarity before the proposal becomes amended during the legislative process. In such circumstances, it is possible that a national parliament may see no breach of subsidiarity in the initial version of a proposal but may spot a breach in the proposal once it has been amended and yet be unable to hold a yellow card up to it.
138. Richard Corbett discussed this problem with us saying that:
 “legislative proposals are a moving target. It is fair enough to comment on the Commission’s initial proposal, and that might be fine, but the difficulty is when the knobs are added in the Council and in the Parliament; so national parliaments should still remain vigilant” (Q 85).
139. If this approach is taken, although national parliaments would not be able to submit reasoned opinions after the six-week period they would still have a voice in the EU lawmaking process. They would be able to influence thinking through the Minister representing their Member State in the Council and would be able to scrutinise legislative proposals in the usual way. Legislative proposals in the United Kingdom would still be subject to the scrutiny reserve. But the direct link between national parliaments and the EU lawmaking institutions would be numbed. Parliaments would at this stage have to route opinions through ministers and civil servants, as Andrew Duff highlighted in his oral evidence, “I would not say you are not permitted to express yourself (after the close of the six-week period). Of course you can say anything you like, at any time of day or night, and that is an intrinsically important political intervention. However, you act, in the course of the lawmaking in the EU, through your own ministers and civil servants” (Q 122).
140. The wording of the Protocol might suggest that national parliaments need only be given the opportunity to see the proposal in its original form. In

³⁶ “The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators”.

practice it is rare that a proposal will be adopted without some amendment³⁷. National parliaments' prerogative, accorded by the Protocol, to consider and comment upon proposals is in fact not limited to original proposals emerging from the Commission and expressly includes "amended drafts". The Protocol, it is suggested, has to be construed with regard to its purpose. It is well-settled in Community law that where the European Parliament is given the right to be consulted, it has the right to be re-consulted in certain circumstances. For example, where the (amended) text to be adopted "differs in essence" from the text on which the Parliament was first consulted.³⁸ It is at least arguable that for the provisions of the Protocol to be meaningful the same should apply in the case of national parliaments. It is at least arguable that "amended drafts" in the Protocol should be widely construed to include all cases where a proposal is substantially amended during its negotiation in the Council and Parliament.

141. **We conclude that the Treaty does not clearly provide whether or not the early warning mechanism applies again in the case of a legislative proposal amended during negotiations in the Council and the Parliament, and we would welcome clarification from the Government on this point³⁹.**

The importance of starting scrutiny "upstream"

142. Given the short timeframe we are faced with it is vitally important that subsidiarity monitoring start as far "up stream" as possible. Although reasoned opinions can only be submitted within the six weeks allowed, scrutiny can begin before a proposal is received. As the Minister for Europe told us "It would also clearly be preferable if national parliaments had a well-developed understanding of forthcoming proposals before draft acts were formally transmitted" (p 68).
143. National parliaments should consult the Commission's Annual Work Programme and its five year work plan to gain advance knowledge of which areas of work may prove contentious from a subsidiarity point of view.
144. Andrew Duff stressed the importance of forward planning: "the earlier national parliaments can pick up foreseen law the better: be it at Green Paper stage or White Paper stage, and certainly the annual legislative programme, but also the Five-Year Programme" (Q 116), as did the French National Assembly in their report: "Owing to the difficulty they will have in deciding in the six week period, national parliaments will be well advised to circumvent this period upstream and downstream" (p 24).
145. **Whilst we recognise that such an analysis of subsidiarity issues upstream would be beneficial, the full subsidiarity implications of EU action in a particular field would not be clear until a draft legislative proposal has been tabled.**

³⁷ Emergency measures, such as those imposing trade and other sanctions, are the exception which most immediately come to mind.

³⁸ See Case C-392/95 *Parliament v Council* [1997] ECR I-3213, at paragraph 15.

³⁹ Although we note that Article 4 of the Protocol does require the Commission to forward to national parliaments its draft legislative acts "and its amended drafts".

Collaboration and co-ordination between National Parliaments

146. Although not strictly necessary, co-operation between national parliaments with regard to the subsidiarity issue would be beneficial.

Critical or constructive collaboration?

147. Almost all witnesses agree that when national parliaments intend to submit reasoned opinions it would be useful for them to communicate with each other before doing so.
148. But witnesses' opinions differ on whether or not it would matter if different national parliaments submit reasoned opinions on differing grounds.
149. Richard Corbett said that whilst opinions should not necessarily have to be closely aligned he assumed that divergence of reasoned opinions would be a rare event. He argued that if national parliaments were submitting reasoned opinions because they have identified a breach of subsidiarity the core of their arguments should not differ greatly.
150. In Andrew Duff's opinion the Convention intended that opinions would have to be identical or at least similar to trigger the early warning mechanism. Stephen Weatherill agreed and suggested that collaboration was essential to the effective functioning of the mechanism.
151. The French National Assembly take a middle ground by saying that "The early warning mechanism is admittedly an individual right of each chamber, but its scope and efficacy will largely depend on the capacity of national parliaments to organise themselves collectively"(p 25). Collaboration is not required but would undeniably help to ensure the smooth running of the mechanism and strengthen the voice of national parliaments at the EU level.
152. Stephen Weatherill suggests that such collaboration should be constructive on occasion as well as critical, "I hope...that...co-ordination will not merely be directed at raising 'objections'. It should ideally be as constructive as possible"(p 3). He goes on to suggest that national parliaments' support for proposed EU action would be valuable and also posits that it would not be inconceivable that a reasoned opinion might be submitted suggesting that a draft measure is "*less* intensive than it should be" (p 3). Such a situation might occur because under the subsidiarity principle "not only that EU action should not be taken where the matter is better handled by the Member States but also that EU action should be taken where the matter is better handled at EU level" (p 3).
153. Richard Corbett also advocated constructive collaboration. He suggested that we might be able to conceive of "horizontal subsidiarity" as a means of achieving such collaboration:
- "You can conceive of horizontal subsidiarity, namely is it a subject on which you need legislation at all, or could it be co-regulation with industry, or simply a code of conduct, or no action at all? If you do need legislation, should it be a directive or a regulation? That is an aspect of subsidiarity to be considered as well, not just the vertical between national and European levels" (Q 52).
154. In the Government's view the Commission would find it easier to review a proposal if the majority of national parliaments opposing it have done so on the same or similar grounds (p 68).

155. **Exchange of information between national parliaments would in our view be highly desirable to ensure the effective operation of the Protocol. Although the Commission may listen to solitary objections to placate the Member State involved, co-ordinated objections are likely to carry more weight. We hope, too, that the new Protocol will encourage co-operation between national parliaments for wider informative and constructive purposes.**

How might co-operation between national parliaments most effectively occur?

156. The Government's view is that it is important "not that there should always be uniformity of view among national parliaments, but that a single mechanism or procedure exists by which the views and conclusions of national parliaments can be transmitted to the EU institutions and to each other" (p 68).
157. If collaboration between national parliaments is to be successful there must be an adequate system in place through which they can exchange information and record objections. The six-week timeframe allowed for subsidiarity objections places additional pressure on the system to be as efficient as possible.
158. Many of our witnesses advocated the creation of an inter-parliamentary website through which ideas and opinions might be exchanged with minimal delay.
159. The Dutch Parliament, in particular, would favour such an approach:
 "It is...wise to allow every parliament to understand the views and opinions of other parliaments, which is why the Committee is in favour of using a website to this effect. By means of a safe structure, national parliaments themselves can define the content of the website and thus make information available on the ideas behind the draft legislative acts"⁴⁰.
160. The French National Assembly, too, believes that the networking of national Parliaments will be "a key issue" (p 25). It, however, favours the COSAC secretariat as a means through which to exchange information. They suggest that the secretariat "could be led to centralise the reasoned opinions and inform national parliaments of the appeal made by such or such a Parliament (or chamber) challenging the validity of a draft European legislative act with respect to the subsidiarity principle"(p 26).
161. They also recognise that a website "could be particularly useful as regards the activation of the early warning right regarding scrutiny of compliance with the subsidiarity principle" (pp 26-27) but would want the COSAC secretariat to be fully involved with the development of such a project.
162. A working group has already been set up (2001) to create an Internet site devoted to the Union's parliaments—IPEX⁴¹ to facilitate exchanges of information.

⁴⁰ Extracted from the Report "*Opinions of the Joint Committee Application Subsidiarity concerning the parliamentary procedure for European draft legislative acts*", p 20. The Report has not been printed but is available for inspection at the House of Lords Record Office (020 7219 5314).

⁴¹ Inter-parliamentary EU Information Exchange. The IPEX website can be found at:
<http://www.ecprd.org/ipex/index.asp>

163. **We continue to support the development of the IPEX project. When the website is ready for use it will be an invaluable tool in achieving close collaboration between national parliaments with the aim of improving subsidiarity scrutiny.**

CHAPTER 4: MONITORING THE MECHANISM

Are National Parliaments legally obliged to monitor the subsidiarity principle?

164. Article 1.11(3) of the Constitutional Treaty provides that: “National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol”.
165. The use of the word “shall” in the Article has led to a debate on whether monitoring of subsidiarity compliance is voluntary for national parliaments or a Treaty obligation.
166. In his written evidence former Commissioner Vitorino takes this article to mean that “national parliaments have a political responsibility” (p 72) to monitor subsidiarity compliance, though he considers that they are free to decide how to meet this obligation themselves.
167. Similarly the evidence we received from the Brethren in Britain group suggested that, “shall places a responsibility on national parliaments to ensure compliance with the principle of subsidiarity” (p 49).
168. Amongst those who disagree with this opinion, Dr Adam Cygan sees the process of monitoring subsidiarity as “entirely voluntary” (p 52). Richard Corbett believes that the new provisions would merely enable some national parliaments to continue the subsidiarity scrutiny they have been engaged in for years, but he feels they are worthwhile because they highlight this work and encourage it. He does stress, however, that the protocol would not compel national parliaments to do anything (Q 60).
169. The Federal Trust suggest that, “The use of the word ‘shall’ in Article 1.9 indicates that the monitoring of subsidiarity is more than a mere political obligation on national parliaments” (p 54). However, they go on to conclude that, “there are no mechanisms for this obligation to be policed, other than political pressure” (p 54).
170. **It is unclear whether the Constitutional Treaty intends subsidiarity monitoring to be a legal or simply a political obligation for each Member State and national parliament. In practice it would be up to each parliament to decide the extent to which they would become involved in scrutinising subsidiarity compliance. While there may be no enforceable legal obligation upon them to do so, in our view the political pressure would be such that they ought to feel obliged to carry out this scrutiny fully.**

Which other bodies are, or should be, responsible for monitoring compliance?

The Commission itself and other EU lawmaking Institutions

171. All EU institutions are already responsible for monitoring subsidiarity compliance. In their respective areas of competence, they are expected to keep Union action under review and warn against possible violation of the principle.

172. A first verification is made at the programming stage when all items set out in the Commission Work and Legislative Programme are subjected to a preliminary impact assessment.
173. A more substantial verification is then made for major proposals at the drafting stage and all proposals must eventually contain “a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”⁴².
174. Andrew Duff believes that the institutions already take these responsibilities seriously: “The institutions here in Brussels are of course part of the subsidiarity check. One can disapprove of the objectives, quality, and indeed quantity, of laws that flow out of Brussels and Strasbourg, but we are, I think, trying to be fairly scrupulous in applying the principle of subsidiarity” (Q 95).
175. Commissioner Wallström agrees: “This subsidiarity control is integrated into what we are doing. In general, we always have to look at subsidiarity, so that check is done in the normal work of the Commission” (Q 133).
176. **It is clear that the Commission and other EU institutions would intensify these checks in order to pre-empt the raising of yellow cards by national parliaments. We welcome this.**
177. In addition to their routine checks, under the protocols the Commission would have to submit, to the European Council, the European Parliament, the Council and national parliaments, a report on the application of Article 1–11 of the Constitution annually.
178. **The Commission’s annual report on subsidiarity is to be welcomed and will be received with interest.**

Her Majesty’s Government

179. The Government already has to consider whether proposed legislation is compatible with the principle of subsidiarity. They summarise their conclusions in the explanatory memoranda they provide to Parliament for scrutiny purposes.
180. **Subsidiarity checks by the Government, and the assessments promised under Clause 3 of the European Union Bill, should be rigorous and detailed whether or not the Protocol comes into force. The Government’s subsidiarity assessment should, as now, be part of the explanatory memoranda furnished by the government on each legislative proposal**⁴³.
181. **We expect, given the short time frame allowed, that these documents should not be presented by the Government any later than two weeks after submission of the draft legislative proposal. This is the timetable to which the Government currently works. In the event of a delay in preparation of an Explanatory Memorandum, the subsidiarity analysis should if necessary be presented separately to avoid delay.**

⁴² Article 5 of the Protocol.

⁴³ The Government normally deposits Explanatory Memorandums about 10 working days after the deposit of the EU document.

182. **In any event, the new procedures will enhance openness and accountability, by subjecting the Government’s assessments to public scrutiny by Parliament, which is all for the good. In addition, we will begin our analysis of draft legislative proposals as soon as they are received.**

The Role of Regional Assemblies with legislative powers and the Committee of the Regions

Provisions made for Regional Assemblies in the Protocol

183. Under the new Protocol regional assemblies with legislative powers will also have an important role to play in monitoring subsidiarity compliance.
184. Article 2 of the Protocol stipulates that:
 “Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged”.
185. Article 6 goes on to detail the workings of the early warning mechanism and stresses that it “will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers” when monitoring subsidiarity and drafting reasoned opinions as necessary.
186. The Constitutional Treaty envisages that regional assemblies would be involved in the subsidiarity monitoring process but it leaves it to Member States to decide the form in which such assemblies will be consulted and integrated into the subsidiarity monitoring systems.
187. The Federal Trust summarises the provisions made for regional assemblies, saying, “The Protocol on the Application of the Principle of Subsidiarity simply provides that, where appropriate, regional parliaments may be involved. This is neither an obligation nor an exclusion of regional input but a ‘flexibility provision’ to allow for constitutional asymmetries of any type” (p 54).

What do the regional assemblies hope to gain from the new Protocol provisions?

188. The Protocol brings with it a renewed hope that the early warning mechanism will give local government and regional assemblies greater access to the European lawmaking process and allow them to assess proposed EU legislation more closely with regard to its local financial and political impact.
189. The Local Government Association (LGA) expects that the rights and responsibilities of local government with regard to monitoring subsidiarity would be respected by the national parliament:
 “It would seem consistent to hold that where there is a democratically-elected sphere of government, such as any future directly-elected English regional assembly, it should also have the right and responsibility to monitor the impact of EU policy and legislation applying to the geographic area under its jurisdiction, either in its own right or in partnership with local government”(p 47).

190. In their evidence the LGA also pointed to Article 2 of the Council of Europe's Charter of local self-government which states that:

“The principle of local self government shall be recognised in domestic legislation and where practicable in the (domestic) constitution” (p 46).

191. It is the view of the LGA that this article places a responsibility on the national parliaments to be vigilant in fully scrutinising proposed EU policy and legislation on behalf of local government. Specifically they ask that the local financial impact of EU legislation should be of the utmost concern to those who take on this responsibility.

192. The recurring hope that emerges throughout the evidence we have received is that communication would be improved between sub-spheres of national government, the national parliament and the EU lawmaking institutions.

Should regional assemblies with legislative powers produce their own assessments of subsidiarity compliance?

193. If national parliaments are to define the role regional assemblies play in monitoring subsidiarity compliance it will be necessary to detail exactly what will be expected of them and what they can expect from the national parliament.

194. The Federal Trust believes that:

“The role of regional legislative assemblies can be both to hold governments to account in respect of their assessments of the question of subsidiarity and to produce their own independent assessments of compliance with subsidiarity” (p 55).

195. In producing their own assessment of subsidiarity compliance regional assemblies can also scrutinise the assessment made by the Government. The two roles are necessarily entwined and complementary.

How can the views of regional assemblies with legislative powers best be presented to the national parliament?

196. There would be two phases of involvement for regional assemblies under the new protocol. They should be consulted at the pre-legislative phase of lawmaking and when potential breaches of subsidiarity are noted.

Involving Regional Assemblies with legislative powers in Pre-Legislative Scrutiny

197. The Federal Trust emphasises the importance of involving regional assemblies with legislative powers from the initial phases of the legislative process:

“Before focusing on mechanisms to articulate national and regional parliaments' views under the early warning system, emphasis should be put on a real involvement of parliaments (state and regional) in EU lawmaking from the very beginning” (p 55).

198. Such early involvement will improve co-ordination of responses from regional and national parliaments at an early stage and help prevent potential clashes of opinion further down the line.

199. Furthermore, the six-week time frame for submitting reasoned opinions means that if regional assemblies are to be properly consulted such

consultation must begin as far upstream as possible. **The Federal Trust suggest that “Regional parliaments and regional authorities ought to be made aware of forthcoming legislation at the time of the presentation of the Commission’s Annual Programme, and to monitor the gradual emergence of policy proposals” (p 55). We agree and recommend that the Government sets the necessary mechanisms in place.**

Regional Assemblies and the early warning mechanism

200. Regional assemblies should be involved in monitoring legislative proposals and scrutinising them for breaches of subsidiarity. Again early involvement would be crucial if they are to be fully integrated into the monitoring process.
201. In order to make this early dialogue possible regional assemblies with legislative powers should be consulted shortly after Parliament itself receives proposals. For their part regional assemblies should actively seek out information and gather opinions.
202. **The views of regional assemblies can best be presented to Parliament through a sustained dialogue between the two authorities. Effective communication would help to ensure the smooth operation of the early warning mechanism.**
203. Improved communications between the House of Commons and the House of Lords would also help ensure the views of regional assemblies are presented in a timely and effective manner. The LGA notes “closer co-ordination between the Commons and the Lords would help local government to make representations and to give advice to Parliament in a more targeted and effective way” (p 47).
204. **The two Houses should ensure that the views of regional assemblies with legislative powers submitted to one House are available to both.**

Potential problems

205. A potential problem with the early warning system was spotted by the Federal Trust:

“An important question is how to resolve discrepancies between state and devolved chambers in the event that a regional parliament decides to raise an objection and the Member State Parliament disagrees with the views of a regional parliament”(p 55).
206. The Protocol only allows for national parliaments to submit reasoned opinions having consulted regional assemblies. What would happen if a regional assembly strongly disagreed with the national parliament on a subsidiarity issue?
207. Furthermore, there may also be circumstances in which, “a regional parliament may want to stop national parliament objections to individual legislation which directly benefits a particular region or devolved authority” (p 55). How would such situations be dealt with?
208. The Federal Trust suggests that “a framework for the management and individuality of each parliament would need to be agreed possibly based on the form of the existing Concordats between state and devolved authorities in the exercise of concurrent powers in the UK”(p 56).

209. **These potential problems concerning clashes of opinion should be considered carefully before they materialise. A system will have to be constructed for dealing with such differences of opinion fairly and efficiently.**

How best can regional and local authorities across Europe work together?

210. Communication between local and regional authorities across Europe will be just as important as communication between authorities in individual member states. Regional and local authorities will have to put procedures in place to ensure opinions and ideas are exchanged amongst themselves effectively.
211. In their written evidence the LGA summarises the recommendations to improve such communications made at the Committee of the Regions' first conference on subsidiarity, held in Berlin on 27 May 2004.
212. At the conference a number of recommendations were made to improve the integration of regional authorities in the subsidiarity monitoring process. Some of those recommendations are:
- Better co-operation with the European Commission in order to ensure the local and regional dimension is taken into account in the ex-ante phase of monitoring;
 - Creation of a co-ordinated mechanism for monitoring subsidiarity based on networking. This will involve the Congress of Local and Regional Authorities of the Council of Europe, as well as the main European and national associations of regional and local authorities;
 - Sharing good practice and research results between public administrations at European, national, regional and local level.
213. **It is for regional and local authorities themselves to decide how best to work with their European counterparts. We recognise the potential benefits of such co-operation and would urge regional and local authorities to continue making progress in this field.**

The Committee of the Regions

214. The Protocol also provides that “the Committee of the Regions may ... bring [before the European Court of Justice]... actions against European legislative acts for the adoption of which the Constitution provides that it be consulted”⁴⁴. We do not comment further on this provision in this report but look forward to hearing how the Committee of the Regions would exercise this power. Other questions concerning Article 8 are dealt with in the next Chapter.

⁴⁴ Article 8 of the Protocol.

CHAPTER 5: THE ROLE OF THE EUROPEAN COURT OF JUSTICE

215. Article 8 of the Protocol expressly recognises the role of the European Court of Justice (“the Court”) and would provide for actions to be brought before the Court challenging European legislative acts (after they have been adopted) on the grounds of infringement of the principle of subsidiarity. We have identified a **number of questions in relation to Article 8, not least the extent to which it would impose any obligation on the executive to bring an action on behalf of the national parliament or a chamber of it.** The issue would become acute where government and parliament took contrary views on whether a European legislative act complied with the principle of subsidiarity. In this Chapter we set out the background to Article 8; explore its intended effect; and pose a number of questions that in our view need clarification.
216. We expect Her Majesty’s Government to respond in full to the questions posed in this Chapter in good time to allow the House to take account of that response in its consideration of the European Union Bill which would ratify the Constitutional Treaty (subject to the referendum).

BOX 3

Article 8

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national parliament or a chamber of it.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such action against European legislative acts for the adoption of which the Constitution provides that it shall be consulted.”

Background—justiciability

217. When the principle of subsidiarity was first introduced into the Community law-making, there was considerable debate both in political and legal circles as to whether subsidiarity was justiciable, *i.e.* whether it is a principle whose exercise is capable of being adjudicated upon by a court. That debate became a matter of history when, in 1993, subsidiarity was included as a legal principle in the Treaty. Since then the Court has on a number of occasions been called upon to apply the principle of subsidiarity.
218. But, while the case law of the Court demonstrates its capacity to handle arguments based on “subsidiarity”, there has been no case where the Court has struck down a measure for breach of the principle and subsidiarity based arguments have received fairly short shrift. Experience is that the Court will not second-guess the Institutions where considered reasons are given justifying action at the Community level. Satisfying the Court that the principle of subsidiarity has been complied with does not appear to have been difficult.

Background—the Convention

219. The European Convention’s Working Group on Subsidiarity was in agreement that *ex post* monitoring of subsidiarity should be “of a judicial nature”. The Group recommended that the conditions for referral to the Court should be broadened. A national parliament (or a chamber thereof) which had delivered a reasoned opinion under the early warning system should be allowed to refer the matter to the Court for violation of the principle of subsidiarity.⁴⁶ Discussions in the plenary disclosed concerns about giving national parliaments the right of appeal to the Court.⁴⁷ Those concerns were reflected in the text of the draft Constitution discussed within the Convention.
220. In our 2003 Report on the then proposed protocols on national parliaments and subsidiarity, we drew attention to the issues raised and called for the Convention’s proposal to be strengthened as they did not appear to give national parliaments any new rights.⁴⁸ As we explained earlier (paragraphs 74-76), that recommendation appears to have been not accepted.

Relationship with the yellow card

221. It is significant that the text of the Constitutional Treaty departs from the recommendation of the Convention’s Working Group. The provisions of Article 8 as it now stands are independent of those contained in Article 6 (the right to send a reasoned opinion—the “yellow card”). **The ability of a national parliament, or a chamber of a national parliament, to trigger proceedings under Article 8 is not subject to any precondition that that parliament, or chamber of it, should have sent a reasoned opinion under Article 6. Nor is any challenge under Article 8 limited to the reasons set out in any reasoned opinion given under Article 6. Nonetheless the failure to raise the yellow card might cast doubts on the merits of a challenge where the substance of the act in question has not changed and thus have a prejudicial effect on the chances of success of a challenge.**
222. It is, however, important to stress that the provisions of Article 8 would only come into play once a European legislative act had been adopted. It would

⁴⁶ Conclusions of Working Group I on the Principle of Subsidiarity, Doc CONV 286/02.

⁴⁷ Summary Report of the plenary session—Brussels, 12 and 13 September 2002. Doc CONV 284/02, Summary Report of the plenary session—Brussels, 3 and 4 October 2002. Doc CONV 331/02.

⁴⁸ “*The Future of Europe: National Parliaments and Subsidiarity—the Proposed Protocols*” (11th Report, session 2002–03, HL Paper 70), paragraphs 59 and 60: 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 proportionality. 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 so). 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 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. 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 needs strengthening, as Gisela Stuart proposed, to give national parliaments the right to bring proceedings for violation of the principles of subsidiarity and proportionality.

not be possible for Article 8 to be invoked while a European legislative act was in draft or under discussion by the law-making institutions. Hence any opportunity to make use of the rights set out in Article 8 would only arise once the legislative act in question had been proposed by the Commission, scrutinised by national parliaments and adopted by the European Parliament and the Council in accordance with the appropriate legislative procedures.

The significance of Article 8

223. It is thus important to stress that the position of a Member State's government on the European legislative act in question would be clearly known before any action under Article 8 could begin. By the time the European legislative act had been adopted, the Government in question would either have supported it in Council, abstained, or opposed it and, where QMV applies, been outvoted. This has important political implications for how far Article 8 would provide an effective new right for national parliaments to pursue, in the Court, any perceived infringement of the principle of subsidiarity.
224. We addressed some questions to the Minister for Europe on the provisions of Article 8. We now turn to an analysis of what the Article means and we refer to the Minister's answers. As indicated above, however, a number of further questions arise which we address below. The extent to which the Constitutional Treaty strengthens the position of national parliaments before the Court, and if it does of what procedures are in effect, or will be put into effect, have yet to be clearly defined.

What does Article 8 mean?

225. Article 8 specifies two ways in which actions on grounds of infringement of the principle of subsidiarity might be brought: first, by Member States; or second, "notified [by Member States] in accordance with their legal order on behalf of their national Parliament or a chamber of it". In the first case, the action must be "brought in accordance with the rules laid down in Article III-365 of the Constitution". This is a reference to the general provision giving the Court jurisdiction and setting out the grounds on which the Court can review the legality of European laws and acts of the Institutions.
226. The reference to Article III-365 would at first sight appear not to apply to the second type of action. We note the Government's view that the Protocol "grants jurisdiction to the Court" to hear actions notified on behalf of a national parliament (Q 1). It would, however, be surprising if Article III-365 did not apply to such actions. The requirement for actions initiated by national parliaments to be notified "in accordance with their [Member States] legal order" seems unlikely to mean that the Court's jurisdiction and procedures in such cases are matters to be determined individually by the Member States. It would be most surprising if it were the intention of Article 8 to confer any different or exceptional jurisdiction on the Court in the circumstances. No amendment of Article III-365 is made or needed to deal with actions brought on behalf of a national parliament: infringement of the principle of subsidiarity would be an "infringement of the Constitution" for the purposes of Article III-365(2).
227. The reference to the national "legal order" seems intended to go primarily to the relationship between the national parliaments and the executive within

Member States. This, as we will explain below, raises a number of questions. **We first, however, ask the Government to clarify whether Article III-365 would apply to an action notified under Article 8 by a Member State on behalf of a national parliament (or a chamber thereof).**

What is the executive's duty under Article 8?

228. The effectiveness of the Protocol as a means of national parliamentary control over the exercise of Union legislative power on subsidiarity grounds would depend on whether a Member State (the executive) was obliged to bring an action when requested to do so by its parliament. Are governments obliged to act? If so, how far is this obligation a matter of Union law? Do national parliaments derive any rights by virtue of the Constitution? Or is the position of national parliaments wholly dependent on national laws and constitutions?
229. The apparent intention of Article 8 is that a national parliament (and each chamber of a national parliament) would have a right, as a matter of Union law, to have proceedings brought before the Court on grounds of infringement of the principle of subsidiarity. It might be argued that the Treaty would place obligations on national parliaments to ensure compliance with the principle of subsidiarity (Article I-11.3). The fact that such an action has to be brought by the Member State means that in order to give effect to the right given by the Treaty the executive/government and any other relevant organs of that State are under an obligation to bring the action when requested by its parliament and to do all that is necessary to that end (Article I-5.2). How a national parliament decides to initiate proceedings and how in practice the executive would carry out the wishes of the national parliament (or a chamber of it) would be determined by national law *i.e.* "in accordance with their legal order".
230. But to construe the Treaty as requiring a Member State to permit the national parliament to bring an action in the State's name before the Court would, in the view of Professor Weatherill, be "an adventurous interpretation" (Q 40). We questioned the Minister for Europe about this and his answer was that the Government do not accept that Article I-11(3) imposes a duty on national parliaments. National parliaments are given a right to make their views known on subsidiarity and a procedure is set to take those views into account. "...the Government strongly hopes that [parliament] will make use of the opportunity" (p 68).
231. There is, we accept, an alternative approach to Article 8 of the Protocol. The reference to actions being notified by Member States "in accordance with their legal order on behalf of their national Parliament or a chamber of it" might be construed as only requiring the executive to act where the national legal order would require it do so. Thus the Constitutional Treaty would not interfere in the internal constitutional relationship between the parliament and the executive within a Member State.
232. Again we raised this question with the Minister for Europe. The Government's view is that: "We believe that the words 'in accordance with their legal order' are intended to reflect the fact that each Member State will have its own procedures and rules for agreeing to notifying a case on behalf of its national parliament"(p 69). If this is the correct approach to Article 8, what would be the position of this Parliament or indeed of this House? The European Union Bill is silent on this point.

233. The Government told us that they did not believe that the Treaty would create a right for national parliaments to refer questions of subsidiarity directly to the ECJ. The modalities for transmission of a national parliament's views to the ECJ would depend on the legal order of each Member State. The Government accepted that meaningful and effective arrangements needed to be put in place. But the Government were not clear whether they were obliged to take forward a request by Parliament: "a natural and subsidiarity-friendly reading of the Article [8] would be that Member States should give careful consideration to taking a case to the ECJ when their national parliaments so request" (pp 69-70). "Careful consideration"? Would that really suffice?
234. **We do not accept that it is in accordance with the letter and the spirit of Article 8 that "careful consideration" by the executive of a request from our Parliament (or a chamber of our Parliament) would suffice. We are also not clear what the legal or political justification of the Government's interpretation is.**
235. **We accordingly ask the Government to clarify first what the position would be in the United Kingdom. Given our national "legal order" would the executive be required to act if either House of our parliament resolved that a challenge be notified under Article 8? If not why not and is this interpretation in accordance with the provisions of Article 8?**
236. **We also ask the Government to set out in full to Parliament how other Member States interpret the effect of this provision.**
237. **In particular we ask the Government what their interpretation is of the changes recently made to the French Constitution.**⁴⁹ A new Article 88-5 provides that each chamber can bring an action in the ECJ against a European legislative act on the grounds of subsidiarity. It appears that the French Government would be obliged to notify the action to the ECJ: "*Chaque assemblée peut former un recours devant la Cour de justice de l'Union européenne contre un acte législative européen pour violation du principe de subsidiarité. Ce recours est transmis*⁵⁰ *à la Cour de justice de l'Union européenne par le Gouvernement*".

Procedural problems—control of the action

238. Further questions arise when consideration is given to the procedural issues arising under Article 8. As explained above, it may be that it is the Member State, and not the national parliament or chamber, who will formally be the applicant in the action. This might place the Member State (the executive) in some difficulty if it did not agree with the line being taken by its parliament.
239. **We accordingly ask the Government to confirm that the national parliament (or chamber) should remain in control of any application.** It would clearly not be acceptable if the executive could, for example, discontinue the proceedings without the consent of the national parliament or chamber, as the case may be.

⁴⁹ République Française. Congrès du Parlement 28 février 2005. Project de Loi Constitutionnelle modifiant le titre XV de la Constitution.

⁵⁰ It is noteworthy that the text of the new Article 88-5 tracks the language of the Constitutional Treaty.

240. The Government take the view that if a Member State agrees to bring a case on behalf of their parliament and does not fully agree with the arguments then it should be able to explain its own views of the issues raised. Procedures to give effect to this understanding of the position would have to be worked out in consultation with the ECJ (p 69).

Will the practice of the Court change under the Constitutional Treaty?

241. As mentioned above, breach of the principle of subsidiarity has been pleaded in a number of cases, but so far without success. Professor Flynn (National University of Ireland, Galway) has spoken of the Court being “very reluctant to legally apply subsidiarity in anything other than a quite minimalist manner”⁵¹. Professor Wyatt said: “The European Court of Justice has shown no interest in giving subsidiarity the importance as a constitutional principle which its prominence in the constitutional scheme of things would seem to merit. This seems to represent more than benign neglect, or bewilderment as to how subsidiarity is intended to work: it seems to represent a judicial policy of minimising recourse to subsidiarity as a basis for judicial review” (p 4).
242. We asked witnesses whether the practice of the Court might change under the Constitutional Treaty. The wording of the principle would change but it seems doubtful whether the essential substance of the principle has been amended. Professor Wyatt described the current criteria as “a mixture of hard edge and open ended criteria” (Q 13). The criteria, he said, had been “slimmed down” in the Constitutional Treaty (Q 13). Professor Wyatt suggested that the Court might be persuaded to look more keenly at the adequacy of reasoning of the measure in question.
243. We have discussed above the case for action at Union level to be fully explained and justified. Compliance with the principle of subsidiarity should not be a matter which the Commission can draft around by way of a suitably worded assertion in a recital to the proposal in question. **The Protocol reaffirms that application of the principle of subsidiarity must be properly substantiated in each case. National parliaments can be expected to look closely at this and can reasonably expect the Court to do likewise.**
244. It is, however, difficult to predict whether the Court will change its approach in the light of the additional role given to national parliaments in the Constitutional Treaty. The Court has shown itself responsive to the need to ensure that the Community only acts within its powers and that the dividing line between the competence of the Community and that of the Member States is respected. The Constitutional Treaty seeks to reinforce the respective roles of the Union and the Member States. Subsidiarity is a key element in that division of powers. **Against this background, it is to be hoped that the Court will take a more critical approach to subsidiarity, particularly in ensuring that the justification for action at Union level is adequate.** However, there has always been and will remain a strong political element in subsidiarity.

⁵¹ Dr Flynn’s Report has not been printed, but is available for inspection at the House of Lords Record Office (020 7219 5314).

⁵³ See discussion in paragraph 140.

245. The Court has historically respected the “margin of appreciation” given to legislators and decision makers under the Treaties. It will not be for the Court to second guess the Council and the European Parliament. But we would expect the Court to concentrate on examining and ensuring the sufficiency of what Professor Wyatt termed the “concrete evidence” of subsidiarity (such as the quantitative and qualitative indicators referred to in Article 5 of the Protocol).

Political significance of Article 8

246. As noted above, Article 8 only comes in to play when a European legislative act has been adopted. As a consequence, the circumstances in which a national parliament (or a chamber of a national parliament) is likely to raise an objection would seem to us to be:

- If that national parliament does not agree with their Member State’s government’s decision to support a proposal in Council and maintains a subsidiarity objection;
- If that national parliament wishes to raise a subsidiarity objection, the Member State’s government having been outvoted in the Council;
- If a European legislative act as adopted is in a form different from that examined by a national parliament at an earlier stage, a new issue of subsidiarity arising as a result of changes made during the passage of the legislative act.

247. Given these factors, it is our preliminary conclusion that the number of occasions on which national parliaments would be likely to make use of the recourse to the Court under Article 8 would be very few. **We recommend that the Government make it their practice, if the Constitutional Treaty comes into force, to keep Parliament fully informed of any changes to a European legislative act during its passage that might give rise to a subsidiarity objection after adoption⁵³.**

Will the Government need to amend the European Union Bill?

248. **In this chapter we have raised a number of complex but in our view highly significant questions about the meaning and effect of Article 8. We will await the answers, and the House’s debate on the matters raised, with considerable interest. We will in due course return to the question whether any of these issues are matters needing to be dealt with by way of amendments to the European Union Bill.**

CHAPTER 6: THE REACTION OF OTHER NATIONAL PARLIAMENTS

249. Papers on the topic of subsidiarity have been received from the Dutch Parliament, The Danish Folketing and the French National Assembly. Their opinions form the substantive sections of this chapter. Where the opinions of other parliaments on the subject are known, they too are included.

How has the protocol been received across Europe?

250. In general it seems as though the protocol has been well received. **Whatever their thoughts on the practicability of the early warning mechanism, parliaments are enthused by the hope that enhanced subsidiarity monitoring would lead to greater involvement of national parliaments in European lawmaking.**

251. The French National Assembly describes the early warning mechanism as “ingenious” (p 35) and hopes that it will “lead most national parliaments to greater involvement in European Affairs” (p 35).

252. They also believe in the importance of monitoring the principle stringently, claiming that, “Compliance with it (subsidiarity) is central to the acceptability of the European project to citizens” (p 7) as it is aimed at avoiding interference by Brussels in Member States’ competences.

253. The Dutch Parliament also welcomes the new protocols saying, “These protocols, for the first time in the history of the European integration process, formally involve the national parliaments of the European Union in the European legislative process”(p 2).

What measures do other national parliaments intend to put in place to deal with their new responsibilities?

254. It would be for each national parliament to decide how to deal with their new responsibilities and ensure the effectiveness of their subsidiarity monitoring. Differences in approach between parliaments are inevitable. While some national parliaments already have effective subsidiarity monitoring mechanism in place, for some the new protocol will lead to an overhaul of their scrutiny systems.

The French National Assembly

255. The French National Assembly has defined four stages of action to ensure effective subsidiarity monitoring. Within the 6 weeks allowed the National Assembly will:

- Sort draft legislative acts to find those of interest from the viewpoint of scrutiny of subsidiarity
- Commence, where applicable, a procedure for the drafting of a reasoned opinion
- Confer with the other Parliaments of the Union, after having coordinated its position with the Senate insofar as possible.
- Formally adopt a reasoned opinion and then send it to the European Institution concerned.

256. Within the French National Assembly, the Delegation for the European Union will be entrusted with the task of examining draft European legislative acts to ensure adherence to the subsidiarity principle. The National Assembly recognises that the quantity of work involved in monitoring subsidiarity may overwhelm the Delegation and proposes the following measures to meet that problem,

“In order not to overload the agenda of the Delegation’s meetings it is proposed to appoint within it subsidiarity rapporteurs tasked with filtering, among all the draft legislative acts directly transmitted by the European institutions, those which they feel fail to comply with the subsidiarity principle” (p 30).

257. They also propose to start scrutiny at the pre-legislative phases in order to ease the burden and make the tight time-frame workable:

“There is a strategic interest in stating one’s views as far upstream as possible, even before the transmission of draft legislative acts. That is where the real challenge is located and national parliaments really can seize their chance by developing a permanent exchange with European commissioners and their services in the pre-legislative phase” (p 24).

258. **We agree that effective scrutiny measures for EU legislation in general are necessary and will vastly improve subsidiarity monitoring across Europe.**

259. The French National Assembly believes that although the six-week time frame is short the influence of national parliaments does not need to elapse with it. National parliaments always have access to the European legislative process through the European Parliament and the Council of the European Union. They therefore aim to develop closer ties with French MEPs and non-national MEPs to facilitate such influence.

260. The House should continue its work of ensuring the national parliaments influence the European legislative process at all stages and should in particular continue to develop links with MEPs from all Member States.

The Dutch Parliament

261. The Joint Committee on the Application of Subsidiarity established to examine how the mechanism might be implemented concludes that a Subsidiarity Review Committee should be set up in the Dutch parliament to implement the subsidiarity protocols, for the following reasons:

- The European legislative procedure is complex
- The six-week timeframe is excessively short
- They want to be able, insofar as possible, to submit a unanimous opinion to Brussels.

262. The Committee would comprise Members of the Permanent Parliamentary Committee on European Affairs and the European Co-operation Organisation in equal numbers. All political parties would be involved in the work of the Subsidiarity Review Committee to prevent bias.

263. The report stipulates that the Subsidiarity Review Committee should not be too large to ensure efficient and effective scrutiny.

264. Under this proposed system preparatory work on monitoring subsidiarity compliance would be undertaken jointly by both Chambers. However final decisions on a proposal's compliance with subsidiarity would be taken by each Chamber independently. Where both Chambers agreed on the final outcome a joint reasoned opinion would be sent the EU institutions.

The Danish Folketing

265. The report completed by the European Affairs Committee of the Danish Folketing⁵⁴ "create a new framework for the Folketing's overall treatment of EU policies" (p 5) in order to ensure they fully exercise their new responsibilities.

266. Appendix 5 of the Report clearly sets out the system they propose to deal with their new responsibilities regarding subsidiarity monitoring.

267. No later than two weeks after the proposal is forwarded to national parliaments—

- The Government will prepare and forward a preliminary subsidiarity memorandum to the European Affairs Committee and the relevant sector committees.
- The EU secretariat will send the subsidiarity memorandum and the accompanying proposal for an electronic hearing on the EU information website.
- The European Affairs Committee will consider the proposal and send relevant suggestions for a hearing in the sector committee concerned.
- The relevant sector committee(s) will be informed of any issues submitted for consultation electronically.

268. No later than four weeks after the introduction of the proposal—

- The Government will forward a basic memorandum to the sector committees and to the European Affairs Committee (the Government's assessment of the degree to which the principle of subsidiarity has been complied with is incorporated into the basic memorandum).
- The sector committees will have considered the proposal and possibly prepared and forwarded a statement to the European Affairs Committee.
- COSAC will be informed if the sector committees feel that there are breaches of the subsidiarity principle in the proposal.

269. No later than six weeks after the introduction of the proposal—

- The European Affairs Committee will assess the compliance of the proposal with the principle of subsidiarity on the basis of any sector committee statements, the Government's basic memorandum, any statements on issues submitted for consultation electronically, any remarks from other national parliaments and/or COSAC.

⁵⁴ Entitled "*Report on reforming the Folketing's treatment of EU issues*", issued by the European Affairs Committee on 10 December 2004. Hereafter page references to the Report will be given in the main body of the text, in brackets. The Report has not been printed but is available for inspection at the House of Lords Record Office (020 7219 5314).

- A joint meeting will be convened in the case of any discrepancies between the statement from the sector committees and the opinion of the European Affairs Committee.
 - The European Affairs Committee recommendation is signed by its chairperson and/or countersigned by the Speaker of the Folketing.
 - The recommendation is sent to the Government, the Commission, the Council, the European Parliament and other national parliaments of the EU.
270. The European Affairs Committee intend to implement these new procedures before the potential ratification of the Constitutional Treaty on 1 November 2006.
271. One of the major recommendations of the report is that Government Basic Memorandums be improved and extended to include—
- A section on the Government’s provisional, general attitude to a Commission proposal.
 - A Section on the general expectations regarding the attitude of other Member States to the extent that this is possible and that the attitudes are known.
 - A section that provides an independent, exhaustive evaluation of the degree to which the proposal complies with the principle of subsidiarity.

Finland and Lithuania

272. In addition, the Committee has learnt the following—
- Finland: on 21 November 2003 an ad hoc committee set up by the Speaker’s Council of the Finnish Parliament started to discuss subsidiarity issues. The conclusions of this Committee were agreed and submitted to the Speaker’s Council on 18 February 2005⁵⁵. It is intended that the necessary adaptations of the Eduskunta’s rules or procedure will be adopted at the same time as the Constitutional Treaty is approved.
273. Lithuania: Specialised committees will be responsible for monitoring subsidiarity. Within 3 weeks of receiving a proposal the committees will submit, where necessary, conclusions concerning possible breaches of the principle. The Committee on European Affairs or the Committee of Foreign Affairs will consider these conclusions within a week. If necessary the conclusions will then be forwarded for debate in the Seimas plenary sitting. After this they will be forwarded to the government if the plenary believes there is indeed a subsidiarity breach.

How will the Early Warning Mechanism be implemented across the EU?

274. The COSAC Secretariat has produced a table charting the anticipated models for the early warning mechanism in national parliaments across Europe. This table is reproduced below.

⁵⁵ “*Improving EU Scrutiny: Report of the Committee to assess EU scrutiny procedures*”; the website for the Finnish Parliament can be found at: <http://www.eduskunta.fi/>

TABLE 1
Anticipated Models for the Early Warning Mechanism in National Parliaments

Member State -Chamber	Not yet decided	Committee(s) expected to be entrusted with the task of monitoring compliance with the subsidiarity principle	Body expected to be responsible for adoption of the formal reasoned opinion	Expected coordination of views in case of two chamber systems?
1. Austria -Nationalrat -Bundesrat		European Affairs Committee European Affairs Committee	European Affairs Committee European Affairs Committee	Not yet decided Not yet decided
2. Belgium -Chamber -Senate	X	Not yet decided	Not yet decided	Not yet decided
3. Cyprus		European Affairs/Plenary	European affairs Committee/Sector Committee	Unicameral
4. Czech Republic -Chamber -Senate		European affairs Committee European affairs Committee/Foreign affairs Committee	Plenary Plenary	No No
5. Denmark		European Affairs Committee/Sector Committees	European affairs Committee	Unicameral
6. Estonia	X	Not yet decided	Not yet decided	Unicameral
7. Finland		European affairs Committee/Sector Committees	European affairs Committee	Unicameral
8. France -Chamber -Senate	X X	Not yet decided Not yet decided	Not yet decided Not yet decided	Not yet decided Not yet decided
9. Germany -Bundestag -Bundesrat	X	Not yet decided Plenary/European Affairs Committee/sector	Not yet decided Plenary/Other	Not yet decided Not yet

		committees/other		decided
10. Greece	X	Not yet decided	Not yet decided	Unicameral
11. Hungary		European affairs Committee	Plenary	Unicameral
12. Ireland				Not yet decided
-Dáil	X	Not yet decided	Not yet decided	Not yet decided
-Senate	X	Not yet decided	Not yet decided	Not yet decided
13. Italy				Not yet decided
-Chamber	X	Not yet decided	Not yet decided	Not yet decided
-Senate	X	Not yet decided	Not yet decided	Not yet decided
14. Latvia	X	European Affairs Committee/Sector Committees	European Affairs Committee	Unicameral
15. Lithuania		European affairs Committee	Plenary	Unicameral
16. Luxembourg	X	Not yet decided	Not yet decided	Unicameral
17. Malta		Foreign and European Affairs Committee	Not yet decided	Unicameral
18. Poland				Not yet decided
-Sejm	X	Not yet decided	Not yet decided	Not yet decided
-Senate	X	Not yet decided	Not yet decided	Not yet decided
19. Portugal	X	European Affairs Committee/sector committees	European Affairs Committee/ Plenary	Unicameral
20. Netherlands	X	Newly to be installed Joint Committee of Senate and HoR	Plenary of both chambers	Yes in the Joint Committee on subsidiarity
-Chamber				
-Senate				
21. Slovakia	X	European Affairs Committee	Not yet decided	Unicameral
22. Slovenia				No, but reps of the National Council are invited to attend meetings of
-National Assembly		European affairs Committee/Sector Committee	European affairs Committee	
-National Council				

				the European Affairs Committee to present and explain opinions adopted or issued.
23. Spain				Not yet decided
-Congress	X	Not yet decided	Not yet decided	Not yet decided
-Senate	X	Not yet decided	Not yet decided	Not yet decided
24. Sweden	X	Not yet decided	Not yet decided	
25. United Kingdom				
-House of Commons	X	European scrutiny Committee proposes a system whereby the ECS would draw up a reasoned opinion.	European scrutiny Committee proposes that the reasoned opinion should be endorsed by the House.	
-House of Lords	X	For the House to decide.	Not yet decided	

Conclusions

275. It is clear from the table that there is still a great deal of uncertainty amongst Member State parliaments as to how they will deal with their new responsibilities.
276. This uncertainty is particularly noticeable with regard to how bi-cameral parliaments will co-ordinate their views.
277. Most parliaments will monitor subsidiarity using committees and plenary sittings. Committees will undertake the preliminary checks and, where necessary, the matter will be referred upwards.
278. Each Member State, in time, will have to devise a system to ensure subsidiarity compliance is monitored effectively. There need not be conformity amongst national parliaments in this area although an exchange of views on the issue may well prove helpful.

CHAPTER 7: SUMMARY OF RECOMMENDATIONS

Why are we reporting on subsidiarity *now*?

279. We believe that it is now important to focus both Parliamentary and public attention on, and to raise the profile of, subsidiarity monitoring by national parliaments (para 22).
280. In view of the delay in establishing Parliamentary scrutiny mechanisms in the United Kingdom when the United Kingdom joined the European Community on January 1 1973 we hope the House will ensure that this time preparations are made well in advance (para 24).
281. We are of the view that, even if the Constitutional Treaty does not enter into force, the provisions relating to national parliaments and to subsidiarity can and should provide a stimulus to greater and more effective scrutiny by all national parliaments in the EU (para 25).
282. In view of the significance of the proposed new mechanism for monitoring subsidiarity and of the issues arising for the House which we set out in this report we make this report to the House for debate (para 44).

Applying the subsidiarity principle

283. We believe that the application of the existing subsidiarity Protocol needs to be more rigorous if it is to be effective. We support the Constitutional Treaty's proposed strengthening of the principle of subsidiarity and its enhanced role in the EU lawmaking process. We in particular welcome the Constitutional Treaty's emphasis on the role of national parliaments (para 59).
284. National parliaments and EU institutions will have to be stringent in ensuring that the principle is adhered to and that the objective of subsidiarity, to ensure that action is taken at the appropriate level, is met. In particular the Council of Ministers, which represents the interests of Member States, has a particular duty to ensure that the principle of subsidiarity is adhered to in practice. National parliaments have a responsibility to hold their Ministers to account in this regard (para 73).
285. The clear statement in the Protocol as to what the Commission's reasoning should encompass as regards subsidiarity is welcome and underlines the need for the Commission to research fully the factual circumstances and to consult widely before bringing forward legislative proposals. Identifying the trans-national/cross border element or genuine Union dimension should continue to be an important criterion (para 88).

The benefits and drawbacks of the new Protocol

286. We hope that the new Protocol, if enacted, will provide a vehicle for highlighting and invigorating subsidiarity compliance across the Union (para 84).
287. We believe that improved communication is an important aim of the Protocol. A clear benefit of the new Protocol would be that the early warning mechanism would encourage and reward effective communication between

national parliaments and EU institutions and amongst national parliaments themselves (para 86).

288. Whatever their thoughts on the practicability of the early warning mechanism, parliaments are enthused by the hope that enhanced subsidiarity monitoring would lead to greater involvement of national parliaments in European lawmaking (para 250).
289. We agree that effective scrutiny measures for EU legislation in general are necessary and will vastly improve subsidiarity monitoring across Europe (para 258).
290. The innovation providing for draft European legislative acts to be transmitted directly to national parliaments is to be warmly welcomed (para 132).
291. The protocols laid out in the Constitutional Treaty specify that national parliaments can only trigger the early warning mechanism if they object to the proposal on grounds of subsidiarity, not on grounds of proportionality. We regret this (para 76).

Making the mechanism work—Procedure in the House

292. In view of the political significance of the exercise of a vote under the early warning mechanism, we recommend that the House itself should cast the vote (subject to our conclusion in paragraph 99) (para 95).
293. We recommend that in this House the trigger for a debate and decision on whether to cast a vote under the early warning mechanism should be a report from our Committee (para 96).
294. The House could agree that the exercise of its vote on any legislative proposal would be delegated to the EU Select Committee in the event of a six week period expiring during a recess, unless the House had already come to a decision on the proposal in question (para 99).
295. We recommend to the House that the operation of the early warning mechanism should be kept separate from the House's current Scrutiny Reserve under which we currently operate (para 100).
296. We recommend that the Government should not support a proposal in Council which has been the subject of a subsidiarity yellow card in either House of Parliament without first further explaining to Parliament its reasons for doing so (para 101).
297. We disagree with the suggestion that the two Houses must co-ordinate their response in individual cases. However, we recognise that although each chamber has its own vote it will be desirable for the House to work with the Commons on subsidiarity issues and, where possible, for the two Houses to support each other when submitting reasoned opinions. In spite of this, it is important to note that if the two Houses do reach a different view on whether a yellow card should be raised in a particular case their votes would not cancel each other out—it will just be that the threshold is not one step closer to being reached (paras 107-108).

Working within the six-week period provided by the Treaty

298. As the six-week timeframe is short we fully expect the EU institutions to ensure that proposals reach national parliaments at the same time as they

reach national governments to give parliaments the opportunity to scrutinise them fully and do so in the light of each other's deliberations. We warmly welcome this new system as it will strengthen the process of parliamentary scrutiny and prompt national parliaments to investigate and act on breaches of the principle of subsidiarity in good time (paras 113-114).

299. We recommend that the Commission should inform national parliaments when consultation on a legislative act is launched (para 115).
300. We welcome the commitment by the Government to assist parliament during the six week period. We expect the Government to assist parliament as early as possible in the six week period and to provide a detailed analysis in each case of the application of the subsidiarity principle. Such an analysis should take the form of the quantitative and qualitative analysis the Commission would be required to produce by Article 5 of the Protocol (para 134).
301. Whilst we recognise that an analysis of subsidiarity issues upstream would be beneficial, the full subsidiarity implications of EU action in a particular field would not be clear until a draft legislative proposal has been tabled (para 145).

The early warning mechanism and the EU Institutions

302. Although we recognise that the Commission has previously carried out checks on their proposals to ensure compliance with subsidiarity, the new protocol is to be warmly welcomed as it will once again highlight this responsibility (para 117).
303. Even below the one-third threshold, the higher the number of objections from parliaments, the greater the political pressure would be on the Institutions concerned to review the draft. However we would warn against too much tactical manoeuvring at this stage. National parliaments should examine each case on its own merits and not just act on a speculative calculation as to whether or not the threshold will be reached. If national parliaments do not act responsibly, the process will be devalued (paras 120-121).
304. We share the view that the raising of a yellow card would have a significant impact on the EU institutions. We consider that if national parliaments operate the mechanism effectively it would be hard for the Commission and the Council to resist such sustained political pressure (para 126).
305. We conclude that the Treaty does not clearly provide whether or not the early warning mechanism applies again in the case of a legislative proposal amended during negotiations in the Council and the Parliament, and we would welcome clarification from the Government on this point (para 141).

Collaboration and co-ordination between national parliaments

306. Exchange of information between national parliaments would in our view be highly desirable to ensure the effective operation of the Protocol. Although the Commission may listen to solitary objections to placate the Member State involved, co-ordinated objections are likely to carry more weight. We hope, too, that the new Protocol will encourage co-operation between national parliaments for wider informative and constructive purposes (para 155).

307. The House should continue its work of ensuring the national parliaments influence the European legislative process at all stages and should in particular continue to develop links with MEPs from all Member States (para 260).
308. We continue to support the development of the IPEX project. When the website is ready for use it will be an invaluable tool in achieving close collaboration between national parliaments with the aim of improving subsidiarity scrutiny (para 163).

Monitoring the mechanism

309. It is unclear whether the Constitutional Treaty intends subsidiarity monitoring to be a legal or simply a political obligation for each Member State and national parliament. In practice it would be up to each parliament to decide the extent to which they would become involved in scrutinising subsidiarity compliance. While there may be no enforceable legal obligation upon them to do so, in our view the political pressure would be such that they ought to feel obliged to carry out this scrutiny fully (para 170).
310. It is clear that the Commission and other EU institutions would intensify their subsidiarity checks in order to pre-empt the raising of yellow cards by national parliaments. We welcome this (para 176).
311. The Commission's annual report on subsidiarity is to be welcomed and will be received with interest (para 178).
312. Subsidiarity checks by the Government, and the assessments promised under Clause 3 of the European Union Bill, should be rigorous and detailed whether or not the Protocol comes into force. The Government's subsidiarity assessment should, as now, be part of the explanatory memoranda furnished by the government on each legislative proposal (para 180).
313. We expect, given the short time frame allowed, that the Government's subsidiarity assessment will be received by Parliament no later than two weeks after submission of the draft legislative proposal. This is the timetable to which the Government currently works. In the event of a delay in preparation of an Explanatory Memorandum, the subsidiarity analysis should if necessary be presented separately to avoid delay (para 181).
314. The new procedures will enhance openness and accountability, by subjecting the Government's assessments to public scrutiny by Parliament, which is all for the good. In addition, we will begin our analysis of draft legislative proposals as soon as they are received (para 182).

The Role of Regional Assemblies

315. The Federal Trust suggest that "Regional parliaments and regional authorities ought to be made aware of forthcoming legislation at the time of the presentation of the Commission's Annual Programme, and to monitor the gradual emergence of policy proposals". We agree and recommend that the Government sets the necessary mechanisms in place (para 199).
316. The views of regional assemblies can best be presented to Parliament through a sustained dialogue between the two authorities. Effective communication would help to ensure the smooth operation of the early warning mechanism (para 202).

317. The two Houses should ensure that the views of regional assemblies with legislative powers submitted to one House are available to both (para 204).
318. The potential for problems to arise from clashes of opinion between Parliament and Regional Assemblies with legislative powers should be a topic for consideration before such problems materialise. A system will have to be constructed for dealing with such differences of opinion fairly and efficiently (para 209).
319. It is for regional and local authorities themselves to decide how best to work with their European counterparts. We recognise the potential benefits of such co-operation and would urge regional and local authorities to continue making progress in this field (para 213).

Article 8

320. A number of questions in relation to Article 8, not least the extent to which it would impose any obligation on the executive to bring an action on behalf of the national parliament or a chamber of it (para 215).
321. The ability of a national parliament, or a chamber of a national parliament, to trigger proceedings under Article 8 is not subject to any precondition that that parliament, or chamber of it, should have sent a reasoned opinion under Article 6. Nor is any challenge under Article 8 limited to the reasons set out in any reasoned opinion given under Article 6. Nonetheless the failure to raise the yellow card might cast doubts on the merits of a challenge where the substance of the act in question has not changed and thus have a prejudicial effect on the chances of success of a challenge (para 221).
322. We ask the Government to clarify whether Article III-365 would apply to an action notified under Article 8 by a Member State on behalf of a national parliament (or a chamber thereof) (para 227).
323. We do not accept that it is in accordance with the letter and the spirit of Article 8 that “careful consideration” by the executive of a request from our Parliament (or a chamber of our Parliament) would suffice. We are also not clear what the legal or political justification of the Government’s interpretation is (para 234).
324. We ask the Government to clarify first what the position would be in the United Kingdom. Given our national “legal order” would the executive be required to act if either House of our parliament resolved that a challenge be notified under Article 8? If not why not and is this interpretation in accordance with the provisions of Article 8? We also ask the Government to set out in full to Parliament how other Member States interpret the effect of this provision (paras 235–236).
325. In particular we ask the Government what their interpretation is of the changes recently made to the French Constitution (para 237).
326. We ask the Government to confirm that the national parliament (or chamber) should remain in control of any application (para 239).
327. The Protocol reaffirms that application of the principle of subsidiarity must be properly substantiated in each case. National parliaments can be expected to look closely at this and can reasonably expect the Court to do likewise (para 243).

328. It is to be hoped that the Court will take a more critical approach to subsidiarity, particularly in ensuring that the justification for action at Union level is adequate (para 244).
329. We recommend that the Government make it their practice, if the Constitutional Treaty comes into force, to keep Parliament fully informed of any changes to a European legislative act during its passage that might give rise to a subsidiarity objection after adoption (para 247).
330. In this chapter 5 we have raised a number of complex but in our view highly significant questions about the meaning and effect of Article 8. We will await the answers, and the House's debate on the matters raised, with considerable interest. We will in due course return to the question whether any of these issues are matters needing to be dealt with by way of amendments to the European Union Bill (para 248).

APPENDIX 1: TEXT OF TREATY ARTICLE AND PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

ARTICLE I-11

Fundamental principles

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

PROTOCOL 2 – PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

The High Contracting Parties

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality as laid down in Article I-11 of the Constitution, and to establish a system for monitoring the application of those principles.

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe.

ARTICLE 1

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

ARTICLE 2

Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

ARTICLE 3

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

ARTICLE 4

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

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

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

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

ARTICLE 5

Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

ARTICLE 6

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

national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

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

ARTICLE 7

The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of bicameral Parliamentary system, each of the two chambers shall have one vote.

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

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

ARTICLE 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

ARTICLE 9

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

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked ** gave both oral and written evidence; those marked * gave oral evidence only; those without an asterisk gave written evidence only.

Eileen Armstrong, Local Government Association

Brethren in Britain

Richard Corbett MEP*

Adam Cygan, University of Leicester

Brendan Donnelly, The Federal Trust

Andrew Duff MEP**

Her Majesty's Government

House of Commons European Scrutiny Committee

The President, The Conference of European Regional Legislative Assemblies

Dr Denis MacShane, The Foreign and Commonwealth Office

Anna Vergés, The Federal Trust

Commissioner António Vitorino, European Commission

Commissioner Margot Wallström, European Commission*

Professor Stephen Weatherill, Oxford University**

Professor Derrick Wyatt, Oxford University**

Papers were also received from:

Report by the European Affairs Committee of the Danish Parliament entitled "*Report on reforming the Folketing's treatment of EU issues*". It has not been printed but is available for inspection at the House of Lords Record Office (020 7219 5314).

Report from the Joint Committee Subsidiarity from the Dutch Parliament concerning the parliamentary procedure for European draft legislative acts. It is not printed but is available for inspection at the House of Lords Record Office (020 7219 5314).

Report from the National Assembly Parliament for the European Union for the French National Assembly entitled "*Towards a more Democratic and Efficient Europe: National Parliaments and the Subsidiarity Principle*". It is not printed but is available for inspection at the House of Lords Record Office (020 7219 5314).

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords European Union Committee has decided to examine the provisions for strengthening subsidiarity as set out in the proposed Constitutional Treaty agreed at the June European Council. In particular, the Committee will wish to explore how the “early warning mechanism” for monitoring subsidiarity compliance would work in practice. Noting that each Chamber of a bicameral National Parliament would have its own vote, the Committee intends to advise the House of Lords on how the mechanism would operate in the House of Lords.

The principle of subsidiarity is defined in **Article I-9** of the Constitutional Treaty and implies that decisions must be made as close to citizens as possible. The “early warning mechanism” as described in the **Protocol on the application of the principles of subsidiarity and proportionality** aims to strengthen national Parliaments’ ability to monitor the Union’s observance of the principle of subsidiarity. Extracts from the latest text of the Treaty are appended.

The Committee would be pleased to have your views. The Committee will in particular wish to explore the following key issues in detail and would welcome your views on any or all of the following questions:

Subsidiarity and its monitoring

Treaty Article I.9 defines the principle of subsidiarity. How is this principle applied in practice?

Is it possible to identify criteria to measure the application of the principle of subsidiarity and, if so, what might they be? On what grounds can infringement of the principle be assessed?

Is monitoring of subsidiarity compliance voluntary for national Parliaments or (as appears to be implied by Article I.9 (3)) a Treaty obligation?

Which other bodies are or should be responsible for monitoring compliance? In particular what are the responsibilities of the Member States, the Committee of the Regions and regional assemblies?

The role of regional assemblies

Is it the role of regional assemblies with legislative powers to produce their own assessments of subsidiarity compliance or to hold the Government’s assessment (via Explanatory Memoranda) to account?

How best can the views of the regional assemblies with legislative powers be presented to the national Parliament?

Through what procedures would such an objection be brought to the attention of the national Parliament so as to allow them to be taken into account as required by the Protocol?

Procedure within the House of Lords

Would an objection require the agreement of the whole House or could the responsibility be delegated to a committee?

If an objection required the agreement of the House what procedure would be followed and how would the necessary time for debate be secured? If a committee

were to decide, what expertise and resources would such a committee require? Would the European Union Committee be able to fulfil this role?

Should there be formal exchange of information between the two Houses on how each House is intending to proceed with regard to a particular legislative proposal?

What effect will Parliamentary recesses have on the operation of the mechanism in the Lords?

Collaboration with other national parliaments

Should national Parliaments co-ordinate their objections across the EU (as opposed to merely exchanging information)? If so, how can this be achieved and, in particular, would there be any virtue in agreeing a common understanding of what subsidiarity means?

In the absence of such co-ordination what effect would objections on multiple, and perhaps contradictory, grounds create?

In any event, to facilitate information exchanges, what use could be made of the IPEX website or the COSAC email exchange network to communicate objections?

Timing

How can the mechanism be operated so that the votes of national Parliaments are submitted and collated within a six week time-frame?

What use can be made of electronic documentation to facilitate quick exchange of communication between institutions?

How can we ensure meaningful exchange of information between national Parliaments given the short timeframe for submissions?

Judicial review

Can a failure by the European Institutions to amend or withdraw a draft act that has been objected to by a quorum of national Parliaments be challenged at any stage before adoption?

Article 7 of the Protocol is innovative in giving the ECJ jurisdiction to hear a case brought or notified by a Member State “on behalf of [a] National Parliament or a chamber of it” objecting to a breach of the principle of subsidiarity in a legislative act as adopted. In what circumstances and through which procedures would the Government take to the ECJ an objection raised by the House of Lords?

Should national Parliaments and the Committee of the Regions operate together in deciding whether or not to seek a challenge under Article 7?

GUIDANCE TO THOSE SUBMITTING WRITTEN EVIDENCE

Written evidence is invited in response to the questions above, to arrive by no later than Tuesday 12 October 2004.

The questions above cover a broad range of topics and there is no need for individual submissions to deal with all the issues. Evidence should be kept as short as possible: submissions of not more than four sides of A4 paper of free-standing text, excluding any supporting annexes, are preferred. Paragraphs should be numbered.

Evidence should be sent in hard copy and electronically to the addresses below.

Evidence should be attributed and dated, with a note of the author's name and position. Please state whether evidence is submitted on an individual or corporate basis.

Evidence becomes the property of the Committee, and may be printed or circulated by the Committee at any stage. You may publicise or publish your evidence yourself, but in doing so you must indicate that it was prepared for the Committee.

Submissions will be acknowledged. Any enquiries should be addressed to: Simon Burton, Clerk of EU Select Committee, Committee Office, House of Lords, London, SW1A 0PW; telephone 020 7219 6083; fax 020 7219 6715; email euclords@parliament.uk.

This is a public call for evidence. You are encouraged to bring it to the attention of other groups and individuals who may not have received a copy directly.

Appendix 1

TITLE III

UNION COMPETENCES

Article I-9: Fundamental principles

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

2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.

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

The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3.

Source: extract from *2003/2004 IGC Provisional consolidated version of the draft Treaty establishing a Constitution for Europe (CIG 86/04)*. The full text can be accessed at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf>.

Appendix 2

Protocol

on the application of the principles of

subsidiarity and proportionality

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as enshrined in Article I-9 of the Constitution, and to establish a system for monitoring the application of those principles by the Institutions,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe:

Article 1

Each Institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-9 of the Constitution.

Article 2

Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for the decision in its proposal.

Article 2a

The term “draft European legislative act” shall denote Commission proposals, initiatives of groups of Member States, initiatives of the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act.

Article 3

The Commission shall forward its proposals for European legislative acts and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator.

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

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

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

Article 4

Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.

This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional

legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Article 5

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

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

Article 6

The European Parliament, the Council of Ministers and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

Where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments and their chambers, the draft must be reviewed. This threshold shall be a quarter in the case of a draft

European legislative act submitted on the basis of Article III-165 of the Constitution on the area of freedom, security and justice.

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

Article 7

The Court of Justice of the European Union shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

In accordance with the same Article of the Constitution, the Committee of the Regions may also bring such actions as regards European legislative acts for the adoption of which the Constitution provides that it be consulted.

Article 8

The Commission shall submit each year to the European Council, the European Parliament, the Council and the national Parliaments a report on the application of Article I-9 of the Constitution.

This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.

Source: extract from 2003/2004 IGC Provisional consolidated version of the Protocols annexed to the Treaty establishing a Constitution for Europe and of Annexes I and II (CIG 86/04 ADD 1). The full text can be accessed at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad01.en04.pdf>.

APPENDIX 4: REPORTS

Recent Reports from the Select Committee

Session 2002–03

Review of Scrutiny of European Legislation (1st Report Session 2002-03, HL Paper 15)

The Future of Europe: National Parliaments and Subsidiarity—The Proposed Protocols (11th Report Session 2002-03, HL Paper 70)

Government Responses: Review of Scrutiny of European Legislation, Europol's Role in Fighting Crime; and EU Russia Relations (20th Report Session 2002-03, HL Paper 99)

The Future of Europe—The Convention's Draft Constitutional Treaty (41st Report Session 2002-03, HL Paper 169)

Annual Report (44th Report Session 2002-03, HL Paper 191)

Session 2003–04

The Future Role of the European Court of Justice (6th Report Session 2003-04, HL Paper 47)

Remaining Government Responses for Session 2002–03 (7th Report Session 2003-04, HL Paper 60)

Proposed Constitutional Treaty: Outcome of the Irish Presidency and the Subsidiarity Early Warning Mechanism (22nd Report Session 2003-04, HL Paper 137)

Annual Report 2004 (32nd Report Session 2003-04, HL Paper 186)

Session 2004–05

Developments in the European Union: Evidence from the Ambassador of the Grand Duchy of Luxembourg and the European Parliament's Constitutional Affairs Committee (3rd Report Session 2004-05, HL Paper 51)