European Committee
of the Regions

Practical guide
on monitoring compliance with the subsidiarity principle
and contesting its infringements

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I. Introduction

This guide offers a comprehensive examination of the CoR's approach to monitoring compliance with the subsidiarity principle and its reactions to possible infringements of this principle, focusing on the legal dimensions thereof. Its aim is to explain the legal basis of the subsidiarity principle under the Treaties and the application thereof as well as to provide legal practitioners and policymakers at the European Committee of the Regions (‘the CoR’) with practical insights and strategies to effectively prevent, manage and resolve instances of infringement of this principle.

1. Purpose of this guide

This document should be used as:

- a practical guide for identifying infringements of the subsidiarity principle in a legislative proposal (in its original or amended form);
- a practical guide for preparing opinions that highlight and challenge those infringements, on the basis of well-researched facts and the necessary documentary evidence;
- a reference document, to remind readers of the procedure that the CoR needs to follow in order to adopt a decision to bring an action before the Court of Justice of the European Union (the ‘CJEU’) for infringement of the subsidiarity principle; this document sets out the steps to be taken to prepare and lodge such action.

This practical guide is addressed in particular to rapporteurs and their teams for preparing and following up opinions in areas of mandatory consultation.

The aim of the guide is to alert those concerned to the importance of gathering as much documentary evidence as possible throughout the legislative procedure, especially when rapporteurs have identified possible infringements of the subsidiarity principle in the legislative proposal. Once the decision has been taken to bring an action before the CJEU, it is this documentary evidence that will put the CoR in a position to draft an application for annulment within the short space of time allowed.

2. Legal basis in the Treaties

The legal basis for the subsidiarity principle can be found in Article 5 of the Treaty on the European Union (TEU) and in Protocol No 2 to the Treaties.

Article 5 – Treaty on the European Union
"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".
(…)
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol (…)."

Within the limits of the Union's competences, subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities – that is, who should take action in the particular case concerned?

If the European Union (EU) has exclusive competence in an area[1], it is clear that it is the EU that should act. On the other hand, if the EU and the Member States share the competence, the principle clearly establishes a presumption in favour of the Member States taking action.

In such areas of shared competence, the EU should only act "*if Member States cannot achieve the objectives sufficiently and, by the reason of the scale or effects, the EU can achieve them better*" (Report from the Commission on subsidiarity and proportionality [COM(2010)547 final])[2].

Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality, provides the specific framework for the implementation of both principles when the EU adopts legal acts; it also makes it clear that the CJEU has jurisdiction to ensure that the subsidiarity principle is respected.

The link between the principle of proportionality and the principle of subsidiarity is quite clear in the CJEU case-law, and it is likely that this link will be maintained in the future[3]. Nevertheless, given the link between these two principles, an argument may be developed based on the subsidiarity principle, which at the same time includes a number of elements concerning proportionality.

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[1] According to Article 3 of the Treaty on the Functioning of the European Union (TFEU):
"1. The Union shall have exclusive competence in the following areas:
(a) customs union;
(b) the establishing of the competition rules necessary for the functioning of the internal market;
(c) monetary policy for the Member States whose currency is the euro;
(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010DC0547&qid=1714493595486
A thorough description and analysis of the principle of subsidiarity is available at: https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity.

[3] Jacques Ziller, Charlie Jeffery: *'The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe'*, study by the European University Institute, Florence, 2006, p. 63: https://op.europa.eu/mt/publication-detail/-/publication/e91f7567-8c09-43e1-b3b3-1b0765cc09cb.

II. The stages of the consultation procedure: understanding the monitoring of compliance with the subsidiarity principle

Concerns about subsidiarity will surface long before a definitive legal act is adopted. For that reason, this section will briefly review both the (1) pre-legislative and (2) legislative phases, followed by (3) an overview of the information to be gathered to check compliance with the subsidiarity principle and/or to draft an action for annulment.

1. Pre-legislative phase

During the pre-legislative phase, i.e. before the CoR is formally consulted with a request for its opinion in the legislative phase, the focus will be on three constituent steps. Firstly, the European Commission's ("the EC" or "the Commission") consultation process and impact assessment will be examined briefly (a). Next, and where applicable, the CoR's contribution to the Commission's consultation and impact assessment will be analysed, emphasising its significance in evaluating socio-economic, environmental and territorial implications (b). Lastly, attention will be given to the opinions of national parliaments and possibly those of regional parliaments with legislative powers, highlighting their role in ensuring legislative alignment with subsidiarity principles and national interests (c).

a. The European Commission's consultation process and impact assessment

Prior to issuing a legislative proposal, the EC engages in an extensive **consultation process**. This may involve green papers, white papers and communications, and consultations of national experts, international organisations and/or non-governmental organisations.

Article 2 – Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality: *"Before proposing 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".*

The consultation process is followed by the EC's **impact assessment**. This is described as a "set of logical steps" designed to help the EC assess "the potential economic, social and environmental consequences of a legislative initiative"[4] and "a tool to help the three institutions reach well-informed decisions and not [as] a substitute

[4] Working Document on 'Better Regulation Guidelines', 3.11.2021, SWD(2021)305 final, especially Chapter IV, 'Impact assessment' - https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

for political decisions within the democratic decision-making process"[5].

An impact assessment is therefore a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impact.

The EC strives for the full involvement of stakeholders in the impact assessment process. A consultation process is also launched among the different Commission departments in order to ensure that all aspects of the matter in question are taken into account (inter-service consultation).

Crucially, an impact assessment also helps to explain why action is necessary at EU level and why the proposed response is an appropriate choice. It may of course also demonstrate why no action at EU level should be taken.

In other words, the EC performs thorough subsidiarity and proportionality analyses of all policy options in its impact assessment. These analyses focus on explaining whether there is a need for and/or added value in EU action.

Article 5 – Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality: *"Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft 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 directive, 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 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."*

The Commission's subsidiarity assessment can be backed up by an assessment grid, a methodological tool initially developed by the CoR and endorsed by the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently'[6]. The grid allows ''a common understanding'' of the principles of subsidiarity and proportionality[7] and identifies several arguments relating to the subsidiarity principle and relevant in the context of the initiative concerned. The EC methodology is explained in its Better Regulation Guidelines and Toolbox[8]. Arguments need to be substantiated with

[5] Commission Staff Working Document on 'Better Regulation Guidelines', 3.11.2021, SWD(2021)305 final, especially Chapter IV, 'Impact assessment' - https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

[6] A model of the Subsidiarity Assessment Grid based on the CoR's own work is included in Annex V of the Final Report of the 'Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', 10 July 2018
a) Report-task-force-subsidiarity-proportionality-doing-less-more-efficiently_2.pdf (europa.eu)
b) CoR Grid: Subsidiarity_Assessment_Grid.docx (europa.eu).

[7] COM (2021) 219 on 29.4.2021, Better regulation: Joining forces to make better laws.

[8] EC 'Better regulation' toolbox 2023 - 0d46029a-aaa8-4c21-bc51-cf9fdbef1f51_en (europa.eu). Each chapter of the toolbox can also be consulted via the following link: Better regulation: guidelines and toolbox (europa.eu).

qualitative and, where possible, quantitative evidence[9].

<table><tr><td>
The following examples of questions from the Commission’s Toolbox and assessment grid[10] focus on this matter:
Perform the necessity/relevance test
- can/have the objectives of the (proposed) action be(en) achieved sufficiently by the Member States acting alone?
- how do the views/preferred courses of action of national, regional and local authorities differ across the EU?
- would national action or the absence of EU level action conflict with the Treaty or significantly damage the interests of other Member States?
- are there transnational/cross-border aspects to the problem? Can these been quantified?
Perform the EU added value test
- can the objectives of the proposed action be better achieved at Union level by reason of the scale or effects of that action?
- are there clear benefits from EU level action?
- are there economies of scale? Can the objectives be met more efficiently at EU level?
With regard to the existing legislation and its revisions, the mentioned Commission’s toolbox notes: “When revising existing legislation, an evaluation should be the starting point. Its results should be used to verify whether the legislation is still necessary and in line with the subsidiarity principle, and which specific provisions should be modified having proven ineffective, excessively costly or outdated.”[11]
Moreover, the EC Better Regulation Guidelines stipulate that the impact assessment process should “explain the necessity and added value of EU action guided by the questions included in the ‘subsidiarity grid’ that must be presented as a linked staff working document with each politically sensitive and important initiative accompanied by an impact assessment,”[12]
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An impact assessment may also be necessary in cases where the EP and/or the Council contemplate any later substantive modifications to the EC’s legislative proposal. Here, the Commission’s original impact assessment serves as the starting point.

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[9] *'Evidence' refers to multiple sources of data, information, and knowledge, including quantitative data such as statistics and measurements, qualitative data such as opinions, stakeholder input, conclusions of evaluations, as well as scientific and expert advice. The official portal for European data: data.europa.eu is an important source of open data.*', Commission Staff Working Document on 'Better Regulation Guidelines', 3.11.2021, SWD(2021)305 final, Chapter I, 'Key concepts and principles of 'Better Regulation' - https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

[10] EC ‘Better regulation’ toolbox 2023, pp. 33 and 34 - 0d46029a-aaa8-4c21-bc51-cf9fdbef1f51_en (europa.eu).

[11] EC 'Better regulation' toolbox 2023, Chapter 2 "How to carry out an impact assessment" - c0561a9c-d112-4d20-b1ec-145748e2c61c_en (europa.eu).

[12] Commission Staff Working Document on 'Better Regulation Guidelines', p. 36, 3.11.2021, SWD(2021)305 final - https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf.

Inter-institutional Agreement on Better Law-making[13], point 15:

“The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission’s proposal. The European Parliament and the Council will, as a general rule, take the Commission’s impact assessment as the starting point for their further work. The definition of a ‘substantial’ amendment should be for the respective Institution to determine.”

Impact assessment reports are published with the proposals or with acts adopted by the Commission[14], together with the subsidiarity grid, among other documents. CoR rapporteurs’ teams are strongly encouraged to obtain copies of the following documents relating to a legislative proposal, insofar as they have actually been drawn up:

(a) Green and White Papers, including the outcome of the relevant consultation;

(b) Commission communications;

(c) Impact assessment(s), to be found at:

- the EC’s Impact Assessment website:

Impact assessments - European Commission (europa.eu); or

- the legislative observatory of the EP, ‘Oeil’:

http://www.europarl.europa.eu/oeil/

(d) Experts’ reports;

(e) Results of consultations of national experts, international organisations and/or non-governmental organisations.

b. The European Committee of the Regions’ contribution to the European Commission’s impact assessment

The added value of specific local and regional points of view was acknowledged as a priority in the “Protocol on cooperation between the European Commission and the European Committee of the Regions”, which explicitly mentions the CoR’s participation in impact assessment exercises carried out by the EC[15].

By carrying out consultation when drafting a legislative proposal, the Commission can better anticipate the territorial impact thereof and promote the principle of “active subsidiarity”. This entails national parliaments and local and regional authorities providing contributions in the pre-legislative phase to help the EC calibrate its proposals in the specific context of multi-level governance[16].

[13] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, 13.04.2016 - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29.

[14] https://ec.europa.eu/transparency/documents-register and Register of Commission Documents (europa.eu).

[15] 'Protocol on cooperation between the European Commission and the European Committee of the Regions', points 16, 17 and 27, 20.3.2024, (C/2024/2478) - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202402478.

[16] Report on "Active Subsidiarity – A new way of working" drafted by the Task Force on Subsidiarity, Proportionality and ‘Doing less more efficiently’ - https://commission.europa.eu/document/download/8530a17b-e2b8-4cd4-a68d-597767cfbad7_en?filename=report-task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en.pdf.

Since the 2009 Lisbon Treaty, the CoR has had a unique role in the EU subsidiarity monitoring framework, with the right to take ex-post action before the Court of Justice of the European Union in cases where the subsidiarity principle is not respected. To facilitate this, the CoR has a comprehensive subsidiarity monitoring framework that is based on its 2012 Bureau Decision establishing a CoR subsidiarity monitoring strategy and on the 2018 update thereto[17].

Building on this strategy, the CoR has been monitoring the compliance with the subsidiarity principle using an approach centred on a comprehensive governance system that includes a Subsidiarity Monitoring Network (SMN) (with around 150 member authorities and organisations contributing to the monitoring of legislative initiatives), REGPEX (a subgroup of the SMN comprised of parliaments and governments representing regions with legislative powers) and a Subsidiarity Expert Group (SEG) (comprising up to 15 members).

The SMN aims to:

- enable local and regional authorities to be active in monitoring implementation of the subsidiarity and proportionality principles;
- raise awareness as regards practical implementation of the subsidiarity and proportionality principles;
- keep CoR rapporteurs and members informed about contributions regarding subsidiarity and proportionality from a representative network of local and regional stakeholders;
- identify measures for better law-making, cut back red tape and increase public acceptance of EU policies;
- act as a laboratory for identifying and exchanging best practice and experience between local and regional authorities regarding application of the subsidiarity principle and the decentralised implementation of EU policies at local level.

Subsidiarity monitoring, including through the contributions from the SMN and from experts, is steered at political level by the subsidiarity component of the CoR Better Regulation and Active Subsidiarity Steering Group (BRASS-G), a Bureau working group established in 2022[18].

Consultations designed to assess subsidiarity (and proportionality) principle compliance are possible through the tools and structures identified above (SMN, REGPEX, Subsidiarity Expert Group) on the basis of the subsidiarity assessment grid and tailor-made questionnaires. This mechanism allows stakeholders to identify – at a very early stage in the pre-legislative phase – potential problems relating to compliance with the subsidiarity principle. At the same time it gives the EC direct access to the

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[17] CoR Bureau, Subsidiarity Monitoring: A revised Strategy for the Committee of the Regions, 2 May 2012; CoR Bureau, Developing 'Active Subsidiarity' in the political work of the CoR, 4 December 2018.

[18] CoR Bureau decision, Active subsidiarity in practice: Better Regulation and Active Subsidiarity Steering Group, COR-2022-02422-23-00-NB-TRA-EN and COR-2022-02422-00-01-ANN-REF, 28 June 2022. See also, on the CoR website: https://portal.cor.europa.eu/subsidiarity/whatis/Pages/Subsidiarity-monitoring-at-the-CoR.aspx https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx.

views of local and regional authorities.

c. The role of national (and regional) parliaments

The Lisbon Treaty further strengthened the role of national parliaments in the legislative process. In particular, under the “early warning system” laid down in Protocols 1 and 2 to the Treaties, national parliaments act as subsidiarity principle “watchdogs” at an early stage in the decision-making procedure.

All proposals from the EC – as well as initiatives from a group of Member States or from the EP, requests from the CJEU, recommendations from the European Central Bank and requests from the European Investment Bank – for the adoption of a legislative act have to be sent to national parliaments. Under this “early warning system”, the national parliaments must receive draft legislative acts at the same time as the the co-legislators (Council and EP). Within 8 weeks of the date of transmission of a legislative act, national parliaments – or any chamber of a national parliament – can issue a reasoned opinion if they consider that the draft legislation does not comply with the subsidiarity principle. Thus, national parliamentary bodies have the opportunity to comment on European draft legislation independently of their governments, which are represented on the EU Council.

Under the “early warning system”, even regional parliaments with legislative powers become players in the EU legislative procedure, assessing whether draft legislative acts comply with the subsidiarity principle. This is possible if the national parliament concerned deems it appropriate to consult and include regional parliaments in the “early warning” consultation process.

More specifically, each national parliament has two votes, whereby each chamber has one vote in bicameral parliaments. Where the number of votes expressing non-compliance with the subsidiarity principle within the defined eight-week period is at least one third (one quarter in the area of Freedom, Security and Justice) of the total votes, a so-called ‘yellow card’ is triggered (Article 7(2) of Protocol No 2), the institution which is the author of the draft legislative act must review it. That institution may decide to maintain, amend or withdraw the draft legislative act in question (and must explain why).

In the framework of the ordinary legislative procedure, where the corresponding proportion of votes is at least a simple majority of the total number of votes (‘orange card’ procedure; Article 7(3) of Protocol No 2), the Commission must review the proposal, which it may then maintain, amend or withdraw. In the event of an ‘orange card’ being issued and the proposal being maintained, however, the Commission must explain in a reasoned opinion why the subsidiarity principle is being respected, and the EU legislator – the EP and the Council of the EU – are also called upon to individually assess whether it is a case of non-compliance. If, on the basis of these documents, the EP, by a simple majority of its members, and the Council, by a majority of at least 55% of its members, considers that the proposal is indeed incompatible with the subsidiarity

principle, it is abandoned[19].

In the EP, the recommendation will be submitted to for a debate and vote. If a recommendation to reject the proposal is adopted by a majority of the votes cast, the President shall declare the procedure closed. Where the EP does not reject the proposal, the procedure shall continue. This is also reflected in the Rules of Procedure of the European Parliament.

Rules of Procedure of the European Parliament - Rule 43 (Examination of respect for the principle of subsidiarity): *"1. During the examination of a proposal for a legislative act, Parliament shall pay particular attention to whether that proposal respects for the principles of subsidiarity and proportionality.* *2. Only the committee responsible for respect of the principle of subsidiarity may decide to make recommendations for the attention of the committee responsible for the subject-matter in respect of any proposal for a legislative act.* *3. Except in the cases of urgency referred to in Article 4 of the Protocol No 1 on the role of national parliaments in the European Union, the committee responsible for the subject-matter shall not proceed to its final vote before the expiry of the deadline of eight weeks laid down in Article 6 of the Protocol No 2 on the application of the principles of subsidiarity and proportionality.* *4. If a national parliament sends the President a reasoned opinion in accordance with Article 3 of the Protocol No 1 that document shall be referred to the committee responsible for the subject-matter and forwarded, for information, to the committee responsible for respect of the principle of subsidiarity.* *…* *5. Where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments in accordance with the second subparagraph of Article 7(1) of Protocol No 2, or a quarter in the case of a proposal for a legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union, Parliament shall not take a decision until the author of the proposal has stated how it intends to proceed.* *6. Where, under the ordinary legislative procedure, reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national parliaments in accordance with the second subparagraph of Article 7(1) of Protocol No 2, the committee responsible for the subject-matter, having considered the reasoned opinions submitted by the national parliaments and the Commission, and having heard the views of the committee responsible for respect of the principle of subsidiarity, may recommend to Parliament that it reject the proposal on the grounds of infringement of the principle of subsidiarity or submit to Parliament any other recommendation, which may include suggestions for amendments related to respect of the principle of subsidiarity. The opinion given by the committee responsible for respect of the principle of subsidiarity shall be annexed to any such recommendation."*

[19] 'Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments' (europa.eu), p. 9. The European Commission's comments relating to the informal political dialogue and the reasoned opinions from national parliaments are also available at: https://national-parliaments-opinions.ec.europa.eu/home and .

2. Legislative phase[20]

After the pre-legislative phase, the legislative phase unfolds through the EC's proposal, which is the result of the extensive consultation process (a). Emphasis will be placed on the CoR's opinions and their role in ensuring respect of the subsidiarity principle, and on its constant monitoring activity in close cooperation with the EP, EC and EU Council (b).

a. The European Commission's proposal

Under the Lisbon Treaty, normally only the EC may put forward legislative proposals ("right of initiative") except where the Treaty provides otherwise. The legal basis used by the EC will determine the legislative procedure.

Each EC initiative is accompanied by an explanatory memorandum intended to show, inter alia, that the proposal complies with the principles of subsidiarity and proportionality. As explained above, the proposal is forwarded simultaneously to the EP and to the Council but also to all national parliaments and, where applicable, to the CoR and to the European Economic and Social Committee.

b. The opinion of the European Committee of the Regions

The legal basis for the opinions of the CoR can be found in Article 307 TFEU. Different situations in which the CoR can issue its opinions are reflected in Rule 41 of its Rules of procedure (RoP).

Article 307 TFEU, first paragraph:

"The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate. (…)."

Rule 41 of the CoR's Rules of Procedure :

"The Committee shall adopt its opinions pursuant to Article 307 of the Treaty on the Functioning of the European Union:

(a) when it is consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate;

(b) on its own initiative when it considers it appropriate either:

i) based on a Communication, Report or Legislative proposal from another European Union institution sent to the Committee for information, or based on a request from the Member State that holds the current or next Presidency of the Council (facultative opinion);

[20] For a more detailed, step-by-step description of the ordinary legislative procedure, please also consult: https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/ https://www.europarl.europa.eu/olp/en/ordinary-legislative-procedure/overview.
Preparatory documents at: https://eur-lex.europa.eu/collection/eu-law/pre-acts.html.

or

ii) entirely on its own initiative and, pursuant to Rule 15, on the basis of the Committee's political priorities in all other cases (own political initiative opinion);

(c) when, in the event of the Economic and Social Committee being consulted under Article 304 of the Treaty on the Functioning of the European Union, it considers that specific regional interests are involved;

(d) when, upon a request from a European institution, the Committee is asked to prepare an outlook opinion on future Union policies before action is taken at Union level or on the implementation of a policy."

The CoR therefore adopts its opinions on the legislative proposals following the procedure mainly established in Rules 15 ('Tasks of the Plenary Assembly'), 42 ('Opinions – Designation of commission'), 43 ('Appointment of a rapporteur-general') and 55 ('Content of opinions') of its RoP.

The opinion of the CoR, together with a record of the proceedings, is then forwarded to the European Parliament, the Council and the Commission.

Even after adoption of the CoR's opinion following the procedure described in the Rules of Procedure, it is important to monitor the subsequent steps of the legislative procedure. In line with Rule 56 of the RoP, the CoR monitors the course of the procedure and promotes the CoR's position adopted in its opinion. This follow-up task is assigned by the RoP to the rapporteur and/or the chair of the commission designated to draw up the opinion.

This follow-up also underpins the CoR's intention to participate in the trilogue meetings held between the EC, the EP and the EU Council throughout the legislative procedure and specifically to have access to the so-called "four column" documents (Rule 58 RoP). Such participation and access to information would entitle the CoR to detect and anticipate potential non-compliance with the subsidiarity principle during the interinstitutional negotiating process.

Such monitoring ought to reveal the extent to which the final act, once adopted, will comply with the subsidiarity principle, in particular (but not exclusively) where the CoR opinion has raised subsidiarity concerns.

Opinion of the CoR on *Guidelines for the application and monitoring of the subsidiarity and proportionality principles* (2006/C 115/35):

"*3.15 points out, however, the need to follow up its assessment of the application procedures for the principles of subsidiarity and proportionality throughout the legislative process; in particular, rapporteurs will need to pay attention to whether discussions in the Parliament and the Council of Ministers have led to changes in the text that make the proposal incompatible with the subsidiarity or proportionality principle and inform the Committee (Bureau) if necessary.*"

However, it should be highlighted that the relationship between the CoR and the other institutions (mainly the EP) is not limited to the adoption of CoR opinions. Indeed, there are numerous contacts; in particular, CoR rapporteurs are being asked with increasing

frequency to speak at meetings of parliamentary committees, giving them an opportunity to raise (among other things) any concerns they might have about subsidiarity.

In the framework of the pre-legislative and legislative phases and with a view to introducing an action for annulment of a legislative act, it is essential to obtain a copy of:

(a) all amendments adopted by the EP;
(b) the EC's proposal as amended;
(c) the national and regional parliaments' legislative resolutions

in order to be able to assess whether:

(1) the CoR's suggestions for amendments – if any – have been taken into consideration and/or
(2) amendments adopted by the Parliament or the Commission's proposal as amended contain new elements that have the potential to infringe the subsidiarity principle.

These documents should be available through:

- Legislative Observatory (Oeil, http://www.europarl.europa.eu/oeil/),
- Lawmaking procedures section of the Eur-lex (https://eur-lex.europa.eu/collection/legislative-procedures.html), and
- EU Law Tracker (https://law-tracker.europa.eu/homepage?lang=en).

Oeil

The Legislative Observatory (Oeil) is the European Parliament's tool set up to monitor the EU's institutional decision-making process with a particular focus on the EP's role[21]. The Observatory consists of a series of comprehensive records in French and English, known as "procedure files". These files list all the documents and key events relating to a given procedure and the players involved at each stage.

The Observatory thus analyses and monitors the interinstitutional decision-making process in the European Union, the role of the European Parliament in shaping European legislation and the activities of the various institutions involved in the legislative procedure. It can also be used to stay up to date with the European Parliament's activities and to anticipate upcoming stages, including work in parliamentary committees and plenary sessions.

The database includes all texts examined and voted on in plenary. A "procedure file" is a file that sets out, in chronological order (as and when the information becomes available), events, documents, dates, people and services involved and related summaries. It enables users to: identify the procedure; monitor its progress step by step and understand the various developments; find out immediately what stage it has reached; and make use of the forecasts and deadlines for further stages in the procedure.

It contains: the identification references for the procedure; events involving documents in the course of the procedure; the provisional dates and deadlines set for the various stages of the procedure; references to those involved in the procedure: the parliamentary committee, the rapporteur, the political group, the relevant departments in the Commission and the Council, etc.; summaries of all the important

[21] https://oeil.secure.europarl.europa.eu/oeil/info/info2.do.

stages, on the basis of the documents (COM, SEC, etc.) or events related to the procedure (activities of the Commission, the Council and the European Parliament); and links to the full text of documents and the text published in the Official Journal.

Lawmaking procedures

EUR-Lex, which gives access to the stages of the procedure and to related documents, includes a section on "Lawmaking procedures" with information about procedures which lead to the adoption of EU legal acts. Additional information is also provided, such as the status of the procedure (ongoing, completed, stopped), type of procedure (e.g. ordinary legislative procedure, non-legislative procedure, etc.), legal basis, etc.

A file in the "Lawmaking procedures" website starts with the adoption of a Commission proposal (with the reference [COM(year)number]) and ends when the legislative act is adopted by the legislator. Between these two events, there is a series of identified events with links to relevant documents[22].

EU Law Tracker

Launched in April 2024 by the European Parliament, the Council, and the European Commission, the EU Law Tracker also enables users to follow the legislative process from the proposal of a legislative act to its adoption. It provides relevant information and documents from the various bodies involved in EU law-making, with a structure similar to previous tracking tools.

3. Information to be gathered

Collecting a comprehensive array of documents throughout the pre-legislative and legislative procedure allows the CoR to check whether and how the subsidiarity principle has been addressed during the procedure itself. In the event that the CoR is tasked with drafting an action for annulment, these documents can provide the basis for legal arguments and serve as supporting evidence, as Section III will further explain.

The documents to be collected are as follows:

- **Initial impact assessments drafted by the Commission**

As already mentioned (see section II 1 a) 'The EC consultation process and impact assessment'), impact assessments examine whether there is a need for EU action and analyse the possible impact of available solutions. These are carried out during the preparation phase, before the EC finalises a proposal for a new legislative act, e.g. legislative proposals, non-legislative initiatives and implementing and delegated acts.

[22] https://eur-lex.europa.eu/collection/legislative-procedures.html.

➢ **The reasoned opinions issued by national parliaments or a chamber of a national parliament and the corresponding reaction from the Commission**

It is important to obtain copies of reasoned opinions drawn up by national parliaments under the early warning system explained above (see section II 1 c), 'The opinions of national parliaments'). Copies can be found on the Interparliamentary EU Information Exchange website, IPEX (www.ipex.eu). IPEX is a platform for the exchange of EU-related information between national parliaments in the EU and the European Parliament. IPEX consists of a database containing documents from the EU institutions and parliamentary documents uploaded by the national parliaments themselves.

These documents are organised according to the specific EU document to which they relate. IPEX also hosts a calendar of interparliamentary cooperation which contains information concerning all Interparliamentary meetings relating to the European Union. In addition, IPEX provides links to relevant websites and databases as well as to EU-relevant pages on the websites of national parliaments.

➢ **Consultations initiated by the European Committee of the Regions throughout the legislative cycle**[23]

Consultations through the Subsidiarity Monitoring Network (SMN): SMN partners can submit their views on the way EU initiatives comply with the subsidiarity and proportionality principles by making contributions on their own initiative; these are uploaded onto the SMN website and sent to the CoR rapporteur for that particular topic and to the relevant CoR commission secretariat. Consultations can also be organised at the initiative of a CoR rapporteur on the basis of a tailor-made questionnaire (targeted consultations).

Consultations through the Subsidiarity Expert Group (SEG): SEG members provide subsidiarity analysis of a limited number of priority files selected by the SEG members in consultation with the CoR commissions' secretariats and included in the CoR Subsidiarity Work Programme. The subsidiarity analyses are submitted to the relevant CoR rapporteur and CoR commission secretariat.

Network of Regional Hubs (RegHub) consultations: when it comes to monitoring implementation of EU law on the ground, the CoR carries out targeted stakeholder consultations through its RegHub network. Its contact points provide information on the implementation of legislation relating to selected topics included in the RegHub Annual Work Programme, drawn up on the basis of the EC Annual Work Programme and the *Fit for Future Platform* Annual Work Programme[24]. Responses to the questionnaires feed into a RegHub report providing valuable first-hand information and detailed

[23] Information on all the tools mentioned in this paragraph is available in the Better Regulation and Active Subsidiarity section of the CoR website.
[24] Since 2020, the CoR RegHub has been a sub-group of the Commission's Fit for Future Platform (F4F), which involves conducting targeted consultations on the ground and supporting the work of the platform with implementation reports on topics with strong regional and local relevance, included in the F4F Annual Work Programme.

analysis of the implementation of the selected initiatives. The RegHub implementation reports serve as a useful reference in the preparation of CoR opinions and the collection of important data that can assist subsidiarity analysis.

Territorial Impact Assessment (TIA) and Rural proofing: The CoR carries out TIA and Rural proofing consultations through its network of experts at local and regional level and partner associations, which provide first-hand information and analysis of the impact of relevant legislative initiatives on regions and rural areas. Like the RegHub implementation reports, TIAs and Rural proofing serve as useful references in the preparation of CoR opinions and the collation of important data that can assist in subsidiarity analysis.

CoR rapporteurs also receive support from the relevant commission secretariat, which includes a policy analysis memo. A section of this memo is devoted to Better Regulation and includes a subsidiarity and proportionality analysis prepared by the secretariat, applying the methodology of the subsidiarity assessment grid.

- **Other impact assessments relating to amendments**

As already mentioned, subsequent substantial amendments to the Commission's proposals proposed by the EP or the Council can be accompanied by an additional impact assessment[25].

Again, it is worth mentioning that documents collected during negotiations on the legislative acts are available through:

- Legislative Observatory (Oeil, http://www.europarl.europa.eu/oeil/),
- Lawmaking procedures section of the Eur-lex (https://eur-lex.europa.eu/collection/legislative-procedures.html), and
- EU Law Tracker (https://law-tracker.europa.eu/homepage?lang=en).

- **Incorporating information into CoR opinions**

The CoR Rules of Procedure require opinions on legal acts in areas not falling within the Union's exclusive field of competence to express a view on a legislative proposal's compliance with the principles of active subsidiarity and proportionality. The aforementioned information will assist CoR rapporteurs that are presenting draft opinions to comply with this requirement. Other CoR opinions can also refer to the application of the subsidiarity and proportionality principles, as well as to the application of the principle of multilevel governance, whenever appropriate. Opinions should likewise indicate whether they incorporate evidence or information stemming from use of the CoR's better regulation toolbox (Subsidiarity Monitoring Network, Reg-Hub,

[25] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, 13.04.2016, point 15 - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01).

territorial impact assessments, opinions of Committee members in the Fit 4 Future Platform, rural proofing and strategic foresight).

Rule 55 (2) of the CoR's Rules of Procedure:

"Committee opinions on proposals for legal acts in areas not falling within the Union's exclusive field of competence shall express a view on the proposal's compliance with the principles of active subsidiarity and proportionality. Committee opinions may refer to the application of the active subsidiarity and proportionality principles whenever appropriate, as well as to the application of the principle of multilevel governance."

Guide (vade-mecum)[26]:

"The assessment shall be based on the methodology of the subsidiarity assessment grid."

Rule 55 (2) of the CoR's Rules of Procedure (continuation):

"Committee opinions may refer to the application of the active subsidiarity and proportionality principles whenever appropriate, as well as to the application of the principle of multilevel governance."

Guide (vade-mecum) (continuation):

"The Committee's view on compliance with the principles of active subsidiarity and proportionality should highlight any potential infringement of these principles in the draft legislative act, based on assessment using the Subsidiarity Assessment Grid. Where subsidiarity or proportionality issues have been identified, the opinion should also further explain the potential infringement of these principles and if feasible, propose amendments or other measures to ensure their compliance.

The Committee opinion should note if the European Commission proposal for a legal act or its accompanying documents do include a subsidiarity assessment grid.

The Committee's better regulation and active subsidiarity tools coordinated by its Better Regulation and Active Subsidiarity Steering Group in order to monitor the application of the principles of active subsidiarity, proportionality and multilevel governance are: the subsidiarity monitoring network, Reg-Hub, territorial impact assessments, opinions of Committee members in the Fit 4 Future platform, rural proofing, and strategic foresight – without prejudice for tools to be developed in the future.

Whenever evidential basis for recommendations in an opinion is based on the use of any of these tools, this shall be clearly indicated in the opinion.

These opinions shall also, wherever possible, address the expected impact on administration and regional and local finances."

Integration of this information into the text of the opinions is also facilitated by their standardised format.

[26] The Guide (vade-mecum) contains interpretations of the provisions of the Rules of Procedure, additional information on the implementing arrangements for the Rules of Procedure and references to implementing texts adopted by the CoR Bureau. The text of the Vademecum is not part of the Rules of Procedure.

III. Challenging an act before the CJEU: the steps for contesting infringements of the subsidiarity principle

In contesting infringements of the subsidiarity principle before the CJEU, two key articles come into play: Article 8(2) of Protocol No. 2 to the Treaties on the application of the principles of subsidiarity and proportionality, and Article 263 TFEU.

Article 8(2) specifically addresses actions brought in the event of an infringement of the subsidiarity principle, while Article 263 TFEU outlines the general conditions for bringing an action for annulment.

This section will first present the legal basis for bringing an action for annulment in the event of an infringement of the subsidiarity principle (1) and then explore the CoR's internal decision-making process when deciding whether to bring such an action (2).

1. Legal basis for bringing an action for annulment in the event of an infringement of the subsidiarity principle

The CoR has the right to introduce proceedings before the CJEU to seek the annulment of new legislation considered to be non-compliant with the subsidiarity principle in policy areas where the Treaties provide for its prior obligatory consultation. The conditions for the CoR to bring such actions are defined in Article 8(2) of Protocol No 2 to the Treaties. This provision refers to Article 263 TFEU, which sets the general conditions for actions for annulment for various types of applicants.

Article 8 of Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality:

"*The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.*

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted."

Article 263 TFEU:

"*The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

(…)

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

According to the above-mentioned provisions, three conditions must be fulfilled to bring an action for annulment before the CJEU in defence of the subsidiarity principle.

➢ ***Mandatory consultation (first condition)***

The CoR has been given the right to defend the principle of subsidiarity by bringing an action for annulment against a legislative act that infringes the principle, provided it falls within an area in which the CoR's consultation is mandatory.

Therefore, according to Article 8(2) of the Protocol No 2 to the Treaties, an action for annulment cannot be brought by the CoR against a legislative act in respect of which:

- the CoR was consulted, but which falls outside the scope of mandatory consultation (namely, optional consultation), or
- the CoR issued an own-initiative opinion.

According to the Treaty on the Functioning of the European Union (TFEU) the fields where the CoR's consultation is mandatory are the following:

- Transport (Articles 90, 91 and 100 TFEU)
- Employment (Articles 148, 149 TFEU)
- Social policy (including European Social Fund, ESF) (Articles 153 and 164 TFEU)
- Education, youth and sport (Article 165 TFEU)
- Vocational training (Article 166 TFEU)
- Culture (Article 167 TFEU)
- Public health (Article 168 TFEU)
- Trans-European networks (Article 172 TFEU)
- Economic, Social and Territorial Cohesion (including Structural Funds) (Article 175, 177 and 178 TFEU)
- Environment (Article 192 TFEU)
- Energy (Article 194 TFEU).

➢ ***Legislative act (second condition)***

An action for annulment before the CJEU on grounds of infringement of the subsidiarity principle can only be brought against a "legislative act". The definition of a legislative

act can be found in the Article 289(3) TFEU, according to which "*legal acts adopted by legislative procedure shall constitute legislative acts*". According to the CJEU, a "*legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure*"[27]. Therefore, it is the procedure leading to the adoption of the act which is important, and not, for example, its legal nature – regulation, directive or decision. As mentioned, the legislative procedure leading to the adoption of a legislative act can be either the "ordinary legislative procedure"[28] or the "special legislative procedure"[29]. Legislative acts are to be distinguished from delegated or implementing acts adopted under Articles 290 and 291 TFEU[30].

- ***Time constraints (third condition)***

Proceedings have to be launched within two months plus fourteen days (i.e. around 10 weeks) from the day of publication of the act in the Official Journal (OJ) of the EU. It follows that the CoR's position needs to be well prepared in advance through the decision-making process developed below[31].

During those 10 weeks, the CoR President or the commission responsible for drawing up the draft opinion will have to formally propose bringing an action, and the Plenary or the Bureau will have to adopt a decision to that effect.

It should be borne in mind that the CoR has no say in the date on which a measure is adopted and/or published in the Official Journal. It is thus not possible to schedule Bureau meetings or Plenary Sessions in a way that would ensure that they fall within the 10-week deadline. As a consequence, recourse to decisions by written procedure might be needed.

[27] Judgment of the Court of Justice of 16 September 2017 in Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary / Council of the European Union, ECLI:EU:C:2017:631, par. 62.

[28] According to Article 289(1) TFEU, "the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294".

[29] According to Article 289(2) TFEU, "in the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure". As Article 289(4) adds, "in the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank".

[30] See, for example, the judgment of the Court of Justice of 20 September 2017 in case C-183/16 P Tilly-Sabco/Commission, ECLI:EU:C:2017:704, par. 88.

[31] Article 50 of the Rules of Procedure of the Court of Justice - "Proceedings against a measure adopted by an institution":"*1. Where the time-limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure, that period shall be calculated, for the purposes of Article 49(1)(a), from the end of the 14th day after publication of the measure thereof in the Official Journal of the European Union".*

2. The European Committee of the Regions' decision to bring an action for annulment: the internal decision-making process

As indicated above, Article 8 of Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality entitles the CoR to bring an action for annulment before the CJEU against an EU legislative act for alleged infringement of the subsidiarity principle, as set out in Article 263 TFEU.

The internal CoR decision to bring an action for annulment is taken in accordance with rules laid down in its Rules of Procedure. Such actions may be proposed to the Plenary Assembly either by the President or by the relevant commission acting in accordance with Rule 59. The Plenary Assembly, having previously verified that more than half of its members are present, will then take a decision by a majority of the votes cast in accordance with the provisions of Rule 24(2), (4), (5) and (7). When such a decision is adopted, the action shall be brought by the President on behalf of the Committee

Rule 59 - Action for infringement of the subsidiarity principle:
"1. The President or the commission responsible for drawing up the draft opinion may propose bringing an action or an application to intervene before the Court of Justice of the European Union for infringement of the subsidiarity principle by a legislative act on which the Treaty on the Functioning of the European Union provides that the Committee be consulted.
2. The commission shall take its decision by a majority of the votes cast, having verified the existence of the quorum referred to in Rule 65(1). The commission proposal shall be sent for decision to the Plenary Assembly in accordance with Rule 15(h) or to the Bureau in the cases referred to in Rule 37(k). The commission shall state the reasons for its proposal in a detailed report, including, where appropriate, the reasons for the urgency of the decision on the basis of Rule 37(k)."

Rule 15 - Tasks of the Plenary Assembly:
"The Committee shall meet as a Plenary Assembly. Its main tasks shall be:
(…) (h) having verified that there is a quorum under the first sentence of Rule 23(1), to take a decision, by a majority of the votes cast, on a proposal by the President, or the competent commission acting in accordance with Rules 59 and 60, to bring an action or an application to intervene before the Court of Justice of the European Union. When such a decision is adopted, the action shall be brought by the President on behalf of the Committee."[32]

Should the urgency of the matter so require, the Bureau is entitled to take this decision according to Rule 37:

Rule 37 - Tasks of the Bureau.
"The Bureau shall have the following tasks:
(…) (k) having verified that there is a quorum under the first sentence of Rule 38(2), taking a decision to bring an action or an application to intervene before the Court of Justice of the European Union, when

[32] The Guide (vade-mecum) to Rule 15(h) provides that "*By virtue of Article 263 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union is competent to take a decision on actions brought by the Committee in defence of its prerogatives and, in accordance with Article 8 of the Protocol to the Treaty on the application of the principles of subsidiarity and proportionality, on actions for infringement of the principle of subsidiarity by a legislative act brought by the Committee against legislative acts on which the Treaty on the Functioning of the European Union requires that the Committee be consulted. Such actions may be proposed to the Plenary Assembly either by the President or by the competent commission acting in accordance with Rules 59 and 60. The Plenary Assembly shall, having previously verified that more than half of its members are present, take a decision by a majority of the votes cast in accordance with the provisions of Rule 24(2), (4), (5) and (7)*".

the Plenary Assembly is not able to take a decision within the deadline, by a majority of the votes cast, on a proposal by the President or the competent commission acting in accordance with Rules 59 and 60. When such a decision is adopted, the President shall bring the action on behalf of the Committee and shall ask the Plenary Assembly at its next session to decide whether to maintain the action. If, having verified the existence of the quorum referred to in the first sentence of Rule 23(1), the Plenary Assembly takes a decision by the majority required in Rule 15(h) not to bring the action, the President shall withdraw the action;"[33]

As described in Section III.1, on 'Mandatory consultation (first condition)', in order to substantiate any argument on subsidiarity in a CoR opinion, rapporteurs need to be able to draw on a comprehensive overview of the relevant legislative competences and/or the relevant existing legislation at national, regional and/or local level in the Member States. To this end, rapporteurs are assisted by experts and can also enlist the help of the SMN, as well as the secretariat of the relevant commission within the CoR.

If the CoR does not succeed in effecting a change to the legislative proposal and the subsidiarity infringement persists and is reflected in the final act, the last resort might well be to bring an action for annulment before the CJEU.

Where appropriate, this might in turn lead to the adoption of a "revised opinion", to highlight the CoR's concerns, notably those relating to subsidiarity.

Rule 57 – Revised opinions

"1. If the commission deems it necessary, it may draw up a revised draft opinion on the same subject and, where possible, with the same rapporteur, in order to take account of and respond to interinstitutional developments in the related legislative procedure.

2. The commission shall meet, where possible, to hold a debate and adopt the draft opinion, which shall be sent to the next Plenary Session.

3. In the event that progress in the procedure underlying the Committee's consultation does not allow enough time for the commission to adopt the draft revised opinion, the chair of this commission shall immediately inform the President in order to allow the procedure for appointing a rapporteur-general under Rule 43 to be invoked."

CoR opinion 220/2004 "Guidelines for the application and monitoring of the subsidiarity and proportionality principles":

"(…) *3.22 The CoR is determined to use the right to bring actions before the European Court of Justice as a last resort and only when all other means of exerting influence have been exhausted* (…)".

Potential subsidiarity problems should have been detected well in advance through follow-up to CoR opinions.

In fact, concerns about a legislative proposal and its compatibility with the subsidiarity principle are very likely to surface long before adoption of the legislative act. Therefore, preparations for bringing an action before the CJEU should commence as soon as

[33] The Guide (vade-mecum) to Rule 37(k) provides that "*The Bureau shall vote having previously verified that at least one half of its members are present. The decision shall be taken by a majority of the votes cast. In accordance with Rule 38(3), the provisions of Rule 24(2) shall apply*".

those concerns arise in earnest. The proposal to bring an action could then be ready for adoption by the CoR by the time the final act is adopted by the co-legislators.

IV. General application of the subsidiarity principle by the Court of Justice of the European Union (CJEU)

The CJEU has, in its jurisprudence, established the conditions for an action on grounds of infringement of the subsidiarity principle. Indeed, it has set up six scenarios or criteria to determine whether the subsidiarity principle has – or has not – been infringed by a legislative act of the EU.

First criterion: The situation at issue presents transnational aspects that cannot be addressed satisfactorily by action at Member State level.

This criterion was applied by the CJEU for the first time in Case C-58/08, 'Vodafone Ltd. and others v Secretary of State for Business, Enterprise and Regulatory Reform'[34].

The case concerned 'Regulation (EC) No 717/2007 – *Roaming on public mobile telephone networks within the Community*', which lays down maximum charges that mobile phone operators may charge for voice calls made and received by users outside their own network. The regulation also imposes a ceiling for wholesale roaming charges, in other words the price paid by the consumer's network to the foreign network that that consumer uses.

The Court examined the regulation in the light of the subsidiarity principle and, following the opinion of the Advocate General, concluded that given the interdependence of retail and wholesale charges for roaming services, the Community legislature could legitimately take the view that a common approach at Community level was necessary to ensure the smooth functioning of the internal market, thus allowing mobile operators to act within a single coherent regulatory framework[35].

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[34] Judgment of the Court of Justice of 8 June 2010 in Case C-58/08, 'The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform', (ECLI:EU:C:2010:321).

[35] Judgment of the Court of Justice of 8 June 2010 in Case C-58/08 (ECLI:EU:C:2010:321):
"46. It was in the light of those circumstances that the Community legislature, in an effort to maintain competition among operators of mobile networks, as stated previously in paragraph 38 of this judgment, chose to act in order to forestall measures which would probably have been taken by the Member States based on their residual competence as regards consumer protection rules.
47. (..) Such a situation justified the Community legislature's seeking to protect the proper functioning of the internal market, as stated in paragraph 38 of this judgment.
48. It follows from the foregoing that the object of Regulation No 717/2007 is indeed to improve the conditions for the functioning of the internal market and that it could be adopted on the basis of Article 95 EC.
72. It is appropriate to recall that the principle of subsidiarity is referred to in the second paragraph of Article 5 EC – and given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty –, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar 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. That protocol, in paragraph 5, also lays down guidelines for the purposes of determining whether those conditions are met.
73. As regards legislative acts, the protocol states, in paragraphs 6 and 7, that the Community is to legislate only to the extent

Second Criterion: Action at national level or lack of action at EU level would be contrary to the requirements of the Treaty (such as the need to strengthen social, economic or territorial cohesion) or would otherwise harm the interests of the Member States.

This criterion was established by the CJEU in Case C-84/94, 'United Kingdom of Great Britain and Northern Ireland v Council of the European Union'[36].

The case was brought in relation to Council Directive 93/104/EC concerning certain aspects of the organisation of working time. The applicant maintained that the Community legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the Treaties or significantly damage the interests of Member States or, finally, whether action at Community level would provide clear benefits compared with action at national level.

The Court found that, in that respect, it should be noted that it was the responsibility of the Council to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a EEC[37], was primarily the responsibility of the Member States. Once the Council found that it was necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements already made, achievement of that objective through the imposition of minimum requirements necessarily presupposed Community-wide action which otherwise, as in this case, left the enactment of the detailed implementing provisions largely to the Member States.

Thus, the Court did not require any quantitative or qualitative indicators in support of the Community measure[38].

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necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty.
75. As regards Article 95 EC, the Court has held that the principle of subsidiarity applies where the Community legislature uses it as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market (British American Tobacco (Investments) and Imperial Tobacco, paragraph 179).
77. (..) [T]he interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market (..)
78. That interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 717/2007, the objective pursued by that regulation could best be achieved at Community level.
79. Therefore, the provisions of Articles 4 and 6(3) of Regulation No 717/2007 are not invalidated by any infringement of the principle of subsidiarity (…)".

[36] Judgment of the Court of Justice of 12 November 1996 in Case C-84/94, 'United Kingdom v Council' (ECLI:EU:C:1996:43).

[37] Current Article 153 TFEU.

[38] Judgment of the Court of Justice of 12 November 1996 in Case C-84/94 (ECLI:EU:C:1996:43):
'46 The applicant further maintains that the Community legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of Member States or, finally, whether action at Community level would provide clear benefits compared with action at national level. In its submission, Article 118a should be interpreted in the light of the principle of subsidiarity, which does not allow adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely

The CJEU also considered that a regulation which contained financial rules determining the procedure to be adopted for establishing and implementing the EU budget, within the meaning of Article 322(1)(a) of the TFEU, came under the exercise of a competence of the EU relating to its functioning, which – by its nature – could be exercised only by the EU itself. It concluded that in such cases the subsidiarity principle did not apply[39].

Third criterion: For reasons relating to its dimension and its effects, action at EU level would present obvious advantages over action at Member State level.

This criterion was established by the CJEU in Case T-362/04, 'Leonid Minin v Commission of the European Communities', which was brought in relation to Commission Regulation （EC） No 1149/2004 of 22 June 2004 amending Council Regulation (EC) No 872/2004 concerning further restrictive measures in relation to Liberia.

The Court found that the complaint alleging breach of the subsidiarity principle had, in any event, to be rejected as unfounded. The Court stated that even assuming that the subsidiarity principle found application in circumstances such as those of this case, it was plain that the uniform implementation in the Member States of Security Council resolutions, which were binding on all members of the United Nations without distinction, could be better achieved at Community level than at national level[40].

Fourth criterion: Action at EU level is justified by the lack of national legislation to address the situation at issue.

This criterion was established by the CJEU in Case C-121/92, 'Staatssecretaris van Financiën v A. Zinnecker', concerning the interpretation of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community.

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between Member States. The applicant explains in this context, however, that it does not rely upon infringement of the principle of subsidiarity as a separate plea.

47 In that respect, it should be noted that it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonization, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States. (..)'.

[39] Judgment of the CJEU of 16 February 2022 in Case C-157/21, 'Republic of Poland v Parliament and Council of the European Union' (ECLI:EU:C:2022:98).

[40] Judgment of the General Court of 31 January 2007 in Case T-362/04 (ECLI:EU:T:2007:25):

'88. It should be noted at the outset that the Community judicature is entitled to assess, depending on the circumstances of each individual case, whether the proper administration of justice justifies the rejection of a plea on the merits without ruling beforehand on its admissibility (..).

89. In the present case, the complaint alleging breach of the principle of subsidiarity must, in any event, be rejected as unfounded for the same reasons, in essence, as those set out in paragraphs 106 to 110, 112 and 113 of Ayadi , in response to a substantially identical plea relied on by Mr Ayadi. The Court considers that that principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community. In any event, even assuming that that principle finds application in circumstances such as those of this case, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level'.

The CJEU followed the opinion on the case of the Advocate General Francis Jacobs who stated that the case-law of the Court made it clear that the relevant provisions of the Regulation firstly were intended to prevent the simultaneous application of a number of national legislative systems to persons covered by the Regulation; secondly, they were intended to prevent such persons from being left without social security cover because there was no legislation applicable to them[41].

Fifth criterion: Action at EU level is justified by taking into consideration the substantial disparity between the different national and/or regional legislation and the effects of that disparity on the internal market.

This criterion found application in CJEU Case C-53/05, ‘Commission of the European Communities v Portuguese Republic’, in which the EC asked the Court for a declaration that the Portuguese Republic had failed to fulfil its obligations under Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property.

The CJEU found that, like other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property were by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, those rights, although governed by national legislation, were subject to the requirements of the Treaties and therefore fell within their scope of application.

Thus, the difference in the legal protection which protected cultural works enjoyed in the Member States as regards public lending was such as to affect the normal functioning of the internal market of the Community and to create distortions of competition[42].

Similarly, the criterion found application in Joined Cases C-154/04 and C-155/04, ‘Alliance for Natural Health and Others’[43], a reference for a preliminary ruling concerning Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements.

The Court found that the prohibition, under provisions of this directive, on marketing certain food supplements had the objective of removing barriers resulting from differences between national rules on vitamins, minerals and vitamin or mineral

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[41] Judgment of the Court of Justice of 13 October 1993 in Case C-121/92, 'Staatssecretaris van Financiën v A. Zinnecker' (ECLI:EU:C:1993:840).

[42] Judgment of the Court of 6 July 2006 in Case C-53/05, (ECLI:EU:C:2006:448):
'29. Firstly, the Portuguese Republic argues that the public lending market is essentially national and not significant at an economic level. It follows that the normal functioning of the internal market cannot be affected by that situation and that, under the principle of subsidiarity, the activity of public lending should remain within the sphere of competence of the Member States.'
32. (..) [c]ontrary to the Portuguese Republic’s assertion, the difference in the legal protection which protected cultural works enjoy in the Member States as regards public lending is such as to affect the normal functioning of the internal market of the Community and create distortions of competition'.

[43] Judgment of the Court of 12 July 2005 in Joint Cases C-154/04 and C-155/04, Alliance for Natural Health and Others (ECLI:EU:C:2005:449) and National Association of Health Stores e.a. (ECLI:EU:C:2004:848).

substances authorised or prohibited in the manufacture of food supplements, whilst ensuring a high level of human-health protection.

According to the Court, to leave Member States the task of regulating trade in food supplements which did not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products were concerned.

It followed in its opinion that the objective pursued by Directive 2002/46 could not be satisfactorily achieved by action taken by the Member States alone and required action to be taken by the Community. Consequently, that objective could be best achieved at Community level.

The same approach was also applied in Cases C-491/01, 'British American Tobacco Investments and Imperial Tobacco'[44], C-103/01, 'European Commission v Federal Republic of Germany'[45] as well as C-377/98, 'Kingdom of the Netherlands v European Parliament and Council of the European Union'[46].

Sixth criterion: Action at EU level is justified taking into account the wording of an act of secondary law that grants the Union the exclusive right to intervene, even though the policy area at issue does not fall within an area of exclusive competence.

This criterion found application in Case T-326/07, 'Cheminova A/S and Others v Commission of the European Communities', in which Cheminova and several other companies brought an action for annulment of Commission Decision 2007/389/EC of 6 June 2007 concerning the non-inclusion of malathion in Annex I to Council Directive 91/414/EEC and the withdrawal of authorisations for plant protection products

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[44] Judgment of the Court of 10 December 2002 in Case C-491/01 (ECLI:EU:C:2002:741)':
'177 The principle of subsidiarity is set out in the second paragraph of Article 5 EC, according to which, in areas which do not fall within its exclusive competence, the Community is to take action 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 at Community level.
178 Article 3 of the protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty establishing the European Community, states that the principle of subsidiarity does not call into question the powers conferred on the Community by the Treaty as interpreted by the Court.
180 As regards the question whether the Directive was adopted in keeping with the principle of subsidiarity, it must first be considered whether the objective of the proposed action could be better achieved at Community level.
181 As the Court has stated in paragraph 124 above, the Directive's objective is to eliminate the barriers raised by the differences which still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection, in accordance with Article 95(3) EC.
182 Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case (see paragraph 61 above).
183 It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level.
184 Second, the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity in that, as paragraphs 122 to 141 above make clear, it did not go beyond what was necessary to achieve the objective pursued.
185 It follows from the foregoing conclusions concerning Question 1(f) that the Directive is not invalid by reason of infringement of the principle of subsidiarity'.
[45] Judgment of the Court of 22 May 2003 in Case C-103/01 – 'Commission of the European Communities v Federal Republic of Germany' (ECLI:EU:C:2003:301).
[46] Judgment of the Court of 9 October 2001 in Case C-377/98 – 'Kingdom of the Netherlands v European Parliament and Council of the European Union' (ECLI:EU:C:2001:523).

containing that substance.

The applicants claimed that when the Commission decided to ban an active substance and to terminate all authorisations relating thereto without considering whether that decision could be better taken at Member State level, it infringed the subsidiarity principle on which, 'as it has itself remarked', Directive 91/414 was based.

The CJEU found, however, that even though, for the purposes of the restrictions imposed, a certain role might be attributed to the Member States, the fact remained that the definitive evaluation concerning the active substance's compliance with the requirements of Article 5(1) of that directive was a matter for the Community authorities alone[47].

The CJEU appears to rely heavily on the factual arguments and data put forward by the parties; however, it also takes into consideration:

- existing or draft legislation at national [and regional] level in the area concerned;
- potential benefits to be derived from intervention at European Union level;
- the appropriateness of the legal basis; and/or
- compliance with the conditions laid down in the relevant provisions of the TFEU.

V. Conclusion

The Treaties afford the CoR an institutional role by giving it specific competences in representing regional and local interests in the EU. To this end, the CoR has, since the Treaty of Lisbon, been entitled to bring an action for annulment before the CJEU for infringement of the subsidiarity principle.

Any action brought by the CoR before the CJEU should rely on some of the criteria above to argue that there is an infringement of the subsidiarity principle and should be brought in good time.

Of all the preparatory documents that the CJEU would take into consideration when assessing a possible infringement of this principle, a negative opinion adopted by the CoR during the legislative process might be key to its ruling.

The CoR should continue to be active in its role as guardian of the subsidiarity principle, even though it has not challenged any EU legislative act before the CJEU on these

[47] Judgment of the Court of First Instance of 3 September 2009 in Case T-326/07, 'Cheminova A/S and Others v Commission (of the European Communities)' (ECLI:EU:T:2009:299):
'259 It is clear from Article 8(8) of Regulation No 451/2000 that only the Commission and the Council have power to decide that an active substance covered by the second stage of the work programme should be included in Annex I to Directive 91/414. Moreover, that provision lays down a procedure which must be followed for the evaluation of substances covered by the second stage and which does not permit, in any case, the Member States to adopt a final decision on the question whether the active substance in question satisfies the criteria of Article 5(1) of Directive 91/414 (…)'.

grounds so far[48].

[48] CoR, 184th meeting of the Bureau, Item 9 a), 'CoR activities in 2017. Report on the impact of CoR opinions', 3 July 2018.