EUROPEAN UNION

Committee of the Regions

Practical guide
on the infringement of the subsidiarity principle

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I. Introduction

1. The purpose of this document is threefold:

- First, it is intended to serve as a practical guide to identifying infringements of the subsidiarity principle in a legislative proposal (in its original form or as amended);

- second, it is intended to serve as a practical guide to preparing opinions that highlight and challenge those infringements, on the basis of well-researched facts and the necessary documentary evidence;

- third, it is intended to serve as a reference document, recalling the procedure that the Committee of the Regions (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 'Court of Justice' or the 'Court') for infringement of the subsidiarity principle, and setting out steps to be taken to prepare and lodge such an action.

⇨ Article 5 – Treaty on the European Union (the 'TEU')

"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 act?*
If the Union has exclusive competence in an area, it is clear that it is the Union which should act. If the Union and the Member States share the competence, the principle clearly establishes a presumption in favour of the Member States taking action.
The Union should only act if Member States cannot achieve the objectives sufficiently and, by the reason of the scale or effects, the Union can achieve them better" (Report from the Commission on subsidiarity and proportionality [COM(2010)547 final]).

2. This practical guide is made available, principally but not exclusively, to rapporteurs – and their team – entrusted with the preparation and follow-up of opinions in an area of mandatory consultation.

⇨ Rule 51: Content of opinions and reports – Rules of Procedure of the CoR:
"(…) 2. *Committee opinions shall contain an explicit reference to the application of the subsidiarity and proportionality principles* (…)".

3. It aims to alert to the importance of gathering as much documentary evidence as possible throughout the legislative procedure. Once the decision has been taken to bring an action before the Court of Justice, it is this documentary evidence that will put the CoR in a position to draft an application for annulment within the short time period given. As such an application for annulment would be reviewed by the judges of the Court of Justice, it would have to contain legal arguments, not political ones.

⇨ Article 51 – Protocol (No 3) on the Statute of the Court of Justice of the European Union:
"*By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against*:
(a) *an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for*:
- decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;
- acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;
(b) *against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union*.
Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank."

II. Conditions to be fulfilled for bringing an action for annulment

Three conditions have to be fulfilled for the CoR to bring an action for annulment against a legislative act.

4. Mandatory consultation

The Lisbon Treaty introduced new rules concerning the right to bring a legal challenge ('standing' or '*locus standi*') before the Court of Justice.

For the first time, 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 that principle, provided it falls within an area in which the CoR's consultation is mandatory (1st condition).

Therefore, 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 consultations);

or

- the CoR issued an own-initiative opinion.

⇨ Article 8 – Protocol (No 2) to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) on the application of the principles of subsidiarity and proportionality ('Protocol (No 2) 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."

🔔 Which are the fields where the CoR's consultation is mandatory? – Treaty on the Functioning of the European Union (TFEU):
Article 91: Transport
Article 100: Sea and air transport
Article 148: Employment
Article 149: Employment
Article 153: Social policy
Article 164: European Social Fund
Article 165: Education, vocational training, youth and sport
Article 166: Vocational training
Article 167: Culture
Article 168: Public health
Article 172: Trans-European networks
Article 175: Economic, Social and Territorial Cohesion
Article 177: Structural Funds
Article 178: Structural Funds (European Regional Development Fund)
Article 192: Environment
Article 194: Energy

5. Legislative act

An action for annulment can only be brought against a 'legislative act' (2nd condition); the CoR would thus have to wait for the legislative act to be adopted before it can bring any action before the Court of Justice.

⇨ Article 289 - Treaty on the Functioning of the European Union (TFEU):

"1. *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.*

2. *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.*

3. *Legal acts adopted by legislative procedure shall constitute legislative acts.*

4. *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*".

🔔 Please note that the ordinary legislative procedure has replaced the former 'co-decision' procedure.

⇨ Article 263 - Treaty on the Functioning of the European Union (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* (…)".

This means that an action for annulment may also be brought against a legislative act adopted:

- Following a 'citizens' initiative' (Article 11 TEU); and/or
- following a request from the Parliament (Article 225 TFEU) or the Council to the Commission to submit a proposal (Article 241 TFEU).

⇨ Article 11 - Treaty on the European Union (TEU):

"(…) 4. *Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.*

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union (…)."

⇨ Article 225 - Treaty on the Functioning of the European Union (TFEU):

"*The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.*"

⇨ Rule 42 Initiative pursuant to Article 225 of the Treaty on the Functioning of the European Union – Rules of Procedures – European Parliament:
"(…) *4. Parliament's resolution shall indicate the appropriate legal basis and be accompanied by detailed recommendations as to the content of the required proposals, which shall respect fundamental rights and the principle of subsidiarity* (…)".

⇨ Article 241 - Treaty on the Functioning of the European Union (TFEU):

"*The Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons*."

However, so-called 'non-legislative acts' – such as those adopted by the Commission either on the basis of a 'delegated act' (Article 290 TFEU) or as an 'implementing act' (Article 291 TFEU) – are excluded.

⇨ Article 290 - Treaty on the Functioning of the European Union (TFEU):

"1. *A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.*

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. *Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows*:

(a) *the European Parliament or the Council may decide to revoke the delegation*;

(b) *the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act*.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. *The adjective 'delegated' shall be inserted in the title of delegated acts*."

⇨ Article 291 - Treaty on the Functioning of the European Union (TFEU):

"1. *Member States shall adopt all measures of national law necessary to implement legally binding Union acts*.

2. *Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council*.

3. *For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*.

4. *The word 'implementing' shall be inserted in the title of implementing acts.*"

6. Time constraints

Proceedings have to be instituted within two months (3rd condition) of the publication of the measure, meaning that the CoR's position needs to be well prepared in advance (see point No 50).

⇨ Article 263 - Treaty on the Functioning of the European Union (TFEU):

"(…) *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.*"

⇨ Article 81 of the Rules of Procedure of the Court of Justice of the European Union:

"1. *Where the period of time 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 80(1)(a), from the end of the 14th day after publication thereof in the Official Journal of the European Union* (…)"

7. Please note that even though Protocol (No 2) on the application of the principles of subsidiarity and proportionality concerns the application of both the principles of subsidiarity and proportionality, the right to bring an action for annulment enshrined in Article 8 of that protocol only refers explicitly to the principle of subsidiarity (and not the principle of proportionality).

🔔 The Committee of the Regions is also one of the so-called "semi-privileged" applicants for the purposes of Article 263 TFEU. Semi-privileged applicants may challenge a Union act if the action is brought for the purpose of protecting their prerogatives.
However, actions brought for the purposes of protecting the CoR's prerogatives are inherently different from actions brought on grounds of infringement of the subsidiarity principle and are therefore not discussed in this Practical Guide.

⇨ Article 263 -Treaty on the Functioning of the European Union (TFEU):
"(…) *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 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 produced by European University Institute, Florenza – 2006:
"(…) *132. As regards the possibility of bringing actions before the Court of Justice, the problem arises essentially for the CoR.*
Indeed, a very strict reading of the Protocol indicates that no action for annulment can be brought except to ensure respect for the principle of subsidiarity, not proportionality.
It should be noted in this context that the key issue, when the time comes to bring an action for annulment, would be to develop an argument which is extremely sound on the point of subsidiarity but at the same time, within the context of subsidiarity, includes a number of elements which have more to do with proportionality.
We are in the realm of hypothesis here.
It may be added that the link between the principle of proportionality and the principle of subsidiarity is quite clear in the current case-law of the Court of Justice, and it is likely that this link will be maintained in the future (…)".

III. Information to be collected

8. Problems with subsidiarity will surface long before the final act is adopted. This may occur:

- During the pre-legislative consultation phase;
- at the moment the Commission's legislative proposal is adopted; or
- following the modification of the original legislative proposal (such as through the introduction of amendments).

9. For that reason, it is important to collect as many documents as possible throughout the entire legislative procedure, as this puts the CoR in a position to account for whether, and how, the issue of subsidiarity was dealt with throughout that procedure. If and when the CoR's Legal Service is called upon to draft an action for annulment, these documents can provide the basis for legal arguments and serve as supporting evidence.

🔔 An application for annulment takes the form of a written document that can run to up to 50 pages. The application must contain a brief account of the relevant facts, all the pleas in law on which the application is based and the arguments in support of each plea in law.

⇨ Article 37 of the consolidated version of the Rules of Procedure of the Court of Justice of the European Union:

"(…) 4. *To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them* (…)"

Documents to be collected include the following:

- Initial impact assessments

🔔 Please note that for the first time, the general subsidiarity principle, defined in Article 5(3) of the Treaty on the European Union, is now explicitly extended to the regional and local level. In addition to this, Protocol (No 2) on the application of the principles of subsidiarity and proportionality, which highlights the role of regional and local government, stresses that draft legislative acts have to take into account the burden also at the level of regional or local authorities.
Consequently, the impact assessments of legislative proposals ought now to take into account all levels of government.

- The original legislative proposal, together with the explanatory memorandum

⇨ Article 5 – Protocol (No 2) 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 reasoned opinions issued by national parliaments or a chamber of a national parliament and the corresponding reaction from the Commission

🔔 The Lisbon Treaty introduces a new "early warning system" for national parliaments. Under these new rules, national parliaments must receive draft legislative acts at the same time as the European Parliament and the Council. Then, normally within 8 weeks from the date of transmission of a legislative proposal, 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 principle of subsidiarity.

Thus, for the first time, national parliamentary bodies will have the opportunity to comment on European draft legislation independently from their governments.

Under the "early warning system", even regional parliaments with legislative powers could become actors in the EU decision-making process. This is possible if the national parliament concerned deems it appropriate to consult and integrate regional parliaments in the "early warning" consultation process.

Each national parliament has two votes. In the case of a bicameral parliamentary system, each of the two chambers has one vote. If compliance of a draft legislative act with the subsidiarity principle is contested by a third of the votes allocated to national parliaments (a simple majority concerning proposals falling under the ordinary legislative procedure), the proposal has to be re-examined.

The European Parliament will receive not only the reasoned opinion of the national parliaments, but also the reaction of the Commission. If on the basis of these documents, under the ordinary legislative procedure, Parliament by a simple majority of its Members (and the Council by a majority of 55% of its members) considers that the proposal is indeed not compatible with the principle of subsidiarity, it is abandoned.

- An overview of the "state of play" of the national/regional legislation in the area concerned

In the same way, it is also important to identify accurately the existing distribution of competences in the Member States for a given policy area.

🔔 The principle of subsidiarity applies only to areas of shared competence between the Union and the Member States.
This implies that it is crucial to have a detailed understanding of the national/regional legislation in force in the area in which legislation is proposed. In his Opinion in Case 58/08 *Vodafone Ltd. and others* v *Secretary of State for Business, Enterprise and Regulatory Reform*, Advocate General Poiares Maduro stated at Point 30: "(…) *First, the judgment to be made under the principle of subsidiarity is not about the objective pursued but whether the pursuit of that objective requires Community action. Certain Community objectives (which in themselves justify the existence of a Community competence) may be better pursued by the Member States (with the consequence that the exercise of that competence is not justified). Second, the intent of the Community legislator is not sufficient to demonstrate compliance with the principle of subsidiarity. The latter requires that there be a reasonable justification for the proposition that there is a need for Community action. This must be supported by more than simply highlighting the possible benefits accruing from Community action* (…)".

- The outcome of consultations initiated through the Subsidiarity Monitoring Network

🔔 Three types of consultations are carried out through the Subsidiarity Monitoring Network: 'Targeted consultations', 'Open consultations' and 'Consultations related to Impact Assessments'. Extract from the CoR website - SMN:
"*TARGETED CONSULTATIONS are initiated by rapporteurs in the context of the preparation of CoR opinions. They may be based on the standard grid or on a tailored questionnaire drawn up and distributed to members.*
On the basis of partners' contributions, the SMN Secretariat draws up a summary report which is forwarded to rapporteurs before they submit their draft opinion.
They may agree to publish the report on the network website and CoR TOAD portal, and distribute it to the members of the relevant CoR commission at the appropriate meeting. Rapporteurs have consistently agreed to the reports being distributed.
OPEN CONSULTATIONS: next to contributing to targeted consultations, network partners also have the opportunity to submit their views on the way EU initiatives comply with the subsidiarity and proportionality principles through open consultations.
These spontaneous contributions are uploaded onto the SMN website and sent to the relevant CoR commission secretariat. In general, the SMN Secretariat has noticed a greater interest for open consultations after the entry into force of the Lisbon Treaty.
In fact, some Network Partners have increased their activity – especially in the context of the early warning system – and have found that the SMN can act as a perfect channel to give publicity to their subsidiarity analysis.
CONSULTATIONS RELATED TO IMPACT ASSESSMENTS: in its effort to achieve a clearer and more effective regulatory environment, the European Commission has to carry out Impact Assessments (IA) of its future initiatives.
The CoR is offering its support to this process, by providing direct access to quantitative and qualitative data from the field. Based on specific questionnaires circulated among the SMN as well as through other platforms (EU 2020, EGTC), the CoR's contributions to IAs reflect a technical input from the local and regional stakeholders' point of view.
They constitute a valuable source of information for CoR members as well as for all stakeholders.
Thanks to their membership of the Subsidiarity Monitoring Network, local and regional authorities are able to express their views on EU proposals before the legislative process starts. This mechanism helps to avoid conflicts regarding compliance with the subsidiarity principle at a very early stage in the pre-legislative process, since it gives the European Commission direct access to the views of local and regional authorities".

- Amendments adopted by the European Parliament in the framework of the ordinary legislative procedure and any opinion from the European Commission on those amendments

🔔 Please note that the early warning mechanism contemplated in Protocol (No 2) on the application of the principles of subsidiarity and proportionality does not apply to amendments: amendments that escape national parliamentary scrutiny.

This implies that the CoR ought to pay particular attention to the follow-up of its opinions and, most importantly, to any changes made to draft legislative acts after the CoR's opinion has been adopted. Indeed, a problem of subsidiarity which did not exist previously could appear at this stage.

⇨ Rule 52 – Follow-up to Committee opinions – Rules of Procedure of the CoR:
"1. *During the period following the adoption of an opinion, the chairman and the rapporteur of the commission appointed to draw up the draft opinion shall, with the assistance of the Secretariat-General, monitor the course of the procedure underlying the Committee's consultation*.
2. *If the commission deems it necessary, it may ask the Bureau for permission to 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 developments in the procedure underlying the Committee's consultation*.
3. *The commission shall meet, where possible, to hold a debate and adopt the revised draft opinion, which shall be sent to the next plenary session*.
4. *In the event that progress in the procedure underlying the Committee's consultation does not allow enough time for the commission to state its views, the chairman of this commission shall immediately inform the Committee President in order to allow the procedure for appointing a rapporteur-general under Rule 41 to be invoked*."

- Any impact assessments on amendments

🔔 "(…) *In practice, nearly all Commission proposals are modified (sometimes to a significant extent) by the legislator during the legislative procedure. Therefore, the European Parliament and the Council have agreed that, where the co-decision procedure applies, they may, '… on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage'. This commitment was reaffirmed in the 2005 Inter-institutional agreement on a 'Common approach to impact assessments'* (…)" (European Court of Auditors, Special Report No 3, Impact Assessments in the EU Institutions: do they support decision making, 2010, point 35).

10. Below is a description of the ordinary legislative procedure[1] and the documents to be collected at each stage. Many of the documents mentioned below are available either on the Oeil (http://www.europarl.europa.eu/oeil) or the Prelex (http://ec.europa.eu/prelex/apcnet.cfm?CL=en) websites.

🔔 It is worth bearing in mind that the CoR should normally be consulted also in respect of substantial changes made to a legislative proposal after the CoR has issued its opinion.
This issue is discussed at greater length in a separate guide on infringement of the CoR's prerogative currently under preparation.

1 For a more detailed, step-by-step description of this procedure, please consult: http://ec.europa.eu/codecision/stepbystep/text/index_en.htm

Oeil

🔔 The Observatory (Oeil) is an administrative, forecasting, information and research tool for EU legislative and non-legislative procedures involving the European Parliament.

The Observatory consists of a series of "procedure factfiles" listing all the documents and key events relating to a given procedure and the players involved at each stage.

There are three main stages in a procedure: the pre-legislative stage, possibly in the form of a preparatory document supplying the context of the procedure; the actual progress of the procedure, from the initial proposal or vote in committee to the legislative act or final opinion; the follow-up to the legislative act, including the replies provided by the Commission, the Commission's mandatory periodic reports and the implementing acts.

Each "procedure factfile" (se below) allows the user to monitor the progress of a procedure step by step, to find out immediately what stage it has reached, and to make use of the forecasts for the stages to come and future deadlines. These detailed records also contain summaries of the main stages based on the relevant documents or events related to the procedure.

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. Users can also stay abreast of the work of the European Parliament and look ahead to future stages, involving both parliamentary committees and plenary sessions.

The database includes all texts examined and voted on in plenary.

🔔 A "procedural factfile" is a dossier setting 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; 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 Council, etc.; summaries of all the important 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); links to the full text of documents and the text published in the Official Journal.

Prelex

🔔 The PreLex database follows all official documents (Proposals, Recommendations, Communications) transmitted by the Commission to the legislator (the Council, the Parliament) and to other institutions and bodies. PreLex is made up of dossiers.

A dossier 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 ("adoption by the Commission" and final adoption by the legislator) there are a series of events which are identified in PreLex.

For each event PreLex will show the date, the departments or individuals responsible, the document reference linked to the event and, where appropriate, a link to the document, a press release, the OJ reference, etc.

PreLex does not contain any texts but, wherever possible, gives a link to the electronic texts available on other sites (EUR-Lex, the Rapid database containing Council and Commission press releases, the Europarl site, the Bulletin of the European Union, the sites of the European Economic and Social Committee, the Committee of the Regions, etc.).

A. The pre-legislative phase: the consultation process

11. Prior to issuing a legislative proposal, the Commission engages in an extensive consultation process.

This may involve green papers, white papers and communications, consultations of national experts, international organisations and/or non-governmental organisations.

12. This is followed by the Commission's impact assessment.

> 🔔 Impact assessments, at the European level, are not only the responsibility of the Commission.
> The Inter-institutional Agreement on Better Law-making acknowledges the importance of impact assessments in improving the quality of Community legislation and also sets out that, where the co-decision procedure applies, the European Parliament and the Council may have impact assessments carried out prior to the adoption of any substantive amendment they make [COM(2005)0097].
> "*The Commission also expects the European Parliament and the Council to honour their commitments to improve the quality of Community legislation by producing impact assessments when tabling substantive amendment to Commission proposals*." [COM(2005)0629].

The Commission describes the impact assessment as a "set of logical steps" designed to help the Commission to assess "the potential economic, social and environmental consequences of a legislative initiative" (European Commission, Impact Assessments Guidelines, 15.01.2009, SEC(2009)).

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

13. The Commission strives for the full involvement of stakeholders in the impact assessment process.

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

In other words, the Commission performs a thorough subsidiarity and proportionality analyses of all policy options in its impact assessment.

🔔 The Commission's impact assessment focuses on subsidiarity and proportionality analysis to explain the necessity and added value of EU action.

It normally identifies several arguments relating to subsidiarity which are relevant in the context of the initiative concerned.

These arguments aim to be substantiated with qualitative, and where possible, quantitative indicators:

Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (e.g. reduction of CO2 emissions in the atmosphere);

Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (e.g. discriminatory treatment of a stakeholder group);

Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States? (e.g. action restricting the free circulation of goods);

Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?

Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?

As expressly mentioned in the Commission's Impact Assessments Guidelines: "(…) *An additional point should be borne in mind: any assessment of subsidiarity will evolve over time. This has two implications. First, it means that Community action may be scaled back or discontinued if it is no longer justified because circumstances have changed. It is important to bear this in mind when reviewing existing Community activities, for example in the context of the Commission's better regulation and simplification agenda. For this type of initiative, the IA report should demonstrate that EU action is still in conformity with the subsidiarity principle; you should not rely exclusively on a subsidiarity analysis that was made in the past. Secondly, it means that Community action, in line with the provisions of the Treaty, may be expanded where circumstances so require. This may include areas where there has been no, or only limited, Community action before. Given the potential political sensitivity of such new activities, the clearest possible justification on the basis of the above questions is essential. Reference to similar activities already carried out at Community level may be useful* (…)" (European Commission, Impact Assessments Guidelines, 15.01.2009, SEC(2009)).

🔔 The rapporteur's team is strongly encouraged to obtain copies of the following documents relating to a legislative proposal, to the extent they have actually been drawn up:

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

(b) Commission communications;

(c)The impact assessment(s), to be found, for example:

- on the European Commission's Impact Assessment website http://ec.europa.eu/governance/impact/ia_carried_out/cia_2011_en.htm,
- on Pre-lex (as an attachment to the legislative proposal): http://ec.europa.eu/prelex/apcnet.cfm?CL=en
- or the legislative observatory of the European Parliament, Oeil http://www.europarl.europa.eu/oeil/

(d) Any experts' reports;

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

B. The CoR's contribution to the Commission's impact assessment

14. The CoR is in a unique position to contribute to the impact assessment process by providing direct access to quantitative and qualitative data 'from the field' through its Subsidiarity Monitoring Network.

In this way, the CoR can help by adding the local and regional perspective.

The added value of specific local and regional points of view has been acknowledged as a priority in the Agreement governing cooperation between the European Commission and the Committee of the Regions, which explicitly mentions the participation of the CoR in impact assessment exercises carried out by the Commission.

⇨ Article 2 – Protocol (No 2) 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*".

15. The CoR is engaged in efforts to encourage the Commission to systematically request contributions from the CoR's Subsidiarty Monitoring Network for the purposes of the Commission's impact assessment.

The CoR bureau appointed a coordinator in 2010 to oversee this process, in the person of the CoR's First Vice-President Mr Valcárcel Siso.

The Subsidiarity Monitoring Network was launched in April 2007 as a technical consultative tool supporting the political activities of the CoR.

Its members include parliaments and governments of regions with legislative powers, local and regional authorities without legislative powers and local government associations in the European Union.

It is also open to CoR national delegations and chambers of national parliaments.

A consultation through the channels established by the Subsidiarity Monitoring Network will involve the distribution of a tailor-made questionnaire to members of the network, followed by an evaluation of all answers received.

This crucial information, which represents the point of view of local and regional stakeholders, should ideally feature in all impact assessments.

Thanks to their membership of the Subsidiarity Monitoring Network, local and regional authorities are able to express their views on EU proposals before the legislative process starts.

This mechanism allows stakeholders to identify – at a very early stage in the pre-legislative process – potential problems regarding compliance with the subsidiarity principle.

At the same time, it gives the European Commission direct access to the views of local and regional authorities.

🔔 To the extent is has been requested/prepared, a copy of the CoR's contribution to the impact assessment must be kept.
Impact assessment consultations (open and closed) may be consulted on the Subsidiarity Monitoring Network website:
http://portal.cor.europa.eu/subsidiarity/Pages/ImpactAssessmentConsultations.aspx

C. The Commission proposal

16. In accordance with the Lisbon Treaty, the Commission only may normally put forward legislative proposals ("right of initiative") (except where the Treaty provides otherwise).

The legal basis adopted by the Commission will determine the legislative procedure.

Now, in 85 areas, the ordinary legislative procedure will apply.

As described above, the Commission's proposal is the result of an extensive consultation 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).

17. Each Commission initiative is accompanied by an explanatory memorandum, intended to show, *inter alia*, that the proposal complies with the principles of subsidiarity and proportionality

> 🔔 The European Commission provides a justification in terms of subsidiarity and proportionality in the explanatory memorandum and recitals of each legislative proposal.

The proposal is forwarded simultaneously to the European Parliament and to the Council but also to all National Parliaments and, where applicable, to the Committee of the Regions and the Economic and Social Committee.

D. The opinions of national parliaments

18. As mentioned above, a new important element introduced by the Lisbon Treaty is the strengthened role of national parliaments in the legislative process. In particular, under the 'early warning system', national parliaments now act as 'watchdogs' of the principle of subsidiarity at an early stage of the decision-making procedure.

All proposals from the Commission – as well as initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice of the European Union, recommendations from the European Central Bank and requests from the European Investment Bank – for adoption of a legislative act are to be sent to the national parliaments at the same time as they are sent to the co-legislator (Council and Parliament).

National parliaments then have eight weeks to send their reasoned opinions on compliance of draft legislative texts with the subsidiarity principle to the Council, the European Parliament and the Commission.

🔔 It is very important to obtain copies of reasoned opinions drawn up by national parliaments under the early warning system.
Copies can be found on the website of the Interparliamentary EU information exchange, www.ipex.eu

🔔 IPEX contains parliamentary documents and information concerning the European Union. Parliamentary documents, which are uploaded individually by each national parliament, are the main building blocks of the IPEX database.
These documents are organised according to the specific EU document which they relate to. 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 links to EU relevant pages on the web-sites of national parliaments.
IPEX contains parliamentary documents pertaining to the national scrutiny of decisions taken at the EU level.
By consulting these documents, users can often find important information concerning the opinions of parliaments/chambers and/or governments on specific proposals. In addition, important information and relevant details about EU proposals are sometimes provided.

🔔 The Framework Agreement on relations between the European Parliament and the Commission expressly mentions that "(…) *the European Parliament and the Commission shall cooperate on the implementation of TFEU Protocol No 2 on the application of the principles of subsidiarity and proportionality. Such cooperation shall include arrangements related to any necessary translation of reasoned opinions presented by national Parliaments* (…)" (point 18).
This means that reasoned opinions will be translated by the European Commission and passed on to the European Parliament. Accordingly, translations of reasoned opinions will have to be obtained from those Institutions.

19. It is worth bearing in mind (see point No 9) that if a draft legislative act's compliance with the subsidiarity principle is contested by a third of the votes allocated to national parliaments (yellow card), the Commission has to review the proposal and decide to maintain, amend or withdraw the act, also giving reasons for its decision.

This threshold is a quarter in the case of a draft submitted on the basis of Article 76 of the TFEU on the area of freedom, security and justice.

In the case of proposals falling under the ordinary legislative procedure, if a draft legislative act's compliance with the subsidiarity principle is contested by a simple majority of the votes allocated to national parliaments (orange card), the Commission has to re-examine the proposal. If it chooses to maintain the draft, the Commission has to justify its position by means of a reasoned opinion.

A reasoned opinion of the Commission and the reasoned opinions of the national parliaments are transmitted to the co-legislator, for consideration in the legislative procedure.

During the first reading, the co-legislator considers the compatibility of the legislative proposal with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission.

If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the co-legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal is abandoned.

🔔 It is very important to obtain copies of reasoned opinions drawn up by the European Commission. They should normally be available through:
(a) Prelex (http://ec.europa.eu/prelex/apcnet.cfm?CL=en)
and/or
(b) Oeil (http://www.europarl.europa.eu/oeil/).

Comments of the European Commission dealing with the Informal Political Dialogue and with reasoned opinions from national parliaments are available on the following website:
http://www.ipex.eu/ipex/cms/home/pid/4;jsessionid=93782CEC491694390F5789D5B0E0F3CC

The European Commission has begun to transmit directly to IPEX its comments on the opinions of national parliaments. Since October 1, 2008 all comments made by the European Commission to national parliaments are available on this page. It is the responsibility of the national parliaments to upload the original opinions and the reasoned opinions on the relevant national scrutiny page.

🔔 As regards reasoned opinions drawn up by national parliaments, one difficulty might consist in distinguishing comments on subsidiarity from other – more general, political or technical – comments on the substance of the proposed legislation, and in deciding how to evaluate these comments.
In any event, an early understanding of the national parliaments' considerations will be beneficial, if not decisive, for future legislation.

⇨ Rule 38a – Examination of respect for the principle of subsidiarity – Rules of Procedure of the European Parliament:

"*1. During the examination of a proposal for a legislative act, Parliament shall pay particular attention to respect for the principles of subsidiarity and proportionality.*

2. 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. If a national parliament sends the President a reasoned opinion in accordance with Article 3 of the Protocol on the role of national parliaments in the European Union and Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, 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.

4. Except in the cases of urgency referred to in Article 4 of the Protocol 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 on the application of the principles of subsidiarity and proportionality.

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 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, 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.

The recommendation shall be submitted to Parliament 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 Parliament does not reject the proposal, the procedure shall continue, taking into account any recommendations approved by Parliament".

E. The opinion of the Committee of the Regions

🔔 As already said, it is worth bearing in mind that the CoR should normally be consulted also in respect of substantial changes made to a legislative proposal after the CoR has issued its opinion.
This issue is discussed at greater length in a separate guide on infringement of the CoR's prerogative currently under preparation.

20. As mentioned above (see point No 2 above), the opinion of the CoR ought to contain an explicit reference to the application of the subsidiarity and proportionality principles.

Please note (see point No 9 above) that the Subsidiarity Monitoring Network can assist the rapporteur through targeted and open consultations.

After the adoption of the CoR's opinion, it is important to monitor the subsequent steps of the legislative procedure.

This 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 (see also point No 47).

🔔 "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*" (Opinion of the Committee of the Regions on Guidelines for the application and monitoring of the subsidiarity and proportionality principles (2006/C 115/08))

21. However, it has to be highlighted that the relationships between the CoR and the other institutions (the European Parliament in particular) are not limited to the adoption of the CoR's opinions. In addition, there are numerous personal contacts; in particular, CoR rapporteurs are asked with increasing frequency to speak at meetings of Parliamentary committees, giving them an opportunity to raise any concerns they may have about subsidiarity.

F. The European Parliament first reading

22. Upon receiving the Commission's proposal, the European Parliament gets ready to prepare and adopt its opinion.

The Lisbon Treaty does not set any time limit for the European Parliament to give its opinion.

In practice, this phase lasts on average 15 months if a first reading agreement is reached and 13 months if the file continues into a second reading.

It may, however, be much longer, depending on the technical or political complexity of the dossiers.

🔔 The European Parliament sometimes prepares its own impact assessment of a legislative initiative. If so, a copy ought to be obtained.

23. Within the European Parliament, the proposal is referred by the President to the committee responsible for consideration: the choice of committee depends on the subject-matter covered by the proposal.

⇨ Annex VII – Powers and responsibilities of standing committees – Rules of Procedure of the European Parliament:

XVI. Committee on Legal Affairs

Committee responsible for:

"*1. the interpretation and application of Union law and compliance of Union acts with primary law, notably the choice of legal bases and respect for the principles of subsidiarity and proportionality* (…)".

The committee responsible appoints a 'rapporteur'. Other parliamentary committees with an interest in the matter dealt with by the proposal may deliver their 'opinion' to the committee responsible.

The parliamentary committee meets several times to study the draft report prepared by the rapporteur.

The rapporteur and the members or substitutes of both the parliamentary committee responsible and any other parliamentary committee may propose amendments to the Commission's proposal.

These amendments, together with those proposed by the parliamentary committees asked for an opinion, are put to the vote in the parliamentary committee responsible, on the basis of a simple majority.

24. Once the report is adopted in the parliamentary committee, it is placed on the agenda of the plenary session.

Additional amendments to the report, including amendments adopted in parliamentary committee, may be tabled and put to the plenary's vote.

The Parliament, acting by a simple majority, delivers its first reading on the Commission proposal. Parliament has, at this stage, three options: it may reject the proposal as a whole or approve it without amendments or, most commonly, approve it subject to a number of amendments.

If the legislative resolution accompanying the report has been adopted in parliamentary committee virtually unanimously (with fewer than 10% of votes against), the report may be adopted by the plenary without further amendment or debate.

As far as outright rejection at first reading is concerned, it should be noted though, that, while the Treaty does not explicitly prohibit this, neither does it explicitly provide for it.

🔔 It is essential to obtain a copy of:
(a) all amendments adopted by the European Parliament:
(b) the Commission's proposal as amended;
(c) the Parliament's legislative resolution;
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) whether amendments adopted by the Parliament or the Commission's proposal as amended contain new elements that have the potential to infringe the principle of subsidiarity.
Those documents should normally be available through:
Prelex (http://ec.europa.eu/prelex/apcnet.cfm?CL=en)
and/or
Oeil (http://www.europarl.europa.eu/oeil/)

G. The amended Commission proposal

25. The Treaty authorises the Commission to alter its legislative proposal, enabling it to incorporate European Parliament amendments which, in its view, improve the initial proposal and/or are likely to facilitate an agreement: the Commission may decide at any time during the first reading either to withdraw or to alter its proposal.

⇨ Article 293(2) - Treaty on the Functioning of the European Union:
"(…) *As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act* (…)".

🔔 If the Commission alters its legislative proposal, it is essential to obtain a copy of that amended proposal, in order to check whether the legislative proposal, as amended, contains new elements that have the potential to infringe the principle of subsidiarity.
The Commission' modified proposal will be available through:
Prelex (http://ec.europa.eu/prelex/apcnet.cfm?CL=en)
and/or
Oeil (http://www.europarl.europa.eu/oeil/)

H. The Council first reading

26. The Council finalises its position on the basis of the Commission's proposal, amended where necessary in the light of the European Parliament's first reading and resultant amendments.

There are three possible scenarios:

- The Council accepts without alteration the Commission's proposal, which the European Parliament has not amended, and the act can be adopted;
- the Council accepts all the European Parliament's amendments which the Commission has incorporated into its amended proposal, and the act can be adopted;
- in all other cases, the Council adopts a 'position'.

27. When the Council does not share the views expressed by the European Parliament, it adopts a position which is forwarded to the European Parliament together with a statement of reasons.

Where the European Parliament has approved the Commission's proposal without amendments(s), but the Council wishes to make changes to it, the Council will again adopt a position.

> 🔔 It is essential to obtain a copy of the Council's position and any statement of reasons.

28. During the whole first reading stage, neither the Parliament nor the Council are subject to any time limit by which they must conclude their first reading.

I. The European Parliament second reading

29. A three-month time limit is laid down by the Lisbon Treaty for the European Parliament to take action on the basis of the Council position at first reading.

30. The adoption procedure is similar to that at the European Parliament's first reading but has some distinct differences.

As a general rule, the amendments must:

- Restore wholly or partly Parliament's first reading position.
- Reach a compromise between the Parliament's and the Council's position.
- Amend a part of the common position which was not included in or differs in content from the initial proposal.
- Take account of a new fact or legal situation which has arisen since the first reading.

31. At second reading, the outcome can be as follows:

- European Parliament approves the Council's position at first reading or does not take a decision: the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council.
- European Parliament rejects, by a majority of its component members, the Council’s position at first reading: the proposed act shall be deemed not to have been adopted.
- European Parliament proposes, by a majority of its component members, amendments to the Council’s position at first reading: the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

🔔 It is important to obtain a copy of the European Parliament's amendments at second reading.
They are available through:
Prelex (http://ec.europa.eu/prelex/apcnet.cfm?CL=en)
and/or
Oeil (http://www.europarl.europa.eu/oeil/)

J. The Commission opinion on European Parliament amendments

32. The Lisbon Treaty specifically requires the Commission to deliver an opinion on the European Parliament's amendments.

33. The Commission's position on the European Parliament's amendments will determine the type of vote necessary in the Council: if the Commission has given a negative opinion on at least one amendment, the Council will have to act unanimously as regards acceptance of the European Parliament's position overall.

> 🔔 It is important to obtain a copy of the Commission opinion on European Parliament amendments, which are published on:
> Eur-Lex (http://eur-lex.europa.eu/fr/index.htm)

K. The Council second reading

34. The Council has a period of three months following receipt of the European Parliament's amendments in which to approve them by a qualified majority, or unanimously if the Commission has delivered a negative opinion, or to reject them.

- The Council approves the amended common position: If the Council agrees to accept all the amendments of the European Parliament, the act will be deemed to have been adopted.

- The Council does not approve the amendments to the common position: then, the conciliation procedure will be set in motion.

L. The conciliation procedure

35. The Conciliation Committee brings together members of the Council or their representatives and an equal number of representatives of the European Parliament, as well as the Commissioner responsible.

Once the negotiators have arrived at a compromise, the Conciliation Committee must give approval in the form of a 'joint text'.

If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

M. The third reading

36. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text.

If they fail to do so, the proposed act shall be deemed not to have been adopted.

The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

N. The Final act

37. Even though only final legislative acts (see point No 51) – for the adoption of which the Treaty on the Functioning of the European Union provides that the CoR be consulted – must comply with the principle of subsidiarity, all the information collected during the above-mentioned legislative stages will be necessary to examine this issue thoroughly.

Moreover, this information will allow the CoR to prepare well in advance any decision to bring an action before the Court of Justice of the European Union on grounds of an infringement of the subsidiarity principle.

Raising the "alarm" at a very early stage will also save time at a later stage (see point No 6 above).

⇨ Article 297 - Treaty on the Functioning of the European Union (TFEU):

"1. *Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.*

Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.

Legislative acts shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication (…)."

🔔 The electronic version of the Official Journal of the European Union is available on the following website:
Eur-Lex (http://eur-lex.europa.eu/fr/index.htm)
The Official Journal of the European Union ensures official publication of the legislation and other acts of the European Union. It has been published on paper since 1958 and, since 1998, it has also been available on the Internet.
The printed edition is currently considered to be the only valid and legally binding publication. However, the European Commission has recently proposed [COM(2011) 162 final] – based on a recommendation of the Management Board of the Publication Office where the CoR is duly represented – to rely on the electronic edition of the Official Journal of the European Union as the official and authentic version.
The proposal also aims to enhance legal certainty compared to the current situation where the online publication serves information purposes only, as rights could be enjoyed and obligations enforced based on their publication in the authentic electronic version of the Official Journal of the European Union.

IV. Application of the subsidiarity principle by the Court of Justice

38. An application for annulment will be reviewed by the judges of the Court of Justice and must therefore contain legal arguments (see point No 3 above) which are in turn supported by factual evidence.

39. For an action before the Court of Justice on grounds of infringement of the subsidiarity principle to have merit, at least one of the two aspects of the subsidiarity principle set out below needs to be disputed:

- ✓ In areas which do not fall within its exclusive competence, the Union is to 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,

- ✓ By reason of the scale or effects of the proposed action, the objectives of the proposed action can be better achieved at Union level.

In past cases, the Court of Justice has established a total of six criteria to determine whether the principle of subsidiarity has – or has not – been infringed by a legal act. These criteria will have to be taken into consideration in the context of any plans to bring an action before the Court of Justice on grounds of an infringement of the subsidiarity principle.

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

This criterion was applied by the Court of Justice in Case C-58/08 *Vodafone Ltd. and others* v *Secretary of State for Business, Enterprise and Regulatory Reform*.

The case concerned the so-called 'Roaming Regulation', 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 which that consumer uses.

The Court examined the regulation in the light of the principle of subsidiarity and, following the opinion of the Advocate General in November 2009, concluded that, given the interdependence of retail and wholesale charges, 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 operators to act within a single coherent regulatory framework.

In its findings, the Court of Justice underlined the fact that, before proposing the Regulation, the Commission had considered in its impact assessment the effectiveness and economic impacts of regulating the retail market, the wholesale market or both.

⇨ Judgement of the Court of Justice of 08.06.2010 in Case C-58/08 *Vodafone Ltd* v *Secretary of State for Business, Enterprise and Regulatory Reform*:
"(…) 45. *It follows that the Community legislature was actually confronted with a situation in which it appeared likely that national measures would be adopted aiming to address the problem of the high level of retail charges for Community-wide roaming services through rules fixing the rate of retail charges. As point 1 of the explanatory memorandum to the proposal for a regulation and point 2.4 of the impact assessment indicate, such measures would have been likely to lead to a divergent development of national laws*.
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. *As regards the functioning of the roaming market, as described in paragraphs 7 to 11 of this judgment, and taking into consideration the considerable interdependence of retail and wholesale charges for roaming services, it is clear that a divergent development of national laws seeking to lower retail charges only, without affecting the level of costs for the wholesale provision of Community-wide roaming services, would have been liable to cause significant distortions of competition and to disrupt the orderly functioning of the Community-wide roaming market, as is clear from recital 14 in the preamble to Regulation No 717/2007. 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 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*.

74. *In addition, it states in its paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice*.

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)*.

76. *In this respect, it must be pointed out that the Community legislature, wishing to maintain competition among mobile telephone network operators, has, in adopting Regulation No 717/2007, introduced a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework.*

77. *As is clear from recital 14 in the preamble to the regulation, the 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. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and retail charges, in order to contribute to the smooth functioning of the internal market in those services*.

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* (…)".

⇨ Opinion of Advocate General Poiares Maduro of 01.10.2009 in Case C-58/08 *Vodafone Ltd* v *Secretary of State for Business, Enterprise and Regulatory Reform*:

"(…) 33.*The decisive argument derives, however, from the cross-border nature of the economic activity to be regulated. Even if there may not be a sufficiently significant problem of collective action at the level of retail prices one may legitimately believe that Community may be in a better position than Member States to address the problem of roaming retail prices. Due to the transnational character of the economic activity in question (roaming), the Community may be both more willing to address the problem and in a better position to balance all the costs and benefits of the intended action for the internal market*.

34. *It is the cross-border nature of the economic activity itself that renders the Community legislator potentially more apt than national authorities to regulate it even at the level of retail charges. Given that the vindication of Community law rights was at issue, the Community legislator may reasonably have concluded that national regulatory authorities may not have attached the degree of priority to such rights which the Community legislator thought necessary. In fact, as it was explained in different parts of the pleadings and at the hearing by different parties, the prices for roaming charges are often set by mobile communications operators as*

part of a package including other services such as domestic communications. Moreover, roaming is a small part of those services and demand for roaming is less than demand for domestic communications. While regulating this market, one could expect that the focus of national regulators would be on the costs, and other aspects, of domestic communications and not on roaming charges. It is the Community, by virtue of the cross-border character of roaming, that has a special interest in protecting and promoting this economic activity. This is the precise type of situation where the democratic process within the Member States is likely to lead to a failure to protect cross-border activity. As such one can understand why the Community legislator intervened (…)".

41. Second criterion: Action at national level or lack of action at Union level would be contrary to the requirements of the Treaty (such as, for example, 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 Court of Justice in Case C-84/94 *United Kingdom of Great Britain and Northern Ireland* v *Council*.

The case was brought in relation to Directive 93/104 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 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.

The Court found that 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 harmonisation, 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 harmonise 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.

Thus, the Court did not require any quantitative or qualitative indicators for support of the Community measure.

⇨ Judgment of the Court of Justice of 12.11.1996 in Case C-84/94 *United Kingdom of Great Britain and Northern Ireland* v *Council of the European Union*:

"(…) 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 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 harmonisation, 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. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality*.

(…) 54. *Fourth, a measure will be proportionate only if it is consistent with the principle of subsidiarity. The applicant argues that it is for the Community institutions to demonstrate that the aims of the directive could better be achieved at Community level than by action on the part of the Member States. There has been no such demonstration in this case*.

55. *The argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action, which has already been examined in paragraph 47 of this judgment* (…)".

42. Third criterion: For reasons related to its dimension or its effects, action at Union level would present obvious advantages over action at Member State level.

This criterion was established by the Court in Case T-362/04 *Leonid Minin* v *Commission*, 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 principle of subsidiarity must, in any event, be rejected as unfounded.

The Court stated that even assuming that the principle of subsidiarity 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.

⇨ Judgment of the Court of First Instance in Case T-362/04 *Leonid Minin* v *Commission of the European Communities* :

"(…) 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* (*see, to that effect, judgment of 13 September 2006 in Joined Cases T-217/99, T-321/99 and T-222/01 Sinaga v Commission, not published in the ECR, paragraph 68, and the case-law cited*).

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*.

90. *It follows from the foregoing that the second part of the first plea and therefore that plea as a whole must be rejected* (…)".

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

This criterion was established by the Court 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.

In his opinion on the case, Advocate General Jacobs stated that the case-law of the Court made it clear that the relevant provisions of the Regulation were

intended to prevent the simultaneous application of a number of national legislative systems to persons covered by the Regulation; secondly, they are intended to prevent such persons from being left without social security cover because there is no legislation which is applicable to them.

⇨ Opinion of Mr Advocate General Jacobs in Case 121/92 *Staatssecretaris van Financiën* v *A. Zinnecker*:

"(…) 12. *Title II (Articles 13-17) of the Regulation, headed "Determination of the legislation applicable", contains choice-of-law rules determining the legislation applicable to migrant workers. The case-law of the Court makes it clear that the provisions of Title II have a twofold purpose. First, they are intended to prevent the simultaneous application of a number of national legislative systems to persons covered by the Regulation; secondly, they are intended to prevent such persons from being left without social security cover because there is no legislation which is applicable to them (see Case C-2/89 Kits van Heijningen [1990] ECR I-1755, paragraph 12 of the judgment, and Case C-196/90 De Paep [1991] ECR I-4815, paragraph 18 of the judgment). In accordance with those objectives, Article 13(1) lays down the general rule that: "... persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title* (…)".

⇨ Judgment of the Court in C-121/92 *Staatssecretaris van Financiën* v *A. Zinnecker*:

"(…) 12. *It must be stated in that respect that Annex I.I to the Regulation provides in relation to the Netherlands that any person pursuing an activity or occupation without a contract of employment is to be considered a self-employed person within the meaning of Article 1(a)(ii) of the Regulation. That provision does not therefore indicate that in order to have the status of a self-employed person, the person concerned must necessarily be resident in the Netherlands*.

13. *It follows that Mr Zinnecker, notwithstanding the fact that he does not fulfil the residence condition laid down by the Netherlands legislation, must be deemed to be a self-employed person falling within the scope ratione personae of the Regulation*.

14. *As a result of that finding, it is not necessary to consider whether Mr Zinnecker is also subject to the German legislation*.

15. *Consequently, the answer to the first and second questions must be that Regulation (EEC) No 1408/71 is to be interpreted as meaning that a German national who is resident in Germany and who pursues an activity as a self-employed person as to approximately one half in that Member State and one half in the Netherlands, is to be deemed to fall within the scope ratione personae of the Regulation* (…)".

44. **Fifth criterion**: Action at Union level is justified taking into consideration the substantial disparity of national and/or regional legislation and the effects of that disparity on the internal market.

✓ This criterion found application in Case 53/05 *Commission* v *Portuguese Republic*, in which the Commission asked the Court for a declaration that the Portuguese Republic failed to fulfil its obligations under Council

Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

The Court found that like other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are 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, are subject to the requirements of the EC Treaty and therefore fall within its scope of application.

Thus 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.

✓ Similarly, the criterion found application in Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others*, 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 those provisions, on marketing certain food supplements has the objective of removing barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of food supplements, whilst ensuring a high level of human-health protection.

To leave Member States the task of regulating trade in food supplements which do 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 are concerned.

It follows that the objective pursued by Directive 2002/46 cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community. Consequently, that objective could be best achieved at Community level.

- ✓ The same criterion was also applied in Case C-491/01 *British American Tobacco Investments and Imperial Tobacco*, Case C-103/01 *European Commission* v *Federal Republic of Germany* as well as Case C-377/98 *Kingdom of the Netherlands* v *European Parliament and European Council*.

⇨ Judgment of the Court in Case C-53/05 *Commission of the European Communities* v *Portuguese Republic*:

"(…) 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*.

30. *However, on the assumption that that Member State thereby intended to dispute the validity of the directive, it should be remembered that, outside the period prescribed in Article 230 EC, it cannot contest the lawfulness of an act adopted by the Community legislature which has become final in its regard. It is settled case-law that a Member State cannot properly plead the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it has failed to implement that decision or comply with that directive (see, inter alia, Case C-74/91 Commission v Germany [1992] ECR I-5437, paragraph 10; Case C-154/00 Commission v Greece [2002] ECR I-3879, paragraph 28; and Case C-194/01 Commission v Austria [2004] ECR I-4579, paragraph 41).*

31. *In any event, the Court has already held that, like other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are 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, are subject to the requirements of the EC Treaty and therefore fall within its scope of application (Joined Cases C-92/92 and C-326/92 Phil Collins and Others [1993] ECR I-5145, paragraph 22).*

32 *Thus, contrary 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* (…)".

⇨ Judgment of the Court in Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others* v *Secretary of State for Health and National Assembly for Wales*:

"(…) 101. *In that regard, it is appropriate to recall that the principle of subsidiarity is set out in the second subparagraph of Article 5 EC, 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*.

102. *Paragraph 3 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty, 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 of Justice.

103. *As the Court has already held, the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition (British American Tobacco (Investments) and Imperial Tobacco, paragraph 179).*

104. *In deciding whether Articles 3, 4(1) and 15(b) of Directive 2002/46 comply with the principle of subsidiarity, it is necessary to consider whether the objective pursued by those provisions could be better achieved by the Community*.

105. *In that regard, it must be stated that the prohibition, under those provisions, on marketing food supplements which do not comply with Directive 2002/46, supplemented by the obligation of the Member States under Article 15(a) of the directive to permit trade in food supplements complying with the directive (see, by analogy, British American Tobacco (Investments) and Imperial Tobacco, paragraph 126), has the objective of removing barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of food supplements, whilst ensuring, in accordance with Article 95(3) EC, a high level of human-health protection*.

106. *To leave Member States the task of regulating trade in food supplements which do 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 are concerned*.

107. *It follows that the objective pursued by Articles 3, 4(1) and 15(b) of Directive 2002/46 cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community. Consequently, that objective could be best achieved at Community level*.

108. *It follows from the foregoing that Articles 3, 4(1) and 15(b) of Directive 2002/46 are not invalid by reason of an infringement of the principle of subsidiarity* (…)".

⇨ Judgment of the Court in Case C-491/01 *The Queen* v *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* :

"(…) 173. *By Question 1(f) the national court asks whether the Directive is invalid in whole or in part by reason of infringement of the principle of subsidiarity.*

Observations submitted to the Court

174. *The claimants in the main proceedings maintain that the principle of subsidiarity is applicable to measures relating to the internal market such as the Directive and that, when the latter was adopted, the Community legislature left that principle wholly out of account or, in any event, failed to take it properly into account. If it had done so, it would have had to reach the conclusion that there was no need to adopt the Directive, since harmonised rules had already been established by Directives 89/622 and 90/239 for the purpose of eliminating barriers to trade in tobacco products. Furthermore, they argue that no evidence has been adduced to show that the Member States could not adopt the measures of public health protection they considered necessary*.

175. *The Belgian Government and the Parliament maintain that the principle of subsidiarity does not apply to the Directive, inasmuch as that principle is applicable only in those areas in which the Community does not have exclusive competence, whereas the Directive, being adopted for the purpose of attaining the internal market, comes within one of those areas of exclusive competence. In any event, even if it were accepted that that principle applied to the Directive, it was complied with in the circumstances, since the action undertaken could not have been satisfactorily achieved at Member State level*.

176. *The United Kingdom, French, Netherlands and Swedish Governments, and the Council and Commission, submit that the principle of subsidiarity is applicable in the present case and was complied with by the Directive. The United Kingdom and French Governments and the Commission observe in particular that the considerations set out in paragraphs 30 to 34 of Netherlands v Parliament and Council, cited above, may be applied to the circumstances of this case and prompt the conclusion that the Directive is valid with regard to the principle of subsidiarity. According to the Netherlands Government and the Commission, where the conditions for the use of Article 95 EC have been satisfied, the conditions for Community action under the second paragraph of Article 5 EC are also satisfied, since it is clear that no Member State acting alone can take the necessary measures to prevent any divergence between the laws of the Member States having an impact on trade.*

Findings of the Court

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*.

179. *It is to be noted, as a preliminary, that the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition (see, to that effect, the tobacco advertising judgment, paragraphs 83 and 95)*.

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* (…)."

⇨ Judgment of the Court in Case C-103/01 *Commission of the European Communities* v *Federal Republic of Germany*:

"(…) 46. *By harmonising the national provisions relating to PPE intended for the protection of fire-fighters in the performance of their usual duties, the PPE Directive does not infringe either the principle of subsidiarity or that of proportionality*.

47. *With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature (see, to that effect, Case C-491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453, paragraphs 180 to 182).*

48. *With regard to the principle of proportionality, the inclusion of PPE intended for the protection of fire-fighters in the scope of the PPE Directive is appropriate in order to ensure the free movement of that equipment between the Member States and does not go beyond what is necessary to obtain that aim. It does not encroach on the competence of those States to define the tasks and powers of fire brigades and to ensure their personal protection. Nor does it encroach, as the French Government submits, on the organisation of the armed forces and those for the maintenance of law and order* (…)".

⇨ Judgment of the Court in Case C-377/98 *Kingdom of the Netherlands* v *European Parliament and Council of the European Union*:

"(…) 30. *The applicant submits that the Directive breaches the principle of subsidiarity laid down by Article 3b of the EC Treaty (now Article 5 EC) and, in the alternative, that it does not state sufficient reasons to establish that this requirement was taken into account*.

31. *It should be borne in mind that, under the second paragraph of Article 3b of the EC Treaty, 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 by the Community*.

32. *The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community*.

33. *Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at*

Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point.

34. *The second plea in law must, therefore, be rejected* (…)".

45. Sixth criterion: Action at Union 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*, in which Cheminova and several other companies brought an application for the 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 containing that substance.

The applicants claimed that when the Commission decides 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 infringes the principle of subsidiarity on which, 'as it has itself remarked', Directive 91/414 is based.

The Court found, however, that even though, for the purposes of the restrictions imposed, a certain role may be attributed to the Member States, the fact remains that the definitive evaluation concerning the active substance's compliance with the requirements of Article 5(1) of that directive is a matter for the Community authorities alone.

⇨ Judgment of the Court of First Instance in Case T-326/07 *Cheminova and Others* v *Commission of the European Communities*

"(…) 251. *The applicants claim that when the Commission decides 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 infringes the principle of subsidiarity on which, 'as it has itself remarked', Directive 91/414 is based (Report from the Commission to the European Parliament and the Council – Evaluation of the active substances of plant protection products, of 25 July 2001, (submitted in accordance with Article 8(2) of Directive 91/414 on the placing of plant protection products on the market (COM(2001) 444 final, paragraph 6)). The applicants explain that Directive 91/414 essentially defers to the Member State concerned, from which an authorisation is being sought, the ultimate scientific evaluation of the active substance contained in a plant protection product. It is the Member States therefore that decide whether the data submitted by a notifier at national level are sufficient to allay any concerns. That is a 'logical aspect of the system', given that a review of an active substance based on an objective*

risk assessment cannot, for example, take into full consideration the variations existing between the geographic and agricultural conditions in the various Member States (…).

255. *Under Articles 3 and 4 of Directive 91/414, the authorisation of plant protection products is the responsibility of the Member States. On the other hand, Article 4(1) of that directive provides that Member States may not, as a rule, authorise a plant protection product unless its active substances are listed in Annex I* (…).

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* (…).

260. *Admittedly, Article 5(4) of Directive 91/414 permits inclusion of active substances which do not fulfil the requirements of Article 5(1) thereof subject to certain restrictions which exclude problematic uses of the substance involved (Sweden v Commission, cited in paragraph 166 above, paragraph 169). Even though, for the purposes of the restrictions imposed, a certain role may be attributed to the Member States, the fact remains that the definitive evaluation concerning the active substance's compliance with the requirements of Article 5(1) of that directive is a matter for the Community authorities alone. Thus, even if Article 5(4) of Directive 91/414 applies, it is for the Commission, or if appropriate the Council, to establish beyond a reasonable doubt that the restrictions on the use of the substance involved make it possible to ensure that use of that substance will be in accordance with the requirements laid down in Article 5(1) of Directive 91/414 (Sweden v Commission, cited in paragraph 166 above, paragraph 170).*

261. *It follows from all the foregoing that this plea in law must also be rejected* (…)".

46. The judicial review of the application of the principle of subsidiarity is still being developed further.

The Court of Justice 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 the level of the European Union;
- ✓ The appropriateness of the legal basis; and/or
- ✓ compliance with the conditions foreseen directly in the relevant provisions of the Treaty on the Functioning of the European Union.

V. The CoR's decision to bring an action for annulment: the internal decision-making process

47. The CoR's newly-acquired right to bring an action for annulment has clearly enhanced the Committee's role and given its opinions greater weight, especially during the legislative process.

The CoR's Rules of Procedure have been amended accordingly; henceforth, CoR opinions must systematically contain a reference to subsidiarity (see points No 2 & No 20 above).

In order to substantiate any argument on subsidiarity in the CoR opinion, the rapporteur needs 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 effect, rapporteurs are assisted by experts and can also enlist the help of the Subsidiarity Monitoring Network, as well as the Secretariat of the relevant commission within the CoR.

48. As mentioned above, the CoR's right to bring an action for annulment requires enhanced subsidiarity monitoring at all stages of the EU legislatives.

This systematic follow-up might alert the CoR at an early stage to a potential infringement of the principle of subsidiarity by the legislative act proposed.

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

⇨ Rule 52 – Follow-up to Committee opinions - Rules of Procedure of the CoR:
"(…) 2. *If the commission deems it necessary, it may ask the Bureau for permission to 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 developments in the procedure underlying the Committee's consultation*.
3. *The commission shall meet, where possible, to hold a debate and adopt the revised draft opinion, which shall be sent to the next plenary session* (…)".

49. If the CoR does not succeed in effecting a change to the legislative proposal and the subsidiarity problem persists and is reflected in the final act, the 'ultima ratio' might well be to bring an action for annulment.

🔔 CoR's 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* (…)".

The decision to bring an action for annulment is taken in accordance with rules laid down in the CoR's Rules of Procedure.

⇨ Rule 53 - Action for infringement of the subsidiarity principle - Rules of Procedure of the CoR:
"1. *The President of the Committee or the commission responsible for drawing up the draft opinion may propose bringing an action 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 59(1). The commission proposal shall be sent for decision to the Plenary Assembly in accordance with Rule 13(g) or to the Bureau in the cases referred to in Rule 36(j). 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 36(j)*.
The commission shall proceed to a vote, having previously verified that at least half of its members are present. The decision shall be taken by a majority of the votes cast. In accordance with Rule 60(1), the provisions of Rule 22(2) shall apply".

⇨ Rule 13 - Tasks of the Plenary Assembly - Rules of Procedure of the CoR:
"*The Committee shall meet as a Plenary Assembly. Its main tasks shall be:*
(…) g) having verified that there is a quorum under the first sentence of Rule 21(1) of the Rules of Procedure, to take a decision, by a majority of the votes cast, on a proposal by the President of the Committee, or the competent commission acting in accordance with Rules 53 and 54, to bring an action 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.
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 of the Regions in defence of its prerogatives and, in accordance with Article 8 of the Protocol to the Treaty of Lisbon 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 of the Regions 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 53 and 54. The Plenary Assembly shall, having previously verified that at least half of its members are present, take a decision by a majority of the votes cast in accordance with the provisions of Rule 22(2), (3), (4) and (6)".

⇨ Rule 36 - Tasks of the Bureau - Rules of Procedure of the CoR:
"*The Bureau shall have the following tasks*:
(…) j) *having verified that there is a quorum under the first sentence of Rule 37(2), taking a decision to bring an action before the Court of Justice of the European Union, when 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 of the Committee or the competent commission acting in accordance with Rules 53 and 54. 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 21(1), the Plenary Assembly takes a decision by the majority required in Rule 13(g) not to bring the action, the President shall withdraw the action*.
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 37(3), the provisions of Rule 22(2) shall apply".

50. While concerns about a legislative proposal and its compatibility with the subsidiarity principle will surface long before the legislative act is adopted, a decision to bring an action before the Court of Justice can be taken only once the legislative act has actually been adopted.

Once a legislative act has been adopted, it is translated into all official languages and subsequently published in the Official Journal of the European Union.

Once a legislative act has been published[2] in the Official Journal of the European Union, the CoR will have two months plus fourteen days (see point No 6) (i.e. a total of around 10 weeks) from the day of publication to bring an action before the Court of Justice.

During these 10 weeks, the President of the CoR 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.

51. It should be borne in mind that the CoR has no say over 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.

At the same time, bureau meetings and plenary sessions take place at regular intervals, which rarely exceed the 10-week deadline (except in July/August).

Moreover, potential subsidiarity problems should have been detected well in advance through follow-up of the CoR's opinion.

> 🔔 It will be essential to bear in mind and factor in the time constraints imposed by the above rules.

52. As mentioned above, concerns about a legislative proposal and its compatibility with the subsidiarity principle are very likely to surface long before the legislative act is adopted.

Ideally, preparations for bringing an action before the Court of Justice should commence as soon as 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.

Ideally, the Legal Service of the CoR should be consulted as soon as concerns arise about the potential infringement, by a legislative proposal, of the subsidiarity principle. The early involvement of the Legal Service will ensure, in particular, that legal arguments are formulated, discussed and consolidated well

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[2] A legislative act enters into force on the date specified in the act or, in the absence thereof, on the twentieth day following that of its publication (see point No 37).

in advance of the 10-week deadline for bringing an action following the publication of the final act.

To assist the Legal Service in the task of formulating legal arguments, the information set out in Chapter III of this Practical Guide should be shared with the Legal Service as soon as it becomes available. At the same time, the Legal Service would need to be able to draw on the overview that has been prepared of national (and regional) legislation in the area concerned.

🔔 It is important to note in this regard that the Legal Service does not have the resources to collect the above information in respect of each and every legislative proposal on which the CoR is consulted.
The Legal Service will therefore have to rely on the cooperation of those entrusted with collecting this information on behalf of the rapporteur, and their willingness to pass this information on to the Legal Service in good time.

VI. Proceedings before the Court of Justice of the European Union

53. Proceedings before the Court of Justice are governed by strict rules laid down in the Treaties, the Statute of the Court of Justice and its Rules of Procedure, and comprise a written phase followed by an oral phase.

⇨ Article 20 - Protocol (No 3) to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community: on the Statute of the Court of Justice of the European Union ('Protocol (No 3) on the Statute of the Court of Justice'):
"*The procedure before the Court of Justice shall consist of two parts: written and oral.*
The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them (…)".

54. A case is brought before the Court of Justice by way of an application for annulment, a written document that can run to up to 50 pages.

- ✓ The application must contain a brief account of the relevant facts, all the pleas in law on which the application is based and the arguments in support of each plea in law.

⇨ Article 21 - Protocol (No 3) on the Statute of the Court of Justice:

"*A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.*

The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings."

⇨ Article 38 - Rules of Procedure of the Court of Justice:
"1. *An application of the kind referred to in Article 21 of the Statute shall state*:
(a) *the name and address of the applicant*;
(b) *the designation of the party against whom the application is made*;
(c) *the subject-matter of the proceedings and a summary of the pleas in law on which the application is based*;
(d) *the form of order sought by the applicant*;
(e) *where appropriate, the nature of any evidence offered in support* (…)."

- ✓ The application will be reviewed by the judges of the Court of Justice and must therefore contain legal arguments.

  Pursuant to the second paragraph of Article 263 TFEU, an act can be annulled on the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of power.

- ✓ Legal arguments should be set forth and grouped by reference to the particular pleas in law to which they relate. Ideally each argument or group of arguments should be preceded by a summary statement of the relevant plea.

  In addition, the pleas in law put forward should ideally each be given a heading so that they can be easily identified.

- ✓ In an action alleging infringement of the principle of subsidiarity, the CoR will have to adduce evidence (see Chapter III of this Practical Guide) to show that it has, throughout the legislative procedure, raised concerns that the legislative proposal infringes that principle.

55. Please note that it is also possible for the CoR to '*intervene*' in proceedings instituted by others: this means in practice that the CoR would then support arguments put forward by other applicants, or even develop or reinforce certain points of those arguments.

⇨ Article 40 – Protocol (No 3) on the Statute of the Court of Justice:
"*Member States and institutions of the Union may intervene in cases before the Court of Justice.*
The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.
An application to intervene shall be limited to supporting the form of order sought by one of the parties".

⇨ Article 93 - Rules of Procedure of the Court of Justice:
1. An application to intervene must be made within six weeks of the publication of the notice referred to in Article 16(6) of these Rules.
The application shall contain:
(a) the description of the case;
(b) the description of the parties;
(c) the name and address of the intervener;
(d) the intervener's address for service at the place where the Court has its seat;
(e) the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene;
(f) a statement of the circumstances establishing the right to intervene, where the application is submitted pursuant to the second or third paragraph of Article 40 of the Statute.
The intervener shall be represented in accordance with Article 19 of the Statute.
Articles 37 and 38 of these Rules shall apply.
2. The application shall be served on the parties.
The President shall give the parties an opportunity to submit their written or oral observations before deciding on the application.
The President shall decide on the application by order or shall refer the application to the Court.
3. If the President allows the intervention, the intervener shall receive a copy of every document served on the parties. The President may, however, on application by one of the parties, omit secret or confidential documents.
4. The intervener must accept the case as he finds it at the time of his intervention.
5. The President shall prescribe a period within which the intervener may submit a statement in intervention.
The statement in intervention shall contain:
(a) a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties;
(b) the pleas in law and arguments relied on by the intervener;
(c) where appropriate, the nature of any evidence offered.
6. After the statement in intervention has been lodged, the President shall, where necessary, prescribe a time-limit within which the parties may reply to that statement.
7. Consideration may be given to an application to intervene which is made after the expiry of the period prescribed in paragraph 1 but before the decision to open the oral procedure provided for in Article 44(3). In that event, if the President allows the intervention, the intervener may submit his observations during the oral procedure, if that procedure takes place.

Annexes

The following annexes are made available by the Court of Justice.

Annex 1: Aide-mémoire: Application.

Annexe 2: Model Summary of the Pleas in Law and main arguments relied on in the application.