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Reformed Subsidiarity in the Constitution for Europe

Can it deliver on expectations?

By
Dr Brendan Flynn

A previous version of this paper was presented at the 2004 Maastricht Forum on "European Integration: Making the Constitution Work" which was held at EIPA on 19 November 2004

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1.0 Introduction

“Protections for “subsidiarity”-ensuring that issues are dealt with at the most appropriate level-are weak at best, non-existent at worst: national parliaments are invited to speak up if they think subsidiarity has been flouted, but the European Commission is merely obliged to take note,” (*The Economist*, June 26th-July 2nd, 2004. p.13).

“The Economist dismissed the procedure for subsidiarity: but it was wrong to do so. At present, there is no obligation on member states or the European Commission to inform national parliaments about draft EU laws, still less to let them have any power. But under the new provisions all national parliaments must be notified independently of all of the draft laws, and given six weeks to respond. If a third of them object the Commission must “review” the draft. Yes, in theory the Commission could then re-submit the original proposals un-amended, but in practice they would be unlikely to do so, not least because, if a third of national parliaments are against a proposal, so will be their governments, and the commission would be close to losing the qualified majority needed to pass,” (Straw, Jack,2004, p.30).

I begin my paper here by providing you with two quotes above, that reflect how the subsidiarity principle is becoming one element of at least some of the national ratification debates on the *Constitution for Europe*. Already considerable expectations about subsidiarity are being advanced, and it is noteworthy that such expectations are decidedly mixed and controversial.

For some, the reformed subsidiarity provisions are basically an ineffectual and disappointing side-show. For others, including the British foreign minister quoted above, the new provisions are a significant and workable approach to what has at times proven to be an elusive and unsatisfying subsidiarity concept.

In fact such widely diverging expectations concerning subsidiarity have been a part of its history at the EU level, with heated disagreement and much rhetorical speculation a feature. Moreover, there has been a fashion to impatiently dismiss the idea of subsidiarity as either vague, lacking intellectual depth, or perhaps dangerous for being an ‘unknown quantity’ (Toth, 1992). Others fail to appreciate that subsidiarity is a concept which has some intellectual depth and it is not as is sometimes confusingly asserted just a ‘catholic’ theory¹ (Norman, 2003, p.94).

Can speculation and rancour over subsidiarity be avoided this time around as we face into various national ratification debates? It is perhaps unlikely. However, this paper hopes to make a modest contribution to such an emerging debate through a number of specific arguments. I should note that time and space limit me to only consider here the subsidiarity concept proper, and not the related but distinct concept of proportionality².

1.1 The *first* argument this paper makes is that subsidiarity has been unquestionably modified by the *Constitution for Europe*. It is not just a concept that has been on the receiving end of a little cosmetic ‘touch up’ exercise. While it is true that the changes are mostly detailed and small, and may not at first seem important, nonetheless their cumulative impact is surely important.

1. It has been widely acknowledged that one can trace the modern political sense of subsidiarity back to 17th century calvinist political thought, most coherently expressed in the work of Althusius (1603-1614), who expressed something like the subsidiarity principle. The emphasis of Althusius in this regard was on a quasi-constitutional principle of confederation, to affirm a hierarchical relationship between Calvinist communities and their more worldly overlords, ensuring a maximum a degree of autonomy. See: Endo (1994, p.2043.)

Attracting the most attention perhaps, has been the so-called ‘reasoned opinion’ procedure that promises an opportunity for national parliaments to apply subsidiarity, by responding to EU level proposals. This has been variously described as an ‘early warning mechanism’ or a ‘yellow card’ device (Norman, 2003, p.95).

1.2 However, as we shall see, this novel and distinctively *political* application of the subsidiarity principle, is not perhaps the most important aspect of the reformed subsidiarity concept to focus on. This observation forms the *second* part of my argument here, which is namely to caution against overly emphasising the importance of the novel ‘reasoned opinion’ procedure. What matters is how subsidiarity has been reworked overall.

The reason why I caution against this, is that it may miss more subtle but perhaps not less important details in how the principle has been altered by the Constitution. For example there is a new protocol attached to the Constitution which makes a number of significant changes, and subsidiarity cannot be assessed without reference to that protocol.

Moreover, I am concerned that a certain misconceived view may be spreading through sections of the media and public opinion, which assumes the new Constitution reduces subsidiarity to a type of symbolic device for issuing merely political ‘yellow cards’ or ‘warnings’ which carry no legal sanction. In fact subsidiarity remains very much legally enforceable and that I suggest, is a crucial point to communicate to the public as part of the various national ratification debates.

Indeed many commentators in their rush to speculate over how national parliaments might use their new ‘early warning’ powers, have ignored how the Constitution *reiterates* and *refines* a distinctively *legal* application of the subsidiarity principle. In particular for the first time, the wording of the subsidiarity concept has been explicitly altered to make reference to sub-national political entities: regions and even local governments. More important still, is the not trivial right to litigate invoking the reformulated subsidiarity principle. In this regard, one innovation is that the Committee of the Regions (CoR) will now have for the first time the *legal* right to invoke the principle.

1.3 The *third* part of my argument, is to answer in the affirmative the question of whether the reformulated subsidiarity concept in the new Constitution can be judged to be a welcome development. Notwithstanding a few qualifications, I suggest, the answer must be clearly yes.

The new text and the new protocol on subsidiarity are improvements on what went before. They give us more clarity on certain aspects that were previously at least a bit vague. For example, the reference to “non-exclusive competences” in the previous Treaties, is now much more clear, because the new constitution gives us a list of what these are and are not.

Moreover, the reasoned opinion procedure is welcome because one can argue it *complements* a legal use of the principle that to date has proven mostly very limited and in fact remains somewhat under-explored. It is regrettably true to say that The European Court of Justice (ECJ hereafter) has not been very enthusiastic about receiving pleadings invoking subsidiarity. Recent case law would suggest a reticence towards subsidiarity by the ECJ, and that has provided something of a vacuum that needed to be filled, by a properly *political* use of the principle. Although some commentators have been scornful of this ‘yellow card’ device, I suggest that politically, as distinct from legally, it will have at least the potential to breath new life into the subsidiarity concept.

2. One other distinctive feature of the EU definition of subsidiarity has been its systematic linking with the principle of proportionality, which taken at its simplest implies that the costs of achieving any policy should not outweigh the gains, or that regulatory burdens should not be irrational or excessive. This principle originally developed within Prussian administrative law, and later was expanded upon in the post war jurisprudence of both the German Constitutional Court and the ECJ, which has ‘learned’ the principle from this German Constitutional tradition. In fact the proportionality principle consists of three distinctive elements (Emiliou, 1996, De Búrca, 1995,) which can be rendered into distinct questions or tests. First, is the proposed policy measure sufficient to meet the planned for ends; in effect is there plausible causation? Secondly, even if it can be judged as sufficient, it could still be possibly disproportionate, so is it the least onerous measure, and in that sense necessary? Thirdly, is the measure proportionate *stricto sensu*? This in practice means wherever a proposed measure intrudes upon some fundamental right, a very high standard of proportionality is expected and regulatory initiatives will be easily defeated, unless they are absolutely necessary by virtue of some other balancing right or qualification.

1.4 Yet note my final argument here is to stress that in order for the reformulated subsidiarity concept to meet expectations we need to appreciate the need for *both* the legal application of the principle, *alongside* the novel process for the political application of the principle through the ‘reasoned opinion’ procedure. They should mutually support each other.

We should not presume that a merely political use of subsidiarity will be enough to make it effective, and that means we should not give up on a legal approach to the principle, which I argue can continue to still be explored in the future, but perhaps in a much more concrete way than has happened heretofore. In particular, the minimalist hesitancy of the current ECJ towards subsidiarity pleadings could be unseated if legal arguments were pitched in a more realistic way. The key to this might be to realise any legal application of subsidiarity might be easier through a focus on its procedural aspects rather than attempting to use it as a substantive test. Indeed I offer here one concrete, albeit brief, suggestion in that regard: an exploration of the concept of ‘manifest error’ as part of future subsidiarity pleadings when challenging EU level legislation or initiatives.

I now turn to develop these arguments over successive sections of this paper.

2.0 How Has Subsidiarity Been Reformed? First Impressions

One of the first points I wish to make here is simply to chart how and where the subsidiarity principle could be much altered by the *Constitution for Europe*, if the constitutional Treaty is ratified. Those changes can be described as piecemeal or incremental, but they are surely not trivial. Taken together, there is a significant response to some aspects of the 1990s debate on subsidiarity that offers us today considerable clarification.

2.1 Defining what non-exclusive competences are

To give a first example, the textual form of words used in the Treaties of Maastricht and Amsterdam, and Nice, all began with a qualification whereby subsidiarity was only applied to non-exclusive competence areas, and by implication exclusive competence areas were immune from subsidiarity arguments.

This was in fact a very confusing qualification, because those Treaties gave no guidance on what non-exclusive competences actually were. The Treaties were all silent on that question. Indeed some legal scholars during the early 1990s argued that the concept of non-exclusive competences was in fact unknown in the jurisprudence of the ECJ, and that potentially the breadth of the Community exclusive competences was very wide (Toth, 1992, 1994).

Certainly it was usually agreed the classic customs union powers enshrined since the Treaty of Rome were matters of an exclusive competence, and there was some speculation as to whether any “common” policies mentioned in the Treaties were also exclusive competences. Crucially the point was nobody really had any authoritative statement about where non-exclusive competences ended and exclusive competences began. That meant nobody really knew exactly to what policies subsidiarity was applicable to or not. For example was the entire Common Agricultural Policy (CAP hereafter) off-limits to subsidiarity type arguments, or not?

The new *Constitution for Europe* resolves that problem simply by the expedient of providing a clear list of exclusive competences and also other obviously non-exclusive types which could be classified as “shared”, or alternatively those that could be described as “complementary”. It is well worth reproducing³ here the relevant provisions of the Constitution for the sake of clarity within this text:

ARTICLE I-13

Areas of exclusive competence

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.

3. The version of the *Constitution For Europe* text that I rely on throughout is that finalised in August 2004.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

ARTICLE I-14

Areas of shared competence

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in Part III;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in Part III.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

ARTICLE I-17

Areas of supporting, coordinating or complementary action

The Union shall have competence to carry out supporting, coordinating or complementary action.

The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, youth, sport and vocational training;
- (f) civil protection;
- (g) administrative cooperation.

What can we say about this listing as regards subsidiarity? The first point is that the list of exclusive competences is quite small, although they are all quite important and general competences, with the exception perhaps of the slightly odd reference to conservation of marine biology, which is highly specific.

Notably, the CAP is not listed here as an exclusive competence. We are now crystal clear for the first time that subsidiarity type arguments can be made and must be listened to by the EU institutions as regards questions of agriculture and rural development. Arguably, this is quite important, because it has been suggested that an exploration of subsidiarity to afford greater national and regional discretion, may be one way to continue on with vital reforms which the CAP still needs and yet which agreement at a collective EU level is still so difficult to sustain (Grant, 1995). In the enlarged EU25, it may be even harder to reform the CAP, making subsidiarity tactically more important as a means of setting out the

case for a more flexible CAP that allows greater discretion and room for national and sub-national innovation.

I give the example of the CAP as but one case, yet clearly the effect of Articles I-13, I-14 and I-17 imply that the remit of subsidiarity is rather large. The only areas where it cannot be applied relate to the classic core competences of the customs union and internal market powers of the Treaties, or where the Commission can make the claim to have competence for external negotiations. These exemptions have been widely accepted anyhow in our understanding of the subsidiarity concept of the 1990s, but what is a relief here is that the category of exclusive competences has been drawn quite narrowly. That is good news for the subsidiarity concept⁴.

2.2 A clear statement of residual powers for the first time

The second major way in which the subsidiarity concept has been changed by the new Constitution is through a reworking of the exact substantive textual definition now found at Article I-II of the Constitution, which I reproduce here, underlining the additions:

Article I-II

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

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

Note a number of changes of emphasis here alongside some new additions⁵. It is made very clear that the powers the EU has, *only* arise because they have been conferred by the member states. This was an idea that was already embedded in the old Treaties, at least since Maastricht, but it is here given much greater emphasis and elevated to a full constitutional principle of ‘conferral’, in case there was any doubt that it was such a principle of EU law.

This is buttressed by the addition of a statement that those powers which are *not* conferred, are assumed to be held residually by the member states. This is truly novel, and represents an important clar-

4. It is however, important that one appreciates that some policy issues potentially straddle the two competences categories in complex ways. For example, environmental policy is mentioned in Article I-14 of the new Constitution as an area of non-exclusive shared competence, to which subsidiarity can then unquestionably apply. However, does that mean all environmental policy issues will necessarily rest upon shared competences? While mostly this will likely be the case, it is possible that the Commission might argue in future, that some aspects of environmental policy could be based on an exclusive competence as set out under Article I-13. Such could relate to competition rules, related to environmental concerns, that are required for operation of the single market, or certainly some instances of international environmental diplomacy where the Commission have a competence based on Article I-13. Both would presumably escape any subsidiarity challenge.

ification especially as regards any fears about an expansionary definition by the ECJ of a doctrine 'implied powers', a doctrine that the Luxembourg Court has explored in the past (Craig and de Búrca, 2003, pp.123-125).

This statement of residual powers also marks a considerable clarification of what had been briefly in the mid 1990s an important disagreement between some advocates of the subsidiarity principle, who endorsed either a positive/prescriptive view of subsidiarity against those who preferred to stress only a negative/proscriptive view⁶ (Endo, 1994, pp.2054-2052; Føllesdal, 1998, p.195; Toulemonde, 1996, p.49).

The latter sought from subsidiarity a restrictive means of limiting EU competences, whereas the former preferred a permissive rule, that would allow actually new competences to be created at the EU level, by using subsidiarity as a general task allocation device. However, the references to powers being granted by conferral, the clarification of this as a constitutional principle, and a clear statement of residual powers existing with the Member States, all tend to firmly rule out the possibility of using subsidiarity as a basis to claim a novel competence or power at the EU level.

Finally very relevant here is an important textual change between the new protocol for the application of the subsidiarity and proportionality principles, and the older protocol that was attached to the Amsterdam and Nice Treaty texts. An entire section has been deleted in the new Constitution's protocol, which used to formerly read:

"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. The criteria referred to in the second paragraph of Article 5 of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its own powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified', (Article 3, Protocol No.30 attached to the Treaties of Amsterdam and Nice).

It is quite likely that this was deleted partly as a matter of expediency: to simply reduce the volume of the text of the new protocol, however its deletion is an important matter. For what these ambiguous statements do is somewhat muddying the interpretation of subsidiarity. Some commentators continue to misrepresent the subsidiarity principle as a constitutional "task allocation device", a type of legal calculus or weighing mechanism by which one could 'read off' what ought to be centralized or decentralised. Potentially some commentators may then hope to use subsidiarity as a 'two-way street' process, meaning using it legally to argue, following perhaps the doctrine of implied powers, for a new EU level competence or leadership role.

5. This particular textual definition should be compared with the current expression of subsidiarity which has been carried over through the Maastricht, Amsterdam and Nice Treaty texts:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas that do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

(Article 5 (ex article 3b) of the Treaty Establishing the European Community within the Treaty on European Union, 1997 and Treaty of Nice, 2001).

6. The negative view of subsidiarity sees the principle as a type of constitutional or normative restraint (the classic Calvinist limitation upon overlords), limiting the scope for centralisation or even for government action in preference to market or civil society actors. The positive view of subsidiarity in contrast suggests the principle can be used as a general tool to inform task allocation, between levels of the state and society, and therefore may actually justify reassigning competences, including even to centralised governments. Rather than serving as a constitutional restraint, subsidiarity then becomes conceived of as a general device to decide task allocation. A good example of the uncertainty about this crucial question can be gleaned from the Commission's initial October 1992 Report on Subsidiarity that was a pre-submission to the European Council Summit held in December. Here it was argued that 'the principle of course operates in both directions: if, within the field of Community competences, a decision or action at Community level meets these requirements, it should be undertaken at this level (CEC, 1992a). I argue elsewhere that this view is mistaken and now quite untenable given substantive expressions of the new Constitutional text.

However, legally speaking, such an interpretation is inconsistent with the clear statement of even Article 3 of the old “Amsterdam/Nice” protocol, which already noted that the subsidiarity principle cannot grant or allocate new competences (or remove them either). All subsidiarity does is inform how certain (non-exclusive) competences are employed or used⁷. The actual allocation of competences is something that has always been done by the Member States on the basis of negotiation and deliberation within successive Treaties. Notably, the new constitution adopts a ‘belt and braces’ approach to this confusion, by firstly being explicit about what these competences are, whether they are for the EU alone or shared with the Member States, as well as then having a clear statement of residual powers being expressed for the first time.

We should then be finally clear that subsidiarity cannot be used to ‘read off’ implied new competences. Note this does not invalidate the observation more generally that subsidiarity indeed should be understood as a dynamic concept which does not necessarily involve a presumption against centralised or EU level policies, a great many of which are rather obviously necessary. Rather subsidiarity is an appeal to guard against excessive centralisation and to increase the capacity for lower levels of governance to solve problems where they can⁸.

2.3 Greater respect for regional and local governments

Also of considerable interest is an explicit reference to the regional, local, and central level of the member states, a refinement of the originally very Spartan reference only to Member States in the previous Treaty texts. Note here however, that this is not some kind of radical reference to the concept of a ‘Europe of the Regions’ or ‘local Europe’.

The regional and local levels are specified as being those regions and locales of the Member States, rather than being treated as free-standing entities in their own right. This qualification is important, as it is really pointing to the varied constitutional *status quo* among the Member States, especially those where sub-national levels have real political power and constitutional autonomy.

It also marks a continuation of a line of argument which the Commission⁹ and the Member States have affirmed since the mid 1990s, which is that subsidiarity is addressed to the Member States and the other EU institutions, and is then subsequently applied sub-nationally by each Member State according to their own national constitutional requirements. Those states which are federal, or at least grant extensive sub-national autonomy, may then choose to apply subsidiarity in a way that accords to their sub-national entities considerable discretion.

7. This distinction between subsidiarity as a device to govern the employment rather than the allocation competences, is actually rather close to the traditional understanding of the role of subsidiarity within German constitutional law, whereby subsidiarity is seen as ‘a rule of reason’ and not as is commonly misunderstood, a general task allocation rule. As Constantinesco makes clear, subsidiarity cannot be applied as a: ‘precise blueprint enabling it to draw up detailed lists of competences...subsidiarity does not make it unnecessary to consider and negotiate the areas of respective competences of the Member States and the Community, for its application leads only to the most general indications’ (Constantinesco, 1991, p.39).

8. My target here is rather the mistaken view that subsidiarity can should be used as a general task allocation device, and my reasons for opposition to such a view are manifold. There is an exaggeration of the scope of one abstract principle to be used mechanically to decide who should do what, which could privilege perhaps economic data on efficiency over other values, including purely political concerns. For example, what if a particular reading of subsidiarity suggested the merging of national navies and air-forces on the ground likely efficiencies? This ignores the concerns about the concentration of military powers and the arguments for national sovereignty. I submit task allocation in any constitution is better assessed ‘in the round’ having regard to history, custom, tradition, experience, as well as efficiency concerns and other political values, such as national solidarity. One principle alone cannot be used to ‘read off’ such concerns and decide who should have a competence. Moreover, the result would in fact be having judges adjudicate over competence allocation rather than democratically elected national representatives.

9. For example in 1994, Bruce Milan answered European Parliamentary queries on whether the subsidiarity principle in Article 3b (later Article 5) could be relied upon by sub-state agencies, as follows: “The application of subsidiarity to the relations between member states and regional or local authorities is a matter of institutional organisation within each Member State and falls within the competence of each member state. Nevertheless, the Commission is convinced that regional and local authority involvement in the project of European Construction is essential”. (CEC, 1994, Flynn, 2000, p.76)

However, the key concern here is that national constitutional orders are not upset. Article I-11 does *not* grant local governments or regional authorities in unitary states a license to demand competences on their own initiative, or even to challenge from within their own prerogatives, a proposed EU level initiative or law¹⁰. If they seek to do so, they must agree such within their own national constitutional framework.

Moreover, Article 6 of the new protocol for applying the subsidiarity and proportionality principles attached to the Constitution, makes it clear that regional governments cannot themselves make a reasoned opinion on European legislation or proposed initiatives¹¹. They must do so through their national parliaments, according to various national constitutional provisions.

It might appear that in fact the reference to regional and local levels is then more timid and less significant than it first appears. However, for states where the sub-national dimension of politics is a vital element, this new textual definition of subsidiarity does mark an important upgrading of what is for them a sensitive issue. In effect, it is a promise from their own national governments that they will remember that subsidiarity concerns should not just reflect their interests, but also those of the regions and the local entities.

Previously that political promise had only been expressed by a protocol attached to the Treaty of Amsterdam where the governments of Germany, Belgium and Austria, each solemnly promised that they would treat the subsidiarity principle with due regard for their own sub-national entities¹². At the level of providing at least a political guarantee, that was a significant move for those states.

Note however, that by now including a reference to the regional and local levels in the actual substantive Constitutional text, such a promise is made for *all* states and is made stronger. We can likely guess that at the level of rhetoric and discourse these references will be relied upon by regionalist and municipal political elites to remind national governments of what their responsibilities will be. Moreover, as I will argue below, the legal enforceability of the new subsidiarity protocol, insofar as it offers distinctive promises for regional and local government, will not be trivial. This is especially because the Committee of the Regions (CoR) will have some scope to litigate if regional or local voices have been ignored.

Unquestionably the new wording here signifies a widening of respect for the regional and local level, while being mindful of the need to ensure such sentiments are compatible with the due authority of national governments of the Member States and their respective constitutional orders.

10. There has for example been some conflict over the scope of subsidiarity principle in relation to EU affairs within Spanish multilevel politics, as Basque and other regional nationalists push for a more permissive definition (Brassloff, 1994, pp.22-23).

11. The relevant passage in Article 6 of the new protocol is: "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers".

12. The exact text read as follows: "It is taken for granted by the German, Austrian and Belgian governments that action by the European Community in accordance with the principle of subsidiarity not only concerns the Member States but also their entities to the extent that they have their own law-making powers conferred on them under national constitutional law" (quoted in Flynn (2000, p.77).

3.0 The Reasoned Opinion Mechanism – How Significant?

To date however the key change which is attracting the most comment and attention is the single major obvious innovation, the so called ‘early warning’ mechanism, although the reader will appreciate that I have already outlined it is not the only important way in which subsidiarity has been modified by the *Constitution for Europe*.

3.1 The reasoned opinion procedure: a deliberative device

Let us firstly be clear what is involved in this mechanism. In the language of political science it should be perhaps chiefly understood as a “deliberative device”. That is to say it is an institutional practice that is designed to further debate, dialogue, and communication, all of which are vital attributes in any democratic legislative order. The goal is also to provide an institutional check and balance, but one which has uniquely as its style and mode of operation, a learning or educational idiom: proposers of EU laws and initiatives communicate with national legislatures, and both have scope to ‘learn’ from each other.

One other feature of the ‘reasoned opinion’ mechanism is that because it will likely necessitate dialogue between various national parliaments (see below), it might then encourage a type of horizontal deliberation between different national parliamentary cultures and indeed, different national debates on subsidiarity. Arguably, the diversity of national views over the principle are currently being missed. To give but one example, the Italian debate on subsidiarity is extraordinarily rich, with a variety of themes emphasised which are not always explored within the Anglophone world’s treatment of the concept, for example a strong emphasis on the voluntary, community, and ‘third sector’ of civil society, whose contribution to policy formation and even delivery, should not be discounted (Cotturri, 2001). It should be of some real gain then to have national parliamentarians becoming familiar with how their colleagues in other Member States see the application of the principle.

Moreover, even when a ‘reasoned opinion’ does not follow from any scrutiny (hopefully the norm), national parliamentarians still ought to become systematically more familiar with the volume and pace of EU legislative, and even non-legislative proposals as well (which are not trivial for that). The Commission, or other EU institutions making proposals, should then be drawn into a necessarily structured deep listening experience towards the concerns of national parliaments.

I might add that one significant qualitative difference between listening to national parliaments, as opposed to national governments, is that the former will generally give greater play to the parliamentary opposition. In this respect, I might differ a little from the British Foreign Secretary, Jack Straw, in his assertion that one can safely assume that if national parliaments express an opinion against an EU level proposal, that this opposition will also be shared by national governments. It is more complex than that, because some continental governments often have a parliamentary minority position, as is historically not uncommon in Scandinavia for example.

In fact one of the very interesting future developments will be to see scenarios emerge where national parliaments either in plenary or in committee, substantially differ from the observations made by national COREPER delegations or national governments otherwise. It is more than possible that ‘backbenchers’ or ‘party rebels’ may feel free to express quite sharp differences on EU proposals, distinct from their national governing party systems. I feel this is actually to be welcomed, rather than

feared. The problem with current national government input into EU legislative proposals is that it masks a wider body of national opinion in the guise of the ‘official’ government position.

It should also be made clear however, that with the ‘reasoned opinion’ procedure we are not talking about some kind of *ad hoc* type of mere consultation exercise. It is not an optional extra for the Commission, in particular, to do a little ‘sounding out’, now or then.

I argue that a close reading of the provisions makes it clear that what is involved is in fact a legal *obligation* upon various EU institutions to communicate all their proposals and relevant documents¹³ to national parliaments, and it would appear there is an equal *obligation* upon national parliaments to consider such material, especially as is set out in the attached protocol. Recall that Article I II.3 of the Constitutional text states using the important legal expression, “shall”, that:

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

Note, here the terms of the protocol in Article 6 make it quite clear that the decision to offer a ‘reasoned opinion’ is however at the discretion of each national parliament. Yet it would appear there is an obligation to at least receive EU proposals as communicated from the EU institutions.

Arguably this obligation strengthens the already evolving obligation upon EU institutions¹⁴ to communicate legislative or other proposals to national parliaments. Previously there had been merely a declaration (not legally binding) attached to the Maastricht Treaty text whereby national governments gave an undertaking to transmit EU legislative proposals to their national parliaments in a timely manner, while both the Amsterdam and Nice texts expanded this practice somewhat within a proper protocol on the role of National Parliaments (COSAC, 2004b, p.9). What is different here is that the obligation has been made sharper: texts must be sent to national parliaments by the EU institutions themselves at the same time as they are sent to other institutions.

It is true that this falls actually short of a legal demand being placed upon national parliaments to scrutinise such proposals. The obligation is not worded like that, but the national parliaments must organise their affairs to give effect to the protocol and the reception of such proposals. Therefore, it does at least formally establish an exchange of papers. The result of this is that it will not be possible for some national parliamentarians to complain in future, that they were never notified about some EU level initiative or law. Instead national parliamentarians will have to be on guard against political complaints that they have failed to properly scrutinise or object to some EU proposal at the early stage where texts have been exchanged.

Finally, I should draw the reader’s attention to one other area of the new Constitutional text where it appears the language used does actually impose some form of legal obligation upon national parliaments. Article III-259, which relates to the sensitive issues of the “Area of Freedom, Security and Justice”, demands that that the national parliaments will pay particular attention to the application of the subsidiarity principle as set out in the new protocol. It reads:

“ARTICLE III-259

National Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality. “

13. The types of documents that would be exchanged here are worth considering. The COSAC 2004 Report suggests they could include: consultation documents such as green papers; white papers; communication documents (COM DOCs); the annual legislative programme; individual detailed legislative proposals; Council of Ministers’ Agendas; Council minutes; proposals for legislative from within the Council (groups of Member States) or any other EU body; European Parliamentary legislative proposals and amendments; the annual reports of the Court of Auditors.

14. It is not just the Commission who is mandated to communicate its proposals. Articles 6 and 7 of the protocol make it clear the Council, the European Parliament, the European Court of Justice, the European Central Bank, and Member States are all equally mandated.

I have reproduced the exact terms of Sections 4 and 5 of Chapter IV, Part III of the Constitution in Annex 8.0 below, but these two relevant topics can be summarised as dealing with judicial co-operation in criminal justice matters and police co-operation. The types of initiative which one can expect here, and which might be very sensitive from a subsidiarity perspective, include under Section 4: the agreeing by unanimity minimum rules for common definitions of serious crimes and the treatment of individuals and victims within criminal justice processes; the refinement of the *Eurojust* organisation which has as its aim to further co-operation between national judicial investigation and prosecution authorities; and the creation of a new European Public Prosecutor's Office which will initially (if such a post is agreed to be founded by the Member States) only be limited to crimes against the financial interest of the EU, however this may, by mutual consent, be expanded to other serious crimes. Section 5 sets out a regime for common policing co-operation which could include exchange of information, joint training initiatives and further clarifies the remit of the *Europol* organisation in this regard.

Some safeguards regarding subsidiarity type concerns are already inbuilt into these Constitutional provisions, such as a statement that the application of coercive measures as part of any policing operations shall be only for each Member States' competent authority (Article III 276(3)), or a mechanism whereby any Member State can refer any minimum rules in the guise of framework laws, to the European Council if they consider these injurious to some fundamental principle of their national criminal justice system. The European Council can then by unanimity resolved the issue in a number of ways (Article III 271(4)).

However, I suggest this apparent obligation that the *Constitution for Europe* imposes on national parliaments, gives a direction to national parliaments that there clearly are areas of special sensitivity with regard to the subsidiarity principle and that special attention must then be given to these matters. This is an important point: if national parliaments are to apply their scrutiny properly they will have to prioritise and be selective.

3.2 The limits of deliberation?

Of course this points to some obvious limitations with this 'reasoned opinion' procedure. The sheer volume of EU legislative proposals and other initiatives might quickly reach proportions to heavily overload various national parliamentary committees for European affairs, or their equivalents. This is already something of a problem: just keeping up with the sheer pace of events. Indeed the new joint committee established by the Dutch Parliament to deal with subsidiarity, has noted the simple challenge of the volume of documentation that will be directed at national parliaments (JCAS, 2004, p.14).

It remains for each national parliament to decide how they will organise the reception of such material, whether by plenary debates (likely mainly for triggering the reasoned opinion mechanism¹⁵), EU affairs committees¹⁶ (very likely), or discrete individual portfolio committees (possible). As mentioned before, the Dutch Parliament have already moved fast to create a new joint committee reflecting both Chambers, which is specifically focused on the application of subsidiarity, and this will likely meet every two weeks, including apparently, even during Dutch Parliamentary recess periods (JCAS, 2004, p.17-18).

In fact workload alone may force the shifting of dossiers to various 'sectoral' national parliamentary committees involved, other than the usual European affairs committees, now found in most national parliaments. This might especially be the case for example in the area of judicial co-operation and police co-operation, where Article III-259 demands special consideration of subsidiarity be given. These matters demand considerable detailed knowledge and experience, all of which might be lacking in a more generally oriented EU affairs committee. Therefore involving other parliamentary committees may be both needed and actually prudent.

15. A number of national parliaments appear likely to use a plenary debate before they formally vote to send a reasoned opinion. These include: the Czech Republic, Hungary, Lithuania, and the Netherlands, See COSAC (2004b) Annex I.

16. As of November 2004 the following EU states appear to have dedicated their relevant EU affairs committee as having primacy with dealing with the subsidiarity provisions: Austria, Cyprus, the Czech Republic, Finland, Hungary, Latvia, Lithuania, Malta, Slovakia, Slovenia and the UK. Both Denmark and Portugal would appear to divide responsibility between their EU committee and various sectoral committees. See COSAC (2004b, Annex 1.).

The problem however with that suggestion, is the issue of coherence and co-ordination. Different committees might take ‘ownership’ of certain proposals and have regard to them without the sensitivity to EU affairs and the *acquis*, which EU specialists inside national parliaments would have at least a better chance of having. It will not be easy for national parliaments to divide the considerable labour involved in a rational and well thought out manner, and yet if the ‘reasoned opinion’ procedure is to work at all, this will surely have to be done.

In any event, it seems obvious that if scrutiny is to work well, and if the reasoned opinion procedure is to be utilised, there will also have to be some procedure for prioritisation. This is needed to signal within national parliamentary committees, or even within a plenary context perhaps, that a given EU proposal requires urgent attention and possibly the triggering of a ‘reasoned opinion’ objection. One innovation here could be to appoint a special parliamentary *rapporteur* for subsidiarity who could have the time and focus to act as a signaller, as the flow of EU level proposals progresses through Committee over the course of the year. Such a person need not even be a parliamentary representative, as it is more than possible that someone of the standing of a senior parliamentary researcher could suffice here.

Remember also that rapid signalling of any potential breach of subsidiarity is urgent because the time-scale to communicate, and justify textually, a ‘reasoned opinion’ is comparatively short. It is just six weeks. The Dutch Parliament’s *Joint Committee on the Application of Subsidiarity* (JCAS) has pointed out that in the past, Dutch MPs have been used to receiving a document (so-called BNC files) from their national government which assesses the likely impact of EU proposal, but this is usually available some 12 weeks after they are published. In other words, this is typically twice the time that will now be needed (JCAS, 2004, p 19).

Consider also that in order to force the Commission to review one of their proposals, any ‘reasoned opinion’ must be representative of at least one third¹⁷ of the 25 national parliaments, or in fact nine parliaments. Each parliament is considered to have 2 votes: bicameral parliaments having one vote for each chamber. So technically 17 votes should be enough to trigger a ‘reasoned opinion’. In fact, even if the minimum of one third national parliaments is not actually met, it is possible that where a few of the larger Member States’ parliaments make objections, these will informally have to be taken onboard by the Commission as a matter of political expediency. The same would likely apply in the case if even a single national parliament issues a very trenchant critique on its own, but fails to muster the required support of the other national parliaments. The Commission will have to take such intense objections into some account.

Yet it goes without saying that if this is to work well it cannot be something left to chance, although some reasoned opinions may well emerge in that way. I think therefore what will be likely required is a structured bilateral communication between various national parliaments over a given ‘reasoned opinion’, and that will take yet more time, even allowing for modern communications. It is plausible that structured communication between the French, British, German, Italian, Spanish and Polish parliaments will be then required, and such communication might have to be organised quite quickly. That will be a not trivial organisation challenge, although bodies such as COSAC¹⁸ may help.

In that respect however it would appear that there is quite a wide degree of divergence within COSAC, with some national parliaments (for example a few in the Nordic states), appearing to be more cautious about a strongly co-ordinated COSAC led response towards ‘reasoned opinions’. The Dutch parliament is apparently also reticent about a strong co-ordination for COSAC¹⁹. It may well be then that

17. It is lower for matters involving some other policy areas. Article 7 states: “This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III-264 of the Constitution on the area of freedom, security and justice.”

18. Craig and De Búrca (2003, p.137) describe how Tony Blair tried to suggest that the non-judicial review of subsidiarity might be carried out at the EU level by some representatives of national parliaments, a role which would obviously invite a major expansion of COSAC (the conference of EC/European Affairs Committees of the national parliaments) if it were selected to organise this. In fact such a role for COSAC was rejected by the Convention working party on subsidiarity in preference for the ‘reasoned opinion’ procedure left with the national parliaments proper. Note this does not preclude an important role for COSAC in co-ordinating various national parliaments as part of that procedure.

19. The Joint Committee on the Application of Subsidiarity argued in a recent report that: “The secretariat of the COSAC (the Conference of Community and European Affairs Committees of the parliaments of the European Union) is interested in playing a coordinating and mobilising role in this respect. The Joint Committee is of the opinion that such an approach would be taking things a bit too far. The Joint Committee believes it is of the utmost importance that all national parliaments can formulate their views and opinions independently;” (JCAS, 2004, p.20).

COSAC does not rise to the occasion²⁰ (or rather is not let do so), although surely the dynamic of new rules in play may well create their own momentum which could eventually force a stronger co-ordination role.

What may then improve communication between national parliaments would be perhaps *ad hoc* standing communication initiatives, and there may well be serious merit in an annual, or more frequent, 'subsidiarity' conference, where informally, national parliamentary representatives could discuss together broad EU legislative trends likely to be upcoming. They could respond to these by exploring shared opinions on 'red lines', or political thresholds on sensitive topics, all well in advance. I suggest the logical opportunity for such an annual 'subsidiarity conference' should be soon after the publication of the Commission's annual legislative and work programme, in Autumn (usually November) each year. The advantage of such an initiative would be to do the prior 'spadework' for any 'reasoned opinion' in establishing some common position between various national parliamentary delegations.

It goes without saying that the 'reasoned' opinion procedure will also require co-operation between the different houses of parliament in bicameral systems, and that will not always prove easy. This is if only due to a sometimes different complexion as to the dominant party political composition of one house over another. I am thinking very much here of the German case where the *Bundesrät* may have quite different concerns and passions compared with say the *Bundestäg*. The same dynamic may apply to other national parliamentary systems. In this case a failure to ensure each national parliamentary chamber is in agreement on whether to initiate a 'reasoned opinion' could well be fatal given the short time. More generally, unicameral parliaments might have a slight advantage with regard to meeting the very tight six week time period. The point here is not to suggest these obstacles will ever be decisive impediments, but that these organisational restrictions will have to be managed intelligently, if national parliaments are going to make extensive use of the 'reasoned opinion' procedure.

I might also add here some comment about a legal quibble which has arisen, namely the question of whether any future reasoned opinion would have to be in the form of a unified text with a common set of complaints, to which all agree to, or alternatively, whether a reasoned opinion could in fact take the form of a dossier of varied complaints and observations by different national parliaments. One can see that from the Commission's perspective they do not want to deal with a reasoned opinion which has as its style the latter 'mixed bag' appearance.

It is possible to object that it would be a nonsense for the Commission to try and respond to any reasoned opinion which might contain contradictory and overlapping statements: one parliament may argue a given initiative offends subsidiarity for one reason, another may complain that subsidiarity is being breached based on some other grounds, while a third national parliament may admit no violation of the subsidiarity principle at all. There is a fear then that reasoned opinions will be something of a 'dogs breakfast' in the guise of a medley of incoherent and contradictory complaints. I suggest such a concern is wildly over-stated and I note, neither the text of the Constitution nor the new protocol attached, makes reference for the need for reasoned opinions to take the form of a unified cohesive text: a common 'hymn sheet' from which all must sing.

I suggest the Commission and the other EU institutions, will simply then have to accept all reasoned opinions, even if they may involve quite different observations and complaints. If anyhow such a practice were genuinely to become problematic, it is likely dialogue with the national parliaments could remedy the worst excesses. Failing that, an authoritative statement on the application of the new protocol, such as another inter-institutional code of practice perhaps, could be agreed by the heads of state/government. This could help force a reasonable degree of coherence in 'reasoned opinion' texts as one of its objectives. Such a clarification was done at the Edinburgh summit in 1992, and it remains open again as a possible approach to refine any ambiguities in this Constitutional text.

Moreover, to demand effectively a single common reasoned opinion text with a unified statement of complaint, in reality adds a serious political precondition upon national parliaments. It demands that *de facto* unanimity pre-exist over the precise details of any reasoned opinion text. That could easily trip up

20. In any event, COSAC continue to do much valuable work in the field of co-ordinating information between national parliaments. For example in 2000 they published a survey which outlined various different national parliamentary approaches and measures towards the scrutiny of EU laws (COSAC, 2004a, p.13) Another possible line of co-operation would be meetings between European Parliamentary committees and the relevant national parliamentary committees. Some 40 of these meetings were held in 2002 alone (Ibid.).

national parliamentary delegations and eat into the time needed to get an agreement (six weeks) as they quickly become mired in textual details. Indeed without extensive inter-parliamentary co-ordination it would be simply impossible to agree a *common* 'reasoned opinion' between one third of parliaments.

However, potentially the more serious objection to this quibble over the content of any future 'reasoned opinion', is that it ignores the diversity inherent within the national legal systems of the Member States, their peculiar bodies of decades old public policy, or the vagaries of their national customs, sensitivities, and preferences. It is quite logical that a given EU legislative proposal could easily pose a problem for one or two Member States under subsidiarity, but not for others. Why should any Member State's parliament in such a position then be forced to be silent on a particularistic concern to them, and instead be merely content with signing up to a common menu of complaints?

I submit it is for the Commission, or the other EU institutional bodies, to integrate diverse feedback and observations about their proposals, which often are already made from wildly different actors, varied ideological perspectives, or unique legal traditions. They must do the best job they can of integrating a range of objections as far as is reasonable and practicable. In my view the question then of whether any future reasoned opinion should take the form of a unified text is simply something of a 'red herring'.

Finally, one can comment on the substantive effect of the 'reasoned opinion' procedure, which should be to force the Commission or other EU institutions to seriously review their proposal. Sceptics will note that it is perfectly open for the Commission or such bodies to engage in a minimalist or 'lip-service' review, and offer merely a few minor adjustments. Yet it should be noted that Article 7 of the new protocol explicitly states that the:

"The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament." (Protocol, Article 7, par.1)

The use of the legal formulation *shall* here, is indicative of an intent to ensure an obligation is placed upon the EU institutions to at least receive and respect national parliamentary opinions. Any flippant or superficial treatment of a reasoned opinion, for example by the Commission, would potentially leave room for some kind of legal challenge. I leave to the sections below to flesh out more substantive points about the modalities of how any legal enforcement could plausibly proceed, yet I think it is important to realise that the reasoned opinion is something which will actually require a substantive response and engagement from the EU bodies. That is the clear intention of the Constitution.

Moving outside of the realm of legality, we can also say that any attempt by EU institutions to merely pay lip service to a reasoned opinion, would unquestionably provoke political controversy and would seem seriously impolitic. Therefore, it would be wrong to describe the 'reasoned opinion' procedure as merely a trivial sanction. There is nothing trivial about its purely political effects.

It would likely embarrass the Commission and place them on the defensive. It would likely delay the production of legislation by at least months, and possibly longer, where especially complex proposals were in question. Moreover, it raises the scope for unpredictable *ad hoc* trans-institutional and trans-national coalitions, between say national parliamentarians, who through their complex multi-level party system affiliations, will also have links to various MEPs and ministers who participate in the Council.

Finally one should note the timing aspect here. Such *ad hoc* coalitions could emerge to face any Commission legislative proposals in a pre-emptive manner. That is, the Commission would be suffering wounding objections crucially *before* the Council, COREPER, and the European Parliament all get a chance to negotiate over and otherwise refine the various legislative details. It would unquestionably then place more pressure on the Commission and the Council, but as regards the vulnerable pre-legislative policy formulation stage.

4.0 The Legal Enforceability of Reformed Subsidiarity

It will be recalled that in a forgoing section, I made much of the improved references to regional and local governments in the new textual definition of the subsidiarity principle. These offer a good example of one serious concern about the reformed subsidiarity principle, namely whether it is legally enforceable. For it is possible an inveterate sceptic would be tempted to observe: “these references to the regional and local level are merely that-pleasing wordy rhetoric: the new constitution gives regions or local governments no firm legal rights as regards the principle of subsidiarity”. Yet such an argument would be fundamentally mistaken.

This is chiefly because the new protocol attached to the *Constitution for Europe*, which guides the application of the principle of subsidiarity, contains a number of very innovative provisions which mandate greater respect for the regional and local levels of governance, and secondly the new attached protocol specifically identifies the Committee of the Regions as a litigant who can cite the principle in proceedings against the other institutions. One should be clear in recalling here that Treaty Protocols are legally binding in contrast to mere Treaty declarations, which are not (Bainbridge, 2002, p.432, Howarth, 1994).

Consider that Article 2 of the new protocol demands that the Commission shall, where appropriate, take into account the ‘regional and local dimension’ when they are formulating new policies or laws. Equally Article 5 of the new protocol mandates that proposals must come with a detailed statement of how they comply with the subsidiarity principle, and that as part of this, there should be reference to any likely impacts which the implementation of framework legislation would have on regional legislation, amongst other concerns.

Article 8 of the new protocol on applying subsidiarity cites the general Treaty provision that governs the rights for the various institutions with respect to litigation, Article III-365²¹ (1-3) (ex-Article 230 in the Nice Treaty). However, what is innovative here is that it makes it very clear under Article 8²² of the new protocol, that the Committee of the Regions (CoR) may initiate a legal challenge against any EU legislation where such would be required to defend their institutional prerogatives, specifically if these were adversely affected by an infringement of the subsidiarity principle.

There was no such clarification in the original protocol attached to the Amsterdam Treaty and note that the position remains that national parliaments do not enjoy an independent right of legal appeals distinct from the approval by their national government to initiate such. It is national governments who retain the right to instigate proceedings in the personality of the Member State. In this respect the CoR is slightly better placed than national parliaments.

However, this innovation regarding litigation rights, has not been accepted as significant by all commentators. For example, Warleigh has recently argued that all the new protocol confers is:

21. The relevant section here is Article III-365 (3), which reads: “The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 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 Treaty of Nice version, Article 230 made no mention of the CoR at all.

22. The relevant part is the last sentence of Article 8 of the new protocol: “In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.”

“an ex-ante right which applies only to legislation on which the CoR had been consulted under Treaty obligation (i.e. neither issues raised either by a CoR ‘own opinion’, nor those on which other institutions have chosen to consult it of their own volition are eligible. For those seeking signs of a powerful link between the CoR and subsidiarity, this measure is too little, too late.” (Warleigh, 2004, p.9).

It is arguable whether such a restrictive interpretation logically follows from the provisions of Article III 365(3) and the new protocol’s Article 8. For what is critical to understand is that the *Constitution for Europe* itself expands the areas under which legislation *must* be referred to the CoR for consultation. The new protocol remember does this firstly very generally, via its Article 2 and 5, which both mandate that ‘wherever appropriate’ a policy with a likely regional impact requires consultation and even consideration as to possible impacts on sub-national regional legislation.

In theory any Commission could be churlish here and argue that a given topic did not appear to them ‘appropriate’ for such a regional consultation or study, but the CoR would very likely challenge this, and indeed any Court reading together the new protocol, together with the new wording of Article I-II, should be inclined to note the important degree of heightened respect conferred upon the regional level within the Constitution. My point here is that the margins of where and when the Commission should consult are open to be litigated by the CoR. One should not then read the details of Article 8 of the new protocol and Article III–365 quite so literally or in a minimalist way.

I might also point out that under the terms of the *Constitution for Europe* there are quite a number of very important areas where there is a mandatory obligation placed upon the Commission, Parliament, and Council to consult with the CoR, and therefore this means they can easily exercise their litigation rights rather uncontroversially. These areas include in general any legislation involving:

- employment policy (Article III 206(2)/207),
- social policy (Article III-210),
- European Social Fund (Article III-219),
- Structural and Cohesion funds (Article III-223),
- European Regional Development Fund (Article III-224),
- environmental policy (Article III-233/234),
- transport policy (Article III-236),
- Trans-European Networks (Article III-246/247),
- energy policy (Article III-256),
- public health policy (Article III-278),
- culture policy (Article III-280)
- education, youth, and vocational training policies (Article III-282/283)

One can see that this listing does certainly give the CoR quite a comprehensive menu of substantive areas where it would appear to be clearly able to exercise its litigation right under Article 8 of the new protocol and Article III 365(3).

In fact, there is also some scope through political networking and dynamics to forge inter-institutional alliances to encourage the main institutions (Council, Commission or Parliament) to, at their discretion, agree to consult the CoR under the terms of Article III 388²³. That article allows for a discretionary consultation procedure with the CoR. Warleigh suggests that where such a discretionary consultation has been invoked this would not allow the CoR to follow-up its legal rights regarding subsidiarity. However, it must be observed that the exact language used within Article 8 of the new protocol does not make any distinction between consultation which is mandatory or that which is discretionary. It uses instead the more permissive formula of words relating to acts where the ‘constitution *provides* for it to be consulted’. It does not use the expression ‘must’ be consulted. I suggest this indicates that discretionary consultation triggered under Article III-388 would logically also provide for a right to litigate following Article 8 of the new protocol and Article III-365.

23. ARTICLE III-388, first paragraph reads: “The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Constitution so provides and in all other cases in which *one* of these institutions *considers it appropriate*, in particular those which concern cross-border cooperation.”

If just one of the main EU institutions can be gently coaxed (or unsubtly pressurised by political means perhaps) into agreeing to a discretionary consultation with the CoR, then once conceded, this arguably creates an attendant and corollary right for litigation by the CoR under the terms Article 8 of the new protocol. In other words, by giving the CoR some freedom to litigate regarding subsidiarity over certain limited issues, the new Constitution also gives them potentially greater political leverage to indirectly expand the areas and subjects over which the CoR might raise subsidiarity concerns either politically or legally. It is all really a question of how the CoR play the ‘hand they have been dealt’ in this respect, and it is rather not an open and shut case, whereby their litigation rights concerning subsidiarity can be dismissed as being minimal.

While this right to litigate is more restrictively drawn than the scope for Member States, the European Parliament, the Commission, or the Council, it is a most useful clarification and would effectively appear to extend the ability of the Committee of the Regions to invoke subsidiarity in any future challenge. This is especially say, if they asserted the Commission had failed to adequately consult or address the views of the Committee of the Region.

Any attempt then to ignore or dismiss the Committee of the Region’s input as part of the pre-legislative process, without good reason, will risk a legal challenge for a failure to *procedurally* apply the subsidiarity principle, as much as any substantive challenge that the principle itself was being breached within the content of a Commission legislative proposal.

4.1 A procedural or substantive legal application of subsidiarity?

I submit this is an important observation as to how best the subsidiarity principle in general may prove legally operable: that is as a *procedural* rule that ought to be followed, especially by the Commission, rather than as a substantive test against which legislative content or proposals can be measured.

One reason why I suggest that a procedural as distinct from a substantive legal use of subsidiarity, could be a better prospect is because the new Constitution has definitively *not* changed the somewhat confusing formula for substantively evaluating subsidiarity:

“The Union shall act only if and insofar as the objectives of the proposed action *cannot be sufficiently achieved by the Member States*, either at central level or at regional and local level, but can rather, *by reason of the scale or effects of the proposed action, be better achieved at Union level*”, (Article I-11.3 *Constitution for Europe*).

This form of words suggests that subsidiarity should be applied through a two-step test. The Commission in particular is tasked with showing that when a proposal is advocated for EU action (typically draft legislation but potentially any form of EU ‘action’), it must be shown that *both* national action would be insufficient *and* that Community level action would be ‘better’. This is quite confusing.

On a first impression, it appears to limit any simplistic arguments based on comparative efficiency data to decide a greater EU role. Note the standard of evidence required is different for member state action, as opposed to EU level action. ‘Sufficiently’ and ‘better’ are not synonyms. The formula suggests clear evidence of policy failure at the national level is first required, but leaves it unclear whether a merely sub-optimal national solution might be considered *sufficiently* acceptable, and thereby justify no EU role.

The Commission, since the early 1990s²⁴, together with the protocol on applying subsidiarity attached to the Amsterdam Treaty (1997) have defined ‘better’ by reference to three key concrete variables that indicate when a given matter would ‘better’ be dealt with at EU level. These are; (1) the existence of trans-national aspects; (2) where there is any conflict with the legal obligations of the Treaties, includ-

24. At the Edinburgh Summit of the Heads of Government/States (1992), a comprehensive Annex was published with the European Council conclusions, which outlined in authoritative terms how the member states viewed the principle and set down guidelines as to how the EU institutions should apply it (CEC, 1992b, p.116). Also at Edinburgh the member states demanded of the Commission a number of proposed directives be withdrawn. However the results of this were less than clear-cut. In addition by 1993 an inter-institutional agreement was signed between the European Parliament, Commission and Council of Ministers on applying subsidiarity

ing distortions and disguised restrictions on trade; and (3) wherever clear benefits can be discerned by 'scale or effects' compared with national solutions.

This last criteria seems to return one to a situation where the Commission could possibly argue using economic data that some EU level policy was objectively more efficient due to economies of scale than national level solutions. It appears that the Commission's concrete definition of 'better' could trump the ambiguity of the term 'sufficiently'.

The important observation to make here is that it is not at all obvious how to apply subsidiarity in a substantive way. Indeed that view was put across forcefully as part of the expert testimony to the Convention working group on subsidiarity during 2003. Jean Claude Piri, head of the Council of Ministers' legal service warned that the word 'better' was potentially too subjective to be of much legal use (Norman, 2003, p.94). Moreover, there has been a persistent theme in the legal science literature on subsidiarity²⁵ which has fretted about its legal applicability because of such a formula (Toth, 1992, 1994). A related fear has been that if subsidiarity is justiciable, it might still breach the separation of powers principle by tasking judges to weigh substantive questions of policy, and effectively then make policy decisions disguised as judicial rulings on subsidiarity grounds. This is the age-old, but often over-stated, fear of '*gouvernement des juges*'.

The Dutch Parliament's own *Joint Committee on the Application of Subsidiarity* (JCAS) has also noted this problematic nature of having subsidiarity reviewed by the ECJ precisely because it risks forcing those judges to engage in substantive questions which are properly political:

"a judge is requested to decide on the question whether the Commission has taken sufficient account of the principle of subsidiarity. If the judge wants to avoid putting himself in the position of politicians, he can merely answer the question on the basis of the description of competences as incorporated in the Treaty. We can assume that the Commission will have considered this carefully in its original draft legislative act. However, the situation is different for the proportionality review. This involves a political opinion, in which respect the judge will tend to be reticent." (JCAS, 2004, p.20).

Unquestionably then, a real risk would be a simplistic or mechanistic attempt to 'read off' what initiatives breach the subsidiarity principle based on economic data, citing economies of scale, etc. One should note here that the new protocol reiterates that in considering subsidiarity, the Commission must provide both quantitative and qualitative data, as well any evidence on fiscal burdens. This could invite rather crude 'cost-benefit' type arguments, that a given policy should be agreed at the EU level because it was basically more efficient or cost-effective to do so. This seriously moves away from the intellectual origins of the subsidiarity principle, and effectively contorts the principle with some kind of opaque utilitarian calculus²⁶. For these reasons I remain sceptical about litigating over subsidiarity in any substantive way that literally follows the terminology of Article I-11.3.

I might say that in general the subsidiarity concept has an ambiguity as its heart as to whether it is something amenable to substantive measurement, or whether it should be regarded more as a procedural 'rule of reason', from which one extracts a process for reaching decisions about how competences should be exercised, especially where they are shared. From within the different sub-disciplines of social sciences there is a wide diversity of answers here. Economists tend to believe that subsidiarity is amenable to rational and scientific empirical measurement²⁷. Lawyers tend to be sceptical about such an approach and stress using the principle procedurally (De Búrca, 1999, Harrison, 1996, Toth, 1994, 1992). Political scientists tend to be sceptical about the substantive content of the principle and see in it a code word for

25. See also the following: Constantinesco (1991), De Búrca (1999), Harrison (1996), Müller-Graf, (1996), Estella (2002), and MacKenzie-Stuart (1991, 1992).

26. Indeed within the dominant Christian Democratic tradition of subsidiarity in post-war Europe, highly efficient centralised policies, delivered by extensive state field agencies, providing fairly uniform public goods were all 'bads' which subsidiarity was supposed to avoid. Instead, subsidiarity was a plea for social intervention which would be *mediated* through voluntary social and civil institutions delivering a range of complex and differentiated types of public goods and services. In practice this did not translate into resistance to the rise of the modern centralised welfare state, but a demand for a share of fiscal resources to ensure confessional sub-cultures could maintain their identities within educational and healthcare provision by receipt of state funds for 'their own' institutions (Catholic schools, Protestant hospitals, etc.). This is important to note, as some authors fail to distinguish Christian Democratic arguments for subsidiarity, from properly classical liberal arguments for a strictly residual state role in welfare creation through public goods (Spicker, 1991, pp.5, 12; Van Kersbergen, 1995, p.226).

other concerns. Indeed the recent political science literature reminds us forcefully of the simple fact that there is no easy consensus over what the subsidiarity means as a matter of substance, by pointing to divergent discourses of what become varying ideological accounts of subsidiarity (Christian Democrats, Neo-Liberal, Third-way, regionalist, etc.) (van Kersbergen and Verbeek, 1994, 2004, Peterson, 1994).

I unreservedly side then with the caution towards a substantive application of the subsidiarity principle, and much prefer the procedural approach, which I feel is not lacking in depth for that. It is possible to accept that some aspects of the subsidiarity principle are of course open to empirical study and indeed the varied literatures within modern economics could offer us some insight. That is a reasonable position. However, I am fearful that such a reasonable starting point, could quickly be abused by the imperialistic claims of such studies, which can quickly lead to a mechanistic view of the principle. The danger here is that the value of efficiency is placed above all other concerns, as economists typically end up advising the allocation of tasks at whichever level is most efficient, but often overlook other criteria, such as legitimacy concerns, or issues of political power.

What one has the guard against is a type of '*gouvernement des sages*' which would be every bit as invidious as any '*gouvernement des juges*'. There might then be merit in having *some* expert testimony about the substantive details of any given subsidiarity review, however this would have to be most carefully conducted and always kept in its proper place²⁸. It should be but one account of how the principle in any concrete case should be interpreted. What would be, in my view, utterly out of keeping with the spirit of the subsidiarity principle would be any attempt to use simple cost-benefit data or financial impact statements to draw hard and fast conclusions.

Therefore, I hold to my claim that a proceduralist approach, as distinct from a substantive approach to apply subsidiarity is actually more likely to prove workable and effective. In this case I suggest that procedure can be substantive in itself. Moreover, it is important to note that one of the merits of any proceduralist approach is that it acts as a check upon a third possibly dangerous application of subsidiarity: to simply decide the question based on subjective political opinions, the expediency of political concerns, or the shifting views of the body politic. Is that a real concern with this reasoned opinion procedure?

Arguably it is not, because the deliberative framing of the approach used in the new Constitution forces the political representatives to actually justify their views in a manner which must be more than simply an expression of opposition to an EU initiative just because they dislike such. Central to guarding against this risk must also be a law based application of subsidiarity. There must be some legal factual basis upon which national MPs can rest their objections and observations, but what might such an approach be?

4.2 The need for clarity about any procedural application of subsidiarity

While the above sections have stressed the need for caution regarding trying to apply subsidiarity as part of a substantive test against which legislation could be measured, I also want to point out that we should be vigilant about any procedural applications of subsidiarity.

This is because the major part of the day-to day reality of what subsidiarity has meant over the last decade or more, has been a quite unsatisfactory initiative by the Commission to systematically link sub-

27. There is a diverse literature from within modern economics on the question of subsidiarity. One strand appears to link subsidiarity with the literature on fiscal federalism (Allsop, et al. 1995). Another strand links subsidiarity to the idea regulatory competition (Esty and Geradin, 2001) or deregulation and competition (Breton, et al., 1998). There is also some linkage between the literature on cost benefit analysis and subsidiarity: see Trachtman (1997). Yet another tradition links subsidiarity to the literature on 'constitutional economics' (Backhaus, 1997a, 1997b) or the 'law and economics' school more generally (Block, 2003). For other economic perspective on subsidiarity see also Laffont and Pouyet (2004), Begg and Grilli (et al.) (1993), Cameron and Ndhlovu (1996), Cox (1994), Crettez (1998), Leaper (1975), Rodger and Wylie (1997), Smith (1993), van den Bergh (1998, 1996), Sun and Pelkmans (1995), and Pelkmans (2001).

28. I note here the valuable comments made by Jacques Pelkmans in response to this paper at the EIPA Conference on "*Making the Constitution work*". He has suggested there is merit in having an independent European level bureau of experts to provide advice on the technical evidence regarding subsidiarity. Such a body I believe would be useful as long as its remit was carefully defined and its working methods were inclusive enough to not just focus on economic perspectives of subsidiarity alone. Moreover, I argue this should not detract from the merits of a proceduralist application of the principle.

subsidiarity to various thematic projects and initiatives which have had as their aim, delivering a better style of governance or law making. This approach has placed subsidiarity within the context of a wider agenda of administrative and regulatory reform, and this tends to rather downplay the fact that subsidiarity is actually a constitutional principle.

Since the Edinburgh (1992) summit agreement on how to apply subsidiarity, the Commission has been tasked with the production of an annual report on the application of the subsidiarity and proportionality principles. One can say here that their major theme since 1994 has been to emphasise how subsidiarity in general should be applied through a pragmatic approach, rather than as a constitutional device.

This approach has come to be summed up under the title that the Commission uses for these reports: 'better law-making'²⁹. Indeed these 'better law-making' reports almost exclusively avoid explicit constitutional analysis. Instead the bulk of their content relates to a much wider Commission led initiative to improve legislative content and style. As Lazer and Mayer-Schoenberger suggest this involves a process of:

'blending together subsidiarity and the more process oriented issue of legislative quality... a much foggier concept of 'better law-making-an eclectic mix of issues on 'where' and 'how' to regulate" (Lazer and Mayer-Schoenberger, 2001, p.137)

One of the important things that the 'reasoned opinion' process does alongside the firmer restatement of subsidiarity more generally, is bring us firmly back to focus more fully on subsidiarity as a constitutional rule. But note it does this through a political deliberative device. What then about making subsidiarity constitutionally effective by specifically *legal* means?

Unfortunately the ECJ has been very reluctant to legally apply subsidiarity in anything other than a quite minimalist manner. First, the Court has established that subsidiarity cannot be used to undermine rights conferred by the Treaties for individual persons. This can be seen for example in the *Vogler* (C-242/99³⁰) and also in the *Bosman* cases (C-415/93³¹), where it was held that if individual rights are conferred by the Treaties, these permit Community legislation which by its very nature could not be in breach of the subsidiarity principle because by implication these are a matter for the *exclusive* competence of the EU³². This underscores the importance I have previously attached to the limited statement of exclusive competences, which the new Constitution makes.

The ECJ have also suggested that wherever EU law has as its objective a harmonisation of standards, and where this has been agreed to by the Council, it will be immune from challenge on subsidiarity grounds. In the *Dutch Biotech patent* case (C-377/98)³³ the Court argued simply that when the objective of harmonisation is agreed to be a legitimate objective within a directive, or following on from a Treaty provision, such can *only* be carried out by a common EU policy.

Indeed, the ECJ appears to be very reluctant to entertain pleas of subsidiarity at all. This trend can be most clearly seen in the *German Tobacco Advertising* case (C-376/98³⁴) where the Court preferred to decide the issues at hand upon arguments relating to what was the proper legal basis for the directive being challenged. This was despite the fact that the applicants' submissions put great stress upon the national features of the problem at hand, in particular the distinctive characteristics related to the German tobacco advertising market³⁵.

29. Indeed, subsidiarity as 'better law-making' can be placed in the context of a wider process of regulatory review that the Commission have forwarded throughout much of the 1990s. For example the Molitor Report initiative (Grant, 1998:160-161, CEC, 1995b), begun by Major and Kohl in the mid 1990s, aimed to reduce "red tape" and produce a more deregulated, 'leaner and meaner' style of European regulation. Since 1996 this has been joined by the so-called SLIM (Simpler Legislation for the Internal Market) project.

30. *Vogler v. Landwirtschaftliche Alterskasse Schwaben*. Case C-242/99. [2000] ECR I-09083.

31. *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal club Liégeois SA, and Union des Associations Européennes de Football* (UEFA). Case C-415/93, [1995] ECR I 4921.

32. The ECJ ruled: "the principle of subsidiarity, even when interpreted broadly to the effect that intervention by Community authorities in the area of organization of sporting activities must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty", (par.9, Case- 415/93).

33. Case C-377/98, *Netherlands and others v European Parliament and others*, 09/10/01, [2001] ECR I-07079, see especially par.31-33.

34. *Germany v European Parliament and others*, Case C-376/98, 05/10/2000, ECR [2000] I-08419.

Finally, another trend is evident in the treatment of the subsidiarity principle by the ECJ: they demand only a minimal standard of evidence with regards to being satisfied that subsidiarity was addressed in the preparation of legislation. This can easily be seen in the *German Deposit Guarantee* case (C-233/94)³⁶ where the Court ruled that in preparing legislation, a failure to provide an explicit statement concerning subsidiarity will *not* be considered fatal as long as the Court can otherwise judge that the legislators were somehow conscious of the subsidiarity issue and have, however indirectly, taken this principle into account in their decision to legislate³⁷. Similarly in the *Dutch Biotech patent* case (C-377/98)³⁸ it was acceptable to the ECJ that subsidiarity had merely been mentioned in the recitals of the legislation, despite no further evidence being offered by the Commission that they had considered subsidiarity more substantively.

I submit that the standard of evidence the ECJ expects here is unquestionably very minimal and simply inconsistent with the significance that the Treaties have consistently placed upon subsidiarity since at least the Treaty of Maastricht. The result is that a wide margin of discretion has been granted to the Commission, and the Member States sitting within the Council, as regards how they interpret subsidiarity. The ECJ does not seem to require the level of detail that the Edinburgh Annex (1992) or the Amsterdam Treaty Protocol (1997) all suggested the Commission (in particular) should undertake in making subsidiarity assessments.

The legal problem then as I see it, is how to convince the ECJ to take subsidiarity seriously, and in that regard I have suggested focusing on the appropriate procedural aspects of subsidiarity, as obligated by the new protocol or in the constitutional text itself. However, there is a logical problem in accepting such an argument as long as the ECJ refuses to be much interested in entertaining subsidiarity pleas. The question then becomes one of how precisely to construct a case for a procedural approach which might better appeal to the ECJ?

4.3 A procedural legal application of subsidiarity based on manifest error?

I argue that there are two potential avenues to explore in this regard. The first could be to cite within future pleadings a failure by the Commission to follow to the letter the terms of the new protocol attached to the Constitutional Treaty (2004). So for example, where the Commission simply fails to consult widely, or where they do not produce assessments of qualitative and quantitative data, such procedural failings could provide some grounds to allow the Court to declare that the subsidiarity principle has been infringed.

However, this is not the only possible line of legal argument. Already within EU law, there is an existing judicially developed standard of review which broadly speaking would fit the bill in applying subsidiarity procedurally. This is the concept of ‘manifest error’ which Emiliou has described as ‘including both error of law and error of fact’ (Emiliou, 1996, p.178) and which Constantinesco has pointed to as somehow conceptually related to subsidiarity (Constantinesco, 1991, p.40).

The ‘manifest error’ approach I advocate here would involve judges scrutinising laws and actions, to discern if at their policy formulation stage, such a process of deliberation was based on reliable and factually correct data or information, and that valid logical inferences had been drawn from such facts, or that stated administrative procedures had been followed by the Commission in the preparation of legislation, notably the undertaking given to consult widely with interested parties. It does *not* mean that every error made as part of the legislative process could be seized upon as proof that subsidiarity was being infringed, as a discretion for EU institutions is always respected by the ECJ³⁹. The point is rather

35. The Court only briefly made mention of subsidiarity to dispose of an argument by the European Parliament and Council, that they enjoyed a general right to socially regulate the single market under Article 95, by having regard to the first paragraph of Article 5, which sets out that: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This is not however, the operative statement of subsidiarity, so the Court did not use subsidiarity to decide this case.

36. *Germany v European Parliament, and the Council*. Case C-233/94, [1997] ECR I-2405

37. The Court noted here that in the specific recitals of the legislative text in question, there was at least *some* evidence of deliberation over subsidiarity like issues (pars. 26-28).

38. Case C-377/98, *Netherlands and others v European Parliament and others*, [2001] ECR I-07079, 09/10/01. See especially par.31-33.

that a manifest error of assessment occurs where no reasonable person would have reached the same view of a situation, knowing there were basic errors of fact or logic in that assessment (Emiliou, 1996, p.86).

A checklist for any allegation of a ‘manifest error’ being a feature of a Commission proposal might include:

- Are any factual data used to justify an EU level response correct, up to date, and validated?
- Were stated procedures followed as part of the preparation of the EU level initiative?
- Have valid inferences be drawn, meaning those which a reasonable person would make, from certain facts adduced as part of the rationale for the EU level initiative?
- Have the EU proposals been based on a manifest error of law, including the wrong legal basis within the Constitution?
- Have the facts used to justify the rationale for an EU level initiative been selectively drawn or has significant countervailing evidence also been considered?

The doctrine of ‘manifest error’, was originally developed within French administrative law and later extended to the ECJ in a number of cases⁴⁰ of the 1970s and 1980s (Emiliou, 1996: 178). It can also be seen operative in a number of more recent cases⁴¹, for example the important *Airtours* case (T-342/99)⁴², which involved the proposed merger of two British charter holiday firms. This saw an allegation that the Commission had made manifest errors of assessment in distinguishing the relevant holiday market into a short haul and long haul component, resulting in a finding that the proposed merger would be anti-competitive.

The Court actually reached its verdict on other grounds, yet the case was a revealing example of how the ECJ could use the ‘manifest error’ approach to hold the Commission’s regulatory activities to account. In that regard the Court sifted the factual information that the litigants had provided regarding the market for charter holidays, and checked to see if the Commission had taken into account the details provided by the litigants. The Court then examined if in each case of the alleged manifest error of assessment, whether the Commission’s reasoning was based on factual errors, wrong assumptions, or invalid reasoning.

Notably, the case did not involve ECJ judges delving into substantive policy considerations of whether distinctions between short haul and long haul charter holidays was wise from a competition policy perspective. The ‘manifest error’ approach is then sensitive to avoiding the ECJ becoming too politicised in making rulings on substantive matters of policy content.

39. Significantly, in the *Portuguese vocational training payments dispute* case (T-180/96 and T-181/96) [Joined cases T-180/96 and T-181/96. *Mediocrurso – Estabelecimento de ensino particular; Ld^a v Commission of the European Communities*, Judgment of the Court of First Instance (Third Chamber) of 15 September 1998], the Court suggested that those relying on claims of manifest error should provide supporting evidence, an important qualification, and moreover reiterated its line that the employment of a manifest error standard of review must not entail the Court going too far and undermining the discretion which the Commission should enjoy; “The Commission must...enjoy a considerable measure of latitude. Consequently, the Community judicature must, in examining whether that power was exercised lawfully, confine itself to examining whether the Commission committed a manifest error in assessing the information in question.” (Summary, Joined cases T-180/96 and T-181/96.) Similarly in the *Italian wine subsidies* case (C-122/94) [Case C-122/94, *Commission v Council*, [1996] ECR I-881] the ECJ expanded on just how much discretion legislators could be entitled to, arguing: “When the implementation by the Council of the Community’s agricultural policy necessitates the evaluation of a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken, but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion”. Case C-122/94 *Commission v Council* [1996] ECR I-881.

40. Both Emiliou and Constantinesco describe how the French Conseil d’Etat began in the 1960s to develop the doctrine of ‘de erreur manifeste d’appréciation’ (Constantinesco, 1991; 40-41; Emiliou, 1996: 69, 81-87), precisely because they were supposed to refrain from judicial review (a power which was expressly forbidden them under Article 61 of the 1958 French Constitution). Senior French judges then required a standard of review which would limit them to a review of factual errors and thus avoid criticism that they were straying into anything that smacked of more overt judicial activism. This was then reflected in case law of the ECJ, for example the *Balkan Import Export* case (C-55/75, [1976] ECR 19, par 30) and the *Schröder* case, (C-265/87, [1989] ECR 2237). See Emiliou (1996, p.178) for a fuller discussion.

In summary, I am not suggesting here that making reference to a failure on the part of the Commission to follow to the letter the procedures specified in the attached protocol, nor the manifest error line or argument, are both a panacea for making the ECJ respect subsidiarity.

However, they surely represent a more focused line of argument than what has gone heretofore, by simply invoking the word subsidiarity and pointing to some substantive difference in national policy or legislation. The ECJ will likely continue to avoid any attempt to force them to substantively weigh EU legislation against national policies, measured by some standard of what is ‘better’ by reason of ‘scale or effects’.

In contrast, the ‘manifest error’ approach in particular, would involve requesting ECJ judges to use a judicially familiar concept to check the assertions made by the Commission or Council that they had in fact properly studied the subsidiarity question and that they had in reality followed the required procedural details as set out in the protocol. This would in practice mean checking whether objective facts used to reach substantive conclusions were correct rather than challenging those conclusions per se. Moreover, it could simply involve checking whether stated procedures for policy assessment had been deviated from. In my view, if we are to have any hope in making subsidiarity legally ‘stick’ it will have to be in some manner such as this: a procedural rather than substantive legal approach.

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41. One other notable case invoking ‘manifest error’ has been the “*German beef quota fraud*” case (Primex/Interporc ,T-50/96) [Produkte Import-Export GmbH & Co. KG, Gebr. Kruse GmbH, Interporc Im- und Export GmbH v Commission of the European Communities, Judgment of the Court of First Instance (First Chamber) of 17 September 1998. Case T-50/96, European Court Reports 1998 page II-3773]. This involved a scenario where a Commission refusal to allow a remission from import duties for two German beef importers because their supporting documents were fraudulent, was held to be a manifest error of assessment. This was because the Commission failed to consider that there had been no actual wrongdoing on the part of the applicants, and especially because the Commission itself had no system to monitor such documents, meaning it was impossible for the applicants to know themselves that they were in effect submitting fraudulent documents. This case is noteworthy as it effectively punishes the Commission for not having a proper system of administrative management procedures for the particular scheme.
 42. In this case the ECJ administered a bloody nose to the Commission’s elite mergers and take-overs investigation team working within the Competition DG, and this forced an internal review of how the Commission conducts such investigations. Judgement of the Court of First Instance, of 6 June 2002, *Airtours plc v Commission of the European Communities*. Case T-342/99. European Court reports [2002] II-02585.

5.0 Conclusions

This paper has taken an unapologetically optimistic tone. So much of the discussion about subsidiarity over the last few years has been pessimistic, skeptical, even dismissive. There has been an intellectual fashion to use the concept as a mere aspirational sentiment about how *ought* the EU relate to its Member States, their regions and local governments. This Constitution invokes a reformed subsidiarity that is much more than merely aspirational.

However, the reformed subsidiarity offered to us by the new Constitution is unquestionably one of the success stories of the entire convention process and it deserves our attention and scrutiny. I have argued here that the new text and protocol when looked at in the round, would appear to constitute a very significant change in the doctrine of subsidiarity. One can see this most obviously with regard to the novel ‘reasoned opinion’ procedure. However, that should not get all the limelight.

In many ways there are more modest but not less significant changes. The confusion over exclusive and non-exclusive competences has been much reduced. The regional and local government levels have been written into the core definition of subsidiarity in a way which at least garners for them important political capital. Better still, the Committee of the Regions has been clarified as having a right to litigate concerning the principle. I submit these are all very important, and mostly very welcome, developments.

There can be no doubt though that if this Constitutional Treaty is ratified (and I believe strongly it should be) then much of our attention will be rather inevitably drawn to the political dynamics of how the ‘reasoned opinion’ procedure will work. I have here stressed a cautious view. There are serious organizational and information challenges for national parliaments to effectively use the procedure. The ‘ball is in their court’. Much will depend on how efficiently they organise the national parliamentary processing and reception of EU proposals. If that is done in a lax or unimaginative way, the promise of the ‘reasoned opinion’ procedure will perhaps ring hollow. For now we must wait and see.

Perhaps the one area where we cannot wait however, is with regard to the legal application of the subsidiarity principle. As a criticism, I might say if there was one area where the Convention process could have done more work it should have been on making subsidiarity more amenable to judicial application. For the problem is that the current Court seem uninterested in the principle, probably for quite understandable and sensible reasons often held by senior judges: they do not want to get drawn into making overly political rulings or be forced to make policy decisions by judicial arbitration.

However, subsidiarity badly needs a more workable approach as to how it will be legally applied. I think this will become obvious as the various national ratification debates mature. One will hear the assertion that subsidiarity is just a symbolic ‘yellow card’ and has no force of law, up to even allowing the Commission to re-submit any original proposals without justification.

Such statements are wildly inaccurate and must be challenged. The principle always has been and remains today justiciable. It is simply that the ECJ has proven reticent in developing case law around the principle. If they can decide a case on some other basis, they will do so. Perhaps then what has to happen to meet expectations is much greater reflection about a new approach to making subsidiarity more easily legally enforceable.

In that regard, I have suggested that a procedural approach seems the most promising. This means avoiding arguing whether in substance a given policy proposal offends subsidiarity, and focusing more on whether the procedures for applying subsidiarity have been applied. This avoids possibly never ending rows over subjective views of what ‘better’ means within the terminology of Article I-II.3, and it may take some of the heat out of debates surrounding subsidiarity. I have also argued that a familiar line of

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precedent, based on the concept of ‘manifest error’, could help tremendously to keep us focused on the core elements of any proceduralist challenge, although it may not be the only avenue to explore.

With these closing comments I let my arguments rest, and welcome your comments. I hope I have provided you with some food for thought and at least some clarification.

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7.0 ANNEX 1

PROTOCOL on the application of the principles of subsidiarity and proportionality

THE HIGH CONTRACTING PARTIES,

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

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

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

ARTICLE 1

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

ARTICLE 2

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

ARTICLE 3

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

ARTICLE 4

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

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

ARTICLE 5

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

This statement should contain some assessment of the proposal’s financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

ARTICLE 6

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

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

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

ARTICLE 7

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

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

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

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

ARTICLE 8

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

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

ARTICLE 9

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

8.0 ANNEX 2

Issues of particular attention under subsidiarity (Sections 4 and 5 of Part IV Area of Freedom, Security and Justice, Part III of the Constitution) relating to Article III-259

SECTION 4

JUDICIAL COOPERATION IN CRIMINAL MATTERS

ARTICLE III-270

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III-271.

European laws or framework laws shall establish measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. Where a member of the Council considers that a draft European framework law as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be

referred to the European Council. In that case, the procedure referred to in Article III-396 shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396, or
- (b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

4. If, by the end of the period referred to in paragraph 3, either no action has been taken by the European Council or if, within 12 months from the submission of a new draft under paragraph 3(b), the European framework law has not been adopted, and at least one third of the Member States wish to establish enhanced cooperation on the basis of the draft framework law concerned, they shall notify the European Parliament, the Council and the Commission accordingly.

In such a case, the authorisation to proceed with enhanced cooperation referred to in Articles I-44(2) and III-419(1) shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

ARTICLE III-271

1. European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a European decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such framework laws shall be adopted by the same procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article III-264.

3. Where a member of the Council considers that a draft European framework law as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council. In that case, where the procedure referred to in Article III-396 is applicable, it shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396 where it is applicable, or
- (b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

4. If, by the end of the period referred to in paragraph 3, either no action has been taken by the European Council or if, within 12 months from the submission of a new draft under paragraph 3(b), the European framework law has not been adopted, and at least one third of the Member States wish to establish enhanced cooperation on the basis of the draft framework law concerned, they shall notify the European Parliament, the Council and the Commission accordingly.

In such a case, the authorisation to proceed with enhanced cooperation referred to in

Articles I-44(2) and III-419(1) shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

ARTICLE III-272

European laws or framework laws may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

ARTICLE III-273

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In this context, European laws shall determine Eurojust's structure, operation, field of action and tasks. Those tasks may include:

- (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- (b) the coordination of investigations and prosecutions referred to in point (a);
- (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.
- (d) European laws shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

In the prosecutions referred to in paragraph 1, and without prejudice to Article III-274, formal acts of judicial procedure shall be carried out by the competent national officials.

ARTICLE III-274

1. In order to combat crimes affecting the financial interests of the Union, a European law of the Council may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The European law referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a European decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

SECTION 5

POLICE COOPERATION

ARTICLE III-275

1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.
2. For the purposes of paragraph 1, European laws or framework laws may establish measures concerning:
 - (a) the collection, storage, processing, analysis and exchange of relevant information;
 - (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;
 - (c) common investigative techniques in relation to the detection of serious forms of organised crime.
3. A European law or framework law of the Council may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.

ARTICLE III-276

1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.
2. European laws shall determine Europol's structure, operation, field of action and tasks. These tasks may include:
 - (a) the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies;
 - (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.
 - (c) European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.
 - (d) Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.

ARTICLE III-277

A European law or framework law of the Council shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles III-270 and III-275 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.