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THE CONTRIBUTION OF LOCAL AND REGIONAL AUTHORITIES TO A ‘GOOD’ SYSTEM OF GOVERNANCE WITHIN THE EU

CARLO PANARA*

ABSTRACT

The participation of the local and regional authorities in EU processes should be promoted and enhanced by the EU, the Member States and the same local/regional authorities. These should perform a stronger role in the constitutional architecture of the EU. In this way they would contribute more effectively to a limited, balanced and legitimate system of governance based on constitutionalism within the EU. The participation of sub-national authorities in the EU reconciles European integration with the multi-level systems of governance of the Member States; strengthens the legitimacy of EU and national (EU-related) decision-making processes; and reinforces the legal limitation of the decision-making power of both Union institutions and national authorities.

Keywords: democracy in the EU; European constitutionalism; legitimacy of EU decision-making; local and regional authorities in the EU; multi-level governance in the EU

§1. AIMS AND METHODOLOGY

The Lisbon Treaty acknowledges the key role of the local and regional authorities in the constitutional architecture of the EU. In this respect the relevant Treaty provisions are:

- (i) Article 4(2) TEU, pursuant to which the Union shall respect the national identities of the Member States ‘inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*’ (emphasis added);

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- (ii) Article 5(3) TEU, according to which ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’ (emphasis added); and
- (iii) Article 10(3) TEU which entails the aspiration that decisions shall be taken as openly and as closely as possible to the citizen. This provision is part of Article 10 TEU which is devoted to the democratic principle.

From the Treaty of Lisbon it emerges that the full realization of three key principles of EU law (protection of the national identity of the Member States, subsidiarity, and democracy) requires that the powers of the sub-national authorities are protected, but also that the sub-national authorities perform an active role in the EU. This is particularly evident in the involvement of regional parliaments with legislative powers in the early warning system (see Article 6(1) Subsidiarity Protocol) and in the fact that, when possible, decisions shall be taken by the level of government which is closest to the citizen (see Article 10(3) TEU).

The key importance of an active role of local and regional authorities is further highlighted in documents of the Commission and of the Committee of the Regions (CoR). The White Paper on European Governance of 2001 places substantial emphasis on communication between the sub-national authorities and the EU. To this purpose it lays down recommendations with the fundamental objective to enhance the legitimacy of EU decisions, but also to promote ‘good governance’ in the EU.¹ The CoR’s White Paper on Multilevel Governance (MLG) of 2009 focuses on two key elements: (i) the implementation of EU and national law and policy at regional and local level (‘translating European or national objectives into local or regional action’); and (ii) the involvement of local and regional authorities in EU law-making and policymaking both at EU and at national level (‘integrating the objectives of local and regional authorities within the strategies of the European Union (...) and encourage their participation in the coordination of European policy’).² The key objectives of the CoR are to enhance the ‘democratic legitimacy’ of Union action and to promote ‘good governance’. The Commission’s Agenda 2020 further emphasizes the role of local and regional authorities in delivering EU policy objectives, but also their contribution to the elaboration of national reform programmes implementing the EU strategy.³

¹ European Commission, White Paper on European Governance, COM(2001) 428, p. 10–11.

² CoR, White Paper on MLG, CdR 89/2009, 17–18 June 2009, p. 6–7. See also the Opinion of the CoR, *Building a European Culture of Multilevel Governance: Follow-up from the Committee of the Regions’ White Paper* (94th plenary session 15–16 February 2012).

³ Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, p. 6, 29.

All of this demonstrates the high normative value that EU primary law, the Commission and CoR ascribe to local and regional participation in the EU. However, the positive or negative impact of such participation is the subject of discussion among scholars. Pernice highlights that constitutionalism in the EU (which he calls 'multilevel constitutionalism') requires the participation of local and regional authorities in the legislative process of the EU in order to compensate for the loss of autonomy resulting from the shift of powers to the European level, but also to provide European legislation with the necessary experience and knowledge from the ground. The participation he has in mind includes preliminary consultation with the local and regional authorities and particularly an important role for the CoR.⁴

The views of other scholars are less optimistic. Peters and Pierre, for example, identify a 'Faustian bargain' in the opaque negotiation of policy taking place among players from different levels within the EU.⁵ Similarly, DeBardeleben and Hurrelmann argue that while MLG is likely to increase 'output legitimacy' (that is, the problem-solving capacity of the EU), it is also likely to reduce 'input legitimacy' (essentially, democratic legitimacy) because of increased difficulties in calling leaders to account. Moreover, while MLG in the EU may open up more room for participation and deliberation, it may also undermine the equal representation of all the citizens in the decision-making process.⁶ It has to be highlighted, however, that these scholars construe MLG essentially as negotiation of policy by the sub-national players on the EU level. Yet, the notion of MLG emerging from the CoR's White Paper (see above) goes beyond the mere lobbying activity of the local and regional offices in Brussels and embraces the 'official' channels created at Member State, as well as at EU level (such as, in particular, the CoR).

A number of scholars (Eppler, Abels, Nettesheim and so on) focus on the specific problem of participation of sub-national parliaments in the EU. They draw attention to the risk that local/regional participation in the EU could be focused exclusively on the 'executive powers', in this way frustrating the role and constitutional status of the sub-national parliaments.⁷

⁴ See I. Pernice, 'Multilevel Constitutionalism in the European Union', *Walter Hallstein-Institut Paper 5*, www.whi-berlin.de/documents/whi-paper0502.pdf, p. 11. On the theory of multilevel constitutionalism see also I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited', 36 *Common Market Law Review* (1999), p. 703 et seq.

⁵ B.G. Peters and J. Pierre, 'Multi-level Governance and Democracy: A Faustian Bargain?', in I. Bache and M. Flinders (eds.), *Multi-level Governance* (OUP, 2004), p. 87.

⁶ J. DeBardeleben and A. Hurrelmann, 'Conclusion', in J. DeBardeleben and A. Hurrelmann (eds.), *Democratic Dilemmas of Multilevel Governance* (Palgrave, 2007), p. 240.

⁷ See, in particular, A. Eppler, 'Vertikal und horizontal, bi- und multilateral: Interparlamentarische Beziehungen in EU-Angelegenheiten', in G. Abels and A. Eppler (eds.), *Auf dem Weg zum Mehrebenenparlamentarismus? Funktionen von Parlamenten im politischen System der EU* (Nomos, 2011), p. 297 et seq.; G. Abels, 'Wandel oder Kontinuität? Zur Europaarbeit der deutschen Landesparlamente nach dem Lissabon-Vertrag und dem Lissabon-Urteil des Bundesverfassungsgerichts', in G. Abels and A. Eppler (eds.), *Auf dem Weg zum Mehrebenenparlamentarismus? Funktionen von Parlamenten im politischen System der EU*, p. 279 et seq.; M. Nettesheim, 'Die Integrationsverantwortung der Länder

It is still unclear, therefore, whether, how, and to what extent local and regional authorities really contribute to a ‘good’ system of governance within the EU, namely a balanced, limited and legitimate system of governance inspired by the principles of constitutionalism.

This study aims to address the question of whether, how and to what extent, certain key goals of constitutionalism are fulfilled through the participation of local and regional authorities in the formulation and implementation of EU law and policy. The notion of constitutionalism used in this study is the notion typical of the Anglo-Saxon constitutional tradition, according to which the exercise of power shall be limited and subject to rules, checks and balances, including judicial review.⁸ This study will focus on five aspects of constitutionalism in the context of the EU: the relationship between EU integration and national constitutions; the democratic legitimacy of EU decision-making; the accountability of decision-makers; the procedural and substantive limits to the exercise of decision-making power; and the power-limiting role of judicial review. These aspects will be analysed to assess if, how and to what extent local and regional authorities have an impact (and what impact) on constitutionalism in the EU multilevel system of governance and to evaluate their positive or negative contribution to this system of governance. Despite the abundance of studies on the sub-national authorities in the EU, this particular aspect of constitutionalism in the EU has never been developed systematically by research in the field.

Following the same path of earlier works⁹ and of EU primary law, this study will focus on the ‘local and regional authorities’, which will be described here as the ‘sub-national’ level of government within the EU. This approach should not be mistaken for a suggestion that there is or there should be an undifferentiated sub-national level of government across the EU.¹⁰ This methodology is consistent with the EU primary law, which does not differentiate between the two categories of sub-national authorities (see the Treaty provisions and the documents referred to previously; the only exception

– Folgerungen aus dem Urteil des Bundesverfassungsgerichts vom 30. Juni 2009 (“Lissabon-Urteil”), Tübingen, 30 July 2009. See also B. Crum and J.E. Fossum, ‘The Multilevel Parliamentary field: A framework for the representative democracy in the EU’, 1 *European Political Science Review* (2009), p. 249–271.

⁸ See C.H. McIlwain, *Constitutionalism. Ancient & Modern* (Great Seal Books, 1947). See also N. Matteucci, *Breve storia del costituzionalismo* (Morcelliana, 2010 [originally published in 1964]); M. Fioravanti, *Costituzionalismo. Percorsi della storia e tendenze attuali* (Laterza, 2009).

⁹ See in particular S. Weatherill and U. Bernitz (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart, 2005); S. Mangiameli, ‘The Role of Regional and Local Government in European Governance’, in H.-J. Blanke and S. Mangiameli (eds.), *Governing Europe under a Constitution* (Springer, 2006), p. 457 et seq.

¹⁰ See C. Moore, ‘A Europe of the Regions vs. the Regions in Europe: Reflections on Regional Engagement in Brussels’, 18 *Regional & Federal Studies* (2008), p. 524: ‘Devolution and decentralization across the EU’s member states has not resulted in anything approaching a single “third level” of constitutional actors. Significant variations in policy competences are identifiable across even the strongest tier of actors below the national level, limiting the extent to which these actors can lobby jointly on policy issues.’

to this lack of differentiation is Article 6(1) of the Lisbon Subsidiarity Protocol, which envisages consultation with 'regional parliaments with legislative powers'). The CoR is the representative of both local and regional authorities, even though the heterogeneous composition of the CoR, due to the multifarious and potentially conflicting interests within this body, is often flagged up as a weakness of local/regional representation within the EU.¹¹ The distinction between 'local' and 'regional' is sometimes ambiguous even at the national level. For example, all the French territorial communities are ultimately all of the same nature, irrespective of their level ('regions', 'departments', 'communes'). In the UK the concept of 'local authority' is almost all-embracing in that it includes both smaller authorities (councils of boroughs) and larger authorities, such as the combined authorities (Greater Manchester, Liverpool City Region and so on), which soon may even enjoy devolved legislative powers similar to those of the devolved administrations in Scotland, Wales and Northern Ireland. The concept of 'region' also lends itself to speculation in that a Spanish Autonomous Community is very different from a French Region, a Belgian Community is very different from an Italian Region and so on. The only reliable distinction in this field is probably between regions with and without legislative powers.¹²

However, also the legislative powers of the regions are very different in the various Member States and the constitutional standing of these regions may vary accordingly. This group of regions would include a micro-region, such as Åland, and a federated entity, such as the *Land* Baden-Württemberg, whose size and GDP are comparable to that of some Member States. Whenever required by the study, it will be clarified whether a conclusion would apply to all the sub-national authorities or only to certain types of authorities. Most examples of sub-national participation in the EU used in this article will refer to 'regional authorities' for the simple reason that these authorities enjoy powers and benefit from resources which increase the opportunities of interaction with Union institutions. It has also to be taken into account that there are different national solutions to the problem of local/regional participation in the EU, with some Member States adopting a more centralistic approach (for example, France or the UK) and others prompting participation opportunities for the sub-national authorities (especially but not exclusively for the regions).¹³ Therefore the approach chosen by this study to consider

¹¹ See, inter alia, E. Domorenok, 'The Committee of the Regions: in Search of Identity', 19 *Regional & Federal Studies* (2009), p. 146. The difficulty for the CoR to represent sub-national interests is evidenced also by the creation of 'political groups' within the CoR. See S. Ricci, 'The Committee of the Regions and the Challenge of European Governance', in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance* (Springer, 2011), p. 115.

¹² See Article 6(1) Lisbon Subsidiarity Protocol. The regions from the EU with legislative powers created two ad hoc associations: REGLEG (Conference of European Regions with Legislative Power) and CALRE (Conference of European Regional Legislative Assemblies).

¹³ On the different approaches to sub-national participation in the EU see P. Popelier, 'Subnational multilevel constitutionalism', 6 *Perspectives on Federalism* (2014), p. 1–23. See also C. Panara and A. De

the 'local and regional authorities' will simplify the analysis without sacrificing the methodological rigour.

§2. THE ROLE OF LOCAL AND REGIONAL PARTICIPATION IN RECONCILING EU INTEGRATION WITH THE MEMBER STATES' MULTILAYERED SYSTEMS OF GOVERNANCE

All the Member States feature a constitutional framework which includes regional and/or local self-government. Given that the Member States are also part of the EU, and that every, or nearly every, EU policy is likely to interfere with the responsibilities or the interests of the sub-national communities, one might be faced with reciprocally contradicting propositions. On the one hand, the Member States' constitutions value regional and local autonomy and ascribe to it the status of a qualifying feature of their constitutional framework. On the other, a considerable degree of that autonomy might have been diluted or even relinquished through the acceptance of an increased role of the EU. In reality, dynamics are more complex as EU integration does not always diminish local/regional autonomy. Sometimes the EU may strengthen local and regional entities by entering into direct relations with them, ignoring the central government's gatekeeper function. However, this is an exception in the current framework of the EU and it is mainly limited to the allocation of certain EU funding streams and to the lobbying and representation activity of the local or regional offices in Brussels.¹⁴

There are at least three strategies to reconcile local/regional autonomy and the growing role of the EU. A first strategy is the doctrine of 'counterlimits', that is, the limits to the principle of supremacy of EU law. According to principle of supremacy of EU law, as construed by the Court of Justice of the European Union (CJEU) since *Internationale Handelsgesellschaft*, EU law shall prevail over any rule of domestic law,

Becker (eds.), *The Role of the Regions in EU Governance*; R. Toniatti, F. Palermo and M. Dani (eds.), *An Ever More Complex Union* (Nomos, 2004).

¹⁴ An important element of the theory of MLG in the EU is that there might be direct relations between sub-national players (not only sub-national authorities) and the EU institutions: see L. Hooghe and G. Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, 2001), p. 28–29. See also S. Piattoni, *The Theory of Multi-level Governance. Conceptual, Empirical, and Normative Challenges* (OUP, 2010). Examples of overlap between EU and regional responsibilities include: education and culture (Belgium, Germany, UK and France); hunting (Belgium, Austria and Italy); fisheries (Belgium, Spain, Italy, Austria and UK); environment (Austria, Spain and Italy); agriculture (Belgium, Austria, Spain, Italy and UK); social welfare (Austria and Spain); radio/TV (Belgium and Germany); energy (Belgium and UK); economic development (Belgium, UK and France); public procurement law (Austria and Italy); economic planning, industry, transport, health, taxation, and consumer protection (Belgium and Spain).

including constitutional law.¹⁵ By analogy, one may argue that on the basis of a rigid application of the principle of supremacy the centripetal push towards integration in the EU (ultimately, the transfers of powers from the Member States to the EU) could always legitimately erode the autonomy of the sub-state authorities. However, this solution to possible conflicts between EU integration and sub-national authorities would not be viable.

It is well known that a number of national courts have placed limits on the prevalence of EU law in order to protect certain constitutional values (doctrine of the 'counterlimits').¹⁶ As previously mentioned, Article 4(2) TEU includes regional and local self-government among the 'fundamental constitutional structures' which are part of the 'national identity' that the Union is obliged to respect.¹⁷ Admittedly, it needs to be demonstrated on a case-by-case basis that a certain 'constitutional structure' reflects the 'national identity', and particularly that a certain MLG arrangement reflects that identity and therefore enjoys the protection of Article 4(2) TEU.¹⁸ Yet the constitutional laws of some Member States strongly corroborate the claim that regional and local self-government are an integral part of their 'constitutional identity', if not even of their 'national identity', with the result that repeal or limitation of these by force of EU or national law would not be legally feasible without a more fundamental change of the 'constitutional identity' of the state. Some examples will be laid out below to illustrate the point.

The federal principle in Austria is a key element of the constitutional system. Accordingly, a major restriction of the powers of the *Länder* or of the municipalities would require a total revision of the Federal Constitution, meaning a radical change

¹⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

¹⁶ See, for example, the jurisprudence of the German Federal Constitutional Court concerning the protection of fundamental rights (see especially *Solange I*, Ruling of 29 May 1974, and *Solange II*, Ruling of 22 October 1986); the protection vis-à-vis *ultra vires* action of the EU (see *Maastricht*, Ruling of 12 October 1993, and *Honeywell/Mangold*, Ruling of 6 July 2010); the protection of the constitutional identity of the Federal Republic of Germany (see *Lisbon*, Ruling of 30 June 2009) and of democratic legitimacy in the EU multilevel system of governance (see *Maastricht* and *Lisbon*). See also the 'controlimiti doctrine' of the Italian Constitutional Court (Ruling No. 183 of 27 December 1973 and Ruling No. 170 of 8 June 1984) and the statement of the French *Conseil Constitutionnel* who, in a case concerning a law transposing a directive, declared that the core of the French Constitution shall not be undermined (Ruling of 25 July 2006; see also the Ruling of the *Conseil d'État* of 8 February 2007).

¹⁷ On the key importance of local and regional self-government for the protection of the national identity of the Member States see I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* (2009), p. 394. See also the Opinion of Advocate General Trstenjak in Case C-324/07 *Coditel Brabant SPRL v. Commune d'Uccle and Région de Bruxelles-Capitale*, EU:C:2008:317, para. 85.

¹⁸ See E. Cloots, *National Identity in EU Law* (OUP, 2015), p. 127 et seq.

of the ‘constitutional identity’ of the Austrian state.¹⁹ Similarly, in Germany the Basic Law rules out any constitutional amendment affecting the division of the country into *Länder*, their participation on principle being in the legislative process and the federal character of the state. These limits to constitutional revision do not apply only *internally* (within Germany), but also in relation to all transfers of powers to the EU.²⁰ They could be overcome only by an entirely new constitution reflecting a new ‘constitutional identity’.²¹

Due to the fluidity of its unwritten constitution, in this context the UK is a very interesting case study. According to the orthodox doctrine of parliamentary sovereignty,²² the UK Parliament can modify any earlier statute: in principle it would have the power to give any responsibility to the local authorities, but it could also take everything away from them. However, over the last few decades, the doctrine of parliamentary sovereignty in its traditional form has been challenged repeatedly. For example, in the case *Thoburn v. Sunderland Laws LJ* held that the doctrine of implied repeal did not apply to the conflict between an earlier ‘constitutional statute’ and a later one.²³

The category of ‘constitutional statutes’ includes any statute which ‘(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’. Any statute not fitting this description is an ‘ordinary statute’. Important examples of constitutional statutes are the Magna Carta of 1215, the Bill of Rights 1689 and the Act of Union 1707, but also more recent statutes, such as the Human Rights Act 1998, the Scotland Act 1998, the Government of Wales Act 1998 and the European Communities Act 1972.²⁴ Whilst *Thoburn* did not touch upon

¹⁹ In addition to the approval by two-thirds majority by both the National Council and the Federal Council, a total revision of the constitution would also require a referendum. See Article 44(3) of the Federal Constitutional Law.

²⁰ See Article 79(3) GG and Article 23(1) GG (the acronym GG indicates the German *Grundgesetz*, Basic Law). See K.-P. Sommermann, ‘Offene Staatlichkeit: Deutschland’, in A. von Bogdandy et al. (eds.), *Handbuch Ius Publicum Europaeum* (Müller, 2008), p. 17 et seq.

²¹ See Article 146 GG. The notion of ‘constitutional identity’, introduced by the *Lisbon* Ruling of the Federal Constitutional Court of Germany, is criticized by some constitutional law scholars for being too vague. See, for example, M. Nettesheim, ‘Wo “endet” das Grundgesetz? – Verfassungsgebung als Grenzüberschreitender Prozess’, 51 *Der Staat* (2012), p. 322 et seq.

²² The traditional definition of the doctrine of parliamentary sovereignty can be traced back to A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edition, MacMillan, 1959), p. 59.

²³ According to the doctrine of implied repeal, if Parliament passes a statute featuring provisions in conflict with an earlier statute, the affected part of the earlier statute is impliedly repealed. The case *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin) specifically concerned the application of the doctrine of implied repeal to the European Communities Act 1972. This ruling is contested by some legal scholars: see for example T. Poole, ‘Questioning Common Law Constitutionalism’, 25 *Legal Studies* (2005), p. 142–163.

²⁴ In the case *BH v. Lord Advocate* [2012] UKSC 24, para. 30, Lord Hope re-stated the ‘fundamental constitutional nature’ of the Scotland Act, with the consequence that ‘Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute.’

the constitutional status of the local government, the Localism Act 2011 contains an interesting development of the same principle in relation to local government in England. Section 2(4) of that Act stipulates that the powers of local authorities are not subjected to implied repeal. By contrast, the acts that *Thoburn* looked at, did not include an explicit provision on implied repeal. Indeed, Laws LJ suggested that the constitutional statutes are such 'by force of the common law'.

The further question of *to what extent* (expressly, of course) it is legally possible for Parliament to limit (or even to remove) the powers of the local government or devolution goes completely to the heart of the constitution in the UK. Whilst *politically* the abolition of the local self-government or of devolution are currently unthinkable, it would appear uncertain, to say the least, whether Parliament would be *legally* authorized to limit their powers beyond a certain extent. Such uncertainty demonstrates that even in a flexible constitutional system like the UK, the regional and local self-government are so deeply rooted in the 'constitutional identity' of the country, that they may even limit the supreme principle of parliamentary sovereignty.²⁵

From the preceding overview it is shown that the transfers of powers from the Member States to the EU shall be compatible with regional/local autonomy and shall not frustrate the fundamental constitutional role of the local and regional authorities in accordance with each constitutional system. When the ability of the local and regional authorities to perform a minimum 'hard core' of essential tasks is undermined, then the transfer of powers to the EU or the prevalence of EU law shall not take place. In turn the EU, created and shaped by these transfers of powers, shall factor in the existence and role of powerful local/regional authorities and has no alternative but to be a 'Europe with the regions and the local authorities', rather than merely a 'union of states'. This conclusion pushes towards the introduction of appropriate arrangements for the involvement of these authorities (in reality only of the regions of some Member States) in the decision to transfer powers to the EU and, once powers have been transferred, for the involvement of both local and regional authorities in the EU decision-making processes concerning their responsibilities or interests.

²⁵ If Parliament ever tried to remove local government or devolution or to render them irrelevant, almost certainly there would be court cases which would test the courts' adherence to the principle of parliamentary sovereignty. To date, the only case to have suggested (in an obiter dictum) a possible willingness of the House of Lords to find certain legislation passed by Parliament to be unlawful is *R (Jackson) v. Attorney General* [2005] UKHL 56. In the case *AXA General Insurance v. Lord Advocate* [2011] UKSC 46, para. 50–51, Lord Hope left open the question of whether the supremacy of the UK Parliament is absolute or may be subject to limitation in exceptional circumstances. On the opinion that parliamentary sovereignty is limited *vis-à-vis* devolution and local government see C. Panara, 'The contribution of local self-government to constitutionalism in the member states and in the EU multilayered system of governance', in C. Panara and M. Varney (eds.), *Local Government in Europe* (Routledge, 2013), p. 377 et seq., and, more recently and specifically in relation to devolution, K. Campbell, 'The draft Scotland Bill and limits in constitutional statutes', *UK Constitutional Law Blog* (2015), <http://ukconstitutionallaw.org>. See also M. Varney, 'Brexit and Welsh Devolution: The Likely Impact', forthcoming book chapter (I would like to thank the author for letting me see the manuscript).

Accordingly, a second strategy to reconcile local/regional autonomy and the growing role of the EU is the involvement of the regional and local authorities in the decision to transfer powers to the EU. The traditional and 'orthodox' EU law perspective is that the Member States are the sole 'masters of the Treaties'. This is confirmed by a *prima facie* reading of Article 48 TEU on the procedures for amending the Treaties. However the transfer of powers from the national level to the EU could undermine the role of the local/regional authorities and alter the constitutional balance between central and sub-national government. This complexity of the EU multilevel system is addressed by certain Member States (Belgium, Germany and Austria in particular) through the involvement of the local/regional authorities in different ways in the decisions concerning the amendment of the Treaties.

For example, the Belgian Regions and Communities have an important say on the transfer to the EU of the exclusive powers they have at the domestic level. A treaty concerning these powers can only enter into force in Belgium if the parliaments of *all* the regional entities concerned consent to it. As a result, every sub-state parliament has a right of veto regarding the ratification of the treaty by Belgium.²⁶ In Germany, the *Länder* are involved *collectively*, as a level of government, in the approval of a treaty. An individual *Land* does not have a right of veto. Every new treaty would need to be approved by a majority of two thirds in the *Bundesrat* (the legislative chamber representing the *Länder* at the federal level), as well as in the *Bundestag* (the democratically elected chamber representing the German people).²⁷ The German system is similar to the solution adopted in Austria, where amendments to the founding Treaties require the approval by a majority of two thirds both in the *Nationalrat* (the chamber representing all the Austrian people) and the *Bundesrat* (the chamber representing the *Länder* at federal level).²⁸

In addition to the *ex post* involvement of the sub-national authorities in the ratification of a new treaty, the Member States may also involve the sub-national level in the work of an intergovernmental conference (IGC) or convention leading to a new treaty. The German *Länder* sent two representatives as part of the German delegation to the IGC that led to the Maastricht Treaty. In this way they contributed to secure the introduction

²⁶ This is a result of the principle *in foro interno et in foro externo*, which is embedded in Article 167(3) of the Belgian Constitution. See A. De Becker, 'Belgium: The State and the Sub-State Entities Are Equal, But Is the State Sometimes Still More Equal Than the Others?', in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 256. Mutatis mutandis the Belgian position is similar to the Finnish position. According to Chapter 9 of the Act on the Autonomy of Åland (1991/1144), the Government of Åland must be informed of negotiations on a treaty impacting on the autonomy of Åland and, if necessary, must be given the opportunity to participate in the negotiations (see Section 58). If a term of a treaty concerns a matter within the competence of Åland, the Åland Parliament must consent to the statute implementing that term in order to have it entering into force in Åland (Section 59).

²⁷ See Article 23(1) GG.

²⁸ See Article 50(1) sub (2) and Article 50(4) Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG). See H. Eberhard, 'Austria: The Role of the Länder in a 'Centralised Federal State'', in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 219.

of the principle of subsidiarity, the establishment of the CoR and the opening up of the Council to regional representatives. This type of involvement is very important given that participating in the negotiation of a new treaty could be more effective than the simple *ex post* approval (or threat of non-approval) of a treaty already negotiated and signed by the national governments.

A third strategy to reconcile local/regional autonomy and the growing role of the EU is the involvement of the regional and local authorities in the EU decision-making process and in the implementation of EU law and policy as envisaged by the CoR's White Paper on MLG. This participation would enable the local and regional authorities to maintain and possibly expand their constitutional role of protection of local interests while being involved in an unprecedented phenomenon of supranational integration. This appears to be the correct way to reconcile regional and local autonomy with European integration. Local and regional participation in the EU has a key constitutional mission to accomplish in the EU context. It is *constitutionally* envisaged by the Member States (at least by those whose constitutional system includes regional and local self-government) and, if and to the extent that MLG arrangements reflect the 'national identity' of a Member State, also by Union primary law. This is an example of how the EU and the national legal orders tend to adjust mutually to each other in the context of the European legal system.²⁹

§3. LOCAL AND REGIONAL PARTICIPATION AND LEGITIMACY OF EU DECISION-MAKING

From a local and regional perspective, the legitimacy of the EU as a system and of single EU decisions depends largely on suitable arrangements for the involvement of local and regional authorities in the EU decision-making process, both at the EU and Member State levels.³⁰ The role of the procedures for local/regional participation in the EU is therefore not merely formal, but also substantial, in that these procedures aim to protect local and regional self-government as an integral part of the constitutional system of a Member State.³¹

²⁹ On the notion of European public law as a result of the interaction and the mutual exchange between the EU and the national legal orders cf. P. Birkinshaw, *European Public Law* (2nd edition, Kluwer, 2014), p. 6 et seq. See also the idea, typical of constitutional pluralism, that the EU and the national legal orders shall take into account as far as possible their respective constitutional requirements: cf. in particular M. Poiarés Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (OUP, 2012), Ch. 4.

³⁰ On the idea that procedures contribute legitimacy to decisions see, from a sociology of law perspective, N. Luhmann, *Legitimation durch Verfahren* (3rd edition, Suhrkamp, 1978). On procedural frameworks in multi-level systems see A. Benz, *Politik in Mehrebenensystemen* (Verlag für Sozialwissenschaften, 2009), p. 205 et seq. On legitimacy in the EU and particularly on the input/output legitimacy distinction see F. Scharpf, *Governing in Europe. Effective and Democratic?* (OUP, 1999), p. 6.

³¹ See the Opinion of Advocate General Kokott in Case C-151/12 *Commission v. Spain*, EU:C:2013:354, para. 34–35, where Kokott implicitly recognized that the right (and duty) of the Autonomous

The EU is a complex system of governance where majoritarian and non-majoritarian forms of legitimacy are combined together in a variety of ways and complement each other, sometimes in a dialectic manner. A train of thought in European studies sees the involvement of sub-national authorities in EU law-making and policy-making as a form of ‘participatory democracy’.³² This concept (like others, such as, deliberative democracy) is traditionally acknowledged as being focused on the civic dimension of democratic legitimacy rather than on the participation of public authorities, such as the local and regional self-governed communities.³³ However this notion can be useful from an epistemological perspective in that it captures three fundamental elements: *participation* by local/regional communities in EU decision-making; the idea that a large number of *democratically* structured sub-national societies contribute to decision-making in the EU; the idea that this participation contributes *legitimacy* to the EU and its policies. The duty for the Commission to consult widely before proposing legislation (Article 2 Protocol on Subsidiarity and Proportionality), the consultation of the CoR during the legislative process (Article 307 TFEU), the involvement of sub-state entities by the Member States in the formulation of the national position in EU decision-making fora, can all be considered atypical forms of participatory democracy. They are described as ‘atypical’ because the participants are not individual citizens or organized social groups (such as, for example, trade unions, NGOs and so on), but sub-state authorities with a democratically representative character.

A sub-national authority is indeed a *public* authority which is an expression of a democratically self-governed territorial community. Accordingly, its choice of priorities should be driven by the common good of the community as well and should undergo the scrutiny of a democratically representative assembly, such as a regional parliament or a local council. If this is the case, it may be argued that regional action at the EU level (for example, the lobbying activity of the regional office) would be democratically

Communities to participate in the implementation of EU law in the areas falling within their legislative responsibility is an essential part of the constitutional identity of the Spanish State. On the key role of regulatory frameworks to prevent a loss of democratic legitimacy of decisions see B.G. Peters and J. Pierre, in I. Bache and M. Flinders (eds.), *Multi-level Governance*, p. 89. See also the reference to a ‘transparent, open and inclusive policy-making process’ in the Charter for MLG in Europe (Point 1.1). On ‘substantial legitimacy’ see C. Martínez-Sicluna y Sepúlveda, *Legalità e legittimità: la teoria del potere* (ESI, 2006), p. 220.

³² See S. Mangiameli, ‘The Role of Regional and Local Government in European Governance’, in H.-J. Blanke and S. Mangiameli (eds.), *Governing Europe under a Constitution* (Springer, 2006), p. 460–462, 475–476, 480–481; J. Greenwood, ‘Actors of the Common Interest? The Brussels Offices of the Regions’, 33 *Journal of European Integration* (2011), p. 437 et seq.; C. Panara, *The Sub-national Dimension of the EU: A Legal Study of Multilevel Governance* (Springer, 2015), p. 173. See also the European Parliament resolution of 14 January 2003 on the role of regional and local authorities in European integration (2002/2141(INI)), at point 4.

³³ On participatory democracy see C. Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970). See also B.R. Barber, *Strong Democracy. Participatory Politics for a New Age* (2nd edition, University of California Press, 2003).

legitimated in front of the local community and would constitute a loyal reflection, a projection, of that community at the EU level.

It is possible to identify the following pathways to legitimacy of EU decision-making deriving from participation of the sub-national authorities: (i) consultation; (ii) systems of coordination to determine the position of the Member States in EU decision-making fora (particularly in the Council); (iii) role of the sub-national parliaments in the EU decision-making process; (iv) lobbying by regional offices in Brussels; and (v) promotion by the sub-national authorities of stakeholders' and citizens' participation in the EU.

A. CONSULTATION

Consultation can be mandatory (for example, consultation of the CoR on certain topics established by the Treaty), or non mandatory (for example, generic obligation for the Commission to consult widely). It can take place at the EU level (for example, Structured Dialogue between the Commission and the associations of territorial authorities;³⁴ as political dialogue between the Commission and national parliaments including the chambers representing the sub-national authorities),³⁵ or at the national level (structured forms of consultation with the regional authorities before determining the national position of the Member State in the Council, and consultation by the national parliament of regional parliaments with legislative powers in the framework of the early warning system;³⁶ and also involvement of the local and regional authorities in the preparation and implementation of the national reform programmes related to the Agenda 2020 of the Commission).³⁷

That proper pre-legislative 'dialogue' or 'consultation' can contribute democratic legitimacy to the EU law-making process is corroborated by the case *UEAPME*, where the Court of First Instance held that whenever the European Parliament does not participate in the enactment of a legislative act, the principle of democracy requires an alternative form of participation of the people. If such participation takes the form of 'social dialogue', the Commission and the Council have the obligation to verify that the social partners involved are 'sufficiently representative'. Only in this way can the democratic legitimacy of the lawmaking process be maintained.³⁸ By analogy,

³⁴ See Communication from the Commission, COM(2003) 811 final; and Committee of the Regions' Bureau Decision CoR 380/2003 part II of 19 March 2004.

³⁵ The political dialogues has been launched by the Barroso Commission in 2006. This avenue has been used by the German *Bundesrat* for example in relation to the added value tax directive in 2013.

³⁶ Article 6 of the Protocol on Subsidiarity and Proportionality.

³⁷ See Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, p. 29. See also the document of the CoR and of the Commission, 'Delivering on the Europe 2020 Strategy. Handbook for Local and Regional Authorities', (2012), p. 13, 20.

³⁸ Case T-135/96 *UEAPME v. Council*, EU:T:1998:128, para. 88–89. See S. Smismans, *Law, Legitimacy, and European Governance* (OUP, 2004), p. 343 et seq.; P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', 17 *European Public Law* (2011), p. 567 et seq.

consultation with the sub-national authorities *outside* the CoR can create legitimacy only if the consultation process is ‘structured’ (that is, based on objective criteria), transparent and sufficiently inclusive.³⁹ More specifically, the Union should identify and develop adequate communication channels with the sub-national authorities, for example by selecting for the Structured Dialogue, and for any other form of consultation, truly representative associations of regional and local authorities, whose internal life is organized democratically.⁴⁰

B. SYSTEMS OF COORDINATION TO DETERMINE THE POSITION OF THE MEMBER STATES IN EU DECISION-MAKING FORA (PARTICULARLY IN THE COUNCIL)

In a number of Member States there are rules of coordination to decide the position of the Member State in EU decision-making fora, for example, to decide the position of the Member State before a meeting of the Council. In this way, when an EU proposal or policy may have an impact on key regional responsibilities or interests, the position of the Member State in these fora will have to incorporate, or at least will have to take account of and be informed by, the point of view of the sub-national authorities. Coordination mechanisms produce legitimacy if and to the extent that they protect effectively the constitutional standing of the sub-national authorities. For example, in a typical federal state like Germany, when the Council agenda features items falling within the exclusive legislative responsibility of the *Länder*, the *Bundesrat* (the legislative chamber representing the *Länder* on the national level) can determine the position of Germany in the Council. In this way, at least from a German *Länder* perspective, the EU decision-making process is legitimated by the involvement of all the *Länder* on an equal footing and with a real opportunity to contribute effectively to the formulation of the position of their Member State.⁴¹

³⁹ On the importance of consultation in EU lawmaking see Interinstitutional Agreement on Better Lawmaking, [2003] OJ C 321/1, point 26.

⁴⁰ The Commission Communication of 19 December 2003 and the Decision of the Bureau of the CoR of 19 March 2004 establish that participation in the Structured Dialogue is open to political representatives at the highest level of national and European associations of local and regional authorities. The participant associations are selected by the Commission with the help of the CoR and have to match certain criteria, including ‘a wide basis of territorial and democratic representation’ and ‘the need to keep a fair balance among associations representing different categories of regional and local authorities’.

⁴¹ On the participation of the German *Länder* in the EU decision-making process see Article 23(2–6) GG. On the different systems of regional participation in the EU see C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, Ch. 6–12. Specifically on Germany see C. Panara, ‘In the Name of Cooperation: The External Relations of the German *Länder* and Their Participation in the EU Decision-Making’, 6 *European Constitutional Law Review* (2010), p. 59 et seq.

C. THE ROLE OF THE SUB-NATIONAL PARLIAMENTS IN THE EU DECISION-MAKING PROCESS

The role of sub-national parliaments, particularly those with legislative powers, has been enhanced not only by the consultation opportunity prompted by the early warning system,⁴² but also by reforms made in recent years by some sub-national authorities to strengthen the role of these parliaments vis-à-vis the regional governments. For example, in the *Land* Baden-Württemberg (Germany), in addition to the ordinary rights to receive regular information, when an EU proposal focuses primarily on an area of exclusive legislative responsibility of the *Länder* (education, culture, police law, radio/TV broadcasting), the *Landtag* (the regional parliament) may impose an imperative mandate on the *Land* government. In such a scenario the *Land* government would be bound to follow the position of the *Landtag* and to defend that position in the *Bundesrat*, unless the position is in conflict with substantial *Land* interests. In this way it enhanced the democratic legitimacy of the *Land* (and indirectly of the whole internal, German) EU-related decision-making activity.⁴³

D. LOBBYING BY REGIONAL OFFICES IN BRUSSELS

Over the last 20–25 years a large number of regional and local authorities across the EU opened liaison offices in Brussels. The main tasks of these offices are the representation of the regional/local authority vis-à-vis Union institutions (especially the Commission); the promotion of the image and interests of the regional/local authority on the EU level; and, finally, networking with other players for joint lobbying. Lobbying is important for the legitimacy of the Union in that it creates a direct communication channel, potentially bi-directional, between the local level and the EU, and insofar as it may secure positive results for a locality or a region. However, democracy is inseparably linked to the idea of equality of opportunity and lobbying can be problematic from an equality perspective; the unequal resources (budget, staff and so on) available to each player, but also the *asymmetry* of their powers across the Member States, shape in a very different and unequal manner the capacity of sub-national players for action in the EU political arena. Lobbying, moreover, takes place through informal contacts: outside of

⁴² Article 6(1) Subsidiarity Protocol. The consultation of the sub-national parliaments during the early warning system does not seem to work well in practice due to the little time (six weeks only) for a reasoned opinion.

⁴³ See Article 34a(2), second sentence, of the Constitution of the *Land* Baden-Württemberg. See also §9(2) Law on the Involvement of the *Landtag* in Affairs of the European Union of 17 February 2011 (*Gesetz über die Beteiligung des Landtags in Angelegenheiten der EU*, EULG in acronym). The *Landtag* uses this instrument *cum grano salis* (i.e. not too often). Also other *Länder* (for example, Bavaria) feature similar mechanisms of parliamentary participation in EU matters. Baden-Württemberg and Bavaria are the leading *Länder* for parliament involvement in EU affairs. See G. Abels, 'Adapting to Lisbon: Reforming the Role of German Landesparlamente in EU Affairs', 22 *German Politics* (2013), p. 1–26.

formal, largely predictable, transparent procedural patterns. This explains why Peters and Pierre indicate this type of activity on the EU level as a ‘Faustian bargain’ and see it as problematic for democratic legitimacy.⁴⁴

E. PROMOTION BY THE SUB-NATIONAL AUTHORITIES OF STAKEHOLDERS’ AND CITIZENS’ PARTICIPATION IN THE EU

Promotion by the sub-national authorities of stakeholders’ and citizens’ participation in the EU may consist of the involvement of public or private players (‘stakeholders’, including other sub-national authorities), but also, *directly*, in the involvement of the citizens. For example, the Region Lombardia (Italy) promotes the involvement of the local authorities and of other public and private players by informing them about EU law and policy and especially by facilitating their participation in EU programmes.⁴⁵ An important way to facilitate contact between the regional stakeholders and the EU institutions has been the creation of a representation of key economic and social players from the regional territory (including, for example, the Conference of the Rectors of the Universities of Lombardia; Assolombarda, which is an association of approximately 5,000 firms; Expo2015; the Regional Agency for the Protection of the Environment; the Regional Council of Lombardia and so on).

The liaison offices in Brussels of some English local authorities are strongly ‘stakeholder based’ in that they are not solely expression of a sub-national authority, but of a group of key local economic, educational and other players. For example, the partners of Liverpool City Region Brussels Office include a wide spectrum of territorial authorities (Knowsley MBC), specialized agencies (Merseyside Fire and Rescue Service, Merseytravel, Merseyside Recycling and Waste Authority), higher education institutions (Liverpool University), organizations with a broader mission (Liverpool City Region LEP, Liverpool Vision, Network for Europe). In this way the Liverpool City Region Office, like the Delegation of Lombardia, aims to represent the ‘regional system’ including a variety of territorial authorities, specialized agencies, research institutions and economic players.

An important example of direct involvement of the citizens by the sub-national authorities is the use made by the *Land* Baden-Württemberg of the European Citizens’ Initiative (ECI). In 2013 the *Land* Baden-Württemberg played a key role in promoting the first successful ECI calling on the Commission to ensure affordable and non-privatized access to water for all EU citizens (Right2Water).

At this stage it is important to highlight that the described mechanisms of local and regional participation in the EU perform overall an important function especially

⁴⁴ B.G. Peters and J. Pierre, in I. Bache and M. Flinders (eds.), *Multi-level Governance*, p. 86. On equality of opportunity in multi-level political systems see A. Benz, *Politik in Mehrebenensystemen*, p. 214 et seq.

⁴⁵ See Article 11(2) of Lombardia Law No. 17 of 21 November 2011. On the involvement of these players in the annual ‘EU session’ of the Lombardia Regional Council see Article 3(2) of Lombardia Law No. 17 of 21 November 2011.

in terms of legitimacy. They legitimize the EU decision-making process in that they enhance the democratic quality of that decision-making and of the internal processes within the Member States. However, the 'intensity' of these participation tools in terms of their ability to shape EU policies and laws is questionable, even though this quantity is difficult or nearly impossible to measure objectively and precisely (how to measure the effectiveness of lobbying by the sub-national authorities? And the impact of the CoR in the decision-making process?⁴⁶ And the impact of consultation more in general?). It is arguable that consultation at national and EU level in its various forms might not be a particularly 'strong' form of participation. However it is probable that the picture would be slightly different if we looked at the preparatory procedures in certain Member States (Belgium, Germany, Austria, Spain), where the position of the Member State in the Council can be determined by the regional authorities. Still, this is not always and everywhere the case and explains why a large number of regional authorities from federal and regional countries, but also of territorial authorities from traditionally more centralized systems (such as, the UK and France), try to escape the constraints arising from the 'gatekeeper role' of the central government by resorting to direct contacts with the EU institutions (lobbying).

At the same time it needs to be taken into account that most tools at national and EU level are available to 'regional' authorities rather than to 'local' authorities (namely sub-regional), although also this second group of authorities plays an important role at EU and national levels. Accordingly, an evaluation of the effectiveness of the various tools needs to take account of a triple asymmetry: between consultation and stronger forms of involvement (currently not available at the EU level, only one at the national level in some Member States); between the Member States, which feature multifarious mechanisms of regional and local involvement with various degrees of strength (in some Member States the regions can determine the position of the Member State in the Council); and finally between regional authorities and 'other' sub-national authorities within the same Member State.

§4. THE PROBLEM OF ACCOUNTABILITY

A system of governance based on constitutionalism requires that the decision-makers are accountable for their actions. Quite correctly Adam Cygan observes that the Treaty of Lisbon, whilst trying to recognize a greater role of the regions in EU lawmaking, has failed to establish appropriate mechanisms for their accountability in circumstances when they misapply EU law.⁴⁷ However in a number of Member States this issue is

⁴⁶ On the difficulty to measure the impact of the CoR in the decision-making process see E. Domorenok, 19 *Regional & Federal Studies* (2009), p. 143 et seq.

⁴⁷ A. Cygan, 'Regional Governance, Subsidiarity and Accountability within the EU's Multi-Level Polity', 19 *European Public Law* (2013), p. 188.

dealt with at national level. In *Konle* and *Haim* the CJEU recognized that State liability may be triggered by an action or a failure to act of a sub-state entity ('a part of the State'). In such circumstances the federation or the central government should not necessarily make the reparation of the damage or the loss. This can be made by the responsible sub-state entity in accordance with domestic law.⁴⁸ In this manner the CJEU 'legitimized' the national legislation imposing exclusively on sub-national authorities the responsibility for a 'loss' or 'damage' attributable to a component of the Member State.

In some Member States there is a subsidiary financial liability of the sub-national authorities towards the Member State, which finds application in the event of a breach of EU obligations originating from the behaviour of a sub-state authority. Such arrangements aim to work as a deterrent against failures to implement, inaccurate implementation, or any other breach of obligations deriving from EU membership. Germany is a good example of this approach. Any cost deriving from Germany's violation of 'supranational' or 'international' obligations must be borne by the responsible *Land* or *Länder* in proportion to the respective quota of responsibility.⁴⁹

Similar criteria find application in other Member States, too. Austrian law lays down the obligation for the *Länder* and the local authorities to pay the costs which derive from judgments of the CJEU in relation to breaches of EU law.⁵⁰ Any disputes on the attribution of the financial liability to the sub-state authorities are decided by the Constitutional Court (see Article 137 Federal Constitutional Law). In a similar manner in Spain the Constitutional Tribunal (*Tribunal Constitucional*) has held that when an Autonomous Community does not implement EU law correctly in an area within its responsibility, that Community shall comply with the findings of the CJEU and pay any fine.⁵¹ In the UK too, when a breach of EU obligations originates from the behaviour of one of the devolved authorities in Scotland, Northern Ireland or Wales, or of a local authority, the responsible entity may be required to pay the pecuniary sanction imposed on the UK.⁵² A comparable 'right of redress' through which the central government can

⁴⁸ See Case C-302/97 *Konle v. Austria*, EU:C:1999:271, para. 61–64; Case C-424/97 *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, EU:C:2000:357, para. 31–32. See P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials* (6th edition, OUP, 2015), p. 254.

⁴⁹ See Article 104a(6), first subparagraph, GG.

⁵⁰ See 2008 Financial Equalization Act (*Finanzausgleichsgesetz 2008*, FAG 2008), BGBl. I 2007/103.

⁵¹ See Ruling of the Spanish Constitutional Court No. 79 of 28 May 1992 and later judgments.

⁵² In relation to devolved administrations see Section B4.26 of the Concordat on Co-ordination of EU Policy Issues. In relation to local authorities see Part 2 and Part 3 of the Localism Act 2011.

recover any expenditure deriving from the non-fulfilment of EU obligations also exists in Italy,⁵³ Belgium⁵⁴ and the Netherlands.⁵⁵

In summary, from a traditional orthodox EU perspective, only the state is responsible for a breach of EU obligations, but from an internal/constitutional perspective the sub-national authority which causes financial liability of the state or state liability may have to pay the fine or the 'loss' or 'damage'. The subsidiary financial liability of the sub-national authorities is anchored to the national constitution (Germany, Spain), or is entrenched in rules of constitutional significance – rules affecting the constitutional autonomy of the sub-national authorities (this is the case for all the other analysed case studies). This confirms that the EU multilevel system is far more complicated and articulated than just a linear national-supranational relationship between Member States and the EU.

Accountability, however, does not apply only to misapplications of EU law. It embraces more in general the idea, typical of democratic constitutionalism, that decision-makers shall be accountable for what they decide to the point that they can be removed from office if their action is judged to be unsatisfactory by voters. If and to what extent local and regional representatives playing a role at the EU level are accountable to a local assembly is a problem of sub-national constitutional law. Carolyn Rowe considers this issue in relation to the regional offices in Brussels and puts forward a divide between 'constitutional regions' (for example the German *Länder*) and 'administrative regions' (for example the English local authorities). She suggests that in the regions of the first group there are adequate accountability mechanisms for the offices. In the regions of the second group accountability ultimately depends on the arrangements established within each local authority, including whether the office represents a single local authority, a number of authorities or it is 'subscriber-based' and therefore includes both local authorities and other public or private stakeholders.⁵⁶ Arguably a failure in the chain of accountability at local level would reverberate negatively and be problematic on local/regional participation and particularly on the contribution of legitimacy to the EU decision-making process.

⁵³ See Article 43(2) Law No. 234 of 24 December 2012. Article 43(10) of the same Law establishes that the State has a similar 'right of redress' against the sub-state authorities responsible of a violation of the European Convention on Human Rights (ECHR). Both provisions were originally introduced in 2007.

⁵⁴ See Article 16(3) of the Special Act of 8 August 1980.

⁵⁵ See Statute of 24 May 2012 on the correct application of European law by public authorities (*Wet Naleving Europese regelgeving publieke entiteiten*), Staatsblad 2012, 245. See C. Backes and W. van der Woude, 'The Netherlands – Local authorities in the Polder-Dutch municipalities and provinces', in C. Panara and M. Varney (eds.), *Local Government in Europe. The 'fourth level' in the EU multilayered system of governance* (Routledge, 2013), p. 252.

⁵⁶ See C. Rowe, *Regional Representations in the EU: Between Diplomacy and Interest Mediation* (Palgrave-MacMillan, 2011), Ch. 6, p. 205–206. See also J. Greenwood, 'Actors of the Common Interest? The Brussels Offices of the Regions', 33 *Journal of European Integration* (2011), p. 437 et seq.; J. Greenwood, 'The regional offices in Brussels. From "push and pull" to "people and place"', 4 *Regions and Cohesion* (2014), p. 1 et seq.

§5. THE POWER-LIMITING FUNCTION OF SUB-NATIONAL PARTICIPATION

The domestic and EU arrangements concerning local and regional participation in EU processes produce the result of limiting the powers of both national governments and Union institutions. The political complexity generated by these arrangements, with its array of procedural, but also of substantive obligations, plays a role in contributing to the fundamental mission of constitutionalism of regulating, tying and ultimately legally limiting the exercise of power.⁵⁷ These arrangements limit power in four fundamental ways: (i) by obliging Union institutions and national authorities to comply with certain procedural requirements; (ii) by preserving the vertical separation of powers between national and sub-national governments; (iii) by influencing or determining the substance of the action of Union institutions and of domestic authorities; and finally (iv) by breaking the traditional state monopoly in the field of external relations.

- (i) By obliging the Union institutions and the domestic authorities to comply with certain procedural requirements (that is, by determining *how* a certain decision has to be adopted), the point of view of the sub-national authorities in relation to certain policy issues is fed to the Union institutions (although these are not necessarily obliged to take it on board). Such procedural requirements are in place both at the EU and the national level. At the EU level there are the compulsory (albeit nonbinding) opinions of the CoR.⁵⁸ Furthermore there is the duty for the Commission to consult widely before making legislative proposals (Article 2 Subsidiarity Protocol) and there are instruments such as the structured dialogue and the political dialogue.⁵⁹ Finally, there is the early warning system which may

⁵⁷ The crucial power-limiting function of constitutionalism is highlighted by C.H. McIlwain, *Constitutionalism*, p. 9.

⁵⁸ See Article 304(1) TFEU. The effectiveness of the opinions of the CoR is difficult to evaluate. According to some accounts this is limited: see, inter alia, D. Chalmers, G. Davies and G. Monti, *European Union Law* (2nd edition, Cambridge University Press, 2010), p. 90. However, while conducting research for other (still ongoing) studies, the author of this article found evidence of different views among regional lobbyists and representatives. Some regional lobbyists (for example, from Cornwall and Liverpool City Region, UK) prefer to deal with the other EU institutions directly rather than with the CoR due to its limited influence. Other lobbyists highlight the importance of the CoR in order to promote the image of a region and for networking purposes (for example, Lombardia, Italy). Finally, a few lobbyists and local politicians, especially from localities and regions with an own representative in the CoR (for example, Baden-Württemberg, Germany, and Greater Manchester, UK), highlight that (also) through the CoR they can play a role in EU decision-making.

⁵⁹ On the structured dialogue see Communication of the Commission, COM(2003) 811 final; and the CoR's Bureau Decision CoR 380/2003 part II of 19 March 2004. The structured dialogue consists of regular meetings hosted by the CoR between the Commission and the European and national associations of sub-national authorities (these are selected by the Commission with the assistance of the CoR). These meetings may concern issues of broad interest, such as the annual work programme of the Commission (general dialogue), or a specific policy area (thematic dialogue). On the political dialogue

concern the sub-national authorities if these are represented in one of the chambers of the national parliament (for example, the German *Bundesrat*). It may concern the sub-national authorities also where there are effective mechanisms in place at the national level for the involvement of regional parliaments with legislative powers in the early warning system (Article 6(1) Subsidiarity Protocol).

At the national level there are domestic processes for regional/local involvement in formulating the national position during the EU decision-making process (see above). There are also domestic processes to enforce compliance with the obligations stemming from the EU, such as substitute powers of the national government, which in turn need to abide by a certain procedure. The exercise of substitute powers is an exception to the normal constitutional allocation of powers. Therefore, in order to respect the decentralized, federal or regional structure of the state, the substitution procedures must be inspired by principles such as loyal cooperation, respect for regional and local autonomy, and proportionality. For example, in Italy the substitution procedure takes account of the constitutional rights of the Regions. The national government has to establish a proper timescale within which the Region shall act, and only in case of a failure to act (or of inadequate action) will the government enact the required measure. The Head of the Executive of the Region has the right to participate in the session of the Council of Ministers deciding on the substitute measure, which shall be limited to what is 'necessary' (proportionality).⁶⁰

- (ii) In federal and regional states, in addition to a horizontal division of powers (legislative, executive, judiciary), there is a vertical separation of powers between central and local/regional governments. An excessive weakening of the latter would undermine this separation and eventually the democratic system established by the state constitution. The participation rights of the sub-national authorities in the promulgation of EU law/policy are designed to compensate for the loss of powers these authorities have suffered as a result of European integration. Also the right/duty of the local/regional authorities to implement and give execution to EU law/policy in the framework of their remit and territory is linked to the need to protect the constitutional role of these entities.
- (iii) The action of the EU and of the national governments is not only procedurally, but also substantively limited, in order to ensure protection to the local and regional authorities. At the EU level substantive limitations include the duty for the EU to

see Commission Communication on a citizens' agenda – Delivering results for Europe, COM(2006) 211. The political dialogue takes place between the Commission and the national parliaments. It concerns the sub-national authorities in those Member States in which they are represented directly in one of the chambers of the national parliament. The political dialogue is used as a communication channel particularly by the German *Bundesrat* on behalf of the *Länder*.

⁶⁰ See Article of 8 Law No. 131 of 5 June 2003. On the EU-related substitute powers of central governments vis-à-vis local and regional authorities in Austria, Belgium, Germany, France, Italy, Spain and the UK see C. Panara and A. De Becker, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 336 et seq.

respect the national identity of the Member States, and particularly the regional and local self-government (Article 4(2) TEU). This implies a positive duty for the EU institutions to involve the local and regional authorities in policy-making in a number of ways: through consultation with these authorities; through the adoption of methods of governance which value the contribution of local and regional authorities; through various forms of ‘dialogue’ with the sub-national authorities and their associations; through the introduction of *ad hoc* funding streams and programmes for local and regional authorities; and through the recognition of the role of the CoR in the institutional architecture of the EU. This also implies the duty for the EU to pay particular attention to the local and regional authorities by introducing and using appropriate tools for their involvement, from tripartite contracts, to special forms of partnership, from the macro-regions to the valuation of localities through, for example, the protection of typical products, the denomination of origin of products and the protection of languages of regional minorities. An expansive construction of Article 4(2) TEU, which would exploit the full potential of this Treaty provision, may also embrace the introduction of future Treaty reforms leading, for instance, to a stronger role, not merely advisory, of the CoR in the European architecture and to the recognition of privileged applicant status to the sub-state authorities.

Substantive limitations also include the duty for the EU to comply with the principles of subsidiarity and proportionality (Article 5(3) and (4) TEU) and the prohibition of *ultra vires* action by the EU to protect the national and sub-national autonomy (Article 5(2) TEU). The enforcement of subsidiarity and proportionality is not a task of the CJEU only. Except for exceptional and unlikely cases of clear abuses of power or manifest errors by the EU, it is unlikely that the CJEU will strike down legislation passed by the EU for a breach of these principles. In most situations full compliance with subsidiarity and proportionality is likely to be channelled by various forms of *ex ante* political dialogue and cooperation, from the early warning system to the consultative activity of the CoR, from the structured dialogue and the political dialogue to various other forms of cooperation and consultation with national and sub-national players, including local and regional authorities.⁶¹

At the national level, there is the fundamental duty for the Member State to create appropriate forms of regional and/or local involvement in the formulation of the national position in the EU as required by its own national constitutional system. There is also a duty, stemming from EU secondary law, to abide by the ‘principle of MLG’ in the creation and operation of partnerships with the sub-national authorities

⁶¹ See C. Panara, ‘The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective’, 22 *European Public Law* (2016), forthcoming. An earlier attempt to link national identity with subsidiarity (although not with regard to local or regional autonomy) can be seen in B. Guastaferrro, ‘Coupling national identity with subsidiarity concerns in national parliaments’ reasoned opinions’, 21 *Maastricht Journal of European and Comparative Law* (2014), p. 320 et seq.

and other economic and social actors in the context of the EU economic, social and territorial cohesion policy in accordance with Regulation (EU) No. 1303/2013.⁶² The same fundamental idea that local and regional authorities shall be involved in EU policy-making is reflected in the Agenda 2020 of the Commission⁶³ and in the related Handbook created by the CoR and the Commission for the local and regional authorities.⁶⁴

- (iv) The participation rights of the sub-national authorities in the EU decision-making process introduce a limit to the power of the national governments in the external arena. Regional and local participation in the EU brings to the fore multiple political arenas and players located *within* the Member States. It leads to variable, wider and cross-cutting coalitions (*'geometrie variabili'*)⁶⁵ along asymmetrical territorial and economic cleavages. Often these coalitions see the sub-national authorities from a Member State pursuing at the EU level political goals that are different from the respective national government.⁶⁶ Local and regional participation concerns both the EU law-making process (secondary and tertiary law) and (but only in some Member States, such as, Belgium, Germany and Austria) the Treaty-making process (EU primary law; see above).

Overall the involvement of local/regional authorities in EU related processes has the effect of limiting the powers of central authorities (both EU and national) and pushes towards the establishment of forms of cooperative federalism or regionalism at national and EU level. Cooperative federalism or regionalism promotes proximity to the citizen by pushing towards the involvement in central decision-making of various players at different levels (EU institutions, national or regional parliaments and governments, and potentially other territorial stakeholders). This outcome is due to the fact that national

⁶² Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, [2013] OJ L 347/320.

⁶³ See Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, p. 6, 29.

⁶⁴ See CoR and Commission, *Delivering on the Europe 2020 Strategy – Handbook for Local and Regional Authorities* (CoR, 2012), <https://portal.cor.europa.eu/europe2020/sitecollectiondocuments/europe%202020%20handbook%20for%20local%20and%20regional%20authorities.pdf>, p. 13, 20. In particular at p. 20 the handbook makes reference to MLG as a method of governance.

⁶⁵ In the Italian political jargon the phrase *'geometrie variabili'* indicates that parliamentary and party political majorities and coalitions may vary in relation to the different issues on the agenda.

⁶⁶ For example, the Merseyside Brussels Office (MBO), along with other regional and national players from across the EU, lobbied the Union institutions for the introduction of the category 'transition regions' in the European Regional Development Fund (ERDF) Objective 1 for the 2014–2020 period, without the support of the UK government. The transition regions are those whose GDP is between 75% and 90% of the average EU GDP.

governments keep a ‘gatekeeper role’ and ‘coordinate’, ‘channel’ or ‘manage’ regional and/or local participation in the EU in a variety of ways. The ‘dual federalism or regionalism’ alternative would be viable only if the Member States renounced largely or entirely to their gatekeeper role and allowed a generalized ‘going solo’ by the sub-national authorities at the EU level (essentially the autonomous representation of the regions in the Council of the EU). However, this would imply the end or an unprecedented weakening of the nation-state within the EU. Accordingly cooperative federalism or regionalism is the solution adopted by all Member States despite their different strategies concerning the involvement of the sub-national authorities in the EU.⁶⁷ For a long time scholars have defined the multilevel participation which is typical of the EU multilevel polity as ‘double political entanglement’ (*doppelte Politikverflechtung*) in that the hands of the national decision-makers are often tied, both in relation to national and EU matters.⁶⁸

§6. THE ROLE OF THE EUROPEAN UNION AND DOMESTIC COURTS

A. THE ROLE OF THE CJEU

The traditional notion of constitutionalism as a ‘legal limitation on government’⁶⁹ highlights the role of the judiciary in ensuring obedience to the legal limitations on the exercise of power.⁷⁰ This is important for the creation of a balanced, limited, legitimate and ultimately ‘good government’ within the EU. The CJEU can enforce and protect the rights of local and regional authorities in the EU fundamentally in two ways: (i) when adjudicating on ‘national identity’ (Article 4(2) TEU), subsidiarity (Article 5(3) TEU) and closeness (Article 10(2) TEU); and when adjudicating on procedural failures concerning (ii) lack of consultation of the CoR or (iii) the early warning system.

⁶⁷ On the concept of cooperative federalism see A. Reposo, *Profili dello Stato autonomico. Federalismo e regionalismo* (2nd edition, Giappichelli, 2005), p. 119 et seq. See also G. Boggetti, ‘Federalismo’, *Digesto delle discipline pubblicistiche*, Vol. VI (UTET, 1994), p. 273 et seq.; and G. De Vergottini, ‘Stato federale’, *Enciclopedia del diritto*, Vol. XLIII (Giuffrè, 1990), p. 831 et seq.

⁶⁸ See R. Hrbek, ‘Doppelte Politikverflechtung: Deutscher Föderalismus und Europäische Integration. Die deutschen Länder im EG-Entscheidungsprozeß’, in R. Hrbek and U. Thaysen (eds.), *Die Deutschen Länder und die Europäischen Gemeinschaften* (Nomos, 1986), p. 17 et seq. More recently see C. Panara, ‘In the Name of Cooperation: The External Relations of the German Länder and Their Participation in the EU Decision-Making’, 6 *European Constitutional Law Review* (2010), p. 59 et seq. On the concept of ‘Politikverflechtung’ see F.W. Scharpf et al., *Politikverflechtung: Theorie und Empirie des kooperativen Foederalismus in der Bundesrepublik* (Scriptor, 1976).

⁶⁹ C.H. McIlwain, *Constitutionalism*, p. 21.

⁷⁰ N. Matteucci, *Breve storia del costituzionalismo*, p. 91.

- (i) The CJEU has never annulled an act for an infringement of national identity⁷¹ or of subsidiarity in relation to local and regional self-government,⁷² nor for an infringement of closeness.⁷³ The potential of these principles has not yet been fully exploited by the Union and the most appropriate way to implement them is probably through forms of cooperation between the different levels of government rather than judicially.⁷⁴ Still, the CJEU has a power of judicial review which embraces these principles and their enforcement and things may change in the future along with the awareness that the local and regional authorities are an integral part of the constitutional system of the EU.
- (ii) The lack of consultation of the CoR, when this is compulsory, could lead to the invalidation of the relevant act by the CJEU. The CoR itself could request the annulment through a direct action pursuant to Article 263(3) TFEU.
- (iii) Failure by the EU institutions to comply with the procedural requirements of the early warning system (for example, failure to take into account a 'yellow' or an 'orange card') may lead to the annulment of an act by the CJEU. As increasingly recognized by scholars, subsidiarity has a 'procedural' dimension concerning how an act has been adopted, as well as a 'substantive' dimension concerning the content of an act.⁷⁵ Accordingly, a claim based on a procedural failure relating to the

⁷¹ Among the cases where the protection afforded to local and regional authorities by Article 4(2) TEU comes to the fore see: Case C-156/13 *Digibet Ltd and Gert Albers v. Westdeutsche Lotterrie GmbH & Co. OHG*, EU:C:2014:1756, para. 34, where the CJEU said that 'the division of competences between the [German] Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU'; Case C-202/11 *Anton Las v. PSA Antwerp NV*, EU:C:2013:239, para. 26, where the Court recognized that the national identity of a Member State includes the protection of all the official languages of that State; Opinion of Advocate General Jääskinen in Case C-202/11 *Anton Las v. PSA Antwerp NV*, EU:C:2012:456, para. 59; Case T-453/10 *Northern Ireland Department of Agriculture and Rural Development v. Commission*, EU:T:2012:106, para. 36–38, where the General Court dismissed the argument that the lack of recognition of locus standi to Northern Ireland goes against the obligation for the EU to respect the national identity of the UK.

⁷² The literature on subsidiarity is huge. For an up to date summary of the case-law and of the literature see C. Panara, *The Sub-national Dimension of the EU: A Legal Study of Multilevel Governance* (Springer, 2015), p. 79 et seq.

⁷³ So far the Court of Justice has never pronounced on closeness. Occasionally this principle has been referred to by the Advocates General. See the Opinion of Advocate General Sharpston in Case C-28/08 P *Commission v. Bavarian Lager Co. Ltd*, EU:C:2009:624, para. 212; Opinion of Advocate General Fennelly in Joined Cases C-376/98 *Germany v. Parliament and Council*, Case C-74/99 *The Queen v. Secretary of State for Health*, EU:C:2000:324, para. 133; Opinion of Advocate General Trstenjak in Case C-428/07 *Mark Horvath v. Secretary of State for Environment, Food and Rural Affairs*, EU:C:2009:47, para. 93.

⁷⁴ See C. Panara, *22 European Public Law* (2016), forthcoming.

⁷⁵ See, among many, A. D'Atena, *Diritto regionale* (Giappichelli, 2010), p. 183; M. Nettesheim, 'Subsidiarität durch politische Verhandlung – Art. 5 Abs. 3 EUV als entmaterialisierte Verfahrensnorm', in D. König and D. Uwer (eds.), *Grenzen europäischer Normgebung* (Bucerius Law School Press, 2014), p. 35 et seq. See also C. Panara, *The Sub-national Dimension of the EU*, p. 79 et seq. Interestingly, in a recent Opinion concerning the alleged breach of subsidiarity by the introduction by the Union of an obligatory maximum fixed ratio of 100% of fixed salary for variable remuneration of bank managers, Advocate

early warning system can be instigated, among others, by a chamber of a national parliament representing regional and/or local authorities or by the CoR. Pursuant to the Subsidiarity Protocol any national parliament, or ‘any chamber thereof’, is entitled to require the respective Member State to ‘notify’ on their behalf an action for annulment of EU legislative acts on grounds of an infringement of subsidiarity.⁷⁶ The expression ‘any chamber thereof’ includes also the national legislative houses which represent local and/or regional authorities (for example, the German *Bundesrat*, the French Senate and so on). The Protocol also grants the CoR the right to challenge an EU legislative act, for the adoption of which the consultation of the CoR is mandatory, on grounds of an infringement of subsidiarity.⁷⁷

B. THE ROLE OF DOMESTIC COURTS

There are essentially two ways in which domestic courts can protect the participation rights of local and regional authorities: (i) *directly*, through the enforcement of the right of local and regional authorities to implement EU legislation and of the participation rights established by national law; and (ii) *indirectly*, through the constitutional review of the arrangements for local and regional participation in domestic processes linked to the EU.

(i) The EU shall not alter the allocation of responsibilities between different levels of government which is in place in a Member State (institutional and procedural autonomy principle)⁷⁸ and national courts play an important role in ensuring that implementation of EU law/policy follows the internal allocation of responsibilities between national and sub-national authorities. The Austrian Constitutional Court created the notion of ‘*doppelte Bindung*’ (double bond). The domestic legislator is ‘bound twice’: on the one hand, it has to comply with EU obligations and, on the other, with the norms of the national constitution, including those concerning the distribution of responsibilities between Federation and *Länder*. The consequence is that the *Länder* have the constitutional *right* and, at the same time, the *duty*, to implement EU law/policy within their sphere of responsibility and territory.⁷⁹ Even in the UK, where certain arrangements concerning

General Jääskinen says that: ‘Subject to respecting procedural requirements, the legislature possesses a wide margin of discretion when assessing whether a Union measure adheres to the principles of proportionality and subsidiarity’ (emphasis added). See Opinion of Advocate General Jääskinen in Case C-507/13 *UK v. European Parliament and Council*, EU:C:2014:2394, para. 100.

⁷⁶ See Article 8(1) Protocol on Subsidiarity and Proportionality.

⁷⁷ See Article 8(2) Protocol on Subsidiarity and Proportionality.

⁷⁸ See Joined Cases 51–54/71 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, EU:C:1971:128. In the literature see G. Guillermin, ‘Le principe de l’équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes’, 119 *Journal de Droit International* (1992), p. 319 et seq.

⁷⁹ See Rulings of the Austrian Constitutional Court published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (VfSlg.) 14.863/1997 and 17.022/2003. However, if, pursuant to Article 258 et seq. TFEU, the CJEU finds that an Austrian *Land* failed to comply with an obligation under EU law,

devolution are binding in honour only,⁸⁰ in case of a disagreement between the UK government and the devolved governments over whether a particular issue falls within a devolved competence or is retained by the Westminster Parliament, the dispute might be referred to the UK Supreme Court.⁸¹ Conflicts may arise in this field. The Italian Constitutional Court stated that an alteration of the normal distribution of competences between state and region may *exceptionally* be justified if an EU regulation is such to require uniform implementation across the entire national territory.⁸²

If arrangements for local or regional participation established by domestic law are not observed, sub-national (or national) authorities could typically request a court to decide on the matter. For example, the constitutional participation rights of the German *Länder* are judicially enforceable before the Federal Constitutional Court (*Bundesverfassungsgericht*; FCC).⁸³ In 1995, the FCC found that the Federal Government had not respected the participation rights of the *Bundesrat* in relation to the adoption of Directive 89/522/EEC on TV. The FCC held that this behaviour was in breach of the principle of federal loyalty.⁸⁴ However, this declaration did not result, nor could it, in the invalidity of the Directive. Admittedly, the lack of invalidity of the final EU act may undermine the effectiveness of the judicial intervention.

(ii) When assessing the constitutionality of the arrangements created by the Member States to protect the autonomy of the sub-national authorities in the context of the EU (for example, mandatory consultation of regional authorities by the national government prior to Council meetings), constitutional courts can evaluate whether these arrangements are consistent with the constitutional concept of regional and local autonomy.

C. A GAP IN THE JUDICIAL PROTECTION OF LOCAL AND REGIONAL AUTHORITIES

The courts of the CJEU do not recognize the status of privileged applicant for local and regional authorities in the direct challenge of EU acts under Article 263 TFEU.⁸⁵

the competence to adopt the necessary measures, including laws, passes *temporarily* to the Federation (substitute power, see Article 23d(5), final sentence B-VG). See H. Eberhard, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 229 et seq.

⁸⁰ Memorandum of Understanding (MoU) and Supplementary Agreements Between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (September 2012).

⁸¹ See Paragraph B4.9 of the Concordat on the Co-ordination of European Union Policy (September 2012).

⁸² See Ruling No. 126 of 24 April 1996.

⁸³ See Article 93(1), No. 1 and No. 3 GG.

⁸⁴ See Ruling of 22 March 1995.

⁸⁵ See, ex multis, Case 222/83 *Municipality of Differdange v. Commission*, EU:C:1984:266, para. 8; Case C-95/97 *Région Wallonne v. Commission*, EU:C:1997:184, para. 6–7. See Case C-180/97 *Regione Toscana v. Commission*, EU:C:1997:451, para. 7–8; Case T-214/95 *Vlaams Gewest v. Commission*, EU:T:1998:77,

This position leaves a considerable gap in the judicial protection of the prerogatives of sub-national authorities in the EU, which is not overcome by the judicial remedies available pursuant to Article 267 TFEU (preliminary rulings) and Article 277 TFEU (inapplicability).⁸⁶ More effective ways to fill this gap have been developed at the domestic level through the creation of tools enabling the regional authorities, individually (like in Belgium⁸⁷) or collectively (like Italy and Germany),⁸⁸ to oblige the own Member State to file an action for direct annulment before the CJEU pursuant to Article 263 TFEU.⁸⁹

§7. CONCLUDING REMARKS – TOWARDS A GOOD SYSTEM OF LEGITIMATE GOVERNANCE FOR THE EU

This analysis has shown that local and regional authorities contribute in a variety of ways to constitutionalism in the EU atypical multilevel polity. This system of governance reflects fundamental principles and values of European constitutionalism. Certainly there is a *normative* value in promoting and enhancing local and regional participation in the EU. This is grounded in the constitutional DNA of most Member States and, particularly after the Treaty of Lisbon, also of the EU.

The references to the sub-national level in the Treaty are limited and their potential has not yet been entirely exploited (see in particular the principle of subsidiarity and the ‘national identity’ of Article 4(2) TEU). Still, the ‘Europe with the regions and the local authorities’ that has been outlined above, performs an important function for the EU in that it reconciles European integration with domestic constitutional laws; enhances the

para. 28. On this topic see A. Thies, ‘The Locus Standi of the Regions Before EU Courts’, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 25 et seq. State aid is an area in which the CJEU normally recognizes the locus standi of sub-national authorities. See *ibid.*, p. 29.

⁸⁶ See C. Panara and A. De Becker, ‘The Role of the Regions in the European Union: The “Regional Blindness” of Both the EU and the Member States’, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 326. See also K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 16 *European Law Review* (2010), p. 609–635; A. Cygan, ‘The Regions within Multilevel Governance: Enhanced Opportunities for Improved Accountability?’, 21 *Maastricht Journal of European and Comparative Law* (2014), p. 276–279.

⁸⁷ See Cooperation Agreement of 11 July 1994. The *duty* for the State Government to bring an action before the Court of Justice applies only to EU acts involving exclusive responsibilities of a Community or a Region.

⁸⁸ See Article 5(2) Law No. 131 of 5 June 2003 (Italy) and §7(1) of the Law of 12 March 1993 on the cooperation of Federation and *Länder* in EU related matters (EUZBLG, Germany). The Federal Government of Germany may refuse to bring the action on grounds of its ‘responsibility for the whole state’, including concerns of ‘foreign, defence, and [European] integration policy’.

⁸⁹ On the different national systems see C. Panara and A. De Becker, in C. Panara and A. De Becker (eds.), *The Role of the Regions in EU Governance*, p. 326 et seq. See also the comprehensive comparative overview by A. Gamper, ‘Regions and Constitutional Courts in a Multilayered Europe’, in P. Popelier, A. Mazmanyanyan and W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance*, p. 105 et seq.

legitimacy of Union's action and of Member States' participation in the EU; strengthens democracy in the EU and, finally, restrains the power of EU and state decision-makers, not only *ex ante* (during the decision-making phase), but also, despite a number of gaps in the judicial protection, *ex post*, through the judicial review of decisions. These achievements of local and regional participation in the EU, although perfectible, are important in that they move in the direction of creating a 'better' European polity – a polity where the principles and ideals of constitutionalism find wider and profounder application. The current 'gaps' and 'limitations', or even the shortcomings, of local and regional participation in the EU, highlighted in the text, can constitute an agenda for reform and improvement of EU governance (for example, creation by the EU institutions of stronger forms of dialogue with the local and regional authorities; special attention given by EU institutions to sub-national parliaments; introduction of a longer timeframe for the delivery of reasoned opinions in the early warning system; recognition of privileged applicant status to the local and regional authorities depending on their status under domestic constitutional law), for the Member States (creation of more effective ways to involve the local and regional authorities in national decision-making processes linked to the EU) and for the local and regional authorities themselves (for example, creation of mechanisms strengthening the role of sub-national parliaments vis-à-vis sub-national governments; measures enhancing the transparency and accountability of the Brussels offices vis-à-vis the local community).