

Multi-Level Governance as a Constitutional Principle in the EU Legal System

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ABSTRACT

In this article, I will examine the notion of multi-level governance in the EU (MLG) as developed by the Committee of the Regions in the 2009 *White Paper on MLG*. I will analyse MLG from a legal perspective to identify its legal basis. I will sketch out the nature of MLG as a procedural principle in the EU legal system and will identify four functions of MLG: shaping the EU as a polity; shaping future developments in EU law; shaping the behaviour of political actors within the EU; shaping the interpretation of EU law by the CJEU.

SUMMARY

This is a legal study of multi-level governance in the EU (MLG). MLG is defined by the Committee of the Regions in the 2009 *White Paper on MLG* as participation of regional and local authorities in EU decision-making processes. Earlier legal studies investigated the nature of MLG as a legal principle, suggesting that MLG is a 'procedural principle' or a 'principle of coordination' of the action of governmental actors at various levels within the EU. However, the legal bases of MLG still need to be persuasively identified in EU primary law and in the constitutional laws of the Member States; the nature of MLG as a legal principle in the context of the EU demands more compelling evidence; the normative content of MLG needs further definition; the practical legal consequences of MLG still need to be clearly determined, especially the application of MLG by Union and national judiciaries.

This study will look at these aspects from a legal perspective. Only through a legal analysis, that is, through the interpretation of the legal bases of MLG, it is possible to address these questions and particularly to determine the legal nature and the legal consequences of MLG in the multi-layered legal system of the EU.

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1. Introduction

In this article, I will examine the notion of multi-level governance in the EU (hereafter MLG). This notion, originally created by political scholars to understand and explain the functioning and particularly the decision-making processes of the EU, has later become a normative and, more recently, a legal concept. Whilst the normative notion of MLG has been persuasively sketched out by political scholars (Piattoni 2010 and Stephenson 2013), and more recently also by legal scholars (Vandenbruwaene 2014), MLG as a legal notion demands further analysis.

At a very general level MLG indicates the dispersion of authoritative decision-making across multiple players at different territorial levels within the EU (Marks and Hooghe 2001: XI). More specifically, MLG in the context of the EU can be used in relation to different phenomena, albeit linked to one another. These include the following:

- (1) A federalism-like system in the EU or at national level with various tiers of government (European, national, regional, local): Type 1 MLG (Marks and Hooghe 2004: 17-20; Piattoni 2010: 246-247).
- (2) Governance based on special-purpose agencies: Type 2 MLG (Marks and Hooghe 2001: 20-22).
- (3) Public-private partnerships in the context of the EU Regional Policy (Marks 1992: 191; Bache 2004: 165).
- (4) Negotiation of policy by private and public players on the national and EU level (Schmitter and Kim 2005: 5).

Type 1 vision of MLG conceives dispersion of authority to jurisdictions or authorities at a number of territorial levels. These jurisdictions or authorities – international, national, regional, meso, local – are ‘general-purpose’, in that they bundle together multiple functions, policy responsibilities, and in many instances, like in the EU, a court system and representative institutions (Marks and Hooghe 2004: 16-20; Hooghe and Marks 2010: 17-20). Hooghe and Marks suggest that in this form of governance every citizen is located in a Russian Doll set of nested jurisdictions, where in principle there is one and only one relevant jurisdiction at any particular territorial scale (Marks and Hooghe 2004: 16; Hooghe and Marks 2010: 17). These jurisdictions are intended to be, and usually are, stable over a relatively long period of time (years or even decades), even though the allocation of policy responsibilities across levels might be flexible. The archetype of Type 1 MLG is federalism, which is concerned with allocation and sharing of powers among territorial jurisdictions (cf. Hooghe and Marks 2010: 18; Marks and Hooghe 2004: 17).

Type 2 MLG is comprised of task-specific jurisdictions (‘agencies’) dealing with ad hoc issues, such as, transport, waste and recycling, water quality monitoring etc. In Type 2 MLG there are intersecting memberships in that

the agencies operate within a territory which is not neatly contained within the borders of a larger jurisdiction and may therefore manage issues concerning citizens belonging to different territorial communities and states. The number of agencies is potentially unlimited and flexible, as in theory there could be as many agencies as required by the various issues on the agenda and the agency system could be reviewed as appropriate at any point in time (Marks and Hooghe 2004: 20-22; Hooghe and Marks 2010: 20-22).

The EU is the most advanced and complex example of Type 1 MLG beyond the national state, even though Hooghe and Marks highlight that certain areas of EU governance reflect a Type 2 MLG approach; for example, the distinct governance systems or 'pillars' for different policies; the multiplication of independent European agencies; the enhanced cooperation in certain fields, such as, monetary policy and border controls (cf. Hooghe and Marks 2010: 23).

The focus of this study is on the participation of regional and local authorities in EU decision-making processes (cf. Skoutaris 2012: 212; Panara 2016b) in the context of Type 1 MLG. This choice finds its justification in the prominent role of Type 1 MLG in the context of the EU (Hooghe and Marks 2010: 23). It also finds justification in the widely shared suggestion, coming especially from legal scholars, that the EU is a *sui generis* and supranational federation which features many elements of a traditional federation (Schütze 2012: 77-79, even though he criticises the use of the adjective '*sui generis*' in relation to the EU; von Bogdandy 2009: 32). Finally, it finds its justification in the prominence ascribed by important political documents of the EU, such as, the *White Paper on European Governance* (2001) and the *White Paper on MLG* (2009), to concerns relating to Type 1 MLG.

According to a different narrative of MLG proposed by Piattoni (2009 and 2010: 26-31), there are three different but combined 'axes', i.e. three dimensions, of MLG. The first is 'center v. periphery', which indicates movements away from the unitary state towards decentralized systems of governance. The second is 'domestic v. international', which indicates movements away from the national state towards increasingly structured modes of international cooperation and regulation, including the EU. The third is 'state v. society', which portrays movements towards increasing involvement of non-governmental organisations and civil society organisations in authoritative decision-making and policy implementation.

This study, which focuses on sub-national participation in EU processes, operates along the axes 'centre v. periphery' (including Type 1 MLG) and 'domestic v. international' (including the shift of powers from the Member States to the EU). The objective of this study is to look at MLG as a legal

notion capable of reconciling these two movements into opposite directions – downwards towards decentralisation (axis 1) and upwards towards centralisation at EU level (axis 2), whilst the third dimension of MLG ('state v. society') is not part of my current analysis.

Following the same path of earlier works (for example, Weatherill and Bernitz 2005; Mangiameli 2006) and of EU primary law, this study will include both 'local' and 'regional authorities', i.e. the 'sub-national' level of government within the EU. This approach should not be understood as a suggestion that there is a homogenous and undifferentiated sub-national level of government across the EU (cf. Moore 2008: 524). This methodology is consistent with the EU primary law, which does not differentiate between the two types of sub-national authorities (the only exception to this lack of differentiation is Article 6(1) Lisbon Subsidiarity Protocol, which envisages consultation with 'regional parliaments with legislative powers').

The distinction between 'local' and 'regional' authorities is at times ambiguous also at national level. For example, all the French territorial communities share the same fundamental nature, irrespective of their level ('regions', 'departments' or 'communes'). In the UK, the concept of 'local authority' is almost all-embracing in that it includes both smaller (such as, the borough councils) and larger authorities, such as the combined authorities (e.g., Greater London Authority, Greater Manchester and Liverpool City Region). Furthermore, the concept of 'region' might lead to speculations, in that a Spanish Autonomous Community is significantly different from a French Region or a Belgian Community. The only reliable distinction in this field is probably between regions *with* and *without* legislative powers. However, also the legislative powers of the regions vary in the various Member States (cross-state asymmetry) and the constitutional standing of these regions varies accordingly. Whenever required by the rigour of this study, it will be clarified whether a conclusion applies to all sub-national authorities or only to some. Therefore, the approach chosen by this study to include in the analysis the 'local and regional authorities' will simplify the analysis without sacrificing its methodological rigour.

So far, the notion of MLG has been primarily employed by legal scholars in a descriptive manner, as a tool to illustrate the multi-layered nature of the EU, or as a paradigm to understand EU decision-making (for example, recently, Popelier *et al.* 2013; Cygan 2013 and 2014; previously, Bernard 2002 and Dubos 2012). Some recent legal studies explore MLG from a legal perspective and more specifically attempt to evaluate the impact of MLG on constitutionalism in the EU (Popelier and Vandenbruwaene 2014; Panara 2015: 155-174), or construe MLG as a *sui generis* system of governance unique to the EU, which is different from federalism (Vandenbruwaene 2014: 235-237; Panara 2015: 166-168; *contra* see Schütze 2009a, and Stein and Turkewitsch 2008).

Panara (2015) and Simonato (2016) investigated the nature of MLG as a legal principle. Panara (2015: 73-74) suggests that MLG is a 'procedural principle', in that it commands a 'method of governance' based on "participation and involvement of sub-national authorities in EU lawmaking and policymaking" (ibid. 73). Simonato (2016: 221-223) construes MLG as a principle of coordination of the action of governmental actors at various levels within the EU. As a 'descriptive principle' with an 'heuristic function' (Simonato 2016: 222), or as a 'procedural principle' (Panara 2015: 73), the judicial enforcement of MLG is seen by these scholars as problematic. A number of aspects relating to MLG, however, require further study from a legal perspective. The legal bases of MLG still need to be persuasively identified in the EU primary law and in the constitutional laws of the Member States; the nature of MLG as a legal principle in the context of the EU demands more compelling corroborating evidence; the normative content of the principle of MLG needs accurate definition; the practical legal consequences of the principle still need to be clearly determined, particularly the application of MLG by Union and national judiciaries.

I will look at these aspects from a legal perspective. Only through a legal analysis, that is, through the interpretation of the legal bases of MLG, it is possible to address these questions and particularly to determine the legal nature and the legal consequences of MLG in the multi-layered legal system of the EU. By EU legal system I mean the 'constitutional composite' (*Verfassungsverbund*, Pernice 2010 and 2009) or, according to a different terminology, the 'fusion' (Wessels 1997) and the 'amalgamation' (*Amalgamierung*, Nettesheim 2012: 324) resulting from the coordination of the EU and the national legal systems.

I will present MLG as a constitutional principle in the EU legal system and I will illustrate the consequences of this conclusion. My article is therefore a contribution to a better understanding of MLG in the EU, particularly as a legal concept. It aims to highlight dynamics and possible developments linked to the legal notion of MLG. The article begins with an introduction to the concept of MLG which distinguishes between descriptive and normative notions of MLG (2.). Then, it construes MLG as a legal notion and more specifically as a legal principle (3.), by identifying the legal basis of MLG in EU primary law (3.1.), in the constitutional laws of the Member States (3.2.) and in EU secondary law (3.3.). After that, the article evaluates the role of Union (3.4.1.) and of domestic courts (3.4.2.) in enforcing aspects of MLG, including subsidiarity (3.5.), and analyses the soft law mechanisms reflecting MLG (3.6.). The final paragraph (4.) lays out the conclusions.

2. Sketching out the background:

The normative notion of MLG in the *White Papers*

Concerns relating to Type 1 MLG are at the forefront particularly in the *White Paper on European Governance* of the Commission (2001) and in the *White Paper on MLG* of the Committee of the Regions (hereafter CoR, 2009). As well as a notion describing the 'multi-levelness' of the EU, since the 2001 *White Paper* MLG became also a normative notion which goes beyond the mere illustration or explanation of the functioning of the EU and of the multiple political arenas within the EU. In the 2001 *White Paper* the Commission highlights the importance of communication between the sub-national authorities and the EU. To this purpose, the *White Paper* lays out recommendations with the fundamental objective to enhance the legitimacy of EU decisions, but also to promote 'good governance' in the EU (10-11).

Eight years later the CoR in the *White Paper on MLG* adopted a notion of MLG which is fundamentally 'procedural', as it lays out guidelines in relation to how decisions are to be made in the EU. MLG emerges therefore as a 'method' or an 'approach', the appropriate method or approach according to the CoR, for bringing together and coordinating the action of the different levels of government in the EU multilevel system. More specifically, according to the CoR, MLG consists of 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') (6-7). The key objectives of the CoR are to enhance the 'democratic legitimacy' of Union action and to promote 'good governance'. I decided to use the CoR's notion of MLG because it comes from an authoritative, although not legally binding, source (a white paper of the CoR), but also because it constitutes the basis for recent developments, such as the political document entitled *Charter for MLG in Europe* (CoR, Resolution on the Charter for MLG in Europe, 106th plenary session, 2 and 3 April 2014, RESOL-V-012). Also, this notion has the capacity for capturing the processes and dynamics of MLG both on the EU level and within the domestic sphere. In the light of this notion MLG can embrace a number of arrangements, such as, in particular: (i) on the domestic level: A) procedures for regional and/or local involvement in the EU lawmaking and policymaking; B) procedures to ensure compliance with EU obligations (e.g., substitute powers of the central government in case of lack of implementation of EU law by a regional authority); and C) involvement of regional parliaments with legislative powers in the early warning system (cf. Article 6(1) Protocol on Subsidiarity and Proportionality). (ii) On the EU level: A)

opening up of the Council to regional representatives at ministerial level (cf. Article 16(2) TEU); B) involvement of the CoR, albeit only in a consultative capacity, in the EU decision-making process; C) duty for the Commission to consult widely when making legislative proposals and to take account of the regional and/or local dimension of the action envisaged (cf. Article 2 Protocol on Subsidiarity and Proportionality); and D) early warning system, which involves also national chambers representing sub-national authorities (cf. Articles 6 and 7 Protocol on Subsidiarity and Proportionality).

The shift from a descriptive to a normative notion of MLG is highlighted also in the document of the CoR entitled *Scoreboard for monitoring Multi-level Governance (MLG) at the European level 2011* (December 2011): "Against this background, the Committee of the Regions (CoR) wants to strengthen MLG in the different strategic priorities of the EU and in the different stages of the decision-making process at European level. MLG thus acquires a new quality: from analytical tool, it becomes a principle and a programme for action. This demands very concretely the establishment of structured political processes for monitoring and analysing governance in the EU." (p. 2).

The *Agenda 2020* of the Commission further emphasises the key normative role of local and regional authorities in delivering EU policy objectives, but also their contribution to the elaboration of the national reform programmes for the implementation of the EU strategy (6 and 29). However, the positive or negative impact of (Type 1) MLG is still the subject of debate among scholars. Peters and Pierre (2004: 87), for example, identify a 'Faustian bargain' in the opaque negotiation of policy taking place among players from different levels within the EU. Similarly, De-Bardeleben and Hurrelmann (2007: 240) argue that whilst MLG is likely to increase 'output legitimacy' (i.e., the problem-solving capacity of the EU), it is also likely to reduce 'input legitimacy' (i.e., essentially, democratic legitimacy) because of increased difficulties in calling leaders to account. Moreover, whilst MLG in the EU may open up new spaces for participation and deliberation, it may also undermine the equal representation of all the citizens in the decision-making process. 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* 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).

Other scholars give a more positive evaluation of MLG. Ingolf Pernice (2002: 11) highlights that constitutionalism in the EU (which he calls 'multilevel constitutionalism') requires the participation of local and regional

authorities in the EU legislative process 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 of the CoR. The political scholar Simona Piattoni (2010: 178 et seqq.) argues that MLG contributes input and output legitimacy to the EU decision-making process and particularly that it contributes positively to democracy in the EU. In the same wavelength others suggest that local and regional participation in the EU contributes significantly to constitutionalism and particularly to participatory democracy in the EU (European Parliament, resolution of 14 January 2003 on the role of regional and local authorities in European integration, 2002/2141(INI), Point 4; Mangiameli 2006: 460-462, 475-476, 480-481; Greenwood 2011: 437 et seqq.; Panara 2016b: 622).

3. The legal notion of MLG

3.1. The constitutional foundation of MLG on the EU level

The first element which is required in order to demonstrate that MLG is a legal principle is the identification of a solid legal basis for MLG in both the EU primary law (i.e., the constitutional charter of the EU) and in the constitutional laws of the Member States. Why both? Because MLG envisages a multi-level participation in EU decision-making processes which requires suitable arrangements and processes both on the EU and on the national level. Participation in EU decision-making processes is possible only if the European institutions open themselves up to such participation and engage with it. At the same time the involvement of the sub-national authorities in the implementation of EU policies is possible only if the Member States recognize the prerogatives of these authorities in the fields covered by the EU. This situation largely reflects the idea, put forward by Ingolf Pernice (2010: 102 et seqq.), that the EU is a 'constitutional composite' (*Verfassungsverbund*) resulting from the national constitutions and the EU primary law.

The constitutional foundation of MLG in the EU can be found in Article 4(2) TEU. According to it, 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. 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 (Cloots 2015: 125 et seqq.). Yet, the constitutional laws of some Member States (for example, Austria, Belgium, Finland, Germany, Italy, Spain, Sweden, UK) 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 to the state constitution (Panara 2013: 373-376).

But how can local and regional self-government be protected by the EU? Given the limited judicial enforceability of Article 4(2) TEU (cf. *infra* 3.4.1.), the most straightforward way for the EU institutions to enhance the role of the sub-national authorities is by promoting their participation in EU decision-making processes. This approach is mirrored by the Treaty provisions concerning the advisory role of the CoR in the lawmaking process (cf. Article 13(4) TEU; Warleigh 1999; Ricci 2011: 110-111), by Article 16(2) TEU concerning the opening up of the Council to regional representatives 'at ministerial level', but also by Article 2 of the Protocol on Subsidiarity and Proportionality (duty for the Commission to consult widely before proposing legislation) and Article 6(1) of the same Protocol on the involvement of regional parliaments with legislative powers in the delivery of reasoned opinions in the framework of the early warning system. This overview corroborates the conclusion that MLG, as defined by the 2009 *White Paper*, has a constitutional foundation on the EU level in the EU primary law.

Despite the above highlighted roots of MLG in the EU primary law, and despite the fact that there is a constitutional framework for regional and local participation, the EU cannot oblige the Member States to create participation channels for the sub-national authorities or to use those prompted by the Union. For example, participation in the Council is not only dependent on the EU, but especially on *if* and *to what extent* each Member State allows the sub-state entities to be involved in the Council. In accordance with the 'united in diversity' motto, the EU cannot impose uniform patterns to *all* the Member States. The EU can open its gates, but it is ultimately up to the Member States and their regions and local authorities to seize the opportunity. Therefore, the foundation of MLG cannot be in the EU primary law only.

Furthermore, the guidance offered by EU primary law is rather minimal. Whilst the EU Treaties open up the Union's processes to forms of sub-national participation, there is little prescriptive indication on how these forms of participation should work in practice. For example, the decision on the composition of each (sub-)national delegation to the CoR is largely left to the Member States. It is up to each Member State to strike a balance

in relation to the representation of the different levels of governance (regional and/or local) within the CoR. *Alone*, the opportunities prompted by the EU primary law do not offer the whole picture of regional and local participation in the EU. MLG, far from being a monolithic notion finding application everywhere in the same way, is a largely *asymmetrical* concept receiving differentiated application in each Member State. Accordingly, there is no single pathway to MLG, but potentially twenty-eight different ones.

The *White Paper on MLG* stresses that “The conditions for good multilevel governance depend on the Member States themselves. The principles and mechanisms of consultation, coordination, cooperation and evaluation recommended at Community level must firstly be applied within the Member States.” (ibid. 7). The reflection paper emanating from the Co-creation Workshop of 16 April 2012 concerning the European Charter on MLG put forward a number of recommendations to the Member States. These include: “stimulate regionalisation and decentralisation”, “cooperation between national parliament and regional parliaments, notably on subsidiarity scrutiny”, “participation of RLA [regional and local authorities] into all stages of the EU policy cycle”, “further develop participation of RLA into the national delegation to the Council formal/informal meetings and comitology” (ibid. 4).

3.2. The constitutional foundation of MLG on the national level

At national level, the foundation of MLG is in the national constitutions of the Member States. All these constitutions protect regional and/or local autonomy and in a number of Member States local/regional autonomy is an element of the national identity as defined in Article 4(2) TEU (Cloots 2015: 226). This suggestion is reinforced by the fact that all the Member States of the EU are also parties to the European Charter of Local Self-Government promoted by the Council of Europe in 1985. This convention stipulates that the principle of local self-government shall be recognised, where practicable, in the national constitution (cf. Article 2). One of the key challenges for the Member States is therefore to ensure a sustainable balance between decentralisation to the sub-national authorities and supranational integration, i.e. centralisation on the EU level. The Member States have developed strategies to reconcile local/regional autonomy with the growing role of the EU (cf. Panara and De Becker 2011; Popelier 2014). These strategies are reflected in legal (often in constitutional) arrangements and mirror perfectly the approach typical of MLG of promoting multi-level participation.

A strategy to reconcile local/regional autonomy with the EU is the involvement of 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 appears confirmed by a 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 and regional authorities and alter the constitutional balance of powers between central and sub-national governments. This complexity of the EU multi-level system is addressed by certain Member States (in particular Belgium, Finland, Germany and Austria) through the involvement of the sub-national authorities in the decisions concerning the European Treaties. For example, the Belgian Regions and Communities have an important say on the transfer to the EU of their exclusive powers. A treaty concerning these powers is ratified by Belgium only if the parliaments of *all* the Regions and Communities concerned consent to it. As a result, every sub-state parliament has a right of veto regarding the ratification of the treaty by Belgium (cf. De Becker 2011: 256). 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 two-third majority in the *Bundesrat* (the legislative chamber representing the *Länder* on the federal level), as well as in the *Bundestag* (democratically elected chamber representing the German people; Article 23(1) Basic Law). The German system is similar to the solution adopted in Austria, where amendments to the Treaties require a two-third majority both in the *Nationalrat* (the chamber representing all the Austrian people) and in the *Bundesrat* (the chamber representing the *Länder* at federal level; Article 50(1) No. 2 and 50(4) Federal Constitutional Law; Eberhard 2011: 219). In addition to their *ex post* involvement in the ratification of a new treaty, the Member States may also involve the sub-national authorities in the work of an intergovernmental conference (IGC) leading to a new treaty. The German *Länder* had two representatives in the German delegation to the IGC which led to the Maastricht Treaty. Their participation contributed to secure the introduction of the principle of subsidiarity, the establishment of the CoR and the opening up of the Council to regional ministers (cf. Gunlicks 2003: 366-67). This form of involvement is very important, since the opportunity to negotiate a new treaty could be more effective than the *ex post* approval (or threat of non-approval) of a treaty already negotiated and agreed by the national governments.

Another strategy adopted by the Member States is the involvement of regional and local authorities in the implementation of EU secondary and tertiary law and policy and in decision-making processes linked to the EU. This is envisaged in the *White Paper on MLG* of 2009. A number of Member States have a framework in place for the involvement of their sub-national authorities in the choice of the position of the Member State in

EU decision-making fora (especially the Council) in relation to those policy issues touching upon sub-national responsibilities and interests (see Panara and De Becker 2011: 297 et seqq.; Eggermont 2011). This participation can take the form of an agreement between national government and sub-national authorities concerning the position of the Member State in the Council (Belgium, Spain), of a consultation of the sub-national authorities by the national government (Italy, Portugal, UK), or of more complex decision-making procedures taking place in the *Bundesrat*, the chamber representing the *Länder* (Austria and Germany; see, respectively, Eberhard 2011 and Panara 2011).

This participation enables the sub-national authorities to maintain and possibly expand their constitutional role of protection of the sub-national interests, while being involved in supranational integration in the EU (Panara 2010: 82-83). It is apparent that local and regional participation in EU decision-making processes has a constitutional mission. It is *constitutionally* required by the Member States (at least by those the constitutional system of which includes regional and/or local self-government) and, to the extent to which quasi-federal arrangements in the domestic sphere reflect the 'national identity' of a Member State, also by EU primary law (cf. *supra* 3.1.). This is an example of how the EU and the national legal orders adjust mutually to each other in the context of the European legal system in conformity with the doctrine of European public law put forward by Patrick Birkinshaw (2014: 6 et seqq.) and to the idea, typical of constitutional pluralism, that the EU and the national legal orders have to take into account as much as possible their respective constitutional requirements (cf. in particular Poiares Maduro 2012).

3.3. EU secondary law

As well as being rooted in EU primary law as a notion embracing potentially all areas of action by the Union, MLG is also reflected in EU secondary law concerning specifically energy policy, as well as economic, social and territorial cohesion. Regulation (EU) No 1233/2010 on EU financial assistance to projects in the field of energy contains a significant reference to MLG. Point 3 of the Preamble establishes that MLG, defined as 'cooperation among the various tiers of government', is essential to the development of further renewable energy sources and the promotion of energy efficiency. Regulation No 1233 also creates a dedicated financial facility in support of investment projects related to energy efficiency and renewable energy by local, regional and national public authorities (Point 4 of the Preamble and Annex II). The notion of MLG as 'cooperation' incorporates the idea of a coordinated action by various levels of governance for the achievement of European objectives, but also the idea that both the

EU and the Member States shall respect the role of sub-national authorities in relation to these objectives. For example, Regulation No 1233 establishes that the Union financial support shall facilitate investments in energy saving, energy efficiency and renewable energy projects from local, regional and, 'in duly justified cases', also national public authorities (cf. Annex II). Regulation No 1233 focuses therefore on the first dimension of MLG linked to translating European objectives into local and/or regional action. Through its financial intervention the EU wishes to enhance the role of regional and/or local authorities in relation to energy.

The strongest reference to MLG can be found in Regulation (EU) No 1303/2013 on EU funding promoting economic, social and territorial cohesion. This act expressly indicates MLG as a 'principle' that, along with subsidiarity and proportionality, must be 'respected' by the Member States when creating partnerships with the sub-national authorities and other economic and social actors for the implementation of the EU economic, social and territorial cohesion policy. Like in the CoR's *White Paper on MLG*, also in Regulation No 1303 MLG emerges as a 'procedural' concept, that is, as a method of governance which envisages the involvement of the sub-national authorities ("In accordance with the multi-level governance *approach*, the partners (...) shall be involved by the Member States in the preparation of Partnership Agreements and progress reports and throughout the preparation and implementation of programmes", emphasis added, cf. Article 5(2)) and requires 'coordinated action' between the different levels of governance ("In order to respect [the] principles [of partnership and MLG] coordinated action is required, in particular between different levels of governance", cf. Point 5.1 (1), Annex I).

Regulation No 1303/2013 also contains indications concerning the *raison d'être* of MLG, where it says that respect for the principles of partnership and MLG is required "in order to facilitate achieving social, economic and territorial cohesion and delivery of the Union's priorities of smart, sustainable and inclusive growth" (Point 5.1 (1), Annex I). Accordingly, in the view of the EU legislator, the partnership with the sub-national authorities finds its justification in the need to enhance the effectiveness of the EU social and cohesion policy. Similarly, Regulation No 1303 also highlights that the ultimate purpose of a partnership in the context of the EU regional policy is "to ensure the ownership of planned interventions by stakeholders and build on the experience and the know-how of relevant actors" (Point 11 of the Preamble). The phrase 'ownership by stakeholders' suggests that the participation of sub-national authorities in the EU regional policy could contribute to the acceptance of these policies, i.e. to their *legitimacy* ('ownership'), as well as to their effectiveness.

The inclusion of MLG as a key principle of the EU regional policy sets aside any remaining doubts concerning the nature of MLG as a legal concept. MLG clearly emerges as a principle of procedural nature (i.e. a principle that requires a certain ‘method’ or ‘approach’), which must be respected by the Member States in the field of economic, social and territorial cohesion. In the context of this policy MLG is a ‘principle’ (Preamble to Regulation 1303/2013) established by Union law and, as such, its interpretation could theoretically be referred to the Court of Justice via preliminary references arising in domestic courts. Yet, the Court of Justice is likely to stick to a minimal and procedural notion of MLG. The EU can require the Member States to respect a certain ‘method’ or an ‘approach’ when implementing European policies, however it cannot impose a specific multilevel structure on them. The ‘method’ of MLG commands an appropriate involvement of the sub-national authorities and of other relevant players in the preparation and execution of projects in the EU economic, social and cohesion policy. Far from laying out a set of prescriptive rules, MLG in this policy area emerges as a principle and more specifically as a ‘procedural principle’ indicating in general *how* decisions shall be made and implemented. The added value of this method is an increased legitimacy and effectiveness of the EU regional policy.

3.4. The role of the courts

3.4.1. The Court of Justice of the EU

The justiciability of a principle is not essential in order to conclude that that principle is a legal and not a philosophical or political notion. For example, the justiciability of the principle of subsidiarity is very limited and controversial, and yet that principle remains a constitutional cornerstone of the EU (Van Nuffel 2011: 78; Panara 2016a: 305 et seqq.). Similarly, judicial enforcement of various aspects of MLG does not need to be the primary route for ensuring compliance on the EU and on the national level (cf. Winter and May 2001: 675 et seqq.). Still, the traditional widely accepted notion of constitutionalism as a ‘legal limitation on government’ (McIlwain 1947: 21; see also along the same lines Morbidelli 2010: 66; de Vergottini 2007: 177 et seqq.) highlights that a legal limitation on power does not only require an adequate system of political rights and freedoms and of checks and balances in the political process. It also requires an important role of the judiciary in enforcing the legal limits to the exercise of political powers particularly through constitutional adjudication (cf. Matteucci 2010 [1964]: 91; Nolte 2005: 16-18). In this and in the following section it will be shown how both Union and domestic courts have a role to play in enforcing and shaping MLG. There are fundamentally three ways in which the

judiciary of the Union can play a role: (i) in relation to the Treaty articles embodying the idea of MLG; (ii) in relation to the concept of 'national identity' of Article 4(2) TEU; and (iii) in relation to acts of secondary law which contain reference to and embody the concept of MLG.

(i) In relation to those norms of EU primary law which embody or reflect MLG, Union courts can play the ordinary role they would play in relation to any other primary law rule. For example, the lack of consultation of the CoR, when this is compulsory, could lead to the annulment of the relevant act by the CJ. The CoR itself could request the annulment through a direct action pursuant to Article 263(3) TFEU. Admittedly, though, it is difficult to imagine a possible role for the CJ in relation to the regional participation in the Council (Article 16(2) TEU) and to the involvement of regional parliaments with legislative powers in the delivery of reasoned opinions in the framework of the early warning system (Article 6(2) Subsidiarity Protocol). The legal position is potentially different in relation to the duty for the Commission to consult widely before drafting a legislative proposal (Article 2 Subsidiarity Protocol). This is an important channel for political cooperation and dialogue, which may help the Commission and the lawmaking institutions to focus on the potential impact of a regulation. It is unlikely that the CJ would uphold the claim that a certain act is unlawful for lack of or inadequate preliminary consultation. However, the Union judiciary has already expressly recognized that consultation contributes legitimacy to the EU lawmaking process. In the case *UEAPME*, the Court of First Instance (hereafter CFI) 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 by the people. If such participation takes the form of social dialogue, the Commission and the Council have an obligation to verify that the social partners involved are sufficiently representative. Only in this way the democratic legitimacy of the EU lawmaking process can be preserved (Case T-135/96, *UEAPME v. Council* [1998] ECR II-2335 para. 88–89; Smismans 2004: 340 et seqq.; Popelier 2011: 567; White Paper on European Governance 2001: 11).

(ii) Article 4(2) TEU appears likely to lend itself to judicial enforcement in relation to MLG only in extreme circumstances. Probably, like for subsidiarity (cf. Panara 2016a: 321; *contra* Schütze 2009b and Vandenbruwaene 2012 and 2013, who argue in favour of stricter judicial scrutiny of subsidiarity), only a clear abuse, such as an EU regulation on economic, social and cohesion policy ignoring completely the role of the sub-national authorities, would find Union courts willing to annul it for a breach of Article 4(2) TEU. An analysis of the jurisprudence of Union courts on Article 4(2) TEU in relation to regional and local autonomy offers important insights on MLG.

As previously stated, the implementation of EU law and policy by the sub-national authorities is a constitutive element of MLG as defined in the 2009 *White Paper* of the CoR (cf. *supra* 2). This aspect came to the fore in a few cases concerning or surrounding Article 4(2) TEU: *Commission v Spain* (2013) and *Digibet* (2014).

An interesting statement going into this direction can be found in the Opinion that Advocate General Kokott delivered in the case *Commission v Spain*, concerning a failure by the Spanish Autonomous Communities to implement Directive 2000/60/EC on the water policy of the EU. In response to the argument advanced by Spain, that a national regulation transposing the directive had already ensured full compliance with the EU rules, Kokott noted that this method of transposition (i.e. the subsidiary application of national rules) is probably in breach of the Spanish constitutional law, because it does not acknowledge the legislative responsibility associated with the legislative power of the regional authorities. Through this *argumentum ad adiuvandum* AG Kokott implicitly recognised that the responsibility of the Autonomous Communities for the implementation of EU law in the areas falling within their legislative remit is an essential part of the constitutional identity of the Spanish State (Opinion of AG Kokott 30 May 2013, Case C-151/12, *Commission v Spain*, para. 34-35).

More recently, the CJ had an opportunity to clarify 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” (cf. Case C-156/13, 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, para. 34). Also, the Court reiterated the principle, already sketched out in the earlier case law (Joined Cases 51-54/71, 15 December 1971, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*), that the EU cannot alter the allocation of responsibilities within the Member States (Case C-156/13, *Digibet*, para. 33). The Opinion of AG Mengozzi in the case *RegioPost*, reflected in the judgment of the Court in the same case, says in express terms that “it is clear from Article 4(2) TEU that EU law cannot prevent a regional or local entity from actually exercising the powers vested in it within the Member State concerned.” (para. 84 of the Opinion). Accordingly, the *Land* of Rhineland-Palatinate is entitled to pass legislation requiring the tenderers of a public procurement contract and their sub-contractors to pay a minimum hourly wage to staff involved in the execution of the contract (cf. Opinion of AG Mengozzi 9 September 2015, Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau*; Case C-115/14, 17 November 2015, *RegioPost GmbH & Co. KG v Stadt Landau*).

At the same time the Court has always consistently maintained that the internal allocation of competences within a Member State between central, regional or local authorities, cannot in any way release that Member

State from fulfilling its obligations under EU law (CJEU 8 September 2010, Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein*, para. 69; 13 September 2001, Case C-417/99, *Commission v Spain*, para. 37; 28 February 1991, Case C-131/88, *Commission v Germany*, para. 71; 14 January 1988, Joined Cases 227-230/85, *Commission v Belgium*, para. 9).

Admittedly, however, the expansive force of Article 4(2) TEU in relation to the role of the sub-national authorities seems to be limited (*contra*, it would appear, Cloots 2015: 226 et seq.). The General Court dismissed the argument that the lack of recognition of *locus standi* to Northern Ireland goes against the obligation for the EU (stemming from Article 4(2) TEU) to respect the national identity of the UK, including its regional self-government. According to the Court “such an obligation does not in any way impinge on the Treaty provisions on judicial remedies” (Case T-453/10, 6 March 2012, *Northern Ireland Department of Agriculture and Rural Development v Commission*, para. 36-38, the quote is from para. 38). This statement reflects the consolidated position of Union courts on the lack of privileged applicant status of the sub-national authorities in direct challenges under Article 263 TFEU (see, *ex multis*, ECJ 11 July 1984, Case 222/83, *Municipality of Differdange v Commission*, para. 8; 21 March 1997, Case C-95/97, *Région Wallonne v Commission*, para. 6-7; 1 October 1997, Case C-180/97, *Regione Toscana v Commission*, para. 7-8; 30 April 1998, Case T-214/95, *Vlaams Gewest v Commission*, para. 28; see also Gamper 2013: 118-120; Thies 2011: 25; Dani 2004). This judicial position leaves a gap in the judicial protection of the rights of the sub-national authorities in the EU. This gap is not overcome by the judicial remedies available pursuant to Articles 267 and 277 TFEU (Panara and De Becker 2011: 324). More effective ways to fill this gap have been developed at domestic level through the creation of tools enabling the sub-national authorities, individually (like in Belgium) or collectively (like in Italy and Germany), to oblige the national government to file an action for direct annulment before Union courts pursuant to Article 263 TFEU (Panara and De Becker 2011: 326).

(iii) As previously stated (cf. *supra* 3.3), the CJEU could be asked the correct interpretation of the concept of MLG through a preliminary reference, when this concept is used in the EU secondary law. To date, only Regulation (EU) No 1233/2010 on renewable energy sources and Regulation (EU) No 1303/2013 on the EU economic, social and cohesion policy refer expressly to MLG.

In summary, the legal nature of MLG is confirmed by the current and potential role of the Court of Justice of the EU in relation to the enforcement of certain aspects of the notion of MLG: the participation in EU decision-

making processes; the implementation of EU law and policy; and, finally, the interpretation of the notion of MLG put forward by EU secondary law.

3.4.2. The domestic courts

Domestic courts, especially constitutional courts, can play a role in the enforcement of aspects of MLG at national level. More specifically, they can play a role: (i) by sanctioning a failure to comply with participatory arrangements established by national law; (ii) by preserving the right and duty of local and regional authorities to implement EU law and policy; and, finally, (iii) by contributing to the definition of important concepts, such as, 'national identity', 'fundamental structures, political and constitutional', 'regional and local self-government' (cf. Article 4(2) TEU).

(i) If participatory arrangements established by domestic law are not observed, the sub-national authorities in some Member States are theoretically entitled to instigate judicial proceedings in domestic courts to enforce their participation rights. This might be the case in Italy and Spain, where the rights of the sub-state authorities could be enforced in the constitutional or administrative courts (cf. Panara and De Becker 2011: 315-317) and, with greater difficulty, in Austria (cf. Panara and De Becker 2011: 316-317). This might be the case also in Germany. The constitutional participatory rights of the German *Länder* through the *Bundesrat* are in principle enforceable in the Federal Constitutional Court (see Article 93(1), No. 1 and No. 3, Basic Law). However, in 1995 the Court found that the Federal Government had not respected the rights of the *Bundesrat* in relation to Directive 89/522/EEC on TV. The Court held that this behaviour was in breach of the principle of federal loyalty (cf. Ruling of the Federal Constitutional Court of 22 March 1995). However, this declaration did not result, nor could it, in the invalidity of the directive. Admittedly, the impossibility to declare the invalidity of the final act could undermine the effectiveness of the judicial intervention. This example suggests that, in case of non-compliance with participatory arrangements, the sanction for a national government might be political and concern the *legitimacy* of an action, rather than legal and lead to the invalidity of an action.

A first problem with the enforcement of the participation rights of the regional authorities is therefore that, should a national court find that a domestic law provision has not been complied with, that court would still not be entitled to declare the invalidity (or the inapplicability) of the EU measure. According to the 'orthodox' EU perspective, the invalidity of EU legislation can be declared *only* by Union courts. A second problem is that it could take some time before a domestic court would pass a ruling on the judicial enforcement of regional participation rights. This would not necessarily be compatible with the speed of EU decision-making processes.

This situation surely limits the effectiveness of national provisions regulating sub-state entities' participation rights. This explains why regional authorities generally prefer to settle their disputes with the national government *politically*, in conformity with the principle of loyal cooperation, rather than judicially (Panara and De Becker 2011: 318).

(ii) The sub-national authorities have a primary responsibility for the implementation of EU law and policy in those areas falling within their remit. This principle is *explicitly* (UK, Section 53 and Paragraph 7(2) of Schedule 5 of the Scotland Act 1998, Paragraph 3(c) Schedule 2 of the Northern Ireland Act 1998, Section 80 of the Government of Wales Act 2006; Italy, Art. 117(5) of the Constitution) or *implicitly* (Germany, Belgium, Spain) entrenched in the constitutional systems of the Member States (Panara and De Becker 2011: 333-335). The constitutional courts can definitely play a role in ensuring that implementation of EU law and policy follows the internal allocation of responsibilities between national and sub-national authorities. Even in the UK, where certain arrangements concerning devolution and MLG are 'binding in honour only', in the event of a disagreement between UK government and devolved administrations over whether a particular issue falls within a devolved competence or it is retained by Westminster, the dispute might be referred to the Supreme Court (cf. Paragraph B4.9 of the Concordat on the Co-ordination of EU Policy of September 2012).

The rule that the implementation of EU law and policy shall follow the internal distribution of responsibilities admits only limited and justifiable exceptions, although the boundaries of these exceptions are uncertain and vary from state to state. The Italian Constitutional Court (Ruling No. 126 of 24 April 1996) stated that an alteration of the normal distribution of competences between State and Regions may exceptionally be accepted if the proper implementation of an EU regulation required the adoption of uniform rules across the entire national territory. In the Ruling of 14 October 2008 concerning EC Regulation No 1782/2003, the German Federal Constitutional Court (*Bundesverfassungsgericht*) held that the proper implementation of the Regulation required a federal statute in order to safeguard the legal and economic unity of the country (para. 88-89).

The Austrian Constitutional Court created the interesting notion of *doppelte Bindung* (double bond). The domestic legislator is indeed 'bound twice'. On the one hand, it has to comply with EU obligations and, on the other, with the national constitution, including the distribution of responsibilities between Federation (*Bund*) and *Länder*. The *Länder* have the constitutional *right* and, at the same time, the *duty*, to implement EU law and policy within their sphere of responsibility and territory. If in a matter within the remit of the *Länder* an EU act required uniform implementation within the national territory, it would be necessary to amend the constitution

(Austrian Constitutional Court 14.863/1997 and 17.022/2003). However, if, pursuant to Article 258 TFEU, the Court of Justice found that an Austrian *Land* failed to comply with an obligation under EU law, the responsibility to adopt the necessary measures would pass *temporarily* to the Federation ('substitute power', cf. Art. 23d, paragraph 5, final sentence, B-VG; cf. Eberhard 2011: 229-230).

Substitute state powers as a tool for the implementation of EU law and policy are also in place in other Member States, such as Italy, Spain and Belgium (cf. Panara and De Becker 2011: 336-340). The constitutional distribution of powers between central government and regional level could be seriously undermined if substitute powers were exercisable *a priori*, i.e., before the non-fulfilment of an EU obligation and in order to prevent it from occurring. The Spanish Constitutional Court envisaged that a substitute power can be exercised only *after* the non-fulfilment of an EU obligation by a region has taken place (cf. Spanish Constitutional Court Ruling No. 80 of 8 March 1993). Such a clear stance, however, has not been taken by the constitutional courts in other Member States, such as Italy, where *a priori* substitution is the rule, even though the regional authorities can replace the implementing measures issued by the central government with their own (cf. Villamena 2011: 175).

(iii) The concept of 'national identity' (and those of 'fundamental structures, political and constitutional' and 'regional and local self-government' of Article 4(2) TEU) is a notion of EU law and, as such, its content shall be further specified by the CJEU. However, the specific content of the 'national identity' is likely to result also from the understanding of the *own* identity by each Member State. Accordingly, the CJEU might have to rely also on the national law and particularly on the case-law of the constitutional courts (von Bogdandy and Schill 2010: 8; Streinz 2012: 28; see also the Ruling of the German Federal Constitutional Court on the ratification of Treaty of Lisbon of 30 June 2009).

In summary, again, the legal nature of MLG is confirmed by the role of the domestic courts in particular in relation to: (i) ensuring that the national authorities comply with participatory arrangements established by national law and linked to MLG, even though in practice the effectiveness of these remedies is limited; (ii) protecting the right (and duty) of local and regional authorities to implement EU law and policy within their remit, although this right of the regional authorities has occasionally been restricted by the courts (for example, in Italy and in Germany) and through the creation of state substitute powers; and, finally, (iii) in relation to the potential contribution of domestic courts to the specification of the content of Article 4(2) TEU from a national perspective.

3.5. MLG and subsidiarity

Another issue closely related to MLG is subsidiarity. Pursuant to Article 5(3) TEU, “the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level”. According to some scholars, subsidiarity is a political or philosophical concept and, as such, its judicial enforcement is impossible or extremely difficult (Working Group I 2002: 2; Barber 2005a; Toth 1994: 282). The Court of Justice of the EU seems to perceive this principle as a ‘threat to integration’ (Estella 2002: 178), as ‘totally alien’ to the EU (Toth 1992: 1079) and in conflict with the ‘broad ethos’ of the Court (Barber 2005b: 199). The constitutional relevance of this problem is high, because it is linked to the general problem of constitutionalism as a legal limitation to political power (McIlwain 1958 [1947]: 21), which in turn presupposes the judicial review of the action of public authorities (Matteucci 2010 [1964]: 91; Barberis 2012: 20-21).

Van Nuffel (2011: 65-66) criticises the opinion depicting the Court of Justice as “consistently unwilling to review Community legislation for alleged violations of subsidiarity” (Cooper 2006: 284). Even though it is a hard fact that in no single case landed before the Court of Justice the outcome has been the annulment of an act for a breach of subsidiarity, analyses of the cases concerning subsidiarity highlight that the Court does not uphold EU action without appropriate scrutiny (Van Nuffel 2011: 65-66; Craig 2012: 80; Panara 2016a: 319; *contra* Vandenbruwaene 2013: 159). According to these analyses the circumstance that until now no act of the Union has been annulled for a breach of that principle is essentially due to the limited number of cases in which subsidiarity pleas have been brought before the Court (Craig 2012: 80) and to the fact that in all cases there were persuasive justifications for the action of the Union (cf. Van Nuffel 2011: 65-66; see, *inter alia*, Case C-84/94, *UK v Council* [1996] ECR I-5755; Case C-377/98, *Netherlands v European Parliament and Council* [2001] ECR I-7079; Case C-491/01, *The Queen v Secretary of State for Health (ex parte British American Tobacco Ltd.)* [2002] ECR I-11453; Joined Cases C-154/04 and C-155/04, *ANH v Secretary of State for Health* [2002] ECR I-6451; Case C-103/01, *Commission v Germany* [2003] ECR I-5369; Case C-58/08, *The Queen v Secretary of State for Business (ex parte Vodafone)* [2010] ECR I-4999; Case C-508/13, *Estonia v European Parliament and Council*, EU:C:2015:403; Case T-257/13, *Poland v Commission*, EU:T:2015:111; Case C-358/14, *Poland v European Parliament and Council*, EU:C:2016:323).

In no circumstance the Court came to a conclusion in relation to subsidiarity different from that advised by an Advocate General (AG). Whilst admittedly some Advocates General’s opinions entail a surface scrutiny of subsidiarity (see, for example, AG Geelhoed Opinion in Joined Cases C-

154/04 and C-155/04 *ANH v Secretary of State for Health*), others have been quite thorough when tackling the same issue (cf. AG Poiares Maduro, Opinion in Case C-58/08, *The Queen v Secretary of State for Business (ex parte Vodafone)*; AG Jääskinen, Opinion in Case C-507/13, *UK v European Parliament and Council* [para. 101 et seqq.]; AG Kokott, Opinion in Case C-358/14, *Poland v European Parliament and Council*; AG Léger Opinion in Case C-84/94, *UK v Council* [Working Time Directive]). It is difficult to picture how the Court of Justice could give more substance to the rights of the regional and local authorities through subsidiarity. None of the cases on subsidiarity has ever concerned directly regions or local authorities within the Member States and the protection for regional and local authorities in Article 5(3) TEU has so far remained on paper (cf. Van Nuffel 2011: 61). MLG envisages participation by sub-national authorities in EU decision-making processes (cf. 2 *supra* and CoR White Paper MLG 2009). So, whilst subsidiarity is judicially enforceable in extreme circumstances of clear abuses, MLG pushes towards multi-level cooperation or procedural mechanisms alternative to judicial enforcement in order to ensure compliance with subsidiarity (Panara 2015: 121-122).

The most important procedural innovation introduced by the Lisbon Subsidiarity Protocol is certainly the 'early warning system' (Articles 6 and 7 of the Protocol), a mechanism aiming to create a dialogue between national parliaments and Union institutions during the legislative process. Whilst it is not easy to reach the minimum number of votes for triggering a 'yellow' or an 'orange card' (so far only two yellow cards have been issued), the early warning system is potentially important for regional participation in EU decision-making processes in that national parliaments shall consult with regional parliaments with legislative powers (Article 6(1) Lisbon Subsidiarity Protocol). In theory, the early warning system could also modify the traditional self-restraint of the Court of Justice in relation to subsidiarity. The evidence contained in the reasoned opinions of the national parliaments and of the Commission could be taken into account by the Court of Justice when addressing a subsidiarity complaint. Additionally, the procedural requirements of the early warning system seem to be judicially enforceable and failure to comply with these could lead to the invalidation of an act by the Court. In this way, however, the Court would be enforcing certain procedural requirements rather than subsidiarity per se (Panara 2016a: 327-328).

A similar tendency towards 'proceduralisation' can be seen in the role of the CoR in relation to subsidiarity. When performing its consultative role, the CoR will normally express its point of view on the conformity of a legislative proposal with subsidiarity (cf. Article 55(2) CoR's Rules of Procedure; Ricci 2011: 123-126). The Lisbon Subsidiarity Protocol gave the CoR the right to challenge a legislative act on grounds of infringement of

subsidiarity (Article 8(2) Protocol). Despite that, the CoR does not appear particularly confident that subsidiarity can be enforced through judicial review. Until now no challenge has been lodged by the CoR against an act for an infringement of subsidiarity. Admittedly, it cannot be excluded that the right to challenge, albeit not yet exercised, may have strengthened the opinions of the CoR vis-à-vis the lawmaking institutions. For this reason, the CoR may be playing a stronger role in the legislative process, in which case compliance with subsidiarity would stem from multi-level dialogue and cooperation between political actors rather than from judicial scrutiny. The procedural requirement for the Commission to consult the CoR (albeit not only in relation to subsidiarity) on proposals in certain policy areas, is judicially enforceable. Pursuant to Article 263(3) TFEU the CoR has the status of a privileged applicant when challenging an act to protect its constitutional prerogatives. Like in the early warning system, however, there would be a shift of focus of the judicial review from subsidiarity per se to the enforcement of certain procedural requirements linked to subsidiarity. This is why Nettesheim (2014) labels subsidiarity as '*politisches Recht*' (political law), an oxymoronic notion indicating those legal provisions which are only or principally enforceable through forms of political coordination.

3.6. Soft law mechanisms

Alongside the hard law mechanisms illustrated previously (cf. *supra* 3.1., 3.2. and 3.3.), there are soft law instruments at EU level which promote multi-level participation of the sub-national authorities in the EU. A tool prompted by the Commission in the wake of the 2001 *White Paper* is the Structured Dialogue created by a Commission's communication (Communication from the Commission COM (2003) 811 final of 19 December 2003) and by a decision of the CoR (see CoR's Bureau Decision CoR 380/2003, part II, of 19 March 2004). The Structured Dialogue consists in meetings between representatives of the Commission and selected European and national associations of sub-national authorities. These associations are identified by the Commission upon advice from the CoR. The meetings of the Structured Dialogue may concern the annual work programme of the Commission ('general dialogue') or a particular policy area ('thematic dialogue'; in the literature cf. Vara Arribas 2005: 19 et seqq.; Domenichelli 2007: 71 et seqq.; Ricci 2011: 122).

In 2006 the European Commission launched the Political Dialogue with national parliaments (Communication to the European Council, *A Citizens' Agenda*, Brussels, 10 May 2006, COM (2006) 211 final, p. 9). Due to the flexible nature of the political dialogue compared, for example, to the early warning system (the political dialogue is not limited to subsidiarity

in relation to legislative acts, nor is it bound by rigid deadlines), national parliaments or chambers thereof (including those houses representing regional authorities, such as, in particular, the German *Bundesrat*), use this tool more frequently than the early warning system. In 2014, 506 opinions were issued by national parliaments, but only 21 of those were reasoned opinions issued in the context of the early warning system (Commission 2014: Annex 1). In 2015, 350 parliaments' opinions were issued, but only 6 of those in the context of the early warning system (Commission 2015: Annex 1).

4. Concluding remarks

The previous legal analysis of MLG suggests that MLG, as defined in the *White Paper* of 2009, is a legal, as well as a normative notion. The nature, scope and sphere of application of MLG go significantly beyond the traditional descriptive notion of MLG of the early days (cf. Marks 1992; Hooghe and Marks 2001). MLG has a constitutional foundation both on the EU and on the national level. The fundamental idea of MLG is rooted in legal arrangements both at EU and national level, as well as in hard and in soft law mechanisms. MLG envisages participatory solutions to the constitutional problems linked to the position of the local and regional authorities in EU integration.

MLG is normatively linked to the principles of local and regional autonomy and of subsidiarity. It operationalises them in the multi-level context of the EU by envisaging participation by local and regional authorities in EU decision-making processes and in the implementation of EU law and policy. MLG has the characteristics of a legal concept and, more specifically, of a legal principle. It is sufficiently 'general' and 'fundamental' to be a principle, but at the same it is sufficiently prescriptive to indicate a way forward in terms of the future direction and development of the EU. It can be classified as a 'procedural' principle which focuses on *how* decision-making processes shall be structured within the EU and on *who* has to participate in these processes. It can also be indicated as an 'accessory' principle in that it is functional to the normative values embodied in local and regional autonomy and in subsidiarity (cf. Panara 2016a: 305-306).

This study identified four functions of MLG as a legal notion in the EU.

(1) Epistemological function concerning the nature of the EU.

Quite rightly, Gary Marks and Liesbet Hooghe argue that federalism is the intellectual foundation of Type 1 MLG (Marks and Hooghe 2004: 17). The EU, like federal or regional states, is a multi-level system (cf. Benz 2009). These systems feature a plurality of mutually interacting layers of governance and, despite significant differences between themselves, belong to the same fundamental family, the 'federations' (Schütze 2012: 77-79). The

legal notion of MLG adds to this background a constitutional traction towards multi-level cooperation in relation to the shaping and implementation of EU laws and policies. It envisages a strong cooperative philosophy for the EU, which is remindful of cooperative federalism, based on participation by the sub-national authorities in the decision-making processes of the central authority, as opposed to the rigid separation of the spheres of responsibility typical of dual federalism (on 'dual' and 'cooperative federalism' cf. Reposo 2005; Boggetti 1994; de Vergottini 1990).

(2) *De iure condendo* function.

As a bi-dimensional (both national and EU) constitutional principle, MLG pushes towards a certain development of the EU as a multi-level system. It is a principle remindful of the 'programmatic rules' of some national constitutions (cf. Crisafulli 1952). These rules lay out objectives for the legislator in various areas, from economy to education or healthcare. MLG is similar to these 'rules' in that it lays out a 'plan of action' concerning how the EU and its Member States have to structure the relationship between layers of governance within the EU. As previously stated, the mutual convergence of the EU and its Member States towards MLG reflects the idea, typical of constitutional pluralism, that the EU and the national legal orders shall take into account as much as possible their respective constitutional requirements (Poiarés Maduro 2012). A Treaty amendment which would go into the fundamental the direction of MLG would be, for example, the extension of the eight-weeks period for the release of a reasoned opinion. This would enhance regional participation in the early warning system and promote compliance with the principle of subsidiarity.

(3) Behaviour-shaping function.

Since it is normatively linked to local/regional autonomy and subsidiarity, MLG as a procedural principle on *how* to make decisions in the EU, shall guide the behaviour of actors in the EU political arena. The Commission, for example, shall consult 'widely' before proposing legislation (Article 2 Subsidiarity Protocol) and the consultation shall include local and regional actors. Where appropriate, the proposed legislation shall create participation mechanisms for these actors (see, for example, the 'partnerships' with local and regional authorities envisaged by EU Regulation No 1303/2013). Compliance with subsidiarity in particular can be enhanced through mechanisms of multi-level cooperation and dialogue, such as the structured and especially the political dialogue, and lead to legislation more respectful of the autonomy of sub-national authorities and Member States. On the other end of the spectrum, as well as the EU and the Member States, also the local and regional actors shall actively engage with the EU and utilize the participation opportunities prompted by the EU.

(4) Interpretation-shaping function.

MLG as a legal principle shall also guide the interpretation and application of the law by the courts and particularly the Court of Justice of the EU in relation to: subsidiarity, enforcement of the participation rights of local and regional authorities, *locus standi* of local and regional authorities in direct challenges to EU acts in Union courts. In relation to subsidiarity the application of MLG should lead not only or necessarily to a stricter judicial scrutiny of Article 5(3) TEU. It should rather ensure compliance with subsidiarity *ex ante*, during the lawmaking process, through multi-level dialogue and cooperation (for example, through consultation of the CoR or the early warning system) and the enforcement of these *procedural* requirements by the Court of Justice.

As to the participation rights of the sub-state authorities, the 'orthodox' EU law position of in principle indifference to the decision-making processes internal to the Member States, would lead the Court of Justice to ignore any infringements of these rights by the Member States. This position reflects a residual 'regional blindness' of the EU, i.e. its traditional tendency (until the 1990s) to ignore completely the sub-national authorities (on the concept of 'regional blindness', '*Landesblindheit*', see Ipsen 1966). This disadvantage for the regions could be addressed by the Court of Justice, if it chose to consider unlawful EU acts for a breach of national rules concerning regional participation. The judicial enforcement of the participation rights of the regions could find its legal basis, as well as in the principle of MLG, also in the protection of the 'national identity' pursuant to Article 4(2) TEU, or in the Vienna Convention on the Law of the Treaties (cf. Article 46). However, it would need to be demonstrated in each case that an infringement of regional participation amounts, respectively, to a violation of the 'national identity' or to a manifest violation of a rule of internal law of fundamental importance.

Finally, MLG could mitigate the consolidated position of the Court of Justice on the *locus standi* of local and regional authorities and establish an interpretation of Article 263(3) TFEU which would make it easier for local and regional authorities to challenge the validity of acts which impact detrimentally on their responsibilities and interests (cf. AG Jacobs, Opinion in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, para. 102, although not specifically in relation to sub-national authorities).

In summary, the legal analysis identifies a compelling legal basis for MLG. This in turn becomes a more stable concept with a constitutional foundation and less exposed to political dispute. The legal analysis also identifies the potential of MLG for the interpretation of EU law and for shaping future developments within the EU legal system.

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