THE EUROPEAN UNION AND ITS REGIONS

The position of sub-national levels in European integration and the contribution of the White Paper on European Governance

LL.M. thesis

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Preface

This thesis is the last and hardest piece of work of an interesting and instructive year at the European University Institute. This year has certainly enriched my knowledge and understanding of European integration. It was also in the course of this year that I quite unexpectedly found an opportunity to work for the integration of my home country into its European environment. Given that I had to start my challenging new job at the Swiss Integration Office[1] earlier than expected, the time to finish my thesis was however also shortened considerably. I am therefore much indebted to my supervisor at the European University Institute, *Gráinne de Búrca*, who infallibly provided me with much appreciated support and many helpful comments. If not all these comments have been taken into account appropriately, this is mainly because there was not enough time to go into as much depth as would perhaps have been desirable. Furthermore, I am particularly grateful to my new boss and collaborator, *Daniel Felder*, who kindly accepted to give me days off, so that I could finalise my thesis while already working. I am now looking forward to the manifold and exciting challenges that we face together in the legal service of the Integration Office.

[1] Attached to the Federal Department of Foreign Affairs and the Federal Department of Economy.

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Note concerning references:

For reasons of simplicity, references in the footnotes will usually only contain the name of the author, the title of the work or review, and the page number. Full details of the references are given in the bibliography, rather than in the footnotes.

Abbreviations

Art.	Article
CMLRev	*Common Market Law Review*
DVBl.	*Deutsches Verwaltungsblatt*
EC	European Community
EC Treaty	European Community Treaty
ECB	European Central Bank
ECJ	European Court of Justice
ECR	European Court Reports
ed./eds	editor/editors
E.L.Rev.	*European Law Review*
EP	European Parliament
ERDF	European Regional Development Fund
EU	European Union
EuR	*Europarecht*
EU Treaty	Treaty on European Union
FS	*Festschrift*
GG	Grundgesetz (=German Federal Constitution)
JCMS	*Journal of Common Market Studies*
JEPP	*Journal of European Public Policy*
JZ	*Juristenzeitung*
M.L.R.	*Modern Law Review*
OJ	Official Journal of the European Communities
para.	paragraph

Introduction

The European Union[1] and its future have become the centre of much attention recently. Not only have lustrous politicians embarked upon a series of speeches about possible ways to organise this complex and unique construction that has led most of the peoples of Europe into a more and more closely integrated union. There seems at the same time to be a certain dissatisfaction amongst those peoples, which apparently finds its cause in a growing distance felt between the European Union and its citizens. A recent expression of this dissatisfaction – or perhaps even distrust – is the negative outcome of the referendum about the Nice Treaty in Ireland.[2] Without trying to generalise, it can probably be said that the European Union finds itself in a sort of identity crisis. The *sui generis* nature of the Union does not seem to satisfy people any more. While many politicians and academics busy themselves with questions relating to the future design and the specific nature of this construction, citizens and other so-called 'new actors', such as sub-national levels of government, find that they are not sufficiently involved in the way European policies are made and implemented.

It is certainly against this background that the Prodi Commission has decided to propose reforms in the way the European Union works. The proposed reforms do not so much address the 'big' questions relating to the nature and future of the European Union, but are aimed at more practical ways of diminishing the distance felt between the Union and its citizens. On July 25th of this year, the Commission has published its proposals in a White Paper called "European Governance – A White Paper"[3]. An important section of this White Paper is consecrated to decentralising the way policies are made and implemented in the European Union. The idea behind such decentralisation is to increase the democratic legitimacy and acceptance of the EU and its policies.

Undoubtedly, decentralised decision-making and implementation are ways of assuring that the decisions taken are provided with democratic legitimacy, and the implementation will therefore find a relatively high degree of acceptance. At least some of the Member States seem to have built their constitutions on this premise, by giving sub-national levels varying degrees of competences

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[1] Please note that it may in certain contexts be incorrect to use the term EU. This is *e.g.* the case in relation to legislation or regional policy, which are activities of the First Pillar, *i.e.* the EC. For reasons of simplicity, I will however often use the more commonly used term EU in order to designate the supranational institutions in contrast to the Member States or sub-national levels.

[2] Although there may have been many other factors involved too.

[3] COM(2001) 428 final.

and law-making powers.[4] The European Union now embraces a variety of different state models and different degrees of decentralisation, reaching from fully federal to highly centralised states. It is however the more decentralised ones – or rather, some of their constituent parts such as the German Länder– that have attracted most attention in the current debate concerning governance in the European Union. The main concern of these sub-national entities is that they feel that they are not adequately involved in the way policies are made in the EU, but on the other hand they find themselves applying and implementing an increasing bulk of EU law. This in turn has the consequence of limiting the powers that such sub-national entities enjoy under their national constitution.

The object of this thesis is to investigate the position that such sub-national levels, or regions, have in the European Union and its legal framework. The purpose of this is to show the manifold roles that the regions have under different perspectives, and the somewhat 'multiple personality' of the EU towards sub-national levels. On the basis of the current legal situation, I will then try to analyse the proposals specifically aimed at the regions contained in the White Paper. These proposals will then be critically assessed as to their suitability to actually further the direct involvement of the regions in the European Union.

The structure of the thesis is the following: A first chapter outlines the historical development of the role and position of the regions in the process of European integration. Chapter 2 will then consider the situation under the current legal framework, and show some of the weaknesses of this system. In chapter 3, the White Paper will be introduced, and the relevant proposals will be critically analysed. This will be followed by some general conclusions explaining why the White Paper is at the same time disappointing and promising.

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[4] Note however that decentralised forms of government do not necessarily emanate from the central government, but the process can also be a historical process whereby formerly separate public bodies join their forces and decide to build one nation state.

Chapter 1

The evolution of the role of the regions in the European Union

1. Introduction

The European Union is in many ways already a very decentralised system, and the regions – or sub-state levels – are involved in a variety of ways in this complex legal system. As will become clear when looking at the different developments, there are different ways in which European law treats – or sometimes ignores - the regions, depending on the context. In very general terms, it is possible to distinguish three different ways in which the regions are affected by, or involved in, European integration: The regions have first been the object of specific Community policies, such as economic and social cohesion, and regional policy, where they have also to a certain extent been actively involved, mainly in connection with the partnership principle. Over the years, sub-national entities have furthermore to a certain extent been recognised as institutional actors, which is most visibly expressed by the Committee of the Regions. And thirdly, the sub-state levels are in many ways direclty or indirectly affected by European law, *e.g.* because they are in many cases responsible for implementing and applying EU law and policies, or because EU legislation can have the effect of narrowing their powers under national law.

This third role of the regions can – depending on the national constitutional arrangements - be a very important one, and it constitutes at the same time an argument for increased involvement of regional and local authorities in the decision-making procedures of the EU. One reason is certainly the big responsibility of such regional and local authorities in implementing EU law and policies, but it is also important to note that European law and policies can greatly affect the regions' own competences under national constitutional law. Direct effect and supremacy of Community law can thus lead to a certain extent to the erosion of the competences which those regions enjoy under national constitutional law. As a consequence, it can be argued that the relevant sub-state levels suffer a certain "loss of sovereignty", or of autonomy, in exercising the powers attributed to them by the national constitution. Hence it is felt by many sub-national bodies that this loss of powers of the regions is not adequately reflected in the shaping of Community policies. It is therefore often claimed that sub-state levels should have more influence in the decision-making processes at European level. The German Länder are probably the most widely known (and certainly most successful) example of this.

Even though it is obvious that the European Union has gone far beyond a "normal" international organisation[5], the Treaties in principle still only recognise the Member States, and consequently exclude the taking into consideration of different levels of government by formally involving sub-state levels in European decision-making. Nevertheless, there is now an increased awareness of the important role played by sub-national levels, and were it "only" for reasons of democratic legitimacy. The debate surrounding the Commission White Paper on Governance – which includes key issues such as decentralisation and multi-level governance with a view to ensure more legitimacy[6] – shows particularly well that these questions are now given more attention at the European level.

In this first chapter, I will try to trace the major developments in the position of the regions from the inception of the European Economic Community in the Rome Treaty, up to the reforms agreed in the Intergovernmental Conference in Nice in 2000[7]. Although I try to proceed in a mainly chronological manner, it will become obvious that different periods have been characterised by different developments. I will thus often focus on the developments that seem to be characteristic for a certain time period.

First, it is however necessary to make a few remarks on terminology: There is no single definition of what 'regions' are.[8] It has been said that regions are a social construct in a given space, and there can be various 'regional' levels within a given system.[9] In addition to this difficulty, one reason why the term 'regions' is difficult to define in European law, is that its meaning depends to a great extent on the context in which it is used. This will become more obvious while looking at the different ways in which European law concerns the regions. Another reason why defining the meaning of 'regions' is rather difficult, flows from the fact that European law does not itself establish a clear concept of what regions are, given that the 'constitutional regions' are defined by the individual Member States according to domestic law. As a result of this being so, there is a multitude of different sub-national levels in the different Member States, and they may have very little in common with each other. Attempts to give a single, uniform breakdown of territorial

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[5] As the Court of Justice has made it clear already in Case 26/62, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105. The debate about the exact nature of the European Union is however far from being settled.

[6] According to Commission president Prodi, talking about governance means talking about democracy, see his speech given to the European Parliament when presenting the White Paper on the 4th of September 2001.

[7] The Nice Treaty will obviously only enter into force once it has been ratified by all Member States. This now depends on the outcome of the second Irish referendum, which will be held at some point next year.

[8] See for the difficulty to define the 'regions', *e.g.* Keating, Is there a regional level of government in Europe?, in: Le Galès/Lequesne (eds), *Regions in Europe*, 11; Hailbronner, Das Subsidiaritätsprinzip als Grundlage einer Regionalisierung der Europäischen Union?, in: Thürer/Ledergerber (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 13, at 14; Bieber/Cornu, Rapports entre la Suisse et une Europe des régions, in: Cottier/Kopše, (eds), *Der Beitritt der Schweiz zur Europäischen Union*, 25, at 27.

[9] See Keating, Is there a regional level of government in Europe?, in: Le Galès/Lequesne (eds), *Regions in Europe*, 11.

units in the territory of the European Community can consequently only have a relatively limited relevance.[10]

For the purposes of this thesis, the term 'regions' shall mean any form of public sub-state or sub-national levels or authorities recognised by their national constitutions, and enjoying a certain degree of autonomy under national law. This includes different levels of regional and local authorities, provided that they are constituent bodies of the state and exercise functions traditionally attributed to the state. This includes *e.g.* the German and Austrian 'Länder', the Belgian 'régions' and 'communautés', the Italian 'regioni', the Spanish 'comunidades autonomas', and so on. As will become evident throughout the thesis, regions can however also be defined according to economic or geographical criteria, as is the case in regional policy. Any attempt to give an abstract definition of what a region is, is consequently doomed to failure, and certainly not possible under the current system.

2. The regions in the Treaty framework from Rome up to Maastricht

2.1. The "blindness" of Community law towards the regions

What has today become known as the European Union had originally been founded by international treaty between sovereign States. The internal organisation of these States remained a matter for national law, and it was for them to decide how to organise themselves. The question of local bodies was considered a secondary question left up to the States, and no formal relationship between the European Communities and the local entities was foreseen in the Treaties.

The starting point is thus that the Treaties do not take into account the internal organisation of the Member States, and the role that these Member States decide to attribute to their sub-national levels, is entirely a question of internal affairs. This has sometimes been called the "blindness" of EC law towards the sub-national bodies, or principle of neutrality, and it was originally used to described the position of the German Länder.[11] This principle is neither written down explicitly

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[10] Such an attempt has been made by Eurostat in 1990 with the *Nomenclature des Unités Territoriales Statistiques* (NUTS) established by the Statistical Office, which forms the basis for the identification of regions whose development is lagging behind for the purposes of Community regional policy, according to Council Regulation 2052/88. The NUTS is based primarily on the institutional divisions in force in the Member States, and it employs a three-level hierarchical classification of regions for each Member State.

[11] The expression "Landes-Blindheit" was first used by Hans Peter Ipsen, in Als Bundesstaat in der Gemeinschaft, in: *FS Walter Hallstein*, 248, at 256. See also Epiney, Gemeinschaftsrecht und Föderalismus: "Landes-Blindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen, *EuR* 3 (1994), 301, with further references; Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 384.

in the Treaties, nor is it expressed in secondary law. It is however inherent in the general structure of Community law. It has furthermore been argued that the European Union's constitutional order contains certain 'conservatory elements' designed to preserve the position of the Member States, some of which can be found, *inter alia,* in Treaty provisions such as Article 6(3) TEU or Article 5 TEC.[12] In addition, it is recognised by the European Court of Justice that 'it is not for the Community institutions to rule on the division of competences by the institutional rules proper to each Member State [...].'[13]

Community law is thus "blind" with respect to sub-state authorities within the Member States, and it recognises in principle only the Member States themselves as full subjects of Community law. This is obvious from the fact that only States can be parties to the Treaties. Furthermore, only the Member States as such have standing before the Court of Justice in this quality. The Court has consequently held that a federal State[14], a region or an autonomous community cannot have standing before the Court of Justice, and that only the (central) government has this quality.[15] Regions must fulfil the conditions of Art. 230 (4) EC Treaty like individuals.[16]

2.2. Elements of regional development as a Community policy under the Treaty of Rome

Nonetheless, the regions[17] have been concerned by several policies and actions foreseen by the Treaty of Rome: The European Investment Bank could grant loans for projects for developing less developed regions.[18] Also, the provisions on the common agricultural policy provided that in working out the common agricultural policy and the special methods for its application, account shall be taken of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions.[19] And the provisions on state aids provided for an exception to the prohibition of aids granted by states, where the aid is intended to promote the economic

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[12] See Dashwood, States in The European Union, (1998) 23 *E.L.Rev.*, 201.

[13] See *e.g.* cases C-8/88, *Germany v. Commission* [1990] ECR I-2321, para. 13; C-180/97, *Regione Toscana v. Commission* [1997] ECR I-5245, para. 7; C-95/97, *Région Wallonne v. Commission* [1997], I-1787, para. 7.

[14] Meaning the decentralised entities, in this context.

[15] C-180/97, *Regione Toscana v. Commission* [1997] ECR I-5245, para. 11; C-95/97, *Région Wallonne v. Commission* [1997], I-1787, para. 7.

[16] See Zuleeg, Die Stellung der Länder und Regionen im europäischen Integrationsprozess, *DVBl.* 1992, 1329, at 1331.

[17] Note that 'region' has in this case a meaning that is not necessarily identical with the regions defined by national law. Rather, the criteria to define the 'regions' were economic or social.

[18] See Art. 130 EC Treaty.

[19] See Art. 39 (2) (a) EC Treaty.

development of areas with an abnormally low standard of living or serious unemployment.[20] Furthermore, the provisions on transports provided for taking into account regional concerns.[21]

Apart from these actions taken by the European Community, the regions have also been directly concerned by the progressive establishment of the common market, which had multiple local repercussions, both economic and social. But even though the Community has progressively taken on more actions in the completion and operation of the common market, the territorial entities have not been taken into account in the institutional structure at the Community level.[22] The regions were merely the *object* of action taken by the Community,[23] particularly by what has later developed into a proper regional policy.

However, there were sporadic means of involving the regions to a certain extent in assistance programmes: The Integrated Mediterranean Programmes, based on Council Regulation 2088/85[24], were an example of Community assistance to the development of certain Mediterranean regions. This Regulation provided for the programmes to be 'drawn up at the relevant geographical level by the regional authorities or other authorities designated by each Member State concerned'.[25] The implementation of these programmes was regulated by programme contracts, which were to be concluded between the Commission, Member States, and regional or other designated institutions.[26] This mechanism could in a certain way already be seen as an example of 'bottom-up' regionalism[27], in the sense that it allowed for full participation of regional institutions in Community decision-making in matters concerning their particular region. It represented an 'atypical regulatory instrument' allowing for regional institutions to have a role which they did not have under EU institutional law.[28]

This - at first sight extraordinary - involvement of regional and local authorities in decision-making at the European level was however weakened by the neutrality principle, which meant that national law could hinder the realisation of the Programmes, for example by entrusting the central institutions with the implementation. Central-regional relations in national law could accordingly imply limits to opportunities for regional institutions to participate in Union decision-

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[20] See Art. 92 (3) (a) EC Treaty.

[21] See Art. 74 *et seq.* EC Treaty.

[22] See on this Audéoud, Les collectivités locales et la communauté européennes, in: Audéoud (ed.), *Les Régions dans l'Europe – L'Europe des Régions*, 154.

[23] See Bieber, Europäische Union und Regionalismus, in: Thürer/Ledergerber (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 1, at 7.

[24] Council Regulation (EEC) No. 2088/85 of 23 July 1985 concerning the integrated Mediterranean programmes, OJ 1985 L 197, 1.

[25] Art. 5(2) of the Regulation.

[26] Art. 9 of the Regulation.

[27] See for this expression Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 384, with further references.

[28] *Ibidem.*

making designed specifically to implement Community legislation concerned with development of their region.[29]

2.3 Economic and Social Cohesion policy and the Single European Act

The Single European Act did not recognise an active role to the sub-state bodies at the Community level either. However, it introduced the new Articles 130a to e[30] concerning Economic and Social Cohesion. This Community policy should be attained on the one hand by Community action, and on the other hand by a co-ordination of the economic policies of the Member States. It was aimed at reducing disparities between the various regions and the backwardness of the least-favoured regions. The main instruments used by the Community to promote social and economic cohesion across the territory of the Community were the structural funds, which comprise the European Regional Development Fund (ERDF), the European Social Fund, the Guidance Section of the Agricultural Guidance and Guarantee Fund, as well as the European Investment Bank, which had the specific aim of assisting projects in less developed regions, and other existing financial instruments.

The Treaty as revised by the Single European Act now specifically provided for a primary law basis for the European Regional Development Fund, which had been established pursuant to Art. 235 (Art. 308 after Amsterdam), without an express Treaty basis.[31] This fund is intended to help to redress the main regional imbalances in the Community through participating in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions. The funds provide financial assistance, through grants or loans, to public authorities and other actors in the Member States. A Regional Policy Committee, which was attached to the Council and the Commission, was entrusted with the task of examining problems relating to regional development, and with studying, *inter alia*, the development programmes presented by the Member States in the framework of the European Regional Development Fund.[32]

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[29] *Ibidem.*

[30] Now Art. 158 to 162, Title XVII EC Treaty.

[31] See Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund, OJ L 73, 1, of 21.3.1975; Scott, Regional Policy: An Evolutionary Perspective, in: Craig/De Búrca (eds), *The Evolution of EU Law*, 625, at 627.

[32] See Council Regulation of 18 March 1975 setting up a Regional Policy Committee, OJ L 73, 47, of 21.3.1975.

2.4. The 1988 reform and the principle of partnership

The structural funds have undergone a thorough reform in 1988, which established a unitary framework for the three funds. The 1988 regulations consisted of a 'framework' and a 'co-ordination' regulation, as well as regulations specific to each of the three funds.[33] In 1993, these regulations have been superseded by 're-reform' regulations,[34] and a further reform has already taken place for the period 2000-6.[35]

The importance of the 1988 reform lies however in the introduction of the 'partnership principle'[36]. This principle, which has since then been at the basis of cohesion policy, meant that Community development operations 'be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies – including, within the framework of each Member State's national rules and current practices, the economic and social partners, designated by the Member State at national, regional, local or other level with all parties acting as partners in pursuit of a common goal.'[37]

This important principle is now contained in Art. 8 (1) of Council Regulation No. 1260/1999. Put very briefly, the partnership principle provides for the involvement of the regions themselves in negotiations with the Commission, thus giving them an active role in drawing up Community assistance. The principle is based upon a sharing of power across different levels of government, with the Community (unusually) conceiving Member States as more than merely single entities.[38]

2.5. The regions as actors in economic law ?

Structural funding is undoubtedly very important for the regions, both from a financial and a political perspective: Whereas in 1975, the ERDF absorbed less than 5 % of the Community budget, today instruments of economic and social cohesion consume more than one-third of the

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[33] See Council Regulation 2052/88 [1988] OJ L 185, 9 ('framework regulation'), Council Regulation 4253/88 [1988] L 374, 1 ('co-ordination regulation'), and the three regulations for the respective funds (Council Regulations 4254/88, 4255/88 and 4256/88, all published in [1988] OJ L 374). For more details see Scott, Regional Policy: An Evolutionary Perspective, in: Craig/De Búrca (eds), *The Evolution of EU Law*, 625.

[34] Council Regulation 2081/93 (framework); Council Regulation 2082/93 (co-ordination); Council Regulation 2083/93 (ERDF), all published in [1993] OJ L 193.

[35] See Council Regulation 1260/1999 of 21 June 1999 laying down general provisions on the Strucrtural Funds, OJ L 161, 1-42, of 26.6.1999. This regulation repeals Regulations 2052/88 and 4253/88. There are also regulations concenring the different funds, *e.g.* Regulation 1783/1999, OJ [1999] L 219, 1-4 concerning ERDF.

[36] I will look at this interesting principle more closely when describing the current situation, see Chapter 2, section 3.

[37] See Council Regualtion 2081/93 OJ [1993] L 193, 5, Art. 4(1).

[38] See Scott, Law, Legitimacy and EC Governance: Prospects for 'Partnership', *JCMS* [1998] 175, at 181.

Community budget.[39] But what is perhaps more important is that with the partnership principle, sub-national entities were given the opportunity to directly participate in Community decision-making, whereas under institutional law, they were not expected to participate in the decision-making processes at European level independently of their Member States. European economic law provisions thus implied for regional institutions a much more active role in European decision-making than that secured for them by European institutional law.[40] What exactly this principle contains, and its limitations, will be shown in more detail in Chapter 2.

3. Towards an 'institutionalisation' of the regions at the European level

3.1. Decentralising trends leading up to the Maastricht Treaty

Over the years, there seems to have been a general trend within the Member States towards more decentralisation. Some authors state an actual tendency towards 'regionalism', which is understood as a "political trend aiming at the creation of administrative units or federal states and at the strengthening of their competences".[41] One Member State (Germany) already had a fully fledged federal structure at the time of the founding Treaties, and many other Member States have subsequently undergone a movement towards more or less decentralised structures. For some of these Member States, this meant giving a rather limited autonomy to regional and local bodies (*e.g.* France, Spain, United Kingdom), whereas other Member States have changed to a fully fledged federal model (*e.g.* Belgium), or are in a process of (possibly) doing so (Italy). With Austria, another State with a federal structure has joined the EU. Many of these decentralising processes are still under way, and the situation is therefore constantly changing. The question of whether this mobilisation of the regions is linked – or even due – to European integration as such,[42] is a different one and shall be left for social scientists to answer. Given that this trend towards decentralisation has taken place more or less parallel to European integration,[43] it is certainly possible to assume that the movement towards decentralisation within the Member

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[39] See Scott, Regional Policy: An Evolutionary Perspective, in: Craig/De Búrca (eds), *The Evolution of EU Law*, 625, at 650.

[40] See Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 388.

[41] See *e.g.* Hailbronner, Das Subsidiaritätsprinzip als Grundlage einer Regionalisierung der Europäischen Union?, in: Thürer/Ledergerber, (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 13, with further references.

[42] Keating, Is there a regional level of government in Europe?, in: Le Galès/Lequesne (eds), *Regions in Europe*, 11, at 18, argues that the Community interventions in the field of regional policy have at least encouraged a strong regional mobilisation, and that some countries have even established regional structures in order to conform more closely to the rules governing the allocation of the Structural Funds.

[43] See *e.g.* Bieber/Cornu, Rapports entre la Suisse et une Europe des régions, in: Cottier/Kopše (eds), *Der Beitritt der Schweiz zur Europäischen Union*, 25, at 37.

States, and the increasing awareness of the regions at the European level have to some extent informed and influenced each other.

However this may be, alongside with this slow and unstable development towards more decentralisation in the Member States, an increased awareness of the importance of the regions and other sub-state bodies had also set in slowly at the European level since the early eighties. This was mainly due to pressure form three sides: One pressure came from the regions themselves, with the German Länder having a leading role and obtaining for themselves considerable privileges from their central government.

A second pressure came from the European Parliament, which had already called for greater participation by the regional and local authorities in the socio-economic development of their regions in 1982.[44] In the aftermath of a 'First Conference of the Regions' in January 1984, the European Parliament adopted a 'Resolution on the role of the regions in the construction of a democratic Europe and the outcome of the Conference of the Regions'.[45] In this Resolution, the European Parliament calls, *inter alia*, for 'the participation of elected regional representatives in the formulation of the Community's present and future policies seen in their regional perspective [...]'.[46] It also calls on the Commission and the Council to 'draft legislation having regard to the constitutional powers of the Member States, to enable the regions to establish and maintain direct relations with the Community institutions in future', and notes that 'the regional authorities of the European Community have so far not been consulted sufficiently at Community level'.[47] It goes on to state that 'the European Community needs an accredited body, which is in a position to speak on behalf of the local and regional authorities, to consult on a permanent basis in the field of Community regional policy'.[48] It furthermore recommends the Commission 'to embark on direct talks with the regions on matters which affect them directly, while respecting the powers of the Member States'.[49]

Indeed, the Commission – from which the third pressure emanated - had already recognised the regions as negotiating partners in the context of its programmes for economic and social cohesion, as has been described above. The Commission had also created a Consultative Council of Regional and Local Authorities, which was a body composed of elected representatives at regional or local level.[50] This Consultative Council was to be consulted by the Commission on

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[44] See Resolution of 22 April 1982, OJ C 125, of 17.5.1982.

[45] Resolution adopted on Friday 13 April 1984, OJ C 127, 240, of 14.5.1984.

[46] See para. 5 of the Resolution.

[47] See para. 7 and 10 of the Resolution.

[48] See para. 13 of the Resolution.

[49] See para. 18 of the Resolution.

[50] See Commission Decision of 24 June 1988 setting up a Consultative Council of Regional and Local Authorities, OJ L 247, 23, of 6.9.1988.

any matter relating to regional development and in particular to the formulation and implementation of Community regional policy, including the regional and local implications of the other Community policies.[51] In spite of the fact that the members of the Consultative Council were recruited amongst experts in regional development and development problems facing municipalities and 'intermediate' administrative areas,[52] it did not allow for sub-state bodies as such to express themselves or to participate in the elaboration of Community policies. Also, the decision whether to consult the Consultative Council or not, depended largely on the Commission.[53] Its role was thus rather limited.

As a result of these developments and pressures from different sides, the next Treaty reform introduced some major changes into the system.

3.2. The Maastricht Treaty: Towards an institutionalisation of the regions?

The Treaty on European Union not only brought about major 'constitutional' changes, it also made a major step towards the recognition of the regions within the institutional framework of this new 'European Union'. It introduced some important institutional novelties regarding the regions, and it gave an impulse for a subsequent revision of the provisions on economic and social cohesion.

The most visible novelty in the institutional framework is undoubtedly the creation of the Committee of the Regions, which will take up much of this section. But the Treaty also allows for the first time ministers from autonomous sub-national governments to represent Member States in the Council.[54] And another important change is the introduction of the long awaited principle of subsidiarity.[55] The revision of the provisions on economic and social cohesion concerned mainly an enlargement of the size of the Regional Development Fund, and some modifications of the procedures, and the creation of a new Cohesion Fund.[56]

It is however the establishment of the Committee of the Regions that constitutes the most visible step in the direction of an institutionalisation of the regions at the European level – a step that could be seen as 'the political recognition of the regional dimension'.[57] This new advisory body

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[51] See Art. 2 of the Decision.

[52] See Art. 3 of the Decision.

[53] See the word 'may' in Art. 2 of the Decision.

[54] Art. 146 (now Art. 203) EC Treaty.

[55] Art. 3b(2) (now Art. 5(2)) EC Treaty. The 'usefulness' of this principle for the regions is however limited, which will be shown in the second Chapter.

[56] Art. 130d EC Treaty. The fund was set up by Council Regulation 1164/94 of 16 May 1994 establishing a Cohesion Fund, OJ L 130, 1, of 25.5.1994, amended by Council Regulation 1264/1999 of 21 June 1999, OJ L 161, 57 .

[57] See Resolution of the European Parliament on the participation and representation of the regions in the process of

was established in the new Articles 198a to 198 c EC Treaty[58]. According to these Treaty provisions, the Committee is composed of representatives of regional and local bodies, which are appointed by the Council acting unanimously upon proposals from the Member States. Every Member State was attributed a certain number of representatives, calculated on the basis of the size of its territory and population. According to Protocol No. 16 annexed to the Treaty on European Union, the Committee of the Regions shared a common organisational structure with the Economic and Social Committee.

The Committee was to be consulted when either the Treaty so provides, or when the Council or the Commission consider it appropriate. The Maastricht Treaty provided for the Committee of the Regions to be consulted before the adoption of incentive measures in the areas of education,[59] culture[60] and public health[61], as well as before the adoption of measures in the fields of trans-European networks[62] and cohesion.[63] The Committee could also issue opinions on matters of specific regional interest referred to the Economic and Social Committee, and whenever it considered this appropriate.

Several criticisms have however been made in relation to the new provisions on a Committee of the Regions. They concerned mainly the question of the representativeness of the Committee. It was argued that the Committee of the Regions fell short of democratic representation, due to its composition and the fact that the members were appointed by the central government of the respective Member States. It was also felt that the members should be democratically elected in the regional or local authority they represent, or accountable to an elected body. This latter weakness was remedied by the amended provisions in the Nice Treaty revision. Another criticism concerned the status of the Committee of the Regions: It was only given 'advisory status', and not the status of a fully fledged institution. This criticism points indeed to a weakness in the position of the Committee, which will be discussed more extensively in the second chapter.

In any case, the creation of this new body was a major step towards a greater involvement of sub-state levels of government in the institutional framework of the European Community, respectively Union. It can be seen as an expression of the objective written down in Article A of the Treaty on European Union, according to which 'decisions are taken as closely as possible to the citizen'. Indeed, a lot of hope has been put in the Committee of the Regions in giving the

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European integration: the Committee of the Regions, of 18 November 1993, OJ C 329, 279, of 6.12.1993, para. 1.

[58] Now Art. 263 to 265.

[59] See Art. 127 (4) (now Art. 150 (4)) EC Treaty.

[60] See Art. 128 (5) (now Art. 151 (5)) EC Treaty.

[61] See Art. 129 (4) (now Art. 152 (4)) EC Treaty.

[62] See Art. 129d (now Art. 156) EC Treaty.

[63] See Art. 130b (now Art. 159), Art. 130c (now Art. 161), and Art.130d (now Art. 162) EC Treaty.

EC's representative system a new regional dimension, which should help to postulate the emergence of a 'Europe of the Regions'.[64]

In spite of all these weaknesses, the Committee has managed to obtain some improvements in its position, which then found their way into the Amsterdam Treaty.

3.3. The reform of the Committee of the Regions by the Amsterdam Treaty[65]

The Amsterdam Treaty revision may have been considered rather 'unspectacular' in the sense that it was aimed more at the consolidation rather than extension of Community powers, and about improving processes and enhancing effectiveness.[66] However, it did bring some changes that are - at least indirectly - relevant to the regions.: A Protocol on the application of the principles of subsidiarity and proportionality was annexed to the Treaty. This protocol should help to bring some clarity in the application of the overly vague principle of subsidiarity. And a protocol on the role of national parliaments was also annexed to the Treaties, which provides for the national parliaments to be sent Green and White Papers and Commission communications, as well as proposals for legislation, with a minimum time period before they are decided upon in the Council.

But also the arguably weak position of the Committee of the Regions experienced some (if modest) improvements. These changes may not have fulfilled the expectations of the Committee itself, and in particular, the Amsterdam Treaty confirmed the strictly consultative role of the Committee of the Regions.[67] Amsterdam can nevertheless be seen as another step towards a more effective position of the regions in the institutional framework. Prior to the 1996 IGC, the Committee of the Regions had published an Opinion on the revision of the Treaty on European Union and of the Treaty establishing the European Community[68], with a view to obtain a better situation in the Community institutional framework. While most of the demands of the Committee of the Regions did not find their way into the Amsterdam Treaty[69], the Committee has however obtained a number of changes strengthening its position:

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[64] See *e.g.* Duff, The Main Reforms, in: Duff/Pinder/Pryce (eds), *Maastricht and Beyond – Building the European Union*, 19, at 32-33; Bieber, Europäische Union und Regionalismus, in: Thürer/Ledergerber (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 1, at 7.

[65] The prvisions on the Committee of the Regions became Articles 263 to 265 EC Treaty.

[66] See Craig/De Búrca, *EU Law – Text, Cases, and Materials*, 32.

[67] See Bieber/Cornu, Rapports entre la Suisse et une Europe des régions, in: Cottier/Kopše (eds), *Der Beitritt der Schweiz zur Europäischen Union*, 25, at 44.

[68] OJ C 100, 1, of 2.4.1996.

[69] See Smets, Le Comité des Régions: Une réforme en trompe-l'oeil?, in: Telò/Magnette (eds), *De Maastricht à Amsterdam – L'Europe et son nouveau traité*, 115.

Some of these changes concerned the institutional independence of the Committee of the Regions: For one thing, it became independent of the Economic and Social Committee in its administrative infrastructure. It was also given more freedom in its internal organisation, with the removal of the previously existing requirement of unanimous approval of the Committee's rules of procedure by the Council.[70] And an additional clause has been added, according to which a member of the Committee cannot at the same time be a member of the European Parliament.[71]

There were also a number of changes extending the Committee's right to be consulted:

The consultation of the Committee of the Regions is now mandatory in the following cases: Measures relating to transport policy[72]; guidelines and incentive measures in employment policies[73]; social policy measures[74] and implementing decisions relating to the European Social Fund[75]; measures concerning education, vocational training and youth[76]; incentive measures relating to culture[77]; action concerning public health[78]; guidelines and other measures relating to the establishment and development of trans-European networks[79]; defining the tasks, priority objectives and the organisation of the Structural Funds and the establishment of a Cohesion Fund[80], decisions relating to specific action outside the structural funds[81], as well as implementing decisions relating to the European Regional Development Fund[82], and measures relating to the environment[83].

Furthermore, the Committee of the Regions shall now be consulted by the Council or by the Commission in all other cases in which one of these two institutions considers it appropriate, in particular those which concern cross-border co-operation.[84] Additionally, the right to consult the Committee has now been extended to the European Parliament.[85]

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[70] See Art. 264 (2) EC Treaty (previously Art. 198b (2)).
[71] See Art. 263 (3) EC Treaty.
[72] See Art. 71 (1) and 80 (2) EC Treaty.
[73] See Art. 128 (2) and 129 (1) EC Treaty.
[74] See Art. 137 (2) EC Treaty.
[75] See Art. 148 EC Treaty.
[76] See Art. 149 (4) and 150 (4) EC Treaty.
[77] See Art. 151 (5) EC Treaty.
[78] See Art. 152 (4) EC Treaty.
[79] See Art. 156 EC Treaty.
[80] See Art. 161 EC Treaty. The latter has already been established.
[81] See Art. 159 EC Treaty.
[82] See Art. 162 EC Treaty.
[83] See Art. 175 EC Treaty.
[84] See Art. 265 (1) EC Treaty.
[85] See Art. 265 (4) EC Treaty.

While these changes have undoubtedly strengthened the position of the Committee of the Regions to a certain extent, it should however not be ignored that they fell short of what the Committee of the Regions would have liked to obtain at the 1996 IGC:

In particular, the Committee of the Regions has not been given the status of an institution in its own right. Nor has its demand for the right to initiate proceedings before the Court of Justice been met. Its request that its political legitimacy be strengthened by specifying that the members of the Committee of the Regions be elected representatives of a regional or local community, has not been followed either. Nor did other demands, such as the greater involvement of regional and local levels in the policy-making of the European Union, or the Committee of the Regions' 'right to co-operate with the Commission', find expression in the Treaty text. After this disappointment[86], the Committee was however going to have another occasion to present its requests, and this time with a little more success.

3.4. Towards a 'citizens' Europe' ?: The Nice reforms[87]

If the Amsterdam Treaty reform was unsatisfactory for the Committee of the Regions, in the run-up to the 2000 IGC - which was supposed to prepare to European Union for enlargement -, the Committee published another Opinion[88] containing the (now a little bit shorter) list of requests. Some of these requests seem actually quite audacious, and it is not surprising that they did not find their way into the Treaty. In particular, the Committee of the Regions reiterated its request that the subsidiarity principle be extended to the local and regional level.[89] It also repeated its proposal to be accorded the status of an EU institution,[90] and to be given the formal right to bring proceedings before the European Court of Justice.[91]

It did however succeed in some points, one of which will certainly contribute to its democratic legitimacy: Article 263 Nice Treaty specifies that the Committee of the Regions shall consist of representatives of regional and local bodies 'who either hold a regional or local electoral mandate or are politically accountable to an elected assembly'. Upon expiry of this mandate, the term of

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[86] The result of the 1996 IGC could arguably be called a 'déception', see Smets, Le Comité des Régions: Une réforme en trompe-l'oeil?, in: Telò/Magnette (eds), *De Maastricht à Amsterdam – L'Europe et son nouveau traité*, 115, at 121.

[87] Even though the ratification and subsequent entry into force of the Nice Treaty seems currently at risk by the failure of the referendum held in Ireland on June 8 of this year, it shall nevertheless be included here, confident that this ratification is ultimately going to take place.

[88] Opinion of the Committee of the Regions on 'the 2000 Intergovernmental Conference', OJ C 156, 6-11, of 6.6.2000.

[89] See para. 5.4. of the Opinion.

[90] See para. 5.9. of the Opinion.

[91] See para. 5.13. of the Opinion.

office shall terminate automatically, whereupon the member must be replaced. This explicit reference to the political mandate and political legitimacy[92] of its members will undoubtedly help to increase the Committee's legitimacy, and therefore perhaps also its credibility.

And although the representatives are still proposed by their Member States, appointments will now be made by the Council acting by qualified majority, as opposed to unanimity. Furthermore, the maximum number of members of the Committee of the Regions has been increased to 350, in order to ensure that local and regional authorities are sufficiently represented after the enlargement of the European Union. There were also some minor changes with regard to certain policy areas involving a consultation of the Committee of the Regions. These concern social policy[93], economic and social cohesion[94] and environment policy[95].

4. Decentralised implementation, application and enforcement of Community law

As I have very briefly mentioned in the introduction, the sub-national authorities of the Member States have another, maybe at first glance less visible role, which can however be a very important one: Given that the implementation and application of Community law is almost entirely decentralised, it is in principle the Member States' – and, where applicable, the regional and local authorities' - duty to implement and apply Community law and policies. This is the general division of tasks in the EC, and the Community itself furthermore lacks the institutional and administrative means to implement and apply legislation, except in very limited areas.

Indeed, ever since the inception of the European (Economic) Community, it was a distinctive feature of Community law that it is (under certain conditions) directly applicable in the Member States. This follows directly from Article 249 (2) EC Treaty (Article 189 of the Rome Treaty), which says that 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.' The ECJ went however further than this, and already in 1963 it created the doctrine of 'direct effect' of Community law in its famous *Van Gend en Loos* ruling[96]. In a Member State in which sub-national authorities are entrusted with applying legal rules, this has the consequence that these authorities also apply Community rules. In relation to sub-national authorities, the Court has furthermore held that all organs of the administration,

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[92] Words already used by the Committee of the Regions in its Opinion for the 1996 IGC.

[93] See the new Art. 137, 139 (2) and 144 EC Treaty (not in force yet).

[94] See the new Art. 159 (3) and 161 EC Treaty.

[95] See the new Art. 175 (2) EC Treaty.

[96] Case 26/62, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105.

including decentralised authorities such as municipalities, are under a duty to apply directly effective Community provisions.[97]

Similarly, sub-national entities can find themselves entrusted with the implementation of EC directives in areas where they are competent under national constitutional law. Even though it is in principle the Member State's free choice how to achieve correct implementation of directives,[98] the ECJ has over the years made it clear that a Member State may not plead situations in its internal legal order, including the distribution of powers and responsibilities between the bodies which exit in its national legal order in order to free itself from the duties imposed by Community law.[99] More specifically in relation to sub-state levels, the Court of Justice has repeatedly held that, although 'it is not for the Community institutions to rule on the division of competences by the institutional rules proper to each Member State or on the obligations which may be imposed on the central authorities of the State and the other territorial authorities respectively', 'it is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence.'[100]

By the same token, it can be incumbent upon the judicial authorities of sub-state entities to apply and enforce Community law. The ECJ has deduced from Article 10 (ex-Article 5) EC Treaty an obligation for national courts to 'ensure the legal protection which citizens derive from the direct effect of the provisions of Community law', but left it up to the domestic legal system of each Member State to 'designate the courts having jurisdiction and to determine the procedural conditions [...]'.[101] The Court imposed however the two Community requirements of equivalence and of practical possibility on any national procedural conditions. In Member States with sub-national bodies enjoying judicial competence,[102] this means that it is for those decentralised courts to apply Community law, and that they must respect the minimum requirements imposed by Community law and the case-law of the Court of Justice.

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[97] See case 103/88, *Fratelli Costanzo v. City of Milan* [1989] ECR 1839, para. 31.

[98] See Art. 249 (3), ex-Article 189 (3) EC Treaty.

[99] See case C-236/99, *Commission v. Belgium* [2000] ECR I-5657, para. 23; C-274/98, *Commission v. Spain* [2000] ECR I-2823, para. 19 and 20.

[100] See cases C-8/88, *Germany v. Commission* [1990] ECR I-2321, para. 13; C-180/97, *Regione Toscana v. Commission* [1997] ECR I-5245, para. 7; C-95/97, *Région Wallonne v. Commission* [1997], I-1787, para. 7.

[101] See case 33/74, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, [1977] 1 CMLR 533.

[102] This would be the case of Switzerland, where the Cantons are in principle responsible for the application and enforcement of all levels of the law (*i.e.* international, national and cantonal), and the organisation of the judiciary as well as the procedural law governing the proceedings before the cantonal courts.

It has already been mentioned that, due to the principle of supremacy, EU/EC law can have a limiting effect on the internal powers of sub-state authorities, which means that such authorities can see their competences diminishing with European integration.

5. Conclusions

As this brief overview over the past developments has shown, there was – and increasingly is – a tendency towards a more fully recognised role for the regions at the European level. It has also shown, though, that the regions have different roles in the Community framework, according to the 'perspective' in which they are being looked at by the Communities:

From a regional policy perspective, regions were originally nothing but the object of Community regional policy. The Commission has however soon recognised sub-national authorities as 'partners' in drawing up and implementing social and economic cohesion policies. The 'partnership principle' in structural funding, which now finds its legal basis in Art. 8 (1) of Council Regulation No. 1260/1999, expressly confirms this more actively involved role of the regions in the area of Community structural funding.

From an institutional perspective, on the other hand, the sub-state levels are in a rather weak position to influence EC policy-shaping and decision-making. The main and most visible instrument for the regions to make their interests heard by means of representation is the Committee of the Regions. This consultative body, which was created by the Maastricht Treaty and subsequently strengthened with each Treaty reform, can certainly be seen as a step towards an actual institutional representation of the sub-state levels in Community policy-making. The role of this 'institution' has been gradually strengthened since its creation, and it is now also becoming more "democratically legitimate". From an institutional point of view, there are also other ways for the sub-national levels to influence European decision-making, such as the possibility for regional representatives to sit in the Council as representatives of their Member States. And it may be argued that the introduction of the subsidiarity principle also serves (albeit to a limited extent, as I will show in Chapter 2) the interests of sub-state levels.

The role played by sub-national levels in implementing and applying Community law and policies may be less visible at the European (institutional) level, given that it is defined by national constitutional law. Also, it has been influenced by the development of a consistent case-law of the ECJ rather than spectacular Treaty changes. It can nevertheless in reality be a very important role.

From this short overview over the historical development of the position of regions or sub-national levels in the Community framework, we can conclude that some important changes in

favour of the regions have taken place over the years. It can however also be observed that there is not one single and uniform approach of European law to the regions, but the position of the latter depends very much on the perspective in which they are being looked at by Community law. Consequently, there are different ways in which the EU treats the regions, which leads to a somewhat contradictory situation. In particular, the importance of the sub-national entities in applying and implementing EU law and policies is not adequately reflected in policy-shaping and decision-making at EU level.

Chapter 2

The current involvement of the regions in European integration

1. Introduction

The European Union has been said to have a 'fragmented personality' with respect to states and sub-state entities.[103] Indeed, the first chapter has shown that there are different ways in which the regions are being treated by European law. As a starting point, Community law uses a rather state-centric approach in that it recognises only Member States as component units, which is underlined by the (still) largely intergovernmental character of the Treaty framework in general. This stands in contrast with the fact that the sub-state levels of the Member States are at least indirectly affected by Community law - mainly due to the doctrines of supremacy and direct effect -, and their important role in implementing Community law, which has even increased with the growing trend towards decentralisation in many Member States.

It was perhaps because of this contradiction that particularly over the past decade the regions' position in the architecture of European integration has changed. In particular the Maastricht Treaty has brought about almost revolutionary changes, notably by creating the Committee of the Regions as a means for sub-state levels to participate in European decision-shaping at the EU level. Another, perhaps less visible change, has taken place in Community structural funding, where the regional and local authorities are involved in direct negotiations with the Commission in accordance with the partnership principle.

As concerns participation of the regions in EC decision-making, it has been argued[104] that there are (at least) two different – and contradictory – approaches of EU law to regional participation in decision-making. Institutional law, on the one hand, does not fully allow the regions to participate in EU decision-making, given the dominant role accorded to the Member States as parties to the Treaties. Economic law, on the other hand, and in particular the partnership

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[103] See Scott, Member States and Regions in Community Law: Convergence and Divergence, in: Beaumont/Lyons/Walker (eds), *Convergence and Divergence in European Public Law*, forthcoming.

[104] See Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377.

principle in cohesion policy, affords the regions with a much more active role, which apparently goes beyond the rights accorded to them by institutional law.

After having outlined in the first chapter how the role of the regions in the EC institutional framework seems to have developed over the years, this second chapter will now focus on the current arrangements for involving sub-state levels in EC decision-making, and will include a critical assessment of their suitability for giving the regions adequate voice. I will look separately at the institutional arrangements, such as the Committee of the Regions, and at those mechanisms of participation which came in 'through the back door' of economic law, in particular the partnership principle.

As I have briefly outlined in Chapter 1, there is of course another very important role of the sub-state levels in the complex legal system of the EU: It is the Member States' – and often the sub-national authorities' - duty (and power) to implement, apply and enforce Community law. This is particularly the case where regions are equipped with legislative powers under national constitutional law. There are two aspects to this: On the one hand, the application of Community law can give the applying authorities a certain scope for manoeuvre and thus make them active players in European integration. On the other hand, European law can also affect these authorities in a negative way, by limiting the powers they have under the national constitutional arrangements. This "loss of competences" is of course perceived as not adequately reflected in the very limited possibilities to participate in the making of Community law and policies.[105]

The role of sub-national levels in implementing Community law constitutes a form of decentralisation that has existed in many Member States long before decentralisation became an issue on the European level. Because the Member States are free to organise themselves internally, the degree of decentralisation is of course entirely dependent on the constitutional arrangements of the respective Member States. The 'negative' effects of Community law on the internal role of the regions, however, constitute an excellent argument for increased participation of the sub-state levels in the initiating and shaping of Community policies, and justify a more effective involvement of the regions in the decision-making procedures of the European Union.

In this chapter, I will first look at such (centralised) ways of participation of the regions in the Community policy-making, and point out their weaknesses. Then, I will try to assess the partnership principle with a view to its suitability to give the regions adequate means of participation. And finally, I will try to illustrate the role of the regions in implementing Community law, and show that there are two sides to the coin.

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[105] See *e.g.* Zuleeg, Die Stellung der Länder und Regionen im europäischen Integrationsprozess, *DVBl.* 1992, 1329, at 1333.

2. Representation of sub-national levels in EC institutional law

Community institutional law does not provide for formalised participation of the sub-national bodies in any of the primary decision-making institutions of the Community, *i.e.* the Council, the Commission or the European Parliament.[106] Since the creation of the European Union in the Maastricht Treaty, however, the national level is completed by a regional level.[107] 'Institutionalised' participation of the sub-national levels of government in European policy-making is now possible through the Committee of the Regions, and by the possibility for regional or local representatives to represent their Member States in the Council of Ministers.

2.1. Representation of regional and local bodies in the Committee of the Regions

Since the Maastricht revision, regional and local bodies have their own 'institutionalised' form of representation in the EC institutional framework. The Committee of the Regions is the 'official voice' of the sub-state bodies in EC decision-making. It is composed of representatives of regional and local bodies.[108] The Committee of the Regions is to be consulted by the Council or by the Commission where the Treaty so provides and in all other cases, in particular those concerning cross-border cooperation, in which one of these two institutions considers it appropriate. The European Parliament may also consult the Committee of the Regions. Moreover, the Committee may issue an opinion on its own initiative in cases where it considers this appropriate.

With the establishment of the Committee of the Regions, the EC Treaty for the first time formally institutionalised the participation of sub-national authorities in EC decision-making. The Committee of the Regions is intended to include local and regional bodies in the legislative process of the European Community.[109] Even if – after a closer analysis of this 'institution' – it may seem that this was more of a symbolic step than an actual institutionalisation of the regions on the EU level, the Committee of the Regions has over the first six years of its existence shown a great deal of dynamic and active involvement in the activities of the EU. The Committee of the Region's work consisted not only in the issuing of a great number of opinions, as foreseen by the Treaty, but also in activities such as the organisation of conferences with the applicant countries,

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[106] See also Bieber/Cornu, Rapports entre la Suisse et une Europe des régions, in: Cottier/Kopše (eds), *Der Beitritt der Schweiz zur Europäischen Union*, 25, at 42.

[107] *Ibidem*, at 37.

[108] Which will after the entry into force of the Nice Treaty have to be either holders of a regional or local authority electoral mandate, or be politically accountable to an elected assembly.

[109] See European Parliament Resolution of 18 November 1993 on the participation and representation of the regions in the process of European integration: the Committee of the Regions, OJ C 329, 279, recital G in the Preamble.

or the information of the public on many issues, or the publication of studies on specific subject-matters.[110] Due to this active commitment, the Committee may have secured itself a role that goes beyond the one formally attributed to it by the Treaty.[111] The Committee of the Regions sees itself as a key player in the debate about the future of the European Union, and it feels in a particularly important position in relation to the White Paper on governance: "Because of its special role as guardian of subsidiarity and player in grass-roots representation, the Committee of the Regions can help make the European Commission's objectives become reality".[112]
The capacity of the Committee of the Regions to adequately represent the various regional and local bodies of the Member States, and its effectiveness in giving the various sub-state levels an adequate voice in the European decision-making is however undermined by certain 'defects' inherent in the design of this body. These concern mainly the question of the actual representativeness of the Committee for the sub-national authorities it is deemed to represent, and its status in the institutional framework.

2.1.1. The representativeness of the Committee of the Regions

Although the Committee of the Regions' value in complementing the democratic representation of the citizens by establishing closer relations between the European level of government and the citizens in their capacity as members of a regional or local community is recognised, it has been argued that the Committee falls short of real democratic representation.[113] One of the reasons for this is seen in its composition: The Committee's composition in no way reflects the regional reality of each Member State, given that the number of representatives for each Member State was calculated on the basis of the size of the territory and population[114], rather than taking account of the internal constitutional order of the Member State in question. This seems problematic, given that the role accorded to the regions under national constitutional law varies considerably,[115] and leads to the consequence that strongly centralised Member States could have

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[110] See *e.g.* the list of activities in the Committee of the Regions' Annual Report 1998, CdR 12/99.

[111] See McCarthy, The Committee of the Regions: an advisory body's tortuous path to influence, *JEPP* 4 [1997], 439-54; Audéoud, Les collectivités locales et la communauté européennes, in: Audéoud (ed.), *Les Régions dans l'Europe – L'Europe des Régions*, 154, at 159.

[112] Jos Chabert, the President of the Committee of the Regions at a meeting with Romano Prodi, see The Voice of the Regions, Quarterly Newsletter of the Committee of the Regions, No. 2 March/April 2001.

[113] See Lenaerts/De Smijter, The Question of Democratic Representation: On the democratic representation through the European Parliament, the Council, the Committee of the Regions, the Economic and Social Committee and the National Parliaments, in: Winter/Curtin/Kellermann/de Witte (eds), *Reforming the Treaty on European Union – The Legal Debate*, 173, at 190.

[114] Small Member States seem however to be over-represented, see Usher, *EC Institutions and Legislation*, 71.

[115] See Bieber/Cornu, Rapports entre la Suisse et une Europe des régions, in: Cottier/Kopše (eds), *Der Beitritt der*

the same number of representatives on the Committee as their fellow Member States with a fully fledged federal system. This can lead to a meaningless representation of the former, and an insufficient representation of the latter. It can also lead to situations where members of the Committee are asked to express themselves on issues in relation to which the entity they represent has no competence under national law.

Another criticism concerns the way in which the members are appointed: It is for the Member States (*i.e.* normally the central government) to designate the representatives, which are then appointed by the Council. This makes it doubtful whether the members enjoy full independence from their central government.[116] Even after Nice, it is still for the Member States (*i.e.* the central authorities) to propose the respective representatives. The wording of Article 263 in the Nice version however now contains a requirement for the members of the Committee of the regions to have an electoral mandate at regional or local level, which ensures the representatives' accountability to the regional or local level.

There is also a difficulty inherent in the fact that there is only one single representative body of the regions at the European level: How can the sometimes diverging interests of the various regions of the European Union be adequately represented by one voice? It has indeed been argued that centralised representation of regional institutions in a body like the Committee of the Regions may not necessarily constitute an adequate basis for regional participation in Union decision-making.[117]

2.1.2. The status of the Committee of the Regions

An important criticism that persists up until today concerns the limited role the Committee was attributed in the decision-making process of the European Union: Indeed, the Committee only enjoys 'advisory status'. This means that it is merely a consultative body, assisting the Council and the Commission.[118] The Committee does thus not enjoy the status of a proper institution.[119] Also, it is not quite clear what the consequences of a disregard of the opinion of the Committee of the Regions by the Council or Commission are.[120]

Schweiz zur Europäischen Union, 25, at 27.

[116] See Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 388.

[117] See Evans, *ibidem*, at 387, with further references, and Evans, *The EU Structural Funds*, 284.

[118] See Art. 7 (2) EC Treaty.

[119] See Lenaerts/De Smijter, The Question of Democratic Representation: On the democratic representation through the European Parliament, the Council, the Committee of the Regions, the Economic and Social Committee and the National Parliaments, in: Winter/Curtin/Kellermann/de Witte (eds), *Reforming the Treaty on European Union – The Legal Debate*, 173, at 192.

[120] *Ibidem*, at 191

Even though the Committee itself has repeatedly uttered its wish to be accorded the status of a fully-fledged EU institution[121], it is still only an advisory body. According to Article 7(2) EC Treaty, the Committee of the Regions shall assist the Council and the Commission acting in an advisory capacity. Article 263 reiterates that the Committee has advisory status. The Committee of the Regions is thus clearly not designed to have the status of a Community institution. In this context, it is however important to observe that the mere status as an institution would not automatically confer more rights on the Committee[122], but rather constitute a more political or symbolic recognition. The exact status of this institution would of course depend on the wording of the legal provisions giving it this status. The important question is whether the Committee would have the right to participate in the decision-taking process, rather than just at the decision-shaping stage.

It has also been criticised that the Committee of the Regions does not have the right to institute proceedings before the European Court of Justice. In fact, the Committee does not have standing under Article 230 (2) EC Treaty like the Member States, the Council and the Commission, nor can it bring actions to protect its prerogatives under Article 230 (3) EC Treaty like the European Parliament, the Court of Auditors and the ECB. If the Committee feels that its prerogatives have been violated by the other institutions, it will therefore have to have recourse to Article 230 (4). This however means that it can only attack decisions addressed to it directly, or else it must achieve the virtually impossible task of showing its direct and individual concern. In the light of the bulk of case law relating to 'direct and individual concern', this is bound to be an extremely difficult undertaking.[123]

Another weakness concerns the scope of the obligation of the Commission and the Council to consult the Committee of the Regions. According to Article 265 EC Treaty, the Committee of the Regions shall be consulted where this Treaty so provides and in all other cases in which the Council or the Commission consider it appropriate, in particular in cases concerning cross-border cooperation. The European Parliament may also consult the Committee of the Regions. The

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[121] See *e.g.* Resolution of the Committee of the Regions on The outcome of the 2000 Intergovernmental Conference and the discussion on the future of the European Union of 4. April 2000, CdR 430/2000 final.

[122] Except perhaps the capacity to institute proceedings for failure to act of the other institutions under Art. 232 (1) EC Treaty.

[123] See *e.g.* case 25/62, *Plaumann v. Kommission* [1963] ECR 213, at 237; case 231/82, *Spijker v. Kommission* [1983] ECR 2559, para. 8; case 11/82, *Piraiki-Patraiki v. Kommission* [1985] ECR 207, para. 11; case 97/85, *Deutsche Lebensmittelwerke* [1987] ECR 2265, para. 10; case C-198/91, *Cook v. Commission* [1993] ECR I-2487, para. 20; case C-225/91, *Matra v. Kommission* [1993] ECR I-3203, para. 14; case T-2/93, *Air France v. Commission* [1994] ECR II-323, para. 42; case T-465/93, *Consorzio gruppo di azione locale "Murgia Messapica" v. Commission* [1994] ECR II-361, para. 25; case C-321/95 P, *Greenpeace v. Commission* [1998] ECR I-1651, para. 28; case T-585/93, *Greenpeace v. Commission* [1995] ECR II-2205, para. 48; case T-597/97, *Euromin v. Council* [2000] ECR II-2419, para. 44; cases T-132/96 and T-143/96, *Freistaat Sachsen and VW v. Commission* [1999] ECR II-3663, para. 83.

Treaty provides for mandatory consultation in the areas of transport policy[124] employment policies[125] social policy[126], the European Social Fund[127], education, vocational training and youth[128], culture[129], public health[130], trans-European networks[131], the structural funds and specific action outside the structural funds[132], the European Regional Development Fund[133], and the environment[134]. The Nice Treaty does not change very much in this respect. Even though there is mandatory consultation in many areas, there are also many areas with an important regional dimension - such as the internal market, competition, industrial policy and consumer protection – which do not require consultation of the Committee of the Regions.[135]

The opinion issued by the Committee of the Regions is to be forwarded to the Council and the Commission. These may set the Committee a time limit for the submission of its opinion, which must be of at least one month. Upon expiry of this time limit, the absence of an opinion shall however not prevent further action by the other institutions.[136] The Treaty fails to be more specific about the procedural value attributed to the opinion. And it has been suggested that the opinions of the Committee carry only limited weight with the other institutions.[137] Indeed, it is not clear what would be the legal consequences if the other institutions failed to seek the Committee's opinion, or if they completely ignored the opinion issued by the Committee of the Regions. The Court of Justice has not yet had a chance to clarify this situation.

2.2. Representation in the Council

With the new wording of Article 203 EC Treaty, the Maastricht revision introduced a potentially very powerful means of representation for the regions. This provision allows for representation of a Member State in the Council by a 'representative at ministerial level, authorised to commit the government of that Member State'. This can be understood as including regional ministers, as

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[124] See Art. 71(1) and 80(2) EC Treaty.
[125] See Art. 128(2) and 129(1) EC Treaty.
[126] See Art. 137(2) EC Treaty.
[127] See Art. 148 EC Treaty.
[128] See Art. 149(4) and 150(4) EC Treaty.
[129] See Art. 151(5) EC Treaty.
[130] See Art. 152(4) EC Treaty.
[131] See Art. 156 EC Treaty.
[132] See Art. 159 EC Treaty.
[133] See Art. 162 EC Treaty.
[134] See Art. 175 EC Treaty.
[135] See for this criticism Chalmers, Damian, *European Union Law*, Volume One: Law and EU Government, 149.
[136] Art. 265 EC Treaty, (1) and (6).
[137] See Chalmers, *European Union Law*, Volume One: Law and EU Government, 150, with further references.

long as they are authorised to commit the government of their Member State as a whole, whereas previously only representatives of the (central) government could sit in the Council. The wording of Article 203 already indicates one of the difficulties with this tool: It depends entirely on the will of the central government whether or not to authorise any regional ministers at all. National practices in this respect are bound to vary considerably. Some decentralised Member States like Austria, Belgium, Germany and Spain have in the past let regional ministers participate in Council meetings. The current Belgian presidency even intends to let the competent ministers from the "communités" or "régions" preside over some Council meetings that fall within their competences, such as the Industry Council, the Research Council, the Culture Council or the Educational Council.[138]

Article 203 – in accordance with what has been called the 'neutrality principle'[139] – leaves it entirely up to the respective Member States whether they let regional ministers represent them in the Council. Whether or not regional concerns are thereby taken into consideration, is also entirely a matter of national constitutional law. It is furthermore a matter for national law to arrange – or not - ways for the sub-national levels to take part in the internal decision-making procedures when the position of the Member State is decided. There is in principle nothing wrong with that, and it certainly corresponds to the idea of the EU as a Union of sovereign nation states. It can however become problematic if the necessity for a Member State to speak with one voice on the European level leads to a centralisation of previously decentralised powers within a Member State, which is invariably the case if central government is given exclusive competence in "external" - or European - affairs. This may seem completely natural from an international law perspective. But it could also be argued that it is becoming more and more justified to consider the centralising effect that European integration has on the national division of powers as a matter of European interest, which should perhaps also be tackled at the European level. This however is an entirely political question, which shall at this stage be left open.[140]

Another difficulty that should be mentioned is – again – that ministers representing a Member State must speak on behalf of the Member State as a whole, and for the totality of the regions

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[138] Announced by the Belgian Prime Minister Guy Verhofstadt in his speech given at the 7th European Forum Wachau in Göttweig – What kind of future for what kind of Europe? on 24 June 2001.

[139] See Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 381.

[140] Note however that the Commission in the White Paper on European Governance, after mentioning that this is of course the Member States' responsibility, also encourages the Member States to 'foresee adequate mechanisms for wide consultation when discussing EU decisions and implementing EU policies with a territorial dimension [...]', see page 12 of the White Paper. I will come back to this later.

they represent. It is thus impossible to take account of the possibly diverging positions of the regions, be it from the central government or among different regions.[141]

3. The partnership principle in Community structural funding

Structural funding is not only important for the regions from an economic perspective, but it also seems to have afforded them with a much more active role in influencing EC decision-making in the field of structural funding than institutional law provided for. This is mainly due to the development of the partnership principle, which has gradually emerged as the principal means for participation by individual regions in committee work concerning operations of the structural funds.[142] The structural funding provisions have undergone a thorough reform in 1999,[143] but the partnership principle has been maintained, although in a slightly different wording.

3.1. The partnership principle according to Article 8 of Regulation 1260/1999

According to Article 8 (1) of Regulation 1260/1999 laying down general provisions on the Structural Funds,[144] Community actions shall be drawn up in 'partnership', which 'shall cover the preparation, financing, monitoring and evaluation of assistance'[145]. The same provision defines 'partnership' as 'close consultation between the Commission and the Member State, together with the authorities and bodies designated by the Member State within the framework of its national rules and current practices, namely the regional and local authorities and other component public authorities, the economic and social partners, and any other relevant component bodies within this framework'. The provision then however continues by saying that 'the partnership shall be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners as defined in the first subparagraph', *i.e.* that it must respect the national rules of each Member State.[146] Even though Article 8 (1) goes on to state that 'in designating the most representative partnership at national, regional, local or other level, the Member State shall create a wide and effective association of all relevant bodies', this is again to be done 'according to national rules and practice'.

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[141] See Evans, Regionalist Challenges to the EU Decision-Making System, *European Public Law* 2000, 377, at 381.
[142] See Evans, *The EU Structural Funds*, 284.
[143] See Regulations 1260/1999 to 1268/1999, all published in OJ L 161, of 26 June 1999.
[144] OJ L 161, 1-42, of 26.6.1999, replacing Regulations 2052/88 and 2053/88 as from 1st of January 2000.
[145] Art. 8(2) of the Regulation.
[146] See also Evans, *The EU Structural Funds*, 288.

Article 8 (2) furthermore requires the Member States to 'ensure the association of the relevant partners at the different stages of programming'. According to Article 8 (3), however, 'in application of the principle of subsidiarity, the implementation of the assistance shall be the responsibility of the Member States, at the appropriate level according to the arrangements specific to each Member State [...]'.

3.2. The limitations of the partnership principle

The problem inherent in this definition of partnership is obvious: The partnership principle may be undermined by national constitutional arrangements allowing the central government to exercise authority over regional authorities.[147] EC legislation does little to ensure that regional authorities are allowed by national law effectively to participate in regional development measures. There seems to be a conflict between the present administrative structure, at both national and regional levels, in some Member States and the structures required to implement EU-assisted operations, as envisaged by the Commission and supported by the Committee of the Regions.[148]

Partnerships were originally established to introduce a decentralized approach to the structural funds.[149] The partnership principle is based upon a sharing of power across different levels of government, with the Community conceiving Member States as more than merely single entities.[150] However, Article 8 already indicates its limitations, by making it dependent on 'national rules and practice'. As a consequence, due to national differences in administrative structures and the tradition of dialogue between levels of government, there is a big diversity of partnerships in the different Member States.[151]

Not that diversity should be considered as a problem. On the contrary, one of the main objectives of decentralisation is usually to allow for a certain degree of diversity. Diversity can indeed be seen as a value in itself, and the trends towards decentralisation at both the national and the European levels show that diversity is perceived in Europe as something valuable. In the context of structural funding, however, too much diversity can be a problem to the extent that diverging national practices undermine the realisation of the partnerships. But to be precise, the

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[147] *Ibidem*, 290.

[148] *Ibidem*, 291.

[149] See Committee of the Regions, Opinion 234/95 on the role of regional and local authorities in the partnership principle of the Structural Funds, OJ C 100, 72, of 2.4.1996, para. 3.

[150] See Scott, Law, Legitimacy and EC Governance: Prospects for 'Partnership', *JCMS* [1998] 175, at 181.

[151] See Committee of the Regions, Opinion 234/95 on the role of regional and local authorities in the partnership principle of the Structural Funds, OJ [C 100, 72, of 2.4.1996, para. 13.

problem then lies in the respective national practices undermining the partnerships, rather than in diversity as such.

Furthermore, until 1988, the task of identifying regions eligible for Community assistance was the exclusive responsibility of the Member States. They were free to do this according to domestic priorities, and they could also decide where to spend the Community funding. Even though this is no longer the case since 1988, the process remains an essentially political one.[152] Up until today, structural funding is very much based on inter-governmentalism, with the national governments dominating the policy process.[153] National governments operate as gatekeepers at various stages of the policy process to put a brake on the emergence of a truly multi-level system of governance. Actors from sub-national (and supranational) levels may well participate, but they do not significantly influence decision-making outcomes.[154] Regional policy has even been described as a sort of struggle for control between the national governments and the Commission, with other actors having a lesser degree of influence. The participation of other actors in the process seems nevertheless to have increased, and in particular the mobilisation of sub-national actors has been encouraged.[155]

A definite assessment of whether the partnership principle has been successfully put into practice is difficult to make. In any case, the complex programming system creates large potential for conflicts between the Commission and the Member States.[156] Furthermore, the inefficiency of the national administrations and the Member States' unwillingness or inability to co-finance the projects can render the absorption of EU commitments in the Member States more difficult. Nevertheless, the partnership approach in EU regional policy seems to have strengthened the regions vis-à-vis the Member States, and their influence in the structural funds implementation is often bigger than in national regional policy.[157]

In its Second Cohesion Report, the Commission however underlines that there is undoubtedly a need to strengthen the role of regional and local authorities and of those on the ground by, for example, programming at the local level when appropriate, and that it would be essential that there are guarantees regarding the involvement of regional and local authorities.[158]

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[152] Scott, Regional Policy: An Evolutionary Perspective, in: Craig/De Búrca (eds), *The Evolution of EU Law*, 625, at 630.

[153] *Ibidem*, at 628.

[154] See Bache, *The Politics of European Union Regional Policy – Multi-Level Governance or Flexible Gatekeeping?*, 155.

[155] *Ibidem*, 156 to 157.

[156] See Reiner, *The Regional Dimension in European Public Policy – Convergence or Divergence?*, 89.

[157] *Ibidem*, 90.

[158] Second Cohesion Report, COM (2001) 21 final, of 31.01.2001, p. XXXV.

4. The regions implementing, applying and enforcing Community law

4.1. The sub-national authorities implementing, applying and enforcing Community rules

It has already been mentioned that the application and enforcement of Community law is almost entirely decentralised[159], and that the EU itself lacks the administrative and financial capacities to enforce Community rules. According to this system, the task of legislating is to a great extent assigned to the European level, whereas the implementation (and financing) of Community policies is carried out in principle by the Member States, and – depending on the constitutional arrangements of each Member State – sub-national levels. It is thus for the Member States – and possibly the sub-state levels – to implement Community law.

In this context, it is sometimes forgotten that the 'implementation' of the law by administrative bodies and courts often goes far beyond a merely mechanical act, and it can also be a creative political task, depending on the scope for interpretation and on the room for appreciation.[160] The application and enforcement of Community law can thus in a certain sense also be understood as a power, rather than a duty.[161] Even more so, the transposition of Community directives requires the Member States to take legislative action in order to fulfil their implementing duty. Depending on the level of detail of the directive, this can involve some room for manoeuvre for the Member States, which in turn can fall within the regions' competence. The duty to transpose directives into national law obviously also includes the duty to legislate where this is necessary. This can in turn fall within the regions' competence under national law, according to the internal division of competences.[162] Education and culture are areas that national constitutions often safeguard as competences for the decentralised authorities, and they are sometimes perceived by the sub-national entities as some sort of stronghold against the central authorities, although these competences will often be shared with the central government.[163] Health and environment are

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[159] The enforcement of European Competition law by the Commission being the exception. There are however proposals to entrust the national authorities with the application and enforcement, see Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [...], of 27.9.2000, COM(2000) 582 final.

[160] See Pernice, Kompetenzabgrenzung im Europäischen Verfassungsbund, *Juristenzeitung* 18 (2000), 866, at 872.

[161] In Germany, for instance, the function of the Länder in applying and implementing laws and policies is called Vollzugs*kompetenz*. This corresponds also to the conception of the Swiss federal division of competences, according to which the implementation of federal law is carried out by the Cantons, and includes a general power of the Cantons to legislate.

[162] See Pernice, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, *Deutsches Verwaltungsblatt* 1993, 909, at 914, 915.

[163] This is the case in *e.g.* Germany and Switzerland. See Pernice, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, *Deutsches Verwaltungsblatt* 1993, 909, at 911.

other examples where the decentralised authorities often have certain competences, usually shared with the central authorities.

It has therefore been argued that the Community legislator should limit legislation to a minimum, at least in areas where the Community does not enjoy exclusive competence.[164] This corresponds also to the principle of subsidiarity as put down in the Protocol on the application of the principles of subsidiarity and proportionality, especially paragraph 6, which states that the Community shall only legislate to the extent necessary, and that it should give preference to 'lighter' forms of legislation.

Given that it is for the domestic legal system to determine the powers and responsibilities of the respective sub-state bodies, the autonomy and degree of legislative competence enjoyed by those obviously varies considerably in the different Member States, ranging *e.g.* from the Länder with very wide legislative powers to regions in more centralised states enjoying much less autonomy. There is accordingly a different picture in different Member States, depending on the respective constitutional arrangements. With the current trend towards decentralisation it is however to be expected that the role of the sub-state levels in implementing Community law will become an increasingly important one. As will be seen in Chapter 3, the Commission takes up the idea of 'lighter legislation' in its White Paper, with a view to allowing for more flexibility in the implementation – a proposal that is particularly aimed at sub-national authorities.

4.2. Community law binding the regions

As shown in Chapter 1, the Court of Justice has developed a range of principles of Community law which impose obligations on the Member States. Although these principles do not impose a certain model of government on the Member States, they can affect the sub-state levels, given that the Member States must respect them independently of their internal organisation. The Court has made this clear for the doctrine of direct effect by saying that the administration – even at the local level – is under the same duty as a national court to apply directly effective Community law.[165] Furthermore, Article 10 EC Treaty ("Community loyalty"[166]) makes it clear

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[164] See Wolfgang Clement, Minister President of the German Land of North Rhine-Westphalia, in a speech given at the Humboldt-University in Berlin on 12th February 2001: "Shaping – not administrating – a new Europe – Allocation of responsibilities within the European Union after Nice".

[165] See case 103/88, *Fratelli Costanzo v. City of Milan* [1989] ECR 1839, para. 33.

[166] It has been argued that this provision creates a reciprocal obligation of the Community to respect Member States' federal structures, see Epiney, Gemeinschaftsrecht und Föderalismus: "Landes-Blindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen, *EuR* 3 (1994), 301, and it could therefore also constitute a safeguard of Member States' freedom to organise themselves internally.

that the Member States 'shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty'.

The principles directly or indirectly binding the sub-state authorities include the principle of supremacy of Community law[167], the principle of direct effect[168], and the obligation to transpose and implement Community law in order to give it effect within the national legal system[169]. Although Community law is in principle 'blind' or 'neutral' towards the internal distribution of powers, it imposes concrete duties upon the sub-national authorities. State liability caused by a breach of Community law is an example of this. The Court of Justice has held that a Member State cannot free itself from State liability caused by non-compliance with Community law on the grounds of the distribution of powers and responsibilities between the bodies which exist in its national legal order[170], nor by claiming that the public authority responsible for the breach of Community law did not have the necessary powers.[171] Not only central government, but also sub-state bodies can be held responsible for breaches of Community law. This follows from two recent ECJ rulings which say that as long as the domestic legal system provides for effective reparation of damages caused to individuals, Community law does not require reparation to be made by the Member State itself, but that it may be made by the public-law body responsible for the breach.[172]

Although this may not necessarily lead to situations where the central government of Member States render their constituent parts, such as the regions, liable for breaches of Community law in all cases[173], the Court has made it clear that the regions are under a real (and possibly quite costly) duty to comply with Community law. In the light of the foregoing, it seems almost sarcastic that under the current case law of the Court of Justice, a region or an autonomous community can not have standing before the Court of Justice in the quality of a State[174], and that only the (central) government has this quality.[175]

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[167] See *e.g.* cases 6/64, *Costa v. ENEL* [1964] ECR 585, [1964] CMLR 425; 106/77, *Simmenthal II* [1978] ECR 629, [1978] 3 CMLR 263; 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, [1972] CMLR 255.

[168] See *e.g.* cases 26/62, *Van Gend & Loos* [1963] ECR 1, [1963] CMLR 105; 57/65, *Lütticke* [1966] ECR 205.

[169] Which includes the duty to adapt and modify the national laws in order to bring the national legal system into full conformity with the objectives specified in Directives, see case 14/83, *Von Colson and Kamann* [1984] ECR 1891.

[170] See case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099, para. 62.

[171] See case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para. 28.

[172] See case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099, para. 63; and even more explicitly case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para. 30 and 31.

[173] As they could, according to one reading of the judgement in Konle, see Lengauer, Discussion of Case C-302/97, Klaus Konle v. Republic of Austria, Judgement of the Full Court of 1 June 1999, *CMLRev* 37 (2000), 181-190.

[174] Regions must have recourse to Art. 230 (4) EC Treaty, like individuals, see Zuleeg, Die Stellung der Länder und Regionen im europäischen Integrationsprozess, *DVBl.* 1992, 1329, at 1331.

[175] C-180/97, *Regione Toscana v. Commission* [1997] ECR I-5245, para. 11; C-95/97, *Région Wallonne v. Commission* [1997], I-1787, para. 7.

4.3. Limitations of the regions' competences by Community law

The duties imposed upon public authorities by Community law can without doubt lead to a limitation, if not erosion, of the powers attributed to regional and local entities under national constitutional law. In particular, the supremacy of Community law implies that once the Community has taken action in a given field, national authorities – be they central or sub-national – are precluded from further (legislative) action in that same field. By virtue of the principle of supremacy, Community law can thus impinge upon the Member States' legislative competences. This phenomenon is not limited to areas where the Community has been attributed the competence over an entire policy sector, and which automatically precludes the Member States from legislating in the same area. Community law can also limit the Member State's powers in areas where they are in principle still competent.

This is particularly the case in the field of the establishment and the functioning of the internal market, which is in general considered a 'functional' competence of the Community. As the Tobacco advertising case[176] has shown clearly, such Community measures can very well impinge on areas not directly linked to the internal market. In this case, the proposed directive would for example have had a great impact on the Länder's competences in the area of health policy. Another example is Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration[177], which also limits the Member State's freedom in education policy to a certain extent. Education is an area where the German Länder have very wide competences, and Community law thus leads to a limitation of their powers to the extent that it regulates subject-matters falling within the Länder's competence.

In addition, a certain expansion of Community action has been noted over the last few decades or so, which is sometimes perceived as a *de facto* increase in Community competences.[178] Precisely because of this apparent expansion of Community action and the consequent limitation or erosion of their proper competences (due to the above-mentioned properties of Community law), some of the most powerful 'regions' of Europe, namely the German Länder - which have very wide-ranging legislative competences under the German constitution - had been pushing for a more precise delimitation of competences[179] and a different understanding of the principle of subsidiarity.

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[176] Case C-376/98, *Germany v. European Parliament and Council* [2000] ECR I-8419.

[177] OJ L 19 , 16-23, of 24.01.1989.

[178] Whether this is actually the case or not, cannot be answered here, as it is far too complex a subject, and a lot has already been written about it.

[179] Although this does not necessarily seem to mean a 'Kompetenzkatalog' in the strict sense any more.

4.4. What the principle of subsidiarity can (or not) do for the regions

The principle of subsidiarity seems for many people to have become some kind of magic word in the context of an alleged expansion of Community competences. It is however not always clear in which precise meaning the respective authors use the 'S'-word that has been the object of innumerable publications even long before its introduction into the Treaties in 1992. At this point, it seems useful to say a few clarifying words about the relevance of this principle for the regions.

First of all, it is important to note that the principle as set out in Article 5 EC Treaty concerns the relationship between the European Community and the Member States, and not the sub-state levels within the Member States.[180] This conclusion can also be drawn from the above-mentioned 'neutrality principle'. Note however that Germany, Austria and Belgium have annexed a declaration to the Treaty of Amsterdam saying that they 'take it for granted that action by the European Community in accordance with the principle of subsidiarity not only concerns the Member States but also their entities to the extent that they have their own law-making powers conferred on them under national constitutional law'.[181] Furthermore, the subsidiarity principle does not say anything about the allocation of powers between the different levels, but it concerns the exercise of (shared) competences attributed to the Community. The subsidiarity principle as such does thus not provide the regions with any rights vis-à-vis the Community.

However, it can in practice help safeguard the scope of action of the regions in the areas where they are competent according to national law, insofar as scope of action left to the Member State may well mean scope of action for the respective regions.[182] By the same token, respect for the subsidiarity principle may – in accordance with the Protocol on the application of the principles of subsidiarity and proportionality – lead to less detailed European legislation, which in turn may leave more scope of action to regional authorities in the concrete implementation of Community policies. Furthermore, it could also be argued that where a subject matter has been regulated satisfactorily by regional authorities, there is no need for Community action.[183] Beyond this

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[180] This is clear from the wording, as Article 5, para. 2 only refers to the Member States and the Community. See also Hailbronner, Das Subsidiaritätsprinzip als Grundlage einer Regionalisierung der Europäischen Union?, in: Thürer/Ledergerber (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 13, at 20.

[181] Declaration (No. 54) by Germany, Austria and Belgium on subsidiarity.

[182] See *e.g.* Pernice, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, *Deutsches Verwaltungsblatt* 1993, 909, at 915.

[183] The same goes for regional co-operation. See Hailbronner, Das Subsidiaritätsprinzip als Grundlage einer Regionalisierung der Europäischen Union?, in: Thürer/Ledergerber (eds), *Regional- und sicherheitspolitische Aspekte Europas*, 13, at 21.

limited function, however, the principle of subsidiarity as defined in Article 5 EC Treaty is not suitable for defending the interests of sub-state levels.

5. Conclusions

The picture that has emerged from this short analysis is a rather confusing one. 'Official' Community institutional law provides for a rather weak involvement of the regions at the European decision-making level, an involvement that can moreover be hampered by national constitutional arrangements. In addition to criticisms relating to, *e.g.* the democratic representativeness or the status of the Committee of the Regions, it could be argued that the existing diversity and the accordingly diverging interests of the various regions throughout the European Union cannot be adequately represented by a centralised body anyhow. The same applies to the possibility for regional representatives to represent their Member States in the Council of Ministers.

A different approach comes from European regional policy, and more specifically the partnership principle in the field of structural funding. This principle provides for the involvement of the regional and local authorities on the basis of a non-hierarchical, 'multi-level' system of governance. But here again, the realisation of the partnership principle depends to a large extent on national arrangements and administrative structures, and effective partnership can be hindered by the central authorities of the Member States. Furthermore, the partnership principle only applies in regional policy.[184]

Decentralised implementation, application and enforcement of Community law on the other hand is already a reality. In many Member States, the sub-state levels are to a large extent responsible for the implementation and application of Community rules. But here again, this depends entirely on the constitutional arrangements of the Member States, and is entirely a matter for national law. While in some Member States the sub-national levels have far-reaching legislative competences, other Member States are organised in a much more 'centralist' way. Given that those sub-state entities equipped with legislative competences are at the same time bound and limited by European law, it is often felt that they should be given more effective means of influencing the way policies are shaped and decisions are taken at the EU level.

In very broad terms, there are thus two aspects to the position of the regions: On the one hand, there is the question of the participation of regions in Community decision-making, be it by

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[184] Surprisingly enough though, the Commission talks about establishing 'partnerships' in various contexts in its White Paper on European Governance. It is however not clear what exactly the Commission means by this. See Chapter 3.

institutionalised means, or through the partnership principle in structural funding. And on the other hand, there is the implementation, application and enforcement of Community law by the regions, which can leave some room for manoeuvre to the authorities concerned. Both contain a lot of potential for a European Union in which 'decisions are taken as closely as possible to the people'. But at the same time, they are mainly hindered by the neutrality principle, which makes effective decentralisation dependent on national constitutional arrangements. After having outlined the existing situation in terms of involvement of the regions in decision-making and implementation, the next Chapter will look at the proposals contained in the White Paper on European Governance adopted by the Commission on July 25 of this year, some of which are expressly aimed at improving the position of the regions in the European framework.

Chapter 3

The Regions in the 'White Paper on European Governance'

1. Introduction

On July 25 of this year, the Commission has adopted a 'White Paper on European Governance'.[185] This White Paper is intended to remedy the growing distance, or gap, that is felt by many people between the European Union and its citizens.[186] This gap can be reduced, according to the Commission, by reforming 'the way in which the Union uses its powers given by its citizens'[187], which is one of the four declared 'strategic objectives' of the Prodi Commission: the promotion of new forms of European governance.[188]

'Governance' is understood 'to encompass rules, processes and behaviour that affect the way in which powers are exercised at European level [...]'. [189] The Commission defines 'good governance' as governance that corresponds to the principles of openness, participation, accountability, effectiveness and coherence.[190] The application of these principles in turn is seen as reinforcing those of proportionality and subsidiarity. In very general terms, the White Paper seeks to 'bring together various proposals [...] with a view to ensuring that the European institutions function more clearly, more responsibly and in a more decentralised way'.[191] One of

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[185] Commission of the European Communities, *European Governance: A White Paper*, COM(2001) 428 final, of 25.7.2001, available on the Commission's governance website: http:// www.europa.eu.int/comm/governance/ index_en.htm.

[186] See *e.g.* Guy Verhofstadt, Speech by Prime Minister Guy Verhofstadt at the 7th European Forum Wachau in Göttweig - *What kind of future for what kind of Europe*, of 24 June 2001; or *Europolitique* n° 2612, of 25 July 2001, I.1, 'Gouvernance: Livre Blanc de la Commission européenne'.

[187] See Commission of the European Communities, *European Governance: A White Paper*, COM(2001) 428 final, of 25.7.2001, Executive Summary.

[188] See Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Strategic Objectives 2000-2005, "Shaping the New Europe"*, COM(2000) 154 final.

[189] See Commission of the European Communities, *The Work Programme for the White Paper on European Governance*, 11.10.2000, SEC(2000) 1547/7 final.

[190] See page 10 of the White Paper.

[191] See the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The Commission's Work Programme for 2001*, of 31.1.2001, COM(2001) 28 final, 4.

the ways in which the Commission intends to bring the EU closer to its citizens is thus by strengthening the role of the regions and local entities in the process of European integration.[192] This apparently increased value that the Commission attributes to (more) decentralised ways of governance - and thus a more important role for sub-national levels - is reflected quite clearly in many parts of the White Paper, and many of the concrete proposals made in the White Paper address in one way or another regional or local sub-state levels of the Member States.[193]

The main idea of the White Paper seems to be that involving more players will make governance more acceptable and legitimate,[194] and lead to greater acceptance of EU policies at the "grass roots". Even though the debate in the aftermath of the Nice IGC has made these concerns more obvious and to some extent institutionalised them in the context of the debate on the future of Europe, they are actually not as new as it may seem: Already in 1993, it has been argued that the effectiveness – in the sense of implementation, enforcement, impact and compliance - of EC law was increasingly at issue, and that it was therefore necessary to create effective democratic political institutions at the Community level, together wit the establishment of processes for the public expression of choices concerning Community politics and Community law within the Community system, including, *inter alia*, decentralisation of power, a clearer allocation of power between the Community, the Member States and subordinate units, clear and public guidelines for putting into practice the concept of subsidiarity, and increased networks among sub-national political units in the Community system.[195]

In this chapter, I will try to give an overview over the proposals contained in the White Paper, and of course in particular the proposals that in one way or another concern the sub-national entities. In a second step, I will then critically analyse these proposals with a view to assessing their suitability to improve the position accorded by European law to sub-national bodies, and in particular authorities equipped with legislating powers under national constitutional law. First of all, the White Paper needs however to be put in a wider context, especially in relation to the post-Nice debate about the future of the Union. I will also say a few words about the way the White Paper was drafted, before discussing the proposals.

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[192] See also *Europolitique* n° 2613, of 28 July 2001, I.1, 'Governance: Romano Prodi souhaite renforcer le rôle des régions en Europe'.

[193] In fact, the White Paper itself is to a certain extent the result of a wide consultation process organised by the Commission before and during the preparation of the White Paper, which involved a vast public and many regional and local players.

[194] See Weiler, *The Legitimating Strategy of the Draft White Paper. A task oriented Commission for a project-based Union*, Comments on the preparation of the White Paper on European Governance by a group of Jean-Monnet professors, published on 7 June 2000, http://www.europa.eu.int/comm/governance/jean_monnet.pdf.

[195] See Snyder, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, 56 *M.L.R.* (1993), 19-54.

2. The context of the White Paper

The wider context of the White Paper on European Governance is certainly to be seen in the post-Nice debate. At the Nice IGC held in 2000, a Declaration on the Future of the Union was annexed to the Nice Treaty, expressing the need for "a deeper and wider debate about the future of the European Union", which involves "wide-ranging discussions with all interested parties". One question to be addressed, *inter alia*, is "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity". The Nice Conference furthermore "recognise[d] the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States."

The Commission expressly mentions the link between the White Paper and the debate about the future of the European Union, by saying that certain elements of the White Paper could also help clarify the responsibilities and thus contribute to the debate launched by the Nice European Council prior to the next revision of the Treaties in 2004.[196] The White Paper is however restricted to a more limited scope (and perhaps all together a little more pragmatic), in that it addresses 'only' the question of how the existing mechanisms of decision-making and implementation can be improved within the existing Treaty framework.[197]

Not surprisingly, the White Paper does not actually introduce any revolutionary proposals, and the proposals in principle respect the way the EU is currently organised. The Commission repeatedly underlines that it in no way intends to challenge the Member States' responsibility for involving the regional and local level in EU policy. It thus avoids the question of 'centralising decentralisation'. The Commission essentially limits itself to encouraging Member States to foresee adequate mechanisms for wide consultation when discussing EU decisions and implementing EU policies with a territorial impact.[198] The proposals address thus in principle the way the European institutions work, and in particular the Commission itself.

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[196] See the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The Commission's Work Programme for 2001*, of 31.1.2001, COM(2001) 28 final, 4.

[197] *Ibidem.*

[198] See page 12 of the White Paper. To what extent this advice will be accepted and followed by the Member States, is of course an entirely different question.

3. The "making of" the White Paper

According to the original work programme[199], the White Paper was to be divided into six work areas, each concerned with a specific issue. One of these issues was 'improving the exercise of European executive responsibilities through decentralisation', and another one 'promoting coherence and co-operation within a 'networked' Europe'. The six work areas were in turn considered by twelve working groups. Two of these working groups were at first sight concerned with questions relating to the regions: The mandate for the working group on "Vertical Decentralisation" was 'to seek to define general principles to organise desirable forms and degrees of decentralisation, and to elaborate concrete examples of how this can apply in a limited number of policy areas'. It should make suggestions as to how the decision-making process should be adapted to create stronger flexibility in implementation, and how actors other than national government interests should be involved in the policy process.[200]

The working group on "Multi-level Governance" was to analyse and propose 'mechanisms of co-operation between the different levels of decision-making, based upon a logic of shared competences and not hierarchy'. The aim was to find new mechanisms of co-operation and complementarity between the different levels in order for them to have better access to the decision-making process, so that they each contribute to more efficiency, coherence and transparency. Special attention was to be paid to the trans-national and interregional dimension as one of the options. A contractual approach could be one of the instruments taken into consideration.[201]

The results of the reports of these and the other working groups have then been sent to the Commission in a first draft in March 2001.[202] This draft was again considerably amended, and the proposals as agreed by the Commission were published in the actual White Paper, which was finally adopted on the 25th of July. The reports by the individual working groups have also been published[203], but they do not reflect the official position of the Commission.[204]

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[199] See the Work Programme for the White Paper on European Governance, SEC(2000) 1547/7 final, available on the governance website.

[200] See the mandate for working group 3b, available on the governance website.

[201] See the mandate for working group 4c, available on the governance website.

[202] The so-called "Draft Vignon", which was unfortunately not made available to a wider public.

[203] On the Commission's Governance website: http://www.europa.eu.int/comm/governance/index_en.htm.

[204] See footnote 2 of the White Paper.

4. The regions in the general structure of the White Paper

The first thing that becomes obvious when trying to describe the general structure of the White Paper is that it is rather difficult to put the proposals relating to regions in a coherent system. In particular, the proposals concerning regional and local players are scattered over several parts of the White Paper, appearing under different headings and in different contexts. Also, it seems that the same – or similar – proposals are sometimes repeated under different headings. This is certainly due to the fact that the issues addressed in the different sections of the White Paper overlap to a considerable extent, depending on the respective focus. Also, the two working groups mainly concerned with decentralisation had overlapping mandates, and it is not quite clear where the respective proposals retained in the White Paper come from. I will nevertheless try to show in what way the regions are either directly addressed, or else affected by the proposals, and then focus on the proposals expressly aimed at the regions.

The White Paper is divided into four sections, each of which addresses one big area of reform.[205] In the section called "Better involvement and more openness", the Commission mentions the need for a 'stronger interaction with regional and local governments and civil society'.[206] This section focuses on improving involvement in shaping and implementing EU policies, and contains several ways of involving different actors in EU policy-making. In this context, the Commission mentions the importance of giving citizens greater access to information, and of an efficient communication policy of the Commission and the other institutions. Special attention is then given to sub-state levels, under a heading called "Reaching out to citizens through regional and local democracy...", which is almost entirely consecrated to measures to be taken at EU level in order to strengthen the role of the regional and local level.[207]

Other proposals in the section "Better involvement" are concerned with the involvement of (organised) civil society, more effective and transparent consultation at the heart of EU policy-shaping, as well as 'connecting with networks', which is also aimed at regional and local authorities to some extent. And of course, the proposals made in the sections "Better policies, regulation and delivery" and "Refocused policies and institutions" can also concern the sub-national levels, albeit in a more indirect way. This is mainly due to the important role that regions can have under national law in implementing EU law and policies, which makes them indirectly

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[205] These four areas are called "Better involvement", "Better policies, regulation and delivery", "Global governance", and "Refocused policies and institutions".

[206] See page 4 of the White Paper.

[207] See page 12 of the White Paper.

beneficiaries of 'better legislation'. By the same token, regions and localities will be positively affected by a refocusing of EU policies and institutions.

This shows again the different roles that regional and local bodies can have in EU law.[208] According to the circumstances, regions can be seen as part of '(organised) civil society', or they can be considered 'interested parties' in the policy-making process at EU level. They are – alongside with private bodies such as businesses, communities and research centres – also mentioned in the section dealing with networks. Furthermore, they can be the Member State authorities applying Community law. Or they can be involved in negotiations with the Commission in regional policy. Although this multiple role of the regions in the European construction may create the impression that they will be in many ways affected by these proposals, the proposals are at the end of the day actually quite modest and come down to – broadly speaking - involvement in policy-making on the one hand, and flexibility in the implementation on the other.

5. Proposals concerning regional and local sub-state levels

In its final version, the White Paper on European Governance deals with sub-national actors mainly in the section called "Better involvement". In a summary, the Commission mentions the need for stronger interaction with regional and local governments and civil society. After emphasising that the Member States bear the principal responsibility for achieving this, the Commission then proposes to do various things at the European level:

It will establish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage in shaping policy. It will also bring greater flexibility into how Community legislation can be implemented in a way which takes account of regional and local conditions. Furthermore, it will establish and publish minimum standards for consultation on EU policy. And finally it will establish partnership agreements going beyond the minimum standards in selected areas committing the Commission to additional consultation of organisations [...].[209]

Further down in the White Paper,[210] the Commission then goes into a little more detail. After emphasising again that the principal responsibility for involving the regional and local level in EU policy remains - and should remain - with national administrations, the Commission then

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[208] The 'multiple personality' of the European Union towards the regional and local entities has already been demonstrated in the first and second chapter.

[209] See page 4 of the White Paper.

[210] From page 11 onwards.

proposes, under the heading "Reaching out to citizens through regional and local democracy", three areas in which it intends to take action, in order to 'build a better partnership across the various levels'.[211] These areas are now formulated as "Involvement in policy shaping", "Greater flexibility" and "Overall policy coherence". This leads the Commission to propose two [*sic*] 'action points':[212] To establish a more systematic dialogue with European and national associations of regional and local government at an early stage of policy shaping, and to launch pilot "target-based contracts" as a more flexible means of ensuring implementation of EU policies.

These two 'action points' probably bring the Commission proposals to the point. There are of course other proposals that will affect the regional and local entities in a more indirect way, as I have already briefly mentioned. For instance, the Commission furthermore calls for more overall policy coherence, which it does however not take up again in the 'action points'. It seems to be more of an suggestion of a general nature, which is in addition addressed to several levels. The Commission will use the "enhanced dialogue" in order to achieve such better coherence.[213]

Furthermore, the Commission undertakes to develop a more systematic and proactive approach to working with key networks, which includes trans-national cooperation of regional and local actors, in order to enable them to contribute to decision shaping and policy execution. It will thus examine how a framework for trans-national cooperation of regional or local actors could be better supported at EU level. Proposals shall however only be presented by the end of 2003.[214]

The discussion in this section will mainly focus on the two main proposals directly aimed at regional and local bodies: Involvement in policy-shaping, and increased flexibility in the implementation.

5.1. Involvement in policy-shaping at EU level

In the light of the growing responsibility of the regions, cities and localities for the implementation of EU policies in many areas, the Commission feels that the way in which the Union currently works does not allow for 'adequate interaction in a multi-level partnership, a partnership in which national governments involve their regions and cities fully in European

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[211] These are the words used by the Commission (see page 12 of the White Paper), but it is not quite clear what exactly they are supposed to mean, given that the concept of partnership is specific to structural funding programmes in regional policy.

[212] See box on page 14.

[213] See page 13 of the White Paper.

[214] See page 18 of the White Paper.

policy-making.'[215] It also mentions the contradiction felt by the regions and cities between their increased responsibility for implementing EU policies, and the possibilities for them to fully exploit their role as an elected and representative channel interacting with the public on EU policy.

One way in which the Commission intends to give the regional and local players more weight in the shaping of EU policies is by taking their knowledge and specific conditions into account when developing policy proposals. The Commission hence suggests the organisation of 'a systematic dialogue with European and national associations of regional and local government, while respecting national constitutional and administrative arrangements'.[216] Unfortunately, the White Paper does not tell us how exactly this is to be done.

In its 'action points'[217], the Commission furthermore suggests several things that the Committee of the Regions 'should' do, which also concern the way policies are made at the European level:

- Play a more proactive role in examining policy, for example through the preparation of exploratory reports in advance of Commission proposals.
- Organise the exchange of best practice on how local and regional authorities are involved in the preparatory phase of European decision-making at national level.

The Commission also calls on the Member States to improve the involvement of local and regional actors in EU policy-making.

5.2. Greater flexibility in implementing legislation

The Commission then goes on to mention the criticism that the legislation adopted by the Council and the European Parliament is either too detailed, or insufficiently adapted to local conditions and experience - which apparently is often in stark contrast to the original proposals tabled by the Commission. Hence, the Commission thinks that there should be 'more flexibility in the means provided for implementing legislation and programmes with a strong territorial impact, provided the level playing field at the heart of the internal market can be maintained.'[218]

In this context, the Commission proposes the testing of "target-based, tripartite contracts" for a better achievement of the implementation of certain EU policies, while respecting the existing Treaty provisions. Such contracts would be concluded between the Commission, Member States, and regions and localities designated by them for that purpose. Central government would still

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[215] See page 12 of the White Paper.
[216] See page 13 of the White Paper.
[217] See box on page 14 of the White Paper.
[218] See page 13 of the White Paper.

play a key role in setting up such contracts, and would remain responsible for the implementation. The contract would provide that the designated sub-national authority in the Member States undertakes to implement identified actions in order to realise particular objectives defined in "primary" legislation. The contract would also include arrangements for monitoring.
This approach concerns regulations or directives in fields where sub-national public authorities are responsible for implementation within the national institutional or administrative system. Possible areas include environmental policy and regional policy. In its Second Cohesion Report[219], the Commission has furthermore committed itself to a more decentralised approach in future regional policy.[220] It does unfortunately not yet mention any possible policy areas other than environment and regional policy, but wants to investigate this further. The working group on "Multi-level Governance" mentions (apart from regional policy) also research, transports and environment as areas with a territorial impact.[221] In any case, the internal market is clearly not a candidate for such flexibility,[222] which of course limits the range of possible areas considerably.
In this context, the Commission also suggests that the Committee of the Regions should review the local and regional impact of certain directives, and report to the Commission on the possibilities for more flexible application. The Commission will then consider a more systematic approach to allow such flexibility for some parts of Community law. It also urges the Member States to promote the use of contractual arrangements with their regions and localities.

5.3. Networks

Under this heading, the Commission emphasises the value of networks between businesses, communities, research centres, and regional and local authorities in 'providing new foundations for integration within the Union and for building bridges to the applicant countries and to the world.' It finds that such networks must be made more open, and their relation with the institutions must be structured better, so that they can make a more effective contribution to EU policies. Also, networks supporting trans-national and cross-border cooperation – such as under the structural funds – are often held back by the diverging administrative and legal conditions that apply to each individual participating authority. The Commission therefore undertakes to

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[219] COM (2001) 21 final, 31.1.2001.

[220] In this report, the Commission found that there is a need to support decentralisation, which is related to the general effort to achieve the consolidation of democracy, the development of partnership and an increase in economic efficiency, see page XXXIV of the Report

[221] See *Rapport du groupe de travail "Governance à plusieurs niveaux: Articulation et mise en réseau des different niveaux territoriaux" (Groupe 4C)*, available on the governance website, 60.

[222] See page 13 of the White Paper: "[...] provided the level playing field at the heart of the internal market can be maintained."

develop a more systematic and proactive approach to working with key networks, in order to enable them to contribute to decision shaping and policy execution. Furthermore, the Commission wants to examine how a framework for trans-national cooperation of regional or local actors could be better supported at EU level.[223]

I am not going to look at this proposal in more detail, given that it is not very specific. Also, it concerns the regions only to the same extent as other organised forms of civil society. Furthermore, the Commission is apparently only starting to examine possibilities for better supporting trans-national cooperation of regional and local actors at EU level, and it will present proposals only by the end of 2003.

5.4. Proposals affecting the regional and local authorities

Sub-state levels are however not only concerned by the proposals in which the Commission expressly refers to them. Given the role that such sub-national bodies and authorities can have under national constitutional and administrative law, they are also affected by the proposals made in the section called "Better policies, regulation and deliveries", and in the section called "Refocused policies and institutions".

5.4.1. 'Better policies, regulation and deliveries'[224]

In this section, the Commission first mentions the increasing complexity of EU policies and legislation, often including an unnecessary level of detail, which leads to a lack of flexibility that damages effectiveness. There is thus a need to improve the quality of EU legislation, including better implementation and enforcement. The solution to this problem is seen in a combination of different policy instruments, and notably of "framework-directives". Also, good consultation "upstream" should lead to better legislation, which in turn is adopted more rapidly and easier to apply and enforce. The Commission then lists seven factors necessary to achieve this.[225]

These proposals aiming at a simplified and thus more flexible way of legislating affect sub-national entities particularly where they have powers to implement EU policies within their

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[223] See the explanations and "Action points" on page 18 of the White Paper.

[224] See page 18 *et seq.* of the White Paper.

[225] These include: 1) a better assessment of the necessity of intervention and its form; 2) a more coherent use of different policy instruments; 3) the right choice of instruments, meaning more use of "framework directives"; 4) implementation using co-regulation; 5) use of "open method of co-ordination" to complement the traditional regulatory tools; 6) more evaluation and feedback; and 7) the possibility for the Commission to withdraw proposals for reasons of subsidiarity and proportionality. See page 20 of the White Paper.

sphere of competence under national law. As I have tried to show in Chapters 1 and 2, a more nuanced and "minimalist" use of regulatory instruments may leave more room for appreciation in the implementation at the national, and hence regional and local levels.

5.4.2. 'Refocused policies and institutions'[226]

In this section, the Commission to some extent repeats the proposals made in other contexts. It underlines again that the institutional proposals mainly aim at a revitalising of the Community method, and that they mainly concern the way the institutions work. The Commission repeats however its intention to use 'enhanced dialogue' with European and national associations of regional and local government, and the need to improve impact assessment. Furthermore, policy execution is expected to be improved by the already mentioned simplification of Community legislation, better regulation through a greater diversity of policy tools and their combined use, as well as the above-mentioned tripartite contracts.

Furthermore, the Commission underlines the importance of identifying clear policies and objectives within an overall vision of where the Union is going. Such long-term objectives may *inter alia* include 'supporting territorial diversity'. Perhaps this will lead to a somewhat clearer definition of the position of regions in the overall framework of the EU, given that regions often reflect the territorial diversity in Member States.

5.5. The different roles of the regions and the difficulty to define them

It seems that the definition of regional and other sub-national authorities used by the Commission is a rather flexible one and depends very much on the context. The Commission furthermore often conflates regional public authorities with private bodies, as in the proposals on civil society and networking. 'Civil society', for instance, is defined as encompassing the social partners, NGOs, professional associations, charities, "grass-roots" organisations (which certainly includes local democratic institutions, one would think), and organisations that involve citizens in local and municipal life (here also, it is surely legitimate to think in the first place of public local authorities and communities), with a particular contribution from churches and religious communities.[227] The fact that regional and local bodies are put on basically the same level as *e.g.*

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[226] See page 28 *et seq.* of the White Paper.

[227] See footnote 9 of the White Paper.

charities or religious communities, does certainly not adequately reflect the important role that such authorities have in some Member States under national constitutional law.

6. Comments on the White Paper and the proposals

After having outlined the proposals aimed at, or indirectly concerning, the regions, the next step is to critically analyse them. But first, I will make a few comments on the fact that the changes are to be achieved 'within the existing Treaties', and the limitations this necessarily implies. After this, I will look at the proposals specifically aimed at the regions.

6.1. 'Within the existing Treaties'

The Commission's starting point is that the proposed changes should take place within the existing Treaty framework, and that they concern merely 'the way in which the Union uses its powers'. As a consequence, the Commission does not propose to modify the existing division of powers. On the contrary, it repeats several times that 'the principal responsibility for involving the regional and local level in EU policy remains and should remain with national administrations.' This of course corresponds to what has been said about the intergovernmental character of the Treaties and consequently the Member States' freedom to organise themselves internally as they please. The Commission thus totally avoids the question of whether it would be appropriate to 'centralise decentralisation' at EU level, and does not challenge the Member States' sovereignty in any way. At least not openly.

On the other hand, the Commission asks the Member States to foresee mechanisms for consulting regional and local actors. Indeed, the proposals made by the Commission for greater involvement of the regions at EU level are presented merely as a 'complementary response' to national consultation procedures involving regional and local levels.[228] The Commission even goes as far as to say in its 'action points' that the Member States 'should' examine how to improve the involvement of local and regional actors in EU policy-making, and promote the use of contractual arrangements with their regions and localities. This makes it plain that even the action that the Commission proposes to take at EU level will depend to a great extent on such national mechanisms. How the Member States will react to these suggestions is of course a different story.

It may thus seem that there is perhaps not very much to say about the proposals from a legal perspective, given that they depend a lot on non-binding suggestions made by the Commission to

[228] See page 12 of the White Paper.

the Member States, and the latter's willingness to follow such suggestions in an area lying entirely within their own competence.[229] If on the other hand the Commission intends to take a much more proactive role in relation to the regions, this may perhaps lead to real changes in the way the Union works, which could in turn have a repercussion on the actual position of the regions both in relation to the EU and in relation to the respective Member States. Such an effect has indeed been observed as a consequence of the partnership principle in regional policy.[230]

Given that at present, the Commission already co-operates with national and sub-national administrations for formulating and implementing a wide range of EU law and policy, it might be doubtful to what extent the proposals in the White Paper will go beyond such existing cooperation. Concerning the implementation of Community law, there already is a variety of possibilities, including cooperation between the responsible Member States and the Commission. But the main responsibility is always with the Member States.[231] These are of course sovereign, and much depends on their willingness to cooperate with the Commission.[232]

Already in the realisation of the internal market, the Commission had introduced the concept of "administrative cooperation"[233] between administrations and the Commission, and between administrations, which included obligations to cooperation, communication and transparency for monitoring purposes, and which has proved quite a good solution, especially because it respected the Member States' sovereignty.[234] As the Commission has in general no authority to issue specific directives to the Member States concerning their administrative implementation of Community law,[235] it will depend on the Member States whether they decide to follow the Commissions suggestions made in the White Paper concerning their internal consultation and implementation processes.

Overall, the proposals seem rather fluid, and it is not always entirely clear what exactly is the value or meaning attributed to them by the Commission. The White Paper is rather brief when it comes to the actual proposals, while relatively wide explanations are made in order to show the need for such action. Hence, it remains to be seen what will be the consequences of all these proposals in practice. Only from 2002 onwards, the Commission will actually start to put the

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[229] Indeed, 'governance' is often discussed in social and political science literature, and much more rarely in a legal context.

[230] See Chapters 1 and 2.

[231] See Pühs, *Der Vollzug von Gemeinschaftsrecht – Formen und Grenzen eines effektiven Gemeinschaftsrechtsvollzuges und Überlegungen zu seiner Effektuierung*, 370.

[232] *Ibidem*, 371.

[233] See Sutherland report and strategic programme on *Making the Most of the Internal Market*, COM (1993) 632 final of 22 .12. 1993, and COM (1994) 29 final.

[234] See Pühs, *Der Vollzug von Gemeinschaftsrecht – Formen und Grenzen eines effektiven Gemeinschaftsrechtsvollzuges und Überlegungen zu seiner Effektuierung*, 208-220.

[235] *Ibidem*, 500.

proposed action into practice (to the extent that this is not already a reality, of course). Furthermore, a wide consultation on the need for action by the other institutions and the Member States is planned, and only by the end of 2002, the Commission will report on its progress with the proposed action. The White Paper will also serve as a basis for the Commission's contribution to the preparation of the Laeken Council and the debate on the future of the European Union. Perhaps then, the lessons drawn from the consultation on the White Paper will lead to corresponding Treaty changes.

6.2. The 'complementary response at EU level'

The proposed action at EU level is thus to be seen as merely complementary to the action taken by the Member States in order to enhance the regional and local participation in decision-making in EU matters, and in the implementation of EU law and policies. The effectiveness of action at the EU level will hence also mainly depend on the Member States' readiness to decentralise, and to cooperate with the Commission.

6.2.1. Involvement of regional and local bodies in EU policy-shaping

Under this heading, the Commission proposes to organise a 'systematic dialogue with European and national associations of regional and local government [...]' at an early stage of policy shaping. The way this proposal is worded raises a number of questions. One that immediately comes to mind is of course, what the Commission means by associations of regional and local government. Certainly this will include associations of a European dimension, such as CEMR[236], CRPM[237], Eurocities, etc. And probably, certain trans-national and national regional associations will also be included. The working group on "Multi-level Governance" proposed the establishment of a special status of 'European association of community interest', which should be established according to criteria such as democratic legitimacy and representativeness and the general interest.[238] The Commission seems to have at least partly adopted this proposal.[239]
This makes it doubtful whether the proposed consultation is intended to include individual regions, such as *e.g.* the German and Austrian Länder, or the Belgian Communautés and Régions.

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[236] Council of European Municipalities and Regions.
[237] Conference of Peripheral Maritime Regions of Europe.
[238] See *Rapport du groupe de travail "Governance à plusieurs niveaux: Articulation et mise en réseau des different niveaux territoriaux" (Groupe 4C)*, available on the governance website, 38.
[239] See the last point on page 4 of the White Paper.

The question arises whether the Commission really intends to give the regional and local authorities a more important role in EU decision-making, or whether its intention is perhaps more directed towards encouraging those levels to cooperate amongst each other, and in ways that probably already exist , such as through the Committee of the Regions.
The fact that the Commission in the same paragraph 'welcomes on-going efforts to increase cooperation between such associations and the Committee of the Regions' seems to point in the direction of the latter. Also, by mentioning the usefulness of exchanges of staff and joint training between administrations at various levels in order to get to know better each other's policy objectives, working methods and instruments[240], it confirms the suspicion that this proposal is at second glance not really a big step towards the involvement of the regions at the European level. Rather, the Commission seems to encourage what is already happening, only this time perhaps in a more open and systematic[241] manner.

6.2.2. Greater flexibility in the implementation

The proposals under this heading should perhaps be seen in the broader context of the Commission's attempt to simplify legislation. As I have tried to explain in Chapter 2, the less detailed EC legislation, the more room for manoeuvre there is for the Member States and – where this is the case – the sub-national authorities with legislative competences. If it is really intended that EC legislation should in the future be less detailed[242], and thus leave 'more flexibility in the means provided for implementing legislation and programmes with a strong territorial impact', then this proposal will certainly correspond to the wishes of regional and local authorities which have legislative competences in implementing EC law.
On the other hand, it is not clear to what extent this proposal goes further than the principle of subsidiarity, which already states that "the form of Community action shall be as simple as possible", and that "the Community shall legislate only to the extent necessary", and "other things being equal, directives should be preferred to regulations [...]".[243] It is furthermore a little bit doubtful whether it should really be for the Commission to introduce more flexibility in the means, given that this is already provided for in the Treaty: Art. 249 EC Treaty clearly says that

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[240] Which seems to be the slightly re-worded version of a minor suggestion made by the Committee of the Regions, see *Opinion of the Committee of the Regions on 'New Forms of Governance: Europe, a framework for citizens' initiative'*, OJ C 144, 1, of 16.5.2001, point 3.4., fourth subparagraph.
[241] It has been proposed to establish a code of conduct for such consultations, which would then take place with the regions having the above-mentioned status, see *Rapport du groupe de travail "Governance à plusieurs niveaux: Articulation et mise en réseau des different niveaux territoriaux" (Groupe 4C)*, available on the governance website.
[242] As is proposed mainly in the section called "Better policies, regulation and delivery".
[243] See the *Protocol on the application of the principles of subsidiarity and proportionality*, point 6.

for the implementation of directives, the choice of form and methods is left to the national authorities, as long as the result is achieved.

The Commission however proposes something else too: It is 'also'[244] in favour of testing whether so-called "target-based, tripartite contracts" could lead to a better implementation of certain EU policies. Such contracts would be drawn up between the Commission, Member States and regional or local authorities designated by these. The central government would of course play a key role in setting up such contracts, and would remain responsible for their implementation. The content of such contracts would be to entrust the designated sub-national authority in the Member States with the implementation of identified actions in order to realise particular objectives defined in "primary" legislation. Arrangements for monitoring would also be provided for in the contract. This approach would concern regulations or directives in fields where sub-national public authorities are responsible for implementation within the national institutional or administrative system.

The limitation of such contracts to fields where sub-national authorities are responsible for implementation under national law, makes it however a tricky task to find out in what way this proposal is supposed to provide these sub-national authorities with more flexibility. On the contrary, couldn't such contractual arrangements lead to a restriction, rather than increased flexibility in the way these sub-national levels implement Community legislation within their areas of competence? Or does the proposal imply that the Member States must be bound by contract, in order to prevent them from centralising competences under the cover of European integration? It is also a little bit surprising that the Commission mentions regional policy as one of the areas where such tripartite contracts could apply, given that this policy area already provides for the partnership principle. Or perhaps it is felt that this principle does not really bring satisfactory results? The working group on "Decentralisation" specifies that partnership within structural funding could be taken as a reference when developing such a contractual approach, but that contrary to the partnership principle, such contracts would be legally binding, and could possibly even be open to judicial review under Article 238 EC Treaty.[245] But the White Paper itself fails to give more details concerning the legal nature of the proposed contracts, or the connection with the partnership principle.

As for the conception of such contracts, the two working groups have indeed proposed different possibilities. While the working group on "Decentralisation" proposes the establishment of legally binding contracts between the Commission (and the Member States, although this does

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[244] Whether this means 'in addition to more flexibility in the means provided for implementing legislation', is not entirely clear.

[245] See *Report from Working Group 3c, Decentralisation, Better Involvement of National, Regional and Local Actors*, available on the governance website, 33.

not necessarily always seem to be assumed) and the relevant sub-national authorities, which would be embodied in secondary legislation and concern a clearly defined subject-matter[246], the working group on "Multi-level Governance" also suggests a model whereby a global contract on a coherent territory would be drawn up, which would allow for a different degree of flexibility for different Member States, according to their respective degree of decentralisation.[247] It seems that the Commission has given its preference to the first-mentioned type of contract. The areas in which the sub-national authorities have the power to conclude such contracts is consequently a matter to be decided according to national law. The central authorities of the Member States will in this case be of crucial importance. The working group on "Decentralisation" even suggests that the Member States must give their express consent to the conclusion of such contracts by the sub-national authorities, whereby the constitutional structure of the Member States would be respected. This shows again how carefully the proposals respect the Member States' internal structures.

6.2.3. The role of the Committee of the Regions

As I have already mentioned very briefly, the White Paper does not address the institutional role of the Committee of the Regions. The Commission merely lists several things that the Committee of the Regions 'should' do. This list includes on the one hand policy-shaping, where the Committee should play a more proactive role and prepare exploratory reports in advance of Commission proposals, and on the other hand the organisation of the exchange of best practice on how regional and local authorities are involved in the preparatory phase of European decision-making at national level. Furthermore, the Commission asks the Committee of the Regions to examine the local and regional impact of certain directives, and to submit a report to the Commission on the possibilities for more flexible means of application.

This leaves the Committee's institutional role entirely unchanged, which is of course not surprising, given that the proposed reform is to take place within the existing Treaties. The institutional proposals aim mainly at a revitalising of the Community method, and they concern mainly the way the institutions work. But even within this framework, it would have been possible to remedy at least one of the weak points that I had identified in Chapter 2, concerning the limited weight attributed to the opinions issued by the Committee of the Regions. Indeed, the

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[246] *Ibidem.*

[247] For this purpose, the group has classified the Member States into four groups, reaching from federal to unitary states. See *Rapport du groupe de travail "Governance à plusieurs niveaux: Articulation et mise en réseau des différent niveaux territoriaux" (Groupe 4C)*, available on the governance website, p. 43.

Committee itself has in a contribution to the governance discussion asked that Commission, Council and European Parliament should be under a duty to explain their reasons if they do not follow the recommendations of the Committee of the Regions.[248] This proposal does not seem to have found its way into the White Paper of the Commission.

On the 20th of September, the Commission and the Committee of the Regions have however signed a protocol on cooperation, which provides for yearly meetings between these two institutions.[249] Furthermore, the protocol puts the Commission under a duty to submit to the Committee of the Regions a list identifying the documents of non-legislative nature on which the Committee could issue an opinion, and to give to the Committee twice a year motivated replies on the fate of the Committee's opinions. The aim of this protocol is to give more weight to the regional dimension in the institutional design of the EU, and it certainly constitutes a more concrete step in this direction than most of the proposals of the White Paper.

7. Conclusions

It almost seems that the Commission somehow lost its eagerness for reform on the way. At least, the proposals specifically aimed at the sub-national authorities turned out to be rather modest, if this is not perhaps even an overstatement. Maybe this is due to the fact that the final White Paper does not go into very much detail on the exact design, conditions and legal nature of the proposed actions, or maybe it is just difficult to get the complete picture in this slightly vague, imprecise and perhaps a little bit embroidered White Paper, in which the proposals sometimes overlap or reappear (no less precise, unfortunately) in different contexts.

At first sight , the White Paper may create the impression that the way the Union is currently working will lead it into an inevitable disaster, and that reform is desperately needed. But if one tries to find the actual content of the proposed reform, it turns out not to be very substantial.[250] And it certainly does not address the "big" questions at all. Or perhaps even the wrong questions. As a journalist put it: "Heart attack? Here's an aspirin."[251]

In short, it can be said that the White Paper turned out to be rather disappointing. Not only it lacks clarity and system as to its form and structure, it also fails to provide the reform proposals that would really address the pertinent questions. At least this seems to be the case for the

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[248] See *Opinion of the Committee of the Regions on 'New Forms of Governance: Europe, a framework for citizens' initiative'*, OJ C 144, 1, of 16.05.2001, point 3.1.

[249] See *Bulletin Quotidien Europe* N° 8053, of 22nd September 2001, 8.

[250] Or perhaps I just didn't find the 'hidden treasure'...?

[251] See *The Economist* of July 28th 2001, 41.

proposals that the Commission made with the manifest intention to combat the increasing gap between the European Union and its citizens by getting more people "at the grass roots" involved through better involvement of sub-national levels in EU policy-making and implementation.

On the other hand, the Commission underlines quite rightly that under the existing Treaty framework, it is the Member States' responsibility to organise themselves internally, and they consequently also decide on the role and powers of their sub-state bodies within their constitutional frameworks. Involvement of such sub-national bodies in decision-making at EU level, and their role in implementing EU law and policies are thus in the first place a matter of national constitutional law. Against this background, reform proposals 'within the existing Treaties' aiming at a greater involvement of sub-state entities in EU policy-making can necessarily only be of a very limited scope. The future will however show whether some of the seemingly modest proposals of the Commission turn out to have a bigger impact on the EU constitutional system, which might at some later stage lead to corresponding Treaty changes. Especially the proposed "target-based, tripartite contracts" involving sub-state levels could in the end effectively contribute to a real strengthening of the role of sub-national entities, just as the partnership did in structural funding. Only this time on a much bigger scale.

General Conclusions

1. What the White Paper contributes to the position of the regions, and to the debate on the future of the European Union

When the Commission announced the preparation of the White Paper on Governance, it said that one objective of the White Paper was to clarify the criteria and conditions for organising EU policy in a more decentralised fashion. Vertical decentralisation, the Commission argued, can contribute to increasing the effectiveness as well as the democratic legitimacy of EU legislation and policy, provided it increases the administrative and social capacity to achieve EU objectives. One of the working groups should thus investigate how governments, administrations, courts and private actors at national, regional and local level can contribute better to shaping EU policy and law in a decentralised manner.[252] A second working group was to investigate and propose mechanisms of co-operation between various levels of territorial government in the EU. It should start from the premise that policy action in a number of fields requires stronger concertation mechanisms between all levels of government, in a system where competences are shared without hierarchical relationships between the levels.[253]

These ambitions were however clearly limited by the stipulation that the proposed reforms should take place within the existing treaties. When presenting the White Paper to the European Parliament[254], Commission president Prodi again underlined the limited scope of the White Paper: It is only the first step in a process of three stages that the Commission has chosen in response to the Nice Intergovernmental Conference, and with a view to ultimately proposing changes to the Treaties. This first stage consists in discussing how European governance can be improved without changing the founding treaties. Or, in Prodi's words: The Commission must put its own house in order before discussing how to rebuild the city.

These limitations certainly did not make the Commission's task easy, and they explain the Commission's manifest reluctance to propose changes that would clearly undermine the existing treaty framework. On the contrary, the Commission repeatedly underlined that any proposed action would have to take place while respecting the constitutional organisation of each Member State. The White Paper thus rests on the conviction of the Commission that much can be done

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[252] See the mandate for Group 3b.

[253] See the mandate for Group 4c.

[254] Romano Prodi to the European Parliament, 4 September 2001.

"simply by changing the way the institutions and the Member States work - applying the existing rules better and more consistently".[255]

At a second stage, however, the Commission will state its position on the "Laeken process". And at the third and final stage, the Commission will then say what substantive amendments it believes should be made to the founding Treaties, while taking account of the opinions expressed in the debate triggered by the White Paper.[256] The White Paper and the discussion it is supposed to provoke should thus ultimately lead to changes in the Treaties, and the White Paper might thus have more important consequences than it actually pretends to have. A very interesting question in this context would be to know how the proposals of the Commission – although they should take place within the existing Treaties – could ultimately lead to changes in the Treaties. By urging the Member States to facilitate the involvement of the sub-national authorities in European policy-making, the Commission makes it plain that the question of decentralisation is for the Member States to decide, and that the White Paper can in this respect only make a modest contribution to the debate on the future of the European Union.

2. Why the White Paper must fail in strengthening the position of the regions

One thing that has certainly become obvious in the foregoing chapters is an apparent contradiction between the limited ways in which the sub-national entities are involved in EU decision-making on the one hand, and their sometimes very important role in implementing and applying EU law and policies on the other. Both the involvement in policy-making and the role in implementing law and policies are in principle determined by national constitutional provisions. For as long as the role of the regions is considered purely a matter of the internal organisation of the individual Member States, EU law can in principle not give the regions a role that goes beyond the role that they have under national constitutional law. It can merely support this role to a certain extent at the EU level, *e.g.* by providing sub-national entities equipped with autonomous powers under national constitutional law with the possibility to directly participate in EU policy-shaping.

The Committee of the Regions and Art. 203 EC Treaty are such ways for the regions to make themselves heard at the EU institutional level. Several problems have however also been pointed out with respect to these mechanisms. The Committee of the Regions may have a high symbolic value, but in spite of a remarkable activity and commitment of the Committee, it does not in

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[255] *Ibidem.*

[256] *Ibidem.*

formal terms have any influence when decisions are taken by the 'legislative' institutions. Also (and this applies even more to Art. 203), it is doubtful whether the diversity of the regions can be adequately reflected in one single body. It can thus certainly be said that institutional law does not really provide satisfactory solutions for taking into account the – sometimes diverging – interests of the regions and sub-national authorities.

In contrast to this, EU law on the other hand imposes obligations on sub-national authorities. The EU is by definition a strongly decentralised legal system, whereby the implementation and application of EU law and policies are in principle incumbent upon the Member States. According to the case-law of the Court of Justice, the duty to apply EU law also binds decentralised authorities of the Member States. Furthermore, where national constitutional law provides the sub-national authorities with law-making competences, these authorities will in principle also be competent for implementing EU law falling within their sphere of competence. Additionally, the principle of supremacy of EU law can have the consequence of limiting the competences of the regions. As a consequence of the obligations imposed by EU law, and in combination with a controversial extension of the fields in which the EU has taken on activities over recent years, these sub-national authorities often find their own competences affected by European law, which in general leads to a limitation of these competences and powers. This in turn has given rise to numerous calls for increased involvement of such sub-national bodies in EU policy-shaping and decision-making, as well as for less detailed European legislation, and for a clearer division of competences between the EU and the Member States. A certain loss of powers is of course also felt by the Member States, which also find that EU law impinges upon their competences in many ways. But unlike the Member States, the regions and sub-national authorities do not have effective possibilities to influence the content of EU legislation by which they will be bound.

This contradiction has been somewhat mitigated in structural funding by the partnership principle, by virtue of which the regions are involved in both the drawing up and the implementation of the programmes. It has been said that the principle of partnership provided the regions with a role that they did not have under EC institutional law. Indeed, the principle of partnership allowed for the regions to directly participate in European decision-making, if only in the limited area of structural funding.

In general, however, the Treaties do not accord a formal status to sub-national levels independently of the Member States. The founding Treaties have been concluded as international agreements between the Member States, and it is considered a matter for the Member States to organise themselves internally as they please. This corresponds to what has sometimes been called the principle of neutrality or "blindness" of Community law towards the internal structure

of the Member States. According to this principle, the Treaties do not take into account the internal organisation of the Member States. The role that national constitutional arrangements attribute to the sub-national levels of the Member States will thus in principle be of no relevance to European law.

This notwithstanding, there seems to have been a general tendency within several Member States towards more decentralisation, and some of the Member States have adopted, or are adopting, more decentralised structures, be it in the form of 'devolution', 'regionalisation', or even by changing to a federal structure. In this sense, powers and responsibilities are being moved away from the central authorities of the state, and towards sub-national levels in varying degrees, according to the model chosen by the respective Member States. As a result, there is now a variety of state structures with different levels of decentralisation throughout the European Union.[257]

Especially against the background of increased decentralisation at the national level, it seems that the importance of the regions in the European structure is not adequately reflected at the EU 'institutional' level. But because it is considered entirely the Member States' responsibility to organise themselves internally, the degree of involvement of sub-state levels in European policy-making is in principle a matter for constitutional and administrative law of the respective Member States. The Commission has furthermore confirmed this view in its White Paper on European Governance. The proposals made by the Commission are based on respect for the principle of subsidiarity and the institutional structure of the Member States.[258] The Commission accordingly cannot "invade the sacred organisation of the Member States".[259]

Although European law does provide for a (limited) number of ways in which the regions can be involved at European level, such as the Committee of the Regions, the Council, or (in structural funding) the partnership principle, these mechanisms depend on the degree of participation allowed by national structures. National mechanisms for participation of sub-national levels are thus the basis of such participation at the European level. With respect to the German Länder, for instance, this means that the Treaties respect the Länder and regions only to a very limited extent, and the Länder can in principle make themselves heard at the European level mainly through the central government.[260]

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[257] But also, of course, highly centralised states.

[258] President Prodi has also confirmed this when he presented the White Paper to the European Parliament on September 4th, in his speech "The European Union and its citizens: a matter of Democracy".

[259] Prodi's words when responding to some of the criticisms after the presentation of the White Paper to the European Parliament.

[260] See Calliess, Innerstaatliche Mitwirkungsrechte der deutschen Bundesländer nach Art. 23 GG und ihre Sicherung auf europäischer Ebene, in: Hrbek, (ed.), *Europapolitik und Bundesstaatsprinzip – Die "Europafähigkeit" Deutschlands und seiner Länder im Vergleich mit anderen Föderalstaaten*, 13, at 26.

It can thus be argued that it is not possible to improve the position of the regions within the existing Treaty framework. The first reactions of the European Parliament to the White Paper are indeed contradictory. While some members of the EP seem quite happy about the importance given to the regions,[261] others are disappointed because they think the White Paper does not adequately reflect the role of the regions.[262] In my first analysis[263] of the relevant proposals in the White Paper, I have come to the conclusion that the proposed reforms are actually quite modest, especially if they are to be achieved within the existing Treaty framework.

In particular, the proposals relating to increased consultation of regional and local governments seem rather unpretentious. For one thing, such sub-national entities are to be consulted on almost the same footing as organised civil society in general. Furthermore, the systematic dialogue proposed by the Commission, which is probably meant to go beyond this 'normal' consultation, is at the same time limited to associations of regional and local entities, and thus seems to exclude the consultation of individual regional and local bodies. The proposal called "systematic dialogue" will thus not necessarily lead to an enhanced dialogue between the Commission and individual regions.

The proposals relating to "target-based tripartite contracts" as a means for more flexible implementation seem to offer a little more potential. As has already been seen with the partnership principle in structural funding, direct contacts of the Commission with sub-national entities can over time lead to a strengthening of the position of the regions. The Commission underlines however that the Member States will of course also play a key role in such contracts, in that they have to provide the framework for regional participation. It is after all the Member States who decide in which areas their regions are to be given the necessary powers to conclude such contracts with the Commission. And it is in principle also national law that determines the means available to such regions in achieving the targets set by the contracts.

Another question relates to the exact nature and content of such contracts, and in particular the relationship between the contracts and the relevant Community legislation. This is unfortunately not specified further in the White Paper. Working Group 3b (which was obviously the main source for this proposal), specified the following: The suggestion is that EU policy objectives and essential elements be clearly defined in "framework" directives or simplified regulations. However, the instruments to be used and the concrete actions to be undertaken in order to implement these objectives - also laid down in such legislation - could be implemented by a provision allowing for the conclusion of a contract between the Commission and the

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[261] Such as Andrew Duff, a British member of the EP.

[262] Such as Nelly Maes, a Belgian member of the EP.

[263] See Chapter 3.

decentralised public entities. Once a satisfactory contract is concluded, and only for as long as it is valid, these implementation provisions would be waived and substituted by the contract. The contractual approach will thus be an alternative to a default mechanism of implementation. Hence, those entities not engaging in contractualisation will have to follow the implementation provided for in the legislation.[264] It is also underlined again that these mechanisms would of course have to fully respect the constitutional arrangements of involved Member States[...]. Thus, the intention is by no means to bypass the national level, rather to increase the flexibility end effectiveness, and to allow for tailor made differentiated solutions to be developed [...].[265]

A lot of weight is thus given to flexible implementation and less detailed legislation. Legislating in less detail at the EU level is indeed recognised as one of the instruments accommodating diversity. A 'lighter regulatory touch' , *e.g.* through minimum standards, mutual recognition, or outline legislation, can allow the Member States to maintain or introduce national rules better fitting local conditions, which is not possible under highly detailed and encompassing legislation applied throughout the Union.[266]

Less detailed legislation will however only translate into more flexibility in the implementation at the regional and local level to the extent that the Member States allow their regional and local bodies to have implementing powers. The same goes for the proposed "target-based, tripartite contracts". Such contracts are supposed to be concluded between the Commission, the Member States, and the regions and localities designated by the Member States. The contracts will thus of course not automatically lead to a shift of powers towards the decentralised levels. Rather, they presuppose that the sub-national authorities are already equipped with powers in the relevant fields under the national constitutional arrangements, or that they are specifically authorised by the central government to participate in such contracts. It would in this context also be interesting to know if such contracts could not perhaps even lead to a limitation of the autonomy of the sub-national authorities concerned. But certainly this was not the idea behind the proposal.

3. A White Paper for nothing?

The foregoing criticisms might have given the impression that the White Paper is really only empty words, and perhaps even a waste of time. But this would be underestimating the potential of the proposals made by the Commission in the White Paper. There are reasons to believe that

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[264] See the report of working group 3b, 33.

[265] *Ibidem.*

[266] See Philippart/Sie Dhian Ho, Flexibility and Models of Governance for the EU, in: De Búrca/Scott (eds), *Constitutional Change in the EU – From Uniformity to Flexibility*, 299, at 319 *et seq.*

the seemingly modest changes proposed by the Commission might turn out to be more important than they seem at first sight.

For one thing, it has been seen with the partnership principle in structural funding that a strengthening of the position of the regions seems to have taken place over the years. This may not necessarily be a legally sanctioned position of the regions, but perhaps more a *de facto* reinforced position. It is nevertheless quite possible that the "target-based tripartite contracts" proposed by the Commission could have a similar effect in the policy areas where they are applied. Furthermore, and unlike the partnership principle, the Commission seems to picture such contracts as legally binding and enforceable. It can thus be assumed that when a Member State has agreed in a contract to concede certain implementation powers to the sub-national level, this should give the respective sub-national authorities a possibility to obtain respect for these powers, be it against the Member State, or against the Commission.

Another reason why the White Paper could have repercussions going beyond the actual proposals is that it repeatedly urges the Member States to decentralise more within their territory. This is of course a political rather than a 'legal' plea of the Commission, given that under the current legal situation there is not very much to do in order to achieve more decentralisation, unless the Member States are in favour of this. Like the White Paper in general, this plea might however trigger far-reaching discussions, not only about the future of the European Union in abstract terms, but perhaps also about the question how powers should be exercised within the respective Member States.

Member States that are already substantially decentralised might find that finally some of the responsibility for linking the sub-national with the supranational level is taken off their shoulders. And especially in federally organised states, it might seem nothing but normal that the component units of the state should be able to deal directly with the Commission, and to be recognised even at the EU level as actors having their own role to play. In other Member States, this might however seem more unusual, and it is not yet possible to say what consequences the Commission proposals might have on more centralised Member States. Perhaps it is even felt that the Commission in its capacity as policy executor is trying to intrude into the Member States' very own domain of organising themselves internally, which is considered so far as an area where the European Union clearly has no 'competence'.

At any rate, the Commission hopes to have triggered a new process with this White Paper - a process that is to be seen in the wider context of the debate on the future of Europe. The Commission has expressly linked the White Paper to that debate.[267] It hopes to have provided

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[267] See page 32 *et seq.* of the White Paper.

principles that should guide the Union in organising the way it works and in pushing reforms forward within the current Treaty, but that should also provide markers for the debate on the future of Europe. In relation to the sub-national levels, the Commission suggests that there is potential for greater use of the skills and practical experience of regional and local actors already under the present treaty framework, even though this is in the first place an issue for national authorities according to their national constitutional and administrative arrangements.

The Commission however also underlines that the proposed actions are first and foremost a question of political will, and that not only the European institutions but also the Member States and the citizens ought to contribute their share.[268] And even the Commission recognises that only the wider process of 'constitutional' reform will bring about real changes – changes that require Treaty reform.

[268] See page 24 of the White Paper.