The Lisbon Treaty and the New Powers of Regions

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A. Introduction

The Treaty signed in Lisbon on 13 December 2007 represents the last step of the reform process of the European Union Treaties which began six months earlier, after the negative results of the referenda in France and in the Netherlands and the demise of the Treaty Establishing a Constitution for Europe (Constitutional Treaty). Therefore, the new Treaty has marked the end of the 'period of reflection' launched by the European Council in June 2005, following the failure to complete the ratification of the European Constitution. The aim was to "enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties."[1]

It is too early to judge the formal and substantive architecture of the new Treaty. Moreover, the negative result of the Irish referendum will probably cause a delay in the ratification process and, therefore, in the entry into force of the Treaty itself.[2] Anyway, it is possible, from now on, to propose some evaluations *de jure condendo* about its most significant provisions and amendments to the current EU institutional structure.

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1 Brussels European Council, 16-17 June 2005, Presidency conclusions, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/85349.pdf. On the Lisbon Treaty, *see* G. Barrett, *"The King is Dead, Long Live the King": the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments*, 2008 ELR 66; P. Craig, *The Treaty of Lisbon: Process, Architecture and Substance*, 2008 ELR 137; L. Daniele, *Trattato di Lisbona: Addio all'Idea Federalista per Superare gli Ostacoli Degli Euroscettici*, 2007 Guida al diritto. Diritto comunitario e internazionale 2; P. Kiiver, *Lisbon and the Lawyers – Reflections on What the EU Reform Treaty Means to Jurists*, 14 MJ 337 (2007); B. Nascimbene & A. Lang, *Il Trattato di Lisbona: l'Unione Europea a una Svolta?*, 2008 Il Corriere Giuridico 237; F. Pocar, *Gli Obiettivi dell'Europa nel Nuovo Trattato: un Compromesso tra Luci e Ombre*, 2007 Guida al diritto. Diritto comunitario e internazionale 2; P. Ponzano, *Le Traité de Lisbonne: l'Europe Sort de sa Crise Institutionnelle*, 3 RDUE 569 (2007); J. Ziller, Il Nuovo Trattato Europeo (2007).

2 The consequences of the Irish referendum on the ratification process are still not clear. The Brussels European Council, 19-20 June 2008, stated only that "more time was needed to analyse the situation" and that the Heads of State and of Government will "come back to this issue at its meeting of 15 October 2008 in order to consider the way forward." The Conclusions are available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf.

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The specific aim of this article is to investigate the provisions of the new Treaty related to the functions of Regions in the context of European Union Law. In this respect, in the last twenty years Regions have progressively claimed a greater role in preparing and implementing EU policies, and they have obtained some important results, though there has never been a real agreement on what this effective role for Regions might actually be. That is because, after the fading of enthusiasm for a possible establishment of a 'Europe of the Regions' stemming from the Maastricht Treaty innovations, it is time to reflect on this subject in a deeper and more comprehensive way.

To this end, the analysis will be developed by means of five key-words: recognition; consultation; representation; justiciability; subsidiarity. As it will be further explained, these concepts summarize the main issues linked to the role of the Regions within the EU. For each of these issues the article will focus on the demands submitted by regional authorities during the last years and it will try to clarify if they have been granted**,** or not, by the new Treaty. In particular, the new powers gained by the Committee of the Regions will be studied in depth, namely its right to refer directly to the Court of Justice of the European Communities to defend its own prerogatives or in case of a breach of the principle of subsidiarity. Finally, some comments will be developed in order to evaluate if, after decades of *lobbying* at the EU level, after the experience of the European Convention and the results temporarily obtained with the signature of the Constitutional Treaty, the European Regions can be satisfied with the reforms introduced by the Treaty of Lisbon concerning their role within the European Union system.

B. The 'Regional Mobilization' from the Nice Treaty to the Lisbon Treaty

To better understand the main innovations introduced by the Lisbon Treaty linked to the functions of Regions in the European Union institutional architecture, it is useful to go back to the involvement of the Regions in the EU Treaties reform process of the last six years.

In recent years several Member States have devolved functions to Regions which have taken over a lot of competencies originally performed by the organs of the central state. At the same time, though, the functions of the EU have significantly increased, particularly after the Single European Act and the Maastricht Treaty. This has allowed national governments, as representatives of their states in the Council, to negotiate and adopt legal acts on matters which, in some countries, had constitutionally been devolved to Regions, such as agriculture, regional development and environment. Consequently, Regions argue that their autonomy is progressively being eroded by European legislation that has infringed upon their functions. The EU is increasingly perceived as affecting the constitutional powers of Regions, without increasing their role in the EU decision-making process in return. These considerations have led to a 'regional mobilization': Regions request the introduction of mechanisms to enhance their

ability to participate and have an influence on EU policymaking. They have also claimed the enforcement and the formal acknowledgment of their role in the EU decision-making process.

The first, concrete result of this mobilization has been the White Paper on European Governance published by the European Commission in July 2001. In this document the Commission expressely brought forward the issue of regional functions in the EU into the more general debate about the reform of the EU governance, suggesting that the European Union would be closer to its citizens only if regional institutions were involved more actively. The White Paper proposed three instruments in order to make Regions able to participate in EU policymaking. First, the Commission stated that more consideration should be given to regional interests in the development of its proposals, by means of a "systematic dialogue with European and national associations of regional government," including greater cooperation between these associations and the Committee of the Regions. Then, the White Paper proposed a greater flexibility in the implementation of EU acts characterised by a "strong territorial impact." Finally, the European Commission noted that a greater recognition of the territorial impact of EU policies like transport, energy and environment was essential, and argued that only by acknowledging the demands of the Regions in the management of these policies, the EU decision-making process would become more democratic and clear.

The Laeken Declaration of 2001 partially responded to the proposals of the Commission: it stated that a "renewed Union" needed to "clarify, simplify and adjust the division of competence between the Union and the Member States."[3] Then, the Declaration called for a year-long Convention on the future of Europe to be convened in particular to decide how the division of competencies could be more transparent and how the principle of subsidiarity should be applied, including the question of allowing Regions to undertake day-to-day administration and implementation of EU policies where appropriate. The sub-national authorities have taken advantage of the open and public method of the Convention to submit many proposals to gain powers within the EU. This has probably been the ever strongest moment of regional mobilization at EU level, which had not been as active during the Intergovernmental Conferences leading to the Amsterdam and Nice Treaties.

Two comments can be made about this strong regional activism during the European Convention. Firstly, the interests of Regions have been represented not only by the Committee of the Regions, but also by other associations, so that this representation has been fragmented among all these subjects. This is a novel element if compared with the previous Intergovernmental Conferences, when regional actors were represented exclusively by members of the Committee of the Regions. Such a fragmentation brought as a consequence the production of an excessive number of documents. Often, the same considerations were developed in various documents. This situation created also a sort of rivalry among the

[3] The Declaration is annexed to the Presidency Conclusions, European Council Meeting in Laeken, 14-15 December 2001 and it is available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf.

different associations and between them and the Committee of the Regions[4] with a weakening of the unitary position and interests of the European Regions. Secondly, the participation of Regions was limited to the observer status granted to the Committee of the Regions. The Regions thus entered the Convention in a weak and marginal position and they were not equal to the representative of the European Parliament, of the Commission, of the Member States and even of the candidate countries. Instead, the Committee remained at the same level of the less active (at least from the point of view of mobilization and debate) Economic and Social Committee and Ombudsman. A formal session concerning the role of Regions in EU governance was convened too late, after the first sixteen articles of the future Constitution draft, dealing with the division of competences between EU and Member States, had already been issued.

Apart from these negative aspects, the regional mobilization within the European Convention has been fundamental in order to increase the functions of Regions in the EU legal system. In fact, as we will see, the Lisbon Treaty has substantially confirmed several innovations introduced by the European Convention and by the IGC which approved the Constitutional Treaty.

C. The Innovations of the Lisbon Treaty

I. Recognition

Since the beginning of the European Convention, Regions have requested that the new Treaty contains an explicit reference to the existence and the role of regional authorities within the EU. The very first draft of the Constitutional Treaty published in February 2003 by the *Praesidium* of the Convention, satisfied only partially this request. In fact, it expressely mentioned Regions in article 9, which read that

> The Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.[5]

This meant that the regional level of government was not considered from a perspective of enhancing its value in the EU institutional framework, but as an expression of the freedom of every Member State to decide freely its own political and territorial organisation. Furthermore, there was no reference to Regions in the articles related to the principle of subsidiarity and to the division

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[4] *See* the Contribution submitted by the Observers of the Committee of the Regions and Members of the Convention, CONV 195/02, of 17 July 2002:

> The CoR would like to reiterate its exclusive legitimacy as institutional discussion partner for the local and regional authorities of the Union and it rejects any attempt to replace it with various structures which do not represent all local and regional authorities.

[5] Praesidium (CONV), 528/03 of 6 February 2003.

of competences between the EU and its Member States. Then, following some specific demands, the European Convention reached a general agreement on the necessity of considering in the first articles of the new Treaty the regional dimension and powers at EU level. The result was a limited amendment of article 5, first paragraph, where it was affirmed that the Union shall "respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

Now, this text has been reproduced in article 4, paragraph 2 of the Lisbon Treaty. It completes the current text of article 6, paragraph 3 of the the EU Treaty – introduced by the Maastricht Treaty – which simply affirms that the European Union "shall respect the national identity of its Member States." So, the Lisbon Treaty gives a more precise definition of the national identity in order to consider also the regional and local communities. Moreover, the Preamble of the Charter of Fundamental Rights of the European Union[6] – which according to article 6 of the new Treaty has the same juridical value as the Treaty itself – states that the Union contributes to the "preservation and development of these common values while respecting […] the national identities of the Member States and the organisation of their public authorities at national, regional and local levels."

Through these two combined provisions the EU primary law would not only recognize Regions in an indirect way as a consequence of the right of every Member State to its national self-organization, but it would directly acknowledge the existence and dignity of regional communities at EU level as well as the values of autonomy and self-governance. Thus, the new Treaty considers the regional and local dimension as an integral part of the complex institutional building of the EU.[7] This does not mean that the new article would constitute an interference of the EU law in the internal affairs of Member States. The general principle that the former cannot influence either the constitutional and political organizations of the latter, or their territorial articulation, would continue to have full application. Nevertheless, the explicit reference to the regional and local autonomies represents clear recognition given by the EU of the importance of decentralized legislative and administrative structures in order to enhance democracy and participation in the EU.

In this respect, we have also to consider article 5, paragraph 3 of the Lisbon Treaty which gives a new content to the subsidiarity principle, authorizing the EU to act in the matters which do not fall under its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.[8] Also this article is an heritage of the Constitutional Treaty; if the Lisbon Treaty enters into force, the involvement of the regional level will be explicit, alongside the central organs of each Member State, in the application of this principle.

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6 The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000, but it is not legally binding.

7 J. Ziller, La Nuova Costituzione Europea 28 (2004).

8 The main innovations linked to the principle of subsidiarity will be analysed in section B.V.

II. Consultation

Like the Constitutional Treaty, also the Lisbon Treaty has taken into consideration the proposals linked to the debate about the European governance started by the European Commission with its White Paper of 2001. To this end, the new Treaty has introduced in the primary law some of the innovations in the decision-making procedures proposed by the Commission in previous years.

Before analyzing the innovations introduced by the Lisbon Treaty it must be said that in the last years the debates on the reform of the Treaties and on the European governance have been carried out separately. The object of the former, from the establishment of the European Convention to the signature of the new Treaty, has fundamentally been the institutional structure of the European Union and the separation of competencies between the EU and its members. By contrast, the debate on governance has been centred more on factual, almost political, aspects and in particular on the instruments enabling the subjects involved in EU policy making (not necessarily belonging to governmental networks) to contribute to the elaboration and the application of the EU policies. The discussions on the EU governance, therefore, are centred on the functioning of the various networks connecting all different subjects, like Regions, which act and cooperate at the supranational level.

Nevertheless, the EU institutional structure and the EU governance can be viewed as complementary. In fact, the first one clarifies the juridical structure in which the supranational institutions, the national governments and the other actors participate in the EU decision-making process, whereas the second one develops the practical methods of this cooperation. The fact that with the Lisbon Treaty the primary law has included some principles established in the context of the EU governance is a further proof that the two aspects are linked.

The Lisbon Treaty acknowledges the juridical value of the new "culture of consultation and dialogue" promoted by the European Commission in its White Paper of 2001 and in its following communications. In these documents the Commission recognizes that the efficiency of a policy depends in large part upon the participation of its addressees. According to this culture of consultation European institutions, in particular the Commission, committed themselves to take more into account the interests and the demands by the various subjects applying EU policies. From this perspective, it was necessary to "enhance the culture of consultation and of dialogue by all the European institutions"[9] through a code of conduct setting minimum standards, focusing on what to consult on, when, whom and how to consult in order to reduce the risk of the policy-makers considering only some partial aspects of an argument or of particular groups getting privileged access. Finally, in the communication of December 2002: "*Towards a reinforced culture of consultation and dialogue*", the European Commission defined the concept of consultation as "those processes through which the Commission wishes to trigger input from outside interested parties

[9] Commission White Paper COM(2001) 428 of 25 July 2001.

for the shaping of policy prior to a decision by the Commission."[10] It is worth observing that among the subjects considered by the Communication there were also the regional authorities: "consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations" (p. 4).

The principle of cooperation and consultation is recognized in several parts of the new Treaty. First of all, article 11, paragraph 3 of the Treaty on European Union states that the European Commission "shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent." Then, according to the second paragraph of the same article, "The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society." These provisions develop the principle – introduced in the Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam – of dialogue between EU institutions, civil society and associations representing the various interests involved with the EU policies.[11]

It is true, though, that in article 11 we do not find any explicit mention of regional autonomy, so that it seems that the contents of the Communications by the European Commission on the structured dialogue and the reinforced consultation have not been fully received by the reform Treaty. Furthermore, the Committee of the Regions is not given any new, strengthened role in the context of the 'pre-legislative procedures'. On the subject, between 2001 and 2005 two Protocols of cooperation – which from a juridical point of view are not binding – were signed by the European Commission and the Committee of the Regions in order to enhance the role of the Committee both in the adoption of the EU acts, and in the development of the principles of good governance exposed in the White Paper. Particularly relevant is point number eight of the Protocol of 2005 which tries to promote a more active role of the Committee in the preparation of EU policies. For example, the Commission can ask the Committee to adopt studies on the impact of its proposals on the regional and local autonomies; these opinions will be examined and discussed by the Commission. The aim of such methods of cooperation is to give the Commission a broader vision about the effects of its proposals.

The inclusion of some of these measures in the new Treaty would have undoubtedly conferred a stronger role to the Committee of the Regions in the 'pre-legislative' stages in the EU decision making process. On the contrary, the provisions of the Protocols have not been transferred in the text of the Treaty, so that they will continue to be not binding for both the Commission and the Committee. Some authors have proposed treating associations of regional authorities at European level like the "representative associations" of article 11.

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[10] Commission Communication COM(2002) 704 of 11 December 2002.

[11] Article 9 of the Protocol states that

> Without prejudice to its right of initiative, the Commission should, except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents.

In other terms, this concept should make reference to those organizations which do not represent civil society, like those representing territorial communities.[12] Therefore, only through this broad interpretation of article 11 it would be possible to consider the principles of consultation and of participative democracy guaranteed by the Treaty. A more explicit acknowledgement of the regional dimension in the procedures of consultation is made by the new article 2 of the Protocol on the application of principles of subsidiarity and proportionality. The text of this article is the following:

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

In the Protocol attached to the Amsterdam Treaty the same concept was expressed using the conditional tense: it was written that the Commission "should consult" This meant that the Commission was not obliged to actually put into practice the consultations with the parties involved; this was subject to its discretionality. Instead, the use of the verb 'consults' has given the consultations a binding value. So, the Commission will have to consider the opinions expressed by the organisations representing civil society and by regional institutions about a EU act proposal. According to article 2 of the Protocol as modified by the Lisbon Treaty, the European Commission will be obliged to consult regional authorities.

The reference to regional dimension in the new version of the Protocol is an important example of the enhancement of the role of Regions in the Lisbon Treaty. Nevertheless, two limitations risk annulling the principle of cooperation. First of all, according to article 2 of the Protocol, the consultations must be developed only for the proposals of legislative acts. It is true that article 11, paragraph 3 of the Treaty reads that the territorial communities can be consulted also in cases other than legislative procedures. This is only facultative, though, and this norm does not impose any obligation in this sense on the EU institutions. Secondly, article 2 contains an ambiguous expression: the Commission makes the consultations "where appropriate". This means that it has a considerable discretion on deciding whether to consult regional authorities. One could even conclude that these limitations reduce the principle of consultation to a mere formal obligation.

Nevertheless, this risk is unlikely. The discretionality of the Commission will be limited because of the right, recognized to the Committee of the Regions by the new Treaty, to resort to the European Court of Justice in order to protect its own prerogatives. The Committee could ask the Court to annul an act not only if the regional authorities have not been previously consulted, but also if the Commission has not given a reason in case of lack of consultations. In fact, the duty to give such a reason is explicitly stated by article 2 of the Protocol. For this purpose, it will be necessary to clarify if the Commission's duty of motivation recurs only when consultations are not held for reasons of extraordinary urgency, or also if the Commission simply deems unnecessary the involvement of Regions.

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[12] *See* F. Priollaud & D. Siritzky, La Constitution européenne. Texte et commentaires 136 (2005).

In conclusion, this right awarded to the Committee of the Regions can be viewed as a useful measure to guarantee the European Commission's strict respect of the provisions on the consultation of Regions.

III. Representation: The Committee of the Regions

The Committee of the Regions,[13] established by the Maastricht Treaty, is composed of regional and local representatives in order to "enable regional and local bodies to participate […] in the decision-making process of the European Union."[14] The Nice Treaty has amended article 263 of the Treaty establishing a European Community in the sense that it requires the members of the Committee to "hold a regional or local authority electoral mandate" or to be "politically accountable to an elected assembly." According to article 265 of the EC Treaty, the Committee must be consulted by the Council or the Commission if the Treaty so provides, that is in relation to education, culture, public health, cohesion and guidelines for trans-European networks. The Committee can also issue an opinion on its own initiatives when appropriate. In any case, it always has only a consulting function.

The Committee has acknowledged the inadequacy of its own role. During the previous intergovernmental conferences for the revision of the Treaties, it strongly demanded an upgrading of its functions within the institutional system in order to gain a more relevant role in the EU decision-making process. As a premise, we can observe that the internal organisation of the Committee of the Regions is not homogeneous, but it is mixed, with representatives of both regional and local institutions.

It is true that the functions and the competencies of the several regional and local institutions differ among Member States and that multiformity is a characteristic of the territorial autonomies, so that the heterogeneous membership of this organ can be considered inevitable. Nevertheless, this composition introduces an excessive fragmentation in the works of the Committee where it is difficult to find a common position which takes into account the interests of both regional and local actors. The demands of the former, which in their country have relevant normative functions, are different from the demands of the latter, which operate in more restricted areas and have only some limited administrative powers. Due to this uneven composition of the Committee a compromise must always be found, and the adoption of opinions and recommendations is often long and

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[13] On the Committee of the Regions, *see* J. Bourrinet (Ed.), Le Comité des Régions de l'Union européenne (1999); A. M. Cecere, *La Dimensione Regionale Della Comunità Europea*. *Il Comitato Delle Regioni*, *in* L. Chieffi (Ed.), Regioni e dinamiche di integrazione europea, 175 (2003); T. Cole, *The Committee of the Regions and Subnational Representation to the European Union*, 12 Maastricht Journal of European and Comparative Law 49 (2005); P. A. Féral, Le Comité des Régions de l'Union Européenne, du Traité de Maastricht au Traité d'Amsterdam (2004); A. W. Pankiewicz, Realtà Regionali ed Unione Europea: il Comitato delle Regioni (2001); L. H. Rancho, El Comité de las Regiones: su Función en el Proceso de Integración Europea (2003); A. Warleigh, Committee of the Regions: Institutionalizing Multi-Level Governance (1999).

[14] Committee of the Regions, Opinion of 17 May 1994, paragraph 4.

complex.[15] Strangely enough, though, this matter has never been challenged by the Committee itself. It has never considered in its demands the problem related to its composition.

Instead, the main demands proposed by the Committee at the European Convention have been the following: the acknowledgement of its status of institution and not only of organ, as is stated in the current text of the Treaty; the right to submit written and oral questions to the European Commission; the faculty to participate in the meetings of the Council if the latter discussed items for which the Committee's opinion must be obtained in accordance with the Treaty.[16] All these demands were inspired by the will of the Committee to perform more relevant functions in the future. Nevertheless, it has also asked for a more effective consulting power.[17] In order to reach this goal it has proposed to increase the number of domains where it must be consulted with an inclusion of all the issues where the regional administrations usually exert some competencies within the Member States, such as agriculture, research and technological development; introduce the duty, for the EU institutions which adopt an act without having accepted the previous Committee's opinion, to justify the reasons for this discrepancy.

None of these demands has found place in the Constitutional Treaty. In the new Treaty there will not be any fundamental modifications for what concerns the composition and the functions of the Committee, but only some limited amendments to the current text of the Treaty. Article 300, after having clarified the consulting functions of the Committee and the rules for its composition, states that

> The rules […] governing the nature of the composition of the Committee shall be reviewed at regular intervals by the Council to take account of economic, social and demographic developments within the Union. The Council, on a proposal from the Commission, shall adopt decisions to that end.

It is worth noting that this article does not require the consultation of the Committee of the Regions before the Council adopts a decision. This is another element of weakness of the Committee if compared to the institutions of the EU.

Article 305 introduces three amendments to the current formulation of the Treaty:

- the number of representatives per country will no longer be fixed in the Treaty. It is the Council of Ministers, unanimously deciding on a Commission proposal, which will adopt a decision regarding its composition. This disposition too, is not completed by the provision of a necessary opinion by the Committee before the adoption of the act. Moreover, it reserves to the Governments of the Member States the final decision about the composition of the Committee

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15 A. Warleigh, *supra* note 13, at 39.

16 *See*, *inter alia*, the Contribution from the six observers to the Convention: *The Committee of the Regions and the Future of the European Union*, Brussels CONV 494/03 of 17 January 2003.

17 *See* Committee of the Regions Opinion, *The Participation of the Committee of the Regions to the Structured Debate on the EU Reform*, 3 October 2001.

and this is not a progress towards the enhancement of the institutional role of the Committee;

- the term in office of the members of the Committee increases from four to five years, to be in line with those of the Parliament and the European Commission. In this way the institutional balance within the EU is increased, because the office of all the institutions and organs will have the same length;
- the European Parliament receives the power to summon the Committee of the Regions and moves into the ranks of the institutions which must consult it. For the Parliament, consultation of the Committee has been until now only a possibility, even if widely used. This innovation effectively strengthens the inclusion of the Committee in the institutional structure of the EU.

By contrast the Lisbon Treaty, as well as the Constitutional Treaty, have not increased the number of domains where an opinion of the Committee is necessary.

It is, therefore, evident that neither the Constitutional Treaty, nor the Lisbon Treaty have introduced any significant amendment in the composition and functions of the Committee within the decision-making process.

IV. Justiciability – The Right of Access to the European Court of Justice

The ability of Regions to challenge the legality of an EC act before the Court of Justice has been one of the fundamental demands proposed during the recent IGCs by the Committee of the Regions and other associations representing Regions. Until now, nevertheless, neither the Committee, nor the regional authorities have been accorded a right of privileged access to the Court of Justice for the annulment of a Community act *ex* article 230 of the EC Treaty. This issue must be analyzed taking into consideration two aspects: the concept of Regions as legal persons and the possibility for a Region to be considered as a privileged applicant.

On the first point, the jurisprudence of the EC Judges is clear in the sense of according the Regions the quality of legal person once this personality has been previously acknowledged by their national laws.[18]

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[18] Advocate General Lenz in *Joined Cases* 62 *and 72/87, Exécutif Régional Wallon and Glaverbel v. Commission*, [1988] ECR 1573, at 459

> In principle, the admissibility of the application of the Exécutif régional wallon cannot be called in question either. It, too, must be regarded as a legal person within the meaning of the second paragraph of Article 173 of the EEC Treaty.

See also the Court of First Instance, judgement of 30 April 1998 in *Case T-214/95, Het Vlaamse Gewest v. Commission*, [1998] ECR 1717, at 328:

> The Flemish Region is therefore not entitled to bring proceedings pursuant to the second paragraph of Article 173 of the Treaty. By contrast, since it has legal personality under Belgian national law it must, on that basis, be treated as a legal person within the meaning of the fourth paragraph of Article 173 of the Treaty.

By contrast, the ability of Regions to be considered as privileged applicants in the *locus standi* before the EC Judges is a more problematic issue. In its jurisprudence the Court of Justice denies the inclusion of territorial authorities in this category. According to the Court, the concept of 'Member State' must be identified with the central government of the State itself, to the exclusion of any extensive interpretation comprehensive of the regional governments. In an Order of 1997 the Court clarifies the notion of 'Member State' as follows:

> It should be noted that it is apparent from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of Regions or autonomous communities, irrespective of the powers they may have.[19]

This means that, according to the European Court, Regions cannot be viewed as privileged applicants and can only bring an action for annulment as legal persons within the meaning of the fourth paragraph of Article 230 TEC. So, these public authorities, which express a collective interest and in certain cases have even a legislative power, are considered at the same level as a legal person of private law.[20] If they want to ask the Court to annul a decision addressed to another person, they have to prove that this decision concerns them directly and individually.[21] This situation could change only by the means of a modification of article 230 of the

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[19] Order of 21 March 1997 in *Case C-95/97*, *Région Wallonne v. Commission*, [1997] ECR 787. The position of the Court is inspired by the concern about not undermining the institutional balance provided for by the Treaties and to avoid situations in which different authorities from the same Member State directly oppose each other in direct actions before the Court. On this issue *see* O. Porchia, *La Legittimazione Attiva Degli Enti Pubblici Territoriali nei Ricorsi per Annullamento Degli Atti Comunitari*, 2000 Diritto dell'Unione Europea 337; P. Van Nuffel, *Région Wallonne v. Commission*, 1998 Col JEL 675; J. Scott, *Case 95/97. Region Wallonne v. Commission of the European Communities*, 1999 CMLRev 231.

[20] Most cases initiated by Regions involve decisions addressed to another person, so that they can challenge these acts only if they are of direct and individual concern to the regions and this is not easy to prove. In the Order of 16 June 1998 in *Case T-238/97*, *Comunidad Autonoma de Cantabria v. Council*, [1998] ECR 2273, centered on the challenge by a regional authority of a Regulation adopted by the Council, the Tribunal of First Instance recalls the previous case law according to which an association able to promote collective interests cannot be considered individually wronged by an act if this does not concern specifically the association itself. The Tribunal stated that this was not the case: the Region was considered having only a generic interest based on the socio-economic consequences of the regulation on its own territory. *See also* the Judgement of the Court of Justice of 2 May 2006 in *Case C-417/04*, *Regione Sicilia v. European Commission*, [2006] ECR 654, where the Court rejected as inadmissible the Regione Sicilia's action for annulment of a Commission Decision relating to the cancellation of the aid granted to the Italian Republic by previous Commission Decision concerning the provision of assistance by the European Regional Development Fund as infrastructure investment in Italy (region: Sicily), and for the recovery of the advance on that assistance made by the Commission.

[21] Some authors have underlined that regions suffer of a "*véritable captis deminutio, dans la mésure où elles ne peuvent attaquer que les actes les concernant directement et individuellement.*" R. Mehdi, *Chronique de jurisprudence du tribunal et de la Cour de Justice des Communautés européennes*, 2000 JDI 455.

EC Treaty. In this view, since the Convention in 2002, both the Committee of the Regions and some associations representing regional authorities have demanded some amendments to the Treaty.

These demands were expressed on several occasions. The Regions with legislative powers asked for extensive reforms in the way they participate in EU institutions, demanding, *inter alia*, the right to initiate proceedings in the European Court of Justice to protect their constitutional prerogatives. Similarly, the Assembly of European Regions (AER) together with the Conference of the Regional Legislative Assemblies of Europe (CRLAE), proposed qualifying Regions as "privileged applicants" in respect of the rights that the constitutions of their states recognize them. Then, the Committee of the Regions asked to be given the right of appeal to the Court of Justice to defend its own prerogatives. It proposed an amendment to article 230 of the Treaty through the addition of a paragraph stating: "The Court of Justice can also decide over the actions proposed by the Committee of the Regions to annul the acts for the purpose of protecting its prerogatives." So, from an analysis of the various documents proposed, a substantial convergence among the regional representative at the Convention appears.

These demands have only partially been accepted by Governments. The Group "*Subsidiarity*" within the European Convention, like the European Court of Justice, had already refused to recognize the right of a Region to bring an action for annulment so as not to "*affect the equilibrium established between the Member States at European level*."[22] This choice has been confirmed by the Lisbon Treaty, whose approach is conservative from this point of view. In fact, to grant Regions a right to bring suit against EC acts autonomously from their national governments would mean to upgrade them to the status of a subject of European law, like the Member Sates. Nevertheless, the European Union still has the nature of an international organisation composed of states, where the Regional authorities, according to the general principles of international law, are not considered as subjects of law. Instead, the Constitutional Treaty (article III-365) stated that

> The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

[22] Speech by the President of the Group Subsidiarity to the members of the Group itself, Conv. 286/02, 8:

> the degree of and arrangements for the involvement of regional and local authorities in the drafting of Community legislation should be determined solely in the national framework. … the mechanism proposed in this document does not, where appropriate, prevent consultation in a national framework with regional or local assemblies. Any other approach would, moreover, risk affecting the equilibrium established between the Member States at European level. For these reasons, the Group did not accept the proposal to grant a right of appeal to the Court of Justice for violation of the principle of subsidiarity to regions which, within the framework of national institutional organisation, have legislative capacities.

This provision has been confirmed by the Treaty of Lisbon (article 263 TFUE). In this way, at least for the ability to bring proceedings before the Court of Justice, the Committee would be similar to those institutions – Court of Auditors and European Central Bank – which already have been accorded jurisdictional protection if their prerogatives are infringed. So, it would acquire the *status* of semi-privileged applicant. Two considerations stem from this innovation.

First of all, one can reasonably imagine that the case law of the Court of Justice related to the violation of the European Parliament prerogatives developed after the *Chernobyl* case[23] would be applied. The Committee of the Regions could bring an action before the Court if the EU institutions took a decision without having previously consulted the Committee, when such a consultation is considered compulsory by the Treaty. According to this jurisprudence, in fact, the compulsory consultation cannot be reduced to a simple formality because, where it is imposed by the Treaty, it represents an essential requisite of validity of an EC act. Therefore, it must be asked in due time, in order to allow the consulted organ to exert efficiently its function and to have the faculty to be involved in the adoption of the final decision.[24] As stated by the Court of Justice, the "due consultation of the Parliament in the cases provided for by the Treaty is one of the means enabling the Parliament to participate effectively in the Community' s legislative procedure."[25]

Secondly, it can be argued that the status of the Committee of the Regions will be even more complicated: it will not be formally qualified as an institution, but it will exert the same judiciary rights of the Court of Auditors, which is fully considered an institution *ex* current article 7 of the EC Treaty.[26]

V. Subsidiarity

The Lisbon Treaty includes two important innovations for the role of Regions in the EU referring to the application of the principle of subsidiarity: (A) the explicit reference to Regions and (B) the new functions of the Committee of the Regions in monitoring respect for the principle.

(A) New article 5 of the Treaty states that

> in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

So, the Lisbon Treaty has incorporated into the definition of the principle also the territorial units, along with the Member States, exactly as it was in the Constitutional Treaty. Consequently, the "sufficient" character of the action carried out by the Member States must be evaluated also taking into due consideration the regional and local government. According to the current version of the

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23 *See* the Judgement of 7 July 1992 in *Case C-295/1990, European Parliament v. Council*, [1992] ECR 644.

24 Ziller, *supra* note 7, at 64.

25 *Case C-295/1990, European Parliament v. Council*, Rec. 12 of the judgment.

26 Ziller, *supra* note 7, at 66.

Protocol on the application of the principle of subsidiarity, attached to the Treaty, instead, this evaluation must be done only regarding the national constitutional systems.[27] The text of the new Treaty, therefore, seems more adequate in the sense of an acknowledgement of the role of the regional authorities within the Member States. Anyway, this amendment neither broadens nor restricts the powers of the EU institutions, which will be able to adopt an act only if the action by the Member States is not sufficient. In fact, for the EU it is not important whether the competence to adopt an act within a State pertains to the central organs or the regional ones.

(B) According to the Lisbon Treaty, the Committe of the Regions can exert new functions in the procedure of control over the application of the principle of subsidiarity, but only in the so-called *ex post* stage, which has a judicial character.

The Committee has often stressed that the role of regional authorities in the EU could be enhanced only by means of a clarification of the distribution of competences. The main demands advanced by the Regions in order to obtain more powers in the ascendent and descendent phases are linked to policies shared between the EU and its Member States. So, the setting of clear rules for the adoption of acts at EU level regarding these shared competences and the application of the principle of subsidiarity have been considered by the Committee of the Regions to be particularly important, even more than the inclusion of an explicit list of EU and State competences in the Treaty. In this context, the Committee has requested for itself a new role in referring infringements of the principle of subsidiarity to the European Court of Justice.

In order to meet these demands, the Constitutional Treaty granted the Committee of the Regions supervision powers on the application of the cited principle. The articles governing the functions of the Committee were included in a Protocol on the application of the principles of subsidiarity and proportionality attached to the Constitutional Treaty. Also in this case, the Lisbon Treaty has confirmed, apart from small changes, the innovations brought by the latter. Article 8, paragraph 2, of the Protocol empowers the Committee of the Regions to institute actions before the European Court of Justice regarding the infringement of the principle of subsidiarity by EU legislation. This is carried out by means of "legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted."

In this way, the Committee obtained the right to turn to the Court in case of a violation of the principle of subsidiarity.[28] The acknowledgement of this new role for the Committee of the Regions is linked to the new text of article 5, paragraph 3 which, as we have seen, now makes reference to the application of the principle of subsidiarity also to sub-national level. The Treaty states that the action must

[27] Paragraph 5 of the Protocol.

[28] Article 8 of the new protocol affirms that the Member States, on behalf of their national Parliament or a chamber thereof, can have recourse to the Court of Justice, ex article 263 TFUE, in case of a violation by a EU act of the principle of subsidiarity. Nevertheless, this option does not make the national parliaments privileged applicants on the same level of the Member States, because the action is formally brought forward by the Member States.

be proposed by the Committee within two months from the publication of the act; it seems that this term is sufficiently adequate, given that the Committee has, probably, already analyzed the contents of the act in the exercise of its consultative function.

These dispositions allow the preservation of the effectiveness of the Committee's function, and to verify if subsidiarity is respected by the EC institutions in the various steps of the decision-making process. It is also possible to contemplate that the Regions with legislative powers will use this jurisdictional function of the Committee as an institutional channel through which they could make requests which have not been previously considered by the national governments or by the European Commission. Nevertheless, the action for annulment of an EU act for the violation of subsidiarity has two limits. Firstly, this action can be proposed only when the Treaty imposes consultation of the Committee. This means that the action is excluded when the institutions have requested a facultative opinion (article 307, par. 1, final part) or when the Committee has delivered an opinion on its own initiative (article 307, comma 4).

The second limit derives from the interpretation of article 8, paragraph 2 which makes explicit reference to the "rules laid down in Article 263." This article mentions the requisite of violation of the prerogatives of the Committee for the exercise of the action. So, the effective violation of these prerogatives must be considered as an essential element in order to allow the Committee to report an infringement of the principle of subsidiarity to the European Court of Justice.

The Lisbon Treaty, like the Constitutional Treaty, has rejected the more radical demand advanced by Regions with legislative powers: the introduction of the choice for these Regions to bring an action for annulment in the context of the procedure of control over the application of the principle of subsidiarity.[29] Indeed, the issue was faced during the plenary sessions of the European Convention, but it raised several doubts. In particular, the Convention did not want to introduce another differentiation among the several regional authorities of the Member States.[30]

Even if the new provisions analyzed above represent a progress towards a more influential role of the Committee of the Regions, some questions can be raised: the new discipline is not fully convincing for two reasons. First of all, the efficiency of the jurisdictional, *ex post*, control is doubtful, if we consider the case law of the Court of Justice. To present day, in fact, it has clarified that the principle of subsidiarity has an eminently political nature, so that it has always

[29] The regions with legislative powers have often asked for a greater say within the EU system, recalling that: they account for some 56% of the total EU population; they have their own governments and parliaments; they often have similar legislative and executive responsibilities within their respective Member States; in areas falling within their legislative competence, they are also responsible for implementing directives in accordance with Article 249 of the EC Treaty. Their demands were essentially finalised to be involved in the control over the respect of subsidiarity, to participate in the Council of Ministers where European action affects regional competences, to bring actions directly to the European Court of Justice, to be consulted by the European Commission when it develops proposals concerning matters for which regions are responsible. *See Florence Declaration of the Regions with Legislative Power on the Future of Europe* of 30 January 2003.

[30] *See* the *Conclusions* of the Group Subsidiarity, CONV 286/02 of 23 September 2002.

been prudent in declaring its violation by the EC institutions. Consequently, the new right granted to the Committee of the Regions could remain essentially theoretical, with no significant impact over the EU decision-making process, as it will not substantially modify the current institutional role and functions of the Committee. Moreover, according to some authors, not only the *ex-post* procedure would be useless if we consider the few cases in which the Court has decided on the application of subsidiarity, but it would even be harmful. The reason is that the Court should decide on cases involving mainly constitutional issues internal to the Member States, thus interfering with the supreme national jurisdictions.[31]

Secondly, the Committee of the Regions shall not exert any function in the *ex ante* stage of the procedure of verifying the application of the principle of subsidiarity. This stage will focus on the activities of the national parliaments. Article 5 allows them to start the *ex ante* mechanism delivering a reasoned opinion within eight weeks after having received a proposal for a legislative act by the European Commission. Regions can be involved only in those Member States with a federal constitutional structure, where one of the chambers of the national parliament represents the interests of regional authorities. Nevertheless, such a chamber is to be found but only in a few Member States. Therefore, the reaction of sub-statal authorities through their national parliaments to an act violating the principle of subsidiarity could be seen as a single initiative involving Regions of few Member States and not the majority of them.

Also the paragraph in article 6 of the Protocol, according to which "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers" does not seem sufficient to guarantee a significant involvement of Regions to the *ex ante* stage. The possibility of consulting regional parliaments is left to the National ones. Moreover, this provision risks creating a fracture among Regions in Europe. In fact, only some of them – namely, the Regions with legislative functions – will have the right to participate to the procedure and to influence the adoption of EU acts, and not those without elected assemblies with legislative powers. Moreover, if the sub-state dimension to the subsidiarity debate is to be engaged in a meaningful manner, then some questions must be considered. For example: are there adequate channels for regional parliaments to receive legislative proposals of the Commission, in time to enable scrutiny to be undertaken? Does the regional parliament have adequate resources to challenge an impact assessment – or other kinds of qualitative and quantitative data – provided by the Commission? In summary, the real efficiency of these procedural mechanisms for regional authorities will depend on the roles national authorities envisage for them.

D. Conclusions

The debate on the role of the Regions in the European Union has emerged largely as a result of five factors: the deepening of the discussions about the institutional

[31] A. Tizzano, *La Costituzione Europea e il Sistema Giurisdizionale Comunitario*, 2003 Il Diritto dell'Unione Europea 475.

reform of the EU; the challenge of reducing the democratic deficit of the EU; the publication by the Commission of several documents where it promotes a stronger dialogue between the supranational institutions and the regional authorities; the rise of Regions with strong legislative powers within several Member States and, finally, the demand for greater autonomy or for self-determination by Regions within some Member States.

The stronger functions devolved upon Regions by their national governments and the contextual, progressive up-grading of the regional level in the European policy process have led some authors to suggest that the European Union has become the signal example of multi-level governance. This concept emphasizes power-sharing among levels of government, with no centre of accumulated authority. Instead, variable combinations of governments on multiple layers of authority – European, national, and subnational – form policy networks for collaboration. The relations are characterized by mutual interdependence on each others' resources.[32]

As regards Regions, the logical consequence is that both their mobilization at the EU institutions and the transferral of powers to Regions within many Member States have favoured the creation of a third level of government in Europe. This would be the regional level, whose institutional actors – the Committee of the Regions, the various associations representing regional interests and Regions with legislative powers – would have gained essentially the same powers and dignity of the traditional subjects of the European Union law, that is the EU institutions and the Member States.[33] The conclusion is that the ascent of the Regions as "new actors in European policy-making" and the consequential pressures for regional participation would be responsible for "novel elements of interlacing and interlocking politics" where Regions would play a primary role.[34]

Are the results of the process of reforming the institutional structure of the EU sufficient to justify the above mentioned conclusions of the theory of Multi-level Governance? We argue that the answer cannot be other than negative.

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[32] L. Hooghe, *Introduction: Reconciling EU-Wide Policy and National Diversity*, *in* L. Hooghe (Ed.), Cohesion Policy and European Governance. Building Multilevel Governance, 18 (1996). About the role of regions in Multilevel Governance, *see also* B. Kohler-Koch, *The Strength of Weakness: the Transformation of Governance in the EU*, *in* S. Gustavsson & L. Lewin (Eds.), The Future of the Nation State, 169 (1996); G. Marks, *Structural Policy and Multilevel Governance in the EC*, *in* A. Cafruny & G. Rosenthal, (Eds), The State of the European Community. Vol. 2: The Maastricht Debates and Beyond, 403 (1993); F. W. Scharpf, *Community and Autonomy: Multi-Level Policy Making in the European Union*, 1994 JEPP 219.

[33] *See, as an example,* A. Benz & B. Eberlein, *The Europeanization of Regional Policies: Patterns of Multi-Level Governance*, 1999 JEPP 342:

> The process of the regionalization of EU policies and the rise of the regions as new actors in European policy-making produced novel elements of interlacing and interlocking politics. They raise the challenge of including the regional level in the EU multi-level fabric without impairing effective decision-making […] European multi-level governance can successfully cope with this challenge.

[34] A. Benz & B. Eberlein, *Regions in European Governance: The Logic of Multi-Level Interaction*, EUI Working Papers RSC. 98/31, at 18 (1998).

It is true that some progress towards a more significant recognition of the regional functions has been made. Firstly, the new Treaty has introduced the principle of autonomy, imposing on the EU the respect of the national identity of the Member States, comprising the system of regional autonomies. Secondly, the Committee of the Regions has gained the right of appeal to the Court of Justice in case of violations of its prerogatives. Finally, the Lisbon Treaty ensures Regions stronger instruments to verify the correct application of the principle of subsidiarity.

Nevertheless, it seems that most of these innovations are more formal than substantial. In particular, the Committee of the Regions' expectations were greater than what achieved with the new Treaty. It will not be consulted by the Council in relation to the decision about its composition. It has not acquired any role in the pre-legislative procedures. Then, it is not likely that the Court of Justice will modify its jurisprudence which generally stresses the political value of the principle of subsidiarity, so that the right of appeal granted to the Committee risks being only theoretical. Finally, the Treaty has not intervened on the composition of the Committee which is one of the causes of its institutional weakness and has not recognized Regions with legislative functions the power of *locus standi* before the European Court of Justice.

Another comment must be made about the control on the application of subsidiarity. Under the Lisbon Treaty, national parliaments are to receive information directly from the EU institutions. An early warning system would allow a national parliament or a chamber of a Parliament to contest a legislative proposal with regard to its compliance with the subsidiarity principle. The system empowers national parliaments to demand that the Commission review a proposal if at least 1/3 of the parliaments submit a reasoned opinion to the Commission. None of these privileges is granted to regional Parliaments. It is not clear why Regions have not been involved in this *ex ante* procedure. As it has been stressed in the literature, "Why should regional and sub-national Parliaments not also enjoy a carefully and narrowly defined right of participation on the model crafted by the Convention for the national parliaments?"[35]

In this sense, the Lisbon Treaty has confirmed the modest results of the Treaty Establishing a European Constitution.

In conclusion, the EU integration process has, in recent years, upgraded the role and the functions of Regions and it has produced new interactions between the latter, the national governments and the EU institutions. It does not seem true, however, that a third level of regional government exists, even if the new Treaty entered into force. We cannot assume that, at the current stage of the integration process, Regions constitute a hypothetical third level of government in which they act as subjects of EU law, along with States and supranational institutions. Not surprisingly, an important author has emphasized that "mobilization and influence are not synonymous."[36]

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[35] S. Weatherill, *Finding a Role for the Regions in Checking the EU's Competence*, *in* S. Weatherill & U. Bernitz (Eds.), The Role of Regions and Sub-national Actors in Europe 130, at 149 (2005).

[36] C. Jeffery, *Sub-national Mobilization and European Integration: Does It Make Any Difference?*, 2000 JCMS 3.