9

The Role of Sub-State Entities in the EU Decision-Making Processes: A Comparative Constitutional Law Approach

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I. INTRODUCTION

IN JUNE 2008, the Finnish Parliament approved the text of the Lisbon Treaty. Three months later, the formal ratification of the Treaty was finalised with the signature of the President of the Republic of Finland, Tarja Halonen. However, it was only on 25 November 2009—a week before the Treaty came into force—that the Parliament of the Åland Islands, an autonomous region of Finland,[1] decided with a majority of 24 to 6 that the Treaty would also apply there. In fact, during the previous months, the Åland Government had put forward four requests that had to be resolved before accepting the Treaty. The autonomous region had requested its own seat in the European Parliament; a right to appear before the Court of Justice; participation in the control of the principle of subsidiarity; and participation in the meetings of the Council. All the requests were satisfied except the seat in the Parliament.[2] The aforementioned largely unknown episode in the Lisbon Treaty ratification saga sheds light on the efforts of a number of sub-State entities to achieve an enhanced role in the Union decision-making processes.

At the same time, certain recent developments concerning both the text of the Treaties and the case law of the Court of Justice might suggest that the European Union (EU) has also become increasingly more willing and able to accommodate similar aspirations of the sub-State entities regarding their role in the political life

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[1] For a review of the status of the Åland Islands in the Finnish constitutional order, see generally J Huusa, *The Constitution of Finland* (Oxford, Hart Publishing, 2011) 121–29.

[2] For an informative analysis, see P Alilonttinen and S Ruà, *Lisbon Treaty Ratification: Will the Åland Islands become Finland's Greenland?* (Brussels, EPIN, Commentary no 1/2008).

of the EU. With regard to the Treaties, we note that Article 4(2) TEU now states that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*'.[3] Moreover, according to Article 5(3) TEU, which provides for the new formulation of the principle of subsidiarity, the Union—outside the areas of its exclusive competence—may act only 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*'.[4] Next to those explicit references to the regional tiers of Member States, one might also note the fact that the Lisbon Treaty includes a number of new provisions for the participation of national parliaments, which are enjoined 'to contribute actively to the good functioning of the Union', 'by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality'.[5] This provision together with Protocol No 2 might enhance further the role of the sub-State entities in the EU decision-making process, especially in those States where there is a chamber composed of representatives of the regions, such as in Germany and Austria.[6] In addition, a review of recent case law demonstrates that the Court is ready to recognise the constitutional autonomy of certain regions to exercise policy choices that differ from one region of a given State to the next, and that the Court has thereby become more mindful of the regional dimension of the Union structure.[7] Such developments in the EU constitutional order cast a serious doubt on that part of the academic literature that has suggested since the early days of the integration process that the Union is 'blind' to the internal territorial and constitutional arrangements of its Member States.[8]

So, it is precisely the aforementioned aspirations of the regional tiers and the political and legal developments in the EU sphere that dictate this examination of the possible channels of regional participation in the Union policy-making processes both at the national and at the EU levels. With regard to the national level, the chapter mainly focuses on the constitutional orders of those Member States

[3] Emphasis added.

[4] Emphasis added.

[5] Art 12(b) TEU.

[6] D Edward and J Bengoetxea, 'The Status and Rights of Sub-state Entities in the Constitutional Order of the European Union' in A Arnull, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford, Hart Publishing, 2011) 31. See also section III.B. of this chapter.

[7] See generally Case C-88/03 *Portugal v Commission* [2006] ECR I-7115; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747; Case C-428/07 *R (on the application of Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-6355. For an analysis this case law, see also R Greaves, 'Autonomous regions, taxation and EC state-aid rules' (2009) 34 *EL Rev* 779.

[8] See, eg, HP Ipsen, 'Als Bundesstaat in der Gemeinschaft' in E von Caemmerer, HJ Schlochauer and E Steindorff (eds), *Probleme des europäischen Rechts: Festschrift für Walter Hallstein* (Frankfurt am Main, Klostermann, 1966) 248.

where the regional tier enjoys a constitutionally grounded claim for participation in the policy-making processes. Those Member States include the federal Austria, Belgium and Germany, and the regionalised Italy, Spain and the United Kingdom. In particular, we refer to the duty that some of the governments of those Member States have to inform their sub-State entities, and to the mechanisms provided for the participation of the regional tier in the formulation of the EU position of the Member State. Concerning the EU level, we examine the presence of the regional tier in the Union institutions and analyse the new system for subsidiarity compliance. Generally speaking, the examination of both the national and the EU levels underlines the complexity of the institutional framework that allows for the participation of the regional tiers in the Union decision-making processes, and the intertwined[9] and composite[10] nature of the European constitution. The very presence of such institutional framework renders—partly at least—the 'regional blindness' thesis obsolete. However, the fact that only rather a limited number of entities benefit from those arrangements sheds light on the asymmetries of the EU's constitutional order and points to the fact that we are still far from the enthusiastic vision of a 'Europe of the Regions' as described in the 1990s.[11]

II. PARTICIPATION IN THE INTERNAL DECISION-MAKING PROCESS

The question underpinning this part of the chapter is whether the regional tier enjoys participatory rights in the formulation of the Union position of the respective Member State. In particular, we focus on two distinct but interlinked issues. First, we examine whether the regional authorities have a right—constitutionally enshrined or not—to be informed in the pre-legislative phase, and then we look at what kind of mechanisms are in place for those regional authorities to express their opinion.

A. Informing the Regional Tier in the Preparatory Phase

Timely access to relevant information is of critical importance for the effective participation of the regional authorities in the preparatory phase of Union decision-making processes. Although it is difficult to over-state the importance

[9] See generally J Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 *European Constitutional Law Review* 247, 452.

[10] L Besselink, A Composite European Constitution/Een Samengestelde Europese Constitutie (Groningen, Europa Law Publishing, 2007); M Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing, 2005).

[11] See generally, S Mazey and J Mitchell, 'Europe of the Regions? Territorial Interests and European Integration: The Scottish Experience' in S Mazey and J Richardson (eds), *Lobbying in the European Community* (Oxford, Oxford University Press, 1993); J Loughlin '"Europe of the Regions" and the Federalization of Europe' (1996) 26 *Publius* 141.

of the availability of information in order for the sub-State entities effectively to influence the EU law-making processes, in most Member States the governments are not legally obliged to inform such entities of Union matters that affect them.[12] And even in those cases where such a duty of information exists, the source of regulation used might differ (constitutional, legislative, non-legislative).[13]

It is hardly surprising that such a constitutional duty to keep the regional authorities informed exists in the three EU Member States that are federations, namely, Austria, Germany and Belgium. In fact, the Austrian Constitution goes as far as to impose a requirement on the federal Government to inform the regional and local authorities both directly[14] and indirectly, through the *Bundesrat*.[15] Similar duties to provide information indirectly to the sub-State entities through the legislative chambers representing them are also provided for by the German Basic Law[16] and the Belgian Constitution.

In the case of Belgium it should be noted that Article 168 of the Constitution provides for such a duty only in the case of the opening of negotiations for the amendment of the EU Treaties.[17] However, such right has been extended to the Communities and the Regions under Article 16(2) of the Special Reform Law of 8 August 1980. In addition, Article 92*quater* of the same law, introduced by the Special Reform Law of 5 May 1993, extended the limited constitutional duty of information to cover Union secondary acts too. The Belgian Senate automatically forwards all EU documents that arrive in its relevant mailbox to the House of Representatives and all legislatures of the sub-State entities.

To complete the picture, apart from the constitutions of the three federations, Article 88-4 of the Constitution of the unitary but decentralised France provides for a duty to provide information indirectly to the regions.[18]

A duty to inform the sub-State entities may also be provided by ordinary national laws. This is the case in Italy and Spain. In Italy, Law No 11/2005, which regulates regional participation in European policy-making, provides in Article 5 that when the relevant EU draft legislation concerns regions and local authorities, it should be transmitted to the competent territorial associations for comment. These associations include the Conference of the Regions and the Autonomous Provinces (*Conferenza delle regioni e delle province autonome*, hereafter 'CRPA') and the Conference of the Presidents of the Assembly of Regional Councils and of Autonomous Provinces. Upon reception, the draft legislation is forwarded by those two associations to the presidents of the regional executive committees and of the regional councils.

[12] M Tatham, 'Devolution and EU policy-shaping: Bridging the gap between multi-level governance and liberal intergovernmentalism' (2011) 3 *European Political Science Review* 53, 58.
[13] *Ibid*.
[14] Austrian Constitution, Art 23d(1).
[15] Austrian Constitution, Arts 23e(1) and 23g(2).
[16] German Basic Law, Art 23(2).
[17] Belgian Constitution, Art 168.
[18] French Constitution, Art 88-4.

In Spain, the duty to inform the regional authorities used to be contained in a non-legislative act: the Agreement on the Internal Participation of the Autonomous Communities in EC Affairs through Sector Conferences of 30 November 1994.[19] That Agreement was concluded three years before the Sectoral Conference for European Affairs (*Conferencia para Asuntos Relacionados con las Comunidades Europeas*, hereafter 'CARCE') was formally institutionalised by virtue of Law 2/97. However, recently, Article 6 of Law 24/2009 of 22 December 2009 has established the national Parliament's duty to transmit any EU draft legislative act to regional parliaments, without any filtering procedure.

Lastly, the duty of the UK Government to inform the sub-State entities is provided for by provisions included in non-legislative acts. The relative framework may be found in the Memorandum of Understanding and the Concordats on Co-ordination of European Union Policy Issues between the UK Government and the devolved administrations.[20]

B. Mechanisms for Involving the Regional Tier in Internal EU Decision-Making Processes

After examining the constitutional, legal and non-legal provisions that provide for the duty of the central State governments to inform the sub-State entities, the next question is what kind of mechanisms are in place for the participation of the regional tier in the internal decision-making processes concerning EU law. In general, the participation of the regional authorities in the formulation of the EU policy of the respective Member State is facilitated by legislative chambers composed of representatives of the regions and inter-governmental bodies, whether interregional or joint national–regional ones.

In this section, I focus mainly on two fundamental questions. First, I examine whether the participatory rights of the regions in the internal EU decision-making process are either constitutionally or legally guaranteed, or guaranteed by non-legislative means. In the case of the upper chambers, the answer is rather straightforward; in the case of the co-ordination bodies, the picture is more mixed. Secondly, I analyse whether the position adopted by the regions through those mechanisms is binding on the respective Member State.

[19] *El Acuerdo sobre la Participación Interna de las Comunidades Autónomas en los asuntos comunitarios a través de las Conferencias Sectoriales, de 30 de noviembre de 1994*. The Agreement was published in the Resolution of 10 March 1995 of the Ministry of Territorial Administration (*Resolución de 10 de marzo de 1995 de la Secretaría de Estado para Administraciones Territoriales*) and in the *Official Journal* (BOE of 22 March 1995 and BOE of 1 April 1995—corrigendum).

[20] Memorandum of Understanding, paras 17–20; Concordats on Co-ordination of European Union Policy Issues (Cm 5240, December 2001, Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee), paras B1.2, B1.4, B2.2, B2.4, B3.2, B3.4, B4.2 and B4.3.

i. Upper Chambers

One of the characteristics of the vast majority of federations is the existence of a constitutionally enshrined body that represents the regional tier at the highest level and allows it to play an important role in the national decision-making processes.[21] In that sense, the fact that both the Austrian and the German *Bundesräte* play a pivotal role in the formulation of the respective national policy does not raise any eyebrows.

As already mentioned, under Article 23e(1) of the Austrian Constitution, the Government informs the *Bundesrat* about 'all projects within the framework of the European Union' and gives them the chance to express their opinion. Where the proposed Union legislation is required to be implemented in accordance with a procedure which requires the agreement of the *Bundesrat*,[22] then the Government is bound by the opinion of the upper chamber during the negotiations that take place in the EU framework. The Government may deviate from such binding opinion only in the event of 'imperative foreign and integrative policy reasons'.[23]

Article 23(4)–(5) of the German Basic Law and an *ad hoc* Act of Co-operation in 1993[24] regulate the relationship in EU affairs between the federal Government and the 16 *Bundesländer* that are united in the *Bundesrat*. According to Article 23(4), the Government informs the *Bundesrat*, which may participate 'in so far as it would have been competent to do so in a comparable domestic matter'.[25] Each *Land* having a weighted vote, the *Bundesrat* adopts with a majority a common position of the *Länder*. The opinion of the *Bundesrat* carries varying degrees of influence depending on what kind of competences the relevant decision concerns. If the relevant decision concerns an exclusive competence of the federal Government, the opinion of the *Bundesrat* merely needs to be taken into account.[26] If the decision affects

> the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures … the position of the *Bundesrat* shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole.[27]

In the event of disagreement, there is a conciliation procedure.[28] The federal Government may override the *Bundesrat* veto in cases where the general political

[21] RL Watts, *Comparing Federal Systems*, 3rd edn (Montreal and Kingston, McGill-Queen's University Press, 2008) 147–53.

[22] Austrian Constitution, Art 44(2).

[23] Austrian Constitution, Art 23e(6).

[24] European University Institute, *Study on the Division of Powers between the European Union, the Member States, and Regional and Local Authorities* (Florence, European University Institute, 2008) 148.

[25] German Basic Law, Art 23(4).

[26] German Basic Law, Art 23(5).

[27] *Ibid.*

[28] European University Institute, above n 24, 148.

responsibility of the federation and its financial interests are at stake.[29] To complete the picture concerning the role of the *Bundesrat*, it should be noted that, by virtue of Article 23(1), its approval by a two-thirds majority is necessary for the ratification of Treaties that amend the Union structure. Such majority is the same as that necessary for the constitutional revision of the Basic Law.[30]

ii. Interregional and Joint National–Regional Bodies

Another mechanism for the involvement of the regional authorities in European policy-making entails institutions that foster co-operation and co-ordination either horizontally, between the regions, or vertically, between the regions and the 'centre'. Those bodies should not be understood as an alternative to the aforementioned constitutionally enshrined bodies that represent the regional tier at the federal level. In certain cases, they may even co-exist.

Prime examples of co-ordination bodies that co-exist with an upper chamber are the Conference of *Länder* Ministers of European Affairs and the Heads of the State and Senate Chancelleries, and the Conference of Minister-Presidents in Germany.[31] Other examples are the Conference of Integration (*Integrationskonferenz*) of the Austrian *Länder* (IKL) and the non-institutionalised but very influential Conference of the Presidents of the *Länder* (*Landeshauptmännerkonferenz*). The former is composed of the President of each *Land* and of the Presidents of the regional Assemblies as well as the Presidents of the two houses of the federal Parliament, while the latter comprises only the Presidents of the *Länder*.

As already mentioned, pursuant to Article 23d(1) of the Austrian Constitution, the Government must directly inform the *Länder*. If the State receives a 'uniform comment' from the *Länder*—through one of the aforementioned bodies—on some Union legislative proposal within *Land* competence, it is bound to respect that opinion during negotiations and voting at the EU level.[32] The Government may deviate from this unitary position 'only for compelling foreign and integration policy reasons'.[33] In that event, the reasons should immediately be communicated to the *Länder*. Where the EU subject matter lies outside the legislative powers of the *Länder* but touches on their interests, the federation must take into account the written opinion of the *Länder*. This obligation does not stem from the Constitution but from a constitutional agreement between the federation and the *Länder* according to Article 23d(4).[34]

While the long-standing federal culture of Austria has dictated those constitutionally enshrined obligations to inform and consult the regional tier, the

[29] *Ibid.*
[30] German Basic Law, Art 79.
[31] European University Institute, above n 24, 148.
[32] Austrian Constitution, Art 23d(2).
[33] *Ibid.*
[34] BGB1 775/1992.

contentious political system of Belgium has led to the establishment of a really inclusive co-ordination procedure. Such procedure is provided for in the 1994 Co-operation Agreement between the federal Government and the sub-State entities.[35] Generally speaking, it is the Directorate for European Affairs in the Foreign Ministry which has responsibility for co-ordinating the Belgian positions within the EU. In order to achieve this, it regularly convenes a Co-ordination Committee on European Affairs. Every decision on the Belgian position is reached in the Directorate General by representatives of the federal prime minister and deputy prime ministers, of the minister-presidents of the different sub-State entities and of those ministers who are responsible for the subjects on the agenda. It is important to stress that all the decisions have to be reached by consensus, especially those that touch on regional or community competences. If consensus is not achieved, the matter may be referred to the Inter-Ministerial Conference for Foreign Policy and thence to the Concertation Committee. If agreement is not reached even in that phase, customary practice is that the Belgian representative abstains in the Council. However owing to the Belgian tradition of consensus and to the fact that the Belgian influence in the Council deliberations would otherwise be completely lost, a common Belgian position is regularly reached.[36]

Joint national–regional bodies like those in Belgium also play an essential role in the participation of the Italian and the Spanish regions in national decision-making processes. Starting with Italy, pursuant to Article 2 of Law No 11/2005, the Inter-Ministerial Committee for Common European Affairs (*Comitato Interministeriale per gli affari comunitari europei*, hereafter 'CIACE') was set up.[37] When the CIACE discusses EU legislation of regional interest, the president of the CRPA, or somebody delegated by him or her, can ask to participate in the meetings.[38]

Where Union legislation concerns competences of the regions and the autonomous provinces, Article 5 of the same law provides for a sophisticated and inclusive procedure. Upon receipt of the relevant draft legislation, the CRPA and the Conference of the Presidents of the Assemblies of Regional Councils and of Autonomous Provinces forwards it to the presidents of the regional executive committees and of the regional councils. They have 20 days to submit their comments to the Government. If the legislation is of particular importance for the regions and the autonomous provinces, or if one or more of the regions or the autonomous provinces so requests, the Government will convene the Permanent

[35] *Samenwerkingsakkoord van 8 maart 1994 tussen de Federale Staat, de Gemeenschappen en de Gewesten en het Verenigd College van de Gemeenschappelijke Gemeenschapscommissie, met betrekking tot de vertegenwoordiging van het Koninkrijk België in de ministerraad van de Europese Unie* (*Belgisch Staatsblad*, 17 November 1994).

[36] European University Institute, above n 24, 64–66; LR Sciumbata, 'Belgium' in Istituto di Studi sui Sistemi Regionali Federali e sulle Autonomie (ed), *Procedures for Local and Regional Authority Participation in European Policy Making in the Member States* (Luxembourg, Committee of the Regions, 2005) 117–18.

[37] P Bilancia, F Palermo and O Porchia, 'The European Fitness of Italian Regions' (2010) 2 *Perspectives on Federalism* E-1, E-122.

[38] Law No 11/2005, Art 2(2).

Conference for the Relations between the State, the Regions and the Autonomous Communities (*Conferenza permanente per i raporti tra lo stato, le regioni e le province autonome*) with a view to reaching a common position within 20 days. After this period of time lapses, or in cases of urgency, the Government may proceed. If the Permanent Conference so requests, the Government will lodge a 'reservation of examination' (*riserva di esame*) in the Council of the EU.[39]

In Spain, on the other hand, EU matters within the respective policy fields are handled by the Sectoral Conferences. In 1992, the Sectoral Conference for Union Affairs (CARCE) was set up with top officials from the State and the Autonomous Communities. Five years later, it was formally institutionalised by virtue of Law 2/97. It now acts not only as a forum for the exchange of information and the implementation of Union policies, but also for the participation of the Autonomous Communities in the preparation of the Spanish position in European decision-making. More analytically, as regards shared competences, the central Government tries to reach a common position with the Autonomous Communities although it retains the final say. With regard to exclusive regional powers, if the Autonomous Communities reach a common position, the State has to defend that position at the EU level.[40]

Similar arrangements also exist in two decentralised Member States, namely, France and The Netherlands. In France, this is a rather recent development. During the first National Conference of Executives (*Conférence nationale des exécutifs*), created in October 2007, it was decided that the General Secretariat for European Affairs (*Secrétariat général aux affaires européennes*, hereafter 'SGAE') would establish a closer relationship with the Association of French Regions (*Association des Régions de France*) and the Assembly of French Departments (*Assemblée des Départements de France*) among others. The SGAE meets regularly with the delegates of the territorial associations responsible for European affairs, to discuss the French position within the EU.[41]

In The Netherlands, the highly decentralised policy-making framework foresees a role for the Association of The Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten*) and the Association of the Provinces of The Netherlands (*Interprovinciaal Overleg*). Those two bodies are represented in many areas in interdepartmental working groups of the national Government, preparing the Dutch position for the Council of Ministers. There is also a monthly meeting with the Ministries of the Interior and Foreign Affairs, and on regular base there are meetings on a political level with the Minister for European Affairs.[42]

[39] Law No 11/2005, Art 5(5).

[40] J Bengoetxea, 'The Participation of Infra-State Entities in European Union Affairs in Spain: the Basque Case' in S Weatherill and U Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Oxford, Hart Publishing 2005) 55; A Ross and M Salvador Crespo, 'The Effect of Devolution on Implementation of EC law in Spain and the UK' (2003) 28 *EL Rev* 210, 226.

[41] European University Institute, above n 24, 132–33.

[42] *Ibid* 229.

Lastly, within the UK framework of devolution, the participatory rights of the regional tier in the domestic EU policy-shaping process are guaranteed by soft non-binding law, as provided for by the aforementioned Memorandum of Understanding and the Concordats. Those agreements between Whitehall and the devolved administrations envisage the full involvement of the devolved regional authorities in the formulation of the UK position.[43] In general, the UK negotiating position is discussed at the Joint Ministerial Committee on Europe. Ministers and officials from the three devolved administrations are part of the UK team, with the UK minister determining the final position and retaining overall responsibility.[44]

III. PARTICIPATION IN THE UNION DECISION-MAKING PROCESSES

It is not only the national constitutional frameworks that provide the sub-State entities with access to the Union policy-shaping process. The EU Treaties themselves also contain provisions that allow for the representation of regional interests at the Union level. The participation of regional ministers in the Council and the role of the regional tier in the application of the subsidiarity principle provide the most tangible examples of this. However, again, the fact that not all regions are able to benefit from these arrangements reminds us of the existence of an asymmetrical 'Europe with some regions'.

A. Participation of the Regions in the Union Institutions

i. The Council

One of the first steps the EU made towards responding to the gradual regionalisation process being undertaken by many EU Member States, was the opening-up of the Council of Ministers to representatives from sub-State entities. Indeed, the Maastricht Treaty amended the then Article 146 TEC, dropping the reference to national governments. The new wording allowed Member States to be represented in Council sessions by members of regional authorities. It is difficult to overemphasise the constitutional significance of this amendment that has survived all subsequent Treaty modifications. In essence, it questions—at least partially—the 'federal blindness' thesis. However, it is interesting to note that the political science literature is divided on the usefulness of such a provision for regions to represent their Union interests.[45] Recently, it has been argued that such a tool may

[43] See Memorandum of Understanding, paras 17–20; Concordats on Co-ordination of European Union Policy Issues, above n 20, paras B1.2, B1.4, B2.2, B2.4, B3.2, B3.4, B4.5 to B4.11.

[44] *Ibid*.

[45] Tatham, above n 12, 59.

allow regions to represent distinctive interests at a crucial stage in the EU policy process.[46]

Be that as it may, Article 16(2) TEU provides:

> The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

It is not prescribed to which internal level of the government that representative must belong. Thus, even ministers of regional governments are allowed to represent their Member States if the internal constitution so provides. In addition, pursuant to Article 5(3) of the Council's rules of procedure, 'officials who assist them' may accompany the members of the Council.[47] There is no legal requirement that the official originate from the same government as the representative. Hence, it is possible to have mixed delegations of federal and regional ministers.

However, in the composite Union constitutional order, the national constitutional framework must be examined in order to appreciate the importance of this provision. Indeed, it seems that only a small number of regional authorities are able to benefit from this arrangement. The 'usual suspects' comprise the sub-State entities of the three federations, the Italian regions and autonomous provinces of Trento and Bolzano, the Spanish *Comunidades Autónomas* and the UK devolved governments.

Starting with Austria, the relevant provisions may be found in Article 23d of the Constitution. According to this provision, if the EU subject matter concerns the legislative powers of the *Länder*, there are two options. As has been mentioned in the previous section, the first option entails Austria being represented in the Council by a federal minister who is bound by the opinion of the *Länder*. In fact he or she 'may deviate therefrom only for compelling foreign and integration policy reasons'.[48] Paragraph 3 of the same Article, however, offers the federal Government a second option, to authorise a representative from the *Länder* to be present in the Council on Austria's behalf. This representative is bound by the common position of the *Länder* as expressed in a decision by the 10 *Länder* prime ministers (*Landeshaptleutekonferenz*). In the Council meeting, he or she has to consult the competent federal minister who sends an associate to the representative into the Council meeting.[49]

With regard to Germany, representation in the Council depends on the issue at stake. Article 23(6) of the German Basic Law provides that if the EU subject matter at issue predominantly lies within the legislative powers of the *Länder*, a minister appointed by the *Bundesrat* may represent Germany.[50] This minister usually

[46] M Tatham, 'Going Solo: Direct Regional Representation in the European Union' (2008) 18 *Regional and Federal Studies* 493, 499–502.

[47] Annex to Council Decision 2009/937/EU adopting the Council's Rules of Procedure [2009] OJ L325/35, art 5(3).

[48] Austrian Constitution, Art 23d(2).

[49] Austrian Constitution, Art 23d(3).

[50] German Basic Law, Art 23(6).

has the mandate for a certain time (one to three years).[51] In practice, Germany's representation by a regional minister designated by the *Bundesrat* is exceptional. In fact, under the federal reform of 2006, such ministers' exclusive right to speak for Germany is now restricted to education, culture and broadcasting.[52]

The Belgian sub-State entities may also represent the federation in the Council. The framework here, however, is more sophisticated and finely tuned than those in Germany and Austria. Following the constitutional reforms of the early 1990s, a Co-operation Agreement was drawn up in 8 March 1994 between the federal Government and the Regions and the Communities.[53] The Agreement lays down the procedure for representation and the co-ordination of the Belgian position in the Council, and is based on three principles: consensus, mixed delegation and rotation. It was amended in 2003 following the regionalisation of agriculture and fisheries.[54]

As far as representation of commonly-agreed positions is concerned, the 1994 Agreement distinguished between four categories: Category I concerns all Council topics which relate to the exclusive federal competences; Category II deals with issues the major part of which concern federal subject matter, while Category III covers those matters of which the major part is of interest to the sub-State entities; and Category IV includes Council topics that touch exclusively on the competences of the sub-State entities. In Category I, Belgium is represented by the federal Government, in Category IV by a representative from the sub-State entities. In the latter case, the sub-State entities decide together who will represent them. In Categories II and III, a system of 'assistance' applies. The delegation is headed by a member of the government which has a dominant share, with an assistant being a member of the government which has the non-dominant share. The head of the delegation votes, whereas the 'assistant' politically controls his behaviour and has the right to speak.

The 2003 Co-operation Agreement added two more categories. Category V concerns Council configurations that touch upon the competences of one regional government. In fact this category refers only to the competence of Flanders with regard to fisheries. Unsurprisingly, in that case, the Flemish government represents Belgium. Lastly, Category VI refers to exclusive regional competences but with the federal Government taking the lead. This applies only to agriculture.[55]

As was mentioned above, apart from the regional tier within the three named federations, the sub-State entities of the three regionalised States (ie, Italy, Spain

[51] Further details may be found in the Law of 12 March 1993 on co-operation of the Federation and the Federated State in EU affairs (BGB1, 1993 I, 313).

[52] European University Institute, above n 24, 148.

[53] Above n 35.

[54] *Samenwerkingsakkoord van 13 februari 2003 tussen de Federale Staat, de Gemeenschappen en de Gewesten tot wijziging van het samenwerkingsakkoord van 8 maart 1994 tussen de Federale Staat, de Gemeenschappen en de Gewesten met betrekking tot de vertegenwoordiging van het Koninkrijk België in de ministerraad van de Europese Unie* (*Belgisch Staatsblad*, 25 February 2003).

[55] Sciumbata, above n 36, 113–15.

and the UK) have also benefited from this arrangement. Under Article 5 of Law No 131/2003, Italian regions may participate in the work of the Council of the EU and its working groups, and may work with the Commission and its expert committees in areas of regional legislative competence, following agreement in the *Conferenza Stato-Regioni*.[56] Moreover, in March 2006, the central Government and the sub-State entities signed an agreement which provides, inter alia, that Italy may be represented by a regional official in the Council. However, that will happen only if an agreement is reached within the framework of the *Conferenza Stato-Regioni*.[57]

In Spain, the culmination of efforts begun in the 1990s resulted in an agreement on 9 December 2004. The Agreement allows for the participation of the Autonomous Communities in the Council in four configurations: Employment, Social Policy, Health and Consumer Affairs; Agriculture and Fisheries; Environment; and Education, Youth and Culture.[58] According to this Agreement concluded by the CARCE, the relevant sectoral conference designates one Autonomous Community to represent all of them in the coming period. This Autonomous Community then seeks the agreement of the others and of the Spanish delegation on their common position and attends the Council.[59]

Lastly, ministers from the three devolved administrations (Scotland, Wales and Northern Ireland) are allowed to attend the Council after agreement with the UK Government.[60] It is the lead UK minister, however, who decides on the composition of the UK team, taking into account that the devolved administrations should have a role to play 'in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their' competences.[61] It is also the head of the delegation who bears the responsibility for the negotiations and agrees to ministers from the devolved administrations speaking for the UK.[62] The Concordat clarifies that 'they would do so with the full weight of the UK behind them', because the positions to be taken within the Council would have been agreed in advance at the relevant Joint Ministerial Committee.[63]

ii. The European Parliament

Despite its importance for the democratic life of the Union, the academic literature has largely overlooked the role of the European Parliament as a channel for

[56] Bilancia *et al*, above n 37, E-142.
[57] *Ibid*.
[58] A D'Atena, 'Participation of Regional and Local Authorities in the Preparatory Phase of European Policy Making—European Side' in Istituto di Studi sui Sistemi Regionali Federali e sulle Autonomie (ed), *Procedures for Local and Regional Authority Participation in European Policy Making in the Member States* (Luxembourg, Committee of the Regions, 2005) 17.
[59] European University Institute, above n 24, 286.
[60] Concordats on Co-ordination of European Union Policy Issues, above n 20, para B4.14.
[61] *Ibid* para B4.13.
[62] *Ibid* para B4.14.
[63] *Ibid*.

regional representation in the EU political structure.[64] The reason for that might be found in the fact that the constituency to elect MEPs in the vast majority of the Member States is a single State constituency. It is only in Belgium, France, Italy, Ireland and the UK that the MEPs are elected on the basis of regional constituencies. In those cases, however, it might be argued that the regional tier indirectly participates in the political life of the Union.[65]

iii. The Court of Justice

It is difficult to overstate the significance of the 'least dangerous branch' in the European integration process. In that regard, it would be important to examine not only the conditions under which the regional tier has access to the Court of Justice, but also whether there are constitutional provisions enabling the sub-State entities to request their Member State to appeal to the Luxembourg Court against EU decisions through the annulment procedure set out in Article 263 TFEU. However, given that such tools are available to the regions *after* an EU decision has been adopted, such an analysis goes beyond the scope of the present chapter. For the purposes of this contribution, it suffices to note that the Court might offer another *forum* for representation of the interests of the regional tier.

iv. The Committee of the Regions

Established in 1994, the Committee of the Regions is an EU advisory body. On a proposal from the Commission, the Council unanimously determines the composition of this political assembly, whose members may not number more than 350. However, it is the Member States themselves that assign their representatives to the Committee. The only sufficient and necessary condition that the Treaties provide is that the members of that body should be 'representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly'.[66] This has allowed the States to adopt very different approaches as to the rules concerning their representation.

There are, to begin with, formal differences. While in Austria there is a constitutionally-enshrined rule concerning the representation of the federation on the Committee of the Regions,[67] in Belgium, Germany and Ireland the rules consist of legislation, and in Italy of regulations. In Spain and Portugal, on the other hand, the members of the delegation are appointed by means of non-legislative parliamentary resolutions.[68] Also with regard to the level of administration actually

[64] For an account of the role of the European Parliament as a channel of regional interest participation, see generally, Tatham, above n 46, 504–06.
[65] *Ibid*.
[66] Art 300(3) TFEU.
[67] Austrian Constitution, Art 23c(1).
[68] D'Atena, above n 58, 20–21.

representing the Member States, the diversity cannot be over-emphasised. More specifically, delegations from federal or regionalised Member States (eg, the three federations, Spain, Italy) are predominantly regional, while in non-regionalised Member States such as The Netherlands, Sweden, Denmark, Luxembourg and Ireland, the representatives come exclusively from local authorities.[69]

Be that as it may, it seems that the Committee of the Regions provides for a *forum* through which the sub-State entities may exert influence in the EU decision-making processes. The obvious question to be posed is in which policy areas this advisory body consults the European Parliament, the Council and the Commission. The answer seems to be: when the Treaties so provide and in all other cases where one of those institutions considers it appropriate.[70] Generally speaking, the Treaties provide for the consultation of the Committee in the areas of transport,[71] employment policy,[72] social policy,[73] the European Social Fund,[74] education and youth,[75] vocational training,[76] culture,[77] trans-European public health,[78] infrastructure networks,[79] economic and social cohesion,[80] the environment[81] and energy.[82]

However, the Committee of the Regions can influence the shaping of the EU constitutional order by other means as well. According to the Lisbon Treaty, it may also bring annulment procedures before the Court of Justice 'for the purpose of protecting its prerogatives'.[83] This right of direct access to the Court is further elaborated in the Subsidiarity Protocol. Article 8 provides that the Committee may bring 'actions against legislative acts for the adoption of which the [TFEU] provides that it be consulted'. It remains to be seen when this institution will exercise such right.

v. The Regional Representation and Liaison Offices

To complete the picture of the representation of regional interests in the EU decision-making processes, we should briefly refer to the regional representation and liaison offices in Brussels. It is important to mention them because they play a crucial role in disseminating and exchanging information on EU policy issues,

[69] *Ibid*.
[70] Art 307(1) TFEU.
[71] Arts 90–100 TFEU.
[72] Arts 145–150 TFEU.
[73] Arts 151–161 TFEU.
[74] Arts 162–164 TFEU.
[75] Art 165 TFEU.
[76] Art 166 TFEU.
[77] Art 167 TFEU.
[78] Art 168 TFEU.
[79] Arts 170–172 TFEU.
[80] Arts 174–178 TFEU.
[81] Arts 191–193 TFEU.
[82] Art 194 TFEU.
[83] Art 263(3) TFEU.

and they are considered to be proof of the Europeanisation of regions and the emergence of a third level in the EU arena.[84]

As a starting point, it should be noted that these offices have mushroomed since the first ones were set up in the mid-1980s. At present, there are over 250.[85] They vary both in terms of the authorities they represent and as regards the legal basis for their establishment.[86] As for the first criterion, while some offices belong to a single regional authority, others represent an association of regional governments or even cross-border regions.[87] Concerning the legal basis, it suffices to note that some offices are set up by law, others are governed by public law as public bodies and still others are run privately as associations.

It seems that the national legal frameworks have progressively become more lenient as regards their existence. A good example of this point is the fact that the Spanish Government had challenged before the Constitutional Court the right of the Basque Country to have a delegation in Brussels, 'alleging that there could be no relation whatsoever between the Basque public institutions and the European institutions'.[88] However, the Court rejected that argument. It held that Union law is internal law and affects the competences of the Autonomous Communities.[89]

B. The Role of the Regional Authorities in the Application of the Subsidiarity Principle

The subsidiarity principle is recognised as a fundamental principle of the Union constitutional order not only by the Treaties,[90] but also by the constitutions of Member States, such as the German[91] and the Portuguese Constitutions.[92] At the

[84] See, eg J Magone, 'The Third Level of European Integration: New and Old Insights' in J Magone (ed), *Regional Institutions and Governance in the European Union* (Westport, Conn, Praeger Publishers, 2003) 11.

[85] European University Institute, above n 24, 41.

[86] D'Atena, above n 58, 40–41.

[87] European University Institute, above n 24, 42.

[88] Bengoetxea, above n 40, 54.

[89] Spanish Constitutional Tribunal, *sentencia* 165/1994, 26 May 1994. See also M Perez Gonzalez, 'La onda regional en Bruselas y el ámbito del poder exterior (Comentario a la sentencia del Tribunal Constitucional 165/1994, de 26 de Mayo)' (1994) 21 *Revista de Instituciones Europeas* 94.

[90] See generally Art 5(3) TEU and Protocol No 2.

[91] Art 23(1) of the German Basic Law reads, inter alia: 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.'

[92] Art 7(6) of the Portuguese Constitution reads: 'Subject to reciprocity and to respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may enter into agreements for the exercise jointly, in co-operation or by the Union's institutions, of the powers needed to construct and deepen the European Union.'

same time, it is a guiding principle in the relationship between certain Member States and their respective regional authorities, as is, for example, the case in Italy.[93] Arguably, one of the major breakthroughs of the Lisbon Treaty was the reinforcement of this principle by the explicit recognition of its regional dimension and by the formal introduction of the Early Warning System (hereafter 'EWS').

With regard to the regional dimension, it should be noted that Article 5(3) TEU, which provides for the new formulation of the principle of subsidiarity, states that the Union—outside the areas of its exclusive competence—may only act 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*'.[94] In addition, Article 2 of Protocol No 2 provides for the duty of the Commission to consult widely before proposing legislative acts. Such consultations must, 'where appropriate, take into account the regional and local dimension of the action envisaged'.[95]

However, the regional dimension is also linked with the functioning of the EWS. This mechanism gives the right to 'any national Parliament or any chamber of a national Parliament' to get involved in the EU legislative process.[96] More precisely, the national parliaments are entitled to send a reasoned opinion to the Union institutions containing their objections to the draft legislation if they believe that the draft is in breach of the subsidiarity principle.[97] If one-third (one-quarter if the issue touches upon the area of freedom, security and justice) of all the votes allocated in the national parliaments oppose the subsidiarity arguments, the legislative initiator may decide to maintain, amend or withdraw the draft. In any case, reasons must be provided for this decision.[98] If, on the other hand, at least a simple majority of all the votes allocated in the national parliaments oppose such draft legislation on grounds of subsidiarity, the proposal must be reviewed. The Commission, being the legislative initiator under the ordinary legislative procedure, may decide to maintain, amend or withdraw the draft. If it decides to maintain its proposal, it has to provide a reasoned opinion why it considers that it is in compliance with the subsidiarity principle. On the basis of the reasoned opinions of the Commission and the national parliaments, the Council (by a majority of at least 55 per cent of its members) or the European Parliament (by a simple majority of the votes cast) shall decide whether the proposal shall be given further consideration.[99]

Be that as it may, the explicit reference to 'any chamber of a national Parliament' is particularly important for the participation of the regional tier in the Union pre-legislative phase in those Member States where chambers composed of

[93] Italian Constitution, Art 118. See also Giuseppe Martinico's contribution in ch 15 of this volume.

[94] Emphasis added.

[95] Protocol No 2, Art 2.

[96] Protocol No 2, Art 6.

[97] *Ibid*. National parliaments must do so within eight weeks from the date of transmission of a draft legislative act.

[98] Protocol No 2, Art 7(2).

[99] Protocol No 2, Art 7(3).

regional representatives exist, such as Austria and Germany. Moreover, Article 6 of Protocol No 2 allows national parliaments to consult regional parliaments with legislative powers, to solicit their opinions on whether a certain Union draft legislative proposal complies with the subsidiarity principle. Although the positions of the regional legislatures—with the exception of Belgium—will not bind the national parliaments, the inclusive nature of the procedure recognises the regional dimension of the subsidiarity principle.

More specifically, the Austrian Constitution, following the amendment act *Lissabon-Begleitnovelle* adopted by the Austrian Parliament on 8 July 2010, acknowledges the rights of the *Bundesrat* to conduct subsidiarity scrutiny[100] and the duty of co-operation between the upper chamber and the regions.[101] In order to fulfil its role with regard to subsidiarity scrutiny, the *Bundesrat* has established a specialised EU committee with such a mandate. The committee takes a decision by simple majority. However, if half of the representatives of at least three regions so demand, the committee will delegate the procedure to the plenary assembly.[102] In that sense, the Austrian upper chamber plays a significant role in the participation of the regional tier in the EWS. The regional parliaments, by contrast, play a much more modest role. Although every EU proposal is automatically forwarded to all of them,[103] the regional parliaments' opinions do not bind the *Bundesrat*.[104]

As far as the German *Bundesrat* is concerned, it should be noted that its president uses his or her discretion to decide whether a certain Union legislative proposal should undergo subsidiarity scrutiny, following a request from another *Bundesrat* member or from a *Land*.[105] In that event, the president distributes the proposal to the relevant sectoral committees, including the EU committee. The committee in question presents its report to the plenary assembly, together with a recommendation for a resolution.[106] The report may be adopted by tacit assent, or in a formal vote by simple majority.[107] Given that the *Länder* vote *en bloc*, it is impossible for individual regions to split the vote. Moreover, the opinions of dissenting regions are not considered.[108]

At the same time, Belgium clarified, in a declaration annexed to the Treaty of Lisbon, that

> in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the

[100] Austrian Constitution, Art 23f(1).
[101] Austrian Constitution, Art 23g(3).
[102] G Vara Arribas and D Bourdin, *The Role of Regional Parliaments in the Process of Subsidiarity Analysis within the Early Warning System of the Lisbon Treaty* (Luxembourg, Committee of the Regions, 2011) 10.
[103] Austrian Constitution, Art 23g(3).
[104] Vara Arribas and Bourdin, above n 102, 19.
[105] *Ibid* 45.
[106] *Ibid* 45–46.
[107] *Ibid*.
[108] *Ibid* 57.

> Communities and the Regions act … as components of the national parliamentary system or chambers of the national Parliament.[109]

This does not mean, however, that consensus must be reached in order for the seven Belgian parliaments to be able to provide for reasoned opinions and to make use of the subsidiarity vote.[110] Neither at the federal level nor at the sub-State level is consensus required. As soon as either the House of Representatives or the Senate considers a certain EU legislative proposal to be in breach of the subsidiarity principle, at least one subsidiarity vote is cast. The same happens when one of the competent sub-State legislatures is of such opinion.[111] Thus, in cases where the proposal involves exclusive federal prerogatives, two votes are cast when both chambers issue a reasoned opinion. In cases where the proposal affects both federal and sub-State powers, two votes are cast when at least one federal chamber and one competent sub-State legislature issue a reasoned opinion. For proposals that relate solely to prerogatives of the Regions and/or Communities, two votes are cast when two legislatures belonging to different linguistic segments issue a reasoned opinion. Lastly, in the case of proposals on fisheries, touching upon the legislative competences of Flanders only, its parliament may cast two votes.[112]

While the constitutional orders of the *federal* Member States clearly provide for procedures that allow the regional tier to participate in the scrutiny of the subsidiarity of EU legislation, the channels of participation of the sub-State level in the *regionalised* Member States are less entrenched and more informal. In Italy, for instance, there is no legal duty to involve the regional parliaments in the EWS.[113] However, the regions may influence the procedure informally, through the aforementioned Conference of the Presidents of the Assemblies of Regional Councils and of Autonomous Provinces. In Spain, the 17 regional parliaments have four weeks to send a reasoned opinion to the national Parliament. However, only if the national Parliament itself decides to approve of a reasoned opinion will the contribution of the sub-State legislatures be mentioned and accompanied with references to the relevant documents.[114] Lastly, in the UK, both chambers at Westminster consider the views of the devolved legislatures to be part of the normal process of scrutiny in the relevant EU Committees.[115]

[109] Declaration by the Kingdom of Belgium on National Parliaments [2008] OJ C115/355.

[110] See *Ontwerp van samenwerkingsakkoord tussen de Federale Wetgevende Kamers, de parlementen van de Gemeenschappen en de parlementen van de Gewesten ter uitvoering van het Protocol betreffende de toepassing van de beginselen van subsidiariteit en evenredigheid gehecht aan het Verdrag tot vaststelling van een Grondwet voor Europa and Vlaams Parlement, Gedachtenwisseling over de stand van zaken aangaande het intra-Belgische samenwerkingsakkoord noodzakelijk voor de operationalisering van een aantal bepalingen van het verdrag van Lissabon*. See also Piet Van Nuffel's contribution in ch 8 of this volume.

[111] Vara Arribas and Bourdin, above n 102, 35.

[112] *Ibid* 37.

[113] *Ibid* 72.

[114] *Ibid* 77–78.

[115] *Ibid* 132–33.

IV. CONCLUSION

In this chapter, I have reviewed EU law and national constitutional law in order to assess the participatory rights of the sub-State entities in the EU decision-making processes. Such exercise is necessary given the composite nature of EU constitutional law. And because the EU is an intertwined constitutional order, the diversity of the arrangements that allow the regional tiers to take part in the EU policy-making process cannot be overstated. However, it is quite clear that the autonomous regions with legislative powers have participatory rights—albeit modest—within the Union political structure. Such rights might be constitutionally enshrined, provided for by law or simply a result of a non-legislative political agreement. Clearly, though, the number of sub-State entities that can take advantage of such arrangements is rather limited. We are far from achieving the enthusiastic vision of a 'Europe of the Regions', perhaps because most EU Member States do not have regions with legislative powers. Be that as it may, assessing the role of the autonomous authorities in Europe is still important, not least because 'the regional question, like the poor, is always with us and has been on the political agenda since the formation of the nation-state'.[116]

[116] J Loughlin, 'The Regional Question, Subsidiarity and the Future of Europe' in S Weatherill and U Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Oxford, Hart Publishing, 2005) 157.