REGIONAL DIMENSIONS TO EUROPEAN GOVERNANCE

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I. INTRODUCTION

Regionalism denotes social demands in regions for greater autonomy from the central institutions of their state.[1] Its bottom-up character sharply distinguishes it from traditional ideas of top-down regional policy.[2] National law may respond to such demands with decentralizing reforms. The reforms may entail federalisation, as in Belgium, or asymmetrical devolution, as in the United Kingdom. The legal significance of the responses may be expected to vary depending on whether legislative or merely administrative powers are allocated to regional institutions and on whether legislative powers allocated are entrenched at regional level or merely delegated to regional institutions.[3]

However, the challenges of regionalism may not be confined to national law.[4] Regionalism also involves an increasing tendency for regions to identify and pursue interests divergent from those expressed in international and European organisations by the central institutions of their state.[5] The divergence may reflect various political, cultural, and economic factors,[6] not least the diminishing capacity of the state, in the face of globalisation, to act as a coherent entity whose collective interests can be represented as expressed by central institutions.[7]

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1 Regionalism has been described as a 'Zeitgeist' (*European Governance*, COM (2001) 429, Report 3B, 22). The demands may be reinforced by realisation that globalisation implies the need for regional institutions to take a more active role to win foreign capital (CM Dudek, 'Can the European Union Influence the Functioning of Regional Governments?', *EUI Working Papers*, RSC No 2000/49).

2 See, regarding this distinction, F Massart-Pierard, 'La Dialectique européanisation-régionalisation', in *L'Europe et ses régions* (The Hague: Faculté de droit, Liège, 1975), 289–310, 291.

3 In a federation the authority to change formal decision-making rules is shared by governments at different levels rather than monopolised by central government (DJ Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987)).

4 *European Governance*, COM (2001) 428, Report 4C, 13. 'If it is true that the sovereign state is an illusion, then self-determination should be redefined as the ability to negotiate one's position within the emerging international order'. See M Keating, 'Plurinational Democracy in a Post-Sovereign Order', *Queen's Papers on Europeanization* 1/2002.

5 Cf. R Strassoldo, 'Globalism and Localism: Theoretical Reflections and Some Evidence', in Z Mlinar (ed), *Globalisation and Territorial Identities* (Aldershot: Avebury, 1992), 35–59.

6 J Painter, 'Regionalism and European Citizenship', IES Seminar on Europeanisation, 19 Apr 2002.

7 RO Keohane and JS Nye, *Power and Interdependence: World Politics in Transition*, 2nd edn (Boston, MA: Little, Brown, 1988). Cf, regarding the idea of 'perforated sovereignty', I Duchacek *et al.* (eds), *Perforated Sovereignties and International Relations* (New York: Greenwood, 1988).

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The approach of EU law to regionalism is explored in the present article. The article considers whether EU law is currently capable of organising regionalism—in other words, transforming the social phenomenon of regionalism into legal process—or whether EU law may undermine decentralisation within Member States and thus produce 'recentralisation' within Member States. Writers generally assume that EU law is favourable to regionalism,[8] or at least that EU law leaves such organisation to national law,[9] though some research suggests that 'EU regulatory policies' may constrain development efforts by regional institutions.[10] These assumptions will be challenged in the present article, in the light of the importance which the European Court of Justice[11] and Union practice generally[12] tend to attach to state sovereignty.

This tendency has formal support in Treaty provisions. Article 1 EC provides that by this Treaty the High Contracting Parties establish among themselves a European Community. Article 1 TEU provides that the European Union has been established in the same way.[13]

According to the European Court of Justice, the 'establishment of institutions endowed with sovereign rights'[14] through the 'transfer of powers from the [Member] States' to these institutions[15] is entailed. However, the sovereignty of Member States is restricted only to the extent necessary to give legal effect to the commitments undertaken by them in ratifying the Treaties. It may even be inferred that participation by Member States in Union decision-making, like ratification of the Treaties, is an exercise of their sovereignty.[16] At least, 'their sovereignty has not been lost, but subjected to a process of division and combination internally [ie, within the Union], and hence in a way

[8] See, eg, J Peterson, 'Subsidiarity: a Definition to Suit Any Vision' (1994) 47 *Parliamentary Affairs* 116–32.

[9] See, eg, C Jeffery, 'Sub-National Mobilization and European Integration: Does it Make Any Difference?' (2000) 38 *JCMS* 1–23.

[10] CM Dudek, op cit, cf also, in the context of enlargement, J Hughes, G Sasse, and C Gordon, 'The Regional Deficit in Eastward Enlargement of the European Union: Top Down Policies and Bottom Up Reactions', *ESRC 'One Europe or Several' Programme Working Paper* 29/01 and B Fowler, 'Debating Sub-state Reform on Hungary's "Road to Europe" ', *ESRC 'One Europe or Several' Programme Working Paper* 21/01.

[11] See, regarding the 'great regard' paid to state sovereignty by the ECJ, O Spiermann, 'The Other Side of the Story: an Unpopular Essay on the Making of the European Community Legal Order' (1999) *EJIL* 763–90.

[12] 'Law remains rooted within the paradigm of the unitary, sovereign actor exercising powers which fall within "its" defined pocket of authority' (J Scott, 'Law, Legitimacy and EC Governance: Prospects for "Partnership" ' (1998) 36 *JCMS* 175–94, 189).

[13] In contrast, according to cl 1 of the Preamble to the Charter of Fundamental Rights of the EU (OJ 2000 C346/1), the 'peoples of Europe [are] creating an ever closer union among them'. The draft charter (<fundamental.rights@consilium.eu.int>) went further and asserted that the 'peoples of Europe have established an ever closer union between them'.

[14] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

[15] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.

[16] Cf, regarding the EU as a 'delegate' of the Member States, G Majone, 'Europe's "Democratic Deficit": the Question of Standards' (1998) *ELJ* 5–28.

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enhanced externally'.[17] The practical reflection of such thinking is the dominant role which Member States are accorded in the development of Union law.[18] Questions arise whether a legal system so dependent on intergovernmentalism is structurally capable of organising regionalism.

The questions were inconclusively considered at the Intergovernmental Conference in Nice and in the White Paper on *European Governance*.[19] In a Declaration on the Future of the Union, attached to the Treaty of Nice, the Conference called for a deeper and wider debate about the future development of the European Union. In 2001 the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, were to encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion; political, economic and university circles; representatives of civil society; and so on. The process was to address, *inter alia*, how to establish and monitor a more precise delimitation of competencies between the Union and the Member States, reflecting the principle of subsidiarity. Addressing this issue, the Conference recognised the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States. The wording of this declaration tacitly acknowledged rather than tackled the essential dilemma which regionalism poses for EU law: should EU law seek to organise regionalism through limiting Union encroachment on state powers, as seems to be favoured in the Laeken Declaration on the Future of the European Union,[20] or should it do so through promoting pluralism in decision-making within the Union?[21]

Consideration of this dilemma in the present article will be based on a review of Maastricht reforms concerning the composition of the Council of the Union, subsidiarity and the Committee of the Regions and the 'missing reform' concerning regional access to the European Courts. The review will

[17] N MacCormick, 'On Sovereignty and Post-Sovereignty', in N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 123–36, 133. Thus 'the exercise of Community powers somehow appears as another mode for the Member States to assume their own sovereignty, not any longer through autonomous, but through common, decision-making' (K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *AJCL* 205–63, 231).

[18] 'Each new phase in the building of the Union requires the consent of the Member States, expressed through a Treaty'. See A Dashwood, 'States in the European Union' (1998) *ELR* 201–16, 209.

[19] COM (2001) 429. Governance is there defined as 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence' (ibid, 8, n 1).

[20] Annex I to the Conclusions of the Presidency, 14–15 Dec 2001.

[21] Cf the declaration of the Austrian, Belgian, and German governments at the Amsterdam IGC (OJ 1997 C340/143). Pluralism seems to have some support in 'Enhancing Democracy in the European Union', Commission Staff Working Document (2000). But cf, regarding practical problems of regionalism in relation to 'new methods of governance', *European Governance*, COM (2001) 429, Report 4A, 32.

have regard to the political science literature on multilevel governance and, more particularly, on the 'coupling' of decision-making arenas. Recourse to such literature may be essential, because limitations to the legal organisation of regionalism may not be apparent in legal materials alone. In practice, to the extent that regional institutions are denied rights to participate in Union decision-making, the problems associated with such denial may not be apparent to EU law.[22] The problems may be revealed, though not necessarily recognised, by political science literature, which concentrates on social aspects of regionalism rather than its legal organisation. Revelation of the problems may assist identification of limitations to such organisation and, in turn, inform discussion of the kind of legal reforms needed.

II. COUNCIL COMPOSITION

According to Article 147 EEC, the Council of Ministers consisted of representatives of the Member States. Each government was to delegate to it one of its members. Article 203 EC, as amended by the Maastricht Treaty, now provides that the Council of the Union shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State. In practice, this provision is interpreted as meaning that each Member State is represented by one member of the Council. The member may be part of a delegation from his Member State, and the delegation may contain regional ministers, such as ministers from the devolved institutions in the United Kingdom. However, only the member may exercise formal functions, notably that of voting.[23]

Under Article 203 EC a regional minister may himself be the member of the Council representing his Member State, provided that he is authorised by national law to commit the government of his Member State as a whole.[24] However, such authorisation of a regional minister may be problematic under national law, given that a regional minister may not be responsible to an institution representative of his Member State as a whole. It is uncertain whether this problem could be solved through treating a national minister as 'leading' the delegation and holding him responsible for the conduct of a regional

[22] The law may thus lack 'adequate learning capacities' (G Teubner, 'Autopoiesis in Law and Society: a Rejoinder to Blankenburg' (1984) 18 *Law and Society Rev*. 291–300, 298). According to AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v. EU Council* [21 March 2002], para 66, restrictive rules on standing may render EU law 'blind'. Rather, the law may have 'distorted vision'. Cf the rigour with which the procedural form for the adoption of a Union act may be examined, once an application has been found admissible (Case C-107/99 *Italy v EC Commission: SPPPR* [30 Jan 2002]).

[23] Art 7(3) of the Rules of Procedure of the Council (OJ 1993 L304/1).

[24] In practice, regional ministers from Austria, Belgium, Germany, and Spain have participated in the Council. See M Westlake, *The Council of the European Union* (London: Cartermill, 1995), 57. However, they participate as 'common representatives putting forward collective subnational positions'.

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minister as a Council member.[25] At the same time, such a solution would highlight rather than resolve the further problem that, as a representative of his Member State, a regional minister might be prevented from expressing regional interests divergent from those pursued by the central institutions of his Member State.[26] At least, if there is a clash of interests between central and regional institutions of a Member State, Article 203 allows for national law to prevent expression of their interests in the Council by regional institutions.[27]

Formally, this provision may thus embody a principle of 'neutrality'. According to the expression of this principle by the Court of Justice, Union law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies that exist on their territory. If the institutional arrangements in the domestic system enable the rights which individuals derive from the Union legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system, the requirements of Union law are fulfilled.[28] The approach of the Court has scant regard to the capacity of the operations of the Structural Funds to 'stir up' regionalist demands[29] or even the extent to which endogenous development sought in the Union legislation governing these funds[30] implies the need for greater regional autonomy.[31]

The principle may be said to respect the right of each Member State to organise itself internally, such organisation being treated as 'entirely a matter of national sovereignty'.[32] In other words, a sovereignty-based approach to the

[25] It is envisaged, eg, that a Scottish Executive Minister may speak for the UK in the Council with the 'UK lead Minister' retaining overall responsibility for the negotiations. See *Scotland's Parliament*, Cm 3658, 17. According to para 7(2)(b) of sch 5 to the Scotland Act 1998, it is a matter of Scottish ministers 'assisting ministers of the Crown'. In practice, attendance of Scottish ministers at the Council is infrequent. See Governance of the European Union and the Future of Europe: What Role for Scotland?, Ninth Report of the European Committee of the Scottish Parliament (2001), para 188. Attendance by Scottish Executive officials at meetings of Council working groups is even less frequent (ibid). Cf. the recommendation that the concordats governing formulation of 'the UK line' in the Council of the Union should be revised to grant Scottish ministers 'an automatic right to attend Council of the EU meetings when devolved matters are being discussed and decided upon' (ibid, para 243).

[26] Ministers from devolved institutions must 'support and advance the single UK negotiating line in the Council' (Memorandum of Understanding (Cm 4444 (1999)), Part II, para B13). See also V Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), 280; and A Wright, 'Scotland and the EU: All Bark and No Bite', in A. Wright (ed), *Scotland: the Challenge of Devolution* (Aldershot: Ashgate, 2000), 137.

[27] See, eg, the examples given by S Bulmer *et al*, 'European Policy-Making under Devolution: Britain's New Multi-Level Governance', *European Policy Research Unit Paper* 1/01.

[28] Case C-302/97 *Klaus Konle v Austria* [1999] ECR I-3099.

[29] Cf T Conzelmann, ' "Europeanization" of Regional Development Policies? Linking the Multi-level Governance Approach with Theories of Policy Learning and Policy Change', *EIoP* 4/1998.

[30] Art 2(1)(c) of Reg 1783/1999 (OJ 1999 L213/1) on the ERDF. See, generally, A Evans, *The EU Structural Funds* (Oxford: Oxford University Press, 1999).

[31] A Evans, 'Regionalist Challenges to the EU Decision-making System' (2000) *European Public Law* 377–400.

[32] Commission Reply by Mr Millan to WQ 1390/90 (OJ 1991 C164/5) by Mr Reinhold Bocklet.

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participation of regional institutions in the Council is formally embodied in Article 203, and the organisation of regionalism is formally left to national law.

However, the effect of the principle may be less than neutral. Even where national law otherwise guarantees for regional institutions a role in decision-making within their Member State, this role may be prejudiced by the working of Council decision-making procedures.[33] For example, the exigencies of negotiating within the Council of the Union have been stressed by the German Constitutional Court.[34] In view of these exigencies, the Court would not grant an interim order to prevent federal representatives from accepting measures in this Council which fell within the powers of the German *Länder*.[35]

Therefore, Council decision-making procedures may effectively serve to strengthen the position of the central institutions in Member States in relation to their regional institutions.[36] In other words, the possibility of '*recentralisation*'[37] or withdrawal of regional autonomy within Member States[38] effectively arises.[39] This possibility may not necessarily be precluded by Union law provisions formally respecting the rights of regional institutions under national law.[40] Rather, the European Parliament considers the possibility to be increased by 'the radical extension of the Community's sphere of activities under the Treaty on European Union'.[41] The effects of such 'Europeanisation' of policy fields may be cross-sectoral, as where economic and monetary union may challenge decentralisation of social policy,[42] or may vary between

[33] *European Governance*, COM (2001) 428, Report 4C, 13.

[34] Cf HC Jones, *The National Assembly for Wales and the European Union* (Cardiff: Welsh Office, 1998), 15.

[35] *Bayerische Staatsregierung v Bundesregierung* [1990] 1 CMLR 649. In *Manfred Brunner* [1994] 1 CMLR 57, 82 the same court found a complaint that the TEU prejudiced the position of the *Länder* to be inadmissible on procedural grounds.

[36] *European Governance*, COM (2001) 428, Report 4C, 17.

[37] J Biancarelli, 'La Communauté européenne et les collectivités locales: une double dialectique complexe' (1991) *Revue Française d'Administration Publique* 515–27, 526. Cf, in the case of the UK, Bogdanor, op cit, 278.

[38] Cf, regarding Swiss federalism and European integration, U Sverdrup and S Kux, 'Balancing Effectiveness and Legitimacy in European Integration: the Norwegian and the Swiss Case', *Arena Working Paper* 97/31.

[39] MV Agostini, 'The Role of the Italian Regions in Formulating Community Policy' (1990) *The International Spectator* 87–96.

[40] Cf, regarding Art 4(1) of Reg. 2081/93 (OJ 1993 L193/5) amending Reg 2052/88 on the tasks of the Structural Funds and their effectiveness and on the coordination of their activities between themselves and with the operations of the EIB and the other existing financial instruments, B Hessel and K Mortelmans, 'Decentralized Government and Community Law: Conflicting Institutional Developments?' (1993) *CMLRev* 905–37, 910, n 17a.

[41] Resolution of 18 Nov 1993 (OJ 1993 C329/279) on the participation and representation of the regions in the process of European integration: the Committee of the Regions, para I of the Preamble.

[42] K Featherstone, 'The Political Dynamics of the *Vincolo Esterno*: the emergence of EMU and the challenge to the European social model', *Queen's Papers on Europeanisation* 6/2001. Cf, regarding the effects of EU transport policy on regional disparities, *European Governance*, COM (2001) 428, Report 4C, 23.

sectors, as where the strengthening of economic and social cohesion[43] appears more favourable to regionalism than economic and monetary union.[44]

Such effects occur, because inputs into Council decision-making are a political resource which may be exploited by some domestic actors, to improve their relative positions in domestic political conflicts.[45] In particular, national governments can use the need to compromise and the temporal closure of the decision-making process for all but state actors at the EU level in order to gain autonomy with regard to domestic groups.[46] For other actors, to attempt postponement of a national response to an EU proposal is to risk exclusion from the 'Brussels debate'.[47]

There may, then, appear to be a 'paradox of weakness' in which the weakening of the state in relation to the EU is accompanied by the internal strengthening of the capacity of state actors to pursue their goals in the face of opposition from regional actors.[48] As Moravcsik argues, integration redistributes political resources by

> shifting control over domestic agendas (initiative), altering decision-making procedures (institutions), magnifying informational asymmetries in their favor (information), and multiplying the potential domestic ideological justifications for policies (ideas).

Indeed, binding EU commitments may enable governments to implement unpopular reforms at home whilst engaging in 'blameshift' towards the Union, even if they themselves favour the reforms.[49] In other words, the restriction of the 'external' sovereignty of the state may be accompanied by a strengthening of certain actors within the state.[50]

In the United Kingdom the effects formalize themselves in the contradiction

[43] According to Art 158 EC, in order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.

[44] Cf the concern for 'putting a coherent regional and local dimension back into the complex procedures and processes caused by the Europeanisation of public policies' (*European Governance*, COM (2001) 428, Report 4C, 21).

[45] 'Political actors respond politically rather than merely yielding to external pressures as hyper-globalists would like us to believe' (M Zürn, 'The State in the Post-national Constellation—Societal Denationalisation and Multi-level Governance', *Arena Working Paper* 35/99, 2).

[46] Featherstone, op cit.

[47] S Bulmer and M Burch, 'Coming to Terms with Europe: Europeanisation, Whitehall and the Challenge of Devolution', *Queen's Papers on Europeanisation* 9/2000.

[48] E Grande, 'Das Paradox der Schache, Forschungspolitik und die Einflusslogik europäischer Politikverflechtung', in M Jachtenfuchs and B Kohler-Koch (eds), *Europäische Integration* (Opladen: Leske and Budrich, 1995).

[49] A Moravcsik, 'Why the European Community Strengthens the State: Domestic Politics and International Cooperation', *Harvard Center for European Studies Working Paper* 52 (1994).

[50] Cf the distinction between internal and external sovereignty in N MacCormick, 'On Sovereignty and Post-Sovereignty', in N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 123–36, 127.

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between treatment of relations with the Union as a non-devolved matter,[51] for which the UK Government remains responsible, and the capacity of Council decisions to affect matters devolved to regional institutions.[52] As a consequence, the autonomy of the regional institutions in devolved matters may be jeopardised by Council decision-making in which members of devolved institutions may not represent their 'regions'.[53]

Therefore, the nature of Council decision-making means that a neutrality principle formally associated with respect for state sovereignty (and, indeed, with subsidiarity)[54] may, in practice, be associated with greater intrusion into state structures than limitations to such sovereignty entailed by the requirements of the common market[55] or fundamental rights.[56]

The need to study this problem is recognised by the European Council. According to the Conclusions of the Presidency at the Helsinki European Council of December 1999, each Member State would keep under permanent review its internal coordination arrangements for EU matters, so that they would be tailored to ensuring the optimum functioning of the Council. On the basis of a contribution from each Member State giving a practical description of internal coordination procedures on EU matters, a summary of coordination systems in the different Member States was to be compiled by December 2000.[57] Similarly, the White Paper on *European Governance* suggests an investigation of 'best practice' in representation of regional interests in national delegations.[58] The underlying problem—'how to channel broadly concerted regional interests into the narrow pipe of executive bargaining between Member State governments'[59]—and the inadequacy of reforms of Council composition alone to overcome this problem may be highlighted by such investigations.

III. SUBSIDIARITY

Subsidiarity was formally introduced into EU law by the Maastricht Treaty. According to the Preamble to the TEU, the Member States were 'resolved to

[51] See, eg, sch 2, cl 3 to the Northern Ireland Act 1998.

[52] Eg, around 80 per cent of the policy areas devolved to the Scottish Parliament are said to have a EU dimension. See *Developments in the European Union, January-June 2000*, Cm 4922, 39. See, similarly, *European Governance*, COM (2001) 428, Report 4C, 21.

[53] The 'decisive and unified national representation reminds critics of an outdated form of personal sovereign power, with negative consequences for each national democratic culture' (J de Areilza, 'Sovereignty or Management? The Dual Character of the EC's Supranationalism—Revisited', *Harvard Jean Monnet Working Paper* 2/95, 6).

[54] *European Governance*, COM (2001) 429, Report 4C, 34.

[55] See, eg, Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

[56] Cf Art 7 TEU. See also the statement of the EU Presidency on Austria on 31 Jan 2000 <http://www.asil.org/insights/insigh40.htm>; and M Merlingen, C Mudde, and U Sedelmeier, 'Constitutional Politics and the "Embedded *Acquis Communautaire*": the Case of the EU Fourteen Against the Austrian Government', *ConWEB*, No 4/2000.

[57] Bull EU 12–1999, I, Annex III, para 14.

[58] *European Governance*, COM (2001) 429, Report 4C, 34.

[59] A Benz and B Eberlein, 'Regions in European Governance: the Logic of Multi-Level Interaction', *EUI Working Paper* RSC 98/31, 4.

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continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. Hence, Article 1 TEU requires that decisions are 'taken as closely as possible to the citizen'. The implication may be drawn from this provision that the existence of 'autonomous regional bodies endowed with sufficient powers and resources'[60] is a condition for achievement of Union objectives, particularly the strengthening of economic and social cohesion.[61] The further implication may be drawn that fulfillment of this condition is required by the Treaty,[62] though the jurisdiction of the European Courts does not extend to Article 1 TEU.[63] Thus, it has been claimed, 'subsidiarity, in its broadest definition, provides the intellectual underpinning for a "Europe of the Regions" '.[64]

However, a narrower approach to subsidiarity is adopted by Article 5 EC.[65] This provision only refers to relations between the European Community and Member States.[66] It states:

> in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Article 5 EC does not reflect the German proposal,[67] that the subsidiarity principle should apply generally in relations between Union, national and regional institutions,[68] or the demands to similar effect made by the European Parliament[69] and the Committee of the Regions.[70] Rather, it seems to reflect

[60] European Parliament Resolution of 18 Nov 1993 (OJ 1993 C329/279) on the participation and representation of the regions in the process of European integration: the Committee of the Regions, para E of the Preamble.

[61] COR Opinion of 17 May 1994 (OJ 1994 C217/10) on the draft notice from the Commission laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning urban areas (Urban), para 5 of the Preamble.

[62] Ibid.

[63] Art 46 TEU.

[64] Peterson, op cit, 129.

[65] This version is made applicable to the EU as a whole by Art 2 TEU. Cf. the distinction between substantive and procedural subsidiarity in A Scott, J Peterson, and D Millar, 'Subsidiarity: a Europe of the Regions v the British Constitution' (1994) *JCMS* 47–68. See also K Neunreither, 'Subsidiarity as a Guiding Principle for European Community Activities' (1993) *Government and Opposition* 206–20.

[66] Cf the Tenth Amendment to the US Constitution, which provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.

[67] Cf Council Reply to WQ E-3100/93 (OJ 1994 C147/1) by Víctor Arbeloa Muru.

[68] 'Beteiligung der Bundesländer an Regierungskonferenz zur Revision der Gemeinschaftsverträge' (1990) *Europäische Zeitschrift für Wirtschaftsrecht* 431.

[69] Resolution of 18 Nov 1993 (OJ 1993 C329/279) on the participation and representation of the regions in the process of European integration: the Committee of the Regions, para 4.

[70] COR Opinion of 21 Apr 1995 on the Revision of the TEU and of the EC Treaty, CdR 136/95.

the statement of the European Council in December 1992 that 'Community measures should leave as much scope for national decision as possible.'[71] It may also be said to reflect the principle in Article 6(3) TEU that the Union 'shall respect the national identities of its Member States'.[72]

These two provisions may be thought to require respect for the central-regional government relations determined by the constitutional law of each Member State. In other words, in so far as constitutional issues are recognised to be present, they are assumed to be resolvable through formal respect for national constitutional law rather than on the basis of any implication in Article 1 TEU. The conclusion drawn by the Commission is that 'it is not for the Community to interfere in the distribution of powers between the central, regional or local authorities in the Member States'.[73] Such interference is assumed to be precluded by the demands of state sovereignty.[74]

However, it would be an oversimplification to infer that the freedom of Member States to choose internally to centralise or decentralise is guaranteed by Article 5 EC.[75] For example, the subsidiarity principle embodied in this provision may lead to increased use of 'soft law' by the Commission.[76] Such law comprises instruments which may have legal effects but which are not adopted according to formal legislative procedures.[77] The fact that such law is not adopted according to these procedures implies that transparency in Union decision-making—necessary for democratic control and for efficiency in a (globalised) information society[78]—will be reduced.[79] Reduced transparency implies, in turn, that such decision-making may become less than ever accessible to

[71] Conclusions of the Presidency, Annex 1 to Part A, Bull EC 12–1992, I.19. See, similarly, para 7 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty by the Treaty of Amsterdam.

[72] U Everling, 'Reflections on the Structure of the European Union' (1992) *CMLRev* 1053–77, 1071.

[73] Commission Reply by Mr Delors to WQ E-3099/93 (OJ 1994 C289/27) by Víctor Arbeloa Muru. Cf the approach of the CFI in Case T-465/93 *Consorzio Gruppo di Azione Locale Murgia Messapica v EC Commission* [1994] ECR II-361. According to AG Saggio in Joined Cases C-400–402/97 *Administración del Estado v Juntas Generales de Guipúzcoa* [1 July 1999], para 37, the fact that aid is granted by a regional institution in the exercise of its exclusive competence is 'une circonstance purement formelle' for the purposes of Union control of state aid.

[74] It is for 'the constituent authorities—the authors of the Treaty' to distribute powers within Member States.' See *Adaptation of Community Legislation to the Subsidiarity Principle*, COM (93) 545, 1–2.

[75] Bogdanor, op cit, 277–8.

[76] *Legislate Less to Act Better: the Facts*, COM (1998) 345, 1–2.

[77] See A Evans, *Textbook on EU Law* (Oxford: Hart Publishing, 1998), s 2.3.1. See, more particularly, AG Tesauro in Case C-58/94 *Netherlands v EU Council: access to documents* [1996] ECR I-2169, I-2184, n 27.

[78] See, eg, Dec 96/339 (OJ 1996 L129/24) adopting a multiannual Community programme to stimulate the development of a European multimedia content industry and to encourage the use of multimedia content in the emerging information society (INFO 2000). See also Dec 96/413 (OJ 1996 L167/55) on the implementation of a Community action programme to strengthen the competitiveness of European industry.

[79] F Snyder, 'Soft Law and Institutional Practice in the European Community', in S Martin (ed), *The Construction of Europe* (Deventer: Kluwer, 1994), 197–225.

regional institutions.[80] In other words, compliance with the subsidiarity principle in Article 5 EC may effectively lead to conflict between the practice of Union decision-making and decentralisation under national law.[81]

It might be argued that Article 5 EC should be interpreted in the light of Article 1 TEU,[82] as precluding Union action where action can better be achieved at regional level.[83] It might further be argued that increased participation by regional institutions in Union decision-making might facilitate achievement of the objectives of action remaining open to the Union, notably the strengthening of cohesion. However, such arguments are not reflected in the case law of the European Court of Justice. The Court assumes that subsidiarity and 'loyalty' to the Union in Article 10 EC[84] are potentially conflicting rather than mutually reinforcing principles. The Court focuses simply on the risk that subsidiarity under national constitutional law may threaten implementation of Union measures. Thus the Court holds that a Member State may only 'delegate' responsibility for implementation of Union measures to regional institutions, provided the Member State ensures that the responsibility is discharged.[85] Hence, decentralisation within a Member State might be seen as precluding effective action by Member States and thus as requiring Union intervention under Article 5 EC.

In short, subsidiarity fails to secure the structural adaptation of Union law necessary for legal organisation of regionalism. Thus 'insofar as the EU remains solely a union comprising of nation states, while subsidiarity may continue to "inspire" thinking about the structure of multilevel governance in the EU, it cannot be applied instrumentally to achieving that end'.[86] Accordingly, 'subsidiarity, as a legal principle, is hardly going to be the shield protecting local values against interference by Brussels that is sometimes portrayed by some national political actors'.[87] Rather, subsidiarity in Article 5 EC may permit or even encourage recentralisation.

[80] See, generally, regarding the importance of accessibility to decision-making, H Smith, *The Power Game* (New York: Ballantine, 1993), 70–83.

[81] Cf the concerns expressed about soft law in the AER Resolution on the Commission's White Paper on New Governance, 8 and 9 Feb 2001.

[82] The ECJ may use Treaty provisions in relation to which it lacks jurisdiction for interpretative purposes. See, eg, Opinion 1/91 *Agreement with the EFTA States* [1991] ECR I-6079.

[83] G de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam', *Harvard Jean Monnet Working Paper* 7/99.

[84] According to Art 10 EC, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Union institutions. They shall facilitate the achievement of the tasks of the European Community. They shall abstain from any measure that could jeopardise the attainment of the objectives of this Treaty.

[85] See, eg, AG Capotorti in Case 73/81 *Commission v Belgium: titanium oxide* [1982] ECR 153, 162; and Joined Cases 227–230/85 *Commission v Belgium: failure to comply with ECJ judgments* [1988] ECR 1, 11.

[86] A Scott, 'The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously', *Harvard Jean Monnet Paper* 9/2000.

[87] N Barnard, 'Decentralized Government and Subsidiarity', in E Kirchner (ed), *Decentralization and Transition in the Visegrad* (London: Macmillan, 1994), 34–52, 38.

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The White Paper on *European Governance* recognises such problems and favours networks between different levels of decision-making rather than separation of these levels through subsidiarity.[88] This approach, however, reformulates, rather than tackles, the essential problem—how legally to organise the relationship between the 'levels'.

IV. COMMITTEE OF THE REGIONS

The Committee of the Regions was established by Article 263 EC, introduced by the Maastricht Treaty, and consists of regional and local representatives. When the Treaty of Nice comes into force, this provision will be amended to stipulate that such persons must either hold a regional or local authority electoral mandate or be politically accountable to an elected assembly.

Article 265 EC provides that the Committee shall be consulted by the Council or Commission where the Treaty so provides. The Treaty so provides in relation to education,[89] culture,[90] public health,[91] guidelines for trans-European networks,[92] and cohesion.[93] The Committee shall also be consulted in all other cases where the Council or Commission considers consultation appropriate. It may also be consulted by the European Parliament. At the same time, the Committee may take the initiative and issue an opinion in cases where it considers such action appropriate. It is thus described as 'an institution through which regional and local bodies can officially be involved in drawing up and implementing Community policies'[94] and, indeed, 'included in the legislative process'.[95] According to the Committee itself, its establishment 'enables regional and local bodies to participate, via the Committee of the Regions, in the decision-making process of the European Union'.[96]

However, the Committee has a purely consultative role. In any case, centralised representation[97] of regional institutions in such a body may not necessarily constitute an adequate basis for regional participation in Union

[88] COM (2001) 429, Report 4C, 1–2.
[89] Art 149 EC.
[90] Art 151 EC.
[91] Art 152 EC.
[92] Art 156 EC.
[93] Arts 159, 161, and 162 EC.
[94] Preamble to Dec 94/209 (OJ 1994 L103/28) winding up the Consultative Council of Regional and Local Authorities. See also A Valle Galvez, 'La Cohesione economica y social como objetivo de la Union europea' (1994) *Revista de Instituciones Europeas* 341–78, 356.
[95] European Parliament Resolution of 18 Nov 1993 (OJ 1993 C329/279) on the participation and representation of the regions in the process of European integration: the Committee of the Regions, recital G in the Preamble.
[96] Opinion of 17 May 1994 (OJ 1994 C217/10) on the draft notice from the Commission laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning urban areas, para 4 of the Preamble.
[97] Though according to Art 263 EC, COR members may not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the general interest of Community.

decision-making[98]—not least because of the diversity of interests between regions and the diversity of competences[99] between regional and local institutions represented in the Committee.[100] The inadequacy of such representation is implicitly recognised by the Committee of the Regions itself. This Committee argues that it should be included in various committees consulted by the Commission, to ensure that views of *individual regions* affected by Union decisions will be 'heard'.[101] This argument reflects recognition in the literature that the structural difficulties of organising regionalism in Union law cannot be overcome simply by creating a body such as the Committee of the Regions.[102]

The White Paper on *European Governance* gives little consideration to the significance of these difficulties faced by the Committee.[103] It merely suggests strengthening the consultative role of the Committee. In particular, it suggests that the Union institutions should have to give reasons for departing from 'significant recommendations' of the Committee.[104]

V. REGIONAL ACCESS TO THE EUROPEAN COURTS

Judicial review may be expected to increase the pluralism of EU decision-making,[105] and demands for Treaty reform securing for regional institutions improved access to the European Courts are well established.[106] In the absence of such reform, rules of standing before the European Courts are problematic for regional institutions. The problems concern both 'passive' and 'active' access to the European Courts.

As regards 'passive' access, infringement proceedings under Articles 226

[98] Cf, regarding policy disagreements within the Committee, T Christiansen, 'A Region among Regions: the Wider View', in D Kennedy (ed), *Living with the European Union: the Northern Ireland Experience* (London: Longman, 1999), 17–37, 31.

[99] Cf the idea of giving 'the Commission . . . the possibility to consult a specific sub-group of the Committee of Regions representing regions with legislative powers and/or city networks' (*European Governance*, COM (2001) 429, Report 3B, 31).

[100] *European Governance*, COM (2001) 429, Report 4C, 14. See, eg, C Jeffery, 'The "Europe of the Regions" from Maastricht to Nice', IES Seminar on Europeanization, 11 May 2001. See also, regarding problems with the allocation of seats in the COR, N MacCormick, 'A Comment on the Governance Paper', *Harvard Jean Monnet Working Paper* 6/01, 4.

[101] Opinion of 17 May 1994 (OJ 1994 C217/26) on the proposal for a decision laying down a series of guidelines on trans-European energy networks, para A.5.1. See, more particularly, regarding Union decisions in the field of fisheries policy, the Opinion of 16 July 1998 on the future of peripheral areas in the EU, CdR 23/98, para 8.6. Cf, regarding the need to 'look at how interregional organisations and the institutions and bodies of the Union should be interlinked', 15 (ibid) and, regarding individual regions, 33 (ibid).

[102] Cf J Scott, *Development Dilemmas in European Community* (Buckingham: Open University Press, 1995), 34.

[103] *European Governance*, COM (2001) 428, Report 4C, 14.

[104] COM (2001) 429, Report 4C, 36.

[105] Cf D Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) *MLR* 44.

[106] See, eg, COR Opinion of 21 Apr 1995 on the Revision of the TEU and of the EC Treaty, CDR 136/95.

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EC and 227 EC may only be brought against Member States. Hence, regional institutions may depend on central institutions to 'defend' them.[107] Consequently, rules regarding 'passive' standing may add to the tendency of EU law to undermine decentralisation under national law.

For example, in the UK relations with the Union are excepted from devolution. However, 'observing and implementing' obligations under Union law do not fall within the exception.[108] Hence, the *Concordats on Coordination of European Union Policy Issues*[109] set out the arrangements for dealing with infringement proceedings relating to matters within the responsibility of a devolved institution. Where such proceedings are initiated by the Commission, replies to the Commission are drafted by the devolved institution and submitted by UKRep. Where a case is referred to the European Court of Justice, the devolved institution must participate in the preparation of the UK submissions. Where any financial costs are imposed on the UK because of a failure of a devolved institution to abide by Union law, responsibility for such costs is to be borne by the devolved institution.[110] Thus the UK Government internally holds the devolved institution responsible for infringements of Union law, but the concordats do not place any reciprocal obligation on the UK Government to defend regional interests in the European Court.

As regards 'active' access, Article 230 EC, on proceedings for annulment of Union acts, distinguishes between the standing of 'privileged', 'semi-privileged', and 'non-privileged' applicants. It has been said that standing embraces two separate ideas.[111] The first is the idea of a 'special capacity or quality in the applicant'. This capacity goes hand in hand with the concept of legal personality, 'la capacité d'ester en justice'.[112] The second is the existence of an interest in bringing an action. It is described as 'la qualité pour ester en justice'. The underlying philosophy of Article 230 assumes that privileged applicants have the capacity and the interest to challenge any Union act, whereas non-privileged applicants have the capacity and the interest to challenge only Union acts that directly impact on their private interests.[113]

Article 230(2) EC confers on Member States, the Council, and the Commission alone[114] privileged standing to challenge the legality of Union acts before the European Court of Justice. Semi-privileged applicants,

[107] In Case C-33/90 *EC Commission v Italy: toxic waste* [1991] ECR I-5987, I-6008 the ECJ stated that '[w]hile each Member State may be free to allocate areas of internal legal competence as it sees fit, the fact still remains that it alone is responsible towards the Community under Article 169 for compliance with obligations under Community law.'

[108] Northern Ireland Act 1998, Sch 2, para 3(c).

[109] Cm 4444 (1999).

[110] Ibid, Memorandum of Understanding, para 20.

[111] A Albors-Llorens, *Private Parties in European Community Law* (Oxford: Clarendon Press, 1996), 17.

[112] AG van Gerven in Case C-70/88 *European Parliament v EC Council: Chernobyl* [1990] ECR I-2041, I-2058.

[113] Albors-Llorens, op cit, 18.

[114] The Treaty of Nice will add the European Parliament to this group.

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currently the European Parliament, the Court of Auditors, and the European Central Bank, have similar standing to bring proceedings 'for the purpose of protecting their prerogatives' under Article 230(3) EC.[115] On the other hand, non-privileged applicants may only challenge Union decisions addressed to them or other Union acts of 'direct and individual concern' to them before the Court of First Instance under Article 230(4) EC.[116]

However, *European Parliament v EC Council: Chernobyl*[117] concerned the standing of the European Parliament to challenge the legal basis for a Council regulation dealing with nuclear radiation of foodstuffs. The Parliament argued that the regulation had been wrongly based on Article 31 EAEC, which only required consultation of the Parliament, rather than Article 100a (now Article 95 EC, as amended), which provided for the Council to act in cooperation with the Parliament. The Court found the application admissible, because the Parliament was seeking to safeguard its prerogatives.

Advocate General van Gerven argued that although the Parliament was not mentioned in Article 173 EEC (now Article 230 EC, as amended), the Court of Justice should recognise its standing to bring annulment proceedings. He based this argument on the requirement of adequate legal protection as a basic element of Union law. He defined legal protection as 'the possibility of any holder of a right, a power or a prerogative to have recourse to judicial authority on his own initiative, that is to say as and when he sees fit, in order to have that right, power or prerogative protected'.[118] He went on to argue that in a Union based on the rule of law 'it must be possible for anyone with the capacity to perform legal acts to assert their individual rights, powers and prerogatives *themselves*'. The recognition of the right to act for oneself in defence of powers recognised in law was, according to the Advocate General, 'the expression of the fundamental right to legal protection . . . which . . . extends to public authorities provided that the institutional framework allows . . . conflicts to be brought before the courts'.[119]

It may be argued that regional institutions should enjoy this 'fundamental right to legal protection'. Protection of the powers of regional institutions should not depend on the central institutions of their Member State. In other words, there should be parallelism between the obligations imposed on regional institutions by Union law and the access of regional institutions to the European Courts.

This argument may be supported by the principle of legality, which underpins

[115] This formula is in effect a codification of the approach taken by the ECJ in its case law on the standing of the European Parliament under Art 173 EEC (now Art 203 EC, as amended). See Case C-70/88 *European Parliament v EC Council: Chernobyl* [1990] ECR I-2041.

[116] According to Case T-70/97 *Region Wallonne v. EC Commission* [1997] ECR II-1513, regional institutions had no standing to bring annulment proceedings under the ECSC Treaty.

[117] Case C-70/88 [1990] ECR I-2041.

[118] Ibid, I-2058.

[119] Ibid, I-2061.

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the Article 230 procedure.[120] In particular, the 'duty to uphold the rule of law implies that the Court should interpret liberally the provisions of the Treaty concerning judicial protection in order to create a system that ensures protection without any gaps'.[121] This argument may be more stronger in the case of regional institutions than in the case of private parties, given the 'democratic deficit' in Union decision-making.[122]

In practice, the European Courts have difficulty accepting such arguments. In *Glaverbel*[123] the Walloon Region challenged a Commission decision prohibiting state aid that it had granted. The Court of Justice did not declare the action to be inadmissible. The Court merely stated that, as the Commission had not contested the admissibility of the action, there were no grounds for examining the issue of admissibility on the Court's own initiative.[124] However, Advocate General Lenz did address the issue. He argued that the region was a non-privileged applicant. Although the region was an 'organ of a Member State' and was 'vested with sovereign powers', it could 'not be regarded as a Member State for the purposes of Article 173' (now Article 230 EC).[125]

In *Région Wallonne v EC Commission*,[126] which also involved a challenge to a Commission decision prohibiting the grant of state aid by the Walloon Region, the Court of Justice itself addressed the issue. Since the entry into force of Decision 94/149,[127] the jurisdiction of the Court of Justice was limited to actions brought by a Member State or a Union institution. In this respect, it was 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, referred only to government authorities of the Member States and could not include the governments of regions or autonomous communities, irrespective of the powers they might have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which, *inter alia*, governed the conditions under which the Member States, that is to say, the states party to the Union Treaties and the Accession Treaties, participated in the functioning of the Union institutions. It

[120] AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v EU Council* [21 Mar 2002], paras 38–9.

[121] Albors-Llorens, op cit, 4, n 17.

[122] Cf, regarding the significance of this deficit for standing questions, AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v EU Council* [21 Mar 2002], para 86. See also A Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford: Oxford University Press, 2000), 203. Cf, regarding 'reaching out to citizens through regional and local democracy', *European Governance*, COM (2001) 428, 12.

[123] Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and SA Glaverbel v EC Commission* [1988] ECR 1573.

[124] Ibid, 1592. Cf, earlier, regarding municipalities, Case 222/83 *Municipality of Differdange v EC Commission* [1984] ECR 2889.

[125] [1988] ECR 1573, 1582.

[126] Case C-95/97 [1997] ECR I-1787.

[127] Amending Dec 88/591 (OJ 1994 L66/29).

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was not possible for the Union to comprise a greater number of Member States than the number of states between which it was established. Accordingly, the Court of Justice had no jurisdiction to take cognisance of the action under Article 230(2) EC and, in accordance with Article 47(2) of its Statute, referred the action to the Court of First Instance.

In *Regione Toscana v EC Commission*,[128] which involved a challenge to a Commission decision withdrawing Union aid granted under an Integrated Mediterranean Programme for Tuscany, the Court of Justice elaborated its position. The Court, through its Registrar, informed the applicant that it did not have jurisdiction to take cognisance of direct actions brought by persons other than a Member State or a Union institution. However, the applicant argued that, in view of the legislative powers which the regions possessed under the Italian Constitution, it had, in the corresponding fields, the same capacity as a Member State.[129]

The Court itself began by repeating its reasoning in *Région Wallonne*.[130] The Court went on to note that it was for all the authorities of the Member States, whether it be the central authorities of the state, the authorities of a federal state, or other territorial authorities, to ensure observance of the rules of Union law within the sphere of their competence. It was not for the Union institutions to rule on the division of competences by the institutional rules proper to each Member State or on the obligations that might be imposed on the central authorities of the state and the other territorial authorities respectively. Thus an action whereby the Commission, under Article 226 EC, or another Member State, under Article 227 EC, could seek a declaration from the Court that a Member State had failed to fulfil one of its obligations concerned only the government of the Member State in question, even if the failure to act was the result of the action or omission of the authorities of a federal state, a region or an autonomous community.[131]

On these grounds the Court found the application of the Region of Tuscany to be inadmissible. Therefore, if regional institutions wish to challenge the legality of a Union act, they must take proceedings before the Court of First Instance under Article 230(4) EC.

In *Comunidad Autónoma de Cantabria v EU Council*[132] a Spanish region duly challenged before the Court of First Instance a Council regulation allowing the Commission to authorize the grant of state aid to a shipyard in Astander. However, according to the Court, an association set up to promote the collective interests of a category of persons could not be considered to be individually concerned by a measure which affected the general interests of

[128] Case C-180/97 [1997] ECR I-5245.
[129] Ibid, I-5249.
[130] Ibid, I-5250.
[131] Ibid.
[132] Case T-238/97 [1998] ECR II-2271.

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that category of persons. Consequently, it was not entitled to bring an action for annulment where its members could not individually do so.[133]

Any general interest the applicant might have, as a third person, in obtaining a result which would favour the economic prosperity of a given business and, as a result, the level of employment in the geographical region where it carried on its activities, was insufficient, on its own, to enable the applicant to be regarded as concerned within the meaning of Article 230(4) by the contested regulation, let alone individually concerned.[134] In other words, a claim by a regional institution that the application or implementation of a Union measure was capable generally of affecting socio-economic conditions within its territorial jurisdiction was not sufficient to render an action brought by that authority admissible.[135]

Besides, the adoption of the contested regulation could not alone affect employment in the region or have any other socio-economic repercussions there.[136] The creation of such consequences necessarily supposed, first, the adoption of a decision by the Commission authorising the payment of aid on condition that no ship conversions were undertaken in the shipyard at Astander, and, secondly, the adoption by the shipyard of autonomous measures connected with that decision, namely making employees redundant. The possibility that such measures would not in fact be taken was not merely hypothetical. That circumstance was enough to establish that the applicant was not directly concerned by the provisions of the contested regulation.[137] Hence, the application was declared inadmissible.

Even where an act contains provisions which are territorial in nature 'they need to be seen as integral' to the act itself.[138] Thus if the act applies to objectively defined situations, the territorial provisions are 'of the same general nature as' the act containing these provisions.[139] Consequently, regional institutions may lack standing to challenge such provisions, even where they mention their region.

The situation may be different where Union law requires that the interests of a particular region be considered before a decision is taken to adopt legislation. Thus the Government of the Netherlands Antilles was successful in demonstrating a sufficient interest to challenge the validity of regulations adopted by the Commission governing the import of rice from the Antilles.[140]

[133] Ibid, II-2285.

[134] Ibid. See also Case T-609/97 *Regione Puglia v EC Commission* [1998] ECR II-4051, II-4060.

[135] [1998] ECR II-2271, II-2285. As AG Lenz had earlier put it in Case 222/83 *Municipality of Differdange v EC Commission* [1984] ECR 2889, 2905, such a wide circle of persons in the region, including employers, customers, suppliers, and businessmen, might also be affected, that the decision might not easily be regarded as of individual concern to a regional institution.

[136] [1998] ECR II-2271, II-2285.

[137] Ibid, II-2285.

[138] Case C-298/89 *Government of Gibraltar v EC Council* [1993] ECR I-3605, I-3654.

[139] Ibid, I-3656.

[140] Joined Cases T-32/98 and T-41/98 *Government of the Netherlands Antilles v EC Commission* [2000] ECR II-201.

According to the Court of First Instance, where actions are brought under Article 230(4), 'it must be borne in mind at the outset that the provisions of the Treaty concerning the right of interested parties to bring proceedings cannot be interpreted restrictively'. Thus the Court noted that the Netherlands Antilles constituted an autonomous entity endowed with legal personality under Netherlands law and held that a territorial unit of a Member State, endowed with legal personality under national law, might, in principle, bring an action for annulment.[141] The Court stated that it was necessary to determine whether the contested regulations were 'measures of general application' or 'decisions in the form of regulations'. The Court held that the contested regulations were indeed 'of general application', but this was not necessarily a bar to a finding that they could be seen as being of direct and individual concern to the applicant.[142]

The Court, examining the framework provision which authorised the Commission to adopt the contested regulations, found that the Commission was required to 'take into account the negative effects which its decision might have on the economy of the overseas country or territory concerned as well as the undertakings concerned'. The Court held that the Netherlands Antilles was, therefore, in a position to benefit from a specific provision of Union law which was sufficient to distinguish it from any other person. Hence, the contested regulations were of individual concern.[143]

Moreover, in *Het Vlaamse Gewest (Flemish Region) v EC Commission*[144] the Flemish Region contested a decision addressed to the Kingdom of Belgium, which prohibited this region from granting state aid. According to the Court of First Instance, the contested decision had a direct and individual effect on the legal position of the Flemish Region. It directly prevented the region from exercising its own powers, which here consisted of granting the aid in question, as it saw fit, and required it to modify the loan contract entered into with the aid recipient.[145]

Hence, the region had an interest of its own in challenging the decision. Its situation could not be compared to that of the Committee for the Development and Promotion of the Textile and Clothing Industry in *DEFI v EC Commission*.[146] In that case, the French Government had the power to determine that committee's management and policies and hence also to define the interests which that committee had to protect. In this case, however, the Belgian Federal Government did not appear to be in a position to determine the manner in which the Flemish Region exercised its own powers, particularly those according it the discretion to grant aid to undertakings.[147] Hence, this application was also held admissible.

[141] Ibid, para 45.
[142] Ibid, para. 49.
[143] Ibid, para. 56.
[144] Case T-214/95 [1998] ECR II-717.
[145] Ibid, II-733.
[146] Case 282/85 [1986] ECR 2469.
[147] [1998] ECR II-717, II-733.

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In *Regione Autonoma Friuli-Venezia Giulia v Commission*[148] the Court of First Instance made more explicit its reasoning. This case concerned a law of the Friuli-Venezia Giulia Region of Italy which provided for aid to the haulage industry. The Commission had decided that this measure contravened Union rules on state aid and that aid granted under the law must be reimbursed. When the region challenged this decision before the Court of First Instance, the Commission objected to the admissibility of the action.

The Commission argued that for the purposes of Article 87 EC the granting of aid could not be attributed to any legal entity other than the Member State. This provision prohibited state aid in any form, and in this context the regional institutions of a Member State were not considered to have a particular legal status in their own right. Union law did not confer any special rights or obligations on a regional institution as such, since it was for the Member State to defend the general interest and to take into account differing interests. In relation to state aid, then, the Commission argued that the interests and obligations of the state were indivisible. The central government was the representative of state interests and, for this reason, had privileged standing under Article 230. To accept any alternative solution would be to undermine the system for control of state aid established under the Treaties. The Commission also sought to rely again on *DEFI* and argued that a regional institution must demonstrate interests distinct from the general interests the defence of which was assured by the Member State.[149]

The Court of First Instance replied that since the applicant had legal personality under Italian law it might bring an action before the Court against a decision addressed to another person, provided that it could show that the decision was of direct and individual concern to it. The test of individual concern was whether the decision affected the applicant by reason of certain attributes peculiar to it or of factual circumstances in which it was differentiated from all other persons and thus distinguished it in the same way as the person addressed. The purpose of Article 230(4) was to ensure legal protection to a person who was in fact affected in the same way as the addressee.[150] The Court found that in fact the contested decision concerned aid granted by the applicant and prevented the applicant from exercising its own powers as it saw fit.[151] Thus the regional institution was individually concerned by the decision. The regional institution was also directly concerned, since it was unable to continue to apply its legislation: its legislation was in effect nullified by the decision and it was required to recover the aid in question. Moreover, the Member State concerned was not given any discretion in the way in which the contested decision was to be applied.

[148] Case T-288/97 [1999] ECR II-1871.
[149] Ibid, II-1878–80.
[150] Ibid, II-1881–2.
[151] Ibid, II-1882.

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The Court of First Instance maintained this approach in *Freistaat Sachsen v EC Commission*.[152] This case concerned aid granted to the motor vehicle industry. The Commission decided that aid which Saxony planned to grant to Volkswagen for modernisation of its car production plants in Eastern Germany would be incompatible with the common market. After the Commission had adopted its decision, Saxony went ahead and paid Volkswagen DEM 90.7 in investment grants. When Saxony challenged the Commission's decision in the Court of First Instance, the Commission objected to the admissibility of the action.

The Commission's objection was similar to that in *Friuli-Venezia Giulia*. The Commission argued that the state aid provisions in the Treaty made the Member State exclusively responsible for such aid. To recognise a right of action on behalf of a regional institution would call into question this exclusive responsibility and could additionally bring about conflicts of interests between regional and central government that the Union lacked power to resolve. Furthermore, in matters of state aid the Federal Republic of Germany and Saxony were identical, and so Saxony could not be regarded in Union law as a separate legal person. The Commission added that a proliferation of actions would result, if the Court held the action to be admissible. Therefore, the Commission argued that Saxony had no interest in bringing the action that could be seen as separable from the Federal Government's interests, particularly as the aid granted was prescribed by federal laws.[153]

The Court of First Instance replied that Saxony had legal personality under German constitutional law. It was, therefore, a natural or legal person and the sole question was whether the decision addressed to the German Federal Government was of direct and individual concern to Saxony. The Court repeated the test for individual concern in *Friuli-Venezia Giulia*.[154] In this case the Court relied on certain key facts to identify Saxony as being individually concerned: the aid was paid by Saxony, partially from its own resources; the decision affected legal measures which Saxony had adopted; the decision prevented Saxony from exercising its autonomous powers as it would wish; and the decision had the effect of requiring Saxony to instigate procedures for the recovery of the aid.[155] Taken together these facts were sufficient to show that Saxony was individually concerned by the decision. Saxony was also directly concerned since the Federal authorities did not exercise any discretion when communicating the decision to Saxony. The Court rejected the argument that the interests of Saxony were subsumed within those of the Member State, since the aid constituted measures taken by Saxony pursuant to the financial and legislative autonomy which it enjoyed directly by virtue of the German constitution.[156] Accordingly, the action was found to be admissible.

[152] Joined Cases T-132/96 and T-143/96 [1999] ECR II-3663.
[153] Ibid, II-3697–9.
[154] Ibid, II-3701.
[155] Ibid, II-3701–2.
[156] Ibid, II-3703.

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Therefore, a regional institution may challenge the validity of a Commission decision addressed to the Member State of which it forms part, provided that the decision directly affects the way in which the regional institution exercises its own powers. In this sense, Union law recognises that the interests of the governments of the Member States and their regions are not merged into one national interest. It is more difficult for a regional institution to challenge the validity of a Council regulation. An argument that a regulation has an adverse impact on a region is insufficient to meet the standing requirements of Article 230. It is possible to challenge a Commission regulation but only where the Commission is under a specific duty imposed by Union law to consider the impact of its regulation on a given territory.

Formally, there is apparent consistency with the neutrality principle.[157] On the one hand, Commission acts may not disturb internal institutional relations within Member States. On the other hand, regional institutions may not use judicial review to disturb the internal institutional arrangements in accordance with which their Member State participates in Council legislative procedures. The practical consequence is that judicial review does not offer regional institutions a means of countering the tendency of Council decision-making to undermine decentralisation under national law. In other words, existing rules on standing mean that judicial review fails to overcome problems in the organisation of regionalism in Union law. However, the White Paper on *European Governance*[158] shows no interest in improving regional access to the European Courts.

VI. 'MERGER' VERSUS 'COUPLING' OF DECISION-MAKING ARENAS

The preference in the White Paper is to accommodate regionalism through reform of the Committee of the Regions.[159] According to the Committee itself, its powers might be strengthened,[160] to ensure that Union legislation could not be enacted without the consent of the Committee.[161] However, if the

[157] According to the Progress Report of the Chairman of the Reflection Group on the Amsterdam IGC, Sept 1995, SN 509/1/95 (REFLEX 10) REV 1, the request by COR to have active legal capacity to refer violations of the principle of subsidiarity within each Member State to the ECJ was unanimously opposed by the Group, because the principle of subsidiarity meant that questions relating to internal powers should be dealt with at national level within each Member State.

[158] COM (2001) 429.

[159] Ibid, Report 4C, 36.

[160] According to the COR Opinion of 21 Apr 1995 on the Revision of the TEU and of the EC Treaty, CdR 136/95, the influence of COR opinions on the decision-making process should be stronger, which meant requiring the Union institutions to justify before the Committee any decision not to follow the recommendations contained in the opinions. Thus Art 265 EC should provide: 'The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission. In the event of disagreement with the Committee's opinion, these institutions shall inform the COR of the reasons for their position.'

[161] See, eg, the Resolution of 4 Apr 2001 on the outcome of the 2000 IGC and the discussion of the future of the EU, CdR 430/2000. Cf. the recommendation that COR should have observer

Committee were to be given co-decision rights of this kind, Union decision-making might be 'seriously stalled'.[162] In any case, it is not clear that the Committee is capable of effectively representing regional interests in such decision-making.

Accommodation of regionalism within the Council of the Union would be even more problematic.[163] If effective opportunities are to be secured for regional institutions to participate in the adoption of the position to be expressed within the Council by the Council member from their Member State, the implication may be drawn that regional institutions should at least have a veto over the adoption of that position. Divergence of interests as between regional and central institutions of a Member State or between regional institutions themselves may lead to the exercise of any such veto and may mean that the Member State is unable to adopt a position.[164] Consequently, regional institutions will lose the opportunity to participate in Council decision-making.

A solution might be sought in the system of weighted voting. This system operates when the Council acts by qualified majority. According to this system, each Member State has a number of votes calculated with some regard to its size of population relative to the Union population as a whole.[165] It might be argued that it would be feasible for some at least of these votes to be allocated to regional institutions within the Member State concerned.[166] Divergence between the positions of regional institutions and central institutions within the same Member State would then have some recognition in Council decision-making. However, Article 205 EC only envisages voting by members of the Council. Besides, such a 'mathematical' approach to the organisation of regionalism would face serious practical problems of allocating votes in a way which would make sense both in national and Union terms.[167]

In short, such attempts to 'merge' decision-making at the Union level with decision-making at the regional level may be unrealistic and may lead to 'institutional overload', where the Union is unable to reach decisions.

status at 'relevant' Council meetings in Governance of the European Union and the Future of Europe: What Role for Scotland?, para 225.

[162] Benz and Eberlein, op cit, 4.

[163] Cf the idea of creating 'a "Regional Affairs Council" involving ministers from the various constitutional regions with legislative powers', in Governance of the European Union and the Future of Europe: What Role for Scotland?, para 225.

[164] Cf, in the case of Belgium, European Liaison, *Post-Agreement Northern Ireland and the European Union* (Queen's University of Belfast, 1998), 16. Cf also the idea of a 'Scottish scrutiny reserve', in Governance of the European Union and the Future of Europe: What Role for Scotland?, para 244.

[165] Art 205(2) EC.

[166] Common Position Paper of the Constitutional Regions Regarding the IGC, Brussels, 20 Sept 2000.

[167] Cf N MacCormick, 'A Comment on the Governance Paper', *Harvard Jean Monnet Working Paper* 6/01.

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An alternative approach to reform is suggested by the literature on multi-level governance and the 'coupling' of decision-making arenas. Multilevel governance concerns network relationships between decision-making in supranational, national and 'subnational' arenas, stressing the possibilities for non-hierarchical interaction between these decision-making arenas.[168] Such thinking has much in common with the idea of legal systems 'in overlapping relations without any necessary assumption of sub- or superordination of one to the other as a totality'.[169] Relevant arenas include, for example, Union institutions, the UK Government, and devolved institutions in the United Kingdom. According to the literature, each arena enjoys 'semi-autonomy', and decision-making in one arena sets the context for decision-making in other arenas. The relationship between the arenas is characterised by 'coupling' through information exchange and negotiation.[170] Resource inter-dependency[171] and cooperation in the overlapping of legal systems are implied.[172]

Such coupling implies, for example, that decision-making at Council level provides information about cohesion needs within the Union as a whole, and decision-making by regional institutions provides information about cohesion needs of individual regions.[173] The relationship between the two decision-making arenas is negotiated, or made less conflictual,[174] through the exchange of such information. To the same extent, the relationship between such decision-making and Council decision-making becomes horizontal rather than being determined by the hierarchical supremacy of Council decision-making.[175] It may, in such circumstances, be feasible to demand 'the local in the name of democracy and responsiveness, and the extended polity in the name of effectiveness and constitutional oversight'.[176]

[168] *European Governance*, COM (2001) 429, Report 4C, 2. See also G Marks, L Hooghe, and K Blank, 'European Integration from the 1980s: State-Centric v Multiple-Level Governance' (1996) 34 *JCMS* 341–78.

[169] N MacCormick, 'Beyond the Sovereign State' (1993) *MLR* 1–18, 8.

[170] Benz and Eberlein, op cit, 11. Cf IJ Sand, 'The Changing Preconditions of Law and Politics: Multilevel Governance and Mutually Interdependent, Reflexive and Competing Institutions in the EU and the EEA', *Arena Working Papers* 97/29.

[171] Cf, regarding the resources provided by the EU to regional institutions, B Kohler-Koch, 'The Strength of Weakness: the Transformation of Governance in the EU', in S Gustavsson and L Lewin (eds), *The Future of the Nation State* (Stockholm: Nerius & Santerus, 1996), 169–210.

[172] N MacCormick, 'Beyond the Sovereign State' (1993) *MLR* 1–18, 17.

[173] Cf the emphasis on *implementation* taking account of regional needs in *European Governance*, COM(2001)428, 4 and, regarding the 'policy chain', 10 (ibid).

[174] Cf, regarding interdependence in Bogdanor, op cit, 283.

[175] A horizontal relationship is said to be the more appropriate in complex and constantly changing societies. See *European Governance*, COM (2001) 429, Report 4C, 4.

[176] Though not by merging decision-making arenas through the partnership, as is advocated by Scott, op cit, 180.

Such a relationship might be expected to be facilitated by, for example, the concordats between devolved institutions in the United Kingdom and the United Kingdom Government[177] and by the Joint Ministerial Committee, where disagreements between devolved institutions and the UK Government about EU issues are supposed to be resolved.[178] Certainly, the concordats stress the need for exchange of information between the UK Government and the devolved institutions regarding participation by the former in Council decision-making. However, the concordats are not intended to be legally binding,[179] though it has been suggested by the Solicitor-General that they may create 'a legitimate expectation of consultation' enforceable through judicial review.[180] Moreover, exchange of information is conditional on respect for confidentiality—necessary for 'the UK's negotiating effectiveness'[181]—and regional adherence to the 'UK line'.[182]

Particular problems may arise in respect of the relationship between agreements reached in the North/South Ministerial Council for the island of Ireland[183] and the 'UK line'.[184] According to paragraph 17 of Strand Two of the Belfast Agreement,[185] the North/South Ministerial Council is to 'consider the EU dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements [are] to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings'. In the event, no formal arrangements have apparently been made, and it seems that 'pragmatic' arrangements involving negotiation between UKRep and the Irish Permanent Representation will be favoured.

It may be argued that such problems are more formal than real. According to this argument, a distinction should be made 'between formal and informal powers in local and regional government development. The latter might involve competencies obtained or greater financial maneuverability as a consequence of EU adjustment, rather than a formal redistribution of power

[177] *Concordats on Co-ordination of European Union Policy Issues*, Cm 4444 (1999).

[178] In practice, the JMC rarely meets. See Governance of the European Union and the Future of Europe: What Role for Scotland?, op cit, para 186

[179] Memorandum of Understanding (Cm 4444 (1999)), Part I, para 2. Similarly, the JMC cannot make binding decisions (ibid, part II, para A1.10).

[180] HC Debs, cols 1131–2, 21 Apr 1998. See also HL Debs, col 396, 6 Oct 1998.

[181] Bulmer *et al*, op cit, 51. Cf the argument that Council debates should be published in MacCormick, 'A Comment on the Governance Paper', *Harvard Jean Monnet Working Paper* 6/01, 9.

[182] Memorandum of Understanding (Cm 4444 (1999), part I, para 19.

[183] This Council is composed of ministers from the Northern Ireland Executive and the Irish Government and is to deal with matters devolved to the former and having cross-border dimensions.

[184] Para 3 of sch 2 to the Northern Ireland Act 1998 treats as an 'excepted matter' 'international relations, including relations with . . . the European Communities (and their institutions)', though not the exercise of legislative powers to give effect to the work of the North/South Ministerial Council, North/South Implementing Bodies or the British–Irish Council.

[185] See also the NI Concordat (Cm 4444 (1999)), part IIB, para 5.

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along decentralized or federalist lines'.[186] At least, national law may confer on regional institutions such organisational and informational resources,[187] though the devolved institutions remain dependent on the UK Government for the vast bulk of their financial resources, that these institutions may be able to engage in a 'political exchange' which Commission officials may perceive as enhancing their medium and long-term position.[188] According to such 'exchange' thinking, policy networks form because mutual resource interdependencies force organisations to collaborate in the formation and implementation of sectoral policies.[189] Structuralist logic analyses exchange in terms of relative structural positions in the network.[190] The implication is that the terms of exchange do not always have to be favourable.[191] In other words, exchange relations can evolve into more permanent, structural relations.

However, in the absence of EU legal guarantees of the degree of autonomy for regional institutions assumed by the literature on multilevel governance,[192] regional institutions may lack the resources to participate in such networks. Indeed, their lack of resources may be exaggerated rather than compensated by EU decision-making.[193] In other words, multilevel governance may be undermined by the dominant role of central institutions of Member States in Union decision-making.[194] For example, in the case of the United Kingdom, the above concordats merely provide for the consultation of devolved institutions in the formulation of a 'UK line' in Union decision-making,[195] and the

[186] EJ Kirchner, 'Transnational Border Cooperation Between Germany and the Czech Republic: Implications for Decentralization and European Integration', *RSC Working Paper* 98/50, 9.

[187] L Hooghe (ed), *Cohesion Policy and European Integration. Building Multi-Level Governance* (Oxford: Oxford University Press, 1996), 19.

[188] A Smith, 'Studying Multi-level Governance. Examples from French Translations of the Structural Funds' (1997) *Public Administration* 711–29, 714.

[189] CK Ansell, CA Parsons, and KA Darden, 'Dual Networks in European Regional Development Policy' (1997) *JCMS* 347–75, 348.

[190] Ibid, 349.

[191] Ibid, 356.

[192] The question whether such guarantees should be provided was raised in part II of the Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Presidency, 14–15 Dec 2001.

[193] JJ Anderson, 'Skeptical Reflections on a Europe of Regions: Britain, Germany, and the ERDF' (1990) *Journal of Public Policy* 417–47.

[194] Cf Benz and Eberlein, op cit, 6 and 12, regarding the importance of arrangements within Member States. In the UK much is said to depend on 'compromise, goodwill and reasonableness' (N Burrows, 'Relations with the European Union', in G Hasan (ed), *A Guide to the Scottish Parliament* (London: The Stationery Office, 1999), 125–31, 126).

[195] The UK Government envisages the participation of devolved institutions in the formulation of the UK's policy position on all EU issues which concern devolved matters, 'subject . . . to mutual respect for the confidentiality of those discussions and adherence to the resultant line' (Lord Falconer, 'Devolution and UK Constitutional Change: Co-operative Policy-Making', Edinburgh, 25 Feb 2000). Cf the argument that the interests of Northern Ireland, Scotland, and Wales will be less effectively represented in UK relations with the EU, because their respective Secretaries of State lose their executive functions, in Bogdanor, op cit, 281.

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United Kingdom Parliament retains specific legislative powers to override the devolved institutions in implementing Union decisions.[196]

The concordats also recognise that the devolved institutions will be able to take part in the less formal discussions with Union institutions and 'interests within other Member States'. To this end, they may establish offices in Brussels. However, the role of UKRep is to be unchanged and the responsibility of the UK Government for non-devolved areas, including overall responsibility for relations with the EU, is to be respected.[197]

The implied constraints on coupling may be more readily recognised by the Commission than the literature on multilevel governance.[198] In essence, the literature offers an analytical basis for identifying limitations to EU legal organisation of regionalism rather than a description of current practice.

Since the constraints on coupling are bound up with the Union decision-making system, the implication is that EU law reform is necessary. In particular, reform of Article 230 EC may be necessary, to entitle regional institutions to challenge before the European Courts the legality of any Union acts, including legislative acts, which disregard regional interests, such as cohesion or environmental protection,[199] recognised by Union law. Life may then be breathed into EU legal principles, such as that cohesion should lead to the reduction of disparities between regions[200] or that pollution should be rectified at source.[201] Such an amendment would go beyond recognition of standing to defend 'prerogatives',[202] as in the case of the Court of Auditors and the European Central Bank, and would imply Union law promotion of regionalism within Member States.[203] However, it would not necessarily lead

[196] Eg, according to s 6(2) of the Northern Ireland Act 1998, the Northern Ireland Assembly may not adopt legislation 'incompatible with Community law'. See, regarding delegated legislation, s 24(1)(b). Moreover, according to s 26, the Secretary of State may prohibit any proposed action by the Assembly that is considered incompatible with international obligations or require that action necessary to give effect to such obligations be taken. At the same time, according to para 33(b) of Strand One of the Belfast Agreement, the Westminster Parliament will legislate as necessary to ensure the UK's international obligations are met in respect of Northern Ireland.

[197] Part IIB, paras 26–7 of the concordats (Cm 4444 (1999)).

[198] *Community Structural Assistance and Employment*, COM (96) 109, 26. See also *European Governance*, COM (2001) 429, Report 4C. The argument that the EU has 'transformed the nature of transnational relations in western Europe' (Christiansen, op cit, 32), therefore, involves questionable assumptions.

[199] Case C-2/90 *EC Commission v Belgium: waste tipping* [1992] ECR I-4431, I-4480. See in the same connection, Case C-155/91 *EC Commission v EC Council: waste disposal* [1993] ECR I-939.

[200] Art 158 EC.

[201] Art 174(2) EC.

[202] Cf the argument that 'constitutional regions [should] have access directly to the European Court of Justice in case of controversies concerning the lawfulness or validity of governmental or legislative action at the level of the internal nation', in N MacCormick, 'A Comment on the Governance Paper', *Harvard Jean Monnet Working Paper* 6/01, 14.

[203] Cf the 'general principle of the right of involvement' in EU decision-making favoured in Governance of the European Union and the Future of Europe: What Role for Scotland?, para 201 and the idea of 'partners of the Union status' (ibid, para 209).

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to 'judicial overload'.[204] Knowledge that judicial challenges were possible would lead central institutions of Member States, when participating in Union decision-making, to take account of regional interests. Indeed, such institutions might even be led to take account of the interests of regions of other Member States.[205] Equally, to the extent that pressures to 'merge' decision-making arenas in the Council were relieved, Council overload[206] could be avoided.

The result would be autonomy for regional institutions of the kind demanded by regionalism and assumed by the literature on multilevel governance and coupling of decision-making arenas. However, from a sovereignty-oriented perspective, such a reform would undermine the conditions governing 'participation in the functioning of the Union institutions'.[207] In other words, the reforms would encounter major obstacles in the structure of EU law.

Even so, reform proposals continue to appear, though they are more limited than that advanced above. They do not envisage standing for regional institutions generally, but seek to relate standing to the powers or prerogatives enjoyed by such institutions under national law. In other words, they aim to organise regionalism to the extent of giving effect to the neutrality principle.[208]

Thus the Belgian Government proposed the insertion of a new paragraph after Article 230(2) EC to the Intergovernmental Conference in Nice. It was proposed to insert: 'The Court shall for this purpose also have jurisdiction in any action brought by an entity of a Member State to the extent that it has its own law-making powers conferred on it under national constitutional law, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.' This amendment would have granted such regions standing to challenge all Union legal acts that fell within the scope of their law-making powers.[209]

[204] Cf, regarding overload by traders, Joined Cases C-267 & 268/91 *B Keck and D Mithouard* [1993] ECR I-6097. But see AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v EU Council* [21 Mar 2002], para 102.

[205] Judicial review may be 'representation-reinforcing' and favourable to 'pluralistic politics'. See C Sunstein, 'Constitutions and Democracies: an Epilogue', in J Elster and R Slagstad (eds), *Constitutions and Democracy* (Cambridge: Cambridge University Press, 1993), 337.

[206] 'As the number of affected parties increases . . . negotiated solutions incur exponentially rising and eventually prohibitive transaction costs' (FW Scharpf, *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research* (Boulder: Westview, 1997), 70).

[207] Case C-95/97 *Region Wallonne v EC Commission* [1997] ECR I-1787, I-1791. Cf Case T-214/95 *Het Vlaamse Gewest v EC Commission* [1998] ECR II-717, II-732.

[208] This principle may not necessarily be considered adequate by regions with 'constitutional powers'. See *European Governance*, COM (2001) 428, Report 4C, 16.

[209] COR had already proposed that regions endowed with legislative powers should be granted the right to institute proceedings for the purpose of defending their powers. According to COR, Art 232 EC should provide: 'The Court shall have jurisdiction under the same conditions in actions brought by the European Parliament, the European Central Bank and the Committee of the

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An apparently more limited approach was favoured in a Political Declaration of the Constitutional Regions Bavaria, Catalonia, North-Rhine Westphalia, Salzburg, Scotland, Flanders and Wallonia on the strengthening of the role of the constitutional regions in the European Union. The Declaration contains a demand for the 'right for the constitutional regions, as exists for the Member States, to refer directly to the European Court of Justice when their prerogatives are harmed'. This formulation seems to reflect the approach taken in Article 230(3) to 'semi-privileged' applicants.

The difference between the two approaches may be particularly significant for the UK.[210] Although the Northern Irish Assembly and the Scottish Parliament have the competence to legislate on devolved matters in their 'regions', the UK Parliament reserves the right to make laws for these regions.[211] If a prerogative is defined as an exclusive power, a prerogative-based rather than a competence-based approach to standing implies that standing before the Court of Justice would be denied to the devolved institutions in the UK.[212]

VII. CONCLUSION

According to sovereignty-based conceptualisations of EU law, Union decision-making depends on the transfer or 'delegation'[213] of decision-making powers by sovereign states to the Union. Such conceptualisations mean that current EU law is structurally ill adapted to organising regionalism[214] or even to recognizing the implications of Union decision-making for decentralisation within Member States.[215] Therefore, to the extent that regionalism is an

Regions for the purpose of protecting their prerogatives. It shall also have jurisdiction in actions brought by the Committee of the Regions against violations of the principle of subsidiarity, and in actions brought by the regions whose legislative powers may be affected by a regulation, directive or decision.' (COR Opinion of 21 Apr 1995 on the Revision of the TEU and of the EC Treaty, CDR 136/95). Cf the AER call for the grant of standing for regions with legislative powers (Press Release 30 Oct 2000).

[210] N Burrows, 'Nemo Me Impune Lacessit: the Scottish Right of Access to the European Courts' (2002) *European Public Law* 45–68.

[211] Northern Ireland Act 1998, s 5(6); Scotland Act 1998, s 28(7).

[212] Nevertheless, the concept is employed in Governance of the European Union and the Future of Europe: What Role for Scotland?, para 210.

[213] M Lagrange, 'L'Ordre juridique de la CECA vu à travers la jurisprudence de sa cour de justice' (1958) *Revue de Droit Public et Science Politique* 841–65, 848.

[214] They provide no basis for the stable balance in positive law between centrifugal and centripetal tendencies sought by some writers. See, eg, R Rivello, 'Il Ruolo delle regioni nel diritto comunitario e nel diritto internazionale: considerazioni sulla normativa vigente e sui progetti di revisione costituzionale' (1995) *Diritto Comunitario e degli Scambi Internazionali* 255–308. Cf, regarding their unsuitability in the context of relations between the Union and third states, A Evans, 'European Union Decision-Making, Third States and Comitology' (1998) *ICLQ* 257–77.

[215] The 'space for a real and serious debate about the demands of subsidiarity' (N MacCormick, 'Beyond the Sovereign State' (1993) *MLR* 1–18, 17) is denied.

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observable social phenomenon in Union decision-making, it is dependent on national law[216] and may be endangered rather than supported by EU law.[217]

The literature on the coupling of decision-making arenas apparently offers a more suitable conceptual basis for the organisation of regionalism. However, if organisation on this basis is to be effected, the EC Treaty may require amendment, to improve the access of regional institutions to the European Courts. Such a reform would entail fundamental changes in the nature of EU law, which currently seeks to organize sovereignty rather than regionalism.

In the absence of such a reform, decentralisation within Member States as regards 'domestic matters', including devolution in the United Kingdom,[218] may be countered by recentralisation within Member States as regards ever more broadly defined 'EU matters'. In these circumstances, regions will have EU-created incentives to seek statehood[219] and accession as new Member States,[220] and EU decision-making may face the spectre of a proliferation of Member States going far beyond that implied by enlargement to include many Central and East European countries. In other words, if EU law fails to adopt reforms necessary to organise regionalism, the EU may face even more critical change.[221]

It is uncertain whether the necessary reforms can be achieved by case law alone. In *Unión de Pequeños Agricultores v EU Council*[222] an association of small Spanish agricultural businesses sought annulment of a Council regulation substantially amending the common organisation of the market in olive oil. Advocate General Jacobs argued for reform of the approach to determining whether an applicant was individually concerned by a Union act. According to the Advocate General, an applicant should have standing to challenge a Union act 'where the measure has, or is liable to have, a substantial adverse effect on his interests'.[223] The Court of First Instance also supports a broadening of standing. According to this Court, a person is individually concerned where a measure affects, in 'a certain and actual manner' his legal

[216] Jeffery, op cit.

[217] Cf the view that 'the transfer by Member States of their sovereign rights to the Community legal order in certain specified fields should . . . be accompanied by a similar transfer of the safeguards which they accord their citizens' (AG Léger in Case C-353/99 P *EU Council v Heidi Hautala* [10 July 2001], para 72).

[218] Cf. G Leicester, 'Devolution and Europe: Britain's Double Constitutional Problem', in H Elcock and M Keating (eds), *Remaking the Union: Devolution and British Politics in the 1990s* (London: Frank Cass, 1998), 10–22, 16.

[219] Scott, op cit. See also Bulmer *et al*, op cit, 122.

[220] Cf, regarding the 'safety-net for secession' provided by EU membership, P Dardanelli, 'The Europeanisation of Regionalisation: European Integration and Public Support for Self-Government in Scotland 1979/1997', *Queen's Papers on Europeanisation* 5/2001.

[221] 'The juxtaposition of two opposing logics cannot be continued for long without tensions arising, creating harmful effects for European integration and the European identity', *European Governance*, COM (2001) 428, Report 4C, 42.

[222] Case C-50/00 P [21 Mar 2002].

[223] Ibid, para 102. Note that the qualifying phrase 'by reason of his particular circumstances' (para 60) was omitted from the concluding paragraphs of the Opinion.

situation by restricting his rights or imposing obligations on him.[224] These approaches have not been endorsed by the Court of Justice itself.[225] Even if such approaches were to the followed by the Court of Justice, the consequences for regional institutions would be unclear. The above ruling in *Cantabria* suggests, for example, that a Union act which prejudices the cohesion interests of a region may not be treated as concerning the relevant regional institution at all. At the same time, their very institutional status may mean that recognition of a broader standing for regional institutions would have implications for internal institutional relations within Member States which the European Courts would be reluctant to realize. In short, while the suggested reforms of the case law might benefit individuals, they might not necessarily benefit their regional representatives. If case law reforms do not benefit such representatives, demands for the 'missing reform' to the Treaties may be expected to constitute a controversial item on the agenda for the next IGC.

[224] Case T-177/01 *Jégo-Quéré v EC Commission* [3 May 2002], para 51.
[225] Case C-50/00 [25 July 2002].

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