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# The 'Europe with the Regions' Before the Court of Justice

By Carlo Panara\*

This article analyses the case-law of the CJEU concerning the regions. It argues that there is a discrepancy between the progressive framing of an 'Europe with the regions' in the political sphere and the limited impact of the Court in this field. This discrepancy does not emerge everywhere, nor does it emerge with the same intensity in all sectors. Indeed, in a number of areas the CJEU has acknowledged the role and responsibilities of the regions. Examples include the right/duty of the regions to implement EU obligations, the protection of regional languages, as well as the 'sufficient autonomy' test developed by the CJEU in relation State aid. There is no 'ideological opposition' of the CJEU to an increasing 'regionalisation' of the EU. There are, however, structural hindrances which prevent the Court from promoting further advancements of the status of the regions in the European edifice, particularly as regards their participation in EU processes. Since the EU remains an 'union of states', the 'Europe with the regions' has developed so far, and is likely to continue to develop, via advancements reflected in policy-making practices, soft law arrangements and Treaty amendments, rather than via the 'judge-made federalism' of the Court.

KEYWORDS: 'Europe with the regions'; national identity; principle of subsidiarity; nature of the EU; role of the Court of Justice of the EU.

## 1. Introduction – The 'long march' of the regions within the EU

Since the Treaty of Maastricht, the role of the regions and local authorities (the 'Third Level' of the EU,<sup>1</sup> which hereafter I will refer to collectively as 'regions') has increased significantly. The regions input into law-making and policy-making processes both on the national level, in certain Member States (domestic participation to determine the negotiating position of the Member State), and on the EU level (direct participation in EU decision-making).<sup>2</sup> One of the markers of regional participation in the EU is the opening-up of the Council of the EU to the potential participation of 'ministers' of regional authorities entitled to 'commit' the national government and, since the Treaty of Lisbon, also to 'cast its vote'.<sup>3</sup>

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<sup>1</sup> C. Jeffery, 'Farewell the Third Level? The German Laender and the European Policy Process', in: C. Jeffery (ed.), *The Regional Dimension of the European Union. Towards a Third Level in Europe?* (Frank Cass: 1997), pp. 56-75.

<sup>2</sup> C. Panara and A. De Becker (eds), *The Role of the Regions in EU Governance* (Springer: 2011); C. Panara, *The Sub-national Dimension of the EU. A Legal Study of Multilevel Governance* (Springer: 2015). See also M. Tatham, 'The Rise of Regional Influence in the EU – From Soft Policy Lobbying to Hard Vetoing', in: *Journal of Common Market Studies*, 2018, Vol. 56, No. 3, pp. 672-86.

<sup>3</sup> Article 16(2) TEU: "The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote." See F. Eggermont, 'In the Name of Democracy: The External Representation of the Regions in the Council', in: Panara and De Becker (eds), *The Role of the Regions*, pp. 3-24.

The institution by the Treaty of Maastricht of the Committee of the Regions (CoR) and the introduction by the same Treaty of the principle of subsidiarity (upon pressure from the Belgian Regions and the German Länder) pursue the same fundamental objective; affording regional authorities a stronger role in the EU. The Treaty of Lisbon has further enhanced the position of the regions through their explicit incorporation into the principle of subsidiarity, which is now defined in the following terms:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>4</sup>

Over the years the Commission has devoted considerable attention to the sub-national levels of governance. In the White Paper on European Governance, the regions and their associations, along with civil society organisations, are identified as an essential interface, as well as a source of legitimacy, for the EU.<sup>5</sup> The Agenda 2020 of the Commission further emphasises the role of local and regional authorities in delivering EU policy objectives.<sup>6</sup> Since the 1980s many regions have established liaison offices in Brussels, primarily with the aim of lobbying the Commission and the European Parliament, as well as attracting investment and EU funding to the region.<sup>7</sup>

The Lisbon Treaty acknowledges further the key role of the regions in the constitutional architecture of the EU. In addition to the reference to the 'regional and local level' in Article 5(3) TEU (subsidiarity), Article 10(3) TEU requires that, when possible, decisions shall be taken by the level of government which is 'closest' to the citizen, whilst the new Subsidiarity Protocol promotes the involvement of regional parliaments with legislative powers in the 'early warning system' (cf. Article 6(1) Subsidiarity Protocol). However, the most symbolically significant recognition of the sub-national authorities comes from Article 4(2) TEU, pursuant to which the Union shall respect the national identities of the Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (emphasis added).

The increasing presence of the regions on the EU level is certainly linked to the constitutional evolution that has taken place in some Member States since the creation of the European Communities. A considerable wave of decentralization has swept across the Member States between the 1970s and the early 2000s.<sup>8</sup>

These developments have paved the way to a change not only in the constitutional position of the regions in the EU, but also in the narrative concerning these authorities. The EU does no longer appear totally 'blind' vis-à-vis the regions.<sup>9</sup> There is consensus

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<sup>4</sup> Art. 5(3) TEU. Emphasis added.

<sup>5</sup> Commission of the European Communities, *European Governance: A White Paper*, Brussels, 25 July 2001, COM (2001) 428.

<sup>6</sup> Communication of the Commission, *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, 3 March 2010, p. 6 and p. 29.

<sup>7</sup> C. Rowe, *Regional Representations in the EU: Between Diplomacy and Interest Mediation* (Palgrave-Macmillan: 2011), chapter 4.

<sup>8</sup> L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield: 2002), pp. 191-212.

<sup>9</sup> S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', in: S. Weatherill and U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Bloomsbury: 2005), pp. 1-31 at pp. 3-6. The first enunciation of the notion of Landesblindheit,

within the political and academic discourse that, although the EU has not become the 'Europe of the regions' some, especially in the 1980s, had hoped for,<sup>10</sup> the EU in its current form is an 'Europe with the regions'.<sup>11</sup> This phrase evokes a system of European governance in which the regions play an important role, enhance the democratic legitimacy of the EU and in which the notion of 'multi-level governance' is increasingly accepted as an important feature of the EU.<sup>12</sup> There are three areas in which the 'Europe with the regions' manifests itself: (1) in relation to the implementation of obligations arising from the EU or compliance by the regions with those obligations; (2) in relation to the protection of the autonomy and identities of the regions through, for example, the principle of subsidiarity; (3) in relation, finally, to regional participation in EU processes and particularly decision-making processes.

Most of the outlined developments have taken place in the political sphere or through Treaty amendments. Despite the emphatic and, at least symbolically, generous toward the regions, 'general clauses' of Article 4(2) and Article 5(3) TEU, the role played by the Court of Justice in this field appears surprisingly small if compared to other areas of European integration. Is there a discrepancy between the limited impact of the Court in this field and developments in the political sphere, including the dominant narrative of an 'Europe with the regions'? And if there is such discrepancy, why is this the case? Is the Court ideologically opposed to an increasing 'regionalisation' of the EU or are there structural hindrances preventing the Court from facilitating breakthroughs for the regions?

As well as by answering these questions, this article innovates the landscape in a threefold manner:<sup>13</sup> first, by adopting a more comprehensive approach than previous studies; rather than focusing on a particular stream of the CJEU's case-law, the article analyses the entire case-law of the CJEU on the regions and, by so doing, offers a

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'regional blindness', of the Community can be found in H.-P. Ipsen, *Als Bundesstaat in der Gemeinschaft*, in: E. von Caemmerer et al. (eds), *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein* (Klostermann: 1966), pp. 248-65.

<sup>10</sup> E. Hepburn, 'The Rise and Fall of a Europe of the Regions', *Regional & Federal Studies*, 2008, Vol. 18, No. 5, pp. 537-55; M. Caciagli, *Regioni d'Europa. Devoluzioni, regionalismi, integrazione europea* (il Mulino: 2nd ed. 2006), chapter 9.

<sup>11</sup> See, inter alia, M. Caciagli, *Regioni d'Europa*, pp. 224-28; S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', in: Weatherill and Bernitz (eds), *The Role of Regions*, pp. 1-31; C. Panara, *The Sub-national Dimension of the EU*.

<sup>12</sup> CoR, *White Paper on Multilevel Governance*, CdR 89/2009, 17-18 June 2009; L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield: 2002); S. Piattoni, *The Theory of Multi-level Governance* (OUP: 2010); C. Panara, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union', *Croatian and Comparative Public Administration*, 2016, Vol. 16, No. 4, pp. 705-39; A. Simonato, *Multi-level Governance. Profili costituzionali. Il coordinamento tra Regioni, Stato e UE* (CLEUP: 2016).

<sup>13</sup> P. Van Nuffel, 'What's in a Member State? Central and Decentralized Authorities Before the Community Courts', *C.M.L. Rev.*, 2001, Vol. 38, No. 4, pp. 871-901; K. Lenaerts and N. Cambien, 'Regions and European Courts: Giving Shape to the Regional Dimension of Member States', *E.L. Rev.*, 2010, Vol. 35, No. 5, pp. 609-35; K. Lenaerts, 'EU Federalism in 3-D', in: E. Cloots, G. De Baere and S. Sottiaux (eds), *Federalism in the European Union* (Hart: 2012), pp. 14-44; E. Cloots, 'The European Court of Justice and Member State Federalism: Balancing or Categorisation?', in: Cloots et al. (eds), *Federalism in the European Union*, pp. 322-61; A. Gamper, 'Regions and Constitutional Courts in a Multilayered Europe', in: P. Popelier, A. Mazmanyán and W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia: 2013), pp. 105-30.

more complete evaluation of the jurisprudence of the Court on regional matters. This approach will lead to a more accurate evaluation of the CJEU's attitude vis-à-vis the regions and will take stock of the most recent developments in the case-law concerning in particular the use of the proportionality test in cases concerning the fundamental freedoms and the regions.

Second, the article challenges the two dominating narratives emerging from the literature. It rebuts both the suggestion that the Court is impermeable to the role of the regions in the EU due to the residual 'regional blindness' of the (CJ)EU,<sup>14</sup> but also the opposite narrative, emerging from the more recent literature, whereby the Court of Justice's recent case-law has advanced significantly the recognition of the role of the regions.<sup>15</sup> This article will argue that the breakthroughs facilitated by the CJEU are limited to a 'negative' recognition of the regions by the Court, that is, to the mere acknowledgement, to a point, on the EU level of the constitutional role and responsibilities of the regions emerging from the domestic sphere. A full recognition of the 'third level', though, would also require the 'positive' recognition of the participation rights of the regions in EU processes, including in particular decision-making processes – a perspective that is still absent, or almost so, in the case-law of the Court.

Third, the article contributes new insights by offering an explanation of the discrepancy between the upwards political trajectory of the regions in the EU and the absence of full 'positive' recognition by the CJEU of the same trajectory. In this way, the article also contributes to the discussion of the possible way forward for the regions in the EU in the absence of their full recognition by the CJEU.

The importance of these questions goes beyond the 'Europe of the regions'. They shall contribute new knowledge on two fundamental and more general issues concerning EU law. The first concerns the ability of the Court of Justice to shape European integration. The second concerns the nature of the EU as a 'multilevel polity' and, more specifically, the question of the legal meaning of 'Europe with the regions', that is, of the overall position and role of the regions in the EU.

The article is sub-divided into three parts. The first part analyses the jurisprudence of the Court of Justice on the implementation of EU obligations (2.). The second part studies the protection of regional autonomy and regional identities (3.-4.). The third part deals with regional participation in EU processes including decision-making processes (5.-6.). A critical discussion of the findings will take place in the concluding remarks (7.).

## **Part I – Regions vis-à-vis EU law obligations**

### **2. Implementation of and compliance with EU law obligations**

The Court of Justice recognises the duty of the regions to abide by EU law including a fortiori the duty to adopt measures to implement it. This duty derives from the Court's construction of the regions as an 'emanation of the state', a construction that emerged for the first time in *Costanzo*, where the Court classified local and regional authorities as part of the state and recognised the vertical direct effect of a directive against an

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<sup>14</sup> S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', pp. 3-6.

<sup>15</sup> K. Lenaerts, 'EU Federalism in 3-D', pp. 14-44. See also E. Cloots, 'The European Court of Justice and Member State Federalism', pp. 322-61.

Italian municipality.<sup>16</sup> A further result of the same logical premise (the regions are emanations of the state) is that the regional, federal or otherwise decentralised structure of a Member State cannot be invoked by a Member State as a defence to justify the failure to implement or to comply with EU obligations.<sup>17</sup> This is no different from the rules governing State responsibility under general international law, according to which a State cannot invoke internal constitutional hindrances for excusing non-compliance with its legal obligations.<sup>18</sup> Only the Member State will therefore bear the responsibility toward the EU for an infringement of EU law,<sup>19</sup> even though each national law may then choose to create mechanisms to hold liable the region that caused the infringement.<sup>20</sup>

According to the Court of Justice, the duty to comply with or to implement EU obligations shall not lead, as a rule, to an alteration of the internal division of powers between central government and regions. In the case *Digibet*, for example, the Court of Justice stated in clear-cut terms that “the division of competences between the [German] Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU”.<sup>21</sup> In *Digibet* the Court also reiterated the principle, already consistently sketched out in its case-law since 1971, that the imposition by the EU of powers or obligations upon the Member States for the purposes of the implementation of EU law cannot alter the allocation of responsibilities within the Member States.<sup>22</sup> Any alteration of the internal division of powers can only come from an autonomous decision

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<sup>16</sup> *Fratelli Costanzo v Comune di Milano* (103/88), paras 28-33. The construction has been recently restated in *Elaine Farrell v Alan Whitty* (C-413/15), para. 33. See also Opinion of AG Sharpston, *Elaine Farrell v Alan Whitty* (Case C-413/15), paras 46 and 151.

<sup>17</sup> *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* (C-46/08), para. 69; *French Community and Walloon Government v Flemish Government, aka ‘Flemish Care Insurance Scheme Case’* (C-212/06), para. 58; *Commission v Spain* (C-417/99), para. 37; *Commission v Germany* (C-131/88), para. 71; *Commission v Belgium* (227-230/85), para. 9.

<sup>18</sup> Article 27 Vienna Convention on the Law of Treaties. See S. Weatherill, ‘The Challenge of the Regional Dimension in the European Union’, in: S. Weatherill and U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Bloomsbury: 2005), pp. 1-31 at p. 2.

<sup>19</sup> See, inter alia, *Commission v Germany* (C-103/01); *Commission v Spain* (C-417/99); *Commission v Belgium* (C-211/91); *Commission v Italy* (C-33/90); *Commission v Germany* (C-288/88).

<sup>20</sup> On the mechanisms established by various Member States to hold the regions and the local authorities to account in case of an infringement of EU law, see C. Panara, ‘The Contribution of Local and Regional Authorities to a ‘Good’ System of Governance Within the EU’, *Maas-tricht Journal of European and Comparative Law*, 2016, Vol. 23, No. 4, pp. 611-39 at pp. 627-28. See also C. Panara and A. De Becker, ‘The Role of the Regions in the European Union: The “Regional Blindness” of Both the EU and the Member States’, in: Panara and De Becker (eds), *The Role of the Regions in EU Governance*, pp. 297-346 at pp. 335-36.

<sup>21</sup> *Digibet Ltd and Gert Albers v Westdeutsche Lotteriede GmbH & Co. OHG* (C-156/13), para. 34. On the protection granted by Article 4(2) TEU to the division of competences within a Member State, see also *Remondis GmbH & Co. KG Region Nord v Region Hannover* (C-51/15), paras 40-41, and the related Opinion of AG Mengozzi, *Remondis GmbH & Co. KG Region Nord v Region Hannover* (C-51/15), paras 39-40.

<sup>22</sup> *Digibet* (C-156/13), para. 33. See also *Mark Horvath v Secretary of State for Environment* (Case C-428/07), para. 49; *Gerhard Fuchs and Peter Köhler v Land Hessen* (C-159/10 and C-160/10), para. 55, and *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* (51-54/71), para. 4.

of the Member State, for example, in the form of substitute powers of the central government in case of failure by a region to implement obligations arising from the EU,<sup>23</sup> or in order to ensure the correct implementation of EU rules.<sup>24</sup> Only compliance with the free movements may require, according to the Court, vertical (between regional and national authorities<sup>25</sup>) or horizontal coordination (between regional authorities<sup>26</sup>) in order to ensure that different national and/or territorial rules do not jeopardise the achievement of legitimate public interest objectives (such as, tackling gaming addiction among the population) which could in principle justify restrictions on the free movements.

In its recent case-law concerning conflicts between the free movements and the federal/regional structure of a Member State, the Court appears to have departed from its earlier patterns so well illustrated by *Cloots*.<sup>27</sup> *Cloots* shows that in cases involving constitutional rights the Court of Justice regards the protection of the right as a 'legitimate interest' which, in principle, justifies a restriction on the fundamental freedoms. More specifically, the Court adopts a 'balancing' approach and uses the proportionality review to strike a 'fair balance' between the constitutional right and the free movement, often concluding in favour of the constitutional right (for example, in *Omega* the particular construction of the principle of human dignity in German constitutional law was upheld against the internal market argument<sup>28</sup>). In contrast to this approach, in cases concerning the conflict between the federal/regional structure of a Member State and the free movements, the Court used to resolve the matter through 'categorisation', that is, by deciding whether a situation is or not 'purely internal' to one Member State. The 'categorisation' approach always prioritises free movements in 'not purely internal situations' and regional measures in 'purely internal situations'. An important example of 'categorisation' in favour of the free movements is the *Flemish Care Insurance* case where the Court, without conducting any balancing between competing interests, held that a residence requirement for the entitlement to a regional benefit constituted an obstacle to both freedom of movement for workers and freedom of establishment. The Court reached this conclusion because the internal allocation of responsibilities within a Member State cannot be invoked to legitimise a restriction on the fundamental freedoms and did not even examine the proportionality of the regional measure.<sup>29</sup>

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<sup>23</sup> On the substitute powers of the central governments vis-à-vis the regions, see C. Panara, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union', pp. 724-26. See also C. Panara and A. De Becker, 'The Role of the Regions in the European Union', pp. 336-40.

<sup>24</sup> The Italian Constitutional Court (Ruling No. 126 of 24 April 1996) stated that an alteration of the normal distribution of competences between State and Regions may exceptionally be accepted if the proper implementation of an EU regulation required the adoption of uniform rules across the entire national territory. In the Ruling of 14 October 2008 concerning EC Regulation No. 1782/2003 (common agricultural policy), the German Federal Constitutional Court (Bundesverfassungsgericht) held that the proper implementation of the Regulation required a federal statute in order to safeguard the legal and economic unity of the country (para. 88-89).

<sup>25</sup> *Carmen Media* (C-46/08), para. 70.

<sup>26</sup> This can be deduced from *Digibet* (para. 36).

<sup>27</sup> E. Cloots, 'The European Court of Justice and Member State Federalism: Balancing or Categorisation?', pp. 324-28.

<sup>28</sup> *Omega Spielhallen GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (C-36/02), para. 35-36.

<sup>29</sup> *French Community and Walloon Government v Flemish Government, aka 'Flemish Care Insurance Scheme Case'* (C-212/06), para. 58.

More recently, though, both in *Carmen Media* and in *Digibet* the Court seems to have mitigated what Cloots describes as differentiated treatments of the constitutional rights (in which decisions are always based on balancing) and of federal/regional structures (where decisions are always based on categorisation). Even in situations which are not 'purely internal' to one Member State (such as, indeed, in *Carmen Media* and *Digibet*), the Court introduced elements of the balancing of competing interests. Instead of concluding automatically in favour of the free movements due to the 'not purely internal' nature of the situation, in these cases the Court delegated to the referring domestic court the evaluation of the 'suitability'<sup>30</sup> or of the 'proportionality'<sup>31</sup> of the regional legislation. In *Libert*, however, concerning a Flemish decree which subjected the transfer of immovable property in certain communes to a 'sufficient connection' between the prospective buyer and those communes, the Court appears to have expanded the scope of the notion of 'not purely internal situation' and, accordingly, to have limited the areas in which automatic categorisation in favour of the regions may take place. The Court acknowledged that, although the applicants in the main proceedings and all aspects of the main proceedings were confined within one Member State, it is 'not inconceivable' that individuals or undertakings established in other Member States could be interested in purchasing or leasing immovable property located in the target communes. Therefore, the mere possibility that individuals or undertakings from other Member States might be affected by the provisions of one region, suffices in order to make a situation 'not purely internal'.<sup>32</sup>

An interesting albeit isolated statement not further developed in the Court's final decision, can be found in the Opinion that Advocate General Kokott delivered in a case concerning a failure by the Spanish Autonomous Communities to implement Directive 2000/60/EC on water policy. Contrary to the argument advanced by Spain that a national regulation transposing the directive already ensured full compliance with EU obligations, AG Kokott pointed out that the subsidiary application of national rules is likely to be in breach of Spanish constitutional law, since it would not acknowledge sufficiently the legislative responsibility associated with the legislative competence of the Autonomous Communities. This acknowledgment is rich of potential, because AG Kokott implicitly recognises that the right, along with the duty, of the Autonomous Communities to take care of the implementation of EU law in the areas falling within their legislative responsibility is an essential part of the constitutional identity of the Spanish State.<sup>33</sup>

An important recognition of regional autonomy, can be seen, before the entry into force of the Treaty of Lisbon, in the landmark case *Portugal v Commission*, concerning State aid. In this case the Court had to determine whether a tax benefit accorded by a region in the exercise of its constitutionally established fiscal autonomy constituted, for the sole reason of the limited geographical application of the measure, a 'selective' advantage prohibited under Article 87(1) TEC (now Article 107(1) TFEU). The Court offered protection to the fiscal autonomy of the regions by concluding that a measure could not be regarded as selective "on the sole ground that it is applicable only in a limited geographical area of a Member State".<sup>34</sup> According to the Court, if a region is 'sufficiently autonomous', it can adopt a tax rate lower than the national rate in order

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<sup>30</sup> *Carmen Media* (C-46/08), para. 71.

<sup>31</sup> *Digibet* (C-156/13), para. 41.

<sup>32</sup> *Eric Libert* (C-197/11 and C-203/11), para. 34.

<sup>33</sup> Opinion of AG Kokott, *Commission v Spain* (Case C-151/12), paras 34-35.

<sup>34</sup> *Portugal v Commission* (C-88/03), para. 60.



to support the undertakings present in the region's territory without incurring automatically in the State aid prohibition of Article 107(1) TFEU.<sup>35</sup>

In summary, the jurisprudence of the Court of Justice on implementation of and compliance with EU obligations reflects an approach by the Court that takes into account the role of the regions as emerging from the notion of 'Europe with the regions'. The regions have the right and the duty to implement and comply with EU obligations. The Court of Justice does not accept any alteration of the division of powers within Member States with a federal or regional structure as a result of the requirement to implement EU law or to comply with it, unless this is absolutely necessary. In an isolated Opinion Advocate General Kokott appeared to go as far as suggesting that the implementation of EU law by the regions in areas falling within their remit might be an essential part of the constitutional identity of the Member State concerned.

## **Part II – The protection of regional autonomy and regional identities**

### **3. Subsidiarity and closeness clauses and their relevance to the regions**

Subsidiarity is symbolically one of the most important elements of the 'Europe with the regions'. As previously mentioned, since the coming into effect of the Treaty of Lisbon, Article 5(3) TEU envisages that "the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." The 'regional and local level' shall therefore be part of the assessment by the Court of Justice as much as the 'central level'.

Claims concerning a breach of subsidiarity have never led to the annulment of an act by the Court of Justice. Despite this, studies of the case-law of the Court suggest that the Court carries out a sufficiently robust subsidiarity scrutiny.<sup>36</sup> The fact that until now the Court has never annulled an act on ground of a breach of subsidiarity is primarily due to the limited number of cases in which subsidiarity pleas have been brought before the Court,<sup>37</sup> as well as to the fact that in all the cases there were plausible justifications for the action by the Union.<sup>38</sup> In theory, subsidiarity has a symbolically important ally in the principle of closeness of Articles 1(2) and 10(3) TEU, pursuant to

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<sup>35</sup> Portugal v Commission (C-88/03), paras 62-66. See also UGT-Rioja and Others (C-434/06), para. 61; Commission v Hansestadt Lübeck (C-524/14 P), paras 54-55; Opinion of AG Wahl, Commission v Hansestadt Lübeck (Case C-524/14 P), para. 66.

<sup>36</sup> P. Van Nuffel, 'The Protection of Member States' Regions Through the Subsidiarity Principle', in: Panara and De Becker (eds), *The Role of the Regions in EU Governance*, pp. 55-79 at pp. 65-66; P. Craig, 'Subsidiarity: A Political and Legal Analysis', in: *Journal of Common Market Studies*, 2012, Vol. 50, S1, pp. 72-87 at p. 80; C. Panara, 'The Enforceability of Subsidiarity and the Ethos of Cooperative Federalism: A Comparative Law Perspective', in: *European Public Law*, 2016, Vol. 22, No. 2, pp. 305-32 at p. 319; W. Vandenbruwaene, 'The Judicial Enforcement of Subsidiarity', in: P. Popelier, A. Mazmanyán and W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia: 2013), pp. 131-64 at p. 159.

<sup>37</sup> P. Craig, 'Subsidiarity: A Political and Legal Analysis', p. 80.

<sup>38</sup> P. Van Nuffel, 'The Protection of Member States' Regions Through the Subsidiarity Principle', pp. 65-66. See, inter alia, UK v Council (C-84/94); Netherlands v European Parliament and Council (C-377/98); The Queen v Secretary of State for Health (ex parte British American Tobacco Ltd.) (C-491/01); Commission v Germany (C-103/01); ANH v Secretary of State for Health (C-154/04 and C-155/04); Portugal v Commission (T-50/07), paras 104-105); The

which in the EU 'decisions shall be taken as closely as possible to the citizen'. So far, however, the Court of Justice has never pronounced specifically on the principle of closeness in relation to the powers of the regions. Occasionally this principle has been referred to in passing by Advocates General in cases concerning subsidiarity, however no reference to closeness is contained in judgments of the Court.<sup>39</sup>

It is hard to figure out exactly how the Court of Justice could give more substance to the rights of the regions through subsidiarity. This is because the regions are seen by the Court as mere 'parts' of a Member State and the Court is likely to carry out an overall evaluation of whether an objective could be better achieved at Union or at Member State level, including the regional and local level, rather than embarking on a separate analysis of whether the same objective could be better achieved by one Member State at central or at regional and local level.

None of the cases on subsidiarity landed before the Court of Justice so far has ever concerned directly regions or local authorities and the protection for regional and local authorities in Article 5(3) TEU has so far remained on paper.<sup>40</sup> The only partial exception is the recent *Germany v Commission*, where the General Court dealt with a subsidiarity plea whereby Germany claimed that the Commission had encroached on "the procedural autonomy of the Member States and the municipalities in the field of spatial planning." Germany argued that "This is a field which is better managed by the Member States and, where appropriate, regional and local actors". The General Court, however, ultimately held that Germany had failed to demonstrate that the Commission had encroached on its field of competence resulting from the application of the principle of subsidiarity.<sup>41</sup> Even in this case, though, the Court did not apply in fact the principle of subsidiarity to the EU-regions dichotomy, but to the EU-Member State dichotomy, concluding that the Commission had not infringed the principle of subsidiarity vis-à-vis Germany rather than vis-à-vis Bavaria.

Nettesheim applies to subsidiarity the notion of 'political law'. This indicates those legal provisions which are applicable only or mainly through 'political coordination', that is, through procedural arrangements which ensure proper consideration for subsidiarity in the legislative process. The role of the courts in relation to these provisions would

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Queen v Secretary of State for Business (ex parte Vodafone) (C-58/08, C-58/08, C-58/08); Mittledeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission (C-288/11 P), para. 79; Romonta GmbH v Commission (T-614/13), para. 106; Poland v Commission (T-257/13), paras 174-91; Estonia v European Parliament and Council (C-508/13), para. 48; Spain v Commission (T-461/13), para. 182; Poland v European Parliament and Council (C-358/14), paras 114-21; Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health (C-477/14), para. 150; Philip Morris Brands SARL and Others v Secretary of State for Health (C-547/14), paras 222-24.

<sup>39</sup> See the Opinions of AG Fennelly, *Germany v Parliament and Council* (C-376/98), and *The Queen v Secretary of State for Health* (C-74/99), para. 133, who defined this principle an "aspiration"; Opinion of AG Trstenjak, *Mark Horvath v Secretary of State for Environment, Food and Rural Affairs* (C-428/07), para. 93.

<sup>40</sup> P. Van Nuffel, 'The Protection of Member States' Regions Through the Subsidiarity Principle', in: C. Panara and A. De Becker (eds), *The Role of the Regions in EU Governance* (Springer: 2011), pp. 55-79 at p. 61; C. Panara, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union', in: *Croatian and Comparative Public Administration*, 2016, Vol. 16, No. 4, pp. 705-40 at p. 727-28.

<sup>41</sup> *Germany v Commission* (T-28/16), paras 102-13.

be the enforcement of the various procedures of 'political coordination'.<sup>42</sup> The Amsterdam Subsidiarity Protocol of 1997 laid out procedural requirements to ensure that the principle of subsidiarity received due consideration by the Union legislator. The Protocol established that "For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators."<sup>43</sup> This obligation contained an additional duty for the Commission, that had to "justify the relevance of its proposals with regard to the principle of subsidiarity", as well as in relation to the Parliament and the Council, that had to "consider their consistency with Article 3b of the Treaty".<sup>44</sup> Similar obligations are put forward in the new Subsidiarity Protocol attached to the Treaty of Lisbon, where it stipulates that "Draft [Union] legislative acts shall be justified with regard to the principle of subsidiarity and proportionality" through "a detailed statement making it possible to appraise compliance with the principles".<sup>45</sup>

These procedural safeguards are legally binding and judicially enforceable. However, the judicial review of the 'duty to state reasons' has historically been light touch. Indeed, so long as the institutions adequately take into account subsidiarity concerns during the legislative process, the Court does not require the act to contain an explicit explanation of compliance with subsidiarity. In *Germany v European Parliament and Council*, the Court stressed that, so long as the subsidiarity aspect has been considered by the law-making institutions, there does not exist a duty to make express reference to subsidiarity in the act.<sup>46</sup> Along the same lines, in *Netherlands v European Parliament and Council*, the Court dismissed the claim that the Directive on the legal protection of biotechnological inventions did not state sufficient reasons. The Court found that the requirement was met, as "Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market".<sup>47</sup> In *Estonia v European Parliament and Council*, concerning the EU Accounting Directive, the Court even held that there is no duty to state reasons in relation to every provision of an act and that it is presumed that a Member State knows about the fundamental reasons of an act also as a result of its participation in the Council.<sup>48</sup> In *Philip Morris*, more recently, the Court held that the Commission's proposal for a directive and its preliminary impact assessment included sufficient information for the EU legislature and the national parliaments to determine whether the proposal complied with the principle of subsidiarity, as well as to enable

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<sup>42</sup> M. Nettesheim, 'Subsidiarität durch politische Koordination', paper presented at the symposium *Grenzen Europäischer Normgebung – EU-Kompetenzen und Europäische Grundrechte*, Frankfurt am Main, 19 March 2014, *passim*. See also C. Panara, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective', in: *European Public Law*, 2016, Vol. 22, No. 2, pp. 305-32 at pp. 328-30.

<sup>43</sup> Point 4 of the Protocol.

<sup>44</sup> Point 9 and Point 11 of the Protocol respectively.

<sup>45</sup> Article 5 of the new Subsidiarity Protocol.

<sup>46</sup> *Germany v European Parliament and Council* (C-233/94), paras 25-29.

<sup>47</sup> *Netherlands v Parliament and Council* (C-377/98), para. 33.

<sup>48</sup> *Estonia v European Parliament and Council* (C-508/13), paras 51 and 62 respectively. See also *Poland v European Parliament and Council* (C-358/14), para. 125.

individuals to understand the reasons relating to that principle and the Court to exercise its power of review.<sup>49</sup>

Although the Court of Justice has never declared the invalidity of an act for a breach of a procedural requirement, the judicial enforceability of subsidiarity-related procedural requirements is confirmed by a number of cases in which the Court of Justice stated that the EU judicature has responsibility for the monitoring of compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by the new Subsidiarity Protocol.<sup>50</sup>

The most important procedural innovation introduced by the Lisbon Subsidiarity Protocol is the 'early warning system'.<sup>51</sup> The rationale for the early warning system is to ensure appropriate consideration of subsidiarity by the proponent of a legislative act and the Union legislature.<sup>52</sup>

In theory, the early warning system could change the historic self-restraint of the Court of Justice in relation to subsidiarity. The evidence contained in the reasoned opinions of the national parliaments and of the Commission could be taken into account by the Court when addressing a subsidiarity complaint. Furthermore, the procedural requirements of the early warning system seem to be judicially enforceable by the Court and failure to comply with these could lead to the invalidation of an act. In this way, however, the Court would be enforcing certain procedural requirements rather than subsidiarity per se. There is no case to date in which a lack of compliance with the early warning system has been brought to the attention of the Court of Justice.

A similar tendency towards the 'proceduralisation' of subsidiarity can be seen, specifically in relation to the regions, in the role of the CoR concerning subsidiarity. When performing its consultative role, the CoR shall express its views on the conformity of a legislative proposal with subsidiarity.<sup>53</sup> The new Subsidiarity Protocol gives the CoR the right to challenge a legislative act on grounds of an infringement of subsidiarity.<sup>54</sup> Until now no challenge has been lodged by the CoR against an act for an infringement of subsidiarity. It cannot be excluded, however, that the right to challenge an act for a breach of subsidiarity, albeit not yet exercised, may have strengthened the opinions of the CoR vis-à-vis the law-making institutions and that, accordingly, the CoR may

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<sup>49</sup> Philip Morris Brands SARL and Others v Secretary of State for Health (C-547/14), paras 225-27. See also Poland v European Parliament and Council (C-358/14), paras 122-24.

<sup>50</sup> Philip Morris Brands SARL and Others v Secretary of State for Health (C-547/14), para. 217; Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health (C-477/14), para. 146; Poland v European Parliament and Council (C-358/14), para. 113. See also Opinion of AG Jääskinen, UK v European Parliament and Council (Case C-507/13), para. 100. On 21 November 2014 the UK withdrew its application and, by Order of the President of the Court of 9 December 2014, the Case C-507/13 was removed from the Register of the Court.

<sup>51</sup> See Articles 6 and 7 of the new Subsidiarity Protocol.

<sup>52</sup> So far only three yellow cards have been issued.

<sup>53</sup> See Article 55(2) of the CoR's Rules of Procedure. The CoR sees itself as the 'custodian' or 'watchdog' of the principle of subsidiarity. See S. Ricci, 'The Committee of the Regions and the Challenge of European Governance', in: C. Panara and A. De Becker (eds), *The Role of the Regions in EU Governance* (Springer: 2011), p. 109-129 at pp. 123-126.

<sup>54</sup> Article 8(2) of the new Subsidiarity Protocol. This only applies to those acts for the adoption of which the consultation of the CoR is mandatory.

now be playing a stronger role in the legislative process than prior to the Lisbon Treaty.<sup>55</sup>

In summary, the new subsidiarity clause has not made, up to now, and it is unlikely to make in the future a great deal of difference to the regions. This is not due to an anti-regional attitude of the Court. At the present stage of European integration, the regions are, and are therefore seen by the Court, as 'parts' of a Member State. Accordingly, the Court is likely to carry out an overall evaluation of whether an objective could be better achieved at Union or at Member State level, a level which includes the regions, rather than embarking on a separate analysis of whether the same objective could be better achieved by one Member State at central or at regional and local level. So far, only in one case the principle of subsidiarity has been invoked to protect the regions and the Court has indeed adopted the approach of looking at the overall position of the Member State vis-à-vis the Union intervention, rather than specifically at the position and prerogatives of the region concerned. Since the regions continue essentially to be seen by the Court as 'parts of a state' or 'sub-state units', it appears unlikely that the new subsidiarity clause could produce a significant change in the jurisprudence of the Court. This is also due the lack of 'privileged applicant' status of the regions under Article 263 TFEU (see infra section 5). The same conclusion applies by analogy to the closeness clause of Article 10(3) TEU.

The progressive proceduralisation of subsidiarity concerns also the role of the regions. The increased role of the CoR, in particular, discloses important opportunities for the regions in the legislative process, especially in relation to subsidiarity. Another potentially important breakthrough for the regions with legislative powers is the early warning system, whereby legislative houses representing the regions at national level (for example, the German Bundesrat or the Austrian Bundesrat) or regional parliaments with legislative powers have a role, albeit limited, to play (see Article 6(1) of the new Subsidiarity Protocol). However, the enforcement of procedural safeguards would be the enforcement of procedural requirements rather than an enforcement of the principle of subsidiarity per se. Although the Court of Justice has repeatedly stressed its willingness to enforce procedural aspects of subsidiarity, there has been no case to date in which a breach of a procedural safeguard has been brought to the attention of the Court, with the sole exception of the 'duty to state reasons'. As to a possible failure by national parliaments to consult regional parliaments with legislative powers, that would not invalidate the EU legislative process as it is a process internal to one Member State and at this stage of European integration there is a non-permeability between processes within a Member State and processes at EU level.

#### **4. The protection of regional cultures – The regional languages**

The notion of 'Europe with the regions' also includes the protection of regional cultures and particularly, as an essential part of these cultures, of the languages in use in the territorial subdivisions of a Member State.<sup>56</sup> Cloots and Sottiaux correctly observe that

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<sup>55</sup> C. Panara, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism', p. 328. See the overall positive evaluation of the role of the CoR in relation to subsidiarity by S. Piattoni and J. Schönlaue, *Shaping EU Policy from Below. EU Democracy and the Committee of the Regions* (Edward Elgar: 2015), p. 157.

<sup>56</sup> M. Keating, *The New Regionalism in Western Europe. Territorial Restructuring and Political Change* (Edward Elgar: 1998), pp. 83-85; M. Keating, *Rescaling the European State. The Making of Territory and the Rise of the Meso* (OUP: 2013), pp. 70-72. See also M. Caciagli, *Regioni d'Europa*, pp. 162-65.

“processes of devolution almost invariably coincided with the granting of (co-)official status to the language of sub-State nations, at least within those nations’ own region.”<sup>57</sup> The case-law on regional languages concerns only three Member States in which the protection of certain linguistic groups is embedded in the constitutional law: Belgium, where there are three linguistic communities (French, Dutch and German); Italy, where the constitutional law protects the rights of linguistic minorities in South Tyrol and in other regions; and Spain, where the Constitution protects the linguistic diversity of the country including in particular the languages spoken in Catalonia and in the Basque Country.<sup>58</sup>

The first thing that emerges consistently from the case-law since Groener<sup>59</sup> is that the Member States can adopt policies to protect their languages including languages spoken by minority groups, or in regions where a language different from the official language of the Member State is spoken widely or by the majority of the population. These policies, however, must not be in breach of the four fundamental freedoms. More specifically, they must not constitute a discrimination against nationals or companies from other Member States, nor be disproportionate to the aim they pursue.

The same rules apply not only if the language requirements are set by public authorities in a Member State but also if these are set by private persons.<sup>60</sup> In Angonese, for example, the Court held that the language requirement set by a private bank, Cassa di Risparmio di Bolzano, that its employees must be able to demonstrate that they are bilingual Italian and German speakers (German being the language spoken by the majority of the population in that particular province of Italy), is not per se in breach of free movement of workers. However, the Court found that it is ‘disproportionate’ to require job applicants to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State, because that would make it excessively difficult, if not impossible, for anyone who is not from that province, to apply for the position.<sup>61</sup>

In Las, in relation to legislation in force in the Dutch-speaking region of Belgium, requiring the employers based in that territory to draft employment contracts in Dutch, the Court held that the national identity of the Member States “includes protection of

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<sup>57</sup> E. Cloots and S. Sottiaux, ‘EU Law and Language Regulation in (Quasi-)Federal Member States’, in: Cloots et al. (eds), *Federalism in the European Union*, pp. 287-321 at p.287.

<sup>58</sup> Articles 1-4 and 127-130 Belgian Constitution; Articles 2-3, 143 and 148 Spanish Constitution; Articles 116-117 Italian Constitution and Article 99 Special Statute of the Trentino Alto-Adige Region and of the Provinces of Trento and Bolzano. On the peculiar structure of Belgium see A. De Becker, ‘Belgium: The State and the Sub-State Entities Are Equal, But Is the State Sometimes Still More Equal Than the Others?’, in: Panara and De Becker (eds), *The Role of the Regions in EU Governance*, pp. 251-74 at pp. 251-56.

<sup>59</sup> Judgment of the Court of 28 November 1989, Case C-379/87, Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee (para. 24).

<sup>60</sup> Judgment of the Court of 6 June 2000, Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA (para. 36). See E. Cloots and S. Sottiaux, ‘EU Law and Language Regulation in (Quasi-)Federal Member States’, pp. 315-16; B. de Witte, ‘Common Market Freedoms versus Linguistic Requirements in the EU States’, in: A. Milian i Massana et al. (eds), *Mundialització, lliure circulació i immigració, i l’exigència d’una llengua com a requisite* (Barcelona, Institut d’Estudis Autònoms: 2008), pp. 109-31.

<sup>61</sup> Roman Angonese v Cassa di Risparmio di Bolzano SpA (C-281/98), paras 44 and 46. See also Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee (C-379/87), para. 23.

the official language or languages of those States”.<sup>62</sup> In the Opinion on this case, Advocate General Jääskinen argued that the notion of ‘official language’ embraces “the official language or various official languages of the State and, where appropriate, the territorial subdivisions in which the various official languages are in use. The concept of ‘national identity’ therefore concerns the choices made as to the languages used at national or regional level”.<sup>63</sup> The promotion of official languages ‘at national or regional level’ can justify restrictions of the fundamental freedoms guaranteed by the Treaty, subject to compliance with the proportionality principle. More specifically, national or regional measures capable of hindering the exercise of fundamental freedoms guaranteed by the Treaty, or of making it less attractive, may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued.<sup>64</sup> The Court in *Las* concluded that the Flemish decree on the compulsory use of Dutch in employment contracts goes beyond what is strictly necessary to achieve the objectives of the law (protection and promotion of Dutch, protection of the employee, facilitation of the work of the employment inspectorate) and therefore imposes a disproportionate restriction on the free movement of workers within the EU.<sup>65</sup> Accordingly, “Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State [...], which requires all employers whose established place of business is located in that entity’s territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.”<sup>66</sup>

Another relevant stream of case-law concerns the interaction between regional rules on the use of a particular language for the information appearing on products and free movement of goods. In *Colim* and *Piageme I* the Court circumscribed the compatibility of national or regional rules imposing the use of a particular language for the labelling of foodstuffs (*Piageme I*) or the information appearing on imported products (*Colim*). In *Piageme I* the Court held that the obligation exclusively to use the language of the linguistic region (Dutch, spoken in the Flemish-speaking region of Belgium) constitutes a measure having equivalent effect to a quantitative restriction (MEQR) on imports, prohibited under the rules that govern the free movement of goods.<sup>67</sup> More specifically, although the Court did not mention proportionality expressly here, such measures appear ‘disproportionate’ for not allowing for the use of another language “easily understood by purchasers”, or for failing to ensure that the purchaser is informed by other, arguably less restrictive, measures,<sup>68</sup> such as designs, symbols or pictograms.<sup>69</sup>

A third group of cases concerns the cultural policies of the Member States or of their regions requiring, inter alia, the broadcasting of programmes in particular languages or the production of films in the official, including the regional, languages of a particular

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<sup>62</sup> *Anton Las v PSA Antwerp NV* (Case C-202/11), para. 26. See also *Runevič-Vardyn and Wardyn v Vilniaus miesto savivaldybės administracija et al.* (C-391/09), para. 86.

<sup>63</sup> Opinion of AG Jääskinen, *Anton Las* (C-202/11), para. 59.

<sup>64</sup> *Anton Las* (C-202/11), para. 23.

<sup>65</sup> *Anton Las* (C-202/11), para. 33.

<sup>66</sup> *Anton Las* (C-202/11), para. 34.

<sup>67</sup> *ASBL Piageme v BVBA Peeters* (C-369/89), para. 16.

<sup>68</sup> *ASBL Piageme* (C-369/89), paras 16 and 17. See also *Piageme and Others v Peeters NV, aka ‘Piageme II’* (C-85/94), paras 17 and 21; *Colim NV v Bigg’s Continent Noord NV* (C-33/97), para. 44.

<sup>69</sup> *Piageme and Others v Peeters NV, aka ‘Piageme II’* (C-85/94), paras. 27 and 31.

Member State. In UPC the Court held that the ‘must-carry’ obligation for cable operators active in Brussels-Capital to broadcast a number of programmes in Dutch, as part of the cultural policy of Belgium to safeguard the ‘freedom of expression’ of the various linguistic components that exist in that region, is in principle compatible with the freedom to provide services, provided that the policy is ‘not disproportionate’ in relation to that objective.<sup>70</sup> In this particular case, by ‘not disproportionate’ the Court meant that “the manner in which [the policy] is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.”<sup>71</sup> In UTECA, concerning the obligation for Spanish television operators to earmark a small percentage of their operating revenue to fund films in one of the official languages of the Member State does not constitute a breach of the principle of non-discrimination of Article 12 EC, nor a State aid in favour of the cinematographic industry of that Member State.<sup>72</sup> A further stream of case-law concerns the right of people belonging to a linguistic minority recognised by a Member State to require that criminal proceedings against them take place, in a particular region or province of that Member State, in a language other than the principal language of the Member State concerned. In Mutsch (criminal proceedings against a Luxembourg national and German native speaker working in Belgium) and Bickel and Franz (an Austrian lorry driver and a German tourist in Italy respectively) the Court held that it would be a discrimination against a worker (Mutsch), or against a service provider (Bickel), or a service recipient (Franz) from another Member State if the right to require that the criminal trial takes place in the language spoken by a recognised linguistic minority was limited to the nationals of the host State (German-speaking Belgian citizens residing in a German-speaking municipality of Belgium and Italian nationals residing in the Province of Bolzano whose first language is German).<sup>73</sup>

An important case, finally, is Kamberaj in which the Court held that the measure of the Italian Province of Bolzano which prioritised the members of the three regional linguistic groups (Italian, German, Ladin) in the allocation of housing benefits, discriminated against third-country nationals enjoying the status of long-term resident conferred pursuant to the provisions of Directive 2003/109.<sup>74</sup> From this judgment it emerges a fortiori that national or regional measures are not allowed to protect linguistic groups by granting to their members social benefits (such as social housing), if the criteria adopted to allocate these benefits infringe the rights deriving from EU law of people not belonging to one of the protected groups.

To sum up, the Court of Justice acknowledges that the cultural policies and measures of the Member States at national or at regional level, aiming in particular to protect the rights of linguistic groups or to promote or protect a language spoken by a minority in a particular region, are ‘legitimate aims’ which, in principle, could justify limitations of the free movements. ‘Legitimate aims’ identified by the Court range from the objective sociological reality of the linguistic diversity within one region<sup>75</sup> to the promotion of the

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<sup>70</sup> UPC et al. v État belge (C-250/06), paras 42, 43 and 51.

<sup>71</sup> UPC et al. v État belge (C-250/06), para. 51.

<sup>72</sup> UTECA v Administración General del Estado (C-222/07), paras 40 and 47.

<sup>73</sup> Ministère Public v Robert Heinrich Maria Mutsch (137/84), para. 18; Criminal proceedings against Horst Otto Bickel and Ulrich Franz (C-274/96), para. 31.

<sup>74</sup> Servet Kamberaj v IPES (C-571/10), para. 93.

<sup>75</sup> Opinion of AG Fennelly, Roman Angonese v Cassa di Risparmio di Bolzano SpA (C-281/98), para. 42: “It is obvious, in the light of the linguistic regime in the province of Bolzano and of the linguistic make-up of its population, that the defendant was entitled to require its potential employees to give evidence of bilingualism.”



local language,<sup>76</sup> the protection of the rights of defence of the members of the linguistic group in criminal proceedings,<sup>77</sup> the protection of consumers in a particular region,<sup>78</sup> the safeguarding of the freedom of expression of the different components which exist in one region,<sup>79</sup> defending and promoting the official languages of the Member State.<sup>80</sup> The protection of regional languages is particularly strong where these are among the 'official languages' of a Member State, in which case they fall within the scope of the protection of Article 4(2) TEU as part of the 'national identity of the Member States, inherent in their fundamental political and constitutional structures'. Any measures protecting the regional languages, however, must not be 'disproportionate', that is, incompatible with internal market requirements. The proportionality review linked to internal market freedoms, though, does not automatically nor necessarily lead to judicial decisions against the protection of regional languages. The Court of Justice's approach to cases involving the protection of languages appears quite balanced. In the analysed cases, the Court found against the protection of languages only in situations in which there was a clear incompatibility with the fundamental freedoms (for example, the obligation to draft transnational employment contracts exclusively in Dutch or to label imported products exclusively in Dutch, like in *Las* and *Piageme I* respectively).<sup>81</sup> This is a reflection of, if not a subscription by the Court, to the 'Europe with the regions', as opposed to an 'Europe of the regions'. 'Regional languages' enjoy an enhanced protection from the EU as 'part' of the national identity of the Member States and as a result of their official recognition by the Member States, rather than separately from and independently of the Member States. This observation appears corroborated indirectly, through an *argumentum a contrario*, by the Court's decision in *Vardyn and Wardyn*, where, as the Lithuanian Constitution designates Lithuanian as the only official State language, the Court ended up upholding the position that members of the Polish-speaking minority living in Lithuania have no claim under EU law to have their names spelt in Polish characters in Lithuanian official documents.<sup>82</sup> In *Vardyn and Wardyn* emerges that the protection of minority languages, far from going against national constitutional laws and policies, shall be consistent with those. The protection of 'regional languages' is therefore a manifestation of an 'Europe with the regions', in which the recognition of the regions is respectful of the prerogatives of the Member States, rather than of an 'Europe of the regions' in which the regions receive recognition to detriment of the traditional standing and role of the Member States.

### **Part III – Regional participation in EU processes**

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<sup>76</sup> *Anton Las v PSA Antwerp NV* (C-202/11), para. 33.

<sup>77</sup> *Ministère Public v Robert Heinrich Maria Mutsch* (137/84); Criminal proceedings against Horst Otto Bickel and Ulrich Franz (C-274/96).

<sup>78</sup> *ASBL Piageme v BVBA Peeters, aka 'Piageme I'* (C-369/89); *Piageme and Others v Peeters NV, aka 'Piageme II'* (C-85/94); *Colim NV* (C-33/97).

<sup>79</sup> *UPC et al. v État belge* (C-250/06), para. 42.

<sup>80</sup> *UTECA v Administración General del Estado* (C-222/07), para. 43. On the 'legitimate aims' see E. Cloots and S. Sottiaux, 'EU Law and Language Regulation in (Quasi-)Federal Member States', pp. 308-11.

<sup>81</sup> E. Cloots and S. Sottiaux, 'EU Law and Language Regulation in (Quasi-)Federal Member States', pp. 287-321, are highly critical of this jurisprudence.

<sup>82</sup> *Runevič-Vardyn and Wardyn* (C-391/09), para. 94. On this case see in particular E. Cloots and S. Sottiaux, 'EU Law and Language Regulation in (Quasi-)Federal Member States', pp. 301-6.

## 5. Locus standi of the regions

The notion of 'Europe with the regions' requires the involvement of the regions in Union processes including the actions of direct annulment of Union acts before Union courts. The regions may have an interest in challenging the validity of Union acts, when these negatively affect their fundamental interests (for example, when they are perceived by the region as detrimental to the local economy). The consolidated jurisprudence of the Court of Justice on Article 263 TFEU, however, does not grant the status of 'privileged applicants' to the regions. In terms of their locus standi (or standing), territorial authorities fall in the same category of applicants ('non-privileged') as the individuals.<sup>83</sup> Union courts have also dismissed the argument that respect for national identity pursuant to Article 4(2) TEU should award the regions 'privileged applicant' status.<sup>84</sup> Accordingly, they may challenge without particular restrictions acts addressed to them, as well as 'regulatory acts which do not entail implementing measures' without having to prove 'individual concern'.<sup>85</sup> Exactly like individuals, though, they can challenge acts which are not addressed to them (for example, a decision addressed to their Member State), only if they are able to demonstrate that these acts are of 'direct' and 'individual concern' to them. Showing 'direct' and 'individual concern' is not easy in practice.<sup>86</sup> As to 'direct concern', for instance, the fact that a region has got responsibility for the execution of a project funded by the EU, does not automatically meet the 'direct concern' threshold required to challenge an act withdrawing entirely or in part the funding previously awarded. In *Sicily v Commission*, for example, in relation to a decision to withdraw the funds for a European Regional Development Fund (ERDF) funded project, the Court of Justice held that the Sicily Region was not 'directly concerned'. The Court stated that "the position of 'authority responsible for the application' [...] does not have the effect of putting the appellant [Region] in a direct relationship with the Community assistance, which [...] was applied for by the Italian Government and granted to the Italian Republic".<sup>87</sup> Likewise, the fact that the project has to be executed in one

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<sup>83</sup> See, inter alia, *Municipality of Differdange v Commission* (C-222/83), para. 8; *Région Wallonne v Commission* (C-95/97), paras 6-7; *Regione Toscana v Commission* (C-180/97), paras 7-8; *Vlaams Gewest v Commission* (T-214/95), para. 28; *Regione autonoma Sardegna v Commission* (T-219/14), paras 44-45.

<sup>84</sup> *Northern Ireland Department of Agriculture and Rural Development v Commission* (T-453/10), paras 36-38.

<sup>85</sup> Cf. Art. 263(4) TFEU. The 'direct and individual concern' requirement also applies to actions for wrongful failure to act under Article 265(3) TFEU brought by a natural or legal person, when the expected act is not addressed to the applicant. See *ENU v Commission* (C-107/91), para. 10; *Port v Bundesanstalt für Landwirtschaft und Ernährung* (C-68/95), paras 58-59; *Telecinco v Commission* (T-95/96), paras 30-31.

<sup>86</sup> P. Van Nuffel, 'What's in a Member State?', pp. 871-901; A. Evans, 'Regional Dimensions to European Governance', in: *International Comparative Law Quarterly*, 2003, Vol. 52, No. 1, pp. 21-51 at pp. 33-42; M. Dani, 'Regions standing before the EU courts – towards a constitutional theory on "Direct and Individual" participation of the regions in the EU decision-making processes', in: R. Toniatti et al. (eds), *An Ever More Complex Union (Nomos: 2004)*, pp. 181-197; K. Lenaerts, 'Access of the Regions with Legislative Power to the ECJ' (August 2008), <http://cor.europa.eu/en/news/highlights/documents/2e30bc34-7ce2-427d-8d35-53f2c7b50a8a.pdf>; A. Thies, 'Locus Standi of the Regions Before EU Courts', in: Panara and De Becker (eds), *The Role of the Regions in EU Governance*, pp. 25-53.

<sup>87</sup> See *Regione Siciliana v Commission* (C-15/06 P), para. 36. See also *Regione Siciliana v Commission* (C-417/04 P), paras 26-32; *Regione Siciliana v Commission* (T-156/06), paras 53-54; *Município de Gondomar v Commission* (T-324/06), paras 37-52, confirmed on appeal

region's territory, does not per se make the challenge admissible. The Court of First Instance (CFI), for example, declared inadmissible due to lack of 'direct concern' an application filed by the Greek local authority Koinotita of Grammatiko against a Commission's decision to fund the creation of a landfill site in that location.<sup>88</sup>

Showing 'individual concern' is not easier either. The fact, for instance, that an EU act deals with an issue falling within the responsibility of one region, is not sufficient in order to entitle that authority to challenge the measure. In *Friuli-Venezia Giulia v Commission*, for example, concerning a regulation which delimited temporally the right to use the label 'Tocai friulano', a wine variety typical of Friuli, the Court of First Instance held that "the division of legislative and regulatory powers within a Member State is solely a matter for the constitutional law of that State and has no effect from the point of view of assessing the possible effects of a Community legal measure on the interests of a territorial body." Accordingly, the Court concluded that the Region Friuli-Venezia Giulia was not 'individually concerned' by the contested legal provision.<sup>89</sup>

The fact, alone, that an act negatively affects a local interest is not sufficient to ground 'individual concern'. In *Cantabria v Council*, the CFI held that "any general interest the applicant [Autonomous Community] may have, as a third person, in obtaining a result which will favour the economic prosperity of a given business and, as a result, the level of employment in the geographical region where it carries on its activities, is insufficient, on its own, to enable the applicant to be regarded as 'concerned' [...], nor, a fortiori, as being individually concerned".<sup>90</sup>

Not even the status as an 'outermost region' under Article 349 TFEU (former 299 EC) does automatically, on its own, lead to 'individual concern'. In *Azores v Council*, for example, the President of the CFI held that the fact that an applicant region enjoys a special status under the Treaties does not suffice in order to show 'individual concern', "[o]therwise the outermost regions mentioned in Article 299(2) EC would acquire rights to bring legal proceedings akin to the rights of Member States. Such a result would be contrary to Article 230 EC [now Art. 263 TFEU] which does not entitle, by analogy, regional entities to bring actions under the same conditions as Member States".<sup>91</sup>

The approach of Union courts to cases concerning State aid is more open. Courts grant regions *locus standi* in relation to Union acts which prevent them from granting aid to companies, or which require them to withdraw and recover the aid already

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by *Município de Gondomar v Commission* (C-501/08 P); *Commission v Ente per le Ville Vesuviane* (C-445/07 P), para. 67; *Regione Puglia v Commission* (T-84/10), paras 29-30, 32-35, 37, 39-44, 48-53; *Northern Ireland Department of Agriculture and Rural Development v Commission* (T-453/10), para. 56, confirmed on appeal by *Northern Ireland Department of Agriculture and Rural Development v Commission* (C-248/12 P).

<sup>88</sup> *Koinotita Grammatikou v Commission* (T-13/08). In this particular case the claimant region attacked an act awarding funding for a project to be executed in loco, rather than a measure withdrawing or reducing the funding previously awarded. No appeal was brought against this decision.

<sup>89</sup> *Regione autonoma Friuli-Venezia Giulia v Commission* (T-417/04), para. 62.

<sup>90</sup> *Comunidad Autónoma de Cantabria v Council* (T-238/97), para. 49. See also *Regione Puglia v Commission* (T-609/97), para. 22; *Commission v Nederlandse Antillen* (C-142/00 P), para. 69; *Região autónoma dos Açores v Council* (T-37/04), para. 118; *Regione autonoma Friuli-Venezia Giulia v Commission* (T-417/04), para. 61.

<sup>91</sup> *Região autónoma dos Açores v Council* (T-37/04), para. 119. An appeal against this decision was dismissed by *Região autónoma dos Açores v Council* (C-444/08 P). See also *Nederlandse Antillen v Council* (C-452/98), para. 50.

granted.<sup>92</sup> In *Flemish Region v Commission*, for example, the CFI acknowledged that “The contested decision [concerning aid granted by the Region to a Belgian airline] has a direct and individual effect on the legal position of the Flemish Region [since] [such decision] directly prevents [the Region] from exercising its own powers, which here consist of granting the aid in question, as it sees fit”.<sup>93</sup> In *Land Saxony v Commission*, as well as in *Friuli-Venezia Giulia v Commission*, the CFI recognized the locus standi of the applicant, given that the contested measure required the region to recover from the beneficiaries an aid previously granted.<sup>94</sup> In 2000 the Sicily Region challenged a Commission’s decision which envisaged that the State aid allocated by a regional law in favour of undertakings operating in the agriculture or fisheries sector was incompatible with EU law and that the aid in question had to be accordingly withdrawn. The Commission did not seek to argue that the measure was not of ‘direct and individual concern’ to the applicant, and the CFI held the action admissible, after verifying that it had been brought within the correct timeframe.<sup>95</sup> In numerous cases since, Union courts showed the tendency to accept that, as a rule, in cases concerning State aid, the regions shall be granted standing,<sup>96</sup> although the applicant still needs to have a relevant legal interest in the annulment of an act.<sup>97</sup>

Despite the difficulties faced by the regions when they attempt to challenge directly the validity of Union acts which are not addressed to them, Union courts maintain that there is no gap in the legal protection afforded to them by EU law. The CFI held that regions are able “either indirectly to plead the unlawfulness of such acts before the Community judicature under Art. 241 EC [now Art. 277 TFEU] or to do so before the national courts and ask them [...] to make a reference to the Court of Justice for a preliminary ruling [under Art. 234 TEC, now Art. 267 TFEU] as to lawfulness”.<sup>98</sup> In reality, though, Articles 277 and 267 TFEU do not seem to overcome the limited locus

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<sup>92</sup> *Região autónoma dos Açores v Council* (T-37/04), para. 82, referring to *Vlaams Gewest v Commission* (T-214/95), para. 29; *Diputación Foral de Álava and Others v Commission* (T-346/99, T-347/99 and T-348/99), para. 37; *Land Oberösterreich and Austria v Commission* (T-366/03 and T-235/04), para. 28. The CFI pointed out in *Região autónoma dos Açores*, at para. 82, that the cases listed above concerned decisions on “aid paid by the applicant local bodies, so that the lawfulness of that aid depended on the outcome of the proceedings”.

<sup>93</sup> *Vlaams Gewest v Commission* (T-214/95), para. 29. See also *Exécutif régional wallon v Commission* (62/87 and 72/87), paras 6 and 8, and the more recent *Comunidad Autónoma del País Vasco v Commission* (T-462/13), para. 34.

<sup>94</sup> *Land Saxony and Volkswagen v Commission* (T-132/96 and T-143/96), paras 84-86; *Friuli Venezia Giulia v Commission* (T-288/97), paras 31-32.

<sup>95</sup> *Regione Siciliana v Commission* (T-190/00), paras 29-33.

<sup>96</sup> See, inter alia, *Westdeutsche Landesbank and Land Nordrhein-Westfalen v Commission* (T-228/99 and T-233/99); *Département du Loiret v Commission* (T-369/00); *Freistaat Thüringen v Commission* (T-318/00); *Freistaat Sachsen v Commission* (T-357/02); *Government of Gibraltar and UK v Commission* (T-211/04 and T-215/04); *Freistaat Sachsen v Commission* (T-357/02 RENV); *Regione autonoma della Sardegna v Commission* (T-394/08); *Land Burgenland and Austria v Commission* (T-268/08 and T-281/08); *Hansestadt Lübeck v Commission* (T-461/12), paras 20 et seqq.; *Comunidad Autónoma de Galicia and Retegal v Commission* (T-463/13 and T-464/13), paras 37-40; *Comunidad Autónoma de Cataluña and CTTI v Commission* (T-465/13), para. 34; *Comunidad Autónoma de País Vasco and Itelazpi SA v Commission*.

<sup>97</sup> *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* (T-443/08); *Regione autonoma Sardegna v Commission* (T-219/14), paras 43-45.

<sup>98</sup> *Região autónoma dos Açores v Council* (T-37/04), para. 92, referring to *Unión de Pequeños Agricultores v Council* (C-50/00 P), para. 40; *Fost Plus v Commission* (T-142/03), para. 75).

standi of the regions. According to Article 277 TFEU, it is possible to invoke the ‘inapplicability’ of an ‘act of general application’ in the context of other proceedings before the Court. More specifically, where an applicant challenges the validity of an act implementing an ‘act of general application’ which forms the legal basis of the impugned act, the applicant may ask the Court to declare ‘inapplicable’ the ‘act of general application’.<sup>99</sup> However, lacking an act implementing an ‘act of general application’, there would be no opportunity for an applicant region to obtain the declaration of inapplicability of the ‘act of general application’.<sup>100</sup>

Preliminary rulings (Article 267 TFEU) do not adequately fill the gap in legal protection either. First, the protection would depend upon the existence of a legal remedy under domestic law. Second, since it is the domestic courts, not the parties directly, who refer a preliminary ruling to the Court of Justice, such ‘filtering’ by the courts could prevent a plea for invalidity of an EU measure from landing before the Court of Justice. Therefore, the current position leaves a gap in the judicial protection of the legal situations of the regions in the EU.<sup>101</sup> At least in theory, more effective ways to fill this gap have been created in federal and quasi-federal Member States by enabling the sub-national authorities, individually (like in Belgium<sup>102</sup>) or collectively (like in Italy and Germany<sup>103</sup>), to require their national government to file an action for direct annulment before Union courts pursuant to Article 263 TFEU.<sup>104</sup>

To conclude, with the exception of State aid cases, Union courts adopt a rather strict scrutiny of the locus standi of the regions. The preceding analysis shows that this is due to the construction that sees the regions as ‘parts’ of the Member States rather than as actors directly and immediately relevant to the EU. It is therefore up to the Member States, as a rule, to represent the interests of the regions in proceedings before Union courts and more in general in processes of the EU. The CFI even stated that “In the [EU] legal order, it is for the authorities of the State to represent any interests based on the defence of national legislation, regardless of the constitutional form or the territorial organisation of that State”.<sup>105</sup> However, given that the central government may have no obvious incentive to bring an action, to rely on the mere good will of the central government could be problematic.<sup>106</sup>

## 6. Regional participation in EU decision-making processes

The ‘Europe with the regions’ requires, finally, also the prompting and exploitation of participation channels whereby the regions make their voice heard in Brussels and contribute knowledge and information, as well as evaluations and views to the EU

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<sup>99</sup> *Simmenthal v Commission* (Case 92/78), para. 39.

<sup>100</sup> C. Panara, *The Sub-national Dimension of the EU*, pp. 37-38.

<sup>101</sup> C. Panara and A. De Becker, ‘The Role of the Regions in the European Union’, p. 326.

<sup>102</sup> Cooperation Agreement of 11 July 1994.

<sup>103</sup> In Italy the State-Regions Conference (a forum for policy discussion between the State and the Regions) may, by absolute majority, oblige the State Government to challenge an EU act concerning a matter of regional competence. In Germany the Bundesrat (the house representing the Länder at federal level), may request the Federal Government to make use of the actions provided by the Treaty against acts or failures to act of the Union which affect issues falling within the competence of the Länder.

<sup>104</sup> C. Panara, *The Sub-national Dimension of the EU*, pp. 39-41.

<sup>105</sup> *Regione autonoma Friuli-Venezia Giulia v Commission* (T-417/04), para. 62.

<sup>106</sup> This is the submission of the applicant in *Northern Ireland Department of Agriculture and Rural Development v Commission* (T-453/10), para. 32.

legislative process. The privileged body identified to this purpose is the CoR, which is a consultative body. Pursuant to Article 263(3) TFEU the CoR has the status of 'semi-privileged applicant' that can challenge an act in order to protect its prerogatives. Up to now the CoR has never filed a case to this purpose. With all probability this demonstrates that the political institutions have observed consistently the procedural requirement of consulting the CoR. In this section, though, I will not focus on the role and prerogatives of the CoR nor on the effectiveness of the various participation channels available to the regions. I will rather look at the approach of the Court of Justice to these channels.

The Commission has a duty to consult widely before proposing a legislative proposal (Article 2 Lisbon Subsidiarity Protocol).<sup>107</sup> This is, potentially, an important channel for dialogue and political cooperation which may assist the Commission and the law-making institutions in determining the possible impact of a regulation. It is unlikely that the Court of Justice would uphold a claim based on Article 2 of the Protocol, that a certain act is null and void for lack of or inadequate consultation. To date, no such claim has been brought to the attention of the Court. However, the Court has already expressly recognised that consultation contributes legitimacy to Union law-making. In *UEAPME* the Court of First Instance held that whenever the European Parliament does not participate in the enactment of a legislative measure, the principle of democracy requires an alternative form of participation of the people. If such participation, like in *UEAPME*, takes the form of social dialogue, the Commission and the Council have an obligation to verify that the social partners involved are 'truly representative'. Only in this way the democratic legitimacy of the EU law-making process is ensured.<sup>108</sup>

The early warning system, due to the eight-week deadline and the high quorum for a yellow or an orange card, can be a difficult channel for the regions. As a result, some legislative chambers representing the regions (such as, the German Bundesrat<sup>109</sup>) often voice their opinion (in relation to subsidiarity or anything else) through the 'political dialogue' launched by the Commission in 2006.<sup>110</sup> Since it is a soft law arrangement, the political dialogue is not judicially enforceable, nor is there a yellow or orange card mechanism attached to it. However, due to its flexibility, national parliaments, including the legislative chambers which represent the regions, resort to this instrument more frequently than to the early warning system (in 2016 national parliaments issued 620 opinions, but only 65 of those were reasoned opinions<sup>111</sup>).

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<sup>107</sup> This duty had been previously introduced by the Amsterdam Subsidiarity Protocol (Point 9).

<sup>108</sup> *UEAPME v Council* (T-135/96), paras 88-89. Cf. P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', in: *European Public Law*, 2011, Vol. 17, No. 3, pp. 555-69 at p. 567; S. Smismans, *Law, Legitimacy, and European Governance. Functional Participation in Social Regulation* (OUP: 2004), p. 340. See also, in relation specifically to the early warning system, M. Bartl, 'The Way We Do Europe: Subsidiarity and Substantive Democratic Deficit', in: *European Law Journal*, 2015, Vol. 21, No. 1, pp. 23-43. The 2001 White Paper on European Governance clearly says that the legitimacy of the EU today depends on involvement and participation. See Commission, *European Governance – A White Paper*, COM(2001)428, 25 July 2001, p. 11.

<sup>109</sup> Such as, the 2013 Directive on the added value tax (Council Directive 2013/43/EU of 22 July 2013, in: *Official Journal of the EU*, 26 July 2013, L 201/4).

<sup>110</sup> See Communication from the Commission to the European Council, *A Citizens' Agenda*, Brussels, 10 May 2006, COM(2006) 211 final, p. 9.

<sup>111</sup> See Commission, *Annual report 2016 on relations between the European Commission and national parliaments*, Brussels, 30 June 2017, COM(2017) 601 final. The figures from the previous five years were: 350 opinions and 8 reasoned opinions in 2015, 506 opinions and 21

Apart from direct lobbying of the institutions in Brussels through their liaison offices or their various European associations (such as, EUROCITIES or the Conference of the Regions with Legislative Power, REGLEG), which is by definition not regulated by law, the participation of the regions in EU decision-making processes takes place primarily at domestic level through various consultation procedures regulated by domestic law. A failure to comply with these procedures could not lead, obviously, to the declaration of invalidity of an act of the Union by the Court of Justice, although it could undermine its legitimacy from the point of view of the regions of one particular Member State. Similarly, the opening up of the Council to the regions pursuant to Article 16(2) TEU does not imply that the failure by a Member State to allow its representation in the Council by a regional minister would lead to the invalidity of the act passed by the Council.<sup>112</sup>

The only case in which there is a reference, albeit limited, to regional participation in EU decision-making processes is *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis (France) v Commission*. The GC observed that, even when an allegedly unlawful state aid is granted by a region, the infraction procedure of Article 108(2) TFEU shall be opened only against the Member State. Respect, *inter alia*, for the 'constitutional identity of the Member States' does not confer on infra-state bodies (such as, the regions providing the aid, the undertakings receiving it and their competitors) the same rights of defence. These bodies are mere 'interested parties', although they "have the right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case".<sup>113</sup> The Member States, however, could autonomously decide to involve the sub-state authorities in the exercise of the rights of defence of the Member State in procedures concerning State aid or any other infringement procedure.<sup>114</sup>

To sum up, the totality of regional participation takes place outside the scope of the law (lobbying), through soft law and political arrangements (political dialogue), through channels created by the Treaties (Article 16(2) TEU), or through channels created by domestic law. The contribution of the Court of Justice to the development of this area of law has been virtually non-existent, although this is not due to a hostility of the Court vis-à-vis regional participation, but to the legal and practical impossibility to enforce judicially political and soft law mechanisms, mechanisms created and regulated by domestic law and participation channels opened up by EU primary law which ultimately rely upon internal processes outside the scope of EU law.

## 7. Concluding remarks

The previous analysis confirms that there is, definitely, a discrepancy between 'Europe with the regions' and jurisprudence of the CJEU. This discrepancy, though, does not emerge everywhere, nor does it emerge with the same intensity in all sectors. Indeed, in a number of areas the CJEU has acknowledged the role and responsibilities of the regions deriving from the national constitutions. Examples include the right/duty to implement obligations arising from the EU, the protection of regional languages provided

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reasoned opinions in 2014, 621 opinions and 88 reasoned opinions in 2013, 663 opinions and 70 reasoned opinions in 2012, 622 opinions and 64 reasoned opinions in 2011.

<sup>112</sup> C. Panara, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union', pp. 723-24.

<sup>113</sup> *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis (France) v Commission* (T-267/08 and T-279/08), para. 74.

<sup>114</sup> See S. Weatherill, 'The Challenge of the Regional Dimension in the European Union', p. 4.

that these are 'official languages' of the Member State concerned, as well as the 'sufficient autonomy' test developed by the CJEU in *Portugal v Commission* in cases concerning State aid. These areas of 'negative' recognition of the regions, though, that is, of recognition limited to taking account of and trying to respect the constitutional status of the regions which emerges from the respective national constitution, is not complemented by a 'positive' recognition by the CJEU of the participation rights of the regions in EU processes, in particular decision-making processes. The only partial exception is the flexible approach of the Court to the *locus standi* in cases regarding State aid. Why is it so?

Despite the traditional, almost natural, centralising ethos of constitutional courts within federations, the CJEU does not appear ideologically opposed to an increasing 'regionalisation' of the EU. The CJEU demonstrates to be willing, as well as able, to facilitate important breakthroughs for the recognition of the role of the regions in the EU. There are fundamental structural hindrances which prevent the Court from promoting further advancements, both 'positive' and 'negative', of the status of the regions in the European edifice. As to 'positive' recognition, the current structure of the EU, and in particular the practical impossibility of enforcing domestic constitutional rules at EU level, *de facto* prevents certain cases from landing before the CJEU, such as, for example, cases concerning regional participation in the Council pursuant to Article 16(2) TEU or regional participation in determining the negotiating position of the Member State. The general clauses of Article 4(2) TEU and Article 5(3) TEU are not suitable to produce a real breakthrough for the regions, either 'positive' or 'negative'. This is due to the fact that these clauses protect primarily the 'national identity' (Article 4(2) TEU) or, despite the new wording of the subsidiarity clause, the autonomy of the Member States (Article 5(3) TEU). Only as a 'side-effect' these clauses also protect regional self-government and regional autonomy. As to subsidiarity specifically, the CJEU is likely to struggle to determine the level of government which is better placed to act in relation to a certain issue within one Member State. The lack of *locus standi* of the regions is another obstacle to the landing before the CJEU of subsidiarity claims coming directly from the regions to protect their own prerogatives *vis-à-vis* the EU.

The 'positive' participation of the regions in EU decision-making processes has historically always followed from Treaty amendments or developments in the political sphere (for example, structured or political dialogue), rather than from the activity of the CJEU. Especially in relation to 'positive' recognition of the status of the regions in the EU, the role of the CJEU has been limited, compared, for example, to the role of the CJEU in promoting integration through supremacy, direct effect, indirect effect. This is not surprising though, not only because all these doctrines are conducive to more integration and the 'regionalisation' of the EU might be conducive to more fragmentation and more obstacles to free movements. The limited role of the CJEU in this particular field is due to the fact that the EU has always been, is and will continue to be in the foreseeable future a union of states, not an 'Europe of the regions'. The jurisprudence of the CJEU on *locus standi*, for example, is entirely dominated by the impossibility to put the regions on the same footing as the Member States. It is for the Member States to organise the regional participation in the Council pursuant to Article 16(2) TEU and for the national parliaments to organise the consultation of regional parliaments with legislative powers pursuant to the new Subsidiarity Protocol. The CJEU does not and cannot have a say on these matters and its role is therefore limited due primarily to the nature of the EU.

The 'Europe with the regions' has developed so far and is likely to continue to develop via political advancements reflected in policy-making practices (such as, new *ad hoc*



consultation channels), soft law arrangements and, especially, Treaty amendments reforming the decision-making processes (for example, a reform strengthening the role of the CoR). It is unlikely that further 'positive' opening up of the EU to the regions will arise, in the absence of a reform of the Treaties, directly from the judicial activism of the CJEU.

So, where is the CJEU vis-à-vis the 'Europe with the regions'? Is it totally 'blind' to the regions or has been the facilitator of important breakthroughs? The correct answer is probably somewhere in the middle, it has facilitated important breakthroughs for the regions but, at the same time, its role has been limited in other areas. So, the CJEU is truly in the middle, as it is the current state of the EU as an 'Europe with the regions', that is, an EU that has moved beyond the complete 'regional blindness' of the past but has not yet become, nor will it realistically in the foreseeable future, if ever, an 'Europe of the regions'.