ADDRESSEES, COUNSELLORS, LEGISLATORS: WHAT ROLE FOR REGIONAL AND LOCAL AUTHORITIES IN THE UNION'S DECISION-MAKING PROCEDURES?

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I. Introduction

The European legal order, in its evolution, differentiation and consolidation, has been a potent factor of change for the constitutional structures of the Member States of the Union. In particular, European integration has had a significant impact on the institutional position and day-to-day life of regional and local authorities within the Member States[1]. Two examples will illustrate the point. On the one hand, the incorporation of European law in the legal orders of the Member States has directly or indirectly modified the laws, principles and regulations concerning the sphere of autonomy and the functioning of regional and local authorities[2]. On the other hand, Member States have increasingly entrusted the task of implementing European laws and EU policies to such authorities. This has resulted in an expansion of their responsibilities, and correspondingly in an augmentation of their financial and organisational needs[3]. For their part, the Treaties of Rome, in their original versions, took no notice of the existence of sub-national entities. In particular these entities had no voice, as such, in the European decision-making procedures, nor did they dispose of effective means to challenge European measures once adopted[4].

This state of affairs, whereby regional and local entities were the passive addressees of an ever-growing *acquis communautaire*, touching upon an increasing number of subject mat-

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1 See A. TIZZANO, *La partecipazione delle Regioni al processo d'integrazione comunitaria: problemi antichi e nuove prospettive*, Le Regioni (1992), 603.

2 See e.g. ECJ, case 103/88, *Fratelli Costanzo*, [1989] ECR, 1839. See also ECJ, case 9/74, *Casagrande*, [1974] ECR, 773.

3 See in this respect the request formulated by the Council of European Municipalities and Region (CEMR), *Position paper* (16 July 2002), para. 24 (available on the website www.ccre.org/site.html)

4 See A. D'ATENA, *Il doppio intreccio federale: le regioni nell'Unione europea*, Le Regioni (1998), 1401.

ters many of which were of direct concern for them[5], finally gave rise to a number of political demands. Such demands were in the first place of a defensive nature: the competences of the Communities (later on, of the European Union) would have to be better delimited. However, it being impossible to insulate the matters of their concern from the reach of European law[6], regional and local authorities also asked for participatory rights in the EU decision-making procedures.

The Maastricht Intergovernmental Conference acceded to such requests[7]. In the first place, the principle of subsidiarity was made into a principle of primary law by virtue of the newly introduced art. 3B of the EC Treaty (now art. 5 ECT). Secondly, a Committee of the Regions (CoR), composed of the representatives of regional and local bodies, was established with advisory status. Thirdly, art. 146 of the EC Treaty (now art. 203 ECT) was amended so as to allow regional ministers to sit in Council. Subsequently, the Treaties of Amsterdam and Nice rounded off the reforms decided in Maastricht, while leaving them unchanged in their essential terms[8].

The steps taken in Maastricht, Amsterdam and Nice, though extremely significant, have left open a number of constitutional issues as regards the position of regional and local entities in European integration. These issues are being discussed in the ongoing debate on

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5 The classical example in this respect is the Single European Act, which conferred new competences upon the EC in matters that in most Member States are of direct concern to regional and local entities (e.g. environment). It should also be recalled that general provisions that were set out in the original Treaties have a significant impact on regional and local policies. E.g., the prohibition of discrimination may affect regional cultural policy (see ECJ, C-388/01, *Commission vs. Italy*, judgement of January 16 2003, not yet reported). Even more so, the Treaty provisions on State aids significantly reduce de scope for regional economic policy (see e.g. CFI, joined cases T-127, T-129 an T-148/99, Territorio Historico de Álava, [2002] ECR, II-1275, especially paras. 140 ff.).

6 See B. BEUTLER / R. BIEBER / J. PIPKORN / J. STREIL, *Die Europäische Union*, 5th ed., Baden-Baden (2001), p. 181. In fact, the Court has stressed that "the effectiveness of Community law cannot vary according to the various branches of national law which it may affect" (ECJ, case C-90/92, *Hubbard*, [1993] ECR, I-3777, para. 19). To condition the effectiveness of European law to the national laws relating to the tasks and competences of regional and loacal authorities would amount to reverse this fundamental principle (see also *infra*, fn. 47).

7 Before the Maastricht IGC, the European Institutions had already reacted to the political requests put forth by regional and local government: see in particular Commission Decision n. 88/487 setting up a Consultative Council of Regional and Local Authorities (OJ 1988 L 247, p. 23) as well as the *Community Charter for Regionalisation*, adopted by the EP on the 18 November 1988 (OJ 1988 C 326, p. 296).

8 With the Treaty of Amsterdam, Protocol (n. 7) "on the application of the principles of subsidiarity and proportionality" (hereinafter referred to as the "subsidiarity Protocol") was annexed to the ECT. Moreover consultation of the CoR was rendered mandatory in the fields of transports, employment, social policy, education and environment. The Treaty of Nice, for its part, has modified the Treaty provisions concerning the composition of the CoR and the procedure of appointment of its members.

the future of the Union[9]. The following are the most prominent: the explicit recognition of regional and local self-government among the values and principles of the Union, the role of sub-national entities in ensuring compliance with the subsidiarity and proportionality principles, their status as litigants before the ECJ (both individually and collectively via the CoR) and their involvement in the decision-making procedures of the Union.

The present contribution aims at examining only the last of the aforementioned issues: the participation of regional and local entities in EU decision-making, and its possible forms under a new Constitutional Treaty. Despite its apparent unity, this subject matter comprises two issues whose terms, political salience and possible constitutional consequences on the European level are significantly different. In the first part of the contribution we shall describe those forms of participation in EU decision-making procedures that are common to all regional and local entities, which are best understood in a perspective of good governance. Against this backdrop, in the second section we will focus on the particular position of the regional entities endowed by national constitutional law with legislative competences (hereinafter "constitutional regions"). As we shall see, in this respect the political and constitutional stakes of the post-Nice process are higher, and the hypotheses of reform are both more innovative and more problematic.

II. The role of regional and local authorities in European governance

The ECT as it stands provides for an institutionalised dialogue between the Union's Institutions and regional and local authorities. The central provisions in this respect are articles 263 ff. ECT, concerning the CoR[10]. The establishment of the CoR was a significant victory for regional and local authorities in their struggle for representation on the European level. This notwithstanding, the aforementioned provisions are far removed from a logic of political representation. Their rationale is rather of a "functional" nature. Before testing the accuracy of such statement, it is perhaps useful to specify more exactly what is meant here by "functional rationale".

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9 In particular, the European Convention has devoted part of its plenary session of February the 7th 2003 to the "Regional and local dimension in Europe": see PRÆSIDIUM *Summary report on the plenary session – Brussels, 6 and 7 February 2003* (doc. CONV. 548/03). Less than one month before, on the 14th of January 2003, the European Parliament had approved an important resolution on the subject (EP, *Resolution on the role of regional and local authorities in European integration*, not yet reported in the OJ).

10 Other provisions of primary law are also relevant. Paragraph 9 of the subsidiarity Protocol disposes that the Commission should "take duly into account the need for any burden, whether financial or administrative, falling upon […] local authorities […] to be minimised and proportionate to the objective". Moreover, several Treaty articles require that the European institutions take into account the "conditions" existing in the "regions of the Community" (e.g. art. 174 ECT). To be sure, these articles make no reference whatsoever to consultations with the regional and local authorities. This notwithstanding, their proper implementation might require that regional and local authorities be consulted by the European Institutions in the decision-shaping phase. Even more so for the Commission, which is under the obligation to "consult widely before proposing legislation" (subsidiarity Protocol, para. 9). In this sense see COMMISSION, *European governance – a white paper* (OJ 2001 C 287, p. 1), p. 10. See also COMMISSION, *Communication on impact assessment*, doc. COM (2002) 276 final, p. 3 and 7.

As we said, in a significant and growing proportion regional and local authorities are responsible for the implementation EU law[11]. Without prejudice to the fact that it is first and foremost the responsibility of the Member States to consult regional and local entities on European affairs[12], this circumstance encourages in and of itself the establishment of a direct dialogue between sub-national entities and European Institutions. Such dialogue, apart from clearly serving the interests of regional and local authorities[13], can also contribute to pursue of the objectives set out in the Treaties. Firstly, it is a valuable source of information, local knowledge and expertise to the benefit of the Institutions. Secondly, assuming that "with better involvement comes greater responsibility"[14], involving regional and local authorities in the shaping of the EU measures is likely to favour their proper implementation by those same authorities.

In this "functional" perspective, the consultation of regional and local authorities is first and foremost motivated by their role in implementing EU law on the field, which is common to all of them: German *Länder,* French *Départements*, Italian *Provincie* and *Comuni* and so forth. The aim of such consultation, as anticipated, is essentially that of providing the European Institutions with better information on the complex reality (factual conditions, economic and social interests) on which they are called upon to take decisions. In other words, under a "functional" rationale, the involvement of regional and local authorities is intended more to favour "better lawmaking" at the EU level (as well as "better implemen-

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11 See COMMISSION, *A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities*, doc. COM (2002) 709 final. See also EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. A. To be sure, the involvement of regional and local authorities in the implementation of EU measures is the result of an autonomous choice of the Member States (see ECJ, case 95/97, *Région Wallonne*, [1997] ECR, I-1787, para. 8; ECJ, case C-388/01, *Commission vs. Italy*, judgement of January 16 2003, not yet reported, paras. 26 and 27).

12 "Each Member State is entitled to lay down its own rules and procedures which determine the position to be adopted by [its] representative in the Council" (J. SANTER on behalf of the COMMISSION, answer to Written question P-3186/98 by Jan Lagendijk, OJ 1999 C 142, p. 102). With specific regard to the involvement of regional and local authorities in the elaboration of EU measures see COMMISSION, *European governance – a white paper, op. cit.*, at p. 9.

13 Since EU measure often have a direct impact on regional and local authorities (see *supra*, Introduction), the latter have an interest in feeding their views into EU decision-making procedures. As a result of the consultation process, EU measures might, for instance, weigh less heavily on the administrative or financial resources on these authorities than in their originally envisaged form (see subsidiarity Protocol, para. 9), or be more appropriate to local conditions (see N. MACCORMICK, *Subsidiarity, common sense and local knowledge*, contribution to the Convention, doc. CONV. 275/02).

14 COMMISSION, *European governance – a white paper, op. cit.*, at p. 12.

tation" at regional and local level) rather than to give a full-blown political representation to the interests that regional and local administrations institutionally represent[15].

The Treaty provisions on the CoR, and especially those on its composition and mandate, reflect clearly this "functional" rationale[16]. The heterogeneous composition of the CoR and the appointment procedure of its members, who are not elected nor chosen by their own constituencies, but are appointed by an Institution of the Union, have often been the subject of stark criticism[17]. In some sense, such criticism reveals a certain discontent as to the fact that the CoR deviates from the paradigm of a fully-fledged "territorial chamber" such as the German *Bundesrat* or the Council of the Union, through which all the territorial units composing a larger polity obtain political representation in its decisional procedures. But the point is precisely that the CoR is not and is not intended to be such a territorial chamber. Its role is not that of giving regional and local authorities a proper political representation in the Union's institutional system[18]. Rather, it is that of "enriching the debates of the Union with the expression of the ideas and political sensitivity of its members"[19] and therefore of contributing to the good execution of the Treaty by the Institutions. Such role is unambiguously set out in the Treaty. Art. 7 § 2 ECT confers upon the CoR the task of "assisting" the Commission and the Council in carrying out their missions[20]. According to art. 263 ECT, the members of the Committee "shall be completely independent in the performance of their duties, *in the general interest of the Community*" (emphasis added). Moreover, the heterogeneous composition of the Committee, so ill-suited for a territorial chamber, appears to be coherent to the "functional" rationale that motivates the involvement of re-

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15 See COMMISSION, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation*, doc. COM (2002) 704 final, p. 4 and 5. This does not mean, of course, that regional and local actors will not use their input in the decision-making process to defend their own interests (see *supra* fn. 13). Moreover, due consideration for interests specifically pertaining to such authorities may on occasion be part of what we have generically termed "better lawmaking". In defining the criteria that must guide the European legislator, the Treaty also makes reference, directly or indirectly, to such interests: we already made reference to paragraph 9 of the subsidiarity Protocol. Another illustrative example is paragraph 7 of the subsidiarity Protocol, which disposes that "Community measures should leave as much scope for national decision as possible".

16 This is quite evident as regards the various provisions whose proper implementation might require direct consultations with regional and local authorities (see *supra*, fn. 10). In fact, these provisions concern the manner in which the Institutions are to make use of their decision-making powers. Consultation of regional and local authorities is to be seen as one of the tools of which the institutions dispose in order to put properly into execution the requirements laid down in primary law.

17 For an overview see A. D'ATENA, *Il doppio intreccio federale*, *op. cit.*

18 It should be noted that their number makes the representation of every European regional and local authority in one same organ impossible. Therefore, many national representations in the CoR do not cover the whole territory of the concerned State, but consist of a "sample representation of the various territorial levels" (the expression is borrowed from PRÆSIDIUM OF THE EUROPEAN CONVENTION, *The regional and local dimension in Europe*, doc. CONV. 518/03, para. 15).

19 P.A. FÉRAL, *Le Comité des Régions*, in Commentaire Mégret (9), 2nd ed., Brussels, 2000, p. 396 (free translation).

20 Since the entry into force of the Treaty of Amsterdam it would be more accurate to say that the CoR assists the Council, the Commission *and* the European Parliament (see art. 265 ECT).

gional and local authorities in EU decision-making procedures. That all regional and local authorities may have their "representative" in the CoR, irrespective of their status under national law, is coherent with the fact that, as we said, all regional and local authorities may be called upon to implement EU law depending on the internal organisation of the Member States[21].

The Commission's white paper on governance[22], as well as the consultation documents that the Commission has subsequently adopted, would seem to confirm the foregoing observations.

The overarching aim of the Commission's initiative on European governance is to "open up policy-making to make it more inclusive and accountable"[23]. To this effect, the Commission is progressively developing and diversifying its channels for dialogue with (*inter alia*) regional and local government. In this context, the central concern of the Commission is that of establishing a more fruitful and intense partnership with the CoR, whose role "of indispensable intermediary between the EU institutions and the regional and local authorities" is recognised and emphasized[24]. In addition, the Commission has also committed itself "to establish a more systematic dialogue with European and national associations of regional and local government at an early stage of policy shaping"[25]. To this effect, the Commission has undertaken to develop and rationalise its current institutional practice of consulting with regional and local authorities[26].

What is of specific interest to us is that in this context, i.e. in the context of a significant effort to exploit more fully the possibilities for dialogue and consultation existing under the Treaties is that the Commission has taken care to stress the purpose and limits of such cooperation and dialogue.

First and foremost, in its consultation documents the Commission iteratively states that an improved participation of regional and local actors at EU level is permissible only insofar as it does not entail a shift in the formal allocation of decisional power. The following

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21 Accordingly, the composition of the various national delegations in the CoR tends to reflect the respective role, under national law, of the various levels of territorial government. Art. 263 ECT, as amended by the Treaty of Nice, is entirely functional to logic of "projecting" the national territorial organisation in the CoR. In fact, the Council appoints the members of the CoR "in accordance with the proposals made by each Member State", who will be free to distribute the seats in the Committee in accordance with their legal and political organization.

22 COMMISSION, *European governance – a white paper, op. cit.*

23 COMMISSION, *European governance – a white paper, op. cit.*, p. 5.

24 To this effect, the presidents of the Commission and of the CoR have concluded a *Protocol governing arrangements for cooperation between the Commission and the Committee of the Regions* (http://www.cor.eu.int/en/acti/acti_rel.html). Moreover the Commission and the CoR are devising new institutional procedures that, while they are not expressly provided for in the Treaty, might allow the CoR to "play a more proactive role" and to better "discharge its consultative duties" (see COMMISSION, *Report on European governance*, doc. COM (2002) 705 final, p. 10).

25 COMMISSION, *European governance – a white paper*, *op. cit.*, p. 11.

26 At present, the Commission is preparing a working document setting out in more detail the forms that enhanced consultation with regional and local authorities might take (see COMMISSION, *Report on European governance*, *op. cit.*, p. 9).

maxim by the Commission illustrates well the point: "Better consultation complements, and does not replace, decision-making by the Institutions"[27].

Secondly, for all the "closer-to-citizens" rhetoric that imbues the Commission's documents, it is transparent that in its view enhanced consultation has primarily the purpose of improving the manner in which the Union's Institutions discharge their duties, and only indirectly that of securing enhanced access to the Union's decision-making procedures to regional and local entities. This clarifies an important limit of the new procedures of "enhanced consultation", in addition to the (obvious) ones of compliance with EU law and respect for the Member States' relevant law[28]. "Enhanced consultation", whatever its forms, must not be taken to a degree where it would hinder the functionality of the Institutions. It is revealing in this respect that the Commission has chosen not to confer to regional and local authorities additional participatory *rights*, preferring an infinitely more flexible, non-binding approach[29].

To be sure, that the Treaties provide for the participation of regional and local authorities in EU decision-making procedures in a "functional" perspective does not detract from the political salience of such participation, nor to the potential contribution these authorities make to the legitimacy of EU measures. It does however entail precise institutional implications. The "functional" rationale we have described justifies the involvement of regional and local authorities, but not a re-allocation of decisional power in the European Union. In other words, it is compatible only with a rigorously consultative role for such authorities[30].

The legal framework we have described so far might of course be confirmed, consolidated or revolutionised with the prospective adoption of a new Constitutional Treaty.

In this regard, it should be first noted that the ongoing debate on the future of the Union marks a resolute orientation in favour of both a more explicit recognition of "the regional and local dimension of Europe" and a greater involvement of sub-national entities in the European political process. Many proposals to this effect seem to have gathered considerable support.

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27 COMMISSION, *European governance – a white paper*, *op. cit.*, p. 13. The EP underscored the point with more vigour: "consultation of the interested parties with the aim of improving draft legislation can only ever supplement and can never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as co-legislators, can take responsible decisions in the context of legislative procedures, due account being taken of the opinions of the bodies specified in the Treaties, i.e. in particular the Economic and Social Committee and the Committee of the Regions" (EP, *Resolution on the Commission White Paper on European governance*, OJ 2002 C 153 E, 314, para. 11 b).

28 These obvious limits are set out in COMMISSION, *European governance – a white paper*, *op. cit.*, p. 10. For an example of the limits that national law can impose on the direct dialogue between regional and local authorities and European institutions see Corte Costituzionale, judgement n. 365/1997, in Rivista Italiana di Diritto Pubblico Comunitario (1998), 237.

29 See COMMISSION, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation*, *op. cit.*, p. 10 and 15.

30 The existing Treaties reflect this correspondence: see in particular art. 263 ECT.

In the first place, it is widely accepted that the opening articles of the Constitutional Treaty, setting out the fundamental principles and values of the Union, should make reference to regional and local authorities[31]. In particular, the principle set out in art. 6(3) TEU, according to which the Union must respect the national identity of its Member States, would be developed accordingly and the Union would be required to take duly into consideration "the organisation of public administration at national, regional and local level" when exercising its competences[32]. It has also been suggested that the subsidiarity principle might be reformulated so as to encompass a reference to action on the regional and local level of government[33]. Such proposal has apparently not obtained support on behalf of the Convention[34]. However, as regards *monitoring* compliance with the subsidiarity principle, the idea of involving more closely regional and local authorities seems to have been widely accepted. It has been suggested that the parliaments of the constitutional regions should be enabled alongside with national parliaments to set in motion the "early warning" procedure proposed by the Convention's Working Group on subsidiarity[35]. But while proposals of

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31 See in particular PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, pages 9 and 12.

32 The expression in inverted commas is a quotation from PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Draft articles 1 to 16 of the Constitutional Treaty* (doc. CONV. 528/03), art. 9(6). According to PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, "[t]he Praesidium's proposal that a reference be included in article 9(6) to regional and local authorities was well received". See also F. LAMOUREUX ET AL., *Contribution to a Preliminary Draft of the Constitution of the European Union - Working Document* (hereinafter referred to as *Penelope*), art. 4(2); EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 13 b. The most advanced proposals in this sense plead for the inclusion of "regional and local self-government" among the general principles of EU law, and for the incorporation of the European Charter of Local Self-Government, adopted by the Council of Europe in Strasbourg on the 15 October 1985 (ETS n. 122) into the *acquis* (EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 3; CoR, *The role of the regional and local authorities in European integration*, doc. CONV. 520/03, paras 1.20 ff. and 2.2).

33 See in particular EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 13 c. See also CoR, *The role of the regional and local authorities in European integration*, paras. 1.9 ff. and 2.4 ff.

34 In particular, no reference to regional and local authorities has been added to the definition of the subsidiarity principle in PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Draft articles 1 to 16 of the Constitutional Treaty*, *op. cit.*, art. 8(3). See also LAMOUREUX ET AL., *Penelope*, *op. cit.*, art. 30.

35 See PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 28 and 29 October 2002* (doc. CONV. 378/02), p. 5.

this kind are still met by significant opposition[36], there would seem to be consensus on the conferral upon the CoR of *locus standi* before the European Court of Justice. In the most generous of the various proposals that have been circulated to this effect, the CoR would be entitled to bring annulment actions before the ECJ on grounds of a violation of its own prerogatives and on grounds of violation of the subsidiarity principle[37].

With more specific reference to the participation of regional and local bodies in EU decision-making procedures, mainly two aspects have been discussed in the Convention.

In the first place, important proposals have been made concerning the CoR.

As for its powers, the Convention seems favourable to a consolidation of its advisory status. As said, the CoR could be entitled to defend its prerogatives before the ECJ. Moreover, the political Institutions could be placed under a duty to regularly "adopt a reasoned report on the measures taken in response to opinions delivered by the CoR"[38] and/or to give reasons when they decide not to comply with the Committee's opinions[39].

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36 The Convention's Working Group I on the Principle of Subsidiarity has openly rejected such idea, suggesting that it would be more appropriate to leave it to the Member States to decide if and how regional parliaments could be consulted to this effect at the national level (see *Conclusions of Working Group I on the Principle of Subsidiarity*, doc. CONV 286/02, p. 8). The document PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Draft Protocols on: – the application of the principles of subsidiarity and proportionality; – the role of national parliaments in the European Union* (doc. CONV. 579/03) follows the Working Group's report under this respect (see Draft subsidiarity Protocol, para. 5). It should be noted that on another point relevant to us, the Præsidium's Draft subsidiarity Protocol adopts a more restrictive approach when compared with the Working Group's report. The latter suggests that in bicameral parliaments each chamber should be individually entitled to set in motion the "early warning" procedure. The Draft subsidiarity Protocol adopts the opposite solution of considering bicameral parliaments as *one* national parliament. Needless say, from the perspective of the regional authorities whose representatives sit in the federal upper chamber (e.g. the German *Länder*), the position of the Præsidium is unduly restrictive (compare with H. FARNLEITNER / G. TUSEK, *Regions and municipalities – a fundament in European architecture*, contribution to the Convention, doc. CONV. 534/03, p. 4).

37 PRÆSIDIUM *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, p. 10

38 EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 13 j.

39 COR, *Contribution to the Convention*, doc. CdR. 127/2002 fin., para. 4. In the areas in which its consultation is mandatory, the CoR has also put forward the request to obtain a power of "suspensive veto" (*Ibidem*, para 4.3). Such power of "suspensive veto" would be an additional protection for the advisory prerogatives of the CoR: the CoR would be entitled to suspend a legislative procedure should the other institutions fail to consult it in breach of the Treaty. The suspension would last until the adoption of the advisory opinion by the CoR, or until a specified period of time had elapsed (see CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 2.12). Be it permitted to observe that *locus standi* before the ECJ, once granted to the CoR in the defence of its prerogatives, would be a largely sufficient protection.

The discussion within the Convention is more open and controversial as regards a possible modification of the Committee's composition[40]. It seems probable, however, that the principle of the mixed composition of the CoR – regional and local authorities – will remain unchanged. A full "regionalisation" of the CoR, would in fact be inconsistent with the fact that in several Member States the local level of government plays a more important role in implementing EU law than the regional level[41]. The CoR itself has recalled that it "should reflect the diversity of regional and local governance in the individual Member States on an equitable basis"[42]. This creates a serious obstacle to any profound reform of the composition of the CoR. In fact, if mixed representation in the CoR is preserved, then the other distinctive feature of representation in the CoR, i.e. its nature of "sample representation", follows by necessity[43].

The debates of the Convention also concern the forms of direct consultation between the Commission and regional and local entities or their associations. In this regard, it should be kept in mind that "with enlargement the Union will comprise about 250 regions and 100,000 local authorities"[44]. This will make it impossible, or at any rate extremely difficult and burdensome for the Commission to consult every single sub-national entity interested to or affected by draft legislation. Therefore, the proposals made to this effect are generally broadly worded, so as to leave the Commission a wide margin of discretion on the more appropriate manner to proceed to consultations[45].

The proposals we have briefly examined above prefigure a positive evolution for the position of regional and local authorities in the context of the European Union. The new Constitutional Treaty may be expected to better defend their sphere of autonomy *vis-à-vis* the Union, and to improve their access to the shaping of EU measures. It should be stressed, however, that the proposals we have examined prefigure a harmonious evolution

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40 PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, p. 11. In particular, it has been contended that the Committee's composition should be recalibrated on a demographic basis, thereby allowing for the "larger" regions to have (e.g.) as many members or more members than the "small" States (See N. MACCORMICK, *Stateless nations and the Convention's Debate on Regions*, contribution to the Convention, doc. CONV. 525/03). Assertions of this kind, while understandable, seem to follow a logic of political representation which is extraneous to the nature of the CoR, which is rather a forum of all regional and local authorities involved in the implementation of EU law (see *supra*).

41 See DANISH LOCAL AND REGIONAL GOVERNMENT ASSOCIATIONS, *Position paper on the European Convention on the future of the Union* (May 2002); see also K.-H. KLÄR, *Die Regionen in einem wachsenden Europa*, in LANDTAG RHEINLAND-PFALZ (ED.), *Verfassungsentwicklung in Europa nach Nizza: die Rolle der Regionen*, Trier (2001), p. 96. In this light, a "regionalisation" of the CoR would betray its original inspiration and undermine its effectiveness as a forum of all the sub-national entities involved in the implementation of EU law (see *supra*).

42 CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 1.34.

43 See *supra*, fn. 18

44 CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 1.37.

45 See in particular PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Draft Protocols on: – the application of the principles of subsidiarity and proportionality; – the role of national parliaments in the European Union*, *op. cit.*, para. 2. See also EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 13 h; CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 2.8.

of the current institutional system, not a dramatic paradigm shift[46]. Many of them aim at restating the law as it stands in a more explicit and clearer manner, even though in some cases the texts that have been proposed seem inadequate or even counterproductive[47].

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46 This prudent approach is underscored in EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. K.

47 The example of art. 6(3) TEU is illustrative. At present, the Union's Institutions are under a duty to take into account and respect the identity of the Member States, and in particular to "respect well established national arrangements and the organisation of and working of Member States' legal systems" (see art. 6(3) TEU; subsidiarity Protocol, para. 7). Even before the adoption of the subsidiarity Protocol, such duty had been inferred by way of interpretation of the proportionality principle (see A. EPINEY, *Gemeinschaftsrecht und Föderalismus: "Landes-Blindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen*, in Europarecht (1994), 301). In the view of many, such obligation should be set out more explicitly in the Constitutional Treaty. Many of the draft texts submitted to the Convention attempt to do so. However, while some of the proposed texts are reasonably close the law as it stands (see e.g. PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Draft articles 1 to 16 of the Constitutional Treaty*, *op. cit.*, art. 9(6)), other texts, irrespective of the drafters' intentions, are worded in a rather dangerous way. For instance, it has been proposed to insert in the Constitutional Treaty a clause whereby "The Union shall take account of *and respect the internal rules* and organisation of the Member States with regard to the division of powers" (CoR, *Worksheet for legal texts to be submitted to the Convention for the Constitutional Treaty*, doc. CdR 3/2003, p. 13, emphasis added). It should be recalled that "the introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of community law, lead inevitably to the destruction of the unity of the common market and the jeopardizing of the cohesion of the Community" (ECJ, case 44/79, *Hauer*, [1979] ECR, 3727, para. 14). What would be the consequences of a Treaty article imposing upon the Union to "respect the internal rules […] with regard to the division of powers" between national, regional and local government?
As for the new definitions that have been proposed for the subsidiarity principle (see *supra*, fn. 33), it is difficult to discern, from a legal standpoint, their utility. Under art. 5 ECT, it is entirely clear that the subsidiarity principle prevents the Union from taking action if "the objectives of the proposed action [can] be sufficiently achieved by the Member States" *including* regional and local government. To spell out such platitude in the Treaty can only lead to confusion: the Treaty only regulates the Union's powers, and it is unclear why it should mention at all a matter which is by definition for national law to settle, i.e. the allocation of tasks and competences between national, regional and local government. And in fact, depending on their more or less prudent wording, the new definitions of the subsidiarity principle are either devoid of any legal purpose, or ambiguous as to the Member States' constitutional autonomy. Such conceptual ambiguity has led the CoR to go so far as to propose that the Constitutional Treaty "impose upon the Member States a duty to establish a mechanism for reviewing the application of the principle as it applies in that State" (CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 2.6): at one fell swoop, the principle of subsidiarity would be imposed (implicitly) as a supra-constitutional principle upon national legislators and constitution givers, and its proper implementation would also have to be monitored in accordance with rules decided at the European level.

Other proposals are intended to constitutionalize existing institutional practice[48]. Others are more innovative, especially those concerning the advisory status of the CoR, as well as its *locus standi* before the ECJ. Still, they tend to develop the institutional architecture existing under the Treaties, rather than to substitute it with a new one.

As regards in particular the participation of regional and local authorities in EU decision-making procedures, its two essential features would remain unaffected by those reforms: it would remain rigorously consultative in nature, and it would still be inspired by an essentially "functional" rationale based on the conceptual sequences "better lawmaking / consultation" and "effective implementation / consultation"[49].

III. The constitutional regions as European co-legislators?

The European Parliament's "Resolution on the role of regional and local entities in European integration" does not put forward any concrete proposals concerning the role of the constitutional regions in EU decision-making procedures. It merely "urges the Member States to strengthen the internal mechanisms which provide for participation by the regions

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[48] For instance, the proposal to the effect that the Council and the Commission should regularly adopt a report on the measures taken in response to the CoR's opinions has an institutional precedent in the *Protocol governing arrangements for cooperation between the Commission and the Committee of the Regions*, *op. cit.*, para. 4. Also the proposals to insert in the Constitutional Treaty a flexible, broadly worded provision requiring the Commission to consult, where appropriate, regional and local entities aims in fact at formalising a well established practice (see PRÆSIDIUM OF THE EUROPEAN CONVENTION, *The regional and local dimension in Europe*, *op. cit.*, para. 8).

[49] The careful reader of the "post-Nice literature" (solemn political declarations, acts of deliberating assemblies such as the EP and the Convention, contributions, policy papers, feasibility studies etc.) might be surprised, even somewhat offended by such assertion. After all, in the "post-Nice literature" the involvement of the regional and local authorities is depicted unquestioningly as a matter of "more democratic participation" or, to use the omnipresent catch phrase, of "bringing the Union's Institutions closer to the citizen" (EUROPEAN COUNCIL, Laeken, 14 and 15 December, Presidency conclusion, annex I, *Laeken Declaration on the future of the European Union*, Bull. EU 12/2001, para. I.27). Be it permitted to note that those who use this same expression seem to have very different things in mind (see e.g. the curious use of the word "closer" in COMMISSION, *European governance – a white paper, op. cit.*, p. 9), and that at any rate to affirm that involving regional and local authorities in EU decision-making procedures will bring the Union's Institutions closer to the citizen is an evident *petitio principii* (C. PASQUA MEP was less kind in this regard: "The argument put forth [to support a greater participation of regional and local entities], to bring the Union closer to its citizens, comes under the definition of fraud" (free translation) EP, proceedings of the sittings of 14 January 2003, not yet published in the OJ). But quite apart from these considerations, it is interesting to note that even in the writings of those who enthusiastically espouse the "closer-to-citizens" rhetoric, the motivations put forth in order to justify a direct involvement of regional and local actors in the European political process are of the functional nature we have described (see e.g. P. HAIN, *Europe and the regions*, contribution to the Convention, doc. CONV. 526/03, paras. 1, 2 and 10.)

and territorial authorities, in particular those endowed with legislative powers"[50]. The Convention, for its part, has given the impression of escaping the issue. In its reflection paper "The regional and local dimension in Europe", intended to serve as a basis of discussion for the debate in the plenary, the Convention's Præsidium recognised that among the issues raised "some concern all European regional and local authorities, [and] others are specific to the regions with legislative powers […]". This notwithstanding, it has not included among the "avenues to be explored" by the plenary any proposal concerning specifically the role of constitutional regions in EU decision-making procedures[51].

This attitude has attracted some criticism, and it contrasts starkly with the ambitious political requests put forward by various associations of regional and local entities, as well as by individual political personalities[52].

It should be noted at the outset that the ECT itself places the constitutional regions of the federal States in a different position with respect to all other regional and local authorities. While in general regional and local authorities have, so to speak, "a voice, but not a vote"[53] in EU decision-making procedures, the constitutional regions may have "a vote". In fact, art. 203 ECT disposes that "the Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State". Therefore, regional ministers may represent the Member States in Council[54].

This form of regional participation in EU decision-making procedures responds to a rationale that is essentially different from the "functional" one we have considered in the previous section. In Maastricht, art. 146 of the EC Treaty (now art. 203 ECT) was amended in order to take into account the particular situation of the federal States of the Union. The constitutional system of these States is such that, in certain matters, the Union "shares its competences exclusively with the regional level", whereas "the federal or central

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50 EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 2. For this reason, it has been criticised by some MEPs at the moment of its adoption. See in particular the interventions made by C. FERRER MEP before and after the vote on the Resolution, and by L. CAVERI after the vote (EP, proceedings of the sittings of 13 and 14 January 2003, not yet published in the OJ).

51 PRÆSIDIUM OF THE EUROPEAN CONVENTION, *The regional and local dimension in Europe*, *op. cit.*, para. 2 and section VI.

52 See *supra*, fn. 50. See also, e.g., ASSEMBLY OF EUROPEAN REGIONS (AER), *Towards a European Constitutional framework* (text adopted in Stuttgart, 22nd November 2001), point 2 (available on the website www.are-regions-europe.org); CONFERENZA DEI PRESIDENTI DELL'ASSEMBLEA, DEI CONSIGLI REGIONALI E DELLE PROVINCE AUTONOME, *Dichiarazione sull'avvenire dell'Europa e sulla Convenzione europea* (adopted in Reggio Calabria on July the 15th 2002), point 2 (available on the website www.avvenireuropa.it/UserFiles/42.pdf)

53 See COMMISSION, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation*, *op. cit.*, p. 5.

54 It should be noted that only those members of the regional executives that have ministerial status under national law may sit in Council. This is not the case, e.g., of the presidents of the Italian Regions and of the members of the *Giunte regionali* (see D'ATENA, *Il difficile cammino delle Regioni italiane*, in Le Regioni (2000), 555).

government is entirely deprived of competence"[55]. The aim of such amendment, therefore, was that of according to the federal States of the Union the possibility of adapting their mode of representation in Council to the internal allocation of legislative competences between the central State and the constitutional regions.

Art. 203 ECT, it should be noted, leaves any choice as to the involvement of the constitutional regions in EU decision-making procedures in the hands of the Member States, and not of the regions themselves.

In the first place, the political process through which the Member States determine their position in Council is a matter to be regulated by the Member States alone[56]. This implies that, as a matter of EU law, national legislators and constitution-givers are free to decide if and how to involve the sub-national tiers of government. Secondly, the Council itself and the Commission have iteratively recalled that, subject to the requirements set out in art. 203 ECT, "it is for each Member State to decide how it is represented"[57]. In other words, art. 203 ECT does not confer upon the regions a right to sit in Council that they could invoke against their national government.

It should also be noted that the reform of art. 203 ECT has not solved one serious problem posed by the institutional provisions of the Treaty to the federal or regional constitutions of some Member States. When regional ministers sit in Council, they represent the Member State as a whole and can only express one position. In this respect, the parallelism between regional competences and representation in Council is only very imperfect. Even in those matters which fall, on the national level, under their exclusive legislative competence, regions are not allowed to develop their own autonomous European policy. In other words, even assuming that under national law it is they and not the central government that fully determine the position of the State in Council, the regions are obliged to vote or seek consensus among them in matters on which, when they legislate on the internal level, they are free to follow autonomous policies[58].

To sum up, under the Treaties as they stand the constitutional regions may sit in Council, but they have no *right* to do so *vis-à-vis* their respective Member State. Moreover, under no circumstance can they express an *individual* vote in EU decision-making procedures, even in matters falling under their exclusive legislative competences on the national level.

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55 M. NAGY, *Intervention in the plenary session of the Convention, 7 February 2003* (free translation. The Verbatim reports of the Convention's plenary sessions are available on the site www.europarl.eu.int).

56 See *supra* fn. 12. It is clear nonetheless that to a certain extent this is a matter of common interest: "Each Member State will keep under permanent review its internal coordination arrangements for EU matters so that they are tailored to ensuring the optimum functioning of the Council." (EUROPEAN COUNCIL, Helsinki, 10 and 11 December 1999, Annex III to the Presidency Conclusions, *An effective Council for an enlarged Union - Guidelines for reform and operational recommendations*, point. 14 of the operational recommendations, Bull. EU 12/1999, section I)

57 See e.g. COUNCIL OF THE EUROPEAN UNION, reply to Written question E-61/02 by Camilo Nogueira Román (OJ 2002 C 205 E, p. 64).

58 See I. PERNICE, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?* in Deutsches Verwaltungsblatt (1993), p. 909; see also R. SCHWEIZER/S. BRUNNER, *Die Mitwirkung der Bundesländer an EU-Vorhaben in der Bundesrepublik Deutschland und in Österreich*, Swiss Papers on European Integration (14), Bern/Zürich, 1998.

Under both respects, demands for change have been put forward in the past as well as in the context of the ongoing debate on the future of the Union[59].

At this point it is important to recall some basic principles and guidelines for reform that the Convention has set to itself, or that are set out in the Convention's founding document, the Laeken Declaration[60]. In the first place, it emerges with great clarity from the proceedings of the Convention that any reform of the Union's institutional system will have to "respect the right of Member States to organise their internal structures themselves" to stand a chance of being approved[61]. In the second place, the Laeken Declaration charged the Convention of examining "how to improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States"[62]. In the light of this overarching objective, the Convention seems to have taken the view that reforms entailing the creation of new organs or new Institutions should be avoided[63].

These criteria narrow down to a considerable extent the options available in order to meet the demands for change we have spelled out above. Numerous proposals that have been put forth in more or less recent times to that effect fail to fulfil one or both criteria.

In the early '90s, it had been proposed to institute a new Chamber, composed exclusively of representatives of regions having legislative competences. Such Chamber would have had co-decision powers, alongside or instead of the Council, in matters falling within the competences of the regions composing it[64]. Such proposals had been formulated at a moment when the creation of a "third level of government" in Europe and the creation of the "Europe of the regions" seemed to be at hand[65], but since then things have considerably changed[66]. In the context of the ongoing debate on the future of the Union, proposals of this kind appear to be incompatible with both of the "golden rules" we have recalled above. On the one hand, their very object is that of creating a new institution, existing alongside with the Council. On the other hand, the diversity that characterises the constitu-

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59 See *supra*, fn. 50 and 52.

60 EUROPEAN COUNCIL, *Laeken Declaration on the future of the European Union*, *op. cit.*

61 See in particular PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, p. 12.

62 EUROPEAN COUNCIL, *Laeken Declaration on the future of the European Union*, *op. cit.*

63 This view has been expressed by the Convention's Working Groups (see *Conclusions of Working Group I on the Principle of Subsidiarity*, *op. cit.*, p. 3 and *Final report of Working Group IV on the role of national parliaments*, doc. CONV. 353/02, paras. 24, 27, 33) and, on occasion, in the plenary (see PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 28 and 29 October 2002*, *op. cit.*, p. 5 and PRÆSIDIUM OF THE EUROPEAN CONVENTION, *Summary report on the plenary session – Brussels, 20 and 21 January 2003*, doc. CONV. 508/03, para. 5). It has been most clearly set out in K. KILJUNEN ET AL., *Premises and principles of EU institutional reform*, contribution to the Convention, doc. CONV. 590/03.

64 See e.g. I. PERNICE, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, *op. cit.*

65 See EP, *Community Charter for Regionalisation*, *op. cit.* See also C. JEFFERY, *The "Europe of the Regions" from Maastricht to Nice*, Queen's papers on Europeanisation n. 7/2002 (available online on the website www.qub.ac.uk/ies/onlinepapers/poe.html).

66 See C. JEFFERY, *op. cit.* On the intrinsic flaws of the idea of an "Europe of the Regions", comprising a membership of the Regions instead of or alongside with the Member States, see A. D'ATENA, *Il doppio intreccio federale*, *op. cit.*

tional orders of the Member States opposes a double, insurmountable barrier to such reforms. In fact, the creation of a regional Chamber presupposes, at the very least, the existence of regions having legislative competences in all the Member States. It also presupposes some degree of homogeneity of such competences. Both preconditions are lacking at the moment and for the foreseeable future[67]. What is more, their realisation lies outside the reach of the European Convention: if the future Constitutional Treaty is to respect the constitutional autonomy of the Member States, the options of a "forced regionalisation" of the unitary States, as well as that of an harmonisation of the various constitutional orders in point of competences, are not available[68].

For similar reasons, the conferral upon the CoR of legislative or quasi-legislative powers would seem to be precluded[69]. Such a dramatic modification in the status of the CoR would require, or rather presuppose, an equally dramatic revision of its composition. Arguably, as a minimum the CoR should be reformed so as to: (a) be entirely composed of the representatives of entities that possess legislative competences on the national level[70] and (b) be composed of the representatives of entities covering all the territory of the Union, since otherwise it would be vested with legislative authority without representing all the citizens falling under its authority. We have already argued that a mere "regionalisation" of the CoR would be undesirable, since its mixed composition – regional and local authorities – is better suited to reflect the diversity of the legal orders of the Member States (see *supra*). A "regionalisation" of the CoR in the strongest sense (i.e. in the sense of its transformation into a chamber of the regions with legislative powers) seems impossible, rather than undesirable, given that such regions exist only in some of the Union's Member States[71]. It is barely the case to recall, moreover, that "a strengthening of the functions of the Committee going beyond its current purely consultative status"[72] would amount to adding a third decision-making body to the European Parliament and the Council.

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67 Only eight Member States of the Union comprise regions with legislative competences: Germany, Austria, Belgium, Italy, Spain, United Kingdom, Portugal and Finland. Of these, only three are federal States, and only two are full regional States (i.e. States whose territory is entirely subdivided in regions having, under constitutional law, legislative competences; in the case of Spain, such situation was made possible, but not imposed, by the constitution: see art. 148 of the Spanish Constitution and compare with articles 5, 114 and 131 of the Italian Constitution). Even among federal and regional States, the principles governing the allocation of competences between the central State and the constitutional Regions, as well as the nature and extension of the latter's competences, present remarkable differences. Within Spain and – to a lesser extent – Italy, the competences of the various Regional entities also present substantial differences. For an overview see A. D'ATENA, *Il federalismo e il regionalismo nell'esperienza europea*, in ID., *L'Italia verso il "federalismo" – taccuini di viaggio*, Milan (2001), p. 3.

68 PRÆSIDIUM *Summary report on the plenary session – Brussels, 6 and 7 February 2003*, *op. cit.*, p. 8; in the past, such idea was not entirely out of discussion (see C. JEFFERY, *The "Europe of the Regions" from Maastricht to Nice*, *op. cit.*; EP, *Community Charter for Regionalisation*, *op. cit.*).

69 It should be recalled in this regard that the CoR has insistently asked for "a strengthening of the functions of the Committee going beyond its current purely consultative status" (CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 1.35).

70 D'ATENA, *Il doppio intreccio federale*, *op. cit.*

71 See *supra*, fn. 67.

72 CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 1.35.

In the light of the foregoing, the perspective of giving the constitutional regions an individual vote in EU affairs through a new institution or through the CoR would seem to be barred. The questions underlying our discourse can therefore be refined: could the constitutional regions obtain, under the new Constitutional Treaty, a right to vote in the Union's decision-making procedures *by means of a reform of the existing Institutions*? And could they secure, by the same means, the right to express autonomous positions? In the following lines we shall analyse these issues with specific reference to the Council[73].

We have recalled above that under EU law, "Each Member State is entitled to lay down its own rules and procedures which determine the position to be adopted by [its] representative in the Council"[74] and that, subject to the requirements set out in art. 203 ECT, "it is for each Member State to decide how it is represented"[75].

In order to respect the constitutional autonomy of the Member States, it would be advisable not to restrain the freedom Member States under either of these two aspects. Many have claimed that the Treaties should "grant explicitly [to the constitutional] regions the right to sit in Council sessions dealing with matters of their competence" and not "leav[e] such possibility to the discretion of the respective [national] governments, whose lack of political will in this respect is […] notorious"[76]. In their zeal for the cause of regional and local self-government, those who advance such requests adopt an uncompromisingly centralistic position: being unsatisfied with the constitutional order existing in their own country, they address a request for its reform to the higher tier of government and regulation, in this case to the European Convention.

Therefore, the first limb of the question we have set out above calls for a negative answer, inasmuch as these requests are clearly incompatible with the purported aim of respecting the constitutional autonomy of the Member States. This does not, however, affect the analysis of the second limb of the question.

As said, according to art. 203 ECT each Member State can have one representative in Council and can only cast its vote in one block. This implies that constitutional regions, when matters falling under their legislative competences are at issue, may never express individually their political preferences. Whereas internally they would be free to decide dif-

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73 It should be noted, however, that another interesting hypothesis has been formulated. It has been suggested that the regional communities (as opposed to the regional authorities) could find a representation in the Union's Institutions, albeit indirectly, if the EP was elected on a regional basis (see A. LAMASSOURE, *Intervention in the plenary session of the Convention, 7 February 2003*. The Verbatim reports of the Convention's plenary sessions are available on the site www.europarl.eu.int)

74 See *supra*, fn. 12.

75 See *supra*, fn. 55.

76 This is the free translation of the intervention of C. FERRER MEP who, criticizing the European Parliament's *Resolution on the role of regional and local authorities in European integration*, affirmed: "[…] tampoco se garantiza explícitamente a estas regiones el derecho a participar en los Consejos de Ministros que traten temas de su competencia, dejándose esta posibilidad al arbitrio de los respectivos gobiernos cuya falta de voluntad política ante esta cuestión es, en la mayoría de casos – entre ellos el del Gobierno español – notoria" (EP, proceedings of the sittings of 14 January 2003, not yet published in the OJ).

ferent courses of action on such matters, at the European level they must seek consensus or vote in order to come to a single position[77].

Neil MACCORMICK, in one of his contributions to the Convention, suggested that "a State's votes in qualified majority voting need not always be cast as a single block vote, but could be split if internal territories decide to pursue different lines on a particular topic"[78]. One possible reading of such suggestion is that that there would still be one representative per Member State, but that in determined cases he could cast a split vote on mandate of the various regions or "internal territories". Under this reading, the suggested solution would run the risk of impairing the negotiation process in Council, the representative of the Member State being reduced to a mere messenger of the determinations taken by the "internal territories" outside of the Council. Naturally, including regional representatives in the national delegations could partially obviate this particular problem[79].

Another possible reading of that suggestion would be the following: Member States could be entitled to have a plurality of representatives, each one disposing of a fraction of their total vote. The identity (and number) of the representatives, as well as the fraction of the Member State's voting rights allotted to each representative, would have to be in principle determined by the Member State. Such discretion could however be tempered by requirements concerning the maximum number of representatives, or their quality (e.g.: ministerial status) *etc.*

The perspective of a plural representation of the Member States in Council, which could be materially coincident to a representation of the constitutional regions if the State so decides, raises a number of legal questions.

The first of such questions concerns its compatibility with the principle that only States can be Members of the Union. In this regard, the question is essentially that of knowing whether the Council would still consist of representatives of the Member States.

It should be noted that the disjunction between the voting rights, which pertain to the Member State i.e. to its central government[80], and their exercise, which can be delegated also to regional ministers, has been operated with the Maastricht Treaty. In fact, art. 203 ECT specifies that the members of Council must be "authorised to commit the government of [their] Member State" essentially for the two following reasons. From a *procedural* standpoint, to eliminate all possible ambiguities as to the fact that the representatives of each Member States are duly authorized by the central government to negotiate and vote. From a *conceptual* point of view, to dispel any doubt as to the fact that, whoever may be

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77 See *supra* fn. 58.

78 N. MACCORMICK, *Democracy at many levels: European Constitutional Reform*, contribution to the European Convention (doc. CONV 298/02).

79 See Council Decision n. 2002/682 adopting the Council's Rules of Procedure (OJ 2002 L 230, p. 7), articles 5 and 20. It should be noted that prior to the Maastricht amendment of art. 203 ECT, regional representatives were already included in the national delegations of some Member States: see J. CLOOS / G. REINESCH / D. VIGNES / J. WEYLAND, *Le Traité de Maastricht – genèse, analyse, commentaires*, Brussels (1993) p. 413 ff. See also Question N. 16 by C. FERRER MEP (H-898/90) to the Council, *Plural representation in the Council of Ministers* (Debates of the EP 1990 n. 394, p. 200).

80 See case C-95/97, *Région wallonne*, [1997] ECR, I-1787, para. 6.

entitled to exercise them, the voting rights "belong" to the Member States and not to the regions[81]. Under this respect, it may be argued that the fact of having a single representative or a plurality of representatives makes no difference. So long as these representatives will have to be "authorised" by the national government, legally speaking, the Council will still be composed of representatives of the Member States.

Secondly, it could be questioned whether such a reform would substantially "undermine the institutional balance provided for by the Treaties", in the meaning that the Court gave to such expression in the *Walloon Region* case[82]. In this case, the Court ruled that "the term 'Member State', for the purposes of the institutional provisions, […] refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have", since "it is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established"[83].

Arguably, plural representation in Council would not alter, from a legal standpoint, the "institutional balance" the Court referred to. It should be stressed once more that a reform allowing for plural representation of the Member States would leave unchanged the number of States in Council, i.e. of the subjects *having* voting rights in the Council. It would only modify the number of their *representatives* in Council, an aspect to which the Court made no reference in its ruling.

Thirdly, it could be questioned whether plural representation in Council would undermine the States' responsibility before the Union for compliance with and implementation of EU law[84].

But as said, the votes would still be cast by representative(s) "authorised to commit" their national government, each one for a certain fraction of the total voting rights of their Member State. The possibility of contradictory votes expressed by the representatives of the same Member State is absolutely irrelevant in this regard. Under EU law, the positions of the representative(s) of the Member States in Council have no effect whatsoever on the

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81 See J.P. JACQUÉ *Le Conseil*, in Commentaire Mégret (9), 2nd ed., Brussels (2000), p. 131. See also J. CLOOS / G. REINESCH / D. VIGNES / J. WEYLAND, *Le Traité de Maastricht – genèse, analyse, commentaires*, *op. cit.*, p. 415.

82 ECJ, case C-95/97, *Région Wallonne*, [1997] ECR, I-1787, para. 6.

83 *Ibidem*.

84 "While each Member State may be free to allocate areas of internal legal competence as it sees fit, the fact still remains that it alone is responsible towards the Community under Article 226 EC for compliance with its obligations" (case C-388/01, *Commission v. Italy*, judgment of January 16th 2003, not yet reported, para. 27). See also ECJ, case C-95/97, *Région Wallonne*, [1997] ECR, I-1787, para. 7.

"obligations arising out of [the] Treat[ies] or resulting from action taken by the institutions of the Community"[85].

This said, the perspective of allowing plural representation of a Member State in Council still has to be tested against the two criteria set by the Convention, and to which we have referred above: respect for the constitutional autonomy of the Member States and compatibility with the effectiveness of EU decision-making procedures.

As for the first criterion, it should be stressed that, in legal terms, the constitutional autonomy of the Member States could only benefit from such a reform. On the one hand, plural representation in Council could take place only if and insofar as a Member State came freely to such determination. On the other hand, it would enable federal or regional Member States to fully equate the manner in which they determine their position(s) and are represented in Council to their internal division of competences. This might in particular reduce the indirect, adverse effects of European integration on the constitutional order of some Member States. For instance, the fact of allowing, if the *Gesaamtstaat* so decides, the Ministers of the *Länder* to represent in Council the position expressed by their own constituencies would contribute to solve the problem, observed by the German doctrine, of a progressive marginalisation of the regional parliaments caused by the process of European integration[86].

As for the requirement not to overburden and overcomplicate the Union's decision-making procedures, the model of plural representation in Council would present the advantage of preserving the "institutional triangle" in its present form: an increase in number of the institutions having decisional powers would be avoided.

Already in 1927, albeit in a very different constitutional context, Hans KELSEN affirmed that "from and organisational point of view, a federal State within a federal State amounts to an irremediable complication"[87]. Undeniably, the constitutional and institutional struc-

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85 Art. 10 ECT. See also ECJ, case 39/72, *Commission v. Italy*, [1973] ECR, 101, paras. 19 and 22. Under this respect, another reform proposal, which is apparently merely "aesthetic", might have more far reaching consequences. The CoR has in fact proposed to amend article 10 ECT so as to give clear recognition to the "the role of regional and local authorities in European integration". According to its proposal, art. 10 could be redrafted as follows: "Member States, and their regional and local authorities, in the context of their respective competences, shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community" (CoR, *The role of the regional and local authorities in European integration*, *op. cit.*, para. 2.7; see also EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 13 d). As it is the case for the proposals concerning the definition of the principle of subsidiarity (see *supra*, fn. 33), it is hard to see what contribution, if any, the proposed amendment could bring to the clarity of the Constitutional Treaty. On the contrary, such a reformulation of art. 10 ECT would only obscure the fact that Member States are sole responsible before the Union for the execution of EU law, and suggest that regional and local authorities bear an equal, direct responsibility.

86 See G. RESS, *Die Europäischen Gemeinschaften und der deutsche Föderalismus*, Europäische Grundrechte-Zeitschrift (1986), 549.

87 "Ein Bundesstaat im Bundesstaat bedeutet organisationstechnisch eine heillose Komplikation" (H. KELSEN, *Staatsrechtliche Durchführung des Anschlusses Österreiches an das Deutsche Reich*, in Zeitschrift für öffentliches Recht (1927), p. 119).

ture of the Union places the constitutional systems of its federal Member States under considerable strain, and raises extremely difficult problems. In this perspective, the suggestion to attempt a solution to such problems by rendering more flexible the norms governing the functioning of the Council is perhaps the most stimulating among those that have been put forward to this effect. On the one hand, as said, it fully respects the constitutional systems of the Member States. On the other, it does not appear to be incompatible with the legal foundations of the Union. One might say that, on the contrary, it respects and develops the role of the Council as the organ representing the Member States by allowing a full projection, or representation, of their constitutional orders on the European level. When reasoning in purely legal terms, the whole construction might appear to be coherent and, so to speak, appealing.

But legal considerations are not the only relevant ones, especially in the context of a constitutional process. The very fact of admitting that a solution exists, which might give an "individual vote" to the constitutional regions in matters falling under their competences without thereby undermining the legal foundations of the Union, leads one to see more clearly the institutional and political repercussions of such a perspective. The risk that will be evoked here is essentially one, and it may be described under a practical point of view and under a broader conceptual perspective.

Under a practical standpoint, it should be observed that plural representation in Council, while not entailing the creation of a new EU institution, might nonetheless impair the effectiveness of the Union's institutional system. In fact, it might pose serious practical problems as regards the decisional capacity of the Council. An improvement of the latter's functioning, with speedier procedures and better coordination among its various configurations, is unanimously considered as an indispensable prerequisite if the enlarged Union is to function properly[88]. The introduction of plural representation in the Council might hinder the attainment of this crucial objective. Two of the possible problems that come to the mind are the following:

- Plural representation would, on occasion, significantly increase the number of negotiators sitting in Council and thereby, at the very least, render the process of negotiations more complicated[89].
- Internal disputes on competencies might cause uncertainties as to the proper representation of the concerned Member State and hold up or delay the decisional procedures.

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[88] See in particular EUROPEAN COUNCIL, Helsinki, 10 and 11 December 1999, Presidency Conclusions, para. 20 (Bull. EU 12/1999, para. I.5) ; COUNCIL OF THE EUROPEAN UNION, *An effective Council for an enlarged Europe – Guidelines for reform and operational recommendations* (doc. Council 13863/99); EP, *Resolution on the reform of the Council* (OJ 2002 C 112 E, p. 317).

[89] It should be taken into account, in this respect, that at present, even when the Council decides by qualified majority, the presidency normally seeks to reach consensus before proceeding to vote (see the critical remarks formulated by COMMISSION, *European governance – a white paper, op. cit.*, p. 18; EP, *Resolution on the reform of the Council*, *op. cit.*, para. 23). In a Union of 25, such *modus procedendi* will certainly make decision-making in Council extremely burdensome. With plural representation, it may lead to the paralysis of the Council.

Whether such problems could be solved or attenuated by imposing requirements upon the Member States (declarations of competences and the like) is open to discussion.

But in a broader conceptual perspective, they imply a larger political question. In a Union of 25, it will be even more difficult than it is now to identify and pursue a *common interest*. In this regard, making it possible for the regions to directly express in Council their own interests and views might prove extremely unwise. For the Union, this would amount to renouncing, at least in some of its fields of action, to the contribution that only the Member States can give as arbitrators of the interests expressed by their lower tiers of government.

Be it permitted, before concluding, to formulate one additional remark on the unintended political consequences that such a reform might have. It is well known that some of the smaller Member States are comparable or inferior, as regards size, population, economic weight and, in some cases, historical and cultural heritage, when compared to some of the European constitutional regions. Under the Treaties, such small States have the status of full Members: their language is an official language of the Union, they have voting rights in Council *et coetera*. On the other hand, the constitutional regions, even the larger ones, do not have any such rights. Some have decried this situation as being discriminatory, and in the most extreme cases have adumbrated the perspective of remedying to such discrimination by means of "internal enlargement"[90]. The issue is likely to be exacerbated should other very small States, such as Malta or Cyprus, adhere to the EU. A reform of the Council allowing for plural representation of the Member States would seem, at first sight, to contribute to the solution of the problem. However, such a reform might also prove utterly counterproductive. Even the larger constitutional regions would still, in all probability, dispose of a smaller number of votes than the smaller Member States[91]. In these conditions, it might become difficult to argue that the influence (e.g.) Bavaria can have on the position of Germany in Council compensates this Region for not having voting rights, to the difference of (e.g.) Luxembourg. In the worse possible scenario, a quantification of the "discrimination" between large regions and small States might open or accelerate an unprecedented constitutional crisis concerning the criteria and terms of Union membership.

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[90] See N. MACCORMICK, *Stateless nations and the Convention's Debate on Regions*, *op. cit.* See also the intervention of C. NOGUEIRA ROMÁN MEP (EP, proceedings of the sittings of 14 January 2003, not yet published in the OJ). On this matter, see also the observations formulated by P. CRAIG, *EU Law and National Constitutions: the UK* (report presented at the XX FIDE, 2002; available on the website www.fidelaw.org).

[91] On January the 1st 2005, Germany will dispose of 29 votes in Council. Let us suppose that, in matters falling under the exclusive competences of the *Länder*, it would distribute entirely its votes among a number of representatives equal to that of the *Länder* (16), and that it would give 2 or even 3 votes to the larger *Länder*. Even under these extremely favourable circumstances, the Bavarian minister representing *pro quota* the Federal Republic of Germany will be authorised to cast less votes than Cyprus, and the same votes as Malta (see Declaration (n. 20) on the enlargement of the European Union, annexed to the Treaty of Nice, para. 2). This example also highlights the obvious fact that plural representation in Council would lead to a fragmentation of the voting power of the federal States, thereby diminishing their political weight in Council.

IV. Concluding remarks

The recent debates in the Convention, as well as the positions taken by the European Institutions, seem to prefigure significant steps towards a clearer recognition of the role that regional and local entities play in European governance. As regards the involvement of regional and local bodies in the Union's decision-making procedures, the direction of change is apparently that of an evolution towards the completion and maturation of the existing institutional system. In this regard, we are not only referring to the possible future evolution under a prospective Constitutional Treaty, but also to the evolution that is taking place, *à droit constant*, in the context of the "Governance" initiative of the Commission.

As regards the specific position of the constitutional regions in Council, the margins for a further evolution of EU primary law would seem limited.

The request has been insistently put fort that the constitutional regions should have a *right* to sit in Council[92]. The fact that several Member States have so far refrained from fully involving their constitutional regions in European affairs, and have not made use of the possibilities that are already offered by art. 203 ECT[93] has fuelled such request. Irrespective of the merits of the request, the very fact of presenting it in the Convention makes in inadmissible. In fact, when examining this particular issue a *Convention-centric* view is an error of perspective to be avoided: the addressees for requests of better involvement of the constitutional regions in EU matters are and should remain the national legislators, and the appropriate political arena is the national political arena. This implies also respect for the decisions taken at national level, whatever these may be. In this sense, the European Institutions, in criticising the "reluctant" Member States, have demonstrated a certain lack of institutional tact[94]. The Union and its institutions are ill placed to pass judgement on the Member States in such matters.

The terms of the question are entirely different with regard to the second problem we have examined, namely that of according, directly or indirectly, an individual "vote" to the constitutional regions when issues falling under their exclusive competence are discussed at the Union level. Here the appropriate political arena *is* the Convention: the institutional provisions of the ECT, which do not contemplate such possibility, constitute an obstacle to any Member State wishing to accede to any such demand put forth by its own regions. Among the various solutions that have been suggested in this regard, the most interesting is perhaps that of allowing a plural representation, or a plural voice of the concerned Member States in Council. Arguably, the legal arguments that could be adduced against such suggestion are not decisive.

This circumstance, however, instead of speaking in favour of plural representation in Council, permits to see with more clarity that the essence of the problem is not legal or

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92 See *supra*, fn. 76.

93 Italy and Spain, in particular, answer to this description. See A. D'ATENA, *Il difficile cammino europeo delle Regioni italiane*, *op. cit.* For an overview of the situation in Spain, see in particular J. MANDARIAGA, *El papel de las regiones en la nueva Europa: especial referencia a las Comunidades Autónomas españolas*, in Cuadernos europeos de Deusto (2002), 55.

94 See in particular EP, *Resolution on the role of regional and local authorities in European integration*, *op. cit.*, para. 2.

technical in nature, but political. To give the constitutional regions a direct vote in European affairs, even admitting that this could be done without affecting the Union's basic legal principles, might put in danger the ability of the Union to identify and pursue, in a spirit of solidarity and mutual understanding, a common interest. That is, it might put in danger the most profound *raison d'être* of the Union.