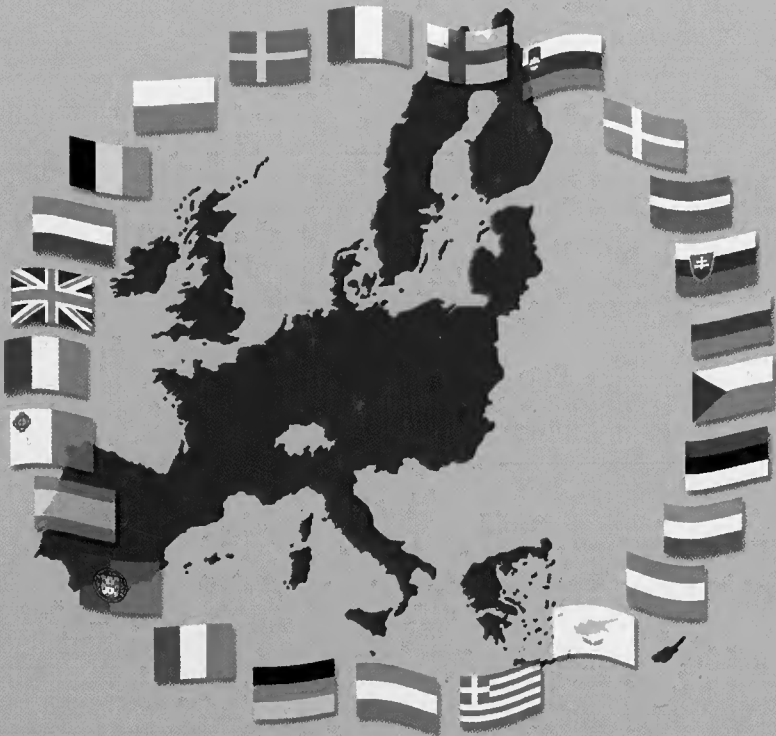


EUROPEAN UNION



Committee of the Regions

Procedures for local and
regional authority participation
in european Policy Making
in the member states



**PROCEDURES FOR LOCAL AND
REGIONAL AUTHORITY
PARTICIPATION IN EUROPEAN
POLICY MAKING IN THE
MEMBER STATES**

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Foreword

Over the past few years, significant progress has been made in promoting the involvement of local and regional authorities in the European Union decision-making process. The Member States present a broad and diverse range of internal legal systems and practical approaches to involving subnational authorities in the European decision-making process.

In some countries an intense – and sometimes difficult – political debate has resulted in the relevant procedures being constitutionalised. In other countries, local and regional involvement has been achieved on the basis of a legal instrument alone. And the remaining Member States have only informal practices that still have to be consolidated, since ongoing discussions have not yet produced a consensus.

This study shows that without a comprehensive debate and development of a common position submitted to central government for approval, local and regional authorities will not be able to participate fully in the framing of Community law.

The study is a valuable contribution to the political debate in the Committee of the Regions, providing its members with an overview of the different forms of local and regional participation in Community decision-making. It also describes the current situation – progress made and ongoing work that will require a sustained effort.

However, although it has only just been completed, the study already needs to be updated to take into account the accession of ten new Member States. We will therefore take the opportunity at a later stage to bring it up to date, in view of how the internal mechanisms of all the EU's countries are evolving.



Peter Straub
President of the Committee of the Regions

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A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (<http://europa.eu.int>).

Cataloguing data can be found at the end of this publication.

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AEBR	Association of European Border Regions
AEM	Association of Representatives of Mountainous Areas
AER	Assembly of European Regions
AFrCCRE	<i>Association Française du Conseil des Communes et des Régions d'Europe</i> (French Association of the Council of European Municipalities and Regions)
AMF	<i>Association des Maires de France</i> (French Federation of Mayors)
AMRIE	Alliance of Maritime Regional Interests in Europe
ARF	<i>Amtsårdsforeningen i Danmark</i> (Danish regions)
ANCI	<i>Associazione nazionale dei Comuni Italiani</i> (National Association of Italian Municipalities)
ANMP	<i>Associação Nacional de Municípios Portugueses</i> (National Association of Portuguese Municipalities)
APCG	<i>Association des Présidents de Conseils Généraux</i> (Association of the Presidents of General Councils, in France)
APCR	<i>Association des Présidents de Conseils Régionaux</i> (Association of the Presidents of Regional Councils, in France)
AREV	<i>Assemblea delle Regioni Europee Viticole</i> (Association of European Wine-Producing Regions)
AVCB	<i>Association de la Ville et des Communes de la Région de Bruxelles-Capitale</i> (Association of the City and the Municipalities of the Brussels-Capital Region)
AVCL	<i>Association des Villes et des Communes Luxembourgeoises</i> (Association of Luxembourg Municipalities)
BSSSC	Baltic Sea States Subregional Cooperation
CALRE	Conference of European Regional Legislative Assemblies
CARCE	<i>Conferencia para Asuntos Relacionados con las Comunidades Europeas</i> (Conference on affairs relating to the European Communities, in Spain)
CCAA	<i>Comunidades Autónomas</i> (Autonomous Communities, in Spain)
CCDR	<i>Comissões de coordenação e desenvolvimento regional</i> (Regional Coordination and Development Committees, in Portugal)
CCR	<i>Comissões de coordenação regional</i> (Regional Coordination Committees, in Portugal)

CEEP	European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest	ENAE	Ένωση Νομαρχιακών Αυτοδιοικήσεων Ελλάδας (Union of District Government of Greece)
CEMR	Council of European Municipalities and Regions	EPTA	Ε.Π.Τ.Α - Ειδικό Πρόγραμμα Τοπικής Αυτοδιοίκησης (Special Programme for Local Government, in Greece)
CIAC	<i>Comissão Interministerial dos Assuntos Comunitários</i> (Inter-Ministerial Committee on Community Affairs, in Portugal)	EU	European Union
CICE	<i>Comissão Interministerial das Comunidades Europeias</i> (Inter-Ministerial European Communities Committee, in Portugal)	EUZBLG	<i>Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union</i> (Federal Government and Länder Cooperation (European Union Matters) Law)
CIU	<i>Convergència i Unió</i> (Catalan nationalist party, in Spain)	FCO	Foreign and Commonwealth Office
CLRAE	Congress of Local and Regional Authorities of Europe	FEMP	<i>Federación Española de Municipios y Provincias</i> (Spanish Federation of Municipalities and Provinces)
COMURB	<i>Comunidade urbana</i> (urban community, in Portugal)	GAM	<i>Grande Área Metropolitana</i> (greater metropolitan area, in Portugal)
CoR	Committee of the Regions	GG	<i>Grundgesetz</i> (Basic Law, in Germany)
CORDIALE	Conference of the European Continental Diagonal Regions	GGO	<i>Gemeinsame Geschäftsordnung der Bundesministerien</i> (Common Rules of Procedure of the Federal Ministries, in Germany)
COREPER	Permanent Representatives Committee	IKL	<i>Integrationskonferenz der Länder</i> (Integration conference of the Länder, in Austria)
COSAC	<i>Conferenza degli organismi specializzati negli affari comunitari</i> (Conference of European Affairs Committees)	IMP	Integrated Mediterranean Programme
CoSLA	Convention of Scottish Local Authorities	IPO	<i>Interprovinciaal Overleg</i> (Association of Dutch Provinces)
CoRePer	Committee of Permanent Representatives	JMC	Joint Ministerial Committee (in the United Kingdom)
CPMR	Conference of Peripheral Maritime Regions	KEDKE	ΚΕΔΚΕ - Κεντρική Ένωση Δήμων & Κοινοτήτων Ελλάδας (Central Union of Municipalities and Rural Communities of Greece)
DATAR	<i>Délégation à l'aménagement du territoire et à l'action régionale</i> (Delegation for Regional Policy and Action, in France)	KL	<i>Kommunernes Landsforening</i> (Local Government Denmark)
DGCL	<i>Direction générale des collectivités locales</i> (Department for Local and Regional Authorities, in France)	LAD-Landesamtsdirektorenkonferenz	(Conference of Directors General of the Regional Administrations, in Austria)
DLT	<i>Deutscher Landkreistag</i> (German District Authority Association)	LGA	Local Government Association (in England and Wales)
DoCA	Department of Constitutional Affairs (in the United Kingdom)	LGIB	Local Government International Bureau (in the United Kingdom)
DOM	<i>Départements français d'outre-mer</i> (French Overseas Departments)	LHK	<i>Landeshauptmännerkonferenz</i> (Conference of Governors of the Länder, in Austria)
DPCM	<i>Decreto del presidente del Consiglio dei ministri</i> (Prime Ministerial Decree, in Italy)	ND	ΝΔ - Νέα Δημοκρατία (<i>Nea Dimokratia</i> , New Democracy, in Greece)
DStGB	<i>Deutscher Städte- und Gemeindebund</i> (German Federation of Cities and Municipalities)	NDP	National Development Plan (in Ireland)
DST	<i>Deutscher Städtetag</i> (German Association of Cities)	NILGA	Northern Ireland Local Government Association
DGNs	Departmental Guidance Notes (in the United Kingdom)	PASEGES	ΠΑΣΕΓΕΣ - Πανελλήνια Συνομοσπονδία Ενώσεων Γεωργικών Συνεταιρισμών (Panhellenic Confederation of Unions of Agricultural Cooperatives)
EC	European Community		
EETAA	Ελληνική Εταιρία Τοπικής Ανάπτυξης και Αυτοδιοίκησης (Hellenic Agency for Local Development and Local Government)		
EIRA	European Industrial Regions Association (see also RETI)		

PASOK	ΠΑΣΟΚ – Πανελλήνιο Σοσιαλιστικό Κίνημα (Panhellenic Socialist Movement)
PP	<i>Partido Popular</i> (People's Party, in Spain)
PSOE	<i>Partido Socialista Obrero Español</i> (Spanish Socialist Workers' Party)
PTOM	<i>Pays et Territoires français d'outre-mer</i> (French Overseas Countries and Territories)
RETI	European Regions of Industrial Technology (see also EIRA)
ROM	<i>Régions d'outre mer</i> (Overseas Regions, in France)
REGLEG	Conference of European Regions with Legislative Power
SDH	South Denmark House
SEAL	<i>Secretário de Estado da Administração Local</i> (Secretary of State for Local Administration, in Portugal)
SIL	<i>Ständiger Integrationsausschuss der Länder</i> (Standing Integration Committee of the <i>Länder</i> , in Austria)
SYVICOL	<i>Syndicat des Villes et Communes Luxembourgeoises</i> (Luxembourg Union of Local Authorities)
TEC	Treaty establishing the European Community
TEDK	ΤΕΔΚ – Τοπική Ένωση Δήμων και Κοινοτήτων (Local Unions of Municipalities and Rural Communities, in Greece)
TEU	Treaty on European Union
UCLG	United Cities and Local Governments
UKRep	UK Permanent Representation
UPI	<i>Unione delle Province d'Italia</i> (Union of Provinces of Italy)
UVCB	<i>Union des Villes et Communes Belges</i> (Union of Belgian Cities and Municipalities)
UVCW	<i>Union des Villes et des Communes de Wallonie</i> (Union of Cities and Municipalities of Wallonia)
VNG	<i>Vereiniging van Nederlandse Gemeenten</i> (Association of Dutch Municipalities)
VVSG	<i>Vereiniging van Vlaamse Steden en Gemeenten</i> (Association of Flemish Cities and Municipalities)
WLGA	Welsh Local Government Association

INTRODUCTION

This study, prepared by the *Massimo Severo Giannini* Institute for the Study of Regionalism, Federalism and Self-Government (ISSiRFA-CNR), looks at the participation of regional and local authorities in Community policy making, with reference to the 15 countries that were Member States of the EU at the time the study was commissioned (15 December 2003). The data have been updated to December 2004. This was to take account of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004.

The study is not only concerned with the "preparatory phase" of Community decision-making processes, i.e. the phase that concludes with the adoption of the final measure by the European Union. It was felt that the analysis should also cover the "implementing phase", i.e. the process of implementation and execution of Community measures once they have been adopted (a process that takes place entirely within individual national systems). This extended investigation was considered necessary for one fundamental reason, namely that the two phases are very closely interwoven. It is well known that the participation of regional and local authorities in Community decision-making processes originates from the fact that very often these bodies are involved in the follow-up to Community measures.

Their involvement in Community policy making essentially fulfils three functions: first, it provides decision-makers with expertise they would otherwise be deprived of (by expressing the needs of the local communities these bodies represent); second, by bringing the content of these decisions more closely into line with the needs of these communities, it makes them more inclined to execute and implement the decisions; and finally, it makes up for the loss of power normally experienced by these communities as a result of the European integration process.

With regard to the preparatory phase, the study makes a distinction between its two component parts, the European and the national.

Regarding the first, it examines the methods and limits of the participation of regional ministers in Council sessions, the variations in the composition and formation of national delegations within the Committee of the Regions, regional participation in the Permanent Representations to the EU and in the national delegations involved in

European decision-making processes, the gradual institutionalisation of associations representing regional and local authorities, and the role of representation and liaison offices. Particular attention is paid to the subsidiarity principle in the light of changes introduced by the Treaty establishing the Constitution, which offers regional and local authorities the explicit recognition they previously lacked, and which has also made provision for their involvement in decision-making processes. It is also responsible for giving the Committee of the Regions the power to refer infringements of the subsidiarity principle to the Court of Justice, where such infringements are due to legislative measures on which the Committee has to be consulted.

Regarding matters that relate specifically to the internal part of the preparatory phase, the study looks separately at the methods by which local and regional authorities are kept informed for the purpose of European decision-making processes, and the mechanisms, both formal and informal, that to differing degrees put these bodies in a position to participate in developing national positions (or at least influencing them).

Regarding the implementing phase, four subject areas are considered in the study: the systems of division of power between the centre and the regions for the execution and implementation of Community measures in individual national systems; the wide variety of legal instruments used by Member States to prevent breaches of Community law being perpetrated by regional and local authorities (or to deal with them); the procedures enabling sub-state bodies to influence proposed referrals to the Court of Justice by the Member States to which they belong; and the way the subsidiarity principle is interpreted in different positive national laws.

The study consists of two parts and a concluding chapter.

The first part is a comparative study of the solutions applied in individual Member States. The comparison also includes a look at issues and phenomena relevant only to the European system, such as the subsidiarity principle, and the role accorded to associations representing regional and local authorities as a result of the White Paper on European Governance.

The second part looks at the 15 Member States studied, giving a chapter to each. Descriptions of the way local and regional powers are organised within the individual Member States have been deliberately left out of these chapters, since they appear in

other studies published by the Committee of the Regions. Reference is only made to these where this was felt to be essential to a proper understanding of the text.

Finally, the concluding chapter contains summary evaluations of the different models that emerge from the study, and verdicts, partly for the purpose of identifying the "best practices" that the White Paper on European Governance demands of the Committee of the Regions.

* * *

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This volume, though largely the fruit of collective discussion and interaction between the various academics involved in the research, is made up of contributions by individual authors.

Antonio D'Atena

PART ONE

COMPARATIVE ANALYSIS OF THE INSTRUMENTS OF PARTICIPATION

CHAPTER I

PARTICIPATION OF REGIONAL AND LOCAL AUTHORITIES IN THE PREPARATORY PHASE OF EUROPEAN POLICY MAKING – EUROPEAN SIDE

1. The original "federal blindness" of the European system. – 2. Regionalisation processes in the Member States. – 3. Europe's first steps towards opening up to the regions and local authorities. – 4. The Treaties of Maastricht, Nice and Amsterdam. – 5. The Treaty establishing a Constitution for Europe – 6. Participation by regional ministers in the Council of Ministers. – 6.1. The solutions applied by the three federal states: Austria, Germany and Belgium. – 6.1.1 Appointment procedures. – 6.1.2 Coordination between central government and regional ministers. – 6.2 The solution applied by the United Kingdom. – 6.3 The Spanish situation. – 7. The Committee of the Regions. – 7.1 Regulation by the EC Treaty. – 7.2 Individual representation and collective representation. – 7.3 The solutions adopted by the Member States. – 7.3.1 Aspects of form: the existence of a legislative basis. – 7.3.2 Aspects of substance: relative weighting of the membership. – 7.3.2.1 Delegations with predominantly regional representation. – 7.3.2.2 Delegations with predominantly local representation. – 7.3.2.3 Delegations with exclusively local representation. – 7.3.3 Procedural aspects: methods of choosing members. – 7.3.3.1 Overview of the different national systems. – 8. The subsidiarity principle. – 8.1 Procedural Regulation. – 9. The regional presence in the Permanent Representations and in the national delegations involved in Community decision-making processes. – 10. Associations. – 11 Regional representation and liaison offices in Brussels.

1. *The original "federal blindness" of the European system*

According to the rather apt metaphor of a German author (H.P. Ipsen), at the time it was set up, the European system was suffering from "federal blindness" (*Landesblindheit*): it could not "see" the local and regional entities that existed within the Member States. What this meant was that the system constructed its own procedures and bodies, taking account solely of central levels of government. This was even the case for Member States that were federal or regional in structure (such as Germany or Italy at the time).

As a consequence of this, as the Community venture got underway, the biggest victims of the integration process were the German *Länder* and the Italian Regions (or to be precise, the regions with special autonomy, the only ones that existed at the time). These entities, like the States to which they belonged, suffered the "Europeanisation" of many of their powers (transferral to Community level). But unlike the States, they could not make up for this loss by participating (either directly or indirectly) in Community decision-making processes. Over the issues now dealt with at European level, they had even lost their powers of interaction with their own central governments, granted to them by their national systems. The powers of the German *Bundesrat* in the federal legislative process are a good example of this. Clearly, if legislation was no longer to be adopted by the Federation but by the European Union, the *Bundesrat* was left out in the cold, with the consequence that the *Länder* also lost ground in terms of influence over the decision-making process. The situation was somewhat similar when it came to the power of initiating national legislation accorded to the Italian Regions by the national constitution.

Finally, there was also a loss of safeguards. While the Regions – like the *Länder* – could appeal to the constitutional court against invasive acts by the State, they did not have access as such to the Community courts.

2. *Regionalisation processes in the Member States*

The original indifference of the Community to regional authorities can probably be traced back to the constitutional structure of the Member States at the time the integration process began.

It is well known that when the treaties setting up the Community were signed, most of the founding Member States were centralised systems, following the French model. The only exceptions were – as we have said – Germany and, at least in part, Italy, which was part-regionalised: the only regions actually in existence were the five regions with special autonomy listed in Article 116 of the Constitution.

The situation changed dramatically from the 1970s.

In 1970, the regionalisation of Italy was completed with the creation of the 15 regions with "ordinary autonomy", which were provided for in the 1947 Constitution but had remained so on paper only for about twenty years. Also in the 1970s, regionalisation began to take hold in Belgium, with the creation of three Regions and three Communities, described as "cultural" Communities at the time, and a number of powers were assigned to them.

During the next decade (on 1 January 1985 in particular), two States that had in the meantime taken on a regional structure joined the European Community. They were Spain and Portugal, whose transition to democracy had coincided with regionalisation processes of varying degrees. In Spain, there was total regionalisation. In line with the 1978 Constitution, 17 Autonomous Communities were set up, covering the whole country. In Portugal, the process was only partial, since the 1976 Constitution had only granted Autonomous Region status to the islands of the Azores and Madeira.

During the 1990s, three more institutional events strengthened the federal and regional component of the European system: a) Belgium's transition to a federal structure, sanctioned by the constitutional reform of 1993; b) the entry into the Community of a second State with a strongly federal tradition, Austria (1 January 1994); and c) the creation of regional assemblies with legislative powers in the United Kingdom (Wales, Scotland and Northern Ireland).

3. *Europe's first steps towards opening up to the regions and local authorities*

In response to this change in situation the Community took its first steps towards opening up to sub-state entities.

On this matter, we should first remember the Joint Statement by the Council, Commission and Parliament of 19 June 1984, which states: "The three institutions recognise the importance of a more effective relationship between the Commission of the European Communities and the regional or, where appropriate, local authorities, with due regard for the internal jurisdiction of the Member States and the provisions of Community law. This will enable the interests of the regions to be taken more fully into account when regional development programmes and intervention programmes are being drawn up."

A further sign of the increasing attention being paid to sub-national authorities came in 1988 when the Commission set up the Consultative Council of Regional and Local Authorities (Commission Decision 88/487/EEC of 24 June 1988), consisting of 42 members holding elected office at regional or local level, divided into two sections responsible for expressing the interests of the regions and those of smaller local authorities respectively.

The European Parliament Resolution on Community regional policy and the role of the regions, of 18 November 1988, known as the Community Charter for Regionalisation (OJ 329, 19 December 1988), was along the same lines. This Resolution not only furthered the institutionalisation of regional authorities by the Member States (or the conservation of this type of entity where it already existed) (Article 2), but it also established the basic features of these entities, viz., their legal personality (Article 3(3)), the legislative powers they possess (Article 11), and the existence of directly elected representative assemblies and democratically recognised governments (Articles 6, 7 and 9).

4. *The Treaties of Maastricht, Nice and Amsterdam*

However, for the sub-state entities had to wait for the Treaty of Maastricht to secure their first recognition at treaty level. It was this that was responsible for the introduction of three new, and in this respect very important, changes.

The first was the opening-up of the Council of Ministers to representatives from sub-state entities. In particular, in an expansion of its initial configuration, which limited representation of the Member States to members of their respective central governments, the Maastricht Treaty amended Article 146 (now Article 203) of the EC

Treaty, dropping the reference to national governments. The new wording thus allowed Member States to be represented in Council sessions by members of regional governments.

The second change was the setting-up of the Committee of the Regions, which was to consist of "representatives of regional and local bodies" (Article 198A, now Article 263 of the EC Treaty).

The third change was the enunciation of the subsidiarity principle. The relevant Articles are Article 3B (Article 5 of the EC Treaty), which does not explicitly mention the existing sub-state entities within the Member States, and Article A(2) (now Article 1 of the Treaty on European Union), which in a repetition of the wording of the Preamble, states that one of the objectives of the Treaty is the creation of "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".

This framework was partially modified by the Treaties of Amsterdam and Nice. Further modifications – as we will see – were introduced by the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004.

The Treaty of Amsterdam, through the special protocol appended to it, was responsible for introducing the complete proceduralisation of the subsidiarity principle.

It also strengthened the position of the Committee of the Regions:

- by giving it powers to adopt autonomously its own Rules of Procedure (which previously, under the Maastricht Treaty, were subject to the Council's approval),
- by stating that the Committee could be consulted by the European Parliament, and not just by the Commission and the Council, as laid down in the Maastricht Treaty,
- by increasing the number of instances in which the Committee must be consulted.

As regards the Treaty of Nice, two changes to the structure of the Committee should be mentioned.

The first concerns the legitimisation of its members. To ensure an institutional link exists between the Committee and the entities it represents, the Treaty stated that its members must hold elected regional (or local) office or must be accountable to an elected assembly at a corresponding level. In this way, using a system similar to that used for the old Consultative Council of Regional and Local Authorities, it was responding to a need widely felt at regional and local level.

The second change concerns the procedure for the appointment of members of the assembly. The Treaty of Nice provides for the strengthening of the principle of *proposal* (by the individual Member States) compared to actual *appointment* (by the Council), stating that the latter must be performed *in conformity* with the former.

The importance of these changes should not be disregarded. True, they ended up codifying what was standard practice. But the fact that they appeared in a treaty is still very significant, for they made legally binding what had previously been the outcome of incidental decisions that could – at least in theory – always be changed.

5. *The Treaty establishing a Constitution for Europe*

The journey begun by the Maastricht Treaty and continued by the Treaties of Amsterdam and Nice was further advanced by the Treaty establishing a Constitution for Europe, the Constitutional Treaty signed in Rome on 29 October 2004.

This Treaty, building on the Preamble to the Nice Charter, gave greater recognition to the regional and local division of power within Member States.

In addition to the Preamble of the Nice Charter⁽¹⁾ – incorporated into the second part of the Treaty – we must not forget Article I-5 thereof. In response to a request made

(1) It states the following: "The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States *and the organisation of their public authorities at national, regional and local levels*" (author's italics).

by the Committee of the Regions, among others, it states that "The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*".

The level of importance given to regional identity, including as regards the cultural identities of the peoples of the Union, is confirmed in Article III-121, which states that in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, among other things, respect "the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and *regional heritage*".

That being said, it should be pointed out that, as far as the participation of regional and local authorities in Community decision-making processes is concerned, the most incisive changes wrought by the Constitutional Treaty are connected, on the one hand, with the strengthening of the role of the Committee of the Regions, and on the other – as we will see in sections 8 and 8.1 of this chapter – with the new regulation of the subsidiarity principle, especially the procedural protection given to it.

6. *Participation by regional ministers in the Council of Ministers*

Looking in more detail at the channels of participation opened up to regional and local authorities following the Maastricht Treaty, we will consider in turn the opening of the EU's Council of Ministers to ministers from these entities, the Committee of the Regions, and the subsidiarity principle.

As far as the first channel is concerned, it should be noted that although the Member States can be represented in the Council by ministers not belonging to central government, local authorities are excluded from this. In addition, only quite a small number of regional authorities benefit from this access. In fact, the right of Member States to be represented in the Council by ministers from this level of government is used only by the three federal States of the Union – Austria, Germany and Belgium – and by two States where regional self-government exists – the United Kingdom and Spain. For the remaining Member States of the Union, even where regional self-

government backed by the constitution exists (as for example in Italy), representation of the State in the Council remains the exclusive prerogative of central government.

6.1 *The solutions applied by the three federal states: Austria, Germany and Belgium*

Starting with the federal States, we could summarise by saying that the cases where regional ministers participate in Council sessions tend to be the cases where their systems of government rely on the internal division of powers.

The German and Austrian constitutions allow for this possibility where matters subject to the exclusive legislative jurisdiction (*ausschließliche Gesetzgebung*) of the *Länder* are involved (such as Article 23(6), GG), and where matters subject *also* to the legislative jurisdiction of the *Länder* are involved (such as Article 23(d)(3), Austrian Federal Constitution), respectively. We should add that, while the first, in this particular hypothesis (exclusive legislative jurisdiction of the *Länder*), *oblige*s the federation to give the sub-state minister responsibility for exercising the rights of the State in its capacity as a member of the European Union, the second is simply an *option* of the federal government, allowing it to entrust participation in the Community decision-making process within the Council to a representative of the *Länder*.

The system used in Belgium is more finely tuned. Here too, the participation of regional or community ministers in the Council is determined on the basis of the internal division of powers. But here, there are different solutions used depending on the type of power in question.

In matters of exclusive jurisdiction, it falls to the minister of the competent authority to be the representative in the Council. So the federal minister will represent the State if the matter is the responsibility of the Federation, and the community or regional minister will represent the State if the matter is the responsibility of the Communities or Regions respectively.

The situation becomes more complex where the division of powers is less clear-cut. Here, there is provision for the participation of both levels of government in the Council session, though with different functions: the representing minister (*ministre-siégeant*) comes from the level of government that has principal responsibility in the

matter, and the advising minister (*ministre-asseur*) comes from the level of government with supplementary responsibility. We should also mention that when the role of advising minister falls to a sub-state minister, he sometimes arranges for an official to take his place.

6.1.1 *Appointment procedures*

All the government systems considered make provision for the participation of sub-state entities in the appointment procedures.

In Austria and Germany, this participation consists of the selection of the representative by the *Länder* (Article 23(d)(3), Austrian Federal Constitution) and by the federal body in which their governments are represented, the *Bundesrat* (Article 23(6), GG), respectively.

A different system is used in Belgium. Here, the decision as to which sub-state minister should represent the State within the Council of Ministers is given to a mixed electoral body. This body is the Interministerial Conference on Foreign Policy (chaired by the Minister for Foreign Affairs and consisting of both federal ministers and members of the regional and community executives). It should be stressed that in Belgium the principle of six-monthly rotation (at each change of Presidency) is used among the representatives of the bodies within the federation.

6.1.2 *Coordination between central government and regional ministers*

One of the more delicate problems posed by the participation of regional ministers in Council sessions is that of coordination with their respective central governments.

The most detailed system for dealing with this is found in Belgium. The fundamental features of this system of regulation are proceduralisation and cooperation.

On the basis of this system:

- a) Belgium's position is established in European coordination meetings organised before each Council session by service P11 (European integration and coordination) of the Department of European Affairs of the Federal Minister for

Foreign Affairs. In these meetings, attended by representatives of the federal government and the regional and community governments, decisions are adopted unanimously;

- b) in the Council, Belgium's representative may only adopt a position on the issues on which there was prior coordination (according to the most reliable source, he is required to abstain on issues where there was failure to reach a consensus);
- c) if a decision has to be modified during negotiations, or taken in a hurry, the representative has to contact all the levels involved, and, where this is not possible (or he finds there is persistent disagreement), he has to express Belgium's position "ad referendum", conditional upon notifying the President of the definitive position within three days.

The systems used in Austria and Germany are less elaborate.

In Austria, the minister from the *Land* called upon to represent the State in the Council is required to act in agreement with the federal minister with responsibility for the matter (Article 23(d)(3), Federal Constitution).

In Germany, Article 23(6) of the Basic Law states that the minister from the *Land* must act in collaboration and agreement with the federal government, in order to safeguard the Federation's accountability to the State as a whole (*Gesamtstaat*).

6.2 *The solution applied by the United Kingdom*

As we said earlier, there is also a non-federal State – the United Kingdom – that provides for the participation of sub-state ministers in Council sessions.

The ministers of the three devolved regions (Scotland, Wales and Northern Ireland) are allowed to participate in sessions of the EU's Council of Ministers. The Concordat on Co-ordination of European Union Policy Issues (1999), in particular, states that the leader of the delegation can agree to their speaking for the UK. The Concordat also states that "they would do so with the full weight of the UK behind them", because the positions to be taken within the Council would have been agreed in advance.

6.3 *The Spanish situation*

As we said earlier, Spain is among the regional States that allow sub-state entities to participate in the Council of Ministers. This faculty is due to a very recent agreement, concluded on 9 December 2004, between the State and the Autonomous Communities.

This was the culmination of efforts begun in the 1990s, and which had progressed with mixed fortunes.

7. *The Committee of the Regions*

Moving on to the Committee of the Regions, we should first point out that it gives local and regional levels of government within the Member States the chance to participate more closely in the EU's decision-making processes than is possible through any (and, as we have seen, quite limited) participation in the sessions of the Council. Of course, the Committee is a consultative body, while the Council is one of the fundamental decision-making bodies. However, while any regional representatives called upon to represent the State as a whole within the Council of Ministers are required to act – as we have said – in close coordination with their central government, in the Committee of the Regions they can express the needs of the regional level to which they belong (if not – in some cases – those of the body from which they have actually come). In addition, not only are sub-state levels of government represented in the Committee of the Regions, but so are local levels (which, as we have already seen, are excluded from participating in sessions of the Council of Ministers). Furthermore, the fairly significant account taken of the Committee's opinions clearly suggests that the Committee is of some considerable importance in EU decision-making processes. Finally, there is a very important change provided for in the Constitutional Treaty and the Protocol on the application of the principles of subsidiarity and proportionality appended to it. This gives the Committee the power to bring actions in the European Court of Justice for infringements of the subsidiarity principle by European legislative acts for the adoption of which the Constitution requires that it be consulted (Article 8 of the above-mentioned Protocol).

We will avoid any analysis on this occasion, since this is dealt with in another Committee of the Regions study (please refer for any specific information to the coverage of the individual Member States in the second part of this study), and instead focus our attention on the national delegations, in the following order: regulation by the EC Treaty, the different types of representation that can be used, and the systems adopted by the individual Member States.

7.1 Regulation by the EC Treaty

Starting with the first point, it should be underlined that the Treaty deliberately holds back from dictating a complete and exhaustive set of rules for the composition of national delegations to the Committee of the Regions. In fact, it leaves a series of important decisions to the Member States. Thus, on the one hand it takes account of the variety of institutional systems that exist within Member States as far as the regional distribution of power is concerned, and on the other it respects the self-determination that must be given to the Member States in an area such as this.

More specifically, it is important to remember that the EC Treaty lays down the number of members in each national delegation and indicates the requirements to be fulfilled by these members, stating expressly, as we have seen, that they must "hold a regional or local authority electoral mandate or [be] politically accountable to an elected assembly"⁽²⁾. However, it does not impose on Member States any particular solutions or ratios of the levels of government to be represented in their delegations (or method of representation to be used). These decisions are left entirely to the Member States which, under the terms of Article 263(4), as amended by the Treaty of Nice, are required to formulate binding proposals ("in accordance" with which the Council is required to adopt the list of members and alternate members).

7.2 Individual representation and collective representation

With regard to the types of representation that can be used, the most significant variable is whether representation within the individual national delegations is *individual* or *collective*. The first scenario is where members come from a single body

(2) This wording is maintained in Article I-32(2) of the Constitutional Treaty, which unlike the EC Treaty does not state the number and numerical distribution of members of the Committee, simply setting the maximum number (to 350) and referring the determination of its composition to a decision adopted unanimously by the Council, acting on a proposal from the Commission (Article III-386).

(from a single region or a single municipality), and the second from a category of bodies.

The significance of this variable should not be underestimated.

It is in fact true that, according to the Treaty, the members of the Committee "may not be bound by any mandatory instructions" and are required to be "completely independent in the performance of their duties, in the general interest of the Community" (last paragraph of Article 263 of the EC Treaty). It is, however, also clearly the case that, if they have come individually from a particular body, they are in a position to express the needs of that body more fully than if they are required to represent a number of bodies of the same type.

There are two observations we can make in relation to this.

The first is that the only bodies for which individual representation is technically possible are regional authorities. The fact that a huge number of local authorities exist in each Member State makes collective representation for these bodies a necessity. This is not to say that *individual* local authorities cannot have their own representatives on the Committee (this scenario is true – for example – for the Municipality of Copenhagen). What is not possible is for *every* authority of this type to have its own representative.

The second observation is that, because of the specific choices made by the Member States, the only cases of guaranteed individual representation for regional authorities are found in the three federal EU Member States and in some Member States having regions with legislative powers guaranteed by a fixed constitution.

7.3 The solutions adopted by the Member States

Moving on to the solutions adopted by the Member States for the composition of their delegations to the Committee of the Regions, aspects of form, aspects of substance and finally procedural aspects must be considered separately.

7.3.1 *Aspects of form: the existence or absence of a legislative basis*

From the point of view of form, what is immediately striking is whether or not a legislative basis exists. While in some systems the proportion of members of the delegation from each of the different regional or local levels of government and the procedures for appointing members are governed by the law or some other legal source, in other systems there is a total absence of written rules in law.

Whether or not a legislative basis exists is generally linked to the institutional structure of the Member State. While in federal States and very regionalised States this basis generally does exist, in non-regionalised States (or to be precise, those without regions with legislative powers), there is, as a rule, no legislative basis.

However, there are exceptions to this general rule.

Firstly, we should mention the case of one non-regionalised State (in the sense described above), where the composition and formation of the delegation to the Committee of the Regions is governed by law. This State is Ireland, which between 1991 and 1998 adopted several pieces of legislation dealing with this matter.

Conversely, in two States with regions that have legislative powers – Spain and Portugal – there is an intermediate solution. In these two States the appointment of members of the delegations is by means of parliamentary resolutions that are not legislative in nature: a motion of the Senate in Spain, and a resolution of the Assembly of the Republic in Portugal.

It should be added that existing laws – in States that have them – are quite diverse.

In one case, that of Austria, they are written into the constitution. In other cases they consist of legislation (Belgium, Germany, Ireland) or regulations (Italy). The importance of this is unmistakable: rules within a fixed constitution and which are binding on central government clearly provide greater guarantees for sub-state levels of government than legislation or regulations.

A further difference between States in which a legislative basis exists is also worth mentioning, and this is how comprehensive that regulation is. Partial regulation exists

in the United Kingdom in particular, and to an even greater extent in Finland. In Finland, the only legislation that exists concerns the Province of Åland (Law 1144 of 16 August 1991 as amended).

Before moving on, we should mention that where legislation exists, it is not only important for guaranteeing representation for regional and local authorities. It can also give greater stability to the composition of national delegations and to the procedures for appointing their members (obviously as long as the legislation is not changed).

7.3.2 *Aspects of substance: relative weighting of the membership*⁽³⁾

The factor with the greatest influence on the composition of national delegations within the Committee is the institutional structure of the individual Member States.

To be more specific, in delegations from federal or fully regionalised States (Germany, Austria, Belgium, Spain, Italy, France⁽⁴⁾), membership is as a rule predominantly regional (in one case, among full members it is entirely regional), while in non-regionalised States (the Netherlands, Sweden, Denmark, Luxembourg and Ireland) representatives come exclusively from local authorities.

Partially regionalised States sit somewhere in between. These are the States where the regionalisation process concerns only part of the territory (Portugal, the United Kingdom and Finland). Their delegations in the Committee include both regional representatives and local representatives. However, unlike delegations from federal States or fully regionalised States, in these the local component tends to predominate. This is dependent upon how few Regions they have: Portugal has two autonomous regions (the Azores and Madeira), the UK has three (Scotland, Wales and Northern Ireland) and Finland has one province with legislative powers (the Åland Islands). These entities, though represented individually within the Committee (and therefore enjoying particularly strong guarantees), are not so numerous that they swing the balance of the composition of their respective national delegations in the favour of the regions.

(3) The figures given in this section relate to the current composition of the national delegations.

(4) We will not go into the issues surrounding the nature of French regionalism here. In France, regionalism is constitutionally guaranteed, but does not break the legislative monopoly of central government.

To complete the picture, we should mention here that in some cases a balance between the different components is achieved by breaking the strict correspondence between full and alternate members, i.e. by arranging it so that the allocation of alternate members does not match that of full members. This is particularly the case for Belgium (whose delegation has local representatives only among its alternate members), for Italy (14 full members and 8 alternate members for the Regions; 5 full members and 4 alternate members for the Provinces; 5 full members and 12 alternate members for the Municipalities), and for Sweden (4 full members and 6 alternate members for the County Councils; 8 full members and 6 alternate members for the Municipalities), and is partially the case for Denmark (the delegation has one representative of the municipality of Copenhagen among its full members and one representative of the municipality of Frederiksberg among its alternate members).

7.3.2.1 Delegations with predominantly regional representation

As might be expected Germany, Austria, Belgium and Italy have predominantly regional representation.

However, while the German, Austrian and Spanish delegations are clearly dominated by the regional component, there is not a particularly marked difference in the Italian delegation between the number of regional representatives and the number of local representatives, who account for slightly over half the delegation.

Belgium and France present quite a different picture, though for differing reasons. In the Belgian delegation, all the full members are from sub-state entities (Communities and Regions)⁽⁵⁾. Meanwhile, in the French delegation, there is an equal ratio of regional to local representatives.

Looking only at the full members, the following can be seen:

- in Austria, 9 seats are filled by representatives from the *Länder*, while 3 are given to local representatives;
- in Belgium, the Flemish Region, the Walloon Region and the French Community are allocated 6, 2 and 2 representatives respectively, while the Brussels Capital

(5) As we have seen, local representatives only feature among the alternate members of this delegation.

Region is allowed two representatives (one for the French Community and the other for the Flemish Community); the German-speaking Community is allocated one representative who replaces a Flemish representative and a Walloon representative in rotation (which causes a temporary reduction in the number of Flemish representatives to 5 seats and in the number of Walloon and French Community representatives to 3 seats, also in rotation); representatives of the local authorities only feature among the alternate members, as we have said;

- in France, 12 members represent the Regions, 6 the *Départements* and 6 the Municipalities;
- in Germany, 21 seats are filled by the regions and 3 by local representatives;
- in Italy, the Regions are allocated 14 seats, while the municipalities and provinces only have 10 (5 for the provinces and 5 for the municipalities)⁽⁶⁾;
- of the 21 Spanish seats, 17 go to representatives of the Autonomous Communities and 4 to local representatives.

Before moving on, there are two observations worth making.

Firstly, individual representation of the Regions is granted not only – as we said – by the three federal States (Germany, Austria and Belgium), but also by Spain (there are 17 regional members corresponding to the number of Autonomous Communities)⁽⁷⁾.

(6) However, as we said in the previous paragraph, in Italy the distribution of alternate members does not mirror exactly the distribution of full members.

(7) Taking account of this fact, and also of the fact that – as we said earlier (in 7.3.2 above) – cases where all the regions in a system of government are represented individually also occur in systems characterised by predominantly local representation, it is easy to see that the only regionalised States in which the Regions are not individually represented are France and Italy. In these States, which have 26 and 20 regions respectively (plus the two autonomous provinces of Trento and Bolzano, which like the regions have legislative powers written into the Constitution), there are 12 and 14 full regional members respectively. This figure is particularly significant for Italy. Unlike the French regions, the Italian regions have legislative powers. So Italy is the only strongly regionalised State in which – as regards full members – individual representation of the Regions is not guaranteed (which, by the way, is probably due to a long and strongly rooted municipal tradition).

The second observation is that, in States that allow their regions individual representation, Germany and Belgium provide extra guarantees. The law in Germany guarantees the 16 *Länder* of the Federal Republic further representation, in addition to their individual representation, in the form of five seats allocated in rotation according to the population of the *Länder*. In Belgium, in addition to individual representation, extra representation is given, as we have seen, to Flanders and the Walloon Region/French Community, which have six and four representatives respectively (this figure may be reduced temporarily through rotation with the representative of the German-speaking Community).

7.3.2.2 Delegations with predominantly local representation

As we have said, the delegations with predominantly (but not exclusively) local representatives are those from the partially regionalised States: Portugal, the United Kingdom and Finland.

In Portugal, the delegation consists of two representatives from the Autonomous regions (one for the Azores and the other for Madeira) and 10 representatives from the municipalities.

In the United Kingdom, the composition of the delegation is based on a mixed institutional and geographical criterion. In application of this criterion, the following are represented in the delegation:

- the three Regions with legislative powers, though not in equal measure, since the respective assemblies of Northern Ireland and Wales are represented with one seat each, while Scotland has a representative for the Scottish Parliament and a representative for the Scottish Executive;
- the English regional assemblies (entities with purely consultative powers) and the Greater London Authority, which together have nine seats;
- the local authorities, with different numbers of representatives in line with the area they cover (seven members from the English Local Government Association, two from the Convention of Scottish Local Authorities, one from the Northern Ireland

Local Government Association and one from the Welsh Local Government Association).

With regard to Finland, we should clear up one possible ambiguity. Although of the nine members' seats allocated to the country, four have been assigned to local representatives (cities and municipalities: *Kaupungit ja kunnat*), one to the Autonomous Province of Åland and four to the regional councils (*Maakuntien liitot*), this does not mean that the regional level predominates. The Province of Åland is the only authority that can be considered truly regional; the Regions are only second-level authorities formed from a collection of municipalities, with councils elected by the municipal councils, without any legislative powers.

7.3.2.3 Delegations with exclusively local representation

Exclusively local representation is found in non-regionalised States: the Netherlands, Sweden, Denmark, Luxembourg, Ireland and Greece.

In the Netherlands, of the 12 full members, 6 come from the provinces (*Provincies*) and 6 from the municipalities (*Gemeenten*). In Sweden, as we have said, 4 full members and 6 alternates are allocated to the county councils, and 8 full members and 6 alternates to the municipalities. In Denmark, the 9 full members and 9 alternate members are divided thus: 4 members and 4 alternates for the regions (*amter*) and 4 members and 4 alternates for the municipalities, one member for the municipality of Copenhagen and one alternate for the municipality of Frederiksberg. All six members of the Luxembourg delegation represent municipalities. In Ireland, all nine members are allocated to local representatives⁽⁸⁾. Finally, in Greece, 7 members come from the municipalities (*Koinótites – Dímoi*), while the remaining 5 are attached to the Prefectures (*Nomoi*), which are second-level authorities.

(8) It is true that the members of the Irish delegation must belong to the administrative regions (and that two of them must be members of regional assemblies). However, within the Irish system, the regions are really second-level entities representing local bodies and without any legislative powers.

7.3.3 Procedural aspects: methods of choosing members

We have already mentioned (see 4 and 7.1 above) that, under the Treaty, the members are appointed to the Committee of the Regions by the Council on the basis of binding proposals by the Member States.

It would be appropriate at this point to look at the background to this proposal method, i.e. the process by which it originated.

It is a process in which the regional and local authorities of the Member States are normally involved, thereby enjoying a significant opportunity for participation in Community policy making.

In terms of the arrangements for this participation the most important variable is the type of representation. With individual representation, selection is the responsibility of the authorities individually represented. With collective representation, obviously this cannot be the case. The involvement of the collectively represented authorities technically can only take place through organisations or associations that represent them collectively.

Having said this, the two methods are actually not necessarily mutually exclusive. In fact, even in Member States that use individual representation (and that consequently give each individually represented authority the task of indicating the member or members they want proposed to the Council), the procedure of designation by collective organisations is also used. This depends on the mix of representatives in the delegation, which can include both regional and local representatives. Obviously, where local authorities are represented collectively (see 7.2 above), the representatives of these authorities can only be chosen collectively⁽⁹⁾.

The situation is different for States that do not use individual representation. Here, the authorities represented are only involved collectively in the formation of their delegations.

(9) Not only do the six States with individual representation of their Regions – Austria, Belgium, Finland, Germany, Portugal and the United Kingdom (see 7.3.2.1 above) – use a system in which individual and collective representation coexist, but so does Denmark, whose delegation includes, as we have seen, one full member from the municipality of Copenhagen and one alternate member from the municipality of Frederiksberg.

7.3.3.1 Overview of the different national systems

Having looked in detail at the different systems used by individual Member States, we can sum them up as follows:

- Austria: the nine *Länder* each choose a representative, while the remaining three members are proposed jointly by the Association of Austrian Cities and Towns (*Österreichischer Städtebund*) and the Austrian Association of Municipalities (*Österreichischer Gemeindebund*);
- Belgium: the list of full members is drawn up by the regions and communities, reserving two seats for representatives from the Brussels-Capital Region, one each for the Flemish and French groups;
- Denmark: the two associations, representing the regions (*Amtsårdaforeningen i Danmark*) and the municipalities (*Kommunernes Landsforening*) respectively, propose four full members and four alternate members each, while the municipal councils of Copenhagen and Frederiksberg propose, respectively, one full member and one alternate;
- Finland: the members of the delegation are chosen by the government on the basis of a list presented by the Interior Minister and proposed by the Province of Åland and the Association of Finnish Local and Regional Authorities;
- France: the Prime Minister chooses the members of the delegation based on the proposals of the Interior Minister following consultation with local and regional community associations (AMF – *Association des Maires de France*; APCG – *Association des Présidents des Conseils Généraux*; APCR – *Association des Présidents de Conseils Régionaux*);
- Germany: the sixteen *Länder* propose one or two members each (of the twenty-one seats representing the regions. As we said earlier, five are allocated in rotation based on the population density of the *Länder*); each of the three local authority associations (*Deutscher Landkreistag*, *Deutscher Städtetag* and *Deutscher Städte- und Gemeindebund*) proposes in turn one of the remaining three members;

- Greece: the Interior Minister chooses seven members drawn from the mayors, and the remaining five members drawn from the prefectures (which in Greece, as we have said, are second-level authorities);
- Ireland: the nine members are chosen by the government, on the advice of the Environment, Culture and Local Government Minister;
- Italy: the fourteen full members (and eight alternate members) representing the Regions and the Self-Governing Provinces of Trento and Bolzano are chosen by the Conference of Presidents of the Regions and Self-Governing Provinces (*Conferenza dei Presidenti delle Regioni e delle Province autonome*), five full members (and four alternate members) are chosen by the Union of Provinces of Italy (*Unione delle Province d'Italia* (UPI)), while five full members (and twelve alternates) are chosen by the National Association of Italian Municipalities (*Associazione Nazionale dei Comuni Italiani* (ANCI));
- Luxembourg: members are chosen by the government on the basis of a proposal by the Luxembourg Union of Local Authorities (*SYVICOL – Syndicat des Villes et Communes Luxembourgeoises*);
- Netherlands: the Interior Minister chooses representatives on the basis of a joint proposal by the Association of Dutch Provinces (*IPO – Interprovinciaal Overleg*) and the Association of Dutch Municipalities (*VNG – Vereniging van Nederlandse Gemeenten*); members are divided equally between the provinces and municipalities;
- Portugal: the two members representing the two autonomous regions of the Azores and Madeira and the ten members representing the municipalities are chosen on the basis of consultation with the governing bodies of the two regions and the National Association of Portuguese Municipalities (*ANMP – Associação Nacional de Municípios Portugueses*) respectively;
- United Kingdom: the Foreign and Commonwealth Office chooses the representatives on the basis of proposals made by all the authorities and associations allocated seats, in accordance with the proportions indicated above in paragraph 7.3.2.2.; in particular, these are the English regional assemblies, the

Greater London Authority, the Scottish Parliament and Executive, the Northern Ireland Assembly, the National Assembly for Wales, the English Local Government Association, the Convention of Scottish Local Authorities, the Northern Ireland Local Government Association and the Welsh Local Government Association;

- Spain: the 17 Autonomous Communities choose one member each, while the representatives of the local authorities are proposed by the Spanish Federation of Municipalities and Provinces (*FEMP – Federación Española de Municipios y Provincias*);
- Sweden: the Interior Minister chooses candidates from the Swedish delegation on the basis of proposals put forward by the Federation of Swedish Municipalities (*Svenska Kommunförbundet*) and by the Federation of County Councils (*Landstingsförbundet*).

8. *The subsidiarity principle*

As we have said, one of the major changes introduced by the Maastricht Treaty was its regulation of the subsidiarity principle. Before we go on to examine it, we should first explain that the principle is not without relevance to a study that looks at the participation of local and regional authorities in European policy making.

It is true that the principle concerns the division of powers between the European Union and the Member States and not the decision-making mechanisms of the European Union. However, we must consider the fact that the dynamic arrangement referred to in Article 5 of the EC Treaty (and Article I-11(3) of the Constitutional Treaty) states that EU decision-making powers should move upwards, but that regional and local levels of government within the Member States can be involved, directly or indirectly, in the process of formulating decisions.

Before focusing on the very important matter of procedures, we should ask whether the introduction of the subsidiarity principle by the Maastricht Treaty has really provided effective protection for regional and local powers.

A paradox is sometimes mentioned in this regard. It is striking, in fact, that although authorities of this type feature among the institutional players that pushed hardest for the introduction of the subsidiarity principle in the Treaty, they are not mentioned in Article 3B of the Maastricht Treaty (Article 5 of the consolidated text), which literally refers to the Member States⁽¹⁰⁾.

It comes as no surprise, then, that one of the demands put forward most insistently – including in the European Parliament – is for the inclusion in legislation of explicit reference to the regional and local levels of government within the Member States.

This demand has been fulfilled in the Constitutional Treaty. We refer to the clarification in Article I-11(3) that intervention by the Union is allowed only where the objectives of the proposed action cannot be sufficiently achieved by the Member States, not only – take note – "at central level", but also – and this is the point – "*at regional and local level*".

The symbolic value of this inclusion is obvious. Its prescriptive scope must not, however, be overestimated. There is no doubt that even by the standards of the regulations in the EC Treaty, any assessment of whether the States are able to achieve sufficiently the objectives of a proposed action has to be made taking account of all regional and local levels of government that exist within them.

So this is not the area in which the position of the regional and local authorities referred to above (paragraph 5) is strengthened. That must be sought elsewhere, in procedures.

8.1 Procedural regulation

As we know, the importance assumed by procedures in the application of the principle was immediately picked up by the Union, which during a period punctuated by the Edinburgh European Council (12 December 1992), the interinstitutional agreement of October 1993 and the protocol appended to the Treaty of Amsterdam, sought to model

(10) Clear reference is made, though implicitly, to these authorities in Article 1(2) of the EU Treaty (Article A of the Maastricht Treaty), which, as we have mentioned, includes among its objectives the creation of "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". This is in some respects a programming provision.

the Community decision-making process on the requirements of the subsidiarity principle.

The proceduralisation thus introduced mostly concerned the initiative phase. We refer, in particular, to the provisions requiring the Commission to:

- a) conduct consultations⁽¹¹⁾;
- b) check that the correct conditions for Community intervention exist, in the light of a series of guidelines included in the Protocol on subsidiarity appended to the Treaty of Amsterdam⁽¹²⁾;
- c) show, from the justification for the act, the qualitative and where possible quantitative indicators that support Community intervention as the preferable option⁽¹³⁾.

The specific line of examination taken by officials immediately after the Maastricht Treaty was signed was meant to meet these requirements. The aim was, among other things, to underline the added value of Community action and the cost of inaction⁽¹⁴⁾.

The phases that follow the initiative phase were also affected by proceduralisation (though less intensely). We refer on the one hand to the requirement that the check on the compliance of the Commission's proposals with Article 5 of the EC Treaty should be an integral part of the evaluation submitted to the Council of Ministers and to the

(11) On the basis of the first bullet of section (9) of the Protocol on the application of the principles of subsidiarity and proportionality appended to the Treaty of Amsterdam, it is only possible to avoid consultation (which, according to section III(a) of the Conclusions of the President of the European Council in Edinburgh on 12 December 1992, could be extended to all Member States), "in cases of particular urgency or confidentiality".

(12) Section (5) of the above-mentioned Protocol on subsidiarity lists the following conditions:
– the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
– actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (...) or would otherwise significantly damage Member States' interests;
– action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

(13) Cf. section (4) of the above-mentioned Protocol on subsidiarity appended to the Treaty of Amsterdam.

(14) See in particular the Commission Report to the European Council on the adaptation of Community legislation to the subsidiarity principle (COM (93) 545 final).

European Parliament, to the extent of their respective responsibilities⁽¹⁵⁾, and on the other to the requirement that any amendments proposed by these bodies also need to be justified in view of the subsidiarity principle, where such amendments involve changes to the sphere of Community intervention⁽¹⁶⁾.

This was the *acquis* at the time when the "Protocol on the application of the principles of subsidiarity and proportionality" was appended to the Constitutional Treaty. This includes a few very important changes concerning the position of the regional and local authorities.

These are:

- the explicit provision that, for the purposes of wide consultation which, except in cases of exceptional emergency, must precede the proposal of legislative acts, the Commission must *take into account* "the regional and local dimension" (Article 2);
- the rule, regulating the consultative role of national parliaments, that states that they (or any chamber within them) must consult, where appropriate, "regional parliaments with legislative powers" (Article 6);

(15) See, in particular, sections 11 of the Amsterdam Protocol and 2.1 of the above-mentioned interinstitutional agreement (the latter states expressly that the Council can request an extra examination from the Commission, in accordance with Article 152 of the Treaty). Also section III(b) of the Conclusions of the Presidency of the Edinburgh European Council ("The following procedure will be applied by the Council from the entry into force of the Treaty ... The examination of the compliance of a measure with the provisions of Article 3b should be undertaken on a regular basis; it should become an integral part of the overall examination of any Commission proposal ... The relevant existing Council rules, including those on voting, apply to such examination. This examination includes the Council's own evaluation of whether the Commission proposal is totally or partially in conformity with the provisions of Article 3b (taking as a starting point for the examination the Commission's recital and explanatory memorandum) and whether any change in the proposal envisaged by the Council is in conformity with those provisions. ... The Article 3b examination and debate will take place in the Council responsible for dealing with the matter. The General Affairs Council will have responsibility for general questions relating to the application of Article 3b.").

(16) See section 2.3 of the October 1993 interinstitutional agreement: 'Any amendment which may be made to the Commission's text by the Council or Parliament must be accompanied by a justification regarding the principle of subsidiarity and Article 3b if it entails a change in the sphere of Community intervention.'

- the requirement that, for the purposes of justification with regard to the subsidiarity principle, in the case of framework laws the implications for "regional legislation" should also be considered (Article 5).

To complete the picture, we should say that it also strengthens the role of the Committee of the Regions, in addition to providing a guarantee for sub-state levels of government. As we have said (see 7 above), the Protocol gives the Committee of the Regions the power to bring actions in the Court of Justice on the grounds of infringement of the principle of subsidiarity, where this is due to legislative acts on which it should be consulted (Article 8(2)).

9. *The regional presence in the Permanent Representations and in the national delegations involved in Community decision-making processes*

The channels we have covered so far are not the only routes available to regional and local sub-state authorities for involvement in European policy making.

Not infrequently they participate, through their own representatives, in the national bodies set up to take part in EU decision-making processes, i.e. the permanent representations and national delegations. We should also mention that they are able to participate as well in the committees and working groups that work with the Council and the Commission.

The significance of these channels is confirmed at both European and national level.

On the European side, we must mention the major support for increased regional and local authority participation in framing European policies, contained in the White Paper on European Governance of 27 July 2001⁽¹⁷⁾. This strongly encouraged a more systematic dialogue with representatives of these authorities, including by involving them in the working groups and committees working with the Commission and the Council.

(17) COM(2001) 428 final/2.

On the national side, we should mention the growing recognition that these channels are receiving in positive law.

Sometimes this recognition is even written into the constitution, as for instance in Germany, Portugal and Italy.

In Germany, the constitutional law that provides for the participation of regional ministers in Council sessions (see 6.1 above: Article 23(6), GG) also requires that, in matters of exclusive legislative competence of the *Länder*, the exercise of powers by the Federal Republic of Germany as an EU Member State must, as a rule, be given to a representative of the *Länder* chosen by the *Bundesrat*. This provision was enacted by the Federal Law of 12 March 1993 (*Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*), on the strength of which, when matters that are the exclusive responsibility of the *Länder* are under consideration, the handling of negotiations (*Verhandlungsführung*) within the consultative bodies (*Beratungsgremien*) of the Commission and Council must be handed by the Federal Government to a representative of the *Länder* (section 6(2)). This law also provides for the possibility of regional representatives being included in national delegations to the same consultative bodies when negotiations concern matters in which, under national law, the involvement of the *Bundesrat* is required, or where the *Länder* have powers or "essential interests" (*wesentliche Interessen*) (section 6(1)).

In Portugal, the relevant article is Article 227(1)(x) of the Constitution. This provision states that the two autonomous regions, the Azores and Madeira, shall participate in the process of European construction, including through the presence of their representatives in national delegations involved in Community decision-making processes, on matters that concern them.

In Italy, constitutional recognition of the role of the regions in European decision-making processes dates back to the 2001 constitutional reform (Const. Law 3/2001). The new Article 117 introduced by this law states, in its fifth paragraph, that the Regions and Self-Governing Provinces of Trento and Bolzano, in matters within their remit, shall participate in any decisions relating to the framing of Community law. In accordance with the national law (Article 5 of Law 131/2003) implementing Constitutional Law 3/2001, these authorities shall play a direct role, in matters within

their legislative remit, in framing Community acts, participating as part of government delegations in the activities of the Council, the working groups and committees of the Council and the European Commission. This law also states that, on matters falling within residual regional competence (Article 117(4) of the Constitutional Law), the president of a regional authority (*Giunta regionale*) can be the leader of the delegation.

In Austria the situation is rather different. Here, the Constitution limits itself to giving regional ministers the possibility of participating in Council sessions (see 6.1 above), and says nothing about other bodies (such as working groups and committees). However, the possibility of allowing representatives of the *Länder* to participate in these bodies too is provided for in an agreement between the Federation and the *Länder* signed on 12 March 1992 (Article 8 of the *Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15° B-Vg über die Mitwirkungen der Länder und Gemeinden in Angelegenheiten der Europäischen Integration*). This states, among other things, that the approval (*Einvernehmen*) of the leader of the delegation is required for these representatives to speak.

Other significant evidence of the institutionalisation of regional participation in the preparatory phase of the decision-making process, through involvement in national bodies set up for this purpose, can be seen in laws that have changed the composition of national permanent representations to take account of regional participation. This has been done either by setting up a special body for this task, as in Portugal⁽¹⁸⁾, or by giving regional authorities the right to send their own officials to the representation, as

(18) In 2001, the Portuguese Permanent Representation was given responsibility as special adviser on matters relating to the autonomous regions of the Azores and Madeira (Decree-Law 146/2001 of 2 May - *Diário da República*, series 1-A, 101 of 2 May 2001). The regional adviser, appointed on a proposal by the competent body of the regional government, participates in meetings and working groups looking at matters concerning the two autonomous regions, promotes and upholds the adoption of special EU provisions in favour of these regions and generally monitors the activities of the Representation and the Council on matters relating to their interests.

in Austria⁽¹⁹⁾, in Italy⁽²⁰⁾, and, as will be seen, in Spain. There is similar regional involvement in the Finnish Permanent Representation, in which the government of Åland has its own adviser.

With regard to Spain, an agreement between the State and the Autonomous Communities, ratified on 9 December 2004 led to an arrangement whereby two officials from the office of the Councillor for Autonomous Affairs, appointed on the basis of a proposal by the Autonomous Communities, would be included in the Permanent Representation. This was different from the original solution, which consisted of the inclusion in the Permanent Representation, from 1996 (RD 2105 of 20 September 1996, *Boletín del Estado* 229 of 21 September 1996), of the Councillor for Autonomous Affairs, a central government official (specifically from the Department for the Autonomous Communities) responsible for keeping the Autonomous Communities informed about matters affecting regional interests discussed and dealt with at the various EU Council of Ministers meetings. This system was probably inspired in part by the German model in which a German observer from the *Länder* (*Länderbeobachter*) is given the task of keeping the *Länder* up to date on EU developments that may affect them. However, there are two important differences between the *Länderbeobachter* and the Spanish Adviser: the German observer comes from the *Länder* himself, and is also required to participate in Commission and Council committees and working groups whenever the *Bundesrat* has not appointed representatives from the *Länder* to these (Article 2(2)(b) of the agreement on the *Länder* observer to the EU – *Abkommen über den Beobachter der Länder bei der Europäischen Union* – signed by the *Länder* in Erfurt on 24 October 1996).

(19) Article 9 of the Agreement between the Bund and the *Länder* dated 12 March 1992, mentioned above, makes the following provision: 'The *Länder* are authorised, in agreement with the Federal Government and at their own cost, to send representatives and other personnel to the Austrian Representation to the European Communities'.

(20) Law 52/1996 gave the Regions and the Autonomous Provinces of Trento and Bolzano the right to send four officials to participate in Italy's Permanent Representation to the European Union on matters specifically concerning them. These officials are chosen by a mixed organisation – the State-Regions Conference – but they are appointed by the Foreign Ministry.

10. Associations

An analysis of the channels through which regional and local authorities participate in the preparation of Community policies would not be complete without a look at some of the other channels available, in addition to those already considered. These include the associations representing regional and local authorities and the representation and liaison offices these authorities have set up in Brussels.

Starting with the associations, we should first point out the "historic" role they played in the gradual opening up of the European system of government to the regional and local dimension. It is to their efforts that, for instance, the creation of the Committee of the Regions is due. Furthermore, they are constantly interacting with the European institutions and bodies to protect the interests of their members.

Committee of the Regions' fact sheets⁽²¹⁾ on the associations representing regional and local authorities make a distinction between associations that are European in scale from those that are purely "regional" (i.e. covering a limited territorial or administrative area). The second category includes, for example, the Association of Elected Representatives from Mountain Areas (AEM), the Alliance of Maritime Regional Interests in Europe (AMRIE), the Association of European Wine-Producing Regions (AREV), the Baltic Sea States Subregional Cooperation (BSSSC), and the European Industrial Regions Association (EIRA).

With regard to Associations that are European in scale, the following deserve special mention:

- AEBR (Association of European Border Regions)
- AER (Assembly of European Regions)
- CALRE (Conference of European Regional Legislative Assemblies)
- CEMR (Council of European Municipalities and Regions)
- CPMR (Conference of Peripheral Maritime Regions of Europe)
- Eurocities
- REGLEG (Conference of European Regions with Legislative Power)

(21) Fact sheets on the activities, representatives and schedules of the European associations of regional and local authorities (updated for the second half of 2004).

The Committee of the Regions has produced fact sheets on the structure and aims of these associations, and a reading of these is recommended.

We now turn to look at the gradual institutionalisation of these associations representing regional and local authorities in recent years, particularly since the above-mentioned White Paper on European Governance (2001).

As we have already said (see 9 above), this document gave unprecedented impetus to the *culture of consultation and dialogue* (to use the title of a Commission communication that was published shortly afterwards⁽²²⁾). In particular, having highlighted the need for "stronger interaction with regional and local governments and civil society", it identified "a more systematic dialogue with representatives of regional and local governments *through national and European associations*" as the most appropriate way of achieving this. Hence the stress placed on "consultation" as "the processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission", according to the Communication of 11 November 2002.

So the role of the Committee of the Regions in this perspective is a strategic one, and it is no coincidence that it is mentioned on a number of occasions by both the White Paper and the Communication of 11 November. It is confirmed, moreover, by the Protocol governing arrangements for Cooperation between the European Commission and the Committee of the Regions, signed on 20 September 2001⁽²³⁾. In fact the Committee, according to one of its own documents dated 30 April 2002, and approved by its Bureau on 14 May 2002⁽²⁴⁾, is the "only body to represent local and regional authorities in the Community decision-making process". As the same document points out, it is therefore "the natural partner and spokesperson for the associations representing these authorities within the Community institutional system".

In this capacity, and in the wake of the White Paper, the Committee immediately committed itself to improving consultation and cooperation with regional and local associations, both in advance of and following its own work, promoting among other

(22) Communication of 11.12. 2002: COM(2002) 704 final.

(23) DI CdR 81/2001.

(24) R/CdR 106/2002 p. 11.

things joint structural actions and regular meetings of the Presidents and General Secretaries⁽²⁵⁾.

Seeing it as the key interface between the Community institutions and regional and local authorities, the Commission, as part of its efforts to promote a culture of dialogue entrusted the CoR with the essential task of selecting the associations for inclusion in this dialogue. In its Communication of 19 December 2003, entitled Dialogue with associations of regional and local authorities on the formulation of European Union policy⁽²⁶⁾, we read the following: "It is the task of the Committee of the Regions to co-operate with the different associations in order to establish the selection criteria. In any case, such organisations must be representative bodies that are able both to deliver a jointly agreed opinion from their members and to pass on to them the Commission's proposals and policy guidelines. The associations that are selected will be required to ensure that they are represented at the highest level. In addition, their selection procedures should be transparent, clear and in compliance with the minimum standards of consultation that apply in the Commission."

For its part, the Committee of the Regions has developed a series of joint action plans agreed with individual associations. In the period between July 2003 and March 2004, there were four of these, with CEMR - Council of European Municipalities and Regions (29 July 2003); with CALRE (8 August 2003); with Eurocities (1 March 2004); and with AEBR (5 March 2004)⁽²⁷⁾. Obviously there is not complete consistency between the priorities set by these plans (they are influenced by the type of interests represented by the associations with which they were agreed). We should mention, however, that the most recent of them make explicit provision for the involvement of local experts from the association in the working groups or *ad hoc* task forces that the Committee sets up to provide support for rapporteurs, to monitor specific projects and to prepare projects or events.

Regarding the arrangements for the involving partner associations in its work, the Committee⁽²⁸⁾:

(25) Ibid.

(26) COM (2003) 811 final.

(27) These action plans are given in CdR 380/2003 Part I Appendices.

(28) 78th meeting of the Bureau of the Committee of the Regions, 19 March 2004, item 13 b.

- in the preparation of opinions and reports on joint priorities established by the annual action plan, has undertaken to ensure its own administration includes any information from or position taken by a partner association in the preliminary analysis supplied to the rapporteurs;
- has made express provision for collaboration between rapporteurs and partner associations;
- has arranged to invite partner associations to all Committee meetings on joint priority projects;
- has arranged that in cases established by common accord, and particularly when preparing outlook projects, partner associations may not only participate actively in working groups, but also be invited to preparatory meetings of the Committee.

11. *Regional representation and liaison offices in Brussels*

Finally, turning to the representation and liaison offices in Brussels, we should first point out that they have mushroomed since the first ones were set up in the mid 1980s. Today, according to the most reliable estimates, there are approximately 200 of them.

They vary considerably in type. Some are set up by law, others by non-legislative resolutions; some are governed by public law (as public bodies or bodies of the authority they represent), and others are privately run (as associations or companies). They also vary in terms of the base they represent: there are offices representing a single authority and offices representing several authorities (not necessarily of the same type).

Since Part Two of this study gives an analysis of the different national solutions, we merely need to point out here that setting up offices of this type is now the rule. The two exceptions to this are Portugal and Belgium, neither of which has offices representing regional or local authorities. In the case of Belgium, however, this is not because these authorities have a lower European profile; it is a result of their geographical proximity to EU bodies and offices, thus making the establishment of dedicated offices unnecessary.

These offices play a very important role, for disseminating and exchanging information, for the contacts they can maintain with the Community institutions, for their lobbying activities on behalf of the authorities they represent, and finally for the links they can maintain with other similar authorities throughout the European Union.

They are becoming increasingly respected as interlocutors of the bodies of the EU, for evaluating the impact at regional and local level of draft policies. The fact that they represent one specific authority, or perhaps several geographically adjacent authorities (or authorities with closely-related interests) means they are not interchangeable with the associations, since unlike these they can express the interests of a geographically defined area. Therefore, they have a special role to play in the *direct consultation* of the authorities they represent.

CHAPTER II

PARTICIPATION OF REGIONAL AND LOCAL AUTHORITIES IN THE PREPARATORY PHASE OF EUROPEAN POLICY MAKING - NATIONAL SIDE

1. Informing regional and local authorities in the preparatory phase of Community procedures. – 1.1 Duty of information. – 1.2 Information channels. – 1.3 The collection of information by regional and local bodies. - 2. Techniques for involving regional and local authorities in the internal European decision-making processes. - 2.1 The upper chamber. - 2.1.1 Level of formalisation. - 2.1.2 Membership. - 2.1.3 Characteristics. - 2.2 Ad hoc interregional bodies.. - 2.3 Joint national-regional bodies. - 2.4 Techniques for bilateral relations. - 2.5 Consultation of associations representing local authorities. – 2.5.1 Consultation: general aspects. – 2.5.2 The importance of the associations. – 2.5.3 Consultation methods

1. Informing regional and local authorities in the preparatory phase of Community procedures

Participation in decision-making processes presupposes that all the information required to make the decision, or the right to access this information, is available. It is clear that, if they are not informed in due time about what is being discussed or decided upon in Europe, regional and local authorities are not in any way able to influence the content of the final provisions.

The impact of participation also varies depending on the stage in the course of the law's formation at which information becomes available. So information should not only be appropriate, but should also come at the right time, which is more likely to be the initiative phase, in order to enable the regional and local authorities to intervene "upstream" of the decision-making process. Information obtained before the Commission's proposal is presented to the Council of Ministers and the European Parliament is in fact a prerequisite for more effective participation in the preparation of Community law.

1.1 Duty of information

Despite the importance of the availability of information for any form of participation in the preparatory stages of the Community decision-making process, in most Member States no provision exists for governments to have to pass on documents in their possession to sub-national and local authorities on matters that concern them. In systems of government where a legal obligation does exist, safeguards differ widely in two respects: in terms of the source of regulation used (constitutional, legislative or non-legislative), and in terms of the information provided.

Constitutional laws concerning the duty to keep regional and/or local authorities informed exist only in Austria, Germany, Belgium and France.

The content of these laws is quite varied. In one case, there is a requirement to inform sub-national authorities *directly*; in other cases, the duty is to provide information through the second house. In the latter case, regional and/or local authorities are therefore informed *indirectly*, through the chamber representing them.

Direct information is provided for by Article 23(d)(1) of the Austrian Federal Constitution, which includes the duty on the government to provide information to the regional authorities⁽¹⁾.

Indirect information – through the second chamber – is provided for by the German Basic Law (Article 23(2)⁽²⁾); by the Belgian Constitution (only as regards Community

treaties, Article 168⁽³⁾); by the French Constitution (Article 88(4)⁽⁴⁾); and also by the Austrian Federal Constitution (Article 23(e)(1)⁽⁵⁾). Of course the effectiveness of this channel depends on the structure and quality of the representation of the second chamber. For more on this, please refer to the section on information channels (1.2.1. in particular).

Constitutional regulation of the information process is based on three criteria. Whether together or separately, they concern the *time* of communication, the *subject* of communication, and – in one case – its *quality*. Regarding the first criterion, there are requirements for the information to be provided "without delay" (Austria and Germany) or "from the moment of transmission to the Council of the European Union" of the acts referred to (France). Regarding subject, the constitutional provisions that consider this with any precision, do so in these terms: "proposals within the framework of the European Union which concern matters within their (the *Länder's* – author's note) competence or could otherwise be of interest to them" (Austria), or "all projects within the sphere of the European Union" (France). The only regulation explicitly governing quality is the German law, which states that communication should be "exhaustive" (*umfassend*).

As we have said, however, national provisions for informing regional and local authorities during the preparatory stages of Community legislation are not only constitutional. They may also involve legislative and in some cases non-legislative acts.

Belgium's "special laws"⁽⁶⁾ carry particular judicial force. The special reform law of 8 August 1980 (Article 16(2)(2)) extended to the Communities and Regions the right

(1) "The Federation shall inform the *Länder* without delay about proposals within the framework of the European Union which concern matters within their competence or could otherwise be of interest to them. (...)The same shall apply in the case of municipalities in so far as their own sphere of competence or other important interests of the municipalities are affected. Representation of the municipalities in these matters shall be the responsibility of the Austrian Association of Cities and Towns and the Austrian Association of Municipalities."

(2) "The Federal Government shall inform the Bundestag and the Bundesrat in an exhaustive and timely way."

(3) "The Chambers shall be informed of the opening of negotiations for any revision of the founding treaties of the European Communities and the treaties and acts amending or supplementing them. They shall have knowledge of the content of the draft treaty before it is signed."

(4) This law states that the Senate shall receive "from the moment of their transmission to the Council of the European Union, drafts and proposals for European Community or European Union acts that include legislative provisions".

(5) "The competent representative of the Federal Government shall inform the National Council and Federal Council in good time of all projects within the European Union and allow it to express an opinion on these."

(6) This term in Belgian law denotes a law passed by a qualified majority, calculated both in relation to the whole Assembly and within each linguistic group (French and Flemish) making up the two branches of the Federal Parliament. These laws are provided for in the Constitution.

granted to the Chambers by Article 168 of the Constitution to be fully informed "of the opening of negotiations for any revision of the founding treaties of the European Communities and the treaties and acts amending or supplementing them." The same law states that "they shall have knowledge of the content of the draft treaty before it is signed". Article 92-d of the same law, introduced by the special law of 5 May 1993, states, finally, that drafts of secondary Community acts (regulations and directives) must be communicated both to the legislative assemblies and to the community and regional councils at the same time as they are sent to the Council of Ministers.

Legislative regulation is used in two Member States in particular – Italy and Portugal.

In Italy, the duty of sending information to the regions and self-governing provinces is laid down in Article 1-a of Law 86 of 1989 as amended by Article 6 of Law 422 of 29 December 2000 and Article 6 of Law 39 of 1 March 2002.

In Portugal, the duty of sending the autonomous regions all the information they may need in order to express an opinion on legislative activity, provided for in Article 2 of Law 4 of 1996, is understood to apply also to Community legislative acts, given the regions' participation in the position the Portuguese State must take in the EU integration process. The Portuguese autonomous regions must be sent all the preparatory documents and information required to express an opinion, while Italy's autonomous provinces and regions must be sent drafts of legislation and guidelines from the bodies of the European Union and the European Communities. Under Italian law, communication must include an indication of the date planned for discussion or adoption by the Community bodies.

In two Member States, the United Kingdom and Spain, the right of sub-national authorities to receive information on the Community decision-making process from the government is based on provisions contained in non-legislative acts: in the UK, the Departmental Guidance Notes (DGNs) that supplement the Concordats between the devolved administrations and the British government on relations with the EU; and in Spain, the agreement of 30 November 1994 adopted by the Spanish Conference on affairs relating to the European Communities (CARCE), an informal organisation set up in 1988 to provide horizontal and vertical coordination between central government, represented by the Ministry for Public Administrations in collaboration with the Secretary of State for the EEC, and the Autonomous Communities.

The subject of this duty of communication, in the case of the UK, is to provide information on matters under discussion by sending copies of the most important correspondence. In the case of Spain, it is to provide the necessary documentation and data, and notify any substantive change from the agreed national position.

In Austria, a non-legislative act (the agreement of 12 March 1992 on the right of the *Länder* and the municipalities to collaborate on matters relating to European integration) contains a non-exhaustive list of the acts that the *Bund* (the federation) is obliged to send to the *Länder* immediately in implementation of the above-mentioned Article 23(d)(1) of the Federal Constitution. In particular, this agreement extends the duty of information to initiatives undertaken in the EU sphere by the federal government.

1.2 Information channels

The methods used by the regulations reviewed above to ensure that information is passed to the regional and local authorities are quite diverse. Sometimes information is direct, as for the Austrian *Länder* under the terms of Article 23(d)(1) of the Federal Constitution. Generally, however, it is indirect, in that it comes via collective bodies or authorities, such as the second chamber, interregional bodies, intergovernmental bodies, or the associations representing the authorities for whom the information is intended.

Starting with the second chambers, the main observation to be made is that their ability to function efficiently as providers of information to the regional and local authorities depends, as we said earlier, on their structure. They tend to be highly efficient if they are made up of members from the Regions (as in the German *Bundesrat*, which comprises members of the governments of the *Länder*), and less efficient where the institutional relationship between members of the second chamber and the regional and local authorities is not so strong (as in Austria, Belgium and

France)⁽⁷⁾.

One significant example of an interregional body with a major role to play in sending information on Europe to the sub-national authorities is Austria's *Integrationskonferenz der Länder* (IKL), which is regulated by an agreement entered into in 1992. It should be noted that although under the Constitution the Austrian *Länder* must be kept directly informed, under an agreement between the *Bund* and the *Länder* dated 12 March 1992, the relevant ministers send documents to the *Länder* liaison office, part of the IKL, which has handled the exchange of information between the *Länder* since 1951.

The situation in Italy is similar. Here, information must be passed on to the regions and self-governing provinces through the Conference of Presidents of the Regions and Autonomous Provinces of Trento and Bolzano in accordance with Article 1-a of Law 86 of 1989.

Looking at intergovernmental bodies, we should first clarify what is meant by this term. It refers to elected bodies composed of both members of the federal government and members of the regional governments.

For the purposes of mutual information, in Austria an intergovernmental body was set up within the Federal Chancellery. The council for EU integration policy (*Rat für Fragen der Europäischen Integrationspolitik*) consists of two representatives of the Conference of Governors of the *Länder* and two representatives of the *Landtage*.

As we have said, CARCE was set up in Spain more to exchange information on Community policies than for actual regional participation in the preparatory stages of Community legislation.

Finally, we should look at the case of Italy, where there is a special "Community session" of the permanent conference for relations between the State, the regions and

(7) It should be pointed out that Finland could also be considered to have a parliamentary system for conveying information. It should be remembered that a) the Åland Islands are guaranteed a member in the Finnish Parliament (Eduskunta); and b) the member of parliament from this autonomous province is automatically a member of the parliamentary committee for European affairs, which has powers of guidance and control over the Finnish government in Community decision-making processes and to which all relevant information is sent.

the self-governing provinces of Trento and Bolzano, chaired by the Prime Minister or a minister delegated by him, consisting of the 20 presidents of the regions with ordinary or special status and the two presidents of the self-governing provinces. This session, the purpose of which is to align national policy on the preparation of Community acts with the needs of the regions (Article 10 of Law 86 of 1989 as amended by Article 13 of Law 128 of 1998), puts the regions in a position where they are informed of the decision-making processes under way in the Community system.

Regarding information passed through the representative associations, Article 23(d) of the Austrian Federal Constitution provides for the use of this method for keeping the municipalities informed, stating that information should be passed from the *Bund* to the Municipalities through the Austrian Association of Cities and Towns (*Österreichischer Städtebund*) and the Austrian Association of Municipalities (*Österreichischer Gemeindebund*).

1.3 The collection of information by regional and local bodies

In the absence of any duty upon national governments to keep regional and local authorities informed, the latter must take steps to intercept and collect information on Community decision-making processes themselves. This is also true for local authorities in Member States where the government has a duty to inform only the regions. It can be seen that the regional and local authorities are capable, through direct contacts with Community and national institutions, of independently gathering information on the Community decision-making process, without the national government sending them the documents in their possession.

In all Member States, the national associations of regional and local authorities act as "collector and distributor of information" among their members. Among the various information channels on the Community side, the national delegations to the Committee of the Regions play a central role in some cases, working in close contact with the offices of the associations of regional and local authorities in Brussels.

However, the associations representing the interests of regional and local authorities are often the only means available, even in highly regionalised States, for the smaller local authorities to receive information on the Community decision-making process.

It is worth mentioning that sub-national authorities, like anyone else, can find out valuable information on current Community decision-making processes through the availability on the web of acts and documents given to the national parliaments involved in the preparatory stages of Community legislation.

This "virtuous circle" has similar characteristics in particular in Denmark, Finland and Sweden. In these countries, the traditional transparency in political and administrative activity has led the national parliaments (the Danish *Folketing*, the Finnish *Eduskunta* and the Swedish *Riksdag*) to set up special EU information centres that publish on websites all the material available to the parliamentary committees for European affairs, which give a kind of mandate to the national government in negotiations at Community level. This bears out the "qualitative" difference of democracies in which the representative assemblies have managed to retain a central role in policy-framing.

2. *Techniques for involving regional and local authorities in internal European decision-making processes*

2.1 *The upper chambers*

In Member States with regional and local authorities that have a high level of autonomy in governing their own communities, the involvement of these authorities in national decision-making processes at the highest level sometimes occurs through the creation of a special "upper chamber", a specialised second house of the Parliament.

The configuration of these second chambers naturally differs in line with the overall system of government and institutional make-up of each country (for example, they are not necessarily part of a two-chamber system in the technical sense, still less when the two have equal status) and they can be distinguished on the basis of the method of composition of their regional representation (or second level of government below the central State), their powers and their role, not only in terms of form but also of substance. However, disregarding the wide range of features peculiar to each chamber, which mean that strictly speaking each one is a case apart, even when they share the same name (as is the case with the Austrian and German *Bundesräte*), their primary characteristic is the same: they are the highest forum for relations between the State and the regions. They are the constitutionally enshrined body that represents the

country's major regional authorities at the highest level, a prerequisite (at least a potential one) for them to play a forceful role in decision-making.

This is one characteristic that, along with others, generally denotes a federal-type government; similarly, the way it works also has limited reference to the European context and, in particular to a few of the countries covered by this research. At present, countries with this type of chamber are in a small minority. It is apparent, however, that the growing importance of Community institutions and policies has had an influence on some second chambers in that it has led to reforms making them specialised in representing self-governing authorities and expressly extending their role to European matters. In many States (beginning with the federal states), this expansion of their role is justified by the need to compensate the federate bodies for the loss of powers transferred to the Community.

A number of aspects require special consideration.

2.1.1 *Level of formalisation*

The creation of the upper chamber, and often its detailed regulation, is generally laid down in the Constitution. A maximum level of formalisation is made necessary by the special importance assumed by the upper chamber in the system, and the interaction it generates with other constitutional bodies, just by its existence, changing the traditional topography of relations between governmental players by adding a new focus.

Thus the Basic Law of Germany (Article 50 GG) provides explicitly for the *Bundesrat*, the federal council through which the *Länder* collaborate in the legislation and administration of the Federation and, notably, also in EU-related affairs. Similarly, the Austrian Federal Constitution establishes the *Bundesrat* that, like other chambers (the National Council, the *Nationalrat*), exercises the legislative power of the Federation (Article 24, B-VG) and has powers of control and guidance over the federal government (Article 52 B-VG).

These are the countries that have opted most clearly (right from the start) for the creation of a specific body to represent the authorities making up the federation (disregarding the distinctive individual features of the two systems). But even in other

countries where the decision to allow the regions representation in a second chamber has been less clear-cut (and also shows different degrees of intensity), the Constitution has been used to achieved this. In these countries, constitutional reforms have been made to the founding text, using less direct technical solutions to adapt the second chamber to the new presence of the regions (a sign perhaps of the difficulty of changing certain equilibria once they have become fixed).

Belgium is a good example, with some quite unique features, as is well known. Once the decentralisation process was well advanced, with the creation of a federal State (including in terms of its formal name), it was clear that reform of the Senate could no longer be put off. This was executed in the constitutional reform of 1993 (new Article 67 of the Constitution). Something similar but on a much smaller scale could be said to have taken place in other government systems where regionalisation occurred to differing degrees and in differing forms, as a result of various major environmental and political factors (including European integration) that together produced an asymmetric form of decentralisation. This is true of Spain, where (until plans to make the Senate the true seat of regional representation are put into effect) the balance currently found with the setting-up of the General Committee of the Autonomous Communities still resides within the (old and inadequate) *Senado*. This at least provides an indication, or confirmation, of what would be the natural forum (if not the principal one) for a body representing the regions.

On the other hand, it has to be said that simply making provision, through the Constitution, for the direct or indirect involvement of the regions, by including them in the second chamber or giving them a marginal role, surely seems inadequate for ensuring they have appropriate weight in terms of representation and concrete involvement in decision-making. Several countries provide examples of this. First there is Spain, with a Senate explicitly defined (though ineffectively constructed) as the chamber to represent the regions (Article 69 of the Constitution). But France too, which has recently arrived at regionalisation having taken a cautious, gradual approach, has made a number of small functional changes to the constitutional regulation of its Senate: simply affirming (Article 24 of the Constitution) that the Senate provides representation for regional communities (which now include the regions) is a poor solution, only to be expected from a State keeping a tight grip on its unified, centralised characteristics. And similarly in Italy, where although the intention was for the Senate to be elected by the regions (Article 58 of the

Constitution), the implementing measures to achieve this, though possible, have never been enacted⁽⁸⁾.

2.1.2 Membership

The choices with regard to composition play a decisive part in determining the role and institutional impact of the upper chamber.

There are significant differences between the two *Bundesräte* on this point. The German model is composed of members of the governments of the *Länder*, which appoint them and recall them. This produces true institutional representation directly in the hands of each *Land* (or rather, its governing majority), and seems to fulfil the goal of balancing various elements: maintaining a high political profile while retaining technical competence and flexibility (its members are ministers who can have themselves represented, but only by other members of the respective governments, to prevent the body from becoming too bureaucratic), ensuring unified regional representation (members are bound to follow the instructions received from the governments they belong to; the votes of a single *Land* are expressed as a block and only by those members actually present; cross-parliamentary groups cannot be set up on a party basis, unlike in the *Bundestag*), and combining confrontation and cohesion (through joint work in the *Bundesrat*). It is a chamber where the balance is tipped in favour of the regional governments, though this is consistent with its regional role in a "federalism of execution".

The nature of the Austrian *Bundesrat's* composition is almost the opposite. Its representation is political, being elected with a proportional criterion by the parliaments (diets) of the *Länder* (external members can even be selected), and its regional aspect is not prioritised (no binding mandate, ability to form transregional parliamentary groups). It really is a second house of the parliament, therefore, which gives greater place to party political factors.

The type of upper chamber that exists in Spain is very far removed from these two models. Its composition - a mix of two different criteria, with only a fifth of its

(8) We should add that, according to the most widespread opinion, the constitutional reform approved on a first reading by both chambers and currently being debated on its second reading in the Senate would not put this right. Although Decree law Cost. S. 2544-13 speaks of a "federal" senate, the senate would essentially maintain its characteristics of political (rather than regional) representation.

members chosen by the parliaments of the Autonomous Communities while the rest are directly elected by the citizens - does not fulfil the goal of creating true "regional representation", distinct from and alternative to the party system. Proposals for reform seem to be blocked for now. However, through a reform of the *Senate's rules of procedure*, a General Committee of the Autonomous Communities has been set up as a sort of regional senate within the main Senate. This committee has almost twice as many members as a normal committee, mostly chosen by the autonomous communities, and representatives of the regional governments are entitled to attend sessions, although objectively they are not part of the assembly. The committee has wide powers that include the possibility of indicating the forms of participation of the *Comunidades* in defining the national position within Europe. But it is hampered by its position within an institutionally lifeless chamber, and it does not appear to attract regional interest or participation. This is a sign of problems, since the introduction of a regional chamber in a government system like this affects the core of the regional system and may upset the delicate balance between the centre and the regions, as well as between the regions themselves.

The French senate is distinguished by its unusual method of taking account of local authorities in a national parliament, based on the possibility of an "accumulation of electoral mandates" (from the municipalities up) for each senator, who thus personally executes the chain of representation between the centre and the periphery and ensures it is completed. This structural arrangement has introduced new possibilities for dialogue between members of parliament, local authorities and their associations in order to scrutinise plans for Community matters which the government, following the constitutional reform of 1992, must submit to Parliament before it moves to legislate. The Senate's special role as representative of the regions was strengthened by the constitutional reform of 2003, whereby all draft laws affecting local authorities must be put before this house.

2.1.3 Characteristics

The characteristics and powers of the German *Bundesrat* are well known and make it exemplary, in the opinion of some (see the chapter on Germany). It cannot strictly be categorised with other second chambers which, by their composition and powers, are part of a pure two-chamber system, although it provides regional representation through the regional governments, consistent with the overall system that exists in

Germany (described as "federalism of execution"). It performs an effective role for the Federation (of which it is an institution) and for the *Länder* (although it has come under recent criticism), since through their consultative forum at the highest level, they can take part in the legislative and administrative activity of the Federal State, and also in matters concerning the European Union, and their intervention is direct.

In the Austrian *Bundesrat* it is the lack of this precise regional, unified feature that is usually considered the weak point as far as the internal decision-making process is concerned. This would explain the growing role (though using different channels) of the presidents of the regional executives. We also note that the almost constant presence of broad coalition governments (with a high level of party political similarity between the majority at federal level and the majorities within the individual states represented in the second chamber) does not encourage the emergence of strongly diversified and contrasting formal positions between the centre and the periphery. On the other hand, these contrasting positions are not always beneficial (they can be exploited to encourage a political struggle at national level). However, extreme differences of opinion have occurred on some specific issues in which the overall constitutional guarantee in favour of the *Länder* has been decisive and has been successfully used by them. European decision-making processes are a case in point. The *Länder* successfully demanded a major role in these, based on the need for a consensus on the Treaties with a unified position in the *Bundesrat* (Article 50 B-VG).

2.2 Ad hoc interregional bodies

In highly regionalised countries the need sometimes arises for horizontal coordination so that it is easier to reach a joint stance vis-à-vis the central power. For this purpose, the authorities concerned may set up interregional bodies, which may win a place, and sometimes even formal recognition, within the system of government.

In Austria, for example, the composition of the *Bundesrat* and certain characteristics of the political system have meant that the *Bundesrat* does not successfully represent the unified will of each region before the federal government and has parallel bodies working alongside it (if not actually bypassing it).

The 1992 agreement between the *Bund* and the *Länder* therefore made provision for an Integration Conference (*Integrationskonferenz*) for the *Länder* (IKL) composed of

the President and of the President of the Assembly (Diet) of each *Land*, as well as the Presidents of the two houses of the federal parliament, to hammer out common positions on European issues which would be binding on the federal government. The Conference receives technical support from the standing committee for the integration of the *Länder* (*Ständiger Integrationsausschuss der Länder – SIL*), which consists of officials from the regional offices for Community affairs.

However, this has not prevented the IKL from losing influence to the non-institutionalised Conference of Governors of the *Länder* (*Landeshauptmännerkonferenz – LHK*), assisted by the Conference of Directors-General of the Regional Administrations (*Landesamtsdirektorenkonferenz*), which in practice has assumed the main liaison role, including where Community matters are concerned, thereby confirming the tendency for relations between the State and the regions to move to the executives.

In Germany, the periodic conferences of the *Länder's* ministers for Community policy and other regional ministers concerned also play a role of informal coordination (though without changing the original constitutional arrangement), in order to sort out their position before a decision is taken in the *Bundesrat* (which retains a central role). In Italy, the meetings held by the non-institutionalised coordination organisations of representatives of the regional executives and assemblies play a fairly similar role. The Conference of Presidents of the Regions (*Conferenza dei Presidenti delle Regioni*) and, less frequently, the Conference of Presidents of the Regional Councils (and Autonomous Provinces) (*Conferenza dei Presidenti dei Consigli regionali (e delle Province autonome)*) meet in advance of meetings with central government, which lacks a truly regional second chamber, with the assistance of technical support structures. The liaison office of the Austrian *Länder* (*Verbindungsstelle der Länder*), which among other things functions as a secretariat for their Conferences, plays a similar role.

2.3 Joint national-regional bodies

Among the many possible systems for involving regional and local authorities in European policy-making, the system based on the presence of joint national-regional bodies has assumed growing importance over time. Various factors are responsible for

this: some are general, while others relate more to individual national contexts, though these can occur in a larger number of countries.

On the one hand, the institutional role and importance of the State in the European process means that in the preparation of Community policy and choices, at least in the most recent phase, they form a vital tier in decision-making. On the other hand, there is the need, clearly felt by regional interests, for constant and systematic access to the centres of decision-making. The preferred contact for this is central government, following a sort of reassessment (if there has been any movement at all) of the day-by-day dimension, the realisation being that big politics springs from a rather mundane but daily commitment, and that even major policy directions need to be constructed, administered and implemented using a circular, interactive process, the stages of which (notwithstanding distinctions of roles and tasks) cannot always be marked out. In any case, the very nature of the matters and powers managed by the regional and local authorities makes this feeling and the consequent strategy understandable.

Despite this common feature, not all countries have developed joint bodies for either general or specifically European intergovernmental coordination. However, the government systems where these bodies do exist seem to have followed a similar route: they are created and operate in an area of relative institutional flexibility, though they have no particular safeguards or explicit constitutional protection (with its associated rigidity); they rely on instruments with little formalisation, and work in experimental realms (at least initially) to adapt their set-up, composition and powers to the actual requirements of policy-making.

The Italian Permanent Conference for relations between the State and the Regions is an interesting example of this. Created "from the bottom" as a link between executives to meet a common, objective need, and formalised in 1983 with a secondary act by central government, it gradually acquired more general responsibilities, eclipsing the many joint sectoral committees set up as time passed, and leading to their closure as it took over their functions. After ending up as substantially the only forum for concluding various types of agreement effective for all parties, it has now been more comprehensively regulated by a recent law. It is thus a political body composed of ministers from central government and their counterparts from the regional governments (attendance varies according to the matter being discussed), with major decision-making powers on all matters of regional interest, including European issues

(especially where these affect sectors or powers, while the Conference's special "Community session" struggles to stick to its six-monthly calendar).

The sectoral Conferences in Spain are similar, having been set up to meet the need for forums for cooperation on various issues that arose with the strong and rapid growth of regionalism. They bring together ministers from central government and the corresponding members of the executives of the Autonomous Communities. Though they have no formal decision-making powers, they can conclude agreements that are signed by the government and each of the Communities and that are binding on both parties.

The Conference on affairs relating to the European Communities (CARCE), mentioned earlier, forms part of this system. It began life in 1988 as an informal intergovernmental organisation, and with a mixed political membership. Over the years it has been given formal recognition (through agreements and then, in 1977, in law), which has grown in line with the expansion of its responsibilities. It now acts not only as a forum for the exchange of information and the implementation of Community policies, but also for the participation of the Autonomous Communities both in the preparation of the Spanish position in European decision-making processes, and in external relations, e.g. with the EU Council of Ministers. For this particular purpose it has its own executive body, the Coordinating Committee for EC affairs (which includes one representative from the Ministry of Foreign Affairs and one from the Spanish Permanent Representation in Brussels) and- from its now prominent position - the other sectoral Conferences. The system currently hinges on CARCE, as the forum for general coordination and guidance, and on the network of sectoral Conferences, as places for regional participation in the preparation and implementation of Community policies, and it maintains a central role (despite continuing weaknesses such as its dependence on central government, which retains control of its power to convene meetings and determine their agenda, and the Conferences' structural inadequacy for carrying out complex tasks).

Unlike the systems described so far, in other countries these joint bodies have different characteristics, for example including political representatives at the highest level and favouring their exclusive relationship with central government as interlocutor, but having powers that are more clearly consultative, albeit highly formalised. In Austria, the council for EU integration policy (*Rat für Fragen der*

Europäischen Integrationspolitik) was set up by a federal law and is composed of representatives from the federal government (federal chancellor, vice-chancellor and foreign minister), from the National Council, from the *Länder* (two representatives from the Governors and two representatives from the *Landtage*), from the municipalities and from the two sides of industry. It specialises in advising the federal government for the purpose of the discussion and coordination of decisions concerning integration policy (beyond just mutual information).

These bodies may still consult and discuss with central government and be highly formalised, but they may be more technical than political in nature, and their joint character may only involve limited and (only) indirect participation by regional and local authorities. This is true of the *Comissão Interministerial dos Assuntos Comunitários* (CIAC), set up in Portugal by legislative act, chaired by the minister for foreign affairs and formed from representatives of all the ministries involved in the various aspects of the European integration process and two representatives of the autonomous regions (and of them alone, pending the establishment of the ordinary regions). This is a technical body, and political decisions on European issues are taken by a special Council of ministers for Community affairs. Since evaluation of the impact of European integration is among the tasks to be performed by CIAC, it acts as a forum for consultation with economic and social players, as well as local authorities, municipalities and parishes, especially now that the right of the National Association of Portuguese Municipalities to be consulted has been recognised by law.

Regional and local authorities seem even more marginalised in Finland. Here, one representative from the Åland Islands sits on the Committee for European Affairs at central government level and its subcommittees.

2.4 *Techniques for bilateral relations*

Direct consultation through bilateral relations between the centre and the regional and local authorities, rather than via a joint body operating as a stable joint forum, is found mostly in government systems that have a political and administrative tradition of this type of consultation and that characteristically have forms of "asymmetrical regionalism". Here, sub-national components that belong to the same tier of government (whether regional, provincial, municipal, etc.) are not placed on an equal

footing, and there is marked differentiation on the basis of their particular features and characteristics, and the extent of their autonomy, resources and powers.

For example, relations between the State and the Regions in Italy were bilateral prior to 1970, when only five "special" regions existed and regionalisation of the whole country was not yet complete.

Similarly, today, the proven system of bilateral relations in the United Kingdom has been consolidated since the constitutional reforms which made Scotland, Wales and Northern Ireland into "nations" and gave them increased autonomy, albeit clearly not in a uniform manner. Thus the government in Whitehall continues to maintain different forms of relations, on a pragmatic, informal and flexible basis, where agreed choice predominates on a particular issue of importance to a particular region (rather than the principle of equal, generalised coexistence of all). At least, this is what happens in the current party political context, where the presence of the same majority (in the centre and the regions) probably provides the unity so often needed.

The Memorandum of Understanding establishes a Joint Ministerial Committee (JMC), a central consultative body that operates as the final settlement forum for defining the negotiating position on European issues that have an impact on regional powers, following specific procedures by which the relevant minister consults the other central government ministers and the regional ministers. A joint Concordat on the coordination of European Union policy signed by central government, Scotland and Wales governs other aspects of cooperation on Europe and provides for full involvement of the regional authorities in the preparation of the negotiating position, with an informal and flexible approach. Numerous bilateral and sectoral concordats have followed on from this joint Concordat.

All the sources underpinning of this system are informal acts that are not legally binding but only "binding in honour". This bilateral, informal approach is also apparent in the practice of openly dealing with most issues by telephone, rather than by consultation meetings.

The memorandum on the JMC also created a supporting Committee of Officials, which in turn has produced a subcommittee for Community issues.

In Spain too, an asymmetrical regional system has encouraged the development of bilateral relations. What we said earlier about the system of Conferences is also true here: the dominant trend is to proceed by means of separate agreements between central government and the individual Autonomous Communities, even when the content of these agreements is identical, and to make them binding only on the Communities that sign them even if these constitute a majority. The institutionalisation agreement and then the law make express provision for bilateral relations to be used in matters for which an individual Community has exclusive competence.

There are also two bilateral "Europe" Committees in which central government meets with the Basque Country and Catalonia. However, these meet rarely, have little influence, and are limited to the exchange of opinions and information (though they nevertheless confirm the preference for special relations with the centre).

In the Netherlands, where the search for a consensus through consultation is traditionally part of the political and administrative culture of the country, the laws on the Municipalities and Provinces state that the government must consult the Municipalities and/or Provinces (or their representative bodies, which have achieved a growing importance) in all areas that concern them respectively.

This legislation is accompanied by two political and programming agreements that complement and interpret it, with the Association of Dutch Municipalities (VNG) and the Association of Dutch Provinces (IPO), which set and periodically update the criteria governing relations between the three tiers of government.

Individual, direct consultation, especially of local authorities, also occurs in other countries such as Germany, where it must be conducted, among other things, "in due time and in an appropriate way" in accordance with the precepts of the European Charter.

2.5 Consultation of associations representing local authorities

Consultation through representative associations meets a very widespread need for the involvement of local communities in national decision-making processes. Almost everywhere, local authorities are the natural interlocutors of central governments,

because of their very ancient origins, presence throughout the land, democratic weight and administrative responsibilities.

This gives them an important institutional role in most states, which may take different forms, although this does not necessarily seem to be entirely dependent on the system involved (federal, regional, or unified and centralised).

The subject of consultation is not very different from that of information. Many points of intersection are necessary to ensure an effective and informed outcome can be reached. So here we can pass over the information and considerations covered elsewhere (see 1.2.1 above, for example) and instead highlight some of the "horizontal" aspects, examining the consultation process on this basis through what happens in individual Member States.

2.5.1 Consultation: general aspects

We will begin by looking at the importance accorded to consultation in the various government systems. It is particularly cherished in such countries as Denmark, the Netherlands and Sweden, where democracy and participation through the search for a consensus seem solidly rooted in the political and administrative culture. Here, even if it is not explicitly written into the constitution, consultation is a general principle that informs the entire system. It is expressed as a constant concern, a special sensitivity, a care for procedural forms at all levels and in all matters, including Community matters. Though this may produce a cumbersome administrative superstructure (which can however be remedied by suitable organisational methods and practices), it always represents a shared value that determines how the system operates (and also guides the interpretation of the activities that apply it). Great importance is also given to consultation in the most consolidated federal systems. In Germany and Austria, it assumes the explicit form of a right granted to local authorities, which is sometimes mirrored by a duty on the State to request an opinion and provide necessary information. The activities associated with it may make reference, though indirectly, to constitutional guarantees.

2.5.2 The importance of the associations

Secondly, on a separate level, there is the importance assumed by the associations. Here we find a whole range of graduations. In Austria, which is a unique case, the recognition given to consultation is highly formalised in that the Constitution itself states that the Austrian Association of Municipalities and the Austrian Association of Cities and Towns are to represent the interests of the municipalities (Article 115.3 B-VG). Elsewhere, associations play a central role, as if constitutionally provided for to all intents and purposes, where consultation is substantially the method of government, as in the Netherlands, or where the associations are the main players in the country by virtue of their capacity for initiative, promotion and coordination, as in Denmark. In Germany, consultation of local authorities through their associations is considered a general principle of law. The law on cooperation between the federal government and the *Länder* on EU matters, in confirmation, requires that the right of the municipalities and their associations to protect the interests of local communities be respected; the common regulation governing the federal ministries states that when drafting legislation, including on European matters, they must consult the associations regarding aspects of local concern; the *Länder* also have their own legislation on this (sometimes constitutional, as in the Saarland, Article 124). But laws also exist in other countries where local participation in policy-making is rare. This is the case in Ireland, where the Local Government Act of 2001 recognises associations of local authorities, which can present proposals and opinions to central government. In Portugal, meanwhile, Law 54/1998 gives the National Municipalities Association the status of partner of the State. However, at the extreme other end of the range of variants, in the United Kingdom the recognition given to the Local Government Association as a formal consultative body is not reflected in any formal regulation governing participation procedures. However, local authority associations as a general rule have quite considerable importance in many countries, either because they represent the most widespread form of authority, or for their network of political and institutional relations. This is the case in Italy, where in many matters they seem to count more than the regions.

2.5.3 Consultation methods

Thirdly, we will look at consultation methods. There are of course many, and the levels of access and interlocutors do vary.

Governments, and in a wider sense ministerial bodies, seem to be the preferred point of reference, considering their power to shape policy and instigate projects, the information they have available, and their dominant role on the European scene. But parliaments too can be a reference forum for consultation, because of their nature. This can occur in any country, for example in the Netherlands or in Finland, through the competent parliamentary committees, or in Germany, where consultation and the collaboration of associations is frequent and guaranteed (see section 69.5 of the *Bundestag* regulation, for example), and may also occur indirectly in the *Bundesrat*, through each *Land*.

At government level, forums for consultation are varied. For example, there are those closest to the Community side of things, such as preparatory talks for meetings of the Committee of Permanent Representatives in Brussels (CoRePer), in which the Austrian associations regularly take part and are allowed to express opinions. There are also dialogue forums with external agencies to deal with matters that go beyond the national boundaries, as in Belgium where the associations participate in special committees. There are also central forums for drafting legislation and drawing up national strategies, some with a direct impact on Europe. In particular, in Austria there are the various national committees which hold weekly meetings to which representatives of local authorities are invited; and more systematically, the federal planning bodies on European matters, which have a duty to inform the municipalities and cities and seek their opinion when local interests are at stake (Article 23(d)(1) B-VG). In Denmark, special EU committees have been set up within the ministries to analyse the proposals of the European Commission, in which representatives of regional and local associations participate. They also play an institutional role (as do representatives of the parliament and the government) in the committees set up to prepare new legislation. This is also the case in Sweden, where the two national associations for regional and local authorities, representing regional and local interests in the national decision-making process including the preparatory stages of Community legislation, play an important role as intermediaries between the centre and the periphery. In Finland, meanwhile, the association contributes to the work of the national Committee on EU Affairs (set up within the government and divided into 35 preparatory subcommittees) as part of a small subcommittee on regional and structural policy and of many larger subcommittees covering a wide range of sectors. It also prepares opinions, documents and position papers. In Ireland, where permanent

formal mechanisms for consultation do not exist and each consultation is *ad hoc*, the regional level is still consulted, though with less intense involvement, and takes part in policy-making regarding the National Development Plan (NDP). In Luxembourg, where there has traditionally been little formal consultation of local authorities, the practice has recently been developed and given legal recognition through the action of the representative association, which has now been changed into the Union of Local Authorities (SYVICOL).

CHAPTER III

DIVISION OF POWERS FOR THE IMPLEMENTATION OF COMMUNITY LEGISLATION

1. Implementation of Community legislation in States in which devolved authorities have no legislative powers. – 1.1 Implementation of Community legislation in the United Kingdom. – 2. Implementation of Community legislation in States in which devolved authorities have constitutionally guaranteed legislative powers. – 2.1 Member States in which Community legislation must be implemented with respect for the prerogatives of sub-national authorities. – 2.2 The case of Portugal

1. Implementation of Community legislation in States in which devolved authorities have no legislative powers

The extent to which sub-national and local authorities participate in the implementation of Community secondary legislation depends closely on the institutional structure of each Member State.

The first question to be asked is whether there is a constitutional guarantee of the legislative powers of the regions. In systems in which no legislative functions are assigned to sub-national authorities, or there is no constitutional guarantee of those functions, responsibility for implementing Community legislation normally lies with the central State.

However, a distinction needs to be made.

In some of the Member States in this category, regional and local authorities are not in fact excluded from participating to various extents in the implementation of Community secondary legislation. A case in point is Denmark, which has a significant tradition of local authority involvement in the preparation of legislation that impinges on local powers. In Denmark the tasks of regional and local authorities are not always

explicitly laid down by law. Some local activities come under what is known as the "rule of general jurisdiction" – a basic principle of unwritten law that entitles local authorities to spend resources on the provision of public services. Nevertheless, most of their functions are delegated. Since Community legislation does indeed impinge on the powers of regional and local authorities, the latter have occasion to participate significantly in the preparation of the relevant implementing legislation. In particular, where Community directives are to be transposed into national law, regional and local authorities participate in the deliberations of the relevant bodies whenever their interests are involved. Regional and local representatives also attend meetings of the special EU committees set up in the various ministries, in order to cooperate in defining the content of the legislation needed to transpose the directives. Again with a view to the implementation of Community regulations, an "open coordination method" was introduced in 1999 to involve national associations of local authorities in the preparation of national action plans, given that such associations are entitled to arrogate to themselves voluntary, non-delegated powers in various matters that fall within Community jurisdiction.

In Sweden, too, relations between the State and local governments involve systematic cooperation. Given Swedish law on local government, integration in the European Union has not given rise to a new division of powers between the State and local authorities. On the other hand, sectoral legislation has enabled local authorities to assume important responsibilities in the regulation of essential public services.

In most of these Member States, however, responsibility for implementing Community legislation lies with central State authorities, and there is no significant participation of regional and local authorities in the preparation of domestic implementing legislation. That is the situation, for example, in France, where national bodies have a monopoly in the matter; in Luxembourg, where responsibility for implementing Community legislation is determined by public administration regulations (subject to a mandatory opinion of the Council of State); in the Netherlands, where the national government is responsible for implementing Community regulations and directives; in Greece, where the government is generally responsible for implementing Community law via presidential decrees based on drafts prepared by the relevant ministries, and the involvement of sub-national authorities is confined to the same forms of consultation as those ordinarily applying to the various national decision-making procedures; and, finally, in Ireland, where the responsibility

for implementing directives lies with the central State (by act of Parliament or by secondary legislation), although local authorities are nevertheless allowed to implement regulations on specific matters within their jurisdiction.

1.1 · Implementation of Community legislation in the United Kingdom

The United Kingdom requires special mention, mainly because of its constitutional structure. In the United Kingdom, all the assemblies that exercise transferred powers were set up directly, or receive their authority indirectly, from legislation passed by Westminster: devolved competence may therefore be modified or revoked by future legislation.

The Scottish Parliament and the Northern Ireland Assembly – strengthened politically through prior approval by popular referendum – pass legislation on an equal footing with that of Westminster. In exercising the relevant legislative powers, however, they are subject, under domestic constitutional agreements, to precise limits concerning Community legislation. In particular, they cannot pass legislation incompatible with Community law [Scotland Act 1988, Section 29; Northern Ireland Act 1998, Section 6(2)(d)]. The provisions concerning devolution for Wales, which include the transfer of executive power and authority to promulgate subordinate legislation, impose the same restriction (Government of Wales Act 1998, Section 106).

The UK system is, moreover, highly asymmetrical. It must be borne in mind that responsibility for implementing a great deal of Community legislation is vested in the devolved assemblies. In Scotland and Northern Ireland, the implementation of Community directives may also require them to legislate.

As regards Scotland in particular, the Scotland Act 1988 (Article 53) stipulates that, in matters of devolved competence, functions formerly exercised by Ministers of the Crown – which, pursuant to the European Communities Act 1972, included the implementation of Community law — are now exercisable by the Scottish Ministers. It should be noted, however, that despite the transfer of functions, Ministers of the Crown retain the power to transpose Community legislation in areas within Scotland's jurisdiction. In addition, the Scottish executive can choose to consign the exercise of such powers to London or to exercise them itself. Since this gives rise to a sphere of competing jurisdiction, the Concordat on Coordination of European Union Policy

Issues stipulates that the regional government and Whitehall are to consult each other on the implementation of obligations deriving from Community legislation and agree whether the Scottish executive is to implement them or consign their implementation to London. In certain cases the central government may subdivide such obligations and assign responsibility for the implementation of specific aspects to the regional government.

As regards Wales, in contrast, the power to pass primary legislation is always vested in the competent bodies in Westminster, while the Welsh Assembly is responsible for the passage of secondary legislation and decrees. The Government of Wales Act 1998 further stipulates that powers to implement Community legislation may be transferred by Ministers of the Crown to the National Assembly for Wales only for a restricted number of functions, namely those previously exercised by the Secretary of State for Wales.

2. Implementation of Community legislation in States in which devolved authorities have constitutionally guaranteed legislative powers

In systems in which sub-national authorities are assigned legislative powers that are guaranteed by the Constitution, responsibility for the implementation of Community legislation is generally divided between the central State and these autonomous authorities with due regard for the division of legislative powers laid down in the Constitution. This follows from the fact that Community primary legislation does not alter the division of powers established in individual Member States.

There are also systems in which the rule that the prerogatives of regional authorities must be respected in the implementation of Community legislation is explicitly enshrined in the Constitution [Belgium, Austria (following the 1994 reform), Germany, Italy (following the 2001 reform)]. In the case of Spain, on the other hand, the matter is not specifically regulated by the Constitution, but constitutional case-law tends to recognise the same rule of non-alteration of the division of powers.

It should be noted, however, that in Portugal, which is only partially regionalised, there was no provision for involving the autonomous regions in the domestic implementation of Community law until the constitutional revision of 2004. Prior to

that, such involvement was rejected by a body of constitutional doctrine which, on the basis *inter alia* of a judgment of the Constitutional Court (71/90), denied the existence of a constitutional basis for regional legislative jurisdiction.

Finally, in Finland, where almost all Community directives are transposed through State legislation, significant involvement is provided for the province of Åland. The Åland Autonomy Act stipulates that, in so far as a matter lies within the legislative jurisdiction of the province, the Government of Åland shall "formulate the national position of Finland relating to the application of a Common Policy of the European Community in Åland" (Chapter 9 a, Article 59 b).

2.1 Member States in which Community legislation must be implemented with respect for the prerogatives of sub-national authorities

More specifically, in Belgium, whenever supranational legislation requires the adoption of implementing measures, those measures are divided between State, community and region with due regard to the domestic division of powers. The Belgian State, the regions and the communities are thus responsible for transposing Community directives, each within its own sphere of jurisdiction: a directive relating to a matter devolved to the regions or communities must be implemented through regional and community decrees or orders, given that the federal State has no powers whatever in such matters. But since the implementation of a Community directive often concerns more than one tier of government, a special department was set up in the Ministry of Foreign Affairs to assign the legislation to be transposed among the competent administrations by splitting it into separate parts that correspond to the various authorities required to implement it. Furthermore, since the implementing provisions drawn up by the various tiers of government may have to be harmonised, it is stipulated that, where necessary, cooperation agreements shall be concluded among the various administrations.

In Austria and Germany, implementation is also governed by the principle that the rules on the division of power between the Bund and the *Länder* must be adhered to when implementing and transposing Community law. In Austria, more particularly, it has been explicitly stipulated since 1992 that the *Länder* are to enact the provisions required to implement Community legislation within their spheres of jurisdiction. In Germany too, responsibility for implementing European legislation is assigned in

accordance with the normal division of powers, except where the Basic Law itself provides for derogations.

In Italy, until the reform of 2001, the power of the regions to implement Community secondary legislation was laid down by primary law. The first paragraph of Article 6 of DPR (Presidential Decree) No. 616 of 1977 assigned the task of implementing regulations to the regions, within their spheres of jurisdiction, and the La Pergola Law (Article 9 (1) and (2)) stipulated that regions could give immediate effect to EC directives. Pursuant to the constitutional reform of 2001, the power of the regions and autonomous provinces to implement and apply Community legislation within their spheres of jurisdiction is now enshrined explicitly in Article 117 (5) of the Constitution, which effectively transposed certain powers already acquired through ordinary legislation and gave them a constitutional guarantee.

Finally, in Spain, although the Constitution makes no provision in the matter, various judgments of the Constitutional Court (beginning with 252/1988) have established the principle that the non-alteration of the domestic division of powers also applies in spheres of competing jurisdiction. Although there has never been a formal debate on the matter, the principle appears to have been curtailed somewhat in practice, *inter alia* because of the tendency of certain State prerogatives to expand, especially the power to regulate the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties (Article 149(1)(i) of the Spanish Constitution).

2.2 *The case of Portugal*

Prior to the 2004 reform, the Constitution (Article 112 (9)) explicitly reserved the task of transposing Community directives for the national legislature. Thus all Community directives, *irrespective* of their regional implications, were subject to the strict principle of exclusive legislation by the sovereign national bodies (by means of laws or decree-laws). The autonomous regions could only adopt regional regulations implementing the national transposition legislation, which they alone were entitled to do pursuant to Article 232 (1) of the Constitution.

The new constitutional arrangements approved in 2004, however, explicitly assign the autonomous regions the task of implementing Community secondary legislation

within their own sphere of jurisdiction via legislative decrees (Article 112 (8) of the Constitution, as revised).

CHAPTER IV

LEGAL INSTRUMENTS DESIGNED TO PREVENT THE STATE BEING IN BREACH OF COMMUNITY LAW THROUGH THE FAULT OF REGIONS OR LOCAL AUTHORITIES

1. Instruments designed to ensure implementation in the event of failure to act on the part of a sub-national authority. – 1.1 Systems permitting intervention by a national government following a ruling against it by a supranational court. – 1.1.1 System in force in Belgium. – 1.1.2 System in force in Austria. – 1.2 Systems permitting intervention by a national government following a ruling against it by a national court: Germany. – 1.3 Legal instruments designed to ensure implementation in the event of failure to act on the part of regional and local authorities, without the need for a court ruling. – 1.3.1 System in force in Portugal and Italy. – 1.3.2 Problems raised by the systems in force in Spain ...– 1.3.3 (cont.): ... and the Netherlands. – 2. Power to annul legislation enacted by sub-national authorities. – 2.1 Power to annul legislation enacted by sub-national authorities following review by national (administrative or judicial) authorities: Denmark, Finland, Sweden, Greece and France. – 2.2 Power to annul legislation enacted by sub-national authorities following review by a constitutional court: Spain, Portugal, Italy. – 2.3 Model adopted in the United Kingdom.

1. Instruments designed to ensure implementation in the event of failure to act on the part of a sub-national authority

The legal instruments designed to prevent the State being in breach of Community law through the fault of regions or local authorities are of two types: those whose purpose is to ensure implementation in the event of *failure to act* on the part of regional and local authorities, and those designed to *punish* breaches of Community law by regional bodies.

Instruments of the first type do not exist in all Member States. Those that do may be broadly divided into two categories.

The first category comprises cases in which the central State may intervene only after a court ruling on non-implementation (Austria, Belgium, Germany).

In this respect, however, one further distinction must be made.

1.1 Systems permitting intervention by a national government following a ruling against it by a supranational court

In Austria and Belgium, the central State is entitled to act in substitution only on condition that there has already been condemnation by a European Union court (Article 23d paragraph 5 of the Austrian Constitution; Article 169 of the Belgian Constitution). In other words, condemnation by a supranational court is a necessary precondition (an "obligatory stage" in the full meaning of the term) for the central State to act temporarily in substitution for the defaulting *Land* or regional entity. Faced with a failure to act on the part of a region, the central State cannot act preemptively in substitution, but only after a court has established that a breach of a supranational obligation has already occurred.

1.1.1 System in force in Belgium

More specifically, the Belgian Constitution (Article 169) entitles the Federal Legislature and the Federal Government temporarily to act in substitution for the authorities of the communities and regions in order to ensure fulfilment of supranational obligations. However, the circumstances in which they may do so, and the procedural conditions to be met, are laid down by a special law (Article 16 paragraph 3 of the Special Law of 8 August 1980 on Institutional Reform, as amended by the Special Law of 5 May 1993 on the International Relations of the Communities and Regions).

This special law establishes a procedure in stages enabling the State to act in substitution once there has been a ruling against it by a supranational court. Three indispensable procedural conditions must be met.

First, the domestic procedures laid down for accession to the Treaty from which the non-implemented obligation derives must be followed (a condition that does not apply

to Community secondary legislation). Second, the defaulting sub-national authority must be given an opportunity to defend itself before the supranational court. Third, before adopting measures in substitution the Federal Government must serve on the defaulting sub-national authority a formal notice to comply within three months (a period that may be curtailed only in exceptional cases). The notice to comply must then be examined by the Belgian Council of Ministers and adopted by royal decree. This arrangement in stages gives the community or region an opportunity to meet its unfulfilled obligation, providing for substitutive powers only as a last resort. Moreover, any measures which the central State takes must be confined to what is strictly necessary in order to give effect to the court's judgment and are conceived as temporary, inasmuch as the same law stipulates explicitly that they shall cease to have effect as soon as the sub-national authority complies with the terms of the judgment condemning the State. It should also be noted that there is no specific legal guarantee in the event of disagreement as to what exactly is necessary in order to give effect to the judgment: the ordinary law and procedure apply. This means that the legislative measures taken by the State may be challenged in the Court of Arbitration or, in the case of administrative provisions, in the Council of State.

Finally, the law stipulates that the State may recover the costs incurred as a result of non-implementation and the consequent breach of supranational law from the region (or community) responsible for the breach, by retaining sums which it is legally required to transfer to that region (or community).

1.1.2 System in force in Austria

In Austria, even before the constitutional revision of 1992, Article 16 of the Constitution stipulated that the *Länder* had to comply, within their own spheres of jurisdiction, with international obligations contracted by the *Bund* and implement them where appropriate. That provision was deemed to be applicable, by extension, to the execution and implementation of Community law. Later, a specific provision was added to the Constitution (Article 16 paragraph 6, now Article 23d paragraph 5 of the *Bundes-Verfassungsgesetz*), explicitly laying down the obligation of the *Länder* to implement EC legislation. Under the new provision, if a *Land* fails to meet such an obligation – and that failure is subsequently established by a European Union court – the power to pass the legislation in question is transferred temporarily to the *Bund*; nevertheless, the measures taken by the federal authorities cease to have effect as soon

as the *Land* takes the measures needed to comply with Community law. In other words, the *Bund* is entitled to act on its own initiative where an obligation has not been implemented by a *Land* and a breach of the Treaty has already been established.

1.2 Systems permitting intervention by a national government following a ruling against it by a national court: Germany

The system in force in Belgium and Austria has considerable disadvantages, inasmuch as it allows the national government to act only after a supranational court has established a breach of Community law and the consequent responsibility of the federal authorities.

In Germany, where there are no specific provisions in this respect, use is made of the instruments generally provided. Although the federal authorities have no powers of control over the activities of the *Länder* nor the power to act in substitution in the event of their failure to fulfil, in part or in full, an obligation under Community law, they retain the power to assert their own responsibility for the execution of Community law in the Federal Constitutional Court by invoking a breach of the unwritten constitutional principle of "federal loyalty". In such cases, therefore, it is accepted that the existence of a breach of Community law can be established directly by a ruling of a *national* court, thus circumventing the difficulty raised by the system in force in Austria and Belgium. Moreover, in extreme cases, if recourse to the Constitutional Court fails to remove the cause of non-implementation by the *Land*, it is theoretically possible to adopt the federal coercion procedure (*Bundeszwang*) provided for in Article 37 of the Basic Law, although this has never been done in the history of the German constitution.

1.3 Legal instruments designed to ensure implementation in the event of failure to act on the part of regional and local authorities, without the need for a court ruling

The second category of instruments designed to prevent a Member State breaching Community law as a result of a failure to act on the part of a region are *ad hoc* mechanisms that, independently of a court ruling on non-implementation, allow the central State to adopt – in the place of the sub-national authority – legal and administrative measures reserved for that entity by the Constitution. Such *ad hoc*

instruments enable the State to avoid having to answer to a Community court for a region's failure to implement a Community measure, by entitling it to pass legislation of supplementary application (i.e. laws intended to remain in force until replaced by regional laws). This is more efficient than the Belgian and Austrian systems. It is true that the provisions in force in those two Member States guarantee full and strict respect for the powers of sub-national authorities by subordinating central State intervention to a ruling by a European court. But that is precisely the system's greatest limitation: by failing to provide any means of compelling sub-national authorities to implement Community legislation until there has been a ruling against the central State in a supranational court, it puts the State in the position of being unable to avoid the breach of Community law that is the legal prerequisite for its subsequent intervention.

The instruments discussed in this section, however, do not presuppose a ruling of non-implementation by a court: on the contrary, they "forestall" it. This system is adopted as a matter of course in Portugal and Italy, whereas, as we shall see, it is highly problematic in Spain and the Netherlands.

In Portugal and Italy, if the regions fail to exercise their powers to implement Community acts in due time, the national parliament (Portugal) or government (Italy) adopts the necessary measures, in some cases after setting an appropriate time-limit for the regional authorities to comply (Italy).

1.3.1 System in force in Portugal and Italy

In Portugal, whose legal order rests upon the unity and indivisibility of State sovereignty, the principle that State legislation is of supplementary application allows the State to act – in the absence of a framework of regional rules – also in matters within the jurisdiction of the autonomous regions.

In particular, Article 128 paragraph 2 stipulates that, in the absence of regional regulation, the legislation of the State shall apply in the autonomous regions.

We may reasonably conclude that this principle also applies to the transposition of Community legislation (which, as we have seen, is now the responsibility of the autonomous regions in matters within their jurisdiction). Consequently, if regions fail

to implement a Community directive in good time, no breach of Community law should arise: pursuant to the said Article 228 paragraph 2, national legislation will apply in their territory and automatically fill any vacuum resulting from the regional authorities' failure to implement the directive.

The situation is slightly different in Italy, where, in order to guarantee the fulfilment of Community obligations by the regions, the State is enabled to act in substitution by two separate articles of the Constitution: Article 117 paragraph 5 and Article 120 paragraph 2. The first of these stipulates that State law shall establish procedures for the State to act in substitution "in the case of non-performance"; the second allows the government to act in substitution for regional authorities if they "fail to comply" with Community legislation. In this regard, Article 8 paragraphs 1 and 2 of the La Loggia Law (Law No. 31/2003) provide that the President of the Council of Ministers shall, on a proposal from the competent minister or at the initiative of the regions or local authorities, set the defaulting authority a suitable time-limit for enacting the necessary provisions. If the time-limit expires without the necessary action having been taken, the Council of Ministers shall, after hearing the authority in question and on a proposal from the competent minister or the President of the Council of Ministers, enact the necessary legal or administrative provisions or appoint a commissioner.

It should also be noted that the latest laws on the implementation of Community acts for 2001 and 2003 (Law No. 39 of 1 March 2002, Article 1 paragraph 5, and Law No. 306 of 31 October 2003, Article 1 paragraph 5) entitle the State to act in substitution "pre-emptively" through primary legislation of supplementary application – a mechanism that ought to ensure more rapid implementation. The laws on the implementation of Community acts – which anticipate in this respect the draft law on "general rules governing Italy's involvement in the legislative process of the European Union and the procedures for fulfilling Community obligations" currently in the process of approval – stipulate that legislative decrees passed in matters within the legislative jurisdiction of the regions or provinces shall take effect, in regions and self-governing provinces whose own implementing legislation is not yet in force, upon expiry of the time-limit set for the implementation of the relevant Community legislation, without prejudice to the right of such regions to pass their own implementing legislation at a later stage. In such cases, too, the substitutive legislation is dependent on the region's failure to act, inasmuch as it applies only from the date of

expiry of the time-limit and remains in force only until such time as the region passes implementing legislation of its own.

1.3.2 Problems raised by the systems in force in Spain ...

In Spain, on the other hand, the legitimacy of State action in substitution is still under debate. The debate has been further fuelled by constitutional case-law, which wavers on the subject. The Constitutional Court has for the most part rejected the contention that the general provision on the supplementary applicability of State law embodied in Article 149 paragraph 3 of the Constitution may be deemed to be a rule on the allocation of powers and may be invoked to justify the application of State law in areas in which the State has no specific jurisdiction (Constitutional Court Judgments 118/96 and 61/1997). In exceptional cases, however, it has accepted that the Executive may pass laws of supplementary application designed to avoid State failure to implement Community legislation (Constitutional Court Judgment 79/1992). In the last-mentioned judgment, the Court held that it was legitimate for the State, on the basis of the general provision on supplementary applicability contained in Article 149 paragraph 3 of the Constitution, to enact, for the purpose of implementing Community legislation, provisions of supplementary application with respect to legislation passed by the Autonomous Communities under the powers vested in them.

The solution that is emerging appears to resemble the established situation in Italy, where the adoption of supersedable State law is acceptable. In Spain, legal opinion is prepared to accept that the government must be able to enact implementing legislation of supplementary application when the time-limit for compliance with Community obligations has expired and the Autonomous Communities have not taken the necessary measures within their sphere of jurisdiction. This raises the problem of ensuring that the passage of State legislation is perfectly synchronised with expiry of the time-limit for compliance, which is not always possible. For that reason, it is accepted that "urgent reasons" may justify advance action by the State. In other words, it is proposed that the central State be able to adopt the necessary measures beforehand, while suspending their entry into force until expiry of the time-limit set for implementation of the Community act.

Nevertheless, the Spanish Constitution (Article 150 paragraph 3) stipulates that, whenever the general interest so requires, the State may pass laws laying down the

principles necessary for harmonising the legislative provisions of the Autonomous Communities, even in matters that fall within their jurisdiction. It is for the *Cortes* to decide, by an absolute majority in both Chambers, whether such laws are needed. It must be emphasised, however, that such laws are exceptional – as can be seen from the particular complexity of the procedure for their passage (an absolute majority in both Chambers), which makes them unsuitable for general application as an instrument for avoiding breaches of Community law. The Constitutional Court itself (Judgment 76/1983) has called the procedure a "closure of the system" that may be applied only in cases where the Constitution provides the State legislature with no other means of exercising its legislative power, or when those means "are insufficient to ensure the harmonisation required in the general interest."

1.3.3 (cont.): ... and the Netherlands

In the Netherlands, a national law exists that entitles the government to compel municipalities or provinces to act in accordance with national legislation with regard to the use of Community subsidies. This law, however, has as yet never been applied. Meanwhile, there is an ongoing debate among local administrators, politicians, and legal experts about the possibility of establishing national instruments to "guide" municipalities and provinces or "indicate" the course of action to be taken in order to deal with tasks and obligations deriving from membership of the European Union.

2. Power to annul legislation enacted by sub-national authorities

In the absence of (or alongside) *ad hoc* provisions designed to avoid non-implementation, the annulment of provisions enacted by regional or local authorities can be used as an instrument for redressing a breach of Community law.

This instrument, which assumes the existence of unlawful legal or administrative provisions, may also be used in cases of breaches of Community law in most of the Member States. The necessary action has to be taken by the State administrative authorities (Denmark, Finland, Sweden, Greece), the administrative courts (France), or the constitutional courts (Portugal, Spain, Italy).

2.1 Power to annul legislation enacted by sub-national authorities following review by State (administrative or judicial) authorities: Denmark, Finland, Sweden, Greece and France

In Denmark, where there is no *ad hoc* legislation on failure to implement Community measures, the implementation of Community law by the regions is subject to the general supervision of locally enacted provisions. The Constitution itself assigns the supervision of local administration to the State. Such supervision is exercised by State administrative authorities with guaranteed independence of action with respect to the government and individual ministers. Pursuant to Articles 63 to 65 of the Law on Local Government, each region has a supervisory council composed of the county governor, who is the prefect of the region and is appointed by the government, plus four members elected by the regional council from among its own members. Whenever the supervisory council identifies a breach of the law, the local authority decision may be annulled or suspended where it has not yet produced its effects; in the opposite case, various sanctions are prescribed, including fines for non-implementation and compensation for damages. Decisions of the Supervisory Council are, however, subject to appeal in the ordinary courts.

In Finland and Sweden, too, ordinary supervisory procedures can be applied to breaches of Community law brought about by decisions of local authorities. In Sweden, such supervision is entrusted to State agencies established by special legislation or to the State county administrations, which are peripheral organs of the State.

In Greece, pursuant to Article 102 paragraph 3 of the Constitution, the State is responsible for reviewing the lawfulness of acts of local authorities. Following abolition of the prefectural supervision of communes and municipalities, these supervisory powers are primarily exercised by the secretaries-general of the regions.

In France, however, verification of compliance with Community law is a matter for the courts, which are responsible for reviewing *a posteriori* the lawfulness of acts of regional and local authorities (Articles L 911-1 to L 911-9 of the *Code de justice administrative*). The Council of State has asserted the doctrine of interpretation of law which is consistent with Community directives (Council of State Judgments of 22 December 1989: *Cercle militaire mixte de la caserne Mortier* and 28 February 1992:

Sociétés Rothmans International et Philip Morris). Even if national law does not entitle French local or regional authorities to transpose Community directives, they are nevertheless legally bound to interpret national laws in a manner consistent with Community primary and secondary legislation or, where such laws are inconsistent with Community legislation, to exclude their application. In other words, French regional and local authorities are bound to comply with and apply Community directives even where national legislation is not consistent with them (Council of State Judgments of 3 December 1999: *Association ornithologique de Saône et Loire et Rassemblement des opposants de la chasse* and 10 January 2001: *France Nature Environnement*).

2.2 Power to annul acts of sub-national authorities following review by a constitutional court: Spain, Portugal, Italy

Finally, in systems where the State has the power to act in substitution, it usually also has coercive powers: that is to say, the central State has the possibility of challenging legislation passed by sub-state entities in the constitutional court on the grounds that it breaches Community law.

In Portugal, for example, the Minister for the Republic in the autonomous regions has a power of supervision enabling him to request the regional assembly to reconsider a regional legislative decree. If the assembly confirms its vote by an absolute majority, the Minister for the Republic must sign the decree (Article 233 of the Constitution) but may still refer it to the Constitutional Court if he considers that it may give rise to a breach of Community law. It should be noted, however, that a more suitable forum for conflicts and conciliation between State and regional levels of government, with respect to possible breaches of Community law brought about by the actions of regional authorities, is the CIAC (Inter-Ministerial Committee on Community Affairs), which is responsible, *inter alia*, for defining Portugal's position in matters of Community pre-litigation and litigation.

In Spain, as in Italy, the State has the right to challenge regional legislation in the Constitutional Court if it considers that legislation to be incompatible with Community law.

In both Spain and Portugal, however, preference tends to be given to resolving conflicts by consensus in cases where an Autonomous Community has enacted provisions contrary to Community law or has failed to transpose Community legislation. The CARCE was set up precisely in order to make the Autonomous Communities more aware of their responsibilities with regard to infringement proceedings initiated by the European Commission and referral of matters to the Court of Justice.

Finally, with regard to Italy, following the amendment of Article 127 of the Constitution, the government can no longer refer the matter to the Constitutional Court pre-emptively, but may only bring proceedings *a posteriori*.

2.3 Model adopted in the United Kingdom

Here again, special mention must be made of established practice in the United Kingdom.

Although the devolution of powers allows for certain functions (including the implementation of Community law) formerly vested in Ministers of the Crown to be exercised henceforth by ministers of the sub-national authorities, that does not alter the fact that Ministers of the Crown retain the power to transpose Community law. This gives rise to a significant area of concurrent jurisdiction. The various devolution acts stipulate that the regional authorities shall implement Community legislation. For that reason, the Judicial Committee of the Privy Council is charged with reviewing the legality of regional legislative and executive decisions to verify compliance with Community obligations. Furthermore, although any penalty imposed by the European Union for failure to fulfil Community obligations obviously falls upon the British Government, the devolution legislation prescribes that the cost of such penalties shall be borne by the devolved administrations (by way of deduction from sums transferred to them) in cases where they are responsible for such failure.

CHAPTER V

JUDICIAL PROTECTION OF POWERS WITHIN THE COMMUNITY. RIGHT TO REQUEST THE STATE TO ACT

1. *Judicial protection of sub-national authorities: general aspects.* –
2. *The solutions adopted in the Member States.*

1. *Judicial protection of sub-national authorities: general aspects*

The question of the judicial protection of sub-national authorities against Community legislation that fails to respect their prerogatives is the subject of lively debate, not least because of those entities' persistent claim to be included among the parties entitled to bring actions under the second paragraph of Article 230 of the EC Treaty.

Suffice to recall that the Charter of the Regions drawn up by the Conference of European Regional Legislative Assemblies (CALRE) – a body composed of the presidents of the legislative assemblies of 74 regions in 8 different countries (including Spain's Autonomous Communities, the Italian regional councils, the Austrian and German *Länder*, the Belgian regions and linguistic communities, and the Scottish, Welsh and Northern Ireland assemblies) – and signed on 19 September 2003 specifically calls *inter alia* for recognition of the right of regions to bring proceedings before the Court of Justice if a Community act infringes directly on their prerogatives (section 10).

Again, the European Parliament resolution of 14 January 2003 on the role of regional and local authorities in European integration calls on the Convention to ensure that "regions and other territorial entities, in the light of the principle of subsidiarity and if their prerogatives have been directly infringed by a Community act, may defend their rights before the Court of Justice under the authority of the Member State concerned, according to its constitutional or national legislation" (section 8).

2. *The solutions adopted in the Member States*

So far, the only Member States that have established instruments designed to meet this demand are Austria, Germany, Belgium, Italy and Spain.

The mechanisms adopted in these States are similar in many respects. Essentially, they grant sub-state entities the right to ask the central State to bring proceedings before the Court of Justice on condition that the allegedly unlawful Community acts concern matters within the jurisdiction of the regions.

They differ significantly, however, in the legal consequences of the sub-state entity's request. In federal systems, the request from a federate entity generally imposes on the central State an obligation to act; this is not the case in the regional systems.

In Germany, more specifically, the federal authorities are obliged, under section 7 of the Law of 12 March 1993, to seek legal remedy in response to a request from the *Bundesrat*, and in accordance with the position adopted by the latter, whenever *Länder* are adversely affected by an act or omission of the Community institutions. Moreover, the powers of the *Länder* are not confined to petitioning the federal government; they include co-definition – via the *Bundesrat* – of the case to be argued by the government in the Community courts.

In Austria, such legal action by the federal authorities is subject to the condition that no other *Land* opposes it and there are no overriding considerations of foreign or European integration policy.

Finally, in Belgium, when a supranational institution enacts secondary legislation on a matter within the jurisdiction of the regions or communities and the lawfulness of that legislation is disputed, the initiative in seeking legal remedy lies with the community or region affected (Cooperation Agreement of 11 July 1994 between the Federal State, the Communities and the Regions on the procedures for bringing proceedings before an international or supranational court in a mixed dispute). In the event of disagreement about the proposed legal action, the parties may refer the matter to the Interministerial Conference on Foreign Policy, which shall seek an agreement between the parties. Failing such agreement, the State is obliged to act. Once the decision to bring proceedings has been taken, a federal official is designated to initiate

and pursue the procedure, although the other authorities have the right to appoint representatives – lawyers or officials – to assist him.

In the regional systems, as we have already said, the request from a sub-state entity is not in itself sufficient to oblige the central State to bring proceedings before the Court of Justice.

In Spain, the Resolution of 24 March 1998 of the *Subsecretaría del Ministerio de Presidencia* (transposing an agreement adopted by the CARCE on 11 December 1997) entitles the Autonomous Communities to ask the Spanish Government, via their representatives in the CARCE, to take the necessary action before the Court of Justice. However, the Autonomous Community's request and statement of grounds must be submitted for his *assessment* to the president of the commission responsible for monitoring and coordinating action in defence of the Spanish State before the Court of Justice. Given the weak legal basis, this does not appear to be a binding rule. Nevertheless, the agreement has established a link between the monitoring commission and the CARCE that has incorporated the Autonomous Communities in a comprehensive system of defence of Spanish interests before the Court of Justice of the European Communities.

The situation in Italy is slightly different. Pursuant to Law No. 131/03, the central government is obliged to bring proceedings only when the request emanates from the State-Regions Conference and has been approved by an absolute majority of the regions (Article 5 paragraph 2).

CHAPTER VI

THE SUBSIDIARITY PRINCIPLE

1. Basic definition. – 2. Legislative recognition: explicit reference or implicit inference. – 2.1 Explicit constitutional references. – 2.2 Subsidiarity as an implicit constitutional principle. – 2.3 The case of the United Kingdom. – 2.4 The subsidiarity principle in legal systems without regional autonomy. – 3. Enforceability.

1. Basic definition

The subsidiarity principle is not only a fundamental principle of the EU, but is, in some cases, a guiding principle in the relationship between Member States and the regional and local authorities operating within them, as set out in Article 4 of the Council of Europe's European Charter of Local Self-Government, ratified and signed by many EU countries.

Broadly speaking, the core content of the subsidiarity principle can be regarded as the rule whereby, in relations between institutional and social entities of various sizes, the smallest are given precedence (as they are closest to the parties concerned): intervention by larger entities is justified only if it is directed towards making up for the shortcomings of these smaller administrative units. Typically, as provided for by Article 5 TEC, the subsidiarity principle is expressed in *dynamic* mechanisms, where power is transferred from one institutional level to another, generally as an upward shift.

It should also be mentioned that constitutional doctrine also recognises *static* expressions of the subsidiarity principle. More specifically, it is on account of this principle that certain powers are reserved for the institutional level closest to the parties concerned, where this is a question of preference (*Vorrangentscheidung*).

In the interest of completeness, this part of the study will examine both dynamic and static expressions of the principle.

2. *Legislative recognition: explicit reference or implicit inference*

2.1 *Explicit constitutional references*

An express reference to the subsidiarity principle can be found in the constitutions of three Member States (Germany, Portugal and Italy), following the constitutional reforms ushered in by the Maastricht Treaty. The legislation in question is the German Constitutional Law of 21 December 1992, the Portuguese Constitutional Laws of 1992 and 1993, and Italy's Constitutional Law No. 3/2001.

In Germany, the principle is enshrined in Article 23 GG, which states that "the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity".

In addition, it is worth mentioning that, according to a substantial part of doctrine, the subsidiarity principle was an unwritten constitutional principle that informed relations between the various levels of regional government (the *Bund*, *Länder* and local councils) even before this Law was introduced. One significant and dynamic expression of this is represented by the concurrent competence (*konkurrierende Gesetzgebung*) referred to in Article 72 GG. This law specifically gives the federation the right to legislate (subsidiarity, by limiting the powers of regional legislators) on matters on which the *Länder* would normally legislate, provided this is dictated by the need to establish equivalent living conditions throughout the federal territory or to maintain legal or economic unity in the interests of the State as a whole (*Gesamtstaat*).

In Portugal too, the subsidiarity principle now expressly appears in Articles 6 and 7 of the Constitution, which, following constitutional reforms, define the external and internal aspects of the principle respectively.

Article 7(6) of the Portuguese Constitution (CRP) (a paragraph added by Constitutional Law No. 1 of 25 November 1992) sets out that "provided that there is

reciprocity, Portugal may enter into agreements for the joint exercise of the powers necessary to establish the European Union, in ways that have due regard for the principle of subsidiarity and the objective of economic and social cohesion".

Article 6(1) CRP (a paragraph amended by Constitutional Law No. 1 of 20 September 1997) proclaims that Portugal is a unitary state and that it "is structured and functions under the rule of the self-governing system of the islands and the principles of the subsidiarity, the autonomy of local authorities and the democratic decentralisation of the public service". In any case, we propose leaving the question of the nationalisation of the subsidiarity principle for the time being, in so far as it concerns us here, to focus instead on its internal dimension.

One application of the subsidiarity approach can be found in the provision whereby functions that are of direct concern to citizens must be performed, wherever possible, by the level of government closest to them (local authorities with representative organs serving the particular interests of the population in their territorial areas (Article 235(2) CRP)).

In Italy, in accordance with Constitutional Law No. 3/2001, express mention of the subsidiarity principle can now be found in Article 118 of the law on the division of administrative powers. Under this law, which establishes the general administrative powers of municipalities, administrative functions may be conferred to higher levels of government (provinces, metropolitan cities, regions, or the state), where this is dictated by the need to guarantee the uniform exercise of these powers "pursuant to the principles of subsidiarity, differentiation and adequacy".

Nevertheless, it should be remembered that the same principle – although not actually identified as such – has also prompted several laws on legislative powers. In particular, dynamic subsidiarity is the basis for the "purposive" powers of the State (for example, in terms of establishing basic levels of service in relation to civil and social rights, which must be guaranteed throughout the national territory, or upholding competition). These – as the Constitutional Court itself admits – allow the State legislator to intervene subsidiarily even in areas that come within the jurisdiction of the Regions, restricting their powers accordingly. Conversely, a static expression of subsidiarity can be discerned in the residual legislative powers of the Regions (as

referred to in Article 117(4) of the Constitution), which are the result of a decision to give precedence to the latter.

Although not directly related to the aims of this study, it is worth bearing in mind that the final paragraph of Article 118 of the Italian Constitution mentions the subsidiarity principle in the context of the relationship between the public administration and civil society. This provision specifically provides, in fact, that "The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest; on the basis of the principle of subsidiarity". In doctrine, instances of this type are generally described as *horizontal* subsidiarity (as opposed to *vertical* subsidiarity, which applies to relations between the various levels of a country's government).

2.2 Subsidiarity as an implicit constitutional principle

The subsidiarity principle is considered an implicit constitutional principle in three other countries (Austria, Spain and France), despite not being specifically ratified or mentioned in the constitutions of those nations. An application of the subsidiarity principle can also be discerned in the Belgian Constitution.

In the relationship between the federation and the *Länder* in Austria, the principle, in its static form, finds expression in the general powers of the *Länder* under the residuality clause, which applies both to legislation and administration (Article 15(1) B-VG). In its dynamic form, it can be found in the "necessity clause", which allows federal law to adopt uniform regulations even for matters where legislation is the responsibility of the *Länder* (Article 11(2) B-VG). As for municipalities, the principle in question can be seen in the criterion that determines their remit according to actual administrative capacity (Article 118(2) B-VG).

Conversely, two explicit references to the principle can be found in the constitutions of two of the *Länder* (Tirol and Vorarlberg). Yet in both cases, this consists of a reference to *horizontal* subsidiarity as a means of promoting individual personality and initiative, as well as social solidarity.

As already stated, in Spain, too, the subsidiarity principle is considered to have an implicit role in the Constitution.

When it comes to the relationship between the State and the Autonomous Communities, this, in its static form, can be seen in the residuality clause, according to which matters that are not expressly assigned to the State by the Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their respective Statutes (Article 149(3) of the Spanish Constitution).

Conversely, subsidiarity, in its dynamic form, can be discerned in:

- the same constitutional provision, which adds that jurisdiction on matters not expressly reserved for the State and not claimed by the Statutes of Autonomy falls to the higher level of State government by virtue of a subsidiary criterion;
- the provision, contained in the same article, that State laws shall prevail, in case of conflict, over those of the Autonomous Communities regarding all matters in which exclusive jurisdiction has not been conferred upon the latter (supersession clause);
- the provision whereby State law shall in any case be supplementary to regional law (additionality clause).

It is interesting to note that the Spanish Constitution applies a subsidiary criterion in assigning administrative powers that are not expressly reserved for the Autonomous Communities or the State to local authorities (Article 137). The relevant principle appears in more detail in some of the provisions of the *Ley de Bases del Régimen Local* (Basic Legal Framework for Local Councils, LBRL No. 7 of 2 April 1985, ratified in accordance with Article 149(1)(18) of the Spanish Constitution).

In France, subsidiarity is implied in the constitutional amendment of 28 March 2003 relating to the decentralisation of the Republic. In fact, according to Article 72 of the new Constitution, "territorial units may take decisions in all matters that are within powers that can best be exercised at their level" (paragraph 2). Furthermore, "in the manner provided by institutional act, where the essential conditions for the exercise of public liberties or of a right secured by the Constitution are not affected, territorial

units or associations thereof may, where provision is made by statute or regulation, as the case may be, derogate on an experimental basis for limited purposes and duration from provisions laid down by statute or regulation governing the exercise of their powers" (paragraph 4).

Finally, in Belgium, the subsidiarity principle can be traced back to Article 162(2) of the Constitution (1994 text), which stipulates that the law must (under the special law on regional legislation of 13 July 2001) provide for "the attribution to provincial and communal councils [of] all that which is in the provincial or communal interest".

2.3 *The case of the United Kingdom*

In the United Kingdom, in the absence of a written Constitution, applications of the subsidiarity principle are found in legislative instruments.

In this respect, laws governing the devolution of power to Wales, Scotland and Northern Ireland are particularly interesting, especially the Scotland Act and the Northern Ireland Act (both dated 19 November 1998). In particular, subsidiarity is apparent in the attribution to the Scottish Parliament and the Northern Ireland Assembly of residual legislative powers in matters reserved for the British Parliament (the list of which is considerable). The same principle, in its dynamic form, could perhaps be inferred from the provision whereby the power of the United Kingdom Parliament to legislate for Scotland and Northern Ireland remains intact (a provision that identifies the legislators in Edinburgh and Belfast as subordinate to the sovereign legislator in London).

Finally, the traditional model of self-government, which grants representative bodies of local authorities a general power of autonomous administration, excluding only those matters directly assigned to central government, has its roots in the subsidiarity principle (see Local Government Act 1999).

2.4 *The subsidiarity principle in legal systems without regional autonomy*

Before concluding this part of the study, we should point out that elements of subsidiarity can also be found in legal systems where regional autonomy does not exist.

Prominent in this respect are Denmark and Sweden, on the one hand, and Greece, on the other.

In the Danish and Swedish administrative systems, municipalities are granted general powers. Under State supervision, local authorities, acting on behalf of the citizens, are able to handle matters which are of interest to the local community, provided the law does not assign jurisdiction over these to other administrations.

In Greece, under the Constitution, local affairs are handled by the local authorities, with the corresponding levels of government being granted administrative independence (Article 102(1) and (2)).

3. *Enforceability*

It is no secret that one of the most sensitive issues raised by the subsidiarity principle is its justiciability. It is clear, in fact, that if infringements of this principle cannot be referred to the courts, the laws on which it is founded risk becoming purely academic.

This problem is well-known, even to the legal system of the European Union. Furthermore, in Community doctrine, it has frequently been pointed out that the proceduralisation which this principle has undergone (and which is described in the first chapter of Part One) is also intended to empower the Court of Justice to rule on infringements of the principle.

Focusing on the rules laid down in the national legal systems of the Member States, with reference to the application of the principle in relations between the various regional and local levels of government, we have to conclude that the problem is particularly acute in dynamic systems. These effectively make subsidiary intervention dependent upon certain assumptions, regarding which it is difficult to draw the line between policy and law. For example, based on experiences in Germany and Italy, we could mention the *equivalence* of living conditions, legal or economic unity (as referred to in Article 72(2) GG), or the need for the *uniform implementation* of administrative functions (as referred to in Article 118(1) of the Italian Constitution).

Now, the guidelines offered by individual national legal systems in this respect are few and far between. These systems normally allow – as already seen in Chapter V of Part One – the regional authority to refer any infringement of its powers to the courts. Thus, it is also enabled to invoke infringements of the subsidiarity principle (where, of course, this principle underpins the division of powers). What is usually lacking, however, are solutions specifically aimed at delivering a response to the sensitive issue raised by dynamic systems.

In this respect, Germany and Italy are both exceptions to the rule.

In Germany, the chosen solution makes express provision in the Constitution for the Federal Constitutional Court to scrutinise the basis for legislative intervention by the Federation in matters that come under concurrent jurisdiction, granting the *Bundesrat* and the individual governments and parliaments of the *Länder* the power of appeal before this Court (Article 93(2) GG, as amended in 1994). This provision was inserted to circumvent the earlier case-law of the *Bundesverfassungsgericht*, which tended not to consider the application of the necessity clause by the *Bund* to be justiciable⁽¹⁾.

As for Italy, in the absence of an equivalent set of constitutional guidelines, a solution has been extrapolated from case-law. The problem effectively arose following the 2003 constitutional reform, to which we owe – as mentioned earlier – the introduction of explicit references to the subsidiarity principle. It was in relation to one of these references – in Article 118(1), concerning administrative functions – that the Constitutional Court, in a landmark judgment of 2003 (No. 303), ruled that it had the authority to verify compliance with the subsidiarity principle by national laws that allocate administrative functions to central government, pursuant to Article 118(1) of the Constitution. To this end, it calls for the proceduralisation of State intervention and ultimately makes the transfer of administrative functions to central government conditional upon an agreement with the Region.

(1) The Federal Constitutional Court of Germany, in its judgment of 24 October 2002 (2 BvF, 1/01) consequently found, with reference to the presumed necessity of federal law (ex Article 72, II GG), that the legislator has no margin of discretion beyond the judicial verification of constitutionality.

PART TWO

PARTICIPATION IN THE INDIVIDUAL MEMBER STATES

AUSTRIA

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

1.1.2 Participation in the Committee of the Regions

1.1.3 Regional representation and liaison offices in Brussels

1.1.4 Regional participation in National Representations

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

1.2.2 Techniques for involving regional and local authorities

1.2.2.1 Organisational aspects

1.2.2.2 Procedural aspects

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

3. Judicial protection of powers within the Community. Right to request the State to act

4. The subsidiarity principle

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

In cases where a proposal at EU level concerns matters for which the *Land* has legislative powers, the federal government (*Bundesregierung*) may appoint the federation's representative, from among the members of a government of one of the *Länder* (*Landesregierung*), on a proposal from the *Länder* (Article 23d(3)(1) of the Federal Constitution). Representatives of the *Länder* cannot participate in the EU Council of Ministers in their own right, however, but only alongside the competent representative of the federal government and with its agreement. Because very few subjects are the exclusive responsibility of the regional legislative authorities and in any case the *Länder* have little scope for conducting negotiations on their own, they often refrain from participating in these negotiations and, consequently, there is not a well established practice of direct codecision-making (internal consultation is considered satisfactory and participation in the Council of Ministers at executive level sufficient).

1.1.2 Participation in the Committee of the Regions

The Austrian delegation consists of twelve full members of the CoR and an equal number of alternates, who are nominated by a decision of the federal government (the list of nominated members is submitted to the EU Council of Ministers, which is responsible for appointing them). The *Länder* propose one representative each as candidates (nine). The remaining three members are proposed jointly by the Austrian Association of Cities and Towns (*Österreichischer Städtebund*) and by the Austrian Association of Municipalities (*Österreichischer Gemeindebund*) (Article 23c(4) of the Federal Constitution). Territorial and geographical criteria are taken into account in the nomination of the members.

By a decision of 9 November 1994, the Conference of Governors of the *Länder* stipulated that each *Land* must be represented by its own Governor. Members of the *Länder* governments, Governors or even members of the regional parliaments (*Landtage*) may act as alternates.

1.1.3 Regional representation and liaison offices in Brussels

The Austrian *Länder* (with the exception of Vorarlberg) have set up their own offices to represent their interests in Brussels. Each office represents the interests of an individual *Land* (information gathering and dissemination, representation of interests, lobbying) by fostering contacts with the European institutions (Commission and European Parliament) and with other regions in EU countries. There is also a branch of the Liaison Office of the *Länder* (*Verbindungsstelle der Länder*), which has an information and lobbying function for matters of common interest. The staff at this branch also work for Austria's Permanent Representation to the EC and are required to follow the instructions of the Head of Mission. In practice, this dual role creates a very important and direct information instrument.

1.1.4 Regional participation in National Representations

When consultations and negotiations are held in connection with European integration on matters that fall within the *Länder's* autonomous sphere of activity or may be in their interest, provision is made for regional representatives to be included in Austrian delegations, if the *Länder* so request, the inclusion of regional representatives is possible and the *Länder* bear the costs. These representatives may speak only with the authorisation of the Head of Delegation (Article 8 of the Agreement of 12 March 1992 between the *Bund* and the *Länder*). This provision is also applicable to consultations in Council working groups. In practice, these joint representatives are appointed by the Governors of the *Länder* through their liaison office in Brussels.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

Article 23d(1) of the Austrian Federal Constitution stipulates that it is the government's duty to inform the regional and local authorities about proposals within the framework of the European Union that concern matters within their competence or

could otherwise be of interest to them⁽¹⁾. In the case of local authorities (in this case the municipalities), such information is provided, under the abovementioned constitutional provision, through the associations that represent them: the Austrian Association of Cities and Towns (*Österreichischer Städtebund*) and the Austrian Association of Municipalities (*Österreichischer Gemeindebund*). This provision is consistent with the constitutional role incumbent on these associations, which, under Article 115(3) of the Federal Constitution, are required to represent the interests of municipalities.

As regards the *Länder* specifically, the constitutional provision is implemented in the Agreement of 12 March 1992 between the *Bund* and the *Länder*, adopted under Article 15a of the Federal Constitution, on the *Länder's* and municipalities' right to be consulted on matters affecting European integration. This stipulates that the *Bund* is to inform the *Länder* immediately, through the Liaison Office of the *Länder* (*Verbindungsstelle der Bundesländer*), about all proposals within the framework of European integration which affect the *Länder's* own sphere of activity or which could otherwise be of interest to them (Article 1 – duty to provide information).

A subsequent change to the Constitution (1994) stipulated that the Federation is to inform the *Länder* without delay about proposals within the framework of the European Union which concern matters within their competence or which could be of interest to them, allowing them to express an opinion in this regard. The same applies to municipalities in so far as their own sphere of competence or other important interests of the municipalities are affected (see 1.2.2.1(d)).

The competent federal government representative on the EU Council must inform (the National Council and) the Federal Council without delay about all proposals within the framework of the European Union and give them a chance to express their opinion (Article 23e(1) of the Federal Constitution).

(1) "The Federation shall inform the *Länder* without delay about proposals within the framework of the European Union which concern matters within their competence or could otherwise be of interest to them (...). The same shall apply in the case of municipalities in so far as their own sphere of competence or other important interests of the municipalities are affected. Representation of the municipalities in these matters shall be the responsibility of the Austrian Association of Cities and Towns and the Austrian Association of Municipalities."

1.2.2 Techniques for involving regional and local authorities

1.2.2.1 Organisational aspects

a) The Upper Chamber of Parliament

The structure of the Austrian Federal Council (*Bundesrat*) is different from that of its German counterpart. In terms of its composition and modus operandi, the *Bundesrat* cannot be seen as an assembly of delegates representing the will of their respective *Länder*. The members of the *Bundesrat* are parliamentarians but they are elected indirectly by the people and have a free mandate (politically and not institutionally representative).

In addition, this chamber does not have the power to pass a vote of no confidence in the federal government (*Bundesregierung*) or its individual ministers and is therefore too weak politically to be able to be regarded - in the absence of strong opposition - as an effective representative of the interests of the *Länder* in the national decision-making process. The position of the *Bundesrat* (and through it the position of the parliaments of the *Länder*) is crucial only in the case of constitutional amendments.

b) Ad hoc interregional bodies

In the *Integrationskonferenz* of the *Länder* (*IKL*) – the interregional body with decision-making powers provided for in the 1992 Agreement between the *Bund* and the *Länder* – each *Land* is represented by its Governor (spokesperson with a right to vote) and by the President of the *Landtag* (who has a merely consultative role). Members of the President's Office in the *Bundesrat* are authorised to participate in sessions (merely formal participation). This body can formulate common positions on the basis of the "consensus principle", which requires at least five votes in favour (each *Land* has a single vote irrespective of its population) and no votes against (right of veto, though abstaining is also an option). The formal Conference has little importance in practice; as a rule it is the non-institutionalised Conference of Governors of the *Länder* (*Landeshauptmännerkonferenz* - *LHK*) that actually participates in policy-making on Community matters.

The Standing Integration Committee of the *Länder* (*Ständiger Integrationsausschuss der Länder - SIL*) is composed of officials from the regional administrations in charge of the offices dealing with Community affairs and acts as a standing body for preparing and coordinating common positions. The practical importance of this body for the technical coordination of the *Länder's* Community policies, and of the IKL, has been diminished, and because many of the latter's tasks are performed by the LHK, much of the SIL's preparatory work has been taken over by the Conference of Directors-General of the Regional Administrations (*Landesamtsdirektorenkonferenz*), a body offering the LHK technical support.

The Liaison Office of the *Länder* is an institution founded in 1951 that acts as supplementary central coordination mechanism for the *Länder*. It is an informal institution, since it is not possible in Austria to set up joint bodies on the basis of agreements between the *Länder* (with the exception of the IKL, which is permitted under the Constitution). The Liaison Office provides a regular exchange of information and acts as a secretariat for the Conferences of the *Länder*. A branch of this office has been opened in Brussels (see point 1.1.3. above).

c) Joint national-regional bodies

The Austrian Council for EU Integration Policy (*Rat für Fragen der Europäischen Integrationspolitik*) is composed of representatives of the federal government (Federal Chancellor, Vice-Chancellor and Minister for Foreign Affairs), the National Council, the *Länder* (two representatives of the Governors and two representatives of the *Landtage*), municipalities and the social partners. This body advises the federal government in questions of integration policy, discusses and coordinates decisions relating to integration policy and provides an exchange of information in such matters (see Federal Law No. 368 of 1989).

d) Consultation of associations representing local authorities

As stated above, the two associations representing local authorities in Austria are provided for in the Constitution (Article 115(3) of the Federal Constitution), and under the Constitution (Article 23d(1)), it is through these associations that local authorities are to be informed about European proposals that may be in their interest.

Local authorities are also kept informed in the preparatory phase as a result of the aforementioned associations' attendance at the preparatory meetings that are held regularly in connection with meetings of the Committee of Permanent Representatives in Brussels (COREPER). The associations also have an opportunity to express their opinions at such meetings.

Representatives of local authorities are officially invited to take part in the work of the different National Committees on matters relating to Community affairs. Meetings are held once a week at the various ministries with an interest in Community affairs.

1.2.2.2 Procedural aspects

a) Different weight carried by opinions (positions)

The common position of the *Länder* on EU initiatives in areas where the *Länder* have legislative powers is binding on the *Bund* in EU negotiations and decisions, unless there are compelling foreign policy or integration policy reasons why this should not be so (Article 23d(2) of the Federal Constitution). The detailed provisions must be adopted by agreement between the Federation and the *Länder* (Article 23d(4) of the Federal Constitution – formerly Article 10(6)). Under the 1992 Agreement between the *Bund* and the *Länder*, the "common position" is drawn up at the Integration Conference of the *Länder* – IKL (see point 1.2.2.1(b)). In reaching the common position, the consensus principle applies. This requires at least five votes in favour and none against. In practice, the IKL is not very important (meets rarely) and politically binding common positions of the *Länder* can also be drawn up by other bodies (the Conference of Governors of the *Länder* or even the Conference of Directors-General of Regional Administrations).

Some regional constitutions or supplementary regional constitutional laws (*Styria, Tyrol, Salzburg, Upper Austria, Vorarlberg, Burgenland*) contain provisions permitting the *Land* Parliament (*Landtag*) to issue the *Land* Government (*Landesregierung*) with mandatory instructions on the line to take at the intergovernmental conferences that define the common position of the *Länder*, except – in some cases – where a derogation is allowed on pressing grounds relating to the general interests of the *Land*.

The opinion of the Federal Council (*Bundesrat*) is binding on the representative of the federal government in EU negotiations – unless there are compelling foreign policy or integration policy reasons why this should not be so - if a Community legislative proposal which takes powers away from the *Länder* requires the consent of the Federal Council for the approval of constitutional amendments (Article 23c(6) of the Federal Constitution). The Federation may exercise the power of derogation without any need to provide information (or a statement of reasons) to the *Bundesrat*.

In other cases, the *Bund* must assess the opinions issued by the *Länder* within the periods prescribed for verifying the Republic's position vis-à-vis the competent European Union bodies (Article 5 of the Agreement of 12 March 1992 between the *Bund* and the *Länder*– laying down the obligation to give due consideration to such matters).

b) *Multi-level consultation*

The Federation regularly convenes meetings of public officials in order to coordinate preparations for the weekly meetings of the Committee of Permanent Representatives (COREPER) or to prepare for Council meetings. The *Länder* participate in these preparatory meetings when the subject-matter concerns them, either through representatives of the Liaison Office of the *Länder* or through other joint representatives. Representatives of municipalities may also be invited to participate.

In practice, immediately before a plenary session of the CoR, the Conference of Governors of the *Länder* holds a preliminary discussion to which representatives of municipalities are also invited. Normally these discussions are held at noon on the first day of the plenary session in Brussels; in preparation for this discussion, a preliminary meeting is held between officials in Austria about a week beforehand.

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community legislation*

In areas within their jurisdiction, the *Länder* are required to take measures that are necessary for the implementation of legislation within the framework of European integration (Article 23d(5) of the Federal Constitution, introduced by the 1994

amendment of the Constitution). This means that they must implement EU legislation and take measures that, within their sphere of competence, are necessary for the enactment of Community legislation.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

Article 23d(5) of the Federal Constitution provides that the *Länder* must implement Community legislation and take the measures necessary for the enactment of that legislation. If a *Land* does not comply with this obligation in good time and if failure to fulfil the obligation is confirmed by a court in the Union or an ECJ judgment (for which the Federation is therefore at fault), power to adopt the measure passes provisionally to the *Bund* (even for the adoption of a law). The *Land* can regain its power by adopting an implementing measure that is consistent with Community law.

3. *Judicial protection of powers within the Community. Right to request the State to act*

The Federation has undertaken to bring an action with the Court of Justice of the European Communities, if requested by a *Land*, in the case of unlawful acts or failures to act by the EU institutions in matters for which the *Land* has legislative powers (Article 10 of the Agreement of 12 March 1992 between the *Bund* and the *Länder*), provided that none of the other *Länder* disapproves and there are no compelling foreign policy or integration policy reasons why such an action should not be taken. The *Länder*, for their part, have undertaken to reimburse the costs incurred by the Federation in bringing such actions. They are also required to pay the costs arising for the Republic of Austria from proceedings brought before the Court of Justice on account of *Länder* claiming that the EC has acted illegally (Article 12 of the Agreement of 12 March 1992 between the *Bund* and the *Länder*).

4. *The subsidiarity principle*

There is no express reference to the subsidiarity principle in the Federal Constitution of the Republic of Austria. However, the division of powers is clearly based on the idea of cooperative federalism in which the different levels of government are closely linked and which is in some way presupposed by this principle (general competence

of the *Länder* unless otherwise stated – Article 15(1); provision allowing federal laws to adopt uniform rules even in matters falling within the competence of the *Länder*, if the need is felt – Article 11(2); criterion for determining the sphere of activity of the municipalities on the basis of effective administrative capacity – Article 118(2)). On the other hand, two express references to the principle of subsidiarity can be found in the constitutions of two *Länder* (Tyrol and Vorarlberg). In both cases, however, it is a reference to horizontal subsidiarity, as a means of promoting individual personality and initiative, as well as social solidarity.

BELGIUM

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

1.1.2 Participation in the Committee of the Regions

1.1.3 Regional representation and liaison offices in Brussels

1.1.4 Other players (associations)

1.2 National side

1.2.1 Techniques for informing and involving regional and local authorities

2. Implementing phase

2.1 Division of powers for the implementation and transposition of EU legislation

3. The subsidiarity principle

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

The legal base for the Belgian rules is Article 81(6) of the Special Law of 8 August 1980 (subsequently amended by the Special Law of 5 May 1993), under which "the (Community* and regional) governments shall be authorised to enter into commitments on behalf of the State within the Council of the European Communities, where one of their members represents Belgium, in accordance with a Cooperation Agreement provided for in Article 92a(4a)".

Belgium's representation in international organisations is not laid down by law, but by cooperation agreements that govern both the definition of the position that Belgium's representative must adopt and the designation of the minister responsible for representing Belgium. On the other hand, rules governing the selection of the minister who will serve as President of the European Council during the six-month Belgian Presidency are laid down in an additional protocol.

In particular, Article 81 of the 1980 Special Law has been supplemented by the "Cooperation Agreement on the representation of the Kingdom of Belgium in the Council of Ministers of the European Union" (signed on 8 March 1994) and the Agreement of 18 May 1995 on the status of representatives of regions and Communities in diplomatic and consular missions (including the Permanent Representation to the EU).

Alongside the official meetings of the European Union Council of Ministers, "Informal Councils" have also developed. Detailed rules for these Councils are laid down in Belgian law in an annex to the Cooperation Agreement relating to the Council, even though they do not have any legal foundation in EU law. There is however no provision in Belgium for any preliminary meeting to determine the position to be adopted by the Belgian representative, since in Informal Councils no

* N.B.: In the section referring to Belgium the "Community" implies the language Communities into which Belgium is divided, namely the Dutch-, French- and German-speaking Communities.

final vote is taken and no official position has to be decided upon by the representatives of the Member States.

The Belgian rules on participation by the regions and the Communities in meetings of the Council of Ministers of the European Union (Article 203 TEC) are based on several principles.

First of all, meetings of the European Union Council of Ministers are classified, according to their agenda, in four categories (appendix to the Cooperation Agreement of 8 March 1994) and representation is determined on the basis of the internal allocation of responsibilities.

In particular, in matters falling within the exclusive competence of the Federation, representation is the sole responsibility of the Federation (general affairs, ECOFIN, budget, justice, telecommunications, consumer affairs, development, civil protection, fisheries); in matters falling primarily within the competence of the Federation (internal market, health, energy, environment and social affairs - agriculture was also included under the Law of 13 July 2001) the Federation's representative is accompanied by a regional or Community minister; in matters falling primarily within the competence of the regions and Communities (industry and research), the regional or Community minister is accompanied by a federal minister; in matters falling within the exclusive competence of the regions and Communities (culture, education, tourism, youth, housing and land-use planning), representation is the responsibility of the regional or Community minister.

In addition, the principle of six-monthly rotation applies (with each change of Presidency) in the case of regional and Community representatives in such a way that each federated entity, including the German-speaking Community, plays a role at EU level (representing Belgium or merely in an advisory capacity), of course without compromising the unity of the Belgian position. Rules have been laid down in respect of the principle of rotation.

It should also be stated that the same rules apply in Belgium to representation at both official meetings of the European Union's Council of Ministers and "Informal Councils".

Article 4 of the Agreement of 8 March 1994, which formalises a procedure that had already been employed in practice, stipulates that the composition of the Belgian delegation at meetings of the European Union's Council of Ministers has to be defined, on a case-by-case basis, by the Interministerial Committee for Foreign Policy. The federal, regional and Community levels have the same status within this Committee, while the representative of the Minister for Foreign Affairs has only a coordinating role. Founded on the principle of linguistic parity, the Committee is composed of six federal ministers and six regional and Community ministers. The representative of the German-speaking Community takes part only if the subjects under discussion directly affect the German-speaking Community.

In most cases, the representative is appointed automatically by the Minister for Foreign Affairs. The Committee is therefore convened only if there is disagreement.

In addition, in accordance with the principle of one representative per Member State (Article 203 TEC), the European Union's Council of Ministers is attended by one government representative (with ministerial status) having power to enter into binding commitments on behalf of the State (Article 10 of the Agreement of 8 March 1994), sometimes accompanied by a minister-counsellor (Article 10(2)). It should be pointed out in this regard that cases where Belgium is represented at EU level, by the federal government are almost the exception and as they occur either in respect of issues where the federal government has exclusive responsibility or in the event of joint responsibilities, it has not been possible to reach agreement on which representative of the regions or the Communities should be sent to the Council meeting in question. Representation by a federal minister represents, in a way, a kind of "penalty" for having failed to reach a compromise.

As regards the scope of action of the Belgian representative, it should be stated that, under the 1994 Agreement, the representative may enter into negotiations only on matters on which there has been prior coordination (Article 2(5) also applies to COREPER). On the other hand, in the case of matters in which there has been no coordination, the representative may abstain or attempt mediation at ministerial level. If the mediation body fails to reach full agreement and is therefore unsuccessful, the Belgian representative in the EU body must abstain.

In Belgium, coordination is carried out using a specific instrument, namely "Coordination P.11" (the abbreviation derives from that of the Directorate for European Integration and Coordination in the Ministry of Foreign Affairs). Using this instrument, all proposals from the European Union are discussed at weekly meetings with equal participation by ministers of the Federation, regions and Communities. Decisions have to be unanimous. Where a decision has to be amended during the negotiations or must be taken urgently, the representative at the EU body concerned must liaise with all the levels involved.

Organisation of work depends on the internal division of powers. In particular, in the case of subjects for which the Federation is primarily responsible, the federal minister follows the negotiations and casts his/her vote, whilst the (accompanying) regional or Community minister takes part, without any right to speak, only in Council meetings and maintains telephone contact with the other regional and Community governments that are not present. Consequently, those accompanying the federal ministers are often not ministers, but their officials.

However, in the case of matters for which the regions and Communities are primarily responsible and for matters falling within the exclusive competence of the regions and Communities, the regional or Community minister subsequently informs the federated entities of the negotiations and the vote cast, thereby going beyond his/her mandate. This action is made necessary because of the difficulty of contacting all the bodies represented. Under Article 2(6) of the Agreement, Belgium's official position on the matter under discussion will be expressed "*ad referendum*" (i.e. subject to confirmation) and notified to the Presidency within three days. From a legal point of view, this provision makes little sense since the EU decision has already been taken and cannot be modified.

On the other hand, abstention by regional or Community ministers would in any case also influence the final decision - beneficially in cases where unanimity is required and detrimentally in the case of decisions that require a qualified majority.

1.1.2 Participation in the Committee of the Regions

Belgium has twelve members of the Committee of the Regions. Those members are representatives of the federated entities (regional and Community) and are subdivided according to language group.

Specifically, there are 6 ministers from the Flemish government, 1 Flemish minister from the government of the Brussels-Capitale region, 2 members from the Walloon region, 2 ministers from the French-speaking Community and 1 French-speaking minister from the government of the Brussels-Capitale region. On a six-monthly rotation, the Prime Minister of the German-speaking Community replaces the Flemish representative for a period of six months and, for the other six months, one of the two Walloon representatives.

The Belgian delegation has the distinction of being the only one not to include representatives of local authorities among its full members; they are included only in the list of alternate members.

1.1.3 Regional representation and liaison offices in Brussels

Given the geographical proximity to the European Institutions that have their seats in Brussels, the subnational entities in Belgium have not set up their own European representation offices (even though some lobbying does take place), but have always used Belgium's Permanent Representation to the European Union. The Representation has its own office, which plays an important role in coordinating action and exchanging information, while allowing direct access to the Permanent Representatives Committee (COREPER).

Only the Brussels-Capitale region has undergone notable development in the last thirty years linked to the presence of the European Institutions. For that reason, in February 1991 the government of the Brussels-Capitale region set up the Brussels-Europe Liaison Office, a non-profit-making association. This office, which serves as the EU representative office of the Brussels-Capitale region, differs from those of the other Member States of the European Union in that its primary function is to receive officials that come to the Community Institutions, assisting them with legal and administrative practices and providing them with useful information. The administrative assistance unit has an important role to play in this respect.

Just as important are the socio-cultural activities of the Brussels-Europe Liaison Office, which organises cultural events to bring together European officials and officials from Brussels and arranges typical Brussels cultural activities which deserve to be showcased at Community level. These activities are all the more significant if it

is borne in mind that, in addition to the Community Institutions, Brussels is home to around sixty intergovernmental organisations and more than one thousand non-governmental organisations, as well as approximately 2,000 foreign companies, around 60% of which have established their registered office in Brussels.

1.1.4 Other players (associations)

In Belgium, an active role is played by three regional associations, set up in 1994, namely the: Union of Towns and Municipalities in Wallonia (UVCW); Association of the City and Municipalities of the Brussels-Capitale Region (AVCB); and the Association of Flemish Towns and Municipalities (VVSG). These associations support the communities in question in achieving their objectives, such as enhancing and protecting their autonomy. Representatives of regional associations can be found in many external bodies and commissions, including, for example, at federal level, the Special Commission for Cross-border Cooperation; the Public Procurement Commission (Prime Minister); and the Federal Road Traffic Commission (Ministry of Communications). Regional representatives also serve on most federal commissions, such as the Joint State/Regional Working Group on Municipal Finances.

Belgium also has the UVBC (Union of Belgian Cities and Municipalities), which officially represents Belgian local authorities at the Council of European Municipalities and Regions (CEMR). This association focuses on two activities: representation and information.

1.2 National side

1.2.1 Techniques for informing and involving regional and local authorities

Belgium has a particularly conflictual political system and there is a need to ensure equal conditions for its Regions and Communities. In view of this, a process of direct codecision is applied as a rule; it is however, backed up by few legal regulations and political consensus is an explicit requirement.

The direct participation of regions and municipalities in the preparatory phase seems to be based on the principle that participation is permitted in compensation for the loss

of powers. This is because of the anomalous situation that has occurred on account of the separation of spheres of responsibility and the presence of many "joint" responsibilities. On the one hand, the federated entities cannot act autonomously in European Union matters, while, on the other, the federal government cannot interfere in areas which are the responsibility of the federated bodies. It has therefore been decided to pursue joint action, through direct codecision. There are no consultation obligations or rights, but procedures for "ad hoc" coordination (coordination procedure), which go beyond mere "consultation", since there is no body which involves regional and Community participation, on account of the marginal role played by the Belgian Senate. The participation mechanisms in Belgium therefore focus on encouraging direct participation by regions and Communities at European level in a large number of cases, even though prior agreement must be reached internally to allow regional or Community ministers to represent Belgium as a whole.

Direct participation by the federated entities is undoubtedly facilitated by the limited number of subjects involved, but nevertheless requires a considerable coordination effort; since it is necessary to reach unanimous political agreement, which is difficult to achieve.

However, by utilising a large number of avenues of cooperation, the various levels of government must reach an agreement. If they fail to do so, Belgium may be unable to take action at EU level or to implement EU law. In this regard, it may be pointed out that the Belgian model makes no provision for direct court action in the event of failure to reach agreement, but in some cases presupposes a political obligation to cooperate (which is also dictated by the principle of federal loyalty). If no such cooperation materialises, a price has to be paid in due course, should Belgium be unable to take action at EU level.

The political approach to the resolution of any disputes can be seen in the choice to have recourse not to the Court of Arbitration (*Cour d'Arbitrage*), but to the Interministerial Committees (for example the Interministerial Committee for Foreign Policy) and, in the final analysis, to the Council of Ministers.

There are no regulations governing the provision of information to local authorities in the preparatory phase of the EU decision-making procedures.

2. Implementing phase

2.1 Division of powers for the implementation and transposition of EU legislation

By definition, a directly applicable provision does not require a transposing measure to be adopted by State bodies. After the implementation of the formalities needed for its entry into force, the provision becomes part of the legal system. No political authorities can play any role in this procedure; the federal authorities cannot interfere in any way whatsoever.

On the other hand, where involvement by national bodies is necessary in order to implement EU legislation, the problem arises of determining which body from amongst the Federal Government and federated entities shall be responsible for adopting the necessary measures.

Belgian law confirms that, when EU laws are implemented, it is essential to respect the responsibilities of the federated entities. The federal government, the regions and the Communities are responsible for transposing directives, each within their own sphere of competence. A directive relating to a regional or Community issue must be transposed by means of Community or regional decrees and ordinances, since the State does not have any power in this regard.

However, the State may act in place of the regions and the Communities if they fail to transpose directives (Article 169 of the Constitution and Article 16(3) of the Special Law on institutional reforms of 8 August 1980).

3. The subsidiarity principle

The Belgian legal system provides for the existence of concurrent powers. In some areas where there are parallel responsibilities, exercised by the federal authorities and by the authorities of the Communities and/or the regions, concurrent spheres of responsibility can be identified, as in the case of, for example, scientific research (Article 6a(3) of the Special Law of 8 August 1980). Under the Law of 16 July 1993, amending the 1980 Special Law, the State may undertake initiatives in areas where the Communities and the regions are responsible, provided its involvement concerns areas of research of international importance or sectors that transcend the interests of a

single Community or a single region. According to some authorities, in cases like this the subsidiarity principle would apply.

Elements of subsidiarity can be seen in Article 162 of the Constitution which, among the principles underlying the law governing the provinces and the municipalities, includes the principle of attributing to the relevant councils "all matters of provincial or municipal interest", without prejudice to the ratification of their acts in such cases and following such procedures as are laid down by law (see paragraph 2(2)).

DENMARK

1. Preparatory phase

1.1 European side

1.1.1 Participation in the Committee of the Regions

1.1.2 Regional representation and liaison offices in Brussels

1.1.3 Regional participation in National Representations

1.1.4 Associations and interregional cooperation at European level

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

1.2.2 Techniques for involving regional and local authorities

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

3. The subsidiarity principle

1. Preparatory phase

1.1. European side

1.1.1 Participation in the Committee of the Regions

In the preparatory phase of the Community decision-making process, a crucial role in the involvement of Danish local and regional authorities⁽¹⁾ is played by the delegation to the Committee of the Regions, which is composed of nine members (and an equal number of alternate members, as provided for in Article 263 TEC).

In the absence of a legal base for the appointment of the Danish delegation, at the request of the Minister for Foreign Affairs, candidates are nominated by the two associations of regional and local authorities, as well as the Copenhagen and Frederiksberg Municipal Councils⁽²⁾.

Each association makes its own proposal based on geographical/territorial and political criteria. In addition, the aim is to have an equal number of men and women present in the delegation, although at present less than half of the full members are women.

All the members of the delegation are representatives elected by direct suffrage. The members of the two associations of regional and local authorities are all regional and local councillors.

(1) In the Danish system the regional level is called *Amter*, which is translated variously as county, province and region, although in other systems these terms indicate territorial bodies at different levels. The Danish Constitution applies to the *Rigsfællesskabet*, which is often translated as the United Kingdom of Denmark, Greenland and the Faroe Islands. Under the Home Rule Acts of 1948 and 1969 respectively, Greenland and the Faroe Islands have a separate system of territorial autonomy (*hjemmestyre*) and are represented in the Danish Parliament (*Folketing*). In 1973 the Faroe Islands decided not to join the EEC; Greenland, on the other hand, joined at first, but, following opposition from the majority of the electorate in the 1982 referendum, left in 1985. Independence parties are particularly strong in regions in the north of Denmark.

(2) These local authorities are special cases since they are regarded as both municipalities and counties under Law No. 615 of 18 July 1995 laying down rules for local government (*Bekendtgørelse af Lov om kommunernes styrelse*). They are not part of the above-mentioned associations.

The eight candidates (four full members and four alternates) for the delegation designated by Danish Regions (*Amtsrådsforeningen i Danmark*), the association that represents Denmark's fourteen regions, are selected by the association's Department for International Relations⁽³⁾.

A similar procedure is followed by Local Government Denmark (*Kommunernes Landsforening* or *KL*), whose members are the 275 municipal councils⁽⁴⁾. Local Government Denmark's International Committee selects eight candidates (four full members and four alternates).

One full member and one alternate are chosen by the cities of Copenhagen and Frederiksberg⁽⁵⁾.

After deliberating over the proposed candidates, the national government sends the list of nominated members to the EU Council of Ministers, which appoints the members of the Committee of the Regions.

(3) By the Law on local government of 31 May 1968, last amended by the Law of 11 December 1996, an amalgamation process was begun which has resulted in a gradual reduction in the number of counties from 25 to 14 (see www.arf.dk). Danish Regions is governed by an assembly formed by all 384 regional councillors. In the Danish system, a key role at regional level is played by the council, elected directly using a proportional representation system.

(4) By the above-mentioned Law on local government, the previously existing 1 300 *Kommuner* were reduced to 275 (see www.arf.dk). As an alternative to merging, other local authorities chose to cooperate in various sectors in less formalised ways. However, unlike in Sweden, the merging process has involved the local authorities, which have often willingly supported their merger into larger entities. This approval can be explained by the marked increase in the status of the municipalities, in relation to regional level, which characterises the reform of Danish local government. Denmark is the most decentralised of the unitary European States. In Denmark, decision-making power is held by assemblies at both regional and local levels. Unlike the other Scandinavian countries, moreover, where the political and administrative spheres are separated at least formally, at local level a very prominent role is played by the mayor, precisely because he is at the same time chairman of the municipal council and head of the local administration. It should be noted that the mayor is elected by the municipal council from among its members, who are all elected using a proportional system. At present, seven Danish members of the Committee of the Regions are mayors (www.kl.dk).

(5) Since 1 January 2000 there has been a special authority, the Greater Copenhagen Authority (*Hovedstadens Udviklingsråd*), encompassing the municipality of Frederiksberg and the county of Copenhagen, which represents a third of the Danish population and performs both municipal and regional functions. Similar mergers into a single administrative unit, both local and regional, have taken place since 1 January 2003 among five municipalities and the county of Bornholm, following the local referendum held on 29 May 2001 and the resulting Act of Parliament of 19 March 2002.

1.1.2 Regional representation and liaison offices in Brussels

The representation and liaison offices in Brussels are an important channel for local and regional authorities in their efforts to influence the Community decision-making process, by creating contacts and networks with the departments of the European Commission and Danish MEPs. The associations of the Danish local and regional authorities consider that these offices fulfil an important information and advisory function with regard to new initiatives and Community programmes on development, growth and employment⁽⁶⁾.

Of the 250 or so regional and local offices in Brussels, 16 are Danish. Since 1997, in particular, there has also been the international secretariat of Local Government Denmark, whose purpose is to influence the growing body of legislation originating at Community level that impinges on the powers of the local authorities and to provide information on financing programmes in which municipalities can participate. Local Government Denmark shares its office in Brussels with the office of Danish Regions, which likewise collects and disseminates early information on policy initiatives undertaken by the Community institutions that are relevant to the regions and provides assistance to Danish regional members of the Committee of the Regions.

There are also offices of regional development agencies, individual municipalities and regions, but it is possible to see a trend to band together by geographical area, socio-economic group and also on the basis of areas selected by Community programmes⁽⁷⁾.

(6) See www.arf.dk and www.kl.dk.

(7) With the establishment of the European Single Market, the Danish local authorities began to notice some of the effects of Community integration, not only through transposition of Community law and adaptation to Community technical standards, but above all on account of the opportunities to finance local and regional development projects offered by the structural funds. In particular, while in the past some politicians and Local Government Denmark have considered that the regional level was ineffectual in Denmark, the importance given to that level by the Community system has removed from the public debate any notion that it is being suppressed. However, the Community orientation is much more pronounced among Swedish and Finnish local authorities, which have begun to be given greater powers in conjunction with their – much more recent – accession to the EU. The structural fund policies have helped to differentiate the attitudes of Danish local and regional authorities to Community integration; among the attitudes of passive, reactive and active resistance, the most widespread is passive, while active resistance can be found among larger local authorities and those located in the areas in the west of Denmark that are eligible for the structural funds. From 1995-1996, the administration of the bulk of the structural funds was transferred from the Department of Industry and National Trade to the regional committees set up by the regions and local authorities.

There is a single office for North Denmark, covering the municipality of Aalborg and the regions of North Jutland and Viborg; since 1 April 2003, five regions in South Denmark (Storstrøm, West Zealand, Funen, South Jutland, Ribe) have set up a common base in South Denmark House (SDH), while eleven municipalities and the region of Ribe form EU West. Offices tend to group together; the regions of Ribe, Funen and South Jutland with the municipality of Odense since 1 January 2001 and the regions of Storstrøm and West Zealand, under a cooperation agreement, since 1 January 2003.

It is interesting to note that some regional or local authorities are represented by commercial development companies: EU West's commercial development centre and the Ringkjøbing region's non-profit Eura company; the office for the municipality of Aarhus is part of the city's commercial development department, which provides the service for the entire region of Aarhus. There are municipal offices for Copenhagen, Odense and Haderslev.

For many Danish regions it is strategically important to coordinate the representation of their own interests to the Community institutions with Finnish and Swedish regions in the Baltic Sea House. Similarly, the B7 Office in Brussels is very important for local authorities, representing the "Baltic Seven" or "7 island cooperation", which represents seven Swedish (Öland and Gotland), Finnish (Åland), Estonian (Saaremaa and Hiiumaa), German (Rügen) and Danish (Bornholm) islands.

1.1.3 Regional participation in National Representations

Even though there is no expert from the local authorities in the Danish Permanent Representation to the EU, the offices of the Danish local and regional authorities present in Brussels, in particular those of the two associations, work closely with it⁽⁸⁾.

1.1.4 Associations and interregional cooperation at European level

In order to build networks to circulate information that is useful for influencing the Community decision-making process, as well as establishing close relations with the corresponding authorities of other countries, the Danish regional and local authorities belong to various international associations.

(8) See www.kl.dk.

The two associations of Danish local and regional authorities participate in international cooperation with a view to promoting autonomy and protecting the interests of local and regional authorities in Europe. Their membership of European and international associations is specifically because they wish to influence Community decision-making processes. With these objectives, both associations belong to the Council of European Municipalities and Regions (CEMR), the European section of the unified international association, United Cities and Local Governments (UCLG). In addition, both associations have their own representatives in the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), which is recognised as being one of the main organisations for "social dialogue" at European level, contributing to the formulation of Community labour market legislation.

Furthermore, five members and the same number of alternate members of the Congress of Local and Regional Authorities of Europe (CLRAE), a consultative body of the Council of Europe, are representatives of municipal (2 full members and 3 alternates) and regional (3 full members and 2 alternates) councils belonging to the two associations, and two Danish regions (Fyn and Veile) are members of the Assembly of European Regions (AER).

The Danish regions are very active, partly through their association, in Baltic Sea States Subregional Cooperation (BSSSC), which brings together the decentralised authorities in the Baltic countries at the level immediately below national level in order to represent their interests *vis-à-vis* governments, the European Commission and other European and international institutions. Some of the many similar associations are based in Denmark and represent a means of contacting the offices of the European Commission⁽⁹⁾.

EU enlargement to include the Baltic republics has been a favoured area of cooperation for Danish local authorities with the corresponding authorities of other countries, to which Local Government Denmark provides consultancy services, in particular with regard to ways to obtain Community financing. The international secretariat of Local Government Denmark provides information on the structural funds, partly to consolidate and encourage town twinnings. From this perspective,

(9) Of these, the Baltic Sea Seven Islands Cooperation Network also has its own office in Brussels.

participation by many Danish cities⁽¹⁰⁾ in the Union of the Baltic Cities is particularly important. The cities of Copenhagen and Aarhus are also members of Eurocities, the network of the largest European cities, whose aim is to place urban issues at the centre of the European agenda, as is shown by the Vienna Declaration of 12 November 2004, by which that association addressed eighteen proposals to the Community institutions and the Member States.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

a) Methods

In Denmark, as in the other countries of Northern Europe, information to regional and local authorities on the Community decision-making process is provided not through *ad hoc* procedures, but by virtue of the ordinary democratic environment and the transparency of the institutions' activity.

Local authorities are informed of European Commission proposals, first of all, by belonging, through their association, to the special EU committees set up in the relevant ministries. Local Government Denmark, whose international committee is composed of local delegates to the Committee of the Regions, therefore represents an important source of information on the Community decision-making process in Denmark. Local Government Denmark is able to use a considerable organisational structure (the international secretariat) which can integrate information from Brussels with that received from the Danish government and distribute it, through a website that is updated daily, to a comprehensive network of all the interested parties at local level, establishing communication between them in electronic forums.

In view of Denmark's leading position with regard to the computerisation of public administration and the distribution around the country of private and business Internet connections, special importance is attached to the online availability of documents relating to the Community decision-making process.

(10) Aarhus, Copenhagen, Fredericia, Horsens, Koge, Kolding, Naestved, Nykobing F., Silkeborg, Vordingborg.

In particular, much of the material supplied to the Parliamentary European Affairs Committee (*Europaudvalg*), set up in 1972 in connection with the 1973 Danish accession to the Community integration process⁽¹¹⁾, is published on the Internet (www.eu-oplysningn.dk). Each minister in the Danish government must obtain a "mandate for negotiation" from that parliamentary committee before attending meetings of the EU Council of Ministers. The mandate is usually regarded as having been granted if the majority of the parliamentary committee are not opposed to the position that the minister intends to take in Brussels⁽¹²⁾.

To that end, the Minister for Foreign Affairs sends the parliamentary committee all European Commission proposals and certain memoranda containing more important information about meetings of the EU Council of Ministers. The committee also receives from individual authorities expert reports and any positions of interest groups which the government (including local and regional authorities) must consult.

The Danish Act of Accession to the European Community (Article 6(2)) actually provides only that the government has an obligation to inform the Parliamentary European Affairs Committee about proposals for Community legislative measures that are directly applicable in Denmark. Agreements concluded between the government and this committee have subsequently made the Danish government's position at Community level subject to the mandate from the committee. The committee's members also sit on other parliamentary committees, in some cases chairing them, which facilitates the dissemination of information on the Community decision-making process.⁽¹³⁾

(11) Accession to the European Community took place without constitutional amendments, but using the special procedure laid down by Article 20 of the Constitution relating to international cooperation. In fact, as early as 1961 the Folketing set up a committee to monitor the government's negotiations on Denmark's accession to the Community. At that time it was called the "Market Negotiation Committee". Following the referendum held on 2 October 1972 on accession to the Community integration process, it became the "Market Committee" and kept that name until the entry into force of the Maastricht Treaty, when it took its current name.

(12) The committee is composed of 17 members and 11 alternates, but when the chairman of the committee counts the "votes" cast, he gives to each person voting a number of votes equal to the number of seats in the Folketing held by the party to which they belong. In this way, in order to deny a minister the 'mandate for negotiation', 90 votes out of a total of 179 are needed.

(13) www.eu-oplysningen.dk.

However, the Danish Parliament (*Folketing*) regrets that the government consults the parliamentary committee only on the most important matters. Even though since 1989 there has been an adviser on European affairs available to its members (who, through his staff, prepares memoranda on European Commission proposals), the workload of the Committee for European Affairs not only makes it difficult to guarantee effective parliamentary scrutiny, but moreover does not allow sufficient publicity of the debate within the *Europaudvalg*.

The importance of the transparency of political and administrative action to democracies in Northern Europe therefore prompted the *Folketing* to set up an EU Information Centre in 1994 in order to make the Community decision-making process accessible. The Minister for Foreign Affairs sends the *Folketing's* Secretariat for European Affairs all the proposals and the most important information from the European Commission, which are then posted on the Information Centre's website, which also has interactive services and questions and answers (www.euo.dk). In addition, under an agreement with the government concluded in 2001, all members of the *Folketing* receive "basic memoranda" on proposals for Commission directives, regulations and decisions no later than four weeks after they have been received by the EU Council of Ministers. The European Affairs Committee receives the agenda for each meeting of the EU Council of Ministers eight days before the meeting is held. Subsequently, after the minister's public report on the meeting, its members may request further information, such as the position of the European Parliament and of the consultative bodies.

Through these information flows, which are accessible to all citizens, local authorities have an effective channel for collecting the materials available to the *Folketing* in the preparatory phase.

b) *The role of representatives of local authorities in the Committee of the Regions with respect to such information*

An important source of information for regional and local authorities in relation to the Community decision-making process is the presence of their representatives in the European institutions, in particular the Committee of the Regions. In addition to communicating regularly with the members of the *Folketing's* European Affairs Committee, with the European Parliament and with the European Economic and

Social Committee, the Danish delegates on the Committee of the Regions circulate any news that may be useful to members of the associations of regional and local authorities, ensuring that all local and regional representatives have access to information on the Community decision-making process. To provide information and communicate news, they use the structures of the two associations. The delegates to the Committee of the Regions designated by Local Government Denmark, as members of the association's international committee, can depend on strong channels (an entire secretariat) to distribute the information collected (a website that is updated daily and periodical publications) and also on networks of local administrators and politicians who are members of the association.

1.2.2 Techniques for involving regional and local authorities

Representatives of regional and local authorities also sit on special EU committees set up within ministries. The positions of chair and secretary of these committees are held by the competent ministry. The committees analyse European Commission proposals. In general, in all cases where new legislation has to be adopted at Community or national level in relation to subjects that are of relevance to regional and local authorities, appropriate committees are set up, composed of representatives of the two associations, the parliament and the government.

The two associations representing local and regional authorities are the main actors at national level as organisers and coordinators and as a pressure group on central government. On the other hand, the local and regional representatives consulted and informed in various capacities are still representatives of the associations.

Relations between central and local government are characterised by a mixture of supervision, negotiation and autonomy, as can be seen from some of the specialist literature. A key role is played by agreements (the annual financial agreement is very important, even though it is not legally binding), contracts and decisions. Great importance is attached to lobbying.

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

The responsibilities of regional and local authorities are not always expressly laid down by law. Local activities come within the scope of the "general competence rules", unwritten fundamental legal principles that enable local authorities to spend their resources on public services and facilities (see the section on subsidiarity below). Nevertheless, the majority of their functions are conferred by the State by law, even though there is no unitary legislation on the division of powers between the State and local authorities. However, the decentralised system for the management of public services is governed by negotiations between the various levels of government and between central government and opposition parties.

At present, the regions and municipalities manage the majority of public services in cases and using procedures provided for by national legislation and under State supervision. The regions are responsible for hospital care, health insurance, secondary education, care for people with disabilities, environmental protection, public transport and regional planning. Local authorities are responsible for civil registers, personal taxes that form the basis for direct taxation both for income taxed at source and for professional earnings, local planning, primary and secondary education (up to the age of 16), care for the elderly, local roads, water services and waste.

Community legislation impinges on regional and local powers in many sectors. Although they do not themselves have a legislative function, regional and local authorities in Denmark are involved in implementing Community obligations that impinge on their powers and responsibilities through their participation in special EU committees set up within the ministries. For the transposition of Community directives into national law, local and regional authorities are involved in the drafting of acts of parliament, as are other pressure groups that participate in the above-mentioned bodies where their interests are affected.

From 1999 an "open coordination method" was introduced for drafting and implementing Community law. In view of the possibility for local authorities to take on non-delegated duties and responsibilities, in all cases where these voluntary powers relate to Community affairs, the two associations of the regional and local authorities

are involved in preparing national action plans, in close cooperation with the delegation to the Committee of the Regions and the Parliamentary European Affairs Committee.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

In the absence of *ad hoc* legislation in respect of failure to implement Community legislation, the execution and application of Community law falls back within the general ambit of local measures. The Constitution confers on the State the power of supervision over local authorities. Such supervision is exercised by State administrative bodies which are recognised as having functional autonomy from the government and from individual ministries.

Supervision over Copenhagen and Frederiksberg is exercised directly in the Ministry of the Interior and Health, through a prefect. Under the provisions of Articles 63-65 of the above-mentioned Law on local government⁽¹⁴⁾, each region has a supervisory council (*tilsynsråd*). Although the regional councils have fewer powers than the corresponding authorities of other Scandinavian countries and are not generally hierarchically above municipalities, the supervisory committee is formed by the county governor, who is the prefect of the region appointed by the government, and by four members elected by the regional council from its own members. They are independent administrative authorities that decide on the compliance of administrative activity with the law, but do not have any discretionary power.

Where a breach of the law is definite and there is no reasonable doubt, the decision by the local authority may be annulled and suspended if it has not yet produced any effects; other possible sanctions are fines for failure to act, compensation for damages, penalties and summons. In some cases, the supervisory authorities oversee the procedure by which the local authority is to rectify the act or unlawful failure to act. It is possible to appeal to the Ministry of the Interior against decisions by the supervisory body. This power has recently been conferred on the ordinary courts.

The Parliamentary Ombudsman may decide, including upon petitions by individual citizens, whether decisions by regional and local authorities are lawful and consistent

(14) See note 2.

with the principles of good administration (efficiency, avoidance of unjustified delays and conduct that inspires public confidence in public authorities), annulling them where necessary.

3. *The subsidiarity principle*

In the absence of express references to the subsidiarity principle in the Danish system, on the basis of "general competence rules" local authorities may, within their boundaries, pursue any type of activity, even in the absence of a specific power conferred by law, provided that local services are non-profit in nature and cannot be offered better by other authorities or by private individuals. As in Sweden, therefore, local powers are defined negatively, and are not expressly listed. On the other hand, in Denmark much regard is had for the principle contained in the Law of 1241, according to which "if no one exceeds the bounds of their own law or permits anyone else to do the same, laws will not be necessary".

However, the Minister for the Interior supervises and monitors the lawfulness of local authorities taking on "voluntary" responsibilities. As a principle, national legislation has sought to divide functions between the State, regions and municipalities in such a way that responsibilities are taken on by the level that can exercise them best. The regions are responsible for functions that, on account of the scale of the interests involved, cannot be exercised better at a level closer to the citizen.

Extensive participation by service users might also be traced back to the principle of horizontal subsidiarity; such participation is important above all in schools and nurseries, where parents are involved in the decision-making process. In general, informal relations are very important in Danish decision-making processes. There are professional networks that bring together actors that share common interests in different scenarios. Together with Sweden, Denmark boasts the highest number of associations in the world, and is very active in lobbying. Decentralisation policies have encouraged interaction between service providers, politicians and administrators and interests organised through agreements, contracts and decisions.

In the recent debate on reforming the division of administrative powers among the three levels of government, it has been proposed expressly to introduce the

subsidiarity principle⁽¹⁵⁾. The Commission for Administrative Reform, set up in 2002 by the Danish government to propose a territorial and administrative reorganisation in Denmark and composed of members nominated in part by the central administration, in part by the associations of local and regional authorities, completed its work in 2004⁽¹⁶⁾. Resolution No. 1434 of 2004 adopted by that consultative commission has formed the basis for a debate and a political process that has resulted in the adoption, in 2004, of an important "Agreement on structural reform" between the Danish government (the Liberal Party and the Conservative Party) and the Danish People's Party, in which it is recognised that a new division of public responsibilities and public services is needed. Although the subsidiarity principle has not been expressly introduced, the parties that signed the agreement have undertaken to strengthen the local political level through active forms of public participation in managing services and to increase the responsibility of larger municipalities, through detailed implementing legislation for that agreement⁽¹⁷⁾. The municipalities will still be responsible for the majority of functions, but five new regions will be created (in the place of 14 counties), responsible for health services, the promotion of regional development and the resolution of major organisational problems in the municipalities.

(15) Opgavekommissionen 1998.

(16) Recommendation of the Commission on Administrative Structure, Recommendation No. 1434, The Commission on Administrative Structure, January 2004, in www.im.dk.

(17) The parties decided to draw up a plan for the detailed implementing legislation for the Agreement from September 2004.

FINLAND

1. *Preparatory phase*

1.1 *European side*

1.1.1 *Participation in the Committee of the Regions*

1.1.2 *Regional representation and liaison offices in Brussels*

1.1.3 *Regional participation in National Representations*

1.1.4 *Associations and interregional cooperation at European level*

1.2 *National side*

1.2.1 *Informing regional and local bodies in the preparatory phase of Community measures*

1.2.2 *Techniques for involving regional and local bodies*

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community measures*

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. *The subsidiarity principle*

1. Preparatory phase

1.1 European side

1.1.1. Participation in the Committee of the Regions

The Finnish delegation to the Committee of the Regions, which is composed of nine members (and nine alternates, as provided for in ECT Article 263), plays an important role in involving local and regional authorities⁽¹⁾ in the preparatory phase of Community decision-making.

The delegation members are appointed by the government of the self-governing Åland Islands (*itsehällintoalue/självstyrande region*) and the Association of Finnish Local and Regional Authorities (*Suomen Kuntaliitto/Finlands Kommunförbund*).

The nomination procedure for members of the Finnish delegation is not governed by any legal instrument. The Åland Autonomy Act,⁽²⁾ however, expressly states that one member and one alternate must be appointed by the Government of the Åland Islands⁽³⁾.

With regional considerations in mind, the Association of Finnish Local and Regional Authorities nominates four members (and four alternates) to represent the Regional Councils (*Maakuntien liitot*), which are bodies comprising all the municipalities

- (1) Chapter II of the new Finnish Constitution of 1999 deals with self-government and states that the provisions governing local administration are laid down in an Act. Finnish decentralisation is based on a strong municipal tradition to which a regional structure has been added under national law. Local Government Act 365/1995 grants substantial autonomy to municipalities, which exercise that autonomy through municipal councils elected by universal suffrage.
- (2) The autonomy of the Åland Islands is recognised in the Constitution, which refers the matter to an Act (Section 122). Under the Åland Autonomy Act (No. 1144 of 16 August 1991 as amended by Act 1556 of 31 December 1994), when the national parliament decided to accede to the EU the parliament of the Åland Islands (following a referendum in which there was a 74% yes vote) voted in favour of joining and obtained a special protocol to the Treaty of Accession of Finland. The Protocol on the Åland Islands is an integral part of primary Community law and cannot therefore be amended by regulations and directives. In particular, the Åland Islands have the right to retain the residence requirement for acquisition of land, the right of establishment and provision of services, and are excluded from the harmonisation of laws on indirect taxation, thereby allowing untaxed trade between the Islands and Sweden.
- (3) Chapter 9, Section 9 of the Åland Autonomy Act.

within the territory of each of the 19 regions (*maakunta/landskap*)⁽⁴⁾, and the same number (four members and four alternates) of candidates to represent the interests of Finland's 452 cities and municipalities (*Kaupungit ja kunnat*)⁽⁵⁾.

The Association's proposal is also based on political criteria and takes account of the results of the most recent local elections. The intention is to ensure that nominations also represent the Swedish-speaking community⁽⁶⁾ and that there is balanced representation of men and women. In geographical terms, the different parts of the country must be represented.

All the Finnish members and alternates of the Committee of the Regions, whether regional or municipal, are either directly elected or politically accountable to a directly elected Municipal Council⁽⁷⁾.

The list of candidates drawn up by this method is forwarded by the Ministry of the Interior to the national government which, after considering the proposed list of candidates, submits it to the EU Council of Ministers, which then appoints the members and alternates of the Committee of the Regions.

- (4) Regional Councils are statutory authorities formed by the municipalities within a region coming together to act as planning bodies and to look after regional interests at European and international level. Local government in Finland operates through existing local authorities and is based on cooperation between them. Essentially, therefore, in contrast to the other Nordic countries, Finland has only one tier of local government. Act 1159/1997 laid down the boundaries of the regions in Finland, thereby determining how Finland was to be subdivided into regions both for the purposes of involvement in the European Structural Funds programmes (Act 1353/1991) and as provided for in the Regional Development Act (Act 602/2002). These Councils have no powers of taxation and are dependent on the municipalities to fund their activities.
- (5) See CoR, *The Selection Process of CoR Members: Procedures in the Member States, 2004*. The website of the Finnish Association (www.Kunnat.net/www.Kommunerna.net, as updated on 25 August 2004) refers to 444 towns and municipalities.
- (6) Local government in Finland is partly a response to requests for autonomy by the Swedish-speaking minority. Under Section 122 of the Constitution, the objective of the public authorities is to subdivide the country such that the Finnish-speaking and Swedish-speaking populations have the opportunity to receive services in their own languages.
- (7) The local authorities elect their representatives in the Association in proportion to their population, and each has the right to one representative. The General Assembly thus elected, in turn elects a Council of 101 members, which itself elects a 15-member board. There are further substructures within the Association, including the Conference of the Presidents of the Regional Councils.

1.1.2 Regional representation and liaison offices in Brussels

The Association of Finnish Local and Regional Authorities has an office in Brussels which acts as a channel for communication and lobbying on the Community decision-making process for all its members. The office provides information services for the Association, municipalities and Regional Councils by maintaining contacts with the Community institutions and the representatives of the individual Member States. It also serves as a base both for the members, alternates and experts in the Finnish delegation to the Committee of the Regions, and for promoting the interests of the Finnish regions and municipalities within the EU. More particularly, it informs the Association about initiatives of Community institutions and proposals for Community legislation of relevance to local and regional authorities⁽⁸⁾.

The accession of Finland to the EU increased the Regional Councils' international relations, especially their involvement in the development of Community regional policies and the drafting of programmes aimed at securing support from the Structural Funds. Many Regional Councils thought that task would be made easier if they had their own representation in Brussels⁽⁹⁾. There are five offices representing broad geographical areas of Finland, comprising regions, some cities and universities: East Finland represents four regions in the eastern part of the country (Etelä-Savo, Kainuu, Pohjois-Karjala and Pohjois-Savo), West Finland represents an alliance of five regions in western Finland (Keski-Suomi, Pohjanmaa, Satakunta, Etelä-Pohjanmaa and Tampere Region), South Finland represents the three regions in the south of Finland which border Helsinki (Häme, Itä-Uusimaa and Päijät-Häme), European North Lapland-Oulu represents the two regions Lappi and Oulu. The Helsinki EU Office represents the Finnish capital, the Regional Council of Uusimaa and the University of Helsinki, and Turku-Southwest Finland represents the University of Turku and the Regional Councils of south-western Finland. Only the city of Tampere has its own office.

The only body in Brussels representing the municipalities, even though they have greater autonomy than the regions, is the Association of Finnish Local and Regional Authorities; by contrast the Regional Councils, as bodies responsible for implementing European regional policy and Structural Funds programmes, have also

(8) See www.Kunnat.net.

(9) See www.reg.fi.

set up their own joint representations to better defend the interests of subnational Finnish bodies with the Community institutions.

The Åland Islands, by contrast, have shared representation in Brussels with six other islands at the B7 Office, the headquarters of the "Baltic Seven" or "7 island cooperation"; the islands in question are Öland and Gotland (Sweden), Saaremaa and Hiiumaa (Estonia), Rügen (Germany) and Bornholm (Denmark).

1.1.3 Regional participation in National Representations

The only local government which has its own adviser at the Finnish Permanent Representation in Brussels is that of the self-governing province of the Åland Islands⁽¹⁰⁾. The representatives of the Association of Finnish Local and Regional Authorities also have contact with the Permanent Representation, which provides them with information on current developments.

1.1.4 Associations and interregional cooperation at European level

Finnish local authorities are involved in many international cooperative bodies. Five cities⁽¹¹⁾ belong to Eurocities, which represents the interests of the largest cities in Europe with the Community institutions and makes proposals and requests to them (see the Vienna Declaration of 12 November 2004). Twice as many Finnish cities are involved in the Union of the Baltic Cities⁽¹²⁾, one of several organisations for cooperation between the Baltic Sea states which has encouraged their accession to the EU. Twinning programmes between cities have become more widespread to enable them to take part in Community programmes and attract Community funds.

Cooperation between municipalities is managed by the Association of Finnish Local and Regional Authorities in the Council of European Municipalities and Regions (CEMR), which is the Europe section of the worldwide organisation United Cities and Local Government (UCLG); its aim is to promote consideration of the interests of local and regional bodies in Europe in Community decision-making processes. The Congress of Local and Regional Authorities (CLRAE), a consultative body of the

(10) See www.lagtinget.aland.fi.

(11) The Finnish cities which have a population of over 100 000 are Espoo, Oulu, Tampere, Turku and Vantaa. Helsinki, the capital city, has over half a million inhabitants.

(12) Espoo, Helsinki, Kemi, Kotka, Lahti, Mariehamn, Pori, Tampere, Turku and Vaasa.

Council of Europe, has five Finnish members and five alternates from the Municipal Councils (three members and two alternates) and the Regional Councils (two members and three alternates), all of whom are members of the Association of Finnish Local and Regional Authorities.

The Regional Councils have also developed many forms of international cooperation. Of the many such organisations, that with the strongest agenda to influence the Community decision-making process is the Assembly of European Regions (AER), to which twelve Finnish regions belong⁽¹³⁾. Five Regional Councils⁽¹⁴⁾ are also involved in the Baltic Sea States Subregional Cooperation (BSSSC), which brings together the government tiers immediately below state level of the Baltic Sea states and represents their interests with the Community institutions.

1.2 National side

1.2.1 Informing regional and local bodies in the preparatory phase of Community measures

a) Procedures

There is no *ad hoc* procedure in Finland for providing information to local and regional authorities about Community decision-making processes. The only local authority which has the right to be informed on proposals for Community measures known to the Finnish government is the self-governing province of Åland. Under the Åland Autonomy Act referred to above, the Åland government receives information from the Finnish government on issues being considered by the Community institutions which may have implications for the legislative powers of the Åland Islands or which may be of particular importance to the province.

"Transparency" and access to information are nonetheless fundamental principles of the Finnish government system, at both local and national level (see Local Government Act No. 365/1995). That principle indirectly grants local and regional authorities access to Community documents.

(13) Etelä-Karjala, Etelä-Pohjanmaa, Häme, Keski-Suomi, Lappi, Pirkanmaa, Pohjois-Karjala, Pohjois-Pohjanmaa, Pohjois-Savo, Satakunta, Uusimaa and Varsinais-Suomi.

(14) Keski-Pohjanmaa, Pohjois-Pohjanmaa, Kainuu, Lappi and Pohjois-Savo.

Following the amendments made to the Constitution on accession to the EU, an entire article (Section 96 of the Constitution) deals with the role of the Finnish parliament (*Eduskunta*) in the Community decision-making process: the government is to communicate to the *Eduskunta*, without delay, proposals for acts, agreements or other measures to be adopted by the European Union (referred to as "U dossiers") after receiving notice of any such proposal. Such documentation is forwarded to the speaker of the *Eduskunta*, who allocates them to the committees responsible for the matter concerned and to the special committee on European Affairs, the Grand Committee. The Grand Committee also receives the agenda of the EU Council of Ministers, as well as the position which the Finnish government intends to adopt in the Council, and the opinions of the other parliamentary committees. The Finnish Prime Minister has a similar duty in respect of meetings of the European Council and inter-governmental meetings, as set out in Section 97 of the Constitution⁽¹⁵⁾. The Grand Committee delivers its opinion, which is politically binding on Finnish ministers and the Finnish government. Under the parliament's Rules of Procedure, the member elected for the constituency of the self-governing province of Åland also sits on the Grand Committee⁽¹⁶⁾. Immediately after the meeting, all the records available to the Grand Committee are made public. The Information Office of the *Eduskunta* runs an updated website explicitly to promote the availability of information which could be useful to anyone including the local authorities⁽¹⁷⁾.

However, the easiest way for Finnish local authorities to obtain information on the Community decision-making process is for delegates from the Association of Local and Regional Authorities to participate in the preparatory subcommittees of the Committee for European Affairs at the Prime Minister's office, whose members include representatives of ministers, the President of the Republic, the Bank of Finland and a representative of the Åland Islands. One of the 40 subcommittees deals with regional and structural policy. The meetings of the Cabinet Committee on European Affairs can be attended by a representative of the provincial government of Åland and two representatives from the EU Affairs section of the Government

(15) Seventy "U dossiers" were examined by the Grand Committee in 2003; it also examined 103 "E dossiers", which deal with the Common Foreign and Security Policy (www.eduskunta.fi).

(16) See Section 25 of the Constitution.

(17) www.eduskunta.fi.

Information Unit when the issue under discussion falls within their remit or is otherwise of significant interest to them⁽¹⁸⁾.

b) *The role played by representatives of regional and local bodies in the Committee of the regions in providing information*

The Finnish delegation to the Committee of the Regions uses the Brussels office of the Finnish Association of Local and Regional Authorities as its base. The Association thereby learns of proposals for Community measures, which it forwards to all local authorities. The activities of the Association as an organisation include providing information in printed form and the publication of a newsletter on the most important issues. The Association essentially receives all its information from its own members.

1.2.2 *Techniques for involving regional and local bodies*

Techniques for involving regional and local bodies can be in either the preparatory or implementing phase. The Åland Autonomy Act referred to above recognises the right of the provincial government to participate in the preparation of Community issues within the Council of State for matters which fall within its legislative remit or which are otherwise of great importance to the province (Section 59 a) and to formulate the Finnish position on the application of a Community policy in Åland (Section 59 b).

The Åland Islands and the other Finnish local and regional authorities are also involved in the system of coordinating European affairs at government level. Preparation of the Finnish position on Community measures involves the ministers responsible and several *ad hoc* bodies at the Prime Minister's office (the Cabinet Committee on European Affairs, the Committee for European Union Affairs and its subcommittees). This is the forum in which the representative from Åland and representatives of other local authorities participate.

The 40 preparatory subcommittees of the Committee for EU Affairs, which are subdivided into specific sectors, are the starting point in Finland for addressing every measure or procedure relating to Community law. The Association of Local and

(18) www.government.fi. The Cabinet Committee on European Union Affairs meets once a week to discuss EU affairs of political, economic and legal importance, prior to formal and informal EU Council meetings. The Permanent Representation to the EU is also represented on the Cabinet Committee.

Regional Authorities is represented on the Regional and Structural Policy subcommittee when it meets in restricted composition and on many of the subcommittees when they meet in extended composition⁽¹⁹⁾. The Åland Islands not only have a representative on the Committee and each subcommittee, but the President of the Åland government also has the right to attend meetings of the Cabinet Committee for European Union Affairs, though not the right to speak.

Finnish local authorities may also be asked to appear before a Parliamentary Committee or the Grand Committee for European Affairs.

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community measures*

Local authorities provide residents in the area they cover with all essential public services, including services relating to education, social security and health as well as technical infrastructure. Some services, such as schools and hospitals, are managed jointly by municipalities. Many of these tasks are affected by Community law, which must be complied with. Compliance of Finnish legislation with Community law is the exclusive responsibility of national institutions, above all the *Eduskunta* and the government.

As has already been stated, the Åland Autonomy Act provides that "where a matter involves the legislative power of Åland, the government of Åland shall draw up the national position of Finland in relation to the application in Åland of the common policy of the European Community" (Section 59 b).

Community directives often require new legislation to be introduced in Finland and in such cases the standard procedure for drafting national law is used, with the decision to adopt the law taken at a plenary session of the *Eduskunta*.

(19) Central Europe and the CIS, Regional and Structural Policy, Justice and Home Affairs, Taxation, Financial Services and Capital Movement, Competition and State Aid, Internal Market, Communications, Research and Technology, Energy and Euratom, Transport, the Environment, Social Affairs, Occupational Safety and Health, Social Security Issues and Movement of Persons, Labour Law Group, Employment Affairs, Education, Culture and Audiovisual Services, Youth and Sport, Health and Enlargement.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

There are no *ad hoc* legal instruments to prevent a breach of Community law on the part of local and regional authorities. The ordinary surveillance instances may examine the lawfulness of measures taken by local authorities, including assessing their conformity with Community law. In Finland there are eight Administrative Courts in addition to the Supreme Administrative Court, as well as the Administrative Court of the province of Åland. Each of those courts has jurisdiction to hear cases brought against administrative decisions taken in the territory of a number of provinces. Certain powers are conferred on particular courts (the Administrative Court in Helsinki has jurisdiction for matters of asylum and taxation law; the Vaasa Court has jurisdiction for the environment and water). Where taxation, municipal or social issues are concerned, anyone who is not satisfied by an authority's decision must ask it to review its position before appealing to the administrative court. Any decision by an authority may be challenged in court and any court ruling may be appealed to the Supreme Administrative Court.

3. *The subsidiarity principle*

Finally, unlike other decentralised countries, particularly Denmark and Sweden, Finland has no mechanism reflecting the subsidiarity principle.

FRANCE

1. *Preparatory phase*

1.1. *European side*

1.1.1 *Participation in the Council of the EU and the European Institutions*

1.1.2 *Participation in the Committee of the Regions*

1.1.3 *Regional representation and liaison offices in Brussels*

1.1.4 *Associations and interregional cooperation at European level*

1.2 *National side*

1.2.1 *Informing regional and local authorities in the preparatory phase of Community procedures*

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2. *Implementing phase*

2.1 *Division of powers for the implementation of Community legislation*

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

2.2.1 *Substitutive powers (and adoption of supersedable legislation)*

2.2.2 *Annulment of legislation and the liability of devolved authorities*

3. *Judicial protection of powers within the Community. Right to request the State to act*

4. *The subsidiarity principle*

1. Preparatory phase

1.1 European side

1.1.1 Participation in the Council of the EU and the European institutions

Only national government ministers may participate in meetings of the Council of Ministers, as there is no legal provision for any involvement by local or elected representatives.

Moreover, under the Jospin government a new practice seems to have been introduced: in order to limit multiple office holding, ministerial office may not be combined with membership of a local executive body.

Regional and local authorities are not represented within the French Permanent Representation and there is no formal arrangement for participation by representatives of sub-regional authorities in the working groups and committees of the Council of Ministers and the European Commission⁽¹⁾.

It could be argued that Article 13 etc of law No. 327 of 11 April 2003 (on the election of regional councillors and representatives to the European Parliament and the public funding of political parties) introduced a form of representation of regional interests in the European institutions. The law regionalised European elections in France and therefore made a break with the entire history of the Republic in that field. Previously, comprehensive and therefore nationwide representation had prevailed, in which France was a single constituency. The regional level has now been strengthened and constituencies are organised regionally.

(1) In order to assess the participation of local and regional authorities in the Community policy-making process at national and European level, it is necessary to take into account the rationale behind the relationships between the various levels of institutions, based on the ideas of the French revolution. The Constitution of 4 October 1958 makes few references to the devolved authorities, and no legislative, regulatory or rule-making powers were vested in them. Only a few articles referred to them (Article 24 states that "The Senate shall ensure representation of the territorial authorities"; Article 34 states that "the law shall lay down the fundamental principles of the self-government of the territorial authorities, their powers and their resources"; Article 72 states that "the territorial authorities of the Republic shall be the municipalities, the départements, and the overseas territories" and that "any other territorial unit shall be established by statute"; Articles 73 etc. stipulate the special system governing overseas territories and overseas departments). One way in which France differed from many other European countries in 1958 was that the regions were not counted as territorial authorities. In 1969, General de Gaulle proposed changing this legal position. However, the referendum, which covered other questions as well, resulted in a no vote which led to de Gaulle's resignation and the abandonment of the project. Law no. 619 of 5 July 1972 established the region as a public body, but it was not until law no. 213 of 2 March 1982 that the region became a territorial unit as covered by Article 72 of the 1958 Constitution. It actually came into being only after law no. 16 of 6 January 1986 and the regional elections of that year. The existence of regions, unlike the other French devolved authorities, was enshrined only in statute and not in the Constitution. Constitutional law no. 276 of 28 March 2003 on the devolved administration of the Republic altered the legal position by enshrining regions as devolved authorities in the Constitution under new Article 72; it also amended several items in the general constitutional framework for devolved authorities. The following now have constitutional value and/or guarantee: devolution, the regions, the regulatory power of the devolved authorities, legislative experimentation (ability to waive certain legislation), the principle of financial compensation for the transfer of powers and the prohibition on trusteeship between the devolved authorities. Statute, however, continues to have a pervasive influence in matters concerning the devolved authorities, including participation by them in the drafting and application of Community legislation. French devolved authorities have no exclusive powers and, unlike other European legal orders, French law made – and still makes – no provision for their direct involvement in the Community policy-making process and therefore their involvement is largely indirect.

1.1.2 Participation in the Committee of the Regions

The French delegation comprises 24 members (12 full members and 12 alternates), of whom 12 represent the regions, six the *départements* and six the municipalities. The regions are therefore stronger than the other local community tiers, which are represented by the same number of members and alternates.

The constitutional framework has evolved considerably, but when the Committee of the Regions was established the distribution of members did not reflect the situation at local level in France. Since 1992, the regions have had twice as many members as the other devolved authorities, despite the fact that they were a recent development at national level and formal guarantees for regions were lower than for other devolved tiers. The predominance of the regions reflects the new interest in the regional level and the signing of the Treaty on European Union. The importance accorded to encouraging the regions' relations with their counterparts in other EU countries and with the European institutions thus opened up new opportunities on the domestic institutional scene, traditionally disinclined to favour regional development⁽²⁾.

The role of the associations representing local and regional authorities in the appointment procedure is indirect but fundamental. Those which take informal part in the procedure are acknowledged to be the best representatives of the various categories of local and regional authorities.

The associations are as follows:

- Association of the Presidents of Regional Councils (APCR)

(2) The signing of the Treaty on European Union and the new transfers of powers to the Union made a revision of the French Constitution necessary, effected by constitutional law no. 554 of 25 June 1992. As regards the devolved authorities, the most interesting innovation from the point of view of this study (except the provision that henceforth the statutes of overseas territories are to be adopted in accordance with the organic law procedure) is the introduction of a new title, now Title XV, "The European Communities and the European Union" (Articles 88-1, 88-2, 88-3 and 88-4 of the Constitution). Although the 1992 revision had no real effect on formal relations between local authorities, regions, central government and the EU, since then the idea has been taking shape that the devolved authorities are preferred partners in the process of democratising the European Union because of their proximity to Europeans, and because it was appropriate to enable subnational French authorities to act on the European scene. Constitutional law no. 554 of 1992 was the first to cover subnational and supranational law, and since then half the revisions of the Constitution have concerned Community law or the law of the devolved authorities.

- Association of the Presidents of General Councils (APCG)
- French Federation of Mayors (AMF)

The associations submit to the government a list of nominees for the national delegation to the Committee of the Regions. The list is forwarded to the Council of Ministers. The prime minister chooses the members of the French delegation on the basis of a proposal from the minister for internal affairs and after consultation with the above associations.

1.1.3 Regional representation and liaison offices in Brussels

Many large devolved authorities have offices near the European institutions or have organised cooperation networks. There are 18 regional representations (including the delegation of French Polynesia) and six representations of devolved authority association networks; the French Federation of Mayors has its own liaison office.

In general, either directly or via the associations which maintain a high profile in European-level relations, the devolved authorities carry out intense information and lobbying activities at the Commission and the European Parliament.

1.1.4 Associations and interregional cooperation at European level

The Alsace and Aquitaine regions are members of the Assembly of European Regions (AER) and Aquitaine, the Basque Country, Pays de la Loire, Poitou-Charentes, Centre, Lower Normandy, Brittany and Limousin are members of the Conference of Peripheral Maritime Regions (CPMR).

Thirteen of the largest French cities belong to the Eurocities network. The principal associations of French local and regional authorities are represented in the Council of European Municipalities and Regions (CEMR) and the Congress of Local and Regional Authorities of Europe (CLRAE).

The French Association of the Council of European Municipalities and Regions (AFrCCRE), established for the purpose of advising and informing local communities about European policies which concern them directly or indirectly, is very active,

especially in the field of anticipating the possible consequences of Community legislation at local level.

The associations of French local and regional authorities have played a very active role in the debate on the white paper on governance adopted by the European Commission on 25 July 2001. A total of nine associations forwarded their opinions to the Commission. They also issued a joint opinion on the Communication from the European Commission on dialogue with associations of regional and local authorities on European Union policy-making (19 December 2003). In this opinion, they welcomed the initiative, the institutionalising of the annual meetings with the president of the European Commission and the ongoing contact with other Commissioners. They pointed out that although the Committee of the Regions was the Commission's preferred partner, it could never replace the associations, which could express their views with no restriction on content or form.

As regards cross-border cooperation, the following legislation is of relevance: Article 65 of the law of 2 March 1982, subsequently repealed, allowed the regions to establish cross-border cooperation, subject to government authorisation. The law of 6 February 1992 subsequently simplified the procedure, which was supplemented and codified in 1995. Law no. 142 of 21 February 1996 introduced the term "devolved cooperation". Organic law no. 705 of 1 August 2003 has not been subject to any substantive amendment, the only change being the revision of the General Code on the Territorial Authorities.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

In the initial phases of Community policy-making, the principal source of information of the regional and local authorities is the participation of their representatives in the Committee of the Regions (although no specific procedures have been established) and in European and national associations.

There is no legal structure at national level governing the communication of information to the devolved authorities or their participation in the promulgation of

Community legislation. Nonetheless, information channels and means of participation have developed informally through dialogue between the national and local tiers, and the Community and local tiers. Although the government is not required by law to communicate information to the devolved authorities during the Community policy-making phase, the close relationships between government and parliament may result in the devolved authorities receiving information indirectly.

There is considerable dialogue between locally and regionally elected representatives and the various national departments which are accountable to ministries and fall within the sphere of devolved authorities and local communities, especially as regards cohesion policy. See the DGCL (Department for Local and Regional Authorities, which is answerable to the ministry of internal affairs) and DATAR (Delegation for Regional Policy and Action, which is answerable to the prime minister).

1.2.2 Techniques for involving regional and local authorities

a) The Upper Chamber (Senate)

Following the 1992 revision of the Constitution and in order to comply with the constitutional balance of institutional relations between the legislative and executive bodies, when the government intervenes in the drafting of Community legislation, it is required to submit Community proposals or measures to parliament, under the terms of Article 88-4 of the Constitution.

Dialogue between MPs, the devolved authorities and their associations may therefore occur (unsolicited opinions).

This informal participation is particularly important because, under Article 24 of the Constitution, the Senate is required to represent the devolved authorities.

The 28 March 2003 revision of the French Constitution strengthened the Senate's role as regards devolution: all draft laws concerning local and regional communities must undergo a first reading in the Senate. This procedure has been criticised, however, because of its consequences on the parliamentary system provided for under the 1958 Constitution, an imperfect bicameral system biased towards the National Assembly rather than the Senate.

The Territorial Authorities Department at the Senate (an internal Senate office, not to be confused with the parliamentary committees) is one of the devolved authorities' preferred partners.

b) Relations between central government and local and regional administrations

There are no formal procedures or bodies to formalise the growing participation in inter-governmental relations, but there is a strong tradition of dialogue between the centre and the periphery, the channels of which are locally elected representatives and relations with the devolved State authorities especially the DGCL and DATAR, as mentioned above in relation to the communication of information.

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

The implementation of Community legislation by devolved authorities is influenced by the division of powers under the Constitution and by the status of those authorities under Community law. Constitutional law no. 610 of 20 July 1998 on New Caledonia, as implemented by organic law no. 209 of 19 March 1999, acknowledged that the Congress of New Caledonia had the right to pass local laws in some fields; any dispute with regard to these laws falls within the jurisdiction of the Constitutional Court, as is the case for laws adopted by parliament. The division of legislative powers for New Caledonia is unlike that which applies to other devolved authorities, but its unique status under Community law deserves mention.

Community law makes allowance for the different legal systems of the devolved authorities governed by ordinary law (municipalities, *départements*, regions) and those situated overseas (Articles 73 and 74 of the French Constitution); because they are geographically situated far from Community territory, the overseas territorial authorities enjoy a special regulatory system. As regards France, the Overseas Departments and Regions (DOM-ROM) are part of the territory of the European Community. Since 1989, the DOM-ROM have benefited from certain waivers: in Decision 89/687/EEC of 22 December 1989, the Council set out Community guidelines for an *ad hoc* options programme, which took into account their

disadvantaged geographical location (POSEIDOM Programme). A declaration annexed to the Maastricht Treaty defined the Overseas Departments (and Madeira, Azores and the Canary Islands) as "outermost regions" and Article 299(2) of the Treaty of Amsterdam refers specifically to these regions. They have special access to the Structural Funds.

New Caledonia, French Polynesia, the French Southern and Antarctic Territories, Wallis and Futuna, Mayotte, and Saint Pierre and Miquelon are not, however, part of the European Community and therefore neither Community secondary law nor Community programmes apply to them. The Treaty of Rome (now Articles 182 to 187 of the TEU) defines them as overseas countries and territories (OCT). Council Decision 2001/822/EC of 27 November 2001 governs their position until 2007. They have access to the European Development Funds and are supported by the European Investment Bank.

a) Transposition of directives

There is no provision in the Constitution (or legislation or regulations) governing the transposition of Community directives.

Title VI of the Constitution ("Treaties and International Agreements") makes no clear reference to Community secondary law.

Title XI, which deals with the European Union ("The European Communities and the European Union"), was inserted to take into account some of the consequences of the Treaty on European Union but it does not touch on the transposition of Community directives.

The establishment of rules governing the transposition of Community directives does not come under Community law, being determined by the Constitution's division of power between the national bodies with legislative and regulatory powers (Articles 34 and 37 and other constitutional provisions which grant the legislator a legislative monopoly) and by the organisation of relations between the national and international legal orders.

The government may also be authorised by parliament to transpose Community directives which fall within the sphere of legislation by means of the instrument provided for under Article 38 of the Constitution (a form of legislation which is part decree-law and part legislative decree).

The national authorities therefore have a monopoly on the transposition of Community directives, because the powers of the devolved authorities are not guaranteed under the Constitution. Their involvement in such matters is subject to the conferral of powers by the legislator but is secondary and subordinate to legislative or regulatory controls. The devolved authorities are not required to transpose directives, only to implement them.

The transposition of Community directives is governed by developments in the case-law of the Council of State (*Conseil d'Etat*), which is based on the interpretation of Article 55 of the Constitution. The supremacy of directives over French administrative measures was recognised long before their supremacy over laws.

In its ruling of 22 December 1978 (*Ministre de l'Intérieur v Cohn Bendit*), the Council of State refused to assess whether an *individual* administrative measure complied with a Community directive on the grounds that the national authorities had not transposed the directive (such an assessment may now be made by contesting the regulation on which it was based, using the objection of unlawfulness: Council of State, 30 October 1996 *SA Revert and Badelon*).

However, in its ruling of 7 December 1984 (*Fédération française des sociétés de protection de la nature*), the Council of State agreed to assess whether a *regulatory* administrative measure complied with a Community directive although it had not been transposed into national legislation.

The supremacy of Community directives over laws was recognised later, in the case-law of the Council of State on the doctrine of laws. The Council of State has a tradition of refusing to monitor laws. However, in the *IVG* ruling in 1975 the Constitutional Court refused to rule on whether a law complied with an international treaty, taking the view that this did not fall within the sphere of monitoring the constitutionality of laws; it thereby implicitly asked the ordinary judicial bodies to make the ruling. The Court of Cassation's ruling in 1975 echoed this move (*Jacques*

Vabre), but the Council of State confirmed its own traditional 1968 case-law (*Syndicat général des fabricants de semoules*) and refused to recognise the supremacy of treaties over subsequent laws. The supremacy of international treaties over subsequent laws was recognised for the first time by the Council of State in the ruling in principle of 20 December 1989 (*Nicolo*).

The Council of State established the principle of interpreting laws in accordance with Community directives two days later (Council of State 22 December 1989, *Cercle militaire mixte de la caserne Mortier*) and on that basis subsequently extended the *Nicolo* ruling to Community secondary law, especially Community directives, with the rulings of 28 February 1992 (*Sociétés Rothmans International and Philip Morris*).

Although under national law the devolved authorities are not competent to transpose Community directives, they must respect Community law. The Court of Justice of the European Communities (ECJ) charged them to comply with and implement Community law. Initially the ECJ referred to all the authorities of Member States in its ruling of 10 April 1984 (*Von Colson and Kamann*, point 26); only in its ruling of 22 June 1989 (*Costanzo*) did it refer explicitly to the obligation incumbent on devolved authorities to apply Community directives.

Therefore, the devolved authorities are required to set aside any national laws which do not comply with Community legislation.

The Council of State referred to that precedent in its ruling of 3 December 1999 (*Association ornithologique de Saône et Loire and Rassemblement des opposants de la chasse*), which states that the principle applies both after transposition and while transposition is pending (Council of State 10 January 2001, *France Nature Environnement*).

Although French devolved authorities are not competent to transpose Community directives, they are required to comply with and apply them even when they are incompatible with national legislation; see Council of State rulings of 3 December 1999 (*Association ornithologique de Saône et Loire and Rassemblement des opposants de la chasse*) and 10 January 2001 (*France Nature Environnement*).

b) *Implementation of non-self-executing Community regulations*

The same argument applies: the competent bodies are authorised to take action, in accordance with the Constitution and legislation.

c) *Implementation of regulations*

The logic applicable to Community directives is also valid for the implementation of regulations, with the distinctive feature that pursuant to the treaties, they have direct effect. The supremacy of Community regulations over laws was recognised in the Council of State ruling of 29 September 1990 (*Boisdet*).

The bodies with powers to implement regulations are therefore those upon which the Constitution confers such powers.

Since the French Constitution does not confer powers directly upon the devolved authorities, the national authorities have a monopoly in this field, where the devolved authorities play a secondary role. They are, however, required to comply with and implement all Community legislation.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

2.2.1 *Substitutive powers (and adoption of supersedable legislation)*

In the event of a breach of Community law, no specific instruments such as substitutive powers exist.

2.2.2 *Annulment of legislation and the liability of devolved authorities*

The instrument used respects the autonomy of the devolved authorities to a certain extent, in that it is litigious in nature. Retrospective monitoring ensures that the measures implemented by the devolved authorities comply with Community legislation. The administrative court has various powers, such as court orders or penalties, which it can use to ensure compliance with its decisions (Articles L 911-1 to L911-9 of the Code of Administrative Justice).

Since 1982, the prefect has held a privileged position as regards initiative in the field of monitoring the lawfulness of the measures implemented by the devolved authorities, although it is no longer the prefect but the administrative court which exercises that function (the prefect's substitutive powers are restricted to the police and financial management in the event of misconduct on the part of a mayor).

In order that measures implemented by the devolved authorities should not be found unlawful by the administrative court, those measures must interpret the national legislative decisions which define their powers in accordance with the corpus of primary and secondary Community legislation. When drafting measures, the authorities are also required to exclude any incompatible interpretation (see Council of State 2000, *Commune de Breil sur Roya* and Council of State 8 December 2000, *Commune d'Auvare*).

The same rules apply when the devolved authorities implement a law or a regulation "properly", as they are required to do by the division of powers set out in the Constitution, legislation and regulations. However, they may still breach Community law and therefore be sanctioned by the administrative court, since they would be held liable for this breach.

The administrative court refers to Community case-law. The ECJ ruling of 10 April 1984 (*von Colson and Kaman*, point 26) states that all the authorities of the Member States must obey Community legislation (directives and treaties). Case-law therefore implicitly refers to the devolved authorities.

The ECJ naturally extended this precedent explicitly to the devolved authorities in its ruling of 22 June 1989 (*Costanzo*), with reference to Community directives.

The national court and administrative bodies, including the devolved authorities, are required to implement Community laws directly.

The Council of State has referred to this legal precedent in other cases and required authorities to disapply legislative provisions incompatible with the Community law which should have been implemented.

The 2002-2003 ruling of the Council of State (*Association Avenir de la langue Française*) clearly demonstrates the difficulties inherent in this situation.

There is some debate on when the administrative authority, required by Community law to disapply national laws and apply Community laws, begins to substitute for the competent but defaulting authority, in line with the division of powers set out in the national legal order. The lack of clarity arises not from the establishment of a measure which complies with Community law (if that were the case the point at issue would be substitution and therefore lack of authority), but the direct implementation of Community law. Direct implementation of a Community rather than a national measure on the grounds that the national authority has failed to carry out its obligations might be described as employing substitutive powers. The question at stake is therefore whether the French devolved authorities possess substitutive powers over national authorities which have failed in their obligations to Community law.

However, disapplying the law and placing administrative authorities under an obligation to do so enables French law to refer to legislative responsibility for breach of Community law and to set up a classic system of liability on the grounds of default by the State. The court requires local and regional legal persons to comply with the obligations incumbent first and foremost on the State and does not accept that the State's failure to transpose laws places any restriction on their obligations. See the following rulings: Council of State 28 February 1992, *Rothmans International France and Philip Morris France*, and Council of State 28 February 1992, *Société Arizona Tobacco products and Philip Morris France*.

In its ruling of 26 January 1973 *Ville de Paris v Driancourt*, the Council of State stated that every breach of law by a devolved authority, regardless of the source of the law which has been broken, is punishable. This decision gives rise to considerable practical difficulties which confront the devolved authorities. They may be liable even if they implement national laws and/or regulations properly, since the implementation may be found to be improper after the event if the laws do not comply with Community legislation.

The tradition in France is that the Council of State is competent to rule on actions seeking compensation from the State for damage attributable to international agreements and treaties (see Council of State 13 July 1961, *Société indo-chinoise radio*

électrique, and Council of State 30 March 1966, *Compagnie générale d'énergie radio électrique*). The administrative court broke new ground in the acknowledgement of State liability, having ruled in favour of recognising the right to compensation for a breach of the Treaty of Rome by the State long before the Community court did so (see Council of State 23 March 1984, *Société Alivar*). The principle of Member State liability for infringement of Community law was not explicitly recognised for the first time until the ECJ ruling of 19 November 1991 (*Francovich and Bonifaci*).

3. Judicial protection of powers within the Community. Right to request the State to act

The devolved authorities may bring an action before the ECJ:

- individually: Article 230 (action for annulment); Article 232 (action for failure to act)
- through the representation of the Committee of the Regions (which does not have the status of a Community institution).

However, the devolved authorities and the Committee of the Regions must establish interest in bringing proceedings, unlike institutions for which that requirement is waived.

4. The subsidiarity principle

The subsidiarity principle as such is not explicitly part of French law. France has signed but not ratified the Council of Europe's European Charter of Local Self-Government. Consequently the Charter, an international agreement, does not apply in French law because, in order for international treaties to enter into force in French law and "upon publication, prevail over Acts of Parliament", Article 55 of the Constitution requires them to have been duly approved and ratified.

However, the 28 March 2003 revision of the Constitution, on the devolved organisation of the Republic, did incorporate that principle if only by implication. It does not appear as such in the Constitution but rather as follows (second paragraph of Article 72): "Territorial units may take decisions in all matters that are within powers that can best be exercised at their level."

The principle has not yet been applied in any court ruling.

GERMANY

1. Preparatory phase

- 1.1 European side*
 - 1.1.1 Participation by regional ministers in the Council of Ministers*
 - 1.1.1.1 Selection of regional representatives*
 - 1.1.1.2 Ways to encourage coordination between regional representatives and federal state governments*
 - 1.1.2 Participation in the Committee of the Regions*
 - 1.1.3 Regional representation and liaison offices in Brussels*
 - 1.1.4 Regional participation in National Representations*
- 1.2 National side*
 - 1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures*
 - 1.2.2 Techniques for involving regional and local authorities*
 - 1.2.2.1 Organisational aspects*
 - 1.2.2.2 Procedural aspects*

2. Implementing phase

- 2.1 Division of powers for the implementation of Community legislation*
- 2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. Judicial protection of powers within the Community. Right to request the State to act

4. The subsidiarity principle

I. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

Where legislative powers exclusive to the *Länder* are principally involved, the protection of the rights of Germany as a Member State of the European Union must by law be transferred from the Federation to a representative of the *Länder* appointed by the *Bundesrat*. Rights are protected in cooperation and by agreement with the Federal Government, which has general responsibility for the Federation (Article 23(6) German Basic Law (GG)). The regional delegate acts for the Federal Government and is authorised to take decisions binding the Federal Republic vis-à-vis the EU.

According to established practice, in the event that the Federal Government refuses a request from the *Bundesrat* to transfer the right of direct representation on the grounds that the pre-requisites for such transfer have not been met, the strategy for dealings with the Community is determined by the Federation in agreement with the *Länder*. This compromise prevents action by the Federal Republic at Community level from being brought to a standstill.

1.1.1.1 Selection of regional representatives

The representative of the *Länder* with ministerial rank is appointed following deliberation in the *Bundesrat*, by the Councils of Ministers for Education, Culture, Research, Justice and the Interior (Section 6(2), Law of 12 March 1993 on cooperation between the Federal Government and the *Länder* in EU matters – EUZBLG). The delegate of the *Länder* is bound by the mandate received, as determined by a majority of the *Bundesrat*.

1.1.1.2 Ways to encourage coordination between regional representatives and federal state governments

It is established practice that senior representatives of the *Länder* accompany the representative of the Federal Government and act as assistants in committee

negotiations or at meetings of the Council of Ministers, or *vice versa* for matters which fall within the exclusive competence of the *Länder*.

1.1.2 Participation in the Committee of the Regions

The German delegation to the CoR comprises twenty four members of the CoR and twenty four alternates. Each of the sixteen *Länder* proposes one or two candidates (of the twenty one posts earmarked for the regions five are assigned in rotation on the basis of a *Länder* list ordered by population); a view is also expressed by each of the three general associations of local bodies, representing the districts, towns and municipalities respectively:– *Deutscher Landkreistag* (German District Authority Association) *Deutscher Städtetag* (German Association of Towns) and *Deutscher Städte- und Gemeindebund* (German Federation of Towns and Municipalities) – (Section 14, Law of 12 March 1993 – EUZBLG, supplemented by the agreement of the Conference of Presidents of the *Länder* (*Ministerpräsidentenkonferenz*) of 27 May 1993). The President of the Conference of Presidents of the *Länder* submits the list of candidates to the Federal Government which, in its turn, having discussed the matter, forwards the list to the Council of Ministers of the EU, which appoints the members and alternates of the CoR.

1.1.3 Regional representation and liaison offices in Brussels

In accordance with the powers conferred on them under the Basic Law, the *Länder* may have Representations (of a non-diplomatic nature) to the European Union which are governed either by private or public law. Representation of the Federal Republic with the federal bodies is reserved to the Federal Government, even where the protection of national rights is conferred on a representative of the *Länder* (Section 8, Law 12 March 1993 – EUZBLG).

Some of the associations which represent local or regional authorities at regional or national level have also established a Representation in Brussels and seek closer cooperation with the German Permanent Representation to the EU.

1.1.4 Regional participation in National Representations

The representatives of the *Länder* appointed by the *Bundesrat* participate in discussions to determine the German position on European matters. As far as is possible, the representatives of the *Länder* must also be consulted in the deliberations of the Commission and of the Council, although under the supervision of the representative of the Federal Government (Sections 4 and 6, Law of 12 March 1993 – EUZBLG).

The *Länder* have introduced the role of *Länder* Observer at the Permanent Representation in Brussels; the Observer is always entitled to attend meetings of Community bodies but is not able to take an active part in them (Agreement of 27 October 1988, confirmed in the Agreement of 29 October 1993). His task is to forward information to the competent regional ministers.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

Article 23(2) GG states that the *Länder* must participate in European Union matters through the *Bundesrat* (principle of participation). The Federal Government must provide full and prompt information to the *Bundesrat* (duty to provide information). The requirement to provide information includes draft laws of interest to the regions and the possibility of participating in negotiations in Brussels through a *Länder* Observer. The guaranteed provision of information to the *Länder* does not expressly cover the municipalities as well, although they have access to information through their own associations.

1.2.2 Techniques for involving regional and local authorities

1.2.2.1 Organisational aspects

a) The Upper House

The *Länder* participate through the *Bundesrat* in the legislation and administration of the Federation and in European Union matters (Article 50 GG).

The *Bundesrat* comprises members of the governments of the *Länder*, whom the *Länder* appoint and recall. An appointed member may be represented by another member of the same Land government. Each *Land* has at least three votes; *Länder* with over two million inhabitants have four votes, *Länder* with over six million inhabitants five votes and *Länder* with over seven million inhabitants six votes. Each *Land* may appoint as many members as it has votes. The votes of one *Land* may be expressed only as a block vote and only by the members in attendance or their alternates (Article 51 GG).

For European Union matters the *Bundesrat* may establish a special commission (*Europakammer*) whose decisions carry the same weight as decisions of the *Bundesrat* (Article 52(3a) GG). That commission comprises one member for each *Land*, and has deliberative powers which allow it to act for the *Bundesrat* in urgent matters.

Although officially the participation of the *Länder* in municipal matters is entirely entrusted to the *Bundesrat*, regular meetings of the ministers for Community policies from the various *Länder* and other regional ministers for matters occasionally affected by European decisions informally coordinate the positions of the *Länder* before the *Bundesrat* makes its decision (interregional concerted action). The meetings of the ministers of the *Länder* are also often attended by the federal minister responsible (in that event the form of cooperation is vertical).

b) Consultation of associations representing local authorities

The law on cooperation between the Federal Government and the *Länder* Cooperation in EU matters (EUZBLG) requires, where draft Community laws are concerned, compliance with the right of municipalities and associations of local authorities to

regulate the affairs of the local community and to protect its interests (Section 10, Law 12 March 1993 – EUZBLG). That provision has not been implemented in practice except by the Common Rules of Procedure of the Federal Ministries (GGO) pursuant to which proposals for European Union legislation which directly affect the interests of local authorities must be forwarded by the relevant ministry to associations representing local bodies at federal level (Section 85d, GGO II). Those rules were repealed by the new *Geschäftsordnung der Bundesministerien* (Rules of Procedure of the Federal Ministries) of 26 July 2000 (Section 79) which, while not prohibiting the provision of information in other matters (Sections 41 and 47), neither includes a right to receive information nor enshrines such a right as capable of being protected by the courts.

1.2.2.2 Procedural aspects

a) Opinions with differing weight

The *Bundesrat* must be involved in determining the policy of the Federation where its participation would be required domestically for a similar measure or where the *Länder* are competent at domestic level (Article 23(4) GG), and given that the *Bundesrat* generally speaking has the power to participate in the legislation and administration of the Federation and EU matters (Article 50 GG), it follows that it is entitled to participate in most cases where the matters at hand fall within the jurisdiction of the *Länder*, in cases of concurrent jurisdiction, federal framework or even exclusive federal jurisdiction, as long as the "interests of the *Länder*" are affected (generic but all-embracing wording).

Where the interests of the *Länder* are affected in an area within the exclusive jurisdiction of the Federation or where the Federation otherwise has the right to legislate, the Federal Government must take account of the position of the *Bundesrat* (non-binding opinion). Where the matter concerned predominantly involves the legislative powers of the *Länder* or the structure of the agencies or administrative procedures of the *Länder*, the opinion of the *Bundesrat* must be considered binding in establishing the policy of the Federation (in the event of disagreement a complex reconciliation procedure is provided for in which the *Bundesrat* can ultimately insist on its position if it has the support of a two-thirds majority – see Section 5(2), Law 12 March 1993 – EUZBLG), without prejudice to the Federation's responsibility for

general policy and the financial interests of the Federal State (Article 23(5) GG – codecision procedure).

As a result of those rules, although the *Bundesrat* has no fiduciary relationship and therefore no direct power of control over the Federal Government, it is able to exercise an extensive influence which ensures that the *Länder* participate in national politics. In the German model of "executive federalism", although the legislative functions are concentrated principally in the Federation, the administrative functions are essentially the purview of the *Länder*, and the *Länder* are responsible for actually implementing Federal laws (federal matters managed directly by the federal administration comprise mainly foreign affairs, defence, monetary policy, posts and telecommunications, air traffic, rail transport, federal navigable waterways and navigation, federal roads and motorways, the federal police, economic and labour law, and protection of competition. The matters in which the devolved powers of the *Länder* are more extensive are essentially education, culture, the organisation of local authorities, public order and safety).

b) Multi-tier consultation

One representative of the *Länder*, appointed by the *Bundesrat*, may take part in meetings of the Federal Government at which the position to be adopted at Community level is to be formulated (Section 4, Law 12 March 1993 – EUZBLG). There is no provision for consultation with the municipalities.

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

Given that Community law is not to be deemed international law, where the Federation has exclusive competence, in order for European law to be transposed and implemented the usual division of powers set out in the domestic provisions of the Basic Law applies in line with the principle that, in general, the power to act belongs to the *Länder* unless otherwise provided for in the Basic Law (Articles 30, 70 and 83 GG). Therefore, in accordance with the general principle on which the German federal system operates, namely "executive federalism", legislation to transpose directives originates principally from the *Bund*, whereas the *Länder* focus principally on

legislation relevant to administrative organisation and procedure as well as on the implementing provisions.

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

The Federation has no powers of control over the activities of the *Länder* and no powers to act in substitution in the event of non-implementation or poor implementation of an obligation arising under Community law, and it would therefore be able to invoke its responsibility to implement Community law only before the Federal Constitutional Court (*Bundesverfassungsgericht*) pursuant to the unwritten constitutional principle of the *Länder's* allegiance to the Federal Government (*Bundestreue*). The ordinary remedy against a breach of Community law is, however, given in the rulings of the European Court of Justice to the extent that the *Länder* – which participate, albeit indirectly, in the process (Section 7 EUZBLG) – are directly bound by its rulings. In extreme cases where even recourse to the Federal Constitutional Court or a ruling of the European Court of Justice fail to remove the cause of a *Land's* failure to implement an obligation, recourse could be had to compulsory federal action (*Bundeszwang* – Article 37 GG); however, that scenario has never actually arisen in the history of the German Basic Law.

3. Judicial protection of powers within the Community. Right to request the State to act

Upon a request of the *Bundesrat* and in accordance with it, the Federation is required to use the courts to remedy an act or omission on the part of Community bodies which affects the interests of the *Länder* because it involves their legislative powers and as the Federation is not competent in that regard (Section 7, Law 12 March 1993 - EUZBLG). The Federation must take the opinion of the *Bundesrat* into account when formulating the position to be taken in the court action.

4. The subsidiarity principle

The Federal Republic of Germany is the only federal system which has been part of the European Communities since their foundation. A long time before the current

rules on involving sub-state tiers of government in the Community decision-making process took shape upon ratification of the Maastricht Treaty, Germany had an opportunity to experiment with and gradually improve on ways of tackling the issues which European integration poses for a State with a complex structure and several autonomous tiers of Government (the *Länder* are Member States in their own right endowed with sovereignty, albeit very limited in substantive terms by the over-arching federal sovereignty of the "*Bund*").

The law authorising ratification of the Treaties of Rome (Law of 27 July 1957) required the Federal Government to provide both Houses of the German Parliament (the *Bundestag* and the *Bundesrat*) with information about Community activities, and conferred on the Houses the power to express non-binding opinions (a power of which the second House, representing the regional governments, made particular use). In 1979 the *Länder*, which had always regarded that instrument as insufficient, secured under an agreement with the Federation a new procedure for participation based on inter-governmental agreements which enabled the *Länder* to express binding positions on matters falling within their exclusive competence, from which the Federal Government were allowed to depart only for very serious reasons (the process for formulating a binding joint opinion proved, however, to be too complex to produce the intended results and did not permit effective regional participation in Community issues).

With the law ratifying the Single European Act (Law of 19 December 1986), which transferred some of the powers in the exclusive sphere of the regions (e.g. schools) to the EC, the *Länder* secured a requirement for the Federal Government to inform the *Bundesrat* promptly about all Community issues which could affect a regional interest and for the federal government to be bound by the opinion of the *Bundesrat* in matters falling within the (exclusive) legislative competence of the *Länder*, except where overriding issues of foreign policy or integration were involved. The *Bundesrat*, which thereby became the principal means of regional involvement in Community matters, can also appoint regional representatives to send to Community negotiations.

The current structure of relations between the Federation and the *Länder*, as far as German participation in the EU is concerned, is set out in Law No. 38 of 21 December 1992 amending the Basic Law; that Law was adopted in view of the Law of 28 December 1992 ratifying the Treaty of Maastricht, which introduced a

"Europe article" into the German Basic Law (the new Article 23 GG). That new Article expressly refers to the principle of subsidiarity as a means of ensuring the constitutional prerogatives of the *Länder vis-à-vis* the EU and their participation in Community decision-making ("In order to bring about a united Europe, the Federal Republic of Germany shall participate in the development of a European Union which is committed to democratic, social, and federal principles, to the principle of the rule of law, and to the principle of subsidiarity, and which guarantees protection for fundamental rights").

It was consequently established that the transfer of powers (rights of sovereignty) to the European Union was subject to a law adopted with the approval of the *Bundesrat*. An enhanced majority is required to amend the Basic Law in the event of amendments to the Treaties establishing the European Union or similar legislation pursuant to which the content of the Basic Law is amended or supplemented. Amendments to the Basic Law which infringe the constitutional principles of the structure of the German system of government, including the federal principle, are prohibited (Article 79(3) GG).

In view of the fact that any transfer of sovereign rights (*Hoheitsrechte*) would substantively affect the organisational structure set out in the Basic Law, even in the absence of an express amendment to the Basic Law, it is not easy to ascertain specifically when the procedure to follow would have to be an ordinary federal law (using the required bicameral procedure) and when it would have to be the special procedure to amend the Basic Law (bicameral procedure and a majority of two-thirds of the members of the *Bundestag* and two-thirds of the votes in the *Bundesrat*). When, for example, the Treaty of Nice was ratified, the Federal Government considered a federal law to be sufficient and forwarded the draft law of ratification to the *Bundesrat* and sought its approval by simple majority. The *Bundesrat*, however, considered that the approval would have to be by a majority of two-thirds of the votes on the basis that the Treaty, by extending the powers of the European Parliament and the instances of acting by unanimity, would affect the Basic Law. That issue, steeped in uncertainty and as yet unresolved, is destined to arise again in future whenever the Federation seeks to adopt a measure involving the transfer of powers to the EU.

As far as the German domestic constitutional arrangements are concerned, the principle of subsidiarity, while not expressly referred to in the Basic Law, is

implemented horizontally both in the relationship between the Federation and the *Länder* (general powers of the *Länder* to legislate and govern unless otherwise provided for in the Basic Law – Articles 30, 70 and 83 GG; necessity/proportionality clause as a criterion for the federal legislative authority to exercise concurrent legislative powers – Article 72(2) GG) and in the relations between a *Land* and the municipalities (principle of self-determination and confirmation of the competence of the municipalities in issues of a local nature, provided that the municipalities are able to deal with them adequately – Article 28(2) GG).

GREECE

1. Preparatory phase - Participation of local and regional authorities in the preparatory phase of European policy making

- 1.1 *European side*
 - 1.1.1 *Participation in the Committee of the Regions*
 - 1.1.1.1 *Representatives of local authorities*
 - 1.1.1.2 *Nomination of members and alternates*
 - 1.1.2 *Regional representation and liaison offices in Brussels*
 - 1.1.3 *Associations and interregional cooperation at European level*
- 1.2 *National side*
 - 1.2.1 *Informing and involving regional and local authorities*
 - 1.2.2 *The role of Parliament*
 - 1.2.3 *Consultation of associations representing local authorities*

2. Implementing phase

- 2.1 *Participation of sub-national authorities in drafting domestic implementing legislation*
- 2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. Judicial protection of local powers within the Community. Right to request the State to bring an action before the Court of Justice pursuant to Article 230(2) TEC

4. The subsidiarity principle

1. Preparatory phase - Participation of local and regional authorities in the preparatory phase of European policy making

1.1 European side

1.1.1 Participation in the Committee of the Regions

1.1.1.1 Representatives of local authorities

There are 24 Greek representatives, of whom 12 are full members and 12 are alternates.

Fourteen of these (seven members and seven alternates) are mayors representing the first tier of local government, namely rural communities (*koinotites*) and municipalities (*dimoi*)⁽¹⁾, which are decentralised public entities governed by bodies elected by direct universal suffrage, and which pursuant to the Constitution (as issued in 1975 and amended in 1986 and 2001) are responsible for "the administration and management of local matters" (Article 102).

The remaining ten members and alternates in the current delegation are Prefects or Presidents of Prefectural Councils (*nomarchiaka simvoulia*), representing the second tier of local government; this second tier comprises the 51 department-prefectures which, as of 1 January 1995, ceased to be extensions of the central government and became bodies with legal personality and governing bodies elected through universal direct suffrage. When the CoR was set up the prefects who were part of the Greek delegation were still government-appointed officials, a factor which led to controversy over observance of the spirit of Article 198a of the Treaty. It is probably no

(1) The formal basis for the subdivision of areas into municipalities and rural communities, depending on their demographic size and rural or urban nature, goes back to the law which laid down the organisational structure and functions of such bodies at the beginning of the last century (Official Gazette Law 58/1912), and established local authorities which were highly dependent on the central government and subordinate to the prefects who, until 1994, were government-appointed officials. That distinction has always remained in place and was reaffirmed in the 1997 reform (Law 2539/1997) which drastically reduced the overall number of first-tier local entities from about six thousand to about one thousand; these are divided into the 133 municipalities, namely towns with over 10 000 inhabitants or prefectural seats, and the 900 rural communities, namely towns with fewer than 10 000 inhabitants, whose distinctive feature is no longer their rural nature but merely their size.

coincidence that 1994 finally saw the implementation of the reform passed in 1986 which provided for direct election of prefects and members of the prefectural councils⁽²⁾.

1.1.1.2 Nomination of members and alternates

The nomination procedure (which is not based on provisions of law) is for the Ministry of the Interior to produce a list of candidates drawn up according to criteria of geographical/regional representativeness, political representativeness and reflecting the results of the most recent local elections. The Government, after deliberating on the list proposed by the Minister for the Interior, makes the official nominations, on the basis of which the Council of Ministers of the EU then makes appointments.

The role of the associations representing local bodies (see also paragraph 1.2.3) is not part of the institutional fabric and it can be said that hitherto pressure has been exerted through political channels and party ties rather than there having been consultations in the true sense. Apart from that, the role of the parties in making proposals for the list of candidates is more expressly acknowledged than in other States⁽³⁾.

(2) At the beginning of the 1980s the process began of transforming the prefectures into local government entities as part of the programme to decentralise and democratise local authorities undertaken by PASOK (Panellinio Sosialistiko Kinima – the Panhellenic Socialist Movement), which was in government from that time until 1989. First of all the role of the prefectural councils (established under Law 3200/1955 with purely consultative duties) was strengthened by increasing their powers to take decisions, particularly in the sphere of spatial planning, and extending participation in such bodies (until that point made up of the mayors of the municipalities and the rural communities in the area covered) to representatives of interest groups (Law 1235/1982). A few years later Law 1622/1986, pursuant to which administrative regions were introduced (see footnote 4), reduced the members appointed by interest groups to less than a third of the members of the prefectural councils and provided for the remaining councillors to be elected directly by the people. However, the socialist government did not make that provision operative during its time in power, probably because of resistance to the reforms, which was also present within PASOK itself, especially after the largest opposition party, Nea Dimokratia (New Democracy) managed to win the largest towns in the administrative elections of 1986. Notwithstanding the fact that in 1990 PASOK, ND and the Communist Party reached an agreement on the implementation of Law 1622/1986, the government led by ND failed to follow up on the provision on direct election of prefects and members of prefectural councils. The new socialist government which took power in 1993 restarted implementation of the reform with Law 2218/1994 (as amended and supplemented by Laws 2240/1994 and 2307/1995), which established self-governing bodies with a council and an executive body in each prefecture, both elected by universal suffrage.

(3) See "Greece" in The Selection Process of CoR Members - Procedures in the Member States, CoR Studies I-1/2004, Brussels 2004.

1.1.2 Regional representation and liaison offices in Brussels

The offices designated as regional liaison offices at the European Union are the Brussels Representation Office of the Region of Epirus and the Development Agency of Heraklion.

The former represents the General Secretariat for the Epirus region⁽⁴⁾ and the four departments into which it is subdivided⁽⁵⁾. The latter is the European office of a development agency established in 1989 by a municipality and three rural communities in Crete, which has since gradually expanded to include other groups. Currently all the prefectures in Crete are members of the organisation, as are some cooperatives and banks.

These are small offices with very few staff which provide information and assistance for the local bodies they represent.

(4) Under Law 1622/1986, in matters of 'local government, regional development and democratic planning', the territory of Greece was subdivided into thirteen regions (*periferies*), principally for the purposes of economic programming and management of European development programmes. The regional partnership mechanisms introduced for the first time by the Integrated Mediterranean Programmes launched by the EC in 1985 served to highlight the specific drawbacks of not having an intermediate tier of programming and management bodies between the central authorities, which were ill-prepared to tackle the new kinds of intervention designed to redress territorial imbalance, and the weak and fragmented system of local government. The new bodies were intended to be offshoots of the central authorities with no financial autonomy or staff of their own. Regional secretaries (*perifereiarchis*), employed by the central authorities, were put in charge of these bodies and were assisted by regional councils (*periferiaka simvoulia*); the councils comprised representatives of local bodies and interest groups following the model used for prefectural councils before their members were directly elected. Since 1994 the regions have become territorial areas for administrative liaison and in 1997 were reorganised (Law 2503/1997) by strengthening the decision-making powers of the regional secretaries and making those powers part of the institutional fabric; additionally, the regions were given their own budget, staff who are not employed by Ministries, and administrative autonomy. The public agencies active in areas covering more than one prefecture and many of the agencies at prefectural level were combined and incorporated into the structure of the regions. Moreover, Law 28/2000 has further extended their scope of action in programming matters and implementation of social, cultural and economic development policies, and a considerable number of powers has been transferred to them which prior to that date were exercised by departments of central ministries.

(5) Generally speaking the area covered by administrative departments is the same as that covered by the district government competent for the second-tier local authority of the area, the exceptions being the three largest departments (Athens-Piraeus, Rodopi-Evros and Drama-Xanthi), which are responsible for more than one prefecture.

A third liaison office, designated as a "representation of a town or sub-local entity" has been opened by the Hellenic Agency for Local Development and Local Government (EETAA), a public company whose principal shareholders are the Ministry of the Interior, the Ministry of the National Economy, the Consignments and Loans Fund, the Union of District Government of Greece (ENAE), the Central Union of Municipalities and Rural Communities of Greece (KEDKE), Local Unions of Municipalities and Rural Communities (TEDK), and the Panhellenic Confederation of Unions of Agricultural Co-operatives (PASEGES). The Agency was established in 1985 to provide legal advice and technical support to local agencies and bodies, especially in respect of local development projects, information technology, organisational issues and environmental matters. In Greece it works in cooperation with various central government sectors and with the regions, universities and research centres. Through the Brussels office it develops partnerships between Greek local bodies and those of other EU countries for particular projects and liaises with the European associations for local and regional bodies (CEMR, CPMR, AER).

1.1.3 Associations and interregional cooperation at European level

The Central Union of Municipalities and Rural Communities of Greece (KEDKE) is involved in the Council of European Municipalities and Regions (CEMR) and nominates the members of the Greek delegation to the Congress of Local and Regional Authorities of Europe (CLRAE). It also appoints representatives of Greek local bodies to the Standing Committee for the Euro Mediterranean Partnership of Local and Regional Authorities.

The thirteen Greek administrative districts participate in the Inter-Mediterranean Commission of the Conference of Peripheral Maritime Regions of Europe (CPMR); the Island administrative districts (Crete, South Aegean, North Aegean, Ionian Islands) also participate in the Islands Commission. Working with regional bodies from Spain, France, Italy and Portugal, the *periferies* have encouraged the establishment of the Centre of Euro-Mediterranean Regions for the Environment (CERE), which has its seat in Athens. The CERE is an initiative resulting from the Marseille meeting (1995) of the Inter-Mediterranean Commission of the CPMR and its objective is to tackle the specific ecological issues facing the Mediterranean regions.

The cities of Athens and Thessaloniki are members of the "Eurocities" network which promotes cooperation projects between major European cities and encourages direct initiatives as a way of lobbying for European policies to their benefit.

Greek local bodies are able to enter into cooperation agreements for specific projects with local bodies from other countries, and this opportunity has been taken up on many occasions within the framework of the European Union and countries in the Balkans.

Article 299 of the Code on Municipalities and Rural Communities (Presidential Decree (DP) 410/1995) provides for twinning procedures; such initiatives, taken by the councils of those bodies, require the agreement of the Minister for Foreign Affairs.

1.2. National side

1.2.1. Informing and involving regional and local authorities

There are no legal provisions and no established practices for informing and involving sub-national bodies in drafting and making decisions concerning the Greek position in the various European policy-making sectors which affect the interests and powers of those bodies.

The absence of organisational instruments and procedures for systematically providing information to sub-national authorities and involving them in the institutional process can easily be explained by the absence of regions with political autonomy and legislative powers, and the structural weakness of local bodies.

Incidentally, it should be pointed out that unlike the situation in other countries, Portugal for example, where the structure of relations between the centre and the regions is in many aspects similar to that of Greece, there are no laws or regulations on autonomy, much less a preferential role in relations with the EU, even for the outlying or island regions⁽⁶⁾. Their distinctive circumstances were taken into consideration to a certain extent only in the last review of the constitution (2001), and

(6) A special arrangement for autonomy is in force only for the Mount Athos peninsula, which is administered by representatives of the Monasteries on the basis of the 'Charter' which they drew up for themselves and which was ratified by the Ecumenical Patriarchate and the Greek Parliament.

as a result the new Article 101 states that "the ordinary legislator and the Public Administration, when acting in a regulatory capacity, shall take into consideration the particular circumstances of the island regions". In any event, this method of managing regional characteristics from the "centre" has created two ministries "for the regions", the Ministry of the Aegean and Island Policy, and the Ministry of Macedonia and Thrace which, despite the fact that they were brought into being for predominantly geo-political reasons⁽⁷⁾, are performing activities in the fields of infrastructure and development programmes which overlap at least in part with the roles of the administrative regions.

Although at the beginning of the 1990s, notwithstanding the ambitious programme of decentralisation and democratisation of local government which PASOK brought with it when it came to power in 1981, the Greek State could still be described as the most centralised state in Europe, it appears recently that more decisive moves have been taken to rationalise local government, decentralise power and decrease the centralised management of public financial resources. For the moment, however, it is still difficult to assess the effective scope of the changes under way in relation to the traditional model of relations between the centre and the regions, as gradually moulded by the attendant effects of a number of factors such as the long and bumpy road towards the formation of the national state and the consolidation of democracy, the centralised structure and a system of politics and representation of interests which revolves around patronage, the local and regional dynamics of economic development which have led to most production and commercial activity being concentrated in the Athens region, along with more than one third of the country's population⁽⁸⁾.

(7) The existence of these two ministries is only marginally related to administrative decentralisation and is principally an expression of the central government's intent to keep areas which are, in geo-political terms, of particular national strategic value under close supervision, particularly in view of events in the Former Yugoslav Republic of Macedonia and tensions with Turkey in the Aegean. That does not detract from the fact that these Ministries tend to play an 'extraordinary intervention' role with regard to development issues in the two areas concerned, as is also evidenced by the change of name of the Ministry of the Aegean, which is now known as the Ministry of the Aegean and 'Island Policy'.

(8) One of the consequences of the striking concentration of population has been to impoverish democratic involvement at local level because many of the people who have moved to the Athens area have stayed registered on the electoral roll of their municipalities or communities of origin, although they have obviously lost both the motivation and the opportunity to be actively involved in matters relating to those areas.

The implementation of the Kapodistrias plan based on Law 2539/1997 (see footnote 1) is viewed by many observers as a missed opportunity in the sense that the grouping together of first-tier local bodies failed by a considerable margin to achieve the objectives of rationalisation and effective strengthening of the local bodies' capacity to act; this was because of the weakness of the overall strategy for reorganising the State and the unduly large influence of special interests. Furthermore, the outcome of the general elections of 2004, which brought the conservative *Nea Dimokratia* (ND) party back into power, does not appear to augur well for rapid political and administrative decentralisation, bearing in mind the traditional positions on the matter taken by that party and the strong opposition expressed recently in the Parliamentary debate on the Kapodistrias plan. However, the "shift to the centre" by ND in the electoral campaign gives grounds for thinking that it is being less swayed by the political forces most strongly opposed to a relaxation of central government control over the local authorities; there is also a broad, across-the-board consensus in the country at present on the need to make the public authorities more efficient and more effective, even if that means rationalising and strengthening local bodies. On that basis an agreement could be envisaged with PASOK to approve the new Code on Municipalities and Rural Communities⁽⁹⁾ which should implement the constitutional reform of 2001, especially with regard to the financial autonomy of local bodies. On that crucial aspect of the reform of the local system it does in fact seem possible for agreement to be reached between the two major parties, at least in the light of some of the positions taken on the matter by leading members of ND.

Over and above the uncertainties which have to date dogged the local government reform process and the resistance to major change on the part of ministerial

(9) The 2001 revision of the Constitution provided for a new Code to be drawn up to reorganise the regulation of local government, which had been subject to many amendments in recent years, the primary aim being to implement effectively the provisions of the Constitution on the financial autonomy of local bodies. Pursuant to Article 102(5) of the Constitution of 2001, the State must adopt "the legislative, regulatory and fiscal measures required so that the duties and powers of local government bodies can be discharged and exercised"; furthermore it states that "any transfer of powers from central or regional offices of the State to local government shall entail the transfer of the corresponding funds". The issue of the allocation of financial resources between the central administration and the local administration continues to be the source of great tension between the two tiers and in 2003, notwithstanding the fact that a considerable number of powers had been transferred to local bodies, only 14% of public expenditure was allocated to them, a markedly lower proportion than the European average. The draft law on the new Code on Municipalities and Rural Communities ought to have been voted on by Parliament in January 2004 but the proximity of general elections suggested that it may be appropriate to postpone it until the new parliament.

bureaucracies and a considerable proportion of both sides of the political system, Greece too now seems to have made the first steps on the road to decentralisation. Many powers have already been transferred to the regions and local bodies, and staff training programmes have been launched, as have programmes to computerise the authorities, which generally receive financial support from the EU. All in all, processes of renewal are under way which may even surpass the intentions of those promoting the present cautious reforms by combining with the impact of the increasing Europeanisation of public policy and the transformations which the country is consequently undergoing in terms of privatisation, of the emergence of a local political class with fewer ties to the central party mechanisms, of the experience of partnerships between local bodies and private companies and of increasingly active associations.

It does not, however, seem likely that the decentralisation under way could in the short term result in significant changes in the relations between the central and local authorities in terms of the introduction of organisational instruments/tools and procedural methods aimed at keeping local authorities regularly informed and effectively involved in the preparatory phase of European policy making. Substantive innovation on this level appears to be too out of step both with political and administrative traditions and with the structure and operation of internal decision-making processes concerning Community procedures; such processes are still generally characterised by a lack of openness on the part of institutions to the parties involved and poor inter-sectoral capacity for coordination, although in recent years there has been some improvement on both those fronts. Against that background the conditions have not been established to date for heightening the awareness of local bodies and their associations as regards the national phase of national drafting of legislation and therefore they have made no specific claims or proposals to be actively involved.

Among the functions conferred on the regions, in particular in the context of management of the structural funds, which make up a considerable part of the funds available for regional development in Greece, some observers glimpse at least the beginnings of a greater debate between the regions and the centre, especially with the Ministry of the National Economy and Finance which, among other things, plays a very important, often primary role in European policy making. Notwithstanding the fact that the *periferies* (regions) are not a sub-national tier of government, the

drafting and management of regional programmes and the way that consultation is organised within the Supervisory Committees, namely by an authority with a degree of autonomy assisted by a consultative body on which local bodies and interest groups are represented, ought to spur interested parties to form regional-scale groupings – which is one of the main objectives of the Community cohesion policy. Not only would that signal a break with the traditional vertical relationships between local interests and the central authorities, but it is likely that the regional bodies would ultimately take on a *de facto* "political" role and would also find themselves acting as central government partners rather than merely being direct extensions of it. In view of the continuity between the drafting and implementation phases of public policy and the special importance of the retroactive effects of the implementation phase on the formulation phase of Community policies, the weakening of the hierarchical, compartmentalised structure of relationships between the centre and the regions and the ensuing shift towards a form – albeit restricted – of regionally-organised governance, ought to be reflected in the implementation of cohesion policy of and the formulation of Greek positions in European forums. It is likely that, given the tendency of such methods to catch on, more sectors will start to engage in consultation and negotiations. They would obviously be informal, non-structured practices which would become part of the way in which regional and local interests are fed into European policy making through the established party-political channels.

1.2.2 *The role of Parliament*

Until the beginning of the 1990s the Greek Parliament showed no discernible interest in European policy making, but during the last decade the growing importance to domestic politics of decisions taken in European forums and the renewed interest in the role of national parliaments set out in the Treaties of Maastricht and Amsterdam have spurred the Greek Parliament to draw up a specific mechanism for drafting the positions it takes on draft Community legislation. To that end a Standing Committee on European Affairs was established, on which Greek Members of the European Parliament also have seats, and recently regulations have been introduced which increase the importance of the Committee in the decision-making process and lay down the procedures for cooperation between parliament and the government on European matters. The Committee participates in the Conference of European Affairs Committees (COSAC). As is the case for many of the assemblies of European States,

the Hellenic Parliament has not, however, developed an efficient enough system of examining European legislation which is in the process of being drafted.

There do not appear to be any initiatives in place to introduce procedures for involving local bodies in parliamentary procedures concerning European policy making. In any event, for the moment the opportunity would be of little consequence in view of the low importance of parliament's role in decision making for most of the positions set out by the government within Europe, and unfeasible given the political weakness of local bodies and their assemblies.

1.2.3 *Consultation of associations representing local authorities*

The municipalities and rural communities are organised at prefectural level under the Local Unions of Municipalities and Rural Communities (TEDK) and each union elects, from among the mayors and local councillors in the area covered by it, its own representatives for the General Assembly of the Central Union of Municipalities and Rural Communities (KEDKE), which represents all first-tier local bodies nationwide. Second-tier local bodies participate through their legal representatives in the Union of District Government of Greece (ENAE). All these bodies are entities governed by private law and under the control of the Ministry of the Interior, Public Administration and Decentralisation, and their statutory objectives are to support local authorities, study matters of concern to them, gather data and information, promote cooperation between local entities and to play a consultative role with the central authorities and make proposals to them.

While ENAE does not have a high political profile, probably in part because of the uncertainty in which the role of second-tier authorities has been left as a result of reform of the prefectures, KEDKE is active at national level as an organisation representing local authorities. The political weight of the Local Unions, which form its grassroots, has increased as a result of the advisory and mediation duties entrusted to them through the grouping together of municipalities and rural communities set out in the Kapodistrias reform and under the management of the Special Programme for Local Government (see footnote 10).

As far as participation in the drafting of Community decisions in national forums is concerned, however, KEDKE has to date been active on only a few issues relevant to

the impact of European policies on local entities (see also paragraph 2.1), and as a whole has displayed a primarily reactive attitude and little capacity for mobilising its members during the drafting of government negotiating positions. In contrast to the past, the government departments responsible for matters concerning the participation of Greece in the EU currently make quite frequent use of external experts' advice when drafting proposals. There are therefore grounds for believing that mechanisms of that kind may also open the way for associations of local bodies to intervene in the early phase of policy making at national level, although there may be restrictions from the point of view of representation (as well as of the strength of opinions) associated with such a practice, which has already been tried out in the sphere of national policies.

2. Implementing phase

2.1 Participation of sub-national authorities in drafting domestic implementing legislation

The issue of division of powers among the various tiers of government for the purposes of implementing Community directives obviously does not arise for Greece since sub-national entities do not have any legislative powers.

Parliament ratifies European Treaties on the basis of its powers to approve international treaties and is involved where decisions about fiscal matters are concerned. In all other cases, Parliament delegates the power to transpose Community law to the government, which issues Presidential Decrees or Ministerial Decisions. The instrument most frequently used for transposing Community law is the Presidential Decree, and such Decrees are prepared on the basis of drafts drawn up by the Ministerial Departments with responsibility for the matter in question.

Sub-national bodies can in some cases be involved in drafting domestic implementing legislation through the consultation methods generally used for national decision making.

There are no bodies composed either entirely or in part of local authority representatives providing a forum for drafting common positions of sub-national authorities and in which they can be discussed with the central government. The

Constitution, while guaranteeing the administrative and financial autonomy of the local authorities, does not contain guarantees on their involvement in decision-making processes on matters of specific concern to them.

The only legal provision on the matter is part of the Code on Municipalities and Rural Communities of 1995 which provides for regions and local entities or their associations to be consulted prior to measures being adopted which relate to the protection of the environment and regional restructuring programmes⁽¹⁰⁾. In principle, measures formulated without consultation are not valid. Given that legislation in Greece on the environment is almost entirely of Community origin, that rule can be considered important in that it involves local tiers in implementing at least one sector of European law.

Leaving to one side the areas in respect of which consultation is provided for by law, sometimes Parliament and/or the Government seek the opinion of local bodies through KEDKE or TEDK as regards matters of interest to a particular area. Such instances are nonetheless fairly few and far between and generally concern very specific issues in respect of which the government position has already been largely sketched out; as a result, the purpose of seeking the opinion of local bodies is merely to broaden the consensus on decisions which have already been taken. No opinions appear to have been sought on the drafting of legislation to transpose European directives.

The commonest form of involvement is for representatives of local bodies to sit on committees set up, usually at a ministry, to draw up government lines of action on intervention where local bodies are also concerned. In some cases this form of cooperation is based on an invitation and the initiative of the ministries concerned, in

(10) Consultation on regional restructuring programmes was introduced to make it easier to implement the project to group local entities together as provided for in the 1997 reform. As a result, the boundaries of the new local authorities were plotted out with the cooperation of the regions and the Local Unions of Municipalities and Rural Communities. This put consultation between the central authorities and organisations representing local bodies on an institutional footing, an approach which was innovative for Greece and all the more important in that it did not come to an end when the territorial boundaries of the local authorities had been redefined, but was also brought to bear on the management of the Special Programme for Local Government (EPTA) provided for under Law 2539/1997 on funding the projects and the investment required for the system of new municipalities and rural communities established under the reform. The programme, which was initially planned to last five years, became a standing instrument for funding local bodies, therefore also providing continuity for the participation of local bodies in programming procedures.

others KEDKE makes a request for its representatives to be included on ministerial committees. In any event these are not forums for co-decision and the role conferred on the representatives of the local bodies is mainly that of providing useful information to the central authorities so that they can shape interventions which reflect the needs and problems of implementation at local level. The representatives of the local bodies are on the committees as "experts" and are not entitled to deal with the central authorities on behalf of all the decentralised authorities.

On some occasions the local bodies have drawn up positions on legislative measures which affect them. KEDKE has set up its own internal sectoral committees (on, for example, social policies, decentralisation, fiscal discipline and distribution of financial resources, structural funds) which draw up proposals and make requests, usually for submission to government, but activities of this kind have no basis in law which give them any official weight.

The only instance in which KEDKE has taken an initiative to the government on a European matter of major importance, according to information it itself has supplied⁽¹¹⁾, was on Greece's adoption of the euro. KEDKE carried out a survey on the possible impact of the introduction of the single currency on local authorities, involved them in collecting information on its financial and legal implications at local level and asked them to forward proposals to it for use as a basis for discussions with the government on the measures to be adopted. That experience seems to indicate the emergence of a new willingness to be involved, at least in managing the consequences of European integration, on the part of Greek local bodies, which to date have taken action almost exclusively in order to be included in European projects and awarded Community funds.

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

In a unitary State such as Greece there is no specific legislative framework to deal any failure of local bodies to fulfil obligations under Community law. Presumably, where the implementation of Community law involves the powers of local bodies, the State performs the obligations incumbent upon it by virtue of its membership of the EU by exercising the usual forms of control over the local authorities.

(11) See CEMR, White paper on consultation procedures of local and regional authorities in Europe 1999.

Article 102(4) of the Constitution establishes that the State supervises the activities of the local authorities regarding the lawfulness of the measures they take, but does not have the power "to impede their initiative and freedom of action", in other words to exercise substantive control. Since the abolition of prefectural controls on the municipalities and rural communities, supervision of lawfulness with regard to first and second-tier local authorities has been performed in the first instance by the Secretaries General of the regions in accordance with Article 117 of the Code on Municipalities and Rural Communities.

3. Judicial protection of local powers within the Community. Right to request the State to bring an action before the Court of Justice pursuant to Article 230(2) TEC

There is no formal right in the Greek legal order for local bodies to request the State to bring an action before the Court of Justice of the EU where Community measures encroach on their powers. Moreover, their general ability to administer and manage local matters, although stated in principle in Article 102 of the Constitution, is in practice restricted by the top-down system of conferral of powers and the lack of financial resources; as a result their ability in this area is more than likely to be only theoretically threatened by Community law. In any event, local bodies and their associations are only able to bring political pressure to bear on the central government in this respect.

4. The subsidiarity principle

There are no explicit references to the principle of subsidiarity in the Constitution or Greek law. Article 101(1) of the Constitution of 2001, which appears in Section VI "Administration", states, however, that the State administration must be organised in accordance with the principle of decentralisation, and Article 102(1) states that the administration of local affairs is a matter for first and second-tier local authorities.

As regards the classic definition of displays aspects which go some way towards introducing the principle into the Greek system, but not without a degree of ambiguity which may ultimately be resolved in the course of implementation. Above all, the sphere of action of the prefectures must be better defined; since the reform of the

1980s their role has been unclear both as regards the administrative regions, upon whom many of the roles which were also part of the prefectures' remit were conferred, and as regards first-tier local bodies which, under the Code on Municipalities and Rural Communities of 1995 (Article 24), were given general powers both in respect of local matters and for the promotion of social, economic and cultural interests of the local authorities. Laws 2218 and 2240 of 1994 provide that "the administration of local matters at prefectural level is a matter for the prefectural authorities" and that provision is universally interpreted as meaning that issues extending beyond the territorial boundaries of first-tier local bodies fall the remit of the prefectures, thereby giving rise to frequent conflicts which are not easy to resolve using the principle of cooperation. The issue of allocation of responsibilities and powers to the various tiers and the distribution of financial resources continue to be the subjects of many disputes, but the principle of subsidiarity is rarely mentioned in the current debate; it is more often referred to in the context of relations between the public sphere and society.

IRELAND

1. *Preparatory phase*

1.1 *European side*

1.1.1 *Participation in the Committee of the Regions*

1.1.1.1 *Nomination of members and alternates*

1.1.2 *Regional representation and liaison offices in Brussels*

1.2 *National side*

1.2.1 *Informing regional and local authorities in the preparatory phase of Community procedures*

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community Legislation*

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. *Judicial protection of powers within the Community. Right to request the State to act*

4. *The subsidiarity principle*

Ireland is a unitary State with a heavily centralised system of local government. The highly centralised nature of the Irish State first became the subject of determined criticism around the mid-1990s, which included comparisons with the systems obtaining elsewhere in Europe.

Legal opinion considered that the weakness of the Irish system of local government could be put down to a combination of factors essentially attributable to the limited ability of local authorities to raise funds, the limited scope of their powers and functions and the low number of councillors in relation to the population (Harvey).

Moreover, the Irish constitution in its original wording contained no provision whatsoever expressly dealing with local government. Recognition of local government as part of the institutional fabric came only in 1999 with the passing of the Twentieth Amendment of the Constitution which introduced the new Article 28A. That article confirms the democratic and representative role of local government and provides for the holding of elections every five years.

That amendment to the Constitution is a fuller response to lobbying by large swathes of Irish society seeking to promote the system of local government. The same lobbying had already led to eight regional authorities coming into being in 1994. These were authorities set up pursuant to Section 43 of the Local Government Act 1991 by the Minister for Local Government, who considered the opinion of the Minister for Finance. They have the dual task of promoting the co-ordination of public services in their own areas and monitoring the use of structural funds allocated by the European Union to local authorities. Precisely in order to effectively guarantee that the latter objective is fulfilled, two Regional Assemblies were set up in 1999: The Border, Midland and Western Region (which has 29 members) and the Southern and Eastern Region (which has 41 members). The principal function of the two Regional Assemblies is to monitor the impact of European Union programmes.

The amendment to the Constitution of 1999 was followed by the Local Government Act of 2001 which brought in organic regulation of the Irish system of government, and resulted in its having a three-tier structure: in addition to the regional tier (which has already been discussed), the local government system has county and sub-county levels.

At county level there are 29 County Councils and 5 County Borough Corporations which cover Ireland's five largest cities (Dublin, Cork, Galway, Waterford and Limerick). Those 34 authorities all have the same powers and form the central nucleus of local government power. By contrast the administrative system at sub-county level is non-uniform: in fact, there are different systems in different areas of the country. The sub-county level is made up of 5 Borough Corporations, 49 Urban District Councils and 26 Town Commissioners.

Attention should be drawn to the introduction of the dual mandate (meaning that one person could be a Member of the Irish Parliament and a local councillor at the same time) which until 2003 (when the dual mandate was repealed under the Local Government Act 2003), meant that local politics was almost entirely secondary to national politics.

1. Preparatory phase

1.1. European side

1.1.1 Participation in the Committee of the Regions

1.1.1.1. Nomination of members and alternates

The Irish delegation consists of nine members and nine alternates. Seats are awarded to the Local Authorities (Cities and County Councils). The Irish members and alternates are appointed by the government on the advice of the Minister for the Environment and Local Government, who is responsible for local authorities and is their principal spokesperson. The associations of local authorities do not have a formally recognised role in the procedure for appointing members and alternates to the Committee. Nonetheless, although the methods of nomination are not the subject of regulation, there is an understanding that the Minister must, when drawing up his proposals, have consideration to party political criteria, and to geographical and gender balance. More specifically, since the establishment of the eight regional authorities (which have, as we have stated, limited powers and are made up of representatives from Town and County Councils), it has been a requirement that the members of the Irish delegation – who are local representatives elected by direct suffrage – come from those regions. Furthermore, four members of the Irish

delegation are also members of the Regional Assemblies appointed by the relevant local authority.

The legal basis for appointing the Irish CoR delegation is set out in the Local Government Act, 1991 (Regional Authorities) (Establishment Order) 1993, (Amendment) Order, 1998. (Statutory Instrument No. 1/1998).

1.1.2. Regional representation and liaison offices in Brussels

The Regional Assemblies have recently opened representations in Brussels to add to those already opened by some of the local authorities.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

Relations between local authorities and central government are regulated by the Department of the Environment and Local Government, which exercises administrative, financial and technical control over the local authorities; the local authorities are, in short, merely executive agencies of government departments and have the job of implementing central government policy. Despite the fact that they are responsible for providing a fairly large number of services which are considered to fall into two basic categories: (a) planning and development, and (b) environmental management and monitoring, Irish local authorities are relatively weak. Their financial base is weak too, made up as it is mainly of transfers from the State. Therefore local authorities have a very restricted margin of discretion, which relates only to methods of achieving the objectives established by the government and to the tailoring of policies and services to local requirements.

It should be pointed out in that regard that no specific formal procedures have been introduced on the provision of information.

Government Departments, in particular the Department of the Environment and Local Government, are supposed to consult local authorities whenever proposals of relevance to the local authorities are due to be negotiated at EU level. However,

assessing when to hold such consultations is essentially for a matter at the discretion of central government. Since no specific formal mechanisms at national level have been laid down in order to ensure the participation of local authorities in the preparatory phase, all consultations are essentially *ad hoc*.

Consideration should, however, be given to the fact that since their establishment (in 1999) the Regional Assemblies have been called upon to participate in drafting the National Development Plan and are therefore consulted, in this regard at least, in respect of Community policy making. Thus it can be said that the very establishment of the two Regional Assemblies contributed to a significant change in the attitude of central government to the inclusion of local and regional authorities in Community decision making; the local and regional authorities are beginning to be regarded as the institutions which are closest to the people, and as bodies whose opinions must at least be taken into consideration.

It should nonetheless be pointed out that local authorities may avail of a "Europe Information Service", supplied by the Institute of Public Administration, through which they can acquire information. The role of the Service is to provide - through the distribution of a bulletin, if necessary - early warning on Community policies affecting local government.

It should also be noted that the representatives of local authorities on the Committee of the Regions are required to report on the activities of the Committee in an annual report presented to the regional authorities. Section 141 of the Local Government Act 2001 expressly lays down the requirement for elected representatives who are subsequently appointed to other bodies to report on the activities of such bodies to their own local assemblies.

Finally, we should not lose sight of the fact that in Ireland local associations play a significant role. In that regard the Local Government Act 2001 (Sections 225 and 226) expressly recognises not only the most important associations (i.e. the General Council of County Councils, which represents the County Councils and the County Borough Councils, and the Association of Municipal Authorities of Ireland, which represents local urban authorities), but also any other association which may in future carry out the functions of those bodies; those functions include the possibility of submitting requests and opinions to the central government.

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community legislation*

In Ireland the central government is the body responsible for transposing EU directives. That implies that the central government department which is competent in the matter concerned is also competent to carry out the whole process of implementation, namely drafting the regulations, whether primary or secondary, as required for implementation.

Any directives which have to be transposed by legislation (act of the *Oireachtas*) follow the ordinary procedure, which consists of approval of the Act by the Lower House (*Dáil*) and the Upper House (*Seanad*) and signature by the President. In that case the parliament's drafting office deals with the legal and formal aspect of drafting the texts.

Often, however, directives are implemented through secondary legislation adopted by the competent Minister (statutory instrument).

By contrast, the implementation of incomplete Community regulations is the responsibility, depending on the sphere of competence, of either the central government, agencies or the local authorities which, as we have already stated, have significant powers where services are concerned (e.g. transport and road safety, water quality and treatment, drafting of development plans, protection of the environment, education, health and employment).

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

There are no legal instruments in Ireland which specifically provide for preventing the State being in breach of Community law through the fault of regional and local authorities. Pursuant to Section 69 of the Local Government Act 2001, however, local authorities must, in the performance of their own functions, have regard to the policies and objectives of the central government; the central government is the body

responsible in the event of a failure to implement obligations arising under Community law.

3. *Judicial protection of powers within the Community. Right to request the State to act*

There is no provision in Ireland for the regional authorities to request the State to enforce judicial protection even where the powers of the decentralised bodies are affected.

4. *The subsidiarity principle*

The prevailing view in Ireland is that the subsidiarity principle has a limited effect on relations between the European Union and the national tier of government, but has no significant influence on relations between the various tiers of government within Ireland.

It should, however, be noted that as stated above, following the establishment of the Regional Assemblies, the central government has gradually ensured that local and regional authorities' involvement in Community decision making is greater and more effective, precisely on the grounds that the opinion of those bodies - which are considered to be the bodies closest to the people - cannot be passed over entirely. Moreover, the local authorities have not been completely excluded from the implementing phase of Community law either, given that they have the responsibility for implementing incomplete Community regulations in matters over which they have jurisdiction. Both those factors point to the conclusion that to a certain extent the principle of subsidiarity is also active, albeit implicitly, in relations between the various tiers of government within Ireland.

ITALY

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

1.1.2 Participation in the Committee of the Regions

1.1.2.1 Nomination of members and alternates

1.1.2.1.1 Regional representatives

1.1.2.1.2 Local representatives

1.1.3 Regional representation and liaison offices in Brussels

1.1.4 Regional participation in National Representations

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

1.2.2 Techniques for involving regional and local authorities

1.2.2.1 Organisational aspects

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

3. Judicial protection of powers within the Community. Right to request the State to act

4. The subsidiarity principle

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

In contrast to other Member States, in Italy, regional presidents and members of regional governments other than the president, do not have the "ministerial status" that is required to take part in meetings of the Council of Ministers.

1.1.2 Participation in the Committee of the Regions

1.1.2.1 Nomination of members and alternates

By comparison to other subnational authorities, Italian regions occupy a subordinate position in the Committee of the Regions. In contrast to the situation in all the European regional and federal states, where each subnational authority has its own representative in the delegation, Italian regions are represented jointly. This unfavourable condition is mainly rooted in the deep-seated traditional concept of local identity (especially municipality-based identity) which has for a long time had greater political influence than the regions. Symbolic of this state of affairs was the DPCM (Prime Ministerial Decree) of 17 December 1997 which, when setting out the number of Italian members and alternates on the Committee of the Regions (24 "full" members and 24 alternates), assigned only half of the allocated seats to regional authority representatives (thereby preventing each region from having its own individual representative) and the remaining seats to local representatives. In other words, of the 24 seats available, 12 were allocated to regional members and 12 to local members. The situation changed recently when the legislation referred to above was amended, altering the balance between local and regional representatives by allocating 14 of the 24 available seats to regional representatives. Nonetheless, there has been no substantive effect as far as the regions are concerned, because they are still represented on a joint basis. The rules governing the nomination of representatives on the Committee of the Regions are currently set out in the DPCM of 11 January 2002 on "New procedures for determining how the seats allocated to Italy are to be distributed among the local and regional authorities and repealing the previous DPCM of 17 December 1997" published in the *Gazzetta Ufficiale* (Italian

Official Journal) of 18 January 2002, no. 1. Article 1(4) of the decree provides that those eligible to be nominated as members or alternates of the Committee of the Regions are the presidents of the regions and the presidents of the self-governing provinces of Trento and Bolzano, the presidents of the provinces, mayors and members of the councils and executive committees. By contrast, it was a pre-requisite of the repealed decree of 1997 that only presidents of regional governments, presidents of provinces, or mayors could be full members (Article 2(1)). The issue of the type of legitimacy which members of the CoR ought to have re-emerged when administrative elections were held in some of the Member States (for example Italy and Spain in 1995) and some of the members of the Committee were not elected to legislative bodies or were not appointed to governing bodies of local or regional institutions. In Italy some of the non-elected members resigned, leaving their posts to the newly elected representatives; others continued to perform their duties as members of the CoR on the grounds that they had been appointed personally by the Council of Ministers and that the Treaty did not expressly state that members had to hold an electoral mandate. Presently, however, the Treaty of Nice makes explicit provision under Article 263 for a Committee "consisting of representatives of regional and local bodies who either *hold* a regional or local authority *electoral mandate* or are *politically accountable* to an elected assembly. (...) *When the mandate* referred to in the first paragraph on the basis of which they were proposed *comes to an end*, the term of office of members of the Committee shall terminate *automatically* and they shall then be replaced for the remainder of the said term of office in accordance with the same procedure." There is no provision to that end, however, in the decree of 2002.

1.1.2.1.1 Regional representatives

Since, as stated above, individual regions are not able to make individual nominations, a system of joint nomination is provided for in Italy. Thus the members and alternates for the regions and the self-governing provinces of Trento and Bolzano on the Committee of the Regions (14 members and 8 alternates) are proposed by the Conference of Presidents of the Regions and the Self-Governing Provinces (Article 1 of the DPCM of 11 January 2002, referred to above).

1.1.2.1.2 Local representatives

Under DPCM of 11 January 2002, the provinces and municipalities are to have five members each. The alternates are distributed as follows: 4 are allocated to the provinces, 12 to the municipalities. The members and alternates of the Committee of the Regions representing provinces and municipalities are nominated by the *Unione province d'Italia* (Union of Italian Provinces) (UPI) and the *Associazione nazionale comuni italiani* (National Association of Italian Municipalities) (ANCI) respectively (Article 1 of DPCM of 11 January 2002). When appointing members and alternates, the associations take account of balanced geographical and regional distribution and political criteria, although the decree makes no specific reference in that regard.

1.1.3 Regional representation and liaison offices in Brussels

The Italian regions took their first steps towards Europe in the mid-1990s, mainly when it became possible to open liaison offices and take part in the Italian Permanent Representation. Consequently, the regions have been able to gather direct and continuous information on Community activity. Relations between the regions and the European Community are governed by Article 4 of the Presidential Decree of 31 March 1994, which provides for regions and the self-governing provinces to maintain relations with Community agencies, bodies and institutions without the need for prior government agreement or notification, where the issues concern them directly, and where the work involved is preparatory in nature and relates to information and documentation in accordance with Community policy established by the State. Moreover, the regions may undertake educational activities to provide information and documentation on legislation submitted to the EC Commission for examination, on condition that it is submitted for scrutiny by the government. Law 52 of 1996 recognised the power of the regions to open liaison offices within the Community institutions. That law, while making the practice of having informal relations with the Community institutions - which had already been carried out by some of the regions - part of the institutional fabric, did not identify liaison offices as EU representations, and they were reduced to having only an informative role.

1.1.4 Regional participation in National Representations

Until the 2001 reform, the Italian Constitution contained no reference whatsoever to European integration. However, the primary outcome of the revision was to codify developments which had already occurred. Article 117(5) of the constitution illustrates this well: it provides for regions and self-governing provinces to contribute, in the matters for which they are responsible, to decisions aimed at establishing Community instruments, and thereby *de facto* enshrines in the Constitution powers which had already been conferred on the regions under ordinary legislation. In line with the constitution, Article 5(1) of Law 131/03 provides for the regions and the self-governing provinces of Trento and Bolzano to contribute directly, in the matters for which they have legislative powers, to establishing Community instruments by participating through government delegations in the activities of the Council, and in working groups and committees of the Council and the European Commission in accordance with procedures to be established at the State-Regions Conference. These should reflect the specific needs of the special autonomies and ensure consistent representation of the Italian position by the Head of the Delegation appointed by the government. The same Article further provides that the government delegations must include participation by at least one of the special statute regions and the self-governing provinces of Trento and Bolzano. It further provides that in the matters for which the regions are responsible under Article 117(4) of the constitution, the head of the delegation, who is appointed by the government according to criteria and procedures determined by a general cooperation agreement entered into at the State-Regions Conference between the government, ordinary regions and special statute regions, may also be president of a regional government or of a self-governing province. However, it should be noted that prior to such agreement being reached or in event that no such agreement is reached, the head of the delegation is to be appointed by the government.

The regions and self-governing provinces have also been empowered to have their own officials at the Italian Permanent Representation (Law 52 of 1996). As a result, since 1997, in addition to the government officials (who are about forty in number), four officials representing regional and local authorities have been working at the Permanent Representation on issues of particular interest for them. The State-Regions Conference has the task of nominating the regional officials, although the minister for foreign affairs is responsible for appointing them.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

a) Methods

Where the drafting of secondary Community legislation is concerned, the regions have limited powers to influence the process whereby the will of the state is formed. As far as participation in the formulation of individual Community instruments is concerned, there is provision for draft legislation and guidance instruments drawn up by EU and EC institutions to be submitted to the regions, so that they can make comments (Article 1 a of Law 86 of 1989, supplemented by Article 6 of Law 422 of 29 December 2000 – Law on the implementation of Community instruments). Moreover, provision is made for intervention by the State-Regions Conference to ensure that national policy on the drafting of Community legislation is in line with the requirements of the regions and the self-governing provinces. Article 10 of La Pergola (as amended by Article 13 of Law 128 of 24 April 1998) provides for the prime minister to call, at least every six months or upon request of the regions and the self-governing provinces of Trento and Bolzano, a special session of the Standing Conference on relations between the state and the regions and self-governing provinces of Trento and Bolzano to address aspects of Community policies which deal with regional and provincial issues. The Law also provides for the Conference to express opinions on the general course of the drafting and implementation of Community legislation on regional competences, and on the criteria and methods to ensure that the exercise of regional functions is reflected in the observance and implementation of Community obligations. It should, however, be pointed out that despite the fact that La Pergola provides for a meeting of the Community Session at least every six months, that commitment has so far not been met. Furthermore, there is evidence of a change in the trend in this respect. Although in the first six years following its introduction (1990-1996), the Community Session of the Conference was called to meet only three times, since 1997 the sessions have become more frequent. The regions have also become more involved, and they have been requested not only to express an opinion on Community laws but to take part in formulating the Italian negotiating position.

b) Regulation

The procedures for fulfilling EU obligations are currently governed by the La Pergola law, referred to above, which has been amended on several occasions. It should nonetheless be pointed out that in the course of approving Draft Law 2386 on "General rules on Italy's involvement in the Community regulatory process, and procedures for implementing EU obligations", which was approved by the Chamber of Deputies and submitted to the Senate (July 2003), the Draft Law, in providing expressly for the repeal of the La Pergola law (Article 22), brings the law on regional participation in the drafting and implementation of Community law and European Union legislation into line with the reform of the Constitution.

1.2.2 Techniques for involving regional and local authorities

1.2.2.1 Organisational aspects

Although regions' participation in state decisions to establish Community law is a requirement of constitutional importance, as it is the means of compensating them for the loss of power they experienced as a result of Italy's accession to the treaties establishing the European Communities, it was not a requirement of the Constitution until the 2001 reform; even after the reform, the methods of implementation were left to the legislator's discretion. Until the 70s separate consultations were preferred – also in view of the fact that the failure to implement ordinary regionalism was an obstacle to the establishment of a body representing all the regions. Subsequently, since the implementation of ordinary regionalism, an organic model of cooperation has been gradually gaining strength, and was placed on a formal footing through the establishment, first under a DPCM in 1983, then under Law 400 of 1988, of a joint panel based at the Prime Minister's Office, namely the State-Regions Conference.

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community legislation*

a) *Transposition of directives*

Under Article 117(5) of the Constitution regions and self-governing provinces are able, in the matters for which they are responsible, take measures to establish and implement European Union instruments. Article 9(1) and (2) of the La Pergola law (as amended by Article 13 of Law 128 of 24 April 1998) provides that "the regions governed by special statute and the self-governing provinces of Trento and Bolzano may, in the matters which fall within their exclusive competence, immediately implement Community directives" and, furthermore, "regions, including those governed by ordinary statute, and the self-governing provinces of Trento and Bolzano may, in the matters which fall within their joint competence, immediately implement Community directives". As regards the regional means of implementing those instruments, Article 9(2 -a) (as amended by Law 422 of 2000) provides that "Regional and provincial *measures*" intended to implement EC directives "shall contain in their title the identifying number of each directive implemented". Therefore implementation appears to be able to be achieved using a regulation or an administrative act, as well as a law.

Following the 2001 reform of the Constitution, fulfilment of the obligations under Community law should be mainly the responsibility of the regions, as they are vested with the power to issue regulations in matters of concurrent and residual competence. The State has power to adopt regulations only in the matters within its own exclusive legislative responsibility. Note should be taken, however of the opposing position taken by the Council of State. To be more specific, as far as the implementation of Community directives is concerned, in its Opinion 2/02 of 25 February 2002 the Council of State, Plenary Sitting, after stating that "the regions and self-governing provinces [are] competent to implement Community directives in matters attributed to the exclusive or joint competence of the regions or self-governing provinces"; and that "where the regions have not adopted measures, the right and duty of the State to implement such directives using its own legislative sources in order to comply with the duties incumbent upon it under Community law [continues to exist]"; and that "since the Constitution provides for a power to act in substitution in the event of

failure to fulfil an obligation, State legislation, if issued prior to the time limit for the fulfilment of an obligation under Community law to implement the directive, will have effect only upon expiry of that time limit and only in the regions which failed to fulfil that obligation"; concludes that "State power to regulate in that regard is expressly provided for under Article 3(c) of Law 142 of 19 February 1992"; and that, therefore, the exercise of the power of the State to issue regulations implementing Community directives when the time limit they lay down for their implementation has expired without their having been implemented in domestic law is justified.

As regards administrative implementation, prior to the revision of the Constitution, Article 1(4) of Law 59/97 ("first Bassanini law") provided that among the administrative functions conferred, the administrative implementation of EC obligations had been assigned to the regions, and only the "coordination of relations" with the EU and "duties intended to ensure fulfilment at national level of the obligations under the Treaty on European Union" were reserved to the State. Since, after the revision, most administrative functions were attributed to the municipalities (Article 118(1) of the Constitution), it must be inferred that administrative implementation is in principle a matter for municipalities. However, exemptions from that general rule are possible, if necessary to ensure consistent practice, subject to the conditions provided for in that Article.

b) *Implementation and enforcement of regulations*

Pursuant to Article 6(1) of Presidential Decree No. 616 of 1977, the implementation of regulations is a matter for the regions in the matters for which they are responsible. Although that decree does not deal with the issue of the implementation of non self-enforcing regulations, the case law of the Constitutional Court in such cases has in principle recognised regional power as a matter for the regions (Constitutional Court Judgment No. 304 of 1987).

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

In order to ensure that regions fulfil Community obligations, provision has been made for the state to have powers to act in substitution, as set out in two separate articles of the Constitution: Article 117(5) and Article 120(2). The former entrusts regulation of

the exercise of power to act in substitution to State law "in the event those obligations are not fulfilled"; the latter provides for the government to have power to act in substitution for regional bodies in the event of "failure to comply" with Community law. In that respect, Article 8(1) and (2) of the "La Loggia" Law provides that the Prime Minister, acting on a proposal by the minister responsible for the subject area, and on the initiative of the regional or local authorities, must set a reasonable time limit within which the authority concerned must adopt the measures due or necessary. In the event that that time limit expires and no such measures have been adopted, the Council of Ministers, having consulted the relevant authority, may, acting on a proposal from the relevant minister or the Prime Minister, take the necessary measures, including legislative measures, or appoint a competent commissioner. Article 9(4) of La Pergola in its turn provides that "in the absence of legislative measures taken by the region" to implement EC directives, "all provisions set out in State law to fulfil obligations arising under Community law shall apply". Under Articles 10 and 11 of the Draft Law amending La Pergola, which is to replace that article, in accordance with the opinion delivered by the Sitting of the Council of State of 25 February 2002 (cited above), the State may set out rules, through regulations and legislation, on areas not listed in Article 117(2) where the matter at issue is the implementation of Community law, provided that it has been ascertained that the region has failed to fulfil its obligations. Moreover, the Community laws of 2001 and 2003 (Article 1(5) of Law 39 of 1 March 2002, and Article 1(5) of Law 306 of 31 October 2003) stipulate that the State's power of substitution can be exercised by means of supplementary acts of primary legislation. Indeed, the laws lay down that any legislative decrees which may be adopted on matters falling within the legislative competence of the regions and provinces, will enter into force, in respect of those regions and self-governing provinces in which no implementing legislation is yet in force, on the date of expiry of the deadline laid down for the implementation of the Community legislation concerned, and for these legislative decrees to cease to have effect as of the date of entry into force of the implementing legislation of each region and self-governing province.

3. Judicial protection of powers within the Community. Right to request the State to act

One important new aspect which recognises the regions' power to have direct recourse to EU case law was introduced under Article 5(2) of Law 131/03. The article

stipulates that the government, in matters within the legislative jurisdiction of the regions and the self-governing provinces of Trento and Bolzano, may, upon request of one of the regions or self-governing provinces, appeal to the Court of Justice of the European Communities against Community instruments which are considered to be unlawful. However, under that legislation, the government is obliged to do so if the State-Regions Conference demands it with an absolute majority of the regions and self-governing provinces.

4. The subsidiarity principle

The Italian experience is that until the 1990s, the institutional structure which gained in strength had assumed clearly centralist overtones, to the detriment of a constitutional model which could be regarded as incorporating the principle of subsidiarity, albeit implicitly. The re-emergence of the principle of subsidiarity is due firstly to Law 142/1990, then to Enabling Act 59 of 15 March 1997, the so-called Bassanini law. The Bassanini law in particular expressly stipulated that functions would be delegated in accordance with certain fundamental principles, including the subsidiarity principle (Article 4(3)(a)). Therefore most administrative competences and functions were delegated to municipalities, provinces and upland authorities, in accordance with the geographical, community and organisational aspects involved, with the sole exception of those functions which were incompatible with those aspects. That law also opened the way significantly to horizontal subsidiarity (Article 4(3)(a)). Currently, the principle of subsidiarity is also expressly provided for in the constitution (Article 118(1) of the Constitution), although the provision deals only with administrative functions. Attention should also be drawn to the provision on horizontal subsidiarity in the final paragraph of Article 118. Other solutions whose underlying basis is the principle of subsidiarity can also be found in the Constitution. We should note in this respect, the regions' (exclusive) legislative powers as regards fulfilment of Community obligations and international treaties, which they can exercise in the matters within their remit.

LUXEMBOURG

1. Preparatory phase

1.1 *European side*

1.1.1 *Participation in the Committee of the Regions*

1.2 *National side*

1.2.1 *Techniques for involving regional and local authorities*

1.2.1.1 *Procedural aspects*

2. Implementing phase

2.1 *Division of powers for the implementation of Community legislation*

1. Preparatory phase

1.1 European side

1.1.1 Participation in the Committee of the Regions

There is no legal basis for the appointment of the Luxembourg delegation to the Committee of the Regions.

The government selects the Luxembourg delegation to the Committee of the Regions on the basis of a proposal put forward by SYVICOL (*Syndicat des Villes et Communes Luxembourgeoises* – Luxembourg Union of Local Authorities). Both geographical/territorial and political criteria are taken into account in the nomination of the Luxembourg delegation. The government discusses on the list submitted by SYVICOL and submits it to the Council of Ministers of the European Union. It should be stressed that SYVICOL plays a key role in the formation of the delegations for both the Committee of the Regions and for the Congress of Local and Regional Authorities of Europe (CLRAE). SYVICOL also takes part in the activities of the Congress of Local and Regional Authorities of Europe.

All members of the Luxembourg delegation to the Committee proposed by the central government are representatives elected by direct suffrage. Alternates who have not been elected by direct suffrage and who are not politically accountable to an assembly elected by direct suffrage lose their posts when the delegation is reappointed.

The Luxembourg delegation to the Committee of the Regions comprises six full and six alternate members. The delegation is made up of local authority representatives.

1.2 National side

1.2.1 Techniques for involving regional and local authorities

In 1951, local authorities in Luxembourg set up the AVCL (*Association des Villes et Communes Luxembourgeoises* – Association of Luxembourg Municipalities). Prior to that, the national authorities did not consult local authorities as a matter of course. It was only at the end of the 1960s that the Minister of the Interior started to ask the

AVCL for an informal opinion on draft laws and regulations to be enacted by his ministry. This included, for instance, a draft law on the merger of municipalities, subsequently withdrawn, whose fate was influenced by the stand taken by the AVCL.

In 1987, the AVCL changed from a not-for-profit association to a union of municipalities: SYVICOL. Over the years, very detailed legislation has made SYVICOL more important and given it a greater political role. Now, SYVICOL is frequently mentioned in laws and regulations whenever their implementation requires a body to which a representative of municipalities is to be appointed.

1.2.1.1 Procedural aspects

There are no specific rules governing the procedure by which local authorities are to be consulted. For some time, however, SYVICOL's opinions have also been forwarded to the Chamber of Deputies and are published as parliamentary documents and therefore form part of the legislative work on draft laws. Although all this is at the discretion of the national authorities, there has been major recognition of SYVICOL's role. It is also able to provide the government with input in cases where it has not been consulted, and may take initiatives to press for legislation on municipal affairs. SYVICOL's opinions have had a considerable impact. One case of successful consultation was the reform of the legislation on inter-municipal unions, where account was taken of the many proposals put forward by SYVICOL.

An important innovation was the promise by the Prime Minister to hold twice-yearly meetings between the government and SYVICOL to examine all the problems raised by the municipal sector. The first meeting took place on 1 April 1999.

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

The implementation and ratification of European Community decisions and directives, and the approval of European Community regulations on economic, technical, agricultural, forestry, social and transport matters takes the form of administrative regulations. Consultation of the Council of State is mandatory.

THE NETHERLANDS

1. *Preparatory phase*

1.1 *European side*

1.1.1 *Participation in the Committee of the Regions*

1.1.2 *Regional representation and liaison offices in Brussels*

1.2 *National side*

1.2.1 *Informing and involving regional and local authorities in the preparatory phase of Community procedures*

2. *Implementing phase*

1. Preparatory phase

1.1 European side

1.1.1 Participation in the Committee of the Regions

The Netherlands delegation to the Committee of the Regions has 12 full and 12 alternate members: six full and six alternate members are from provinces and the other six full and six alternate members are from municipalities. There are no legal rules for their nomination.

The delegation's members are proposed to the Minister of the Interior by the Association of Dutch Provinces (*IPO - Interprovinciaal Overleg*) and the Association of Dutch Municipalities (*VNG - Vereniging van Nederlandse Gemeenten*) respectively. The Minister of the Interior draws up a list of candidates for the Netherlands delegation on the basis of a joint proposal from the associations which takes account of both geographical/territorial and political criteria (latest provincial and/or municipal elections). These associations also endeavour to ensure that the delegation includes a fair number of women. After deciding on the list of members proposed by the Minister of the Interior, the government forwards it to the Council of the European Union, which appoints the members of the Committee.

1.1.2 Regional representation and liaison offices in Brussels

The Netherlands has four offices in Brussels representing the provinces. These are: North Netherlands Assembly (Fryslân/Groningen/Drenthe); East Netherlands Provinces (Overijssel/Gelderland); Randstad Region (North Holland/South Holland/Utrecht/Flevoland); South Netherlands Provinces (Zeeland/North Brabant/Limburg).

1.2 National side

1.2.1 Informing and involving regional and local authorities in the preparatory phase of Community procedures

One of the most significant features of Dutch political and administrative culture is the ongoing quest for consensus through consultation. This is true both of the national actors (cabinet, houses of parliament) and of relations between central government, provinces and municipalities. The associations have played a key role in developing this culture of consensus and consultation both within and outside the regulatory framework (as it stood prior to 1994). These consultation procedures have largely taken the form of informal political and/or administrative contacts.

Direct consultations can be examined by looking at both the regulatory framework and the Dutch political framework.

Although there are general provisions that set out all the instruments needed to reach a consensus, there have been a number of cases of late consultation or even a lack of consultation of the decentralised authorities. The Provincial and Municipal Associations (*IPO* and *VNG*) successfully highlighted the need for an effective regulatory framework.

This framework for regulating consultation was introduced by the current law on municipalities (revised in 1992) and the current law on provinces (also revised in 1992). Under similar articles in these two laws, the government has to consult the municipalities and/or provinces (or a body which can be considered representative of the municipalities and provinces) in all fields and on draft laws which concern them. Consultation procedures are set out in particular in Articles 112, 113, 114, 116 and 117 of the law on municipalities and in Articles 110, 111, 112, 114 and 115 of the law on provinces.

In addition to the legislative framework, there is also a political framework for consultation. This involves the signature of "political agreements" (*bestuursakkoord*) between the government and the Provincial and Municipal Associations (*IPO* and *VNG*), a quarter of which were signed in March 1999. These agreements, supplementing the legislation in force, set out rules of conduct to be observed between

the various tiers of government, general principles for the distribution of public funds between the national, provincial and municipal levels and starting points for bilateral or trilateral cooperation in particular fields of public policy and/or new legislation. The current political agreement sets out three main areas for consultation: social infrastructure and public security, territorial and economic infrastructure, and quality of government. The political agreement serves as a joint programme of work for the local, regional and national authorities for the government's term of office. It also makes provision for a "Tripartite Conference" attended by delegates from the state, the provinces and the municipalities. This conference meets at least twice a year, under the aegis of the Prime Minister, to discuss the joint programme of work and to supplement it or update it to meet current needs.

Lastly, the Association of Dutch Municipalities (*VNG - Vereniging van Nederlandse Gemeenten*) and the Association of Dutch Provinces (*IPO - Interprovinciaal Overleg*) take part, together with national government departments, in preparing national positions on all European Commission initiatives. These associations also manage, with financial support from national government, a European information and consultancy service (with eight members) for decentralised government (i.e. provinces and municipalities).

2. Implementing phase

In 2001, a national law was adopted under which the national government can oblige municipalities and/or provinces to act in accordance with national regulations on the use of Community subsidies. According to information supplied by the IPO, this law has not been applied up to now. There are also ongoing discussions (with legal experts, local authority officers and politicians) on the preparation of a series of national instruments designed to "guide" or "inform" municipalities and provinces about the best way of meeting Community obligations.

PORTUGAL

1. Preparatory phase

- 1.1 *European side*
 - 1.1.1 *Participation by regional ministers in the Council of Ministers*
 - 1.1.2 *Participation in the Permanent Representation*
 - 1.1.3 *Participation in working groups and committees*
 - 1.1.4 *Participation in the Committee of the Regions*
 - 1.1.5 *Regional representation and liaison offices in Brussels*
 - 1.1.6 *Associations and interregional cooperation at European level*
- 1.2 *National side*
 - 1.2.1 *Participation in parliament and government*
 - 1.2.2 *The Comissão Interministerial dos Assuntos Comunitário (CIAC)*

2. Implementing phase

- 2.1 *Division of powers for the implementation of Community measures*
- 2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. The subsidiarity principle

1. Preparatory phase

Within its borders, which have remained stable for hundreds of years, Portugal has a very high level of linguistic and ethnic homogeneity and has not experienced any significant regionalist claims for regions to be recognised as nations. The island regions of Madeira and the Azores, the last vestiges of the colonial empire, which are on the very edge of Europe geographically speaking, enjoy special autonomy. The Constitution, enacted in 1976 and amended in 1982, 1989, 1992, 1997, 2001 and 2004, recognises their special nature, within a state defined as unitary and having "indivisible sovereignty", because of their "geographic, economic, social and cultural characteristics" and the "historic aspirations of the peoples of those islands for autonomy". The scope and limits of their autonomy and procedures for exercising it are laid down first by the Constitution (Articles 225-234 of the Constitution) and then by the statutes, drawn up by the regional assemblies and approved by the Assembly of the Republic⁽¹⁾ (Portugal's single-chamber parliament). In mainland Portugal, the Constitution provides for the creation of "administrative regions" in the section dealing with regulations on local government (Section VIII, Local Authorities). The powers and responsibilities of this type of region, introduced largely for the purposes of land-use planning, organisation of public services and support for the work of municipalities, were to be defined by a subsequent enacting law, to be subject to a national referendum. The framework law implementing this provision of the Constitution (Law 56/1991) was approved in 1991, but the introduction of the administrative regions was not addressed. The problem of reaching a political agreement on the number and territorial boundaries of the regions led to an impasse which was resolved only in 1998 (Law 19/1998) and two referendums were held: a national referendum on the creation of this new tier of government and a referendum in each of the eight regions provided for in the proposed new law on its introduction in the individual areas. The failure to reach the quorum required for national consultation to be valid caused the law to lapse, with the result that regional reform was set aside. In Portugal, therefore, the question of regional participation in European policy-making only concerns the two autonomous regions of Madeira and the Azores.

(1) The law approving the Statute of the autonomous regions takes the form of an ordinary state law (Article 161(b) of the Constitution). The political and administrative statute of the Azores was adopted by Law 39/1980 and amended first by Law 9/1987 and then by Law 61/1998 of 27 August 1998. The statute of the region of Madeira, approved by Law 13/1991, was amended in 1999 (Law 130/1999 of 21 August 1999).

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

There is no provision for a member of a regional government to represent the Republic in the Council of Ministers under the terms of Article 203(1) of the EU Treaty.

Under the Constitution (Article 227(1)(v)), the autonomous regions are nevertheless entitled to take part in the Community decision-making process in connection with decisions relating to them as regards the definition of the positions to be taken by the government in the Council. This constitutional provision is taken up in the regional statutes: Article 83(c) of the statute for the Azores and Article 94 of the statute for Madeira.

The exercise of this right requires the assent of the government on a case-by-case basis; the government has never refused such assent up to now, especially as the regions do not make frequent use of it and merely ask to take part when the questions being discussed relate closely to their specific interests.

Under Article 227(1)(t), the autonomous regions can also participate in negotiations for international treaties and agreements of direct concern to them and share in any resulting benefits.

1.1.2 Participation in the Permanent Representation

In view of the growing political importance of issues connected with the two autonomous regions in Community policies, Decree Law 146/2001 of 2 May 2001 of the Ministry of Foreign Affairs (*Diário da República* [Official Journal], Series I, A, No. 101 of 2 May 2001) supplements the Portuguese Permanent Representation to the European Union by introducing the post of "special adviser for matters relating to the autonomous regions of the Azores and Madeira" within the Ministry's specialist staff.

Introducing direct representation of the interests of the regions in the Permanent Representation was intended to forge a closer link between the positions of the

government and those of the autonomous regions. The tasks of the regional adviser, appointed at the proposal of the relevant regional government body and subject to supervision by the Permanent Representative, are to attend meetings and working groups dealing with issues of interest to the autonomous regions, to promote and support the adoption of specific EU measures of benefit to the two regions and, in general, to monitor the work of the Permanent Representation and the Council in areas where their interests are concerned.

1.1.3 Participation in working groups and committees

Under the Constitution (Article 227(1)(x)), the autonomous regions of the Azores and Madeira also participate in the process of implementing the European Union through representation in the national delegations involved in Community decision-making processes when these relate to matters of interest to them.

Under this provision the regional authorities are invited to nominate their representatives to Portuguese state delegations, for both technical formulation (working groups, committees, direct liaison with Commission departments) and political negotiation within the Council.

1.1.4 Participation in the Committee of the Regions

Portuguese local and regional authorities are represented in the Committee of the Regions by 12 full members and 12 alternates.

The criteria governing the distribution of the seats assigned to the Portuguese delegation among the various types of subnational authorities and the nomination procedures are set out in Resolution No. 1 of 5 January 1994 of the Assembly of the Republic (*Diário da República*, Series I, A, No. 20 of 25 January 1994), which states that the delegation is to comprise four representatives of the autonomous regions (two full members and two alternates) and 20 representatives of the municipalities (*municípios*) (ten full members and ten alternates).

Stressing the unitary nature of the Portuguese State, the resolution speaks of "consultation" of the governing organs of the autonomous regions for the purposes of nomination of their representatives by the government. The fact that the regions'

suggestions are automatically taken up by the government has never, of course, been called into question.

In the case of representatives of the municipalities, the Secretary of State for Local Administration (SEAL) draws up a list of nominees on the basis of geographical/territorial and political criteria which take account of the results of the most recent elections, i.e. ensuring that the percentage votes obtained by the various parties are reflected. As regards the composition of this representation, the parliamentary resolution states that the ANMP (National Association of Portuguese Municipalities) representing the *municípios* (municipalities) and *freguesias* (parishes)⁽²⁾ is to be consulted.

The government, after deciding on the proposed list of members, submits it to the Council of the European Union, which appoints the members of the CoR.

The nomination procedure and criteria were further confirmed when the CoR members were appointed in 2002 (see the Resolution No. 10/2002 (Series II) of the Council of Ministers of 17 January 2002, published in the *Diário da República*, Series II, No. 27 of 1 February 2002).

The representatives of the autonomous regions nominated as full members of the CoR are the respective Presidents of the regional councils. Persons in posts with

(2) The 4251 *freguesias* (parishes) have limited local service management tasks, while the 308 *municípios* (municipalities) have tasks including infrastructure, network services, town planning, law and order, education and culture, economic development and environmental protection. Although these local authorities are politically well rooted, they have up to now, particularly as a result of a chronic shortage of resources, been in a weak position with respect to central government and its local administration, which draws on the Napoleonic model of the Prefectures with governors appointed by the government to the 18 administrative districts into which the country is divided. In more recent years, as part of a wide-ranging programme to modernise the public administration which is now entering the implementation phase (see "Statement by the Prime Minister on the reform of the public administration" of 26 April 2004), it has been decided to transfer powers and resources to the municipalities in accordance with the terms of Law 159/1999. In view of the major disparities between the various municipalities from the point of view of their operating capacity, the law sets out a system of staggered decentralisation, under which the new powers are to be awarded, under contracts with the state, to those municipalities satisfying the criteria for their exercise. The process should have been completed in 2004, but it seems that matters are proceeding with some difficulty. The local government system has also been reformed by Law 5-A/2002, which repealed the legal provisions in force on the organisation of local authorities and overhauled the regulations on the governing organs of local authorities.

responsibility for European affairs in the regional executives were nominated as alternates: the Vice-President of the government of Madeira, under Regional Regulatory Decree 43/2000/M (organisation and operation of the regional government of Madeira) and the Regional Secretary for Finance and Planning of the Presidency of the government of the Azores, under Regional Regulatory Decree No. 33/2000/A (overall structure of the eighth regional government of the Azores).

The representatives of the *municípios* appointed in 2002 are all Presidents of municipal councils (*Câmara Municipal*)⁽³⁾.

1.1.5 Regional representation and liaison offices in Brussels

The autonomous regions do not have their own representation offices in Brussels, probably because they do not feel that such an expense is necessary at the moment, given the opportunities to take part in European policy-making set out in the Constitution and ensured by the national government through the inclusion of their representatives in the national delegations and the inclusion in the Permanent Representation of special advisers on issues relating to the autonomous regions.

(3) The *Câmara Municipal* is the executive organ of the municipality, chaired by the head of the list receiving the most votes in the municipal elections, in which the elected members of the assembly (*assembleia municipal*), i.e. the deliberative organ, are also elected; half of the assembly's members are elected by universal direct suffrage and the remaining members are the Presidents of the councils of the *freguesias*, using a mixed composition scheme – elected members and representatives of local territorial authorities – which the Constitution replicates for the assemblies of the administrative regions.

The metropolitan cities⁽⁴⁾ and local authorities have not opened liaison offices either individually or jointly. Moreover, despite the importance of the Structural Funds for Portuguese regional development, cohesion policy does not seem to have mobilised the sub-national authorities to deal with the European institutions, as has been the case in many other Member States. Where European regional programmes are concerned, the Regional Coordination Commissions (*Comissões de coordenação regional*), now Regional Coordination and Development Commissions (*Comissões de coordenação e*

(4) Under the Constitution, urban conurbations can set up "other forms of autonomous territorial organisation" in relation to their particular needs. In 1991 (Law 41/1991), the metropolitan areas of Lisbon and Oporto were created as public-law territorial bodies in order to carry out activities of common interest to the municipalities in their areas, chiefly in the sectors of public transport, infrastructure and supra-municipal services and civil and environmental protection. Their governing organs are formed by the assembly, made up of elected members from the municipal assemblies, and the council, made up of the presidents of the municipal executives. Links between the various tiers of administration in the metropolitan areas are provided by a 'technical' organ with consultative tasks, the Metropolitan Council, made up of the Chairman of the Regional Coordination Commission (a body recently replaced by the Regional Coordination and Development Commission), the members of the metropolitan council and representatives of public bodies and service companies whose work is connected with the tasks of the metropolitan cities. The need to overcome the problems raised by administrative fragmentation, in particular as a result of the shelving of the regional reform, has led the experiment with intermediate bodies of this type to be extended to the rest of the country as well. Law 10/2003 promotes the creation of new "large-scale" governments on a voluntary basis, i.e. adopting the consensual mechanisms tried out for the creation of the metropolitan cities of Lisbon and Oporto, with the express consent of two thirds of the assemblies of the municipalities of the respective areas representing the majority of the population concerned. Two types of metropolitan area are planned: the "greater metropolitan areas" (GAM) requiring the membership of at least nine neighbouring municipalities, with a total population of at least 350,000 inhabitants, and the "urban communities" (COMURB) made up of at least three neighbouring municipalities with no fewer than 150,000 inhabitants.

desenvolvimento regional)⁽⁵⁾ have built up their role, not just domestically, but also at European level, lobbying alongside the autonomous regions as part of European associations of regions (see 1.1.6). In Portugal, rather than encouraging local institutions to work at a European level, European regional programmes have mobilised private entrepreneurs, and it is no surprise, therefore, that the five liaison offices registered as Portuguese representations by the *Bureau de Liaison Bruxelles-Europe* (Brussels-Europe Liaison Office) have been set up by their organisations.

1.1.6 Associations and interregional cooperation at European level

The parliaments of the two autonomous regions belong to the Conference of European Regional Legislative Assemblies (CALRE). This organisation held its fifth conference (28-30 October 2001) in Funchal, capital of the Madeira archipelago; the conference ended with the approval of the document known as the "Madeira Declaration" which calls, in particular in the context of the European Convention and the Intergovernmental Conference of 2003, for a proper balanced redistribution of powers

(5) The Comissões de coordenação regional (CCR – Regional Coordination Commissions) were set up in the late 1960s and early 1970s as research committees responsible for cooperating on the formulation of the national development plan. Their technical and operating resources were increased in the subsequent period, especially in the context of direct measures to provide the country with a modern network of infrastructure and services and in response to the need to make up for the shortcomings of municipalities in tackling tasks of this type. They were then reorganised and regulated by Decree Law 494 of 21 December 1979 as decentralised bodies of the Ministry of Planning with a degree of administrative and financial autonomy. The powers required for the management of Structural Funds programmes and the need for a regionally structured organisation to plan and implement these programmes subsequently increased the scope of action of the CCRs, which combined their technical tasks with a growing political role, becoming forums for discussion with and between institutional and in particular economic, actors and a point of reference for regional interests in general. Their participation in European regional associations (see 1.1.6), in which what matters is not so much legal status as functional role, was both a result of the position that they have acquired in the national arena and a way of strengthening that position. The power of these bodies, especially as regards the management of the substantial funds provided by the EU, was widely criticised chiefly on the grounds that there was no democratic control of their work, and pressures for their reform grew following the abandonment of regionalisation plans. Decree Laws 224/2001 and 104/2003 renamed them Comissões de coordenação e desenvolvimento regional (CCDR – Regional Coordination and Development Commissions) and reorganised them, among other things by providing for participation in the Regional Councils (the consultative bodies of the Commissions) by all the presidents of the councils of the municipalities in the area covered by each CCDR). Under the reform, the Regional Council, whose members also include representatives of the social partners, non-governmental organisations, universities and ministries (although the latter have no voting rights), is entitled to put forward a list of three names, from which the government chooses the president of the CCDR.

at regional, national and European levels. The President of the Assembly of the autonomous region of the Azores is currently a member of the CALRE standing committee, and is responsible for overseeing participation by regional parliaments in the work of the COSAC.

The Madeira and Azores regions are members of the AER, together with the Regional Coordination Commissions (now Regional Coordination and Development Commissions) of Norte and Alentejo.

All five Commissions, via their vice-chairmen, who are responsible for European affairs, are members, together with the two autonomous regions, of the transnational cooperation association Conference of Peripheral Maritime Regions of Europe (CPMR): Madeira and the Azores in the "Islands Commission", and Norte, Lisbon-Valle del Tejo, Centro, Algarve and Alentejo in the "Atlantic Arc Commission". Alentejo and Algarve are also members of the Inter-Mediterranean Commission, whose aim is to promote cooperation between the European and non-European regions of the Mediterranean basin.

The cities of Lisbon and Oporto belong to the Eurocities network, which promotes cooperation projects between the main cities of Europe and initiatives to press for European policies promoting their interests.

The National Association of Portuguese Municipalities (ANMP) is a member of the Council of European Municipalities and Regions (CEMR) and appoints the members of the Portuguese delegation to the Congress of Local and Regional Authorities of the Council of Europe (CLRAE).

Local authorities may enter into cross-border and transnational agreements with their counterparts in other EU Member States, generally with the assistance of the *Regional Coordination and Development Commissions*.

There is a specific constitutional basis (Article 227(1)(u)) for cooperation between the autonomous regions and foreign regional bodies.

1.2 National side

1.2.1 Participation in parliament and government

Under Article 2 of Law 40 of 31 August 1996 (*Diário de República*, Series I, A, No. 2002 of 31 August 1996) it is mandatory to consult the governing organs of the autonomous regions in the phase preceding the approval by Parliament and the government of legislation and regulations, when matters for which they are responsible are involved. Consultation is also mandatory for other government acts concerning "questions of a political and administrative nature of significant interest" to the autonomous regions.

The law does not specify that these provisions also apply to the formulation of the positions to be taken by the government in the Council of the European Union and to cases in which Parliament intends to give its opinion on "matters that are pending decision within the organs of the European Union and that have a bearing on their exclusive legislative powers" as set out in Article 161(n) of the Constitution and regulated by Law 20 of 15 June 1994 (*Lei de acompanhamento e apreciação pela Assembleia da República da participação de Portugal no processo de construção da União Europeia*). However, following the fourth amendment of the Constitution in 1997, which expressly gives the autonomous regions the right to be consulted on "the positions to be taken by the Portuguese State in the context of the process of implementing the European Union" (Article 227(1)(v)), there does not seem to be any doubt that the application of Article 2 of Law 40/96 is extended to cases of national decisions relating to reforms of the treaties establishing the EU and European policies.

Under the procedure envisaged by this law, the government and/or Parliament are responsible for organising consultation of the competent governing organ of the autonomous regions (the legislative assemblies in the case of legislation or regulations, the governments for issues of a political and administrative nature) which are required to give a reasoned opinion within 15 days if the request is to the regional assemblies or within ten days if the regional governments are asked for their opinion, in line with the terms of the regional statutes and unless otherwise specified. Preparatory work and any information which may be useful to them in drawing up their opinion must also be forwarded to the regional organs.

If the consultation leads in practice to a specific proposal, the regional organs must be informed of any substantive amendments to such proposals and reasons given.

There are nevertheless grounds for considering that the adoption of these procedures is of little significance for the participation of the autonomous regions in European policy-making. The consultations that Parliament can organise do not seem to be a genuinely influential instrument, since Parliament plays a rather low-level role in the formulation of decisions relating to the integration process and Law 20/1994, which is presented as an attempt at least partly to make up for Parliament's disadvantaged position in comparison with the executive in this field, actually sets out rights of information rather than other rights. In the case of consultations organised by the government, the autonomous regions have more effective and timely methods, bearing in mind that they are involved in the decision-making process at European level and their representatives take part in formulating Portuguese positions in the CIAC, which coordinates the various sectors of the administration and the autonomous regions for that purpose, and monitors the legislative work of the European institutions (see 1.2.2).

It is interesting to note that the mechanism of parliamentary and government consultation was put forward again by Law 54/1998, which gives the National Association of Portuguese Municipalities "the status of partner of the State" in connection with the right of the ANMP to be consulted by the sovereign organs on "all legislative initiatives relating to an area of its competence". Leaving aside the unsatisfactory general application of this provision, as reported by the ANMP, the problem of adopting these consultation procedures as part of the legislative processes connected with European policies does not seem at present to have been raised.

1.2.2 The *Comissão Interministerial dos Assuntos Comunitários* (CIAC)

The work of the various sectors of the administration and the autonomous regions as regards technical Community issues is domestically coordinated by a body set up in 1991 (Decree Law 345/1991 of 17 December 1991) and known as the *Comissão Interministerial das Comunidades Europeias* (Inter-Ministerial European Communities Committee – CICE) but subsequently renamed, by Decree Law 48/94 on the new organisation of the Ministry of Foreign Affairs, the *Comissão Interministerial dos Assuntos Comunitários* (Inter-Ministerial Committee on

Community Affairs – CIAC). There was no change to the composition of the committee, which is chaired by the Minister for Foreign Affairs and made up of representatives from all the ministries involved in the various aspects of European integration and of two regional representatives, one for each region. Its tasks are also as set out in the 1991 Decree:

- drawing up proposals on main lines of policy on Community issues;
- discussing all questions requiring a coordinated Portuguese position, drawing up negotiating positions on technical matters from the start of the Community legislative process;
- drawing up Portuguese positions on the agenda items of meetings of the Permanent Representatives and forwarding instructions to the Permanent Representation;
- formulating Portuguese policy on Community pre-litigation and litigation;
- monitoring the impact of European integration on the Portuguese economy and society;
- considering the opinions of the economic and social partners.

The representatives of the autonomous regions take part in plenary meetings, which are normally held every 15 days, and are entitled to ask for issues that are of interest to them to be included in the agenda and discussed. They can also be members of the sub-committees and working groups set up to deal with various matters and topics, the only constraint being that the issues in question are concerned with regional powers and interests.

It should nevertheless be borne in mind that CIAC is a technical body, and that political decisions on European matters are taken by the Council of Ministers for Community Affairs, chaired by the Prime Minister and including all the members of the government and the Secretary of State for European Affairs.

As its tasks include monitoring the impact of European integration on Portuguese society and the Portuguese economy and consulting the economic and social partners, the CIAC can also be assumed to be a forum for consultation of local authorities, especially as they are represented in the Economic and Social Council, which replaced the National Planning Council and the Social Consultation Council in 1991, and even more so as Law 54/1998 enshrined the right of the National Association of Portuguese Municipalities to be consulted on initiatives of local interest.

Although it is not an active participant in the preparatory phase of Community Law, in the area of information, the ANMP carries out important work for local authorities through its Internet site, the publication of a newsletter and the dissemination of documents. It has a standing committee on the Structural Funds, whose task is to undertake research and offer consultancy services for its members.

2. Implementing phase

2.1 Division of powers for the implementation of Community measures

One of the most innovative features of the constitutional revision of 2004 is the express provision that, in matters for which the regions are competent, the autonomous regions are responsible for transposing Community law into domestic law and are required to do so by means of regional decree laws (Article 112(8)).

This point merits special attention as, under the preceding constitutional provisions (Article 112(9)), Community directives always (including matters coming within the remit of the regions) had to be transposed by state legislation. At that time, the autonomous regions could only adopt regional regulations implementing the national law transposing the directive.

It should also be borne in mind that, as a result of the new constitutional provisions, the autonomous regions are also responsible – obviously within the scope of their powers – for implementing incomplete Community regulations.

In matters falling within their remit, moreover, the autonomous regions are also responsible for implementing Community secondary legislation.

The Constitution does not specifically regulate the forms and methods of participation by the autonomous regions in the implementing phase of Community law. The provisions of the Constitution which define the general rules and criteria for the division of powers between the state and the autonomous regions also apply in this respect.

2.2. Legal instruments designed to prevent the State being in breach of Community law through the fault of regions or local authorities

In the Portuguese legal order, shaped by the unity and indivisibility of the sovereignty of the state, the principle of the supplementary application of state law applies with the result that the latter, where there are no regional regulations, may also be effective in the territory of the autonomous regions. In particular, Article 228(2) states that, where there is no regional legislation, the legislation of the state applies in the autonomous regions.

Logically, therefore, this principle also has to apply with respect to the transposition of Community law (which, as mentioned above, is now the task of the autonomous regions – in matters which fall within their remit). As a result, if the region fails to implement a Community directive in due time, there would be no breach of Community law as national law would apply in its territory as a result of the above-mentioned Article 228(2). Bearing in mind, lastly, that Portuguese regionalisation is partial and limited to the island territories of the Azores and Madeira, there are state laws on all matters, containing complete regulations, that apply in the remainder of national territory (not regionalised). These laws should therefore be able automatically to fill any gap that may be left by the failure of the region to implement a directive.

However, in the case of breaches that are not due to the failure of the autonomous regions to act but arise because they have adopted laws conflicting with Community law, the remedy is provided by the prior scrutiny of regional laws by the State.

More specifically, the Minister for the Republic, representing the government in the autonomous regions, can refer laws that he refuses to sign back to the regional assembly. When the assembly confirms its approval of a measure by an absolute majority of members, the Minister for the Republic must sign it (Article 233(3) of the

Constitution). It is nevertheless possible to take the matter to the Constitutional Court (Article 278(2)).

It is another matter if the breach of Community law arises from an act of the regional government. In this case, the Minister for the Republic in practice has an absolute veto, which the region can get around – as the Constitution expressly provides – by converting the measure into a legislative bill (Article 233(4)).

To complete the picture, it should be noted that, under Portuguese law, the Courts may disallow provisions which they deem not to comply with constitutional provisions or principles (in this case those relating to the division of powers or commitments taken on by Portugal as an EU Member State), without prejudice to the right of the party in question to appeal against such decisions before the Constitutional Court.

On a less formal level and with regard to possible breaches for which the regional authorities are responsible in matters which fall within their remit, the forum for discussion and settlement of any conflicts between the two tiers of government should be the CIAC, whose tasks include formulating Portuguese policy on Community pre-litigation and litigation.

3. The subsidiarity principle

The Constitution expressly affirms the subsidiarity principle in Article 7(6), introduced by the 1992 amendment of the Constitution, in connection with relations between the state and the European Union, and in Article 6(1), introduced by the 1997 amendment, on the principles reconciling the existence of a unitary state with the self-governing system of the islands, the autonomy of local authorities and the decentralisation of the public service.

From a domestic point of view, the subsidiarity principle has no more than a complementary function of guaranteeing the autonomy of sub-state entities, taking the form, in principle, both of a guideline for interpreting constitutional and ordinary legislation on the division of powers, and of a guiding criterion for the legislator in all cases touching on these matters, without, however, becoming a primary criterion calling into question the hierarchy and powers expressly attributed by law and long consolidated in the Portuguese legal order.

The revision of the statute of Madeira, in 1999, explicitly makes subsidiarity the basis for relations between the region and state. In the previous version, the principle could be deduced from Article 9, which specified that the regional assembly could legislate on all matters not reserved for central government, in compliance with the Constitution and the general laws of the Republic. The new Article 11 states that "the principle of subsidiarity shall apply in relations between the organs of the state and the organs of government of the region, and, outside the exclusive prerogatives of the state, public action is to be preferred at the level of administration deemed to be closest and most appropriate to the measure."

It is interesting to note that, while the constitutional provisions on the powers of the autonomous regions do not expressly mention the subsidiarity principle, the framework law on the administrative regions (set out in Article 255 *et seq.* of the Constitution but not enacted as a result of the failure to reach the prescribed quorum in the national referendum on the 1998 enacting law) explicitly recognises it. Article 4 of Law 56/91 of 13 August 1991 states that the administrative and financial autonomy of the administrative regions is based on the principle of subsidiarity of their functions in relation to the state and the municipalities and on the unitary organisation of the state. This provision was widely criticised, some commentators taking the view that dual subsidiarity, on the one hand in respect of the state, and, on the other hand in respect of local authorities, ultimately deprived the regions of any role unless provision was made at the same time to transfer state and municipal functions to the regions. Others pointed out that the "minimalism" of the framework law and the failure to transfer powers were justified by the fact that there were still doubts about the establishment of the regions and, therefore, that it was advisable merely to draw up a general rule of preference, in the exercise of concurrent powers, favouring the bodies closest to citizens.

As regards relations between the state and local authorities, some consider that the principle of subsidiarity is to be found – leaving aside the explicit general mention in Article 6(1) – in some provisions of the Constitution, especially Article 235(2), Article 65 and Article 241.

The first, defining local authorities as territorial bodies corporate with representative organs serving the particular interests of their respective communities, hints at a general power based on closeness to the interests of the community represented.

Article 65 seems to reserve the administration of urban planning and housing for local authorities (now, moreover – following the constitutional revision of 2004 – extended to regional authorities) and, lastly, Article 241 gives local authorities their own power to make regulations, within the limits of the Constitution, of the laws and regulations issued by higher tiers of government.

Leaving aside this latter provision, these are fairly vague indications which have not up to now been reflected by a system of substantive political and administrative autonomy.

SPAIN

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

1.1.2 Participation in the Committee of the Regions

1.1.3 Regional representation and liaison offices in Brussels

1.1.4 Regional participation in the Permanent Representation

1.1.5 Participation in the work of the Commission

1.1.6 Associations and interregional cooperation at European level

1.2 National side

1.2.1 Instruments of regional and local participation in the legislative processes

1.2.1.1 Organisational aspects

1.2.1.2 Procedural aspects

2. Implementing phase

2.1 Division of powers for the implementation of Community legislation

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

2.2.1 Substitutive powers (and adoption of supersedable rules)

2.2.2 Annulment of legislation

3. Judicial protection of powers within the Community. Right to request the State to act

4. The subsidiarity principle

1. Preparatory phase

1.1 European side

1.1.1 Participation by regional ministers in the Council of Ministers

Under a very recent agreement between the State and the Autonomous Communities, ratified on 9 December 2004, regional ministers may participate in Council meetings.

This marked the end of a process initiated in the 1990s, the key stages in which are recorded below.

In 1994, a motion tabled in the Senate established the right of the Autonomous Communities to be included in Spanish delegations to Brussels in cases where the negotiations concerned matters touching on exclusively regional prerogatives.

Four years later, the Congress-Senate Joint Committee for Regional Affairs passed another motion, supported by all political parties, calling for provision to be made for the Autonomous Communities to participate, in turn, in the work of the Council. The executive initially supported the motion but later failed to translate it into draft legislation.

Subsequently (in September 1999) the Autonomous Communities obtained a general agreement, although there was no text formally setting out a common position on the detailed rules for participation.

On 26 September 2000, the Basque and Catalan regional parties together tabled a draft law, which was also supported by the Spanish Socialist Party (PSOE). The proposed system of participation in the various configurations of the Council contained elements based on the Belgian experience (division of national representation between State and Autonomous Communities, with different permutations in the various configurations of the Council, depending on domestic administrative arrangements) and on the German and Austrian experience (when the subject falls primarily within the exclusive jurisdiction of the Autonomous Communities, the powers exercised by the State as a member of the EU must normally be transferred by the State to an Autonomous Community representative of ministerial rank).

The draft was rejected by the Congress of Deputies, with the party then in power, the People's Party (PP), voting against. On that occasion, the government was supported by the regional party for the Canary Islands, which considered the draft to be unsatisfactory in that it did not adequately represent the requirements of their community.

In this impasse, a small opening appeared following the decision, adopted at the meeting of the Conference on affairs relating to the European Communities (CARCE - see 1.2.1.1 b) on 28 November 2000, to set up a working group to examine the question. The prospect of reaching a solution that would satisfy the regions receded again, however, as a result of the attitude subsequently adopted by the government towards the request by the President of the Basque Regional Council to participate in meetings of the EU Council of Ministers concerned with fiscal policy. The central government initially intimated that it was willing to discuss the matter but the negotiations with the Basque Country nevertheless ended in failure once again (December 2001).

1.1.2 Participation in the Committee of the Regions

The Spanish Government established the composition of its delegation on the basis of a Senate motion, passed on 20 October 1993, under which 17 of the 21 CoR seats allocated to Spain would be occupied by the Autonomous Communities and the other four by local authority representatives. Under the terms of the motion, all members must either be elected by universal suffrage or at least be politically answerable to an elected assembly.

Each of the 17 Autonomous Communities nominates a member (usually the President) and an alternate.

Under the terms of the Senate motion, the four representatives of local authorities are proposed by the *Federación Española de Municipios y Provincias* (FEMP) which comprises 6,971 municipalities (86% of the total), including all the provincial capitals except Tarragona, and all the provinces including Alava, and the island councils and *juntas*.

The government scrutinises the list of candidates submitted to it and forwards it to the Council, which then appoints the members.

1.1.3 *Regional representation and liaison offices in Brussels*

As soon as Spain acceded to the European Community, as it was then (1986), the Autonomous Communities showed a keen interest in establishing direct contact with the Community institutions.

Catalonia, the Basque Country and Galicia immediately opened offices in Brussels, if only unofficially, in the form of chambers of commerce or regional development agencies.

In 1994, the Basque Regional Government petitioned the Constitutional Court regarding the admissibility of direct communications between the Autonomous Communities and the European institutions. . By judgment 165/1994, the Court ruled that Article 149(1)(1) of the Spanish Constitution, whereby the conduct of foreign affairs is the exclusive prerogative of the State, is not applicable to activities which, although they are pursued outside the boundaries of the State, nevertheless remain within the EU. It further ruled that acts constituting direct communications between the Autonomous Communities and the EU must also be forwarded to the State authorities.

That judgment enabled the Basque Regional Government to put its Brussels office on a formal footing and establish a regional department for European affairs, and it opened the way for the other Autonomous Communities, all of which now have offices representing them in the EU. The city of Barcelona also has its own office.

In most cases, such offices are direct emanations of the regional governments but Catalonia and Galicia are represented by organisations in which private individuals also participate: the *Patronato catalano Pro Europa*, established in 1982 by the regional *junta* with a group of bodies representing the world of economics and finance, universities and local authorities, to promote knowledge of European policies; and the *Fundación Galicia Europa*, a private non-profitmaking institution in which both public and private bodies participate and whose governing body is chaired by the President of the *Xunta de Galicia*.

A measure of the importance the Autonomous Communities attach to direct relations with the European institutions is the size of their offices, particularly the offices of the "historic" regions. Altogether, the number of officials in their offices is not far short of the number of German representatives who, taken as a whole, comprise the largest contingent.

1.1.4 *Regional participation in the Permanent Representation*

In 1996, under the agreement signed on 22 June in the Conference on affairs relating to the European Communities (CARCE), the post of Counsellor for Autonomous Affairs was created as an integral part of the Permanent Representation of Spain (Royal Decree 2105 of 20 September 1996, *Boletín del Estado* No. 229 of 21 September 1996).

Under the terms of the decree, the Counsellor was entrusted with the task of informing the Autonomous Communities about matters of regional interest discussed and negotiated in the EU Council of Ministers and maintaining relations between the Permanent Representation and the Autonomous Communities' representative offices in Brussels, without prejudice – as the decree did not fail to point out – to the relations "normally" maintained with other Counsellors in the Permanent Representation, or to the information that the government is required to produce in sectoral Conferences under the agreement signed in the CARCE on 30 November 1994 (*see* 1.2.1.1 b below).

The solution, described in the decree as a "compromise" (resulting primarily from negotiations between the PP and the Catalan nationalist party, *Convergència i Unió*), did not allow direct regional participation, since the Counsellor was a State official of the Department for the Autonomous Communities, appointed by the central government or to be precise, as stipulated in Article 2 of the agreement, by the Ministry of Foreign Affairs on a proposal from the Ministry of Public Administration, having heard the opinion of the CARCE delivered in plenary session, the Inter-ministerial Committee for EU Affairs, and the Ambassador-in-office as Permanent Representative.

That situation was to be resolved only with the agreement between the State and the Autonomous Communities ratified on 9 December 2004, whereby ministers of the Autonomous Communities were allowed to sit on the EU Council of Ministers. Under that agreement, the office of the Counsellor for Autonomous Affairs in the Permanent Representation is to include two officials appointed on a proposal from the Autonomous Communities.

1.1.5 *Participation in the work of the Commission*

In the period 1998-2002, some Autonomous Communities' representatives, selected by the government on the basis of criteria that do not seem to have taken sufficient account of regional interests, participated in 55 Commission committees. The Autonomous Communities were unhappy about both the number of committees in which the regions were to be represented and the subjects to be covered. Another source of dissatisfaction was the lack of adequate mechanisms for interregional consultation capable of producing agreed positions that could be effectively presented in the committees. Thus, the regional officials who participated in these committees were accused of acting primarily in the interests of their own communities; this experience was instrumental in creating a climate of mutual distrust which in turn, had an adverse effect on the chances of reaching agreement on the Autonomous Communities' participation in the work of the Council.

To overcome these problems, the CARCE set up a working group in 2000 comprising two members representing the government (the Ministry of Public Administration and the Ministry of Foreign Affairs) and three representing the Autonomous Communities (Andalusia, Castilla y Leon and Galicia) with a remit to evaluate the results of this experience, identify the committees dealing with matters of interest to the Autonomous Communities, and examine the draft regulation produced in this connection by the Ministry of Public Administration. On the basis of a selection carried out with the assistance of the Inter-ministerial Committee for EU Affairs, general agreement was reached on 95 committees and the Autonomous Communities were asked to indicate their preferences as to participation by their representatives in the various committees. Between the end of 2002 and the beginning of 2003, regional representatives were allocated to the 95 committees and the government's draft "Rules on autonomous participation in Commission committees" were approved, with a clause providing for regular review.

1.1.6 *Associations and interregional cooperation at European level*

Most of Spain's Autonomous Communities participate in what are termed the "general" associations, i.e. those with a large number of members and intended to represent all regional and local authorities: the Assembly of European Regions (AER) the Council of European Municipalities and Regions (CEMR). The Autonomous Communities' parliaments are represented in the Conference of European Regional Legislative Assemblies (CALRE).

The *Federación Española de Municipios y Provincias* is a member of the CLRAE (Congress of Local and Regional Authorities of Europe) and participates in the CEMR (Council of European Municipalities and Regions).

Catalonia and the city of Barcelona played a leading role in the campaigns to establish the Committee of the Regions conducted by the AER and the CEMR in the period preceding the Maastricht Treaty. Jordi Pujol, who was President of the Catalan *junta* and the AER at the time, and Pasqual Maragall, mayor of Barcelona and President of the CEMR, were among those involved in the negotiations, who were deeply divided on the issue of whether or not representatives of the local authorities should also participate in the CoR.

Some of the Autonomous Communities, by reason of their geographical position or particular aims, belong to "specific" associations, that is to say associations specialising in certain subjects or designed to promote special interests: the Association of European Border Regions (AEBR), in which some municipalities in those areas also participate; the Conference of Peripheral Maritime Regions (CPMR), comprising various sections (the Atlantic Arc, the Inter-Mediterranean Commission, etc.); the European Regions of Industrial Technology (RETI) working group; and the Conference of the European Continental Diagonal Regions (CORDIALE).

Catalonia has been particularly active in promoting cross-border cooperation involving neighbouring regions and cities in joint projects, and also international cooperation based on the identification of shared cultural and economic interests rather than geographical contiguity. The Pyrenean community, comprising the Autonomous Communities of Catalonia, Aragon, Navarre and the Basque Country,

the French regions of Languedoc-Roussillon, Aquitaine and Midi-Pyrénées and the State of Andorra, falls into the first category. Some of the regions in this group (Catalonia, Languedoc-Roussillon and Midi-Pyrénées) have formed a closer relationship leading to the formation of the Trans-Pyrenean Euro-region, recognised in the 1995 Treaty of Bayonne between France and Spain. The "Four Motors for Europe" group, on the other hand, is based on an agreement of the second sort between the Autonomous Community of Catalonia and the regions of Lombardy, Rhône-Alpes and Württemberg.

Along the Spanish-Portuguese border, another cross-border cooperation agreement links Spain's Autonomous Communities and local authorities with the Portuguese Regional Coordination Committees (now Regional Coordination and Development Committees).

The city of Barcelona heads a network of six Spanish and French cities (Montpellier, Toulouse, Palma de Mallorca, Valencia and Zaragoza), known as the C-6, designed to promote joint programmes in the context of European integration.

1.2 *National side*

1.2.1 *Instruments of regional and local participation in the legislative processes*

1.2.1.1 *Organisational aspects*

a) *The Upper Chamber*

Under Article 69 of the Spanish Constitution, the Senate is defined as the house of "territorial representation" but its composition is actually by a mixture of the federal model, in which the members are appointed centrally, and the unitary model, in which the senators are elected directly by the citizens. Of the 258 senators, 208 are elected by direct suffrage in provincial constituencies and the other 50 are nominated by the parliaments of the Autonomous Communities (one senator for each and a further senator for each million inhabitants in the region); also guaranteeing adequate proportional representation of the regional assembly.

The presence of Autonomous Community representatives in the Senate did not prove to be sufficient to enable them to have a significant influence on the decisions connected with Spanish participation in the EU, for two reasons.

The first reason is connected with the more general question of the marginal position of national parliaments in European policy-making. In view of the major decisions involved in the integration process, the guarantee contained in Article 94 of the Spanish Constitution, under which the government is required to inform the Senate regarding international treaties or agreements, appears somewhat weak. In most decisions concerning the many Community policies, the chief actors are the government, which conducts inter-governmental negotiations in the European arena, and those sections of the administration involved in the technical and bureaucratic aspects of European policy-making.

The second reason relates specifically to the limitations of the Spanish Senate as a forum for the Autonomous Communities to participate in the legislative process. These limitations arise from the composition of the Senate, in which the claims of regional representation cannot compete with party loyalties, and from the two-chamber system based on the model employed in unitary states. The Spanish Senate is, in effect, the chamber where laws are given a second reading and its duties are mainly confined to confirming decisions already adopted by the Congress of Deputies.

The need to reform the Upper Chamber, so as to turn it into the real seat for regional representation and ensure that the Autonomous Communities participate in the framing of European policy, as the *Länder* do in the *Bundesrat*, has been on the political agenda for more than a decade but the problem has not yet been solved. The Senate itself submitted a formal request for reform in 1989 and raised the matter again in 1994 in a motion passed by a huge majority of its members after a lengthy debate on the "autonomic state". The proposals tabled by the PSOE, the party in government at the time, were brought to a standstill by the dissolution of the *Cortes* in 1996.

All that remained was the reform of the Senate's rules of procedure, which had been adopted as a first step towards creating a chamber for the Autonomous Communities, pending the constitutional changes.

Under that reform, the "General Committee of the Autonomous Communities" was established as a kind of regional senate within the Senate, with its own Presidency Office and its own Conference of Heads of Groups. It is a large body, with almost twice as many members as the average Committee, most of them appointed by the Autonomous Communities. Representatives of the regional governments may also attend its meetings and so participate in the work of the Senate even though they are not members.

The Committee can take any steps it considers conducive to the development of the autonomic State and may *inter alia* suggest instruments that will enable the Autonomous Communities to participate in defining the positions adopted by Spain in its capacity as a Member State of the EU.

However, the Committee's ability to exert an effective influence on the decision-making process is hampered, particularly when it comes to European policies, by the overall limits on the Senate's current role, so the Autonomous Communities generally show little interest in this instrument of participation.

b) Joint national-regional bodies

Having become a member of the EEC on the eve of the entry into force of the Single European Act and the substantial increase in Community intervention associated with the completion of the Internal Market, Spain found itself suddenly faced with the problem of implementing an imposing body of EU legislation, in a State that had opted decisively for regionalisation bordering on federalism but had no institutional framework for developing inter-governmental cooperation.

The government's first attempts to introduce legislation for transposing Community law met with opposition from the Autonomous Communities, while the possibility of making provision by means of national legislation, even if regional powers were involved, was precluded by constitutional case law (see 2.1).

For the purpose of implementing European legislation, it was therefore decided to employ the conventional instrument of coordination between the two levels of government provided under Law No. 12/1983 (Organic law on harmonisation of the autonomy process), by which the national legislature had intended to introduce some

form of State control over the activities of the Autonomous Communities; this was heavily amended by the Constitutional Court ruling STC 76/1983.

The sectoral Conferences - inter-governmental liaison bodies bringing together one or more central government ministers and the Counsellors responsible for the relevant sectors of the regional authorities - have no formal decision-making powers but they represent an important instrument for discussion purposes, particularly as they afford an opportunity to reach agreements which are to be signed by the government and by each of the Autonomous Communities and are binding on both parties. The basis for the sectoral Conferences is the general principle of cooperation between the State and the Autonomous Communities, which is not expressly enshrined in the Constitution but which has repeatedly been recognised in constitutional case law (from ruling STC 18/1982 on) as a duty of reciprocal loyalty, inspired by the German concept of *Bundestreue*, albeit without the legal force it has in the German legal order.

On that basis, the Conference on affairs relating to the European Communities (CARCE) was established in 1988 as an informal organisation for horizontal and vertical coordination between the central government, represented by the Ministry of Public Administration in collaboration with the State Secretariat for the EEC, and the Autonomous Communities.

In the initial phase, the CARCE's work was concerned primarily with the implementation of Community law and relations with the European Commission on the subject of State aid, leading to the agreement of 29 November 1990 (see 2.2.2) which defined the terms of cooperation between the State and the Autonomous Communities in connection with infringement proceedings brought by the European Commission and acts of the Court of Justice of the EC relating to regional powers (*Boletín del Estado* (BOE) 216 of 8 September 1992, p. 30853 and 229 of 23 September 1992, p. 32464).

In the climate created by the development of the system of autonomy, marked by the pacts signed in 1992 by the government, the PSOE and the PP, and on the basis of Article 5 of Law No. 30/1992 "Legal regime governing public authorities and common administrative procedures", the CARCE was accorded more formal recognition in the form of the "Institutionalisation Agreement" adopted on 29 October (BOE 8-10/1993, 241, p. 28669). Following that agreement, the Conference assumed

the function of liaison body not only for the exchange of information and the implementation of Community policies but also for the participation of the Autonomous Communities in preparing the Spanish position in the European decision-making process.

The role of the Conference in the preparatory stages of Community law was confirmed in a later agreement (14 June 1994) amending the Institutionalisation Agreement, which was expressly designed to extend the CARCE's activities to cover relations between the Autonomous Communities and the Council of the European Union, by providing among other things for the Technical Secretary-General in the Ministry of Foreign Affairs to participate in the Coordination Committee for EC Affairs (BOE 257 of 27 October 1994, p. 33815).

This Committee had been established under the Institutionalisation Agreement to act as the executive body of the Conference, with the task of preparing its work and implementing its decisions, and had consisted before this enlargement of a director-general from the State Secretariat for the European Communities and an official of the same rank from the State Secretariat for the Territorial Authorities, representing the central government, and a director-general or other official appointed by the regional government to represent each of the Autonomous Communities. The Coordinating Committee was further enlarged with the adoption of the CARCE rules of procedure on 5 June 1997 (BOE 79 of 5 August 1997, p. 24191), which specified that the body was to include the Counsellor for Autonomous Affairs attached to the Spanish Permanent Representation in Brussels, thus establishing a definite link between the Conference and the Representation.

In order to guarantee a more specific role for the Autonomous Communities in the domestic decision-making process concerning Community policies on matters within their remit, another agreement, adopted at the Conference immediately after the Institutionalisation Agreement on 30 November 1994 (BOE 69 of 22 March 1995, p. 9037, and BOE 78 of 1 April 1995, p. 10045), provides that the other sectoral Conferences established for the purpose of coordination between the central government and the Autonomous Communities in the various sectors of activity may also be used to that end. The agreement, which refers to the indication given by the Senate in the 1994 motion, specifies that the procedures governing participation by the CARCE (see 1.2.1.2) are also to be adopted in the case of the other sectoral

Conferences when the matters under discussion concern European sectoral policies that affect regional interests and prerogatives.

The organisational plan that emerges from those provisions envisages the CARCE as the organ of cooperation between the central government and the Autonomous Communities with regard to the development of the Community process, the definition of mechanisms for effective regional participation in forming Spain's policy stance within the Community institutions, and dealing with general questions connected with relations with the European Union. Responsibility for regional participation in the preparation and implementation of the various Community policies that touch on the prerogatives of the Autonomous Communities falls within the ambit of the relevant sectoral Conferences.

Once again, a pact between the ruling party (PP) and the Catalan nationalist party (CiU) opened the way for a further step towards formalising the instruments for cooperation between the central government and the Autonomous Communities, in this case legislation to institutionalise the CARCE (Law No. 2/1997 - *Boletín del Estado* No. 64 of 15 March 1997, p. 8518). The law does not introduce any new elements over and above the provisions contained in the agreements but it is important in that it confers formal legitimacy on the body and explicitly recognises the experience of the CARCE as an instrument of inter-governmental cooperation, in view of "the impossibility of defining powers clearly and the advisability of reaching agreement in order to combine interests and increase efficiency in the exercise of government functions".

Pursuant to Article 4(1) of the law, the CARCE adopted new rules of procedure on 5 August 1997 (BOE 189 of 8 August 1997, p. 24191) replacing the 1994 rules and setting out detailed arrangements for the exercise of its function of guidance and support *vis-à-vis* the sectoral Conferences. In addition to ensuring that they have the necessary data and documentation at their disposal, the CARCE is to see that the participation procedures laid down in the 1994 agreement are adopted, among other things by producing proposals and recommendations on the subject and providing the necessary technical support.

This system for involving the Autonomous Communities in European policy decisions appears to have at least two weak points. In the first place, the sectoral Conferences,

including the CARCE, are convened by government representatives, who chair the meetings and draw up the agenda, with the result that their practical operation depends on whether or not the minister is favourably disposed towards the Autonomous Communities. The lack of provision for horizontal cooperation weakens their ability to exert enough political pressure to correct the imbalance arising from the government's power to set and manage the agenda. It is at least conceivable that not all the ministers who chair the various Conferences are equally interested in securing the participation of the Autonomous Communities in general, and particularly of those that are likely to put up more resistance to the line of action they have in mind. Regional participation therefore tends to vary according to the area of activity and to depend too much on political contingencies. In addition to this political reason for the tendency to fragmentation, there is also a functional cause which constitutes the second weak point in the system. The sectoral Conferences are not all as structured (with a small tight-knit body ensuring continuity, working groups to study problems, and formalised participation procedures) as the CARCE has become over the years and it is doubtful whether the CARCE, from the outside, can really make up for the difficulties many of them have in addressing the complex issues involved in European policy-making and ensuring that the participation procedures are applied.

c) Bilateral relations

The fact that the various Autonomous Communities have separate statutes of autonomy has encouraged the development of bilateral relations, to the detriment of relations between the central government and the regions as a whole. In the case of most questions to be settled by agreement between the two levels, the usual practice is for separate agreements to be adopted between the government and the individual Autonomous Community, even where the content of the agreements is identical.

Agreements decided with the support of a majority of the Autonomous Communities represented in the CARCE are binding only on the signatory Communities. The Basque Country refused to accept the 1992 and 1994 Institutionalisation Agreements and, in both cases, only signed them later. Moreover, the 1992 Institutionalisation Agreement expressly provides for recourse to bilateral relations in matters touching on the exclusive prerogatives of an individual Autonomous Community and that provision is also included in Law No. 2/1997.

There are bilateral "Europe" committees based on agreements between the central government and the Basque Country (Agreement of 30 November 1995) and between the central government and Catalonia (Agreement of 9 June 1998). These committees, which generally meet once a year, have little influence and their activities are confined to exchanges of information and opinions on matters of interest to the two regions. They are, however, a sign of the preference for special relations with the centre, in a situation where there are different degrees of autonomy and where it is consequently difficult for the regions to participate multilaterally on equal terms.

1.2.1.2 Procedural aspects

The agreement signed in the CARCE on 30 November 1994 governs the mechanism through which the State and the sectoral Conferences are to define a common position to be presented in the Community before the start of negotiations leading to the adoption of European legislation.

Spain has adopted a system similar to that employed in Germany, under which the criterion for determining the regions' right to be involved in defining the common position is the type of legislative power with which the Autonomous Communities are invested. If the State has exclusive jurisdiction, it is merely required to inform the Autonomous Communities when expressly requested to do so. The decision-making process is more complex in cases where the Autonomous Communities have exclusive or concurrent jurisdiction. In the former case, the regions must first reach a common position or agreement on participation among themselves, which will then be "mandatory" for the State, which is formally bound by that position and must present it as its own in the Community. However, should the Autonomous Communities be unable to reach a common position, the State remains free to determine its own position unilaterally. In the case of concurrent jurisdiction, the Autonomous Communities must reach agreement both among themselves and with the State.

In any event, the application of the participation procedures "must ensure that the Kingdom of Spain retains its ability to act and its freedom to conduct negotiations" (Article 3(8) of the agreement). Should the original position change substantially in the course of the negotiations, the government must inform the Autonomous Communities of the changes through the relevant sectoral Conference, so as to enable a new common position to be formulated if there is time within the schedule set for

the negotiations at European level. If not, it must explain the reasons for departing from the original position.

Apart from the wide freedom of action which these provisions accord the government, some legal commentators doubt whether an instrument in the nature of a pact, such as the agreement, can give rise to legal obligations. This objection could perhaps be overcome if Law No. 2/1997 were considered to confer formal legitimacy on the participation procedures agreed within the CARCE and extended to the whole system of Conferences.

However, at present the regions do not seem to have managed to get that procedure to work. Indeed there are no records of cases in which it has been used, except for one occasion in 1997 when the CARCE adopted a position on the inter-governmental conference that was taking place at the time. There appear to be two major difficulties in applying the mechanism. In the first place, the criterion of the effect on jurisdiction is open to different and often highly contentious interpretations. Secondly, the essentially vertical nature of the inter-governmental conference system has made the model relatively ineffective in the absence of any horizontal forum, such as a conference of regional presidents, in which it might be possible to reach convergent positions.

2. *Implementing phase*

2.1 Division of powers for the implementation of Community legislation

For the implementation of European legislation, Spain has adopted a system similar to that employed in Germany, in the sense that it follows the general rule of maintaining the division of powers within the country, except that the Constitutional Court has sole jurisdiction in this area.

Even before Spain became a member of the EEC, the government had prepared a draft law based on the premise that the implementation of Community law would be within the State's remit as part of its responsibility for the conduct of "international relations". European legislation would consequently be transposed in provisions adopted at State level, which would then be applied by the Autonomous Communities in so far as they referred to matters within their jurisdiction. The Autonomous

Communities rejected this draft law and also a subsequent proposal (April 1986), which took into account some of their observations on the first draft.

In 1988, the Constitutional Court, ruling on the subject of a conflict of powers raised by Catalonia in connection with the transposition of a European directive by government decree, delivered a judgment (STC 252/1988) which precluded the possibility of any change in the domestic arrangements with regard to jurisdiction for the implementation of Community law even where, as in the case at issue, the European measure itself specified that in decentralised States it must be transposed by "the competent central authority". This established a general principle, which was confirmed by subsequent judgments of the Constitutional Court and which extends in principle to legislative jurisdiction as well.

The prevailing rule is therefore that the State is responsible for implementing a regulation or a directive if it has jurisdiction in the particular case, and that the Autonomous Communities are responsible if the subject is within their remit. However, the rule is not as easy to apply as it sounds, since the principle of cooperation between the Member States requires that Community law be applied in a uniform manner throughout the EU and in some cases the requirement of uniformity extends to the institutional and procedural aspects associated with implementation. To make matters even more complicated, Member States are also required to remove or amend any provisions of their domestic legal order that are contrary to Community law.

It is therefore not surprising that, in the decisions on the various cases in which the Constitutional Court has been called upon to rule, the principle that there must be no change in the arrangements with regard to jurisdiction has undergone substantial transformation even though it has never been formally called into question. Generally, the transformation has been based on the Constitutional Court's ability to invoke "overriding responsibilities" of the State such as the duty to guarantee equal basic rights for all citizens and responsibility for the general regulation of the economy (*ordenación general de la economía*). If this type of State power is called into question, it has implications for the State's concurrent legislative jurisdiction to enact basic law (*normas básicas*). More "regionalist" legal commentators have observed that, where basic legislation is involved, the decision should be taken by parliament and not by the government, as it is in most cases involving the implementation of

Community law, quite apart from the fact that in the great majority of cases the "rules" are already contained in the European legislation which is to be incorporated.

In such a complicated and contentious situation, the establishment of the CARCE was intended to provide a forum for discussion that would facilitate the incorporation of the principle, recently confirmed by the Constitutional Court, that there must be no change in jurisdiction, with the principle of cooperation between the State and the Autonomous Communities, also recognised in the case-law of the Constitutional Court, in order to reduce potential conflict and ensure that the various competent parties implement Community legislation with some degree of coherence and consistency. The agreement of 30 November 1994 covers three different instances of implementation of Community provisions:

- a) implementation by means of legislative acts: draft legislation is forwarded by the administrative authorities to the government and Autonomous Community representatives participating in the relevant sectoral Conference and, if it is agreed that uniform or similar provisions should be introduced, the specialists on the subject are instructed to produce a joint text to be submitted to the Conference in plenary session;
- b) implementation by means of administrative provisions: the government and the Autonomous Communities exchange information in the sectoral Conference on provisions that are in the process of being adopted and agree where necessary, in a manner similar to that provided in the previous paragraph, to draw up a joint document;
- c) implementation of Community programmes: the State authorities inform the Autonomous Communities through the relevant sectoral Conference of any programmes it is conducting, whether or not they are open to regional partnership, and the Autonomous Communities in turn keep the central authorities regularly informed of Community programmes that are not coordinated by the State authorities.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regions or local authorities*

2.2.1 *Substitutive powers (and adoption of supersedable rules)*

In Spain, the question of the power of the State authority to act in substitution for sub-national bodies in connection with the State's exclusive responsibility for fulfilling the obligations arising from participation in the EU is particularly complex, and continues to be the subject of lengthy and lively debate in the legal literature.

On the one hand, Article 93 of the Constitution, according to which it is incumbent on the Cortes Generales or the government to guarantee compliance with treaties establishing international and supranational organisations and with measures emanating from such organisations, cannot, as the Constitutional Court has repeatedly ruled, be regarded as a provision which confers powers. The Constitutional Court has also ruled that the general clause on the extension of State powers contained in Article 149(3) of the Constitution cannot be invoked to justify extending those powers to areas in which the State is not specifically entitled to exercise jurisdiction (STC 118/96 and STC 61/1997).

On the other hand, to leave responsibility for the correct and timely implementation of Community law in the hands of 17 Autonomous Communities and their legislative and executive organs, in a situation moreover where there are fairly wide differences in respect of their ability to adopt and enforce decisions, would have left the Spanish State unduly exposed to the risk of failing to fulfil its obligations as a Member State of the EU. The Constitutional Court therefore accepted, by judgment No. 79/1992, that the executive might introduce additional measures to avoid that danger.

However, that was by no means the end of the matter, not least because that judgment was followed by others limiting the scope of the clause on the extension of powers. Legal writers, conscious of the problems associated with the limits on regional autonomy arising from the incorporation of Community law, have suggested a solution in terms of State implementing measures that could in a sense be "superseded". There is no doubt that the government is entitled to adopt additional implementing measures when the time-limits for fulfilling Community obligations have expired and the Autonomous Communities have failed to adopt measures in

areas within their remit. However, since legislation cannot be timed to coincide exactly with the expiry of the time limits, early intervention by the State is justified in practice, on "grounds of urgency", and may even precede action by the Autonomous Communities. It is therefore proposed that the State measure should not enter into force until the time limit expires and that it should be superseded by Autonomous Community provisions, in respect of the part within their remit, if those provisions are adopted in time. This would ensure that the State did not fail to fulfil its obligations and would enable the Autonomous Communities to avoid being deprived of their powers.

2.2.2 *Annulment of legislation*

If an Autonomous Community adopts a measure that does not comply with the Community legislation, the State may bring an action against it before the Constitutional Court.

However, the prevailing tendency seems to be to seek consensual solutions, both in these instances and in the event of failure by the Autonomous Communities to incorporate the Community legislation. The CARCE was originally established precisely in order to empower the Autonomous Communities to act in infringement proceedings instituted by the European Commission and actions before the Court of Justice of the European Communities.

Under the terms of the agreement adopted in this connection in 1990, the State Secretariat for the European Communities in the Ministry of Foreign Affairs acts as intermediary between the European Commission and the Autonomous Communities responsible for the alleged infringements, to help them prepare their case and to encourage a settlement, if necessary by arranging for the Autonomous Communities to participate in meetings between the Secretariat and the Commission departments. Similarly, from the very outset, one of the main tasks of the sectoral Conference established in the Ministry of Public Administration was to produce agreements on State aid, so as to ensure that the systems of incentives set up by the Autonomous Communities do not conflict with European competition policy.

On the whole, these consultation mechanisms seem to have proved sufficiently effective, at least according to the account contained in the preamble to the agreement

adopted by the CARCE on 11 December 1997 (BOE 79 of 2 April 1998, p. 11352) extending cooperation between the two levels of government to cover actions before the European Court of Justice in the event of any infringement of regional powers (see 3 below).

3. *Judicial protection of powers within the Community.* *Right to request the State to act*

Under the agreement adopted by the CARCE on 11 December 1997, the Autonomous Communities may request the Spanish Government, through their representatives in the Conference, to institute the necessary proceedings before the Court of Justice if they consider that an act of the Community institutions is detrimental to their powers or interests, or that they have suffered loss or damage as a result of failure to adopt an act.

Requests, together with the relevant reasons, must be forwarded to the President of the Commission responsible for the conduct and coordination of actions relating to the defence of the Spanish State before the Court of Justice of the European Communities (*Comisión de Seguimiento y de Coordinación de las Actuaciones Relacionadas con la Defensa del Estado Español ante el Tribunal de Justicia de las Comunidades Europeas*).

This Commission was established in 1986 by decision of the Spanish Council of Ministers to consider all possible actions Spain might bring before the European Court of Justice, to coordinate the activities of the government departments and authorities concerned and to seek the assistance of the State Legal Service.

The agreement thus established a link between the Commission and the CARCE, and the Autonomous Communities took their place in the overall system for defending Spanish interests before the European Court of Justice.

By virtue of this procedure, the Autonomous Communities may request the Spanish Government to obtain the opinion of the Court of Justice under Article 228(6) of the Treaty as to whether a decision is compatible with the provisions of the Treaty, and may bring an action against another Member State under Article 170 for infringement of an obligation under the Treaty.

They may also submit observations to the President of the Commission on questions referred by a court or tribunal of a Member State for a preliminary ruling, which the State Secretariat for the European Union is required to communicate to them whenever the questions concern an act or omission on the part of the Autonomous Communities or a State provision involving the exercise of their powers.

4. *The subsidiarity principle*

The subsidiarity principle is not expressly mentioned in the Constitution but it is reflected in the Spanish legal order in various constitutional provisions, starting with the order in which the territorial authorities are mentioned in Article 137; this defines the organisation of the State into municipalities, provinces and Autonomous Communities and the detailed rules governing the establishment of the Autonomous Communities, which are formed by a voluntary "bottom-up" process bringing a number of bordering provinces together (Article 143 *et seq.* of the Spanish constitution).

On relations between the central level of the State and the Autonomous Communities, the residual provisions contained in Article 149(3) are instructive, specifying that matters not expressly assigned to the State by virtue of the Constitution shall fall within the jurisdiction of the Autonomous Communities by virtue of their respective statutes, and that matters for which jurisdiction has not been assumed by the statutes of autonomy shall fall within the jurisdiction of the State. There is thus an area in which, in principle, action may be taken either at central or at regional level, according to the powers assigned to the Autonomous Communities under their statutes. The division of powers between the two levels is thus based not only on the Constitution but also on the statutes of autonomy, resulting in different regimes and the asymmetrical powers of the Autonomous Communities that characterise the Spanish legal order.

However, a process of standardisation has been observed over the years, which has tended to iron out most of the differences arising from the distinction initially drawn between the "historic" regions which were assigned wider powers (Article 151) and the others (Article 148(2)), with a strong general tendency for the Autonomous Communities to intervene more and the State less. There is a legal basis for this

propensity in Article 150, which provides that in matters of State jurisdiction the *Cortes* are to confer on the Autonomous Communities the power to enact legislation for themselves within the framework of the principles, bases and guidelines established by State law (paragraph 1) and that the State may transfer or delegate to the Autonomous Communities, through an organic law, powers appertaining to it which lend themselves to transfer or delegation (paragraph 2). Those provisions too essentially give effect to the subsidiarity principle by enabling a growing number of functions to be performed at regional level. Compliance with the principle is however closely bound up with political measures in the form of agreements between the State and the Autonomous Communities and between the parties, in particular the *Pactos autonómicos* extending the powers of the Autonomous Communities, signed in 1992 by the government and the two main parties, the Socialist Party and the People's Party, and enshrined in Organic Law No. 9/1992.

The positive aspect of the subsidiarity principle, namely that authorities at the higher level must act if those at lower levels are not in a position to do so, is implicit in the closing provisions of Article 149(3). These state that in case of conflict, the laws of the State prevail over those of the Autonomous Communities regarding all matters over which exclusive jurisdiction has not been conferred upon the latter (precedence clause), and that State law shall, in all cases, be supplementary to that of the Autonomous Communities (supplementarity clause). The precedence clause is invoked only with reference to areas in which the Autonomous Communities have exclusive jurisdiction but the supplementarity clause, which in theory is universally applicable, has been hotly debated by legal commentators, *inter alia* with regard to its compatibility with the subsidiarity principle, and leading to disputes between the State legislature and the Autonomous Communities, which the Constitutional Court has frequently been called upon to resolve. The constitutional case-law on the subject has wavered between a broad interpretation of the clause in question (see for example judgments 214/1989, 147/1991 and 155/1993) and a narrower interpretation (STC 118/1996; STC 61/1997), which appears to have gained ground in recent years.

As regards the relations between the State, the Autonomous Communities, and the provinces and municipalities, the Constitution (Article 137) contains a rule on subsidiarity to the effect that all these bodies are to enjoy self-government for the management of their respective interests - i.e. the local authorities have legislative jurisdiction in all matters not expressly assigned to the Autonomous Communities or

the State - but it does not contain any provision on the core functions to be assigned to the municipalities and provinces. The minimum functions they are to perform are listed in Law No. 7/1985 on local autonomy (*Ley Reguladora de las Bases del Régimen Local*), which also requires the national and regional legislature to comply with the principles of autonomy and decentralisation in assigning further powers to local authorities and to ensure that they have the right to act in matters that expressly concern them. The basis of local jurisdiction established by the constitutional and legislative provisions can also be amended, by mutual consent, by means of instruments in the form of local agreements (*Pactos locales*), which may help to extend the scope of concurrent powers to the level of government that is closer to the citizens. However, many Spanish local authorities suffer from organisational and financial weaknesses which limit their ability to put subsidiarity into practice.

SWEDEN

1. Preparatory phase

- 1.1 *European side*
 - 1.1.1 *Participation in the Committee of the Regions*
 - 1.1.2 *Regional representation and liaison offices in Brussels*
 - 1.1.3 *Regional participation in the Permanent Representation*
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- 1.2 *National side*
 - 1.2.1 *Informing regional and local authorities in the preparatory phase of Community procedures*
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2. Implementing phase

- 2.1 *Division of powers for the implementation of Community legislation*
- 2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

3. The subsidiarity principle

1. Preparatory phase

1.1 European side

1.1.1 Participation in the Committee of the Regions

The Swedish delegation to the Committee of the Regions consists of twelve members (and an equal number of alternates in accordance with Article 263 TEC).

Although there is no legislation on the appointment of those members, candidates for membership of the Swedish delegation are nominated by the Minister for the Interior on the basis of proposals from the Association of County Councils (*Landstingsförbundet*) and the Swedish Association of Municipalities (*Svenska Kommunförbundet*)⁽¹⁾. In making their selection, the associations seek to ensure balanced geographical and gender representation based on the latest local election results. All the Swedish members of the delegation are directly elected representatives currently holding office.

The regional level⁽²⁾ carries less weight than the municipalities in the Swedish system, so the Association of County Councils puts up less than half the candidates for membership of the delegation: four members and six alternates. The Association represents the interests of 18 County Councils (*landsting*) and the two "experimental

(1) Under the 1974 Instrument of Government (*Regeringsformen*) - the most important of the four Swedish basic laws - local self-government is granted, the relevant forms and guarantees being determined by ordinary State legislation (see Chapter 1, Articles 1 and 7, and Chapter 8, Article 5). A new law on local government was approved in 1991 (SFS 1991:900 as amended, available in English at www.justitie.regeringen.se), under which "Sweden is divided into municipalities (*kommuner*) and County Councils (*Landsting*)" (Chapter 1, Article 1).

(2) Although there is some doubt about the definition of the regional level in Sweden, according to earlier studies carried out by the Committee of the Regions, it is deemed to include the County Council level. The County Councils are political bodies directly elected at county (*Län*) level. They are responsible for medical and healthcare services.

regions" (*försöksregioner*), Västra Götaland and Skåne⁽³⁾.

The Association of Municipalities, a political organisation and interest group for all 289 local authorities (*kommuner*)⁽⁴⁾, on the other hand, is entitled to nominate eight members and six alternates.

The national government, having duly considered the list of candidates submitted to it, forwards it to the EU Council of Ministers, which then appoints the members of the Committee of the Regions.

1.1.2 Regional representation and liaison offices in Brussels

The Swedish local and regional authorities have also opened offices in Brussels, to foster direct relations with the Community institutions with a view to gathering

(3) Pilot projects for a new division of responsibilities were launched at the end of the 1990s in the "experimental regions", often comprising more than one county, of Kalmar, Gotland, Skåne and Västra Götaland. The fifth Swedish region of Jämtland on the Norwegian border, which is farthest from continental Europe, was not included in the project. The Parliament (*Riksdag*) decided in 2001 that only the Skåne and Västra Götaland projects should continue until 2006. "Regional Councils", political bodies elected at regional level with the participation of one or more counties, have been introduced in those experimental regions.

The counties, on the other hand, were allowed to establish "regional development councils" including all the municipalities within a county's territory and, if they wished, a county council. Eight regional development councils have been established so far, in Kalmar and Gotland (two of the former pilot regions), Blekinge, Halland, Östergötland, Södermanland, Uppsala and Dalarna, and many other counties are in the process of establishing them. These bodies are not projects but permanent institutions. They enjoy a degree of autonomy halfway between that of the regions and counties, comprising statutory joint authorities (*Kommunalförbund*) without directly representative assemblies. It should be noted, lastly, that the long tradition of decentralisation may account for this tardy interest in regionalisation, which coincided with Sweden's accession to the EU.

(4) See CoR, The selection process of members of the Committee of the Regions: procedures in the Member States of the European Union, 2004. According to the two associations' joint website (www.lf.svekom.se) there are 290 local authorities. The municipalities are political bodies, directly elected at local level, with no legislative powers. Their association conducts its own decision-making activities through a Congress comprising 401 delegates of local authorities, elected in each of the counties and in the cities of Stockholm, Malmö and Gothenburg, in proportion to the population in the reference area.

information and attempting to influence Community decision-making processes⁽⁵⁾. Ten of the 250 regional and local representation and liaison offices in Brussels are Swedish⁽⁶⁾.

The offices of the two Swedish associations (which will join forces on 1 January 2007 to form a single association) are located at the same address as their Finnish, Dutch, Danish and Norwegian counterparts. In addition to the two associations' offices, there are at least five combined local authority offices based on the authorities' geographical location within Sweden (West Sweden, South Sweden, East Sweden, Central Sweden, North Sweden) and two representing individual authorities, a city (Malmö) and the region of the Swedish capital (Stockholm Region).

Collaboration with the Finnish and Danish islands in Baltic Sea House is of strategic importance to the Swedish islands. The Baltic Sea association is very important to the local authorities. Office B7 - The Baltic Sea Islands EU Office in Brussels - houses the representation of the Baltic Seven, or 7 island cooperation, comprising two

(5) An ad hoc act, the law on the EU (1994:1500), was adopted to enable Sweden to accede to the EU. A clause was inserted in the Regeringsformen under which the Parliament (Riksdag), "may transfer a right of decision-making to the European Communities so long as they guarantee protection of rights and fundamental freedoms corresponding to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Riksdag shall approve such transfer by means of a decision in which at least three fourths of those voting concur. The Riksdag's decision may also be taken in accordance with the procedure prescribed for the enactment of fundamental law." (Chapter 10, Article 5). The special procedure was in fact adopted for the first time to ratify the Treaty of Amsterdam but in 1994 the procedure for the enactment of fundamental law was adopted, under which two identically worded decisions are required, with an interval of at least nine months between them, and the second decision may not be taken until elections and possibly a referendum have been held (Chapter 8, Article 15). In 1994, a formally consultative but politically binding referendum was held (52% in favour), enabling the Riksdag to pass the motion on accession to the EU by a simple majority. The law thus enacted, unlike most of the constitutional provisions of the other Member States, refers expressly to the European Communities. The wording of the accession clause was clearly influenced by the 1993 German Constitutional Court decision known as the "Maastricht judgment": the legal literature on the protection of fundamental rights as a limitation on the transfer of decision-making powers to the EU found its way into the text of the Swedish Constitution through the phrase så länge, synonymous with the German solange and translated literally as long [...] as in the official English version.

(6) Accession to the process of Community integration in 1995 coincided with the decision to proceed with plans for the regionalisation of the country. Europeanisation certainly influenced regional moves to increase self-government and reduce dependence on the State.

Swedish islands (Öland and Gotland), one Finnish (Åland), two Estonian (Saaremaa and Hiiumaa), one German (Rügen) and one Danish (Bornholm).

1.1.3 Regional participation in the Permanent Representation

There is no evidence of any official collaboration between the local and regional authorities and the Swedish Permanent Representation to the EU.

1.1.4 Associations and interregional cooperation at European level

The Swedish local and regional authorities play an active part, individually and through their associations, in the international associations established to represent the interests of local and regional authorities in the Community institutions.

The two Swedish associations participate in the Council of European Municipalities and Regions (CEMR), and in the European section of the world-wide association, United Cities and Local Governments (UCLG), to ensure that the interests of local and regional authorities in Europe are taken into consideration in the Community decision-making process. Six members and as many alternates, from the same associations, representing the regional and local councils (three members and three alternates each), participate in the Congress of Local and Regional Authorities of Europe (CLRAE), a consultative body of the Council of Europe. The two associations also form part of the Swedish delegation to the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP), which is recognised as one of the principal forums for "social dialogue" at European level, where it helps to formulate Community legislation on the labour market. Indeed the two associations and their members employ an impressive number of people themselves.

There are 14 Swedish regions⁽⁷⁾ in the Assembly of European Regions (AER). When it comes to municipalities, however, only three Swedish cities (Gothenburg, Malmö and Stockholm) belong to Eurocities, the network of European metropolitan areas, although at least 23 are members of the Union of the Baltic Cities⁽⁸⁾. The aim of both

(7) Blekinge, Dalarna, Gävleborg, Jämtland, Jönköping, Örebro, Östergötland, Södermanland, Uppsala, Värmland, Västerbotten, Västernorrland, Västmanland, Västra Götaland.

(8) Gävle, Gothenburg, Kalmar, Karlskrona, Karlstad, Kristianstad, Landskrona, Linköping, Luleå, Malmö, Nacka, Norrköping, Norrtälje, Nyköping, Örebro, Oskarshamn, Oxelösund, Stockholm, Sundsvall, Umeå, Västervik, Växjö, Visby.

these associations of cities is to influence the decision-making processes of the Community institutions by alerting them to urban problems.

The Swedish authorities find that the Baltic Sea region offers particularly good opportunities for cross-border cooperation and they participate in various associations, including Baltic Sea States Subregional Cooperation (BSSSC), in which the two "experimental regions" and all the Swedish counties take part.

1.2 National side

1.2.1 Informing regional and local authorities in the preparatory phase of Community procedures

There is no legislative provision for informing the local and regional authorities about the preparatory phase of Community procedures.

By virtue of the fact that the Swedish Parliament (*Riksdag*) is actually involved in the preparatory phase of Community procedures and that the right of access to documents is an important tradition in the Swedish legal order⁽⁹⁾, the *Riksdag* has a pivotal role in the dissemination of information on Community decision-making processes. The Parliamentary Committee on European Union Affairs (Parliamentary Resolution of December 1994 and *Riksdag Act*, Chapter 10, Article 4) is the forum in which the government, having supplied all the Community documents at its disposal, states its own position prior to meetings of the EU Council of Ministers. This parliamentary committee is based on the Danish model but is not formally invested with the same powers. However, the committee's opinion is regarded as a kind of mandate, so much so that the positions adopted by the government in the EU Council of Ministers are checked *ex post facto* and any deviation from the position adopted in the *Riksdag* must be explained and may lead to a vote of no-confidence. The committee's role is important in enabling the local authorities to gather information, since all European Commission proposals, together with the government's explanatory memoranda (*faktapromemorior*), and detailed records of all the committee's meetings are posted on the Internet (www.riksdagen.se/eu). The Swedish Government is required under

(9) The constitutional basis for the traditional dissemination of information is to be found in Chapter 7, Article 2 of the *Regeringsformen* which reads: "In preparing Government business the necessary information and opinions shall be obtained from the public authorities concerned".

the *Riksdag Act* to inform the committee of all the activities of the EU Council of Ministers, the European Council and the Inter-Governmental Conference, and to appear before the committee whenever at least five of the 17 members of the committee request it to do so.

The government is also required to forward written information on European Commission proposals to the parliamentary committees concerned.

A *Riksdag* information centre has also been established, through which information on the EU and Sweden's participation in the process of Community integration is made available to the public (1994/95:KU36)⁽¹⁰⁾.

1.2.2 Techniques for involving regional and local authorities

Techniques for involving the regional and local authorities are employed in both the preparatory and implementing phases.

In Sweden, there are no joint bodies like those in Italy and Portugal, but participation in the decision-making processes is a feature of the Swedish system of government. Article 2 of Chapter 7 of the *Regeringsformen* – The work of the Government – provides that "organisations and private persons shall be afforded an opportunity to express an opinion as necessary". It is traditional practice for the government, before proposing any new piece of legislation, to set up a commission of inquiry (or Royal Commission) to study and analyse the various aspects of the matter. These commissions are usually composed of members of parliament, experts and representatives of various interests. These certainly include local and regional representatives. It must also be borne in mind that Sweden has a long tradition of association, with the result that the two associations (the local association was founded in 1908) represent very powerful pressure groups. Suffice it to say that 21% of all workers are employed by the municipalities and 6% by the county councils, making the associations of regional and local authorities the largest employers' associations in the country.

(10) The government is also required to present an annual report on the activities of the European Union (*Årsboken om EU*).

Faced with the speed and complexity of the Community decision-making process, this practice has been deemed too cumbersome and various solutions have been proposed in the past decade, depending on the government in power. The coordination of Community policies is currently handled by the Prime Minister's office, with the assistance of the Department of European Affairs in the Ministry of Foreign Affairs, which is responsible for maintaining contacts between the *ad hoc* units established in each of the ministries and with the Permanent Representation in Brussels.

2. *Implementing phase*

2.1 *Division of powers for the implementation of Community legislation*

Under the law on local government⁽¹¹⁾, participation in the process of Community integration has not required any change in the division of powers between the State and the local authorities. The division of powers is not governed by the basic laws but is adjusted in the light of the social developments resulting from administrative decentralisation. Through laws and decrees the *Riksdag* and the government set national objectives for the municipalities and counties, which have assumed responsibility under sectoral legislation for many essential public services (social services, medical and healthcare services, childcare, education). Under State law, the municipalities are primarily responsible for schools, social services for the elderly and the disabled, roads, water supplies and drainage systems, while the counties are responsible for all health services broadly speaking, public transport, and regional development in the areas of trade, tourism and cultural activities. In addition to the services normally run by the counties, the directly elected regional councils in the two "experimental regions" have also assumed responsibility for regional development policies that are entrusted in the counties to county administrative boards. These are decentralised bodies which the national government has tasked with directing and monitoring the activities of the local authorities.

The law on local government and the *Regeringsformen* confer powers on the municipalities and the counties to legislate in some areas such as public order and traffic. In the other areas of jurisdiction, decisions at local and regional level are taken by administrative act. Relations between the State and local governments are

(11) See footnote 1.

characterised by continuous cooperation and consultation in various areas, by various means and in different forms, and with constant adjustments to the division of powers.

The Government may transpose directives when there is national legislation on the subject; otherwise the normal legislative procedure is followed, under which the government presents a proposal to the *Riksdag*. Where the regulations are incomplete, the 300 or so government agencies provided for in the legislation step in.

2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

Sweden has rarely been in breach of Community law and it is the most efficient Member State of the EU in respect of fulfilment of Community obligations⁽¹²⁾.

It should be borne in mind that constitutional organisation in Sweden is diffuse, although the Supreme Administrative Court functions as a Constitutional Court in administrative matters, while civil and administrative cases are decided in the Supreme Court, as the court of last instance⁽¹³⁾.

There are no *ad hoc* arrangements for dealing with failure by the local and regional authorities to comply with Community obligations. Acts of those authorities are monitored by State agencies or by the State authorities in the counties. These are peripheral organs of the State, presided over by county governors appointed by the State.

After the European Court of Human Rights found Sweden to be in breach of Article 6 of the ECHR, the 1988 law on legal appeal was approved, allowing anyone to bring an action before the courts against a final administrative provision and conferring general jurisdiction on the administrative courts. Any decision of the municipalities or the

(12) No instances of failure to fulfil obligations were recorded before 1999, just one in 1999, and three in 2000.

(13) Legal writers point out that both Courts are most reluctant to annul laws. One law was annulled (in 1996) for infringement of a Community directive, without referring to the Court of Justice for a preliminary ruling. According to available sources, the Swedish courts and the Court of Justice decided at least 118 cases concerning relations between domestic law and European law between 1994 and 1996.

county councils may therefore be challenged before the administrative courts to determine whether it is lawful.

3. *The subsidiarity principle*

Although there are no national rules on the subject, the principle of vertical subsidiarity is implicit in Article 1 of Chapter 2 of the abovementioned law on local government, under which "municipalities and county councils may themselves attend to matters of general concern which are connected with the area of the municipality or county council or with their members and which are not to be attended to solely by the State, another municipality, another county council, or some other body". This is the principle of the "general jurisdiction" of local authorities or the principle of proximity. As in Denmark, therefore, local powers are defined in negative terms and are not expressly listed. However there is "special legislation" in Sweden, including highly detailed legislation, defining the duties that are incumbent on the local and regional authorities and those that are not within their remit.

On horizontal subsidiarity, the third paragraph of Article 6 in Chapter 11 of the *Regeringsformen* contains the following provision: "Administrative functions may be delegated to a limited company, association, collective, foundation, registered religious community or any part of its organisation, or to a private person. If such a function involves the exercise of public authority, delegation shall be made by virtue of law."

UNITED KINGDOM

1. *Preparatory phase*

- 1.1 *European side*
 - 1.1.1 *Participation by regional ministers in the Council of Ministers*
 - 1.1.1.1 *Selection of regional representatives*
 - 1.1.1.2 *Ways to encourage coordination between regional representatives and central government*
 - 1.1.2 *Participation in the Committee of the Regions*
 - 1.1.3 *Regional representation and liaison offices in Brussels*
 - 1.1.4 *Regional participation in National Representations*
- 1.2 *National side*
 - 1.2.1 *Informing and involving regional and local bodies in the preparatory phase of Community procedures*

2. *Implementing phase*

- 2.1 *Transposition of Community directives*
- 2.2 *Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities*

1. Preparatory phase

1.1 European side

The implementation of the Labour government's devolution plans – after lengthy discussions of constitutional reforms and the positive outcome of the referendums held in the areas concerned – has given Scotland, Wales and Northern Ireland particular forms of autonomy (for one of the four nations making up the United Kingdom, England, it was decided to defer any choice of home rule to a later date) and brought about a far-reaching change, effective from 1 July 1999 ("D-Day"), to the traditional model of the centralised state.

In this new framework, bearing in mind, in general, the considerable importance that Europe attaches to the regions (both as recipients of territorial policies and as institutions) and, in particular, the fact that some devolved matters also fall within the powers of the European Union, there is a clear need for appropriate types of link to be set up at various levels between regional authorities and the European decision-making process.

1.1.1 Participation by regional ministers in the Council of Ministers

Although differences in the transfers made from the central level have now brought about a very asymmetrical system – with repercussions as regards powers and summit arrangements – it is a standard rule that ministers from all the devolved "regions" can take part in meetings of the Council of the EU.

This participation within the UK delegation is expressly set out in the general and specific regulations on devolution.

These are the Memorandum of Understanding and supplementary agreements, of October 1999 (agreement between the central government in Whitehall and Scotland and Wales, extended "where appropriate" to Northern Ireland, to regulate their relations), setting out outline principles, and five annexes (covering separate matters of intergovernmental interest), including the Concordat on Co-ordination of European Union Policy Issues. Thus, it was decided to entrust regulation to relatively informal instruments rather than to instruments of a specifically legislative nature.

Following these agreements, issues connected with European affairs are no longer the exclusive preserve of central government, as is the case for international relations. Among other things, the Concordat in particular establishes that the leaders of the delegation may grant regional ministers the opportunity to speak at the Council.

The new arrangement confirms and builds on what happened in the past, when the three Secretaries of State of the Scottish Office, the Welsh Office and the Northern Ireland Office took part in meetings of the Council and negotiations of European affairs. The new "regional" ministers are nevertheless in a very different position: the three previous "territorial" ministers in practice personified the special importance of these territories (in some cases taking positions on European matters differing from and conflicting with the Whitehall departments) but always took part as members of the United Kingdom's central government; i.e. they were (and still are, as the three posts have been retained to act as a local link for those central powers which have not been devolved) a manifestation more of administrative decentralisation (albeit at the highest level) than of autonomy.

This particular arrangement has been strengthened by the very recent reform of the executive, of major importance from a historical and constitutional point of view, adopted by the Secretary of State for Constitutional Affairs Order 2003 (formal instrument of the Crown, but substantially of the Government) which has also, by creating this new department as part of a major ministerial reshuffle, had an impact (over and above a clearer division of powers through the abolition of the post of the Lord Chancellor which had existed for many centuries and reflected an anomalous link between politics and the courts, the abolition of his membership of the Cabinet and the redistribution of his functions) on the territorial departments, bringing them even closer to Whitehall and in particular introducing a supervisory and coordination agency (the new Department of Constitutional Affairs – DoCA) in respect of the Scotland Office and the Wales Office (thereby scaled down almost to the rank of "part-time" departments, probably as a result of the much wider autonomy granted to the two respective regions, while the Northern Ireland Office continues to play a full role, given the stalemate surrounding devolution in Northern Ireland).

1.1.1.1 Selection of regional representatives

Representatives to meetings of the Council may in practice be selected with reference to the matter to be dealt with in the particular case, given that the formal provision of the domestic constitutional order which empowers the regional ministers to be active members of the delegation is such as to satisfy the requirements set by Article 203 (formerly Article 146) of the EC Treaty as regards the composition of the Council.

In practice, therefore, the stress is on flexible and pragmatic criteria.

Power to conduct negotiations with the European institutions lies with central government ministers (similarly, relations with the Community order, upstream of the implementing phase, are the preserve of the UK Parliament); in accordance with the Concordat (section B.3.13), they decide on a case-by-case basis whether to involve the regional minister, depending on the importance of the regional interests involved, according to a consolidated practice based on cooperative mechanisms. Participation by regional officers in the various committees of the Council or the Commission is decided in the same way (section B.3.15).

It can be seen that the institutional arrangement brought about by devolution – which has accentuated the previous administrative separation – means, for the majority of matters transferred to Scotland and Northern Ireland, that there is no corresponding United Kingdom ministry; where there was a ministry, what was left of it following the transfer has become a (solely) English ministry or a joint English and Welsh ministry (if this has been specified by the legislator).

In many cases, therefore, the selection of regional representatives, when Whitehall considers it appropriate, is shaped by this key structural feature which is both historical and organisational. This may well go some way towards explaining why the practice of bilateral relations between central government and the regions tends to predominate. It also helps to explain why the regions can, and in some cases must, be treated differently and why some of them have developed more intensive forms of participation.

Overall, some observers consider attendance of the Council by regional ministers to be sporadic, bearing in mind in particular the weak role of Wales; others set greater

store by it, stressing the activity of the Scottish departments (throughout 2000, Scottish ministers took part in 14 Council meetings, and officials in 75 meetings of Council working groups).

At present, however, there is no provision for the new ministers of the regional governments, in view of their particular and direct link with their respective parliaments, to guide and chair the overall UK delegation (although they can attend Council meetings under the methods discussed above). In contrast, this was possible prior to devolution in those matters involving territorial interests and Community powers (for instance fisheries, agriculture) for the Secretary of State for Scotland, precisely because of the institutional arrangement under which he was a member of central government.

The operation and effectiveness of the ways in which representatives are selected nevertheless have to be assessed together with types of coordination mechanisms, with which they are closely linked.

1.1.1.2 Ways to encourage coordination between regional representatives and central government

Coordination is one of the trickier aspects of the current institutional arrangement and also makes it possible to weigh up the effects of opening up to Community institutions. Moreover, the question of Europe visibly influenced the whole of the recent debate on constitutional reforms and the new order provided by devolution shows – in the view of many – a level of adjustment to the European institutions unprecedented in British constitutional experience. The increased level of complexity to which this leads and which shapes the system, from both the European and the domestic perspective, is therefore to be expected and is understandable.

The reform regulations pay attention to these problematic areas.

The Memorandum lays down principles in this respect, and the Concordat on Co-ordination of European Union Policy Issues highlights the importance of participation by the regions at European Union level and the role of their ministers in supporting the United Kingdom's position. It states in particular that ministers from the

"devolved administrations" may attend and also speak at meetings of the Council of the EU.

As regards this function of primary importance, coordination techniques (section B.3.14) operate on two complementary levels: on the one hand, through the legal and formal provision which makes the Whitehall ministries responsible for conducting negotiations and expressly gives the leader of the delegation the right to allow the regional minister to speak (and therefore to assess, politically as well, whether the matter in question is "appropriate" or not); on the other hand, and more fundamentally, because agreement is reached among those involved on the policy line to be taken before the Council. In this case, regional ministers may "speak for the United Kingdom (...)" with the full weight of the United Kingdom behind them, because the policy positions advanced will have been agreed among the interests of the United Kingdom".

This kind of participation, although not infrequent, is not, however, the rule. Even though the regulations are based, in this respect, on informal and flexible criteria, with a clear preference for bilateral relations between Whitehall and the individual region, so as to make these "Team UK" cooperation methods as effective as possible, coordination is not an easy task.

Reconciling unity, autonomy and differentiation raises a major problem – fairly unprecedented bearing in mind the British centralist tradition. The United Kingdom, much more so now than before, has an asymmetrical and complex territorial structure. In many sectors and areas there no longer seems to be a genuine "centre", but only territorial departments located in different places. At the same time, however, the fact that the central government has retained powers over Community matters leads its departments to behave, as regards the European Union, as departments of the United Kingdom, i.e. as though there were still a centre.

Many people have commented that, since devolution to Scotland and Wales, the central departments have had to speak on matters for which they are no longer responsible and, indeed, the two nations do not feel appropriately represented in Europe by the central departments in cases in which they are not directly involved in Council meetings.

In practice – starting from the European side and then, as will be seen, from the national side – the system is paying for its endeavours to match tried and tested methods of coordination, which have long been used to supervise solely unitary institutions, to the composite needs of the new multinational and regionalised state.

Little help has been provided in this respect by the presence of figures who played a consolidated role in the pre-devolution arrangements (albeit lacking any genuinely representative nature from a local point of view) such as the Secretaries of State for Scotland, Wales and Northern Ireland who have retained (the first two only until 2003) major tasks in state-region relations. Although they are still able to speak for the "devolved" regions in European forums, they now prefer to put forward their own positions directly and in the first person, with the result that these departments within the Cabinet no longer seem to be appropriate go-betweens as regards the Community institutions.

New prospects for appropriate and efficient cooperation between regional representatives and government (overcoming the various inadequacies and fragmentations which emerged after devolution) could well emerge from the very recent overhaul of the Executive introduced by the above-mentioned Order in Council of 2003, in particular because the new post of Secretary of State for Constitutional Affairs, and his Department (the DoCA), seat of a complex and unprecedented concentration of functions, is given a hierarchically superior role of supervision and coordination to those of the Scotland Office and the Wales Office (bearing in mind that the recommendation contained in the report *Devolution: Inter-Institutional Relations in the UK*, tabled in December 2002 by the House of Lords Select Committee on the Constitution, to combine the two Offices into a single ministerial office has not been taken up).

Lastly, it should be stressed that the types of relationship between the "devolved" nations and the centre have been facilitated by the political comparability of the election results at both levels. The fact that the governments of the United Kingdom, Scotland and Wales are led by the same party has made coordination easier (and in practice the Labour majorities throughout the country have simplified the transition from the previous system to devolution, from the point of view of its Community implications as well). If the situation were to be less comparable, however, cooperation techniques based on informal and flexible criteria (and no longer

underpinned by a shared party policy line) could function less well and could even make it necessary to adopt better defined formal and legal mechanisms.

1.1.2 Participation in the Committee of the Regions

The members of the Committee of the Regions are appointed, as is known, by the Council of Ministers of the European Union. In the United Kingdom, nominations and the submission of the list of proposed members is the task of the Foreign and Commonwealth Office, which coordinates the list of the 24 full and 24 alternate members in line with the corresponding nominations made and approved locally. The Local Government International Bureau (LGIB) acts as a secretariat to the delegation on behalf of the British government.

The relevant regulations are set out in the European Communities (Amendment) Act of 1993 and subsequent provisions adopted to allow nominations by the new regional authorities (Scotland, Wales, Northern Ireland, Greater London Authority). Supplementing the only requirement set by the Treaty ("representatives of local and regional authorities"), it is specified that proposed members must hold a democratic electoral mandate and that the whole range of sub-state levels of government must be represented. Moreover, criteria balancing various factors are taken into account in the composition of the British delegation. Following devolution, the procedure by which nominations are submitted also differs in the four regions.

In England (which puts forward 16 full and 16 alternate members), the regional assemblies (currently elected bodies with consultative functions) and the Greater London Authority put forward 18 nominations, and the Local Government Association (LGA) puts forward 14. The LGA and LGIB ensure that the nominations are balanced from a political point of view (depending on the strength of each party in local government) and from the geographical, ethnic and gender points of view. The English nominations are then approved by the Office of the Deputy Prime Minister.

In Scotland (four full and four alternate members), the First Minister coordinates nominations. The Scottish Executive and Parliament put forward two nominations each and the Convention of Scottish Local Authorities (CoSLA) puts forward four. The nominations are then approved by the Scottish Parliament.

In Wales (two full and two alternate members), the First Minister coordinates nominations. The Welsh National Assembly and the Welsh Local Government Association (WLGA) put forward two nominations each. The nominations are then approved by the Welsh National Assembly.

In Northern Ireland (two full and two alternate members), the First Minister coordinates nominations. The semi-autonomous assembly of Northern Ireland and the Northern Ireland Local Government Association (NILGA) each make two nominations. The nominations are approved by the Assembly (or, if it has been suspended, by the Secretary of State for Northern Ireland in consultation with the region's political parties and the NILGA).

1.1.3 Regional representation and liaison offices in Brussels

The principle of a single United Kingdom policy line in the European arena made it difficult in practice for Scotland, Wales and Northern Ireland to establish a presence and organise their own working methods in Brussels. Following devolution, it has become officially possible to open regional representation offices.

Scotland, which had already opened the Scotland Europa Centre as a non-institutional operating base to look after Scottish interests, has therefore also had, since July 1999 (at the same centre, renamed Scotland House and managed by a private-law consortium) a Scottish Executive EU Office which represents the Executive (and works with the other offices).

Along the same lines, Wales has set up its own representation, opting for a single structure, the National Assembly for Wales EU Office, reflecting the particular nature of the Regional Assembly, which has (only) administrative powers.

The tasks of these units are chiefly to provide assistance and operating support to the respective regions, to gather information for ministers and authorities, to monitor matters and issues of regional interest, to influence the Community decision-making process, to maintain a network of relations with the counterpart offices of other regions and effective relations with public institutions and private sector interests, and to support and raise the region's profile in Europe. This is therefore a key role (and has proved to be such, especially as regards those Community policies implemented

directly through devolved powers, as is the case for the environment), whose actual extent depends, however, on the institutional strength of the body in question: in this respect Scotland has shown that it is able to target these objectives in a more solid way as, in the British asymmetrical model, it has greater autonomous status.

The regional representation offices work closely with the Permanent Representation (UKRep).

A large number of local authorities have also opened their own offices in Brussels, which act as listening posts and channels through which participation in the preparatory phase of Community measures can be organised.

1.1.4 Regional participation in National Representations

Overall responsibility for promoting and defending the United Kingdom's position in the European Union decision-making process is the task of a "triad" of central coordination offices: the European Secretariat of the Cabinet Office, the Foreign and Commonwealth Office (FCO) and the UK Permanent Representation (UKRep). This last is the pivot of the British system in Brussels (and is also an important interface with the domestic world, in contrast to many of the counterpart offices of other countries, thereby ensuring a degree of continuity when formulating policy).

Following devolution, it has recently acquired the further task of coordinating relations with the regional representation offices (in particular the Scottish Executive EU Office and the National Assembly for Wales EU Office), which are considered to be "part of the UKRep family" and are able to play their part in it through ongoing contacts.

This method helps to create the team spirit and to underpin the particular importance that is attached to a unitary, coherent and timely representation of the British position, which seem to be the main traits of the representation in Brussels in its various activities connected with the collection and dissemination of information, monitoring of the action of the Community institutions, formulation and ongoing updating of the national strategy, assistance for ministers and officials conducting negotiations, and so on. The authorities and interests represented by the regions undoubtedly benefit from

this, albeit indirectly, as they are part of the circuit and are kept informed, together with the other departments involved (as in matters of agriculture and fisheries).

However, many see the reflection of a persisting centralism in these tried and tested mechanisms. The regions have gone along with these mechanisms and have adopted practices that are in line with these consolidated arrangements and the key role of the Permanent Representation; however, even after devolution – according to some researchers – they are finding it difficult to gain direct access to the policy-making process in Brussels.

In very recent years, there may well be some signals that the devolved regions are gaining ground on this advanced coordination front (for instance the four Scottish officials in UKRep now report to the Scottish Parliament and not to central government) but within limits that are at present well defined.

1.2 National side

The problems identified in terms of coordination reappear, perhaps in a slightly more diffuse way, in the relations that are being forged on the domestic front. They are shaped by the limits that Whitehall is now likely to come up against when carrying out its customary role, which continues to be a distinctive feature of the system and which British commentators see as an explicit "coordination ambition" intended not just to avoid misunderstandings and conflicting activities, but also to give an overall line to policy: this ambition has solid roots in principles of the system (such as collective Cabinet responsibility, shared principles and values, unity of the government, etc.) and in a network of rules, practices and organisational formulae which implement and develop them.

1.2.1 Informing and involving regional and local bodies in the preparatory phase of Community measures

The main channels through which information passes are the relevant government departments, which issue circulars, opinions and suggestions; and the Local Government International Bureau, whose remit covers Europe and international affairs. The LGIB has a long tradition of work with the Committee of the Regions and with other European organisations such as the Council of Europe, the Congress of

Local and Regional Authorities of Europe and the Council of European Municipalities and Regions. The LGIB regularly provides local authorities with updates on European matters and their progress in a wide range of areas.

The role of the Local Government Association should also be stressed, as it is the most authoritative voice on behalf of local authorities and is formally consulted by central government.

2. *Implementing phase*

2.1 Transposition of Community directives

Transposition of directives is the task of central government and Parliament in cases in which new legislation is introduced; generally, however, new directives are covered by existing legislation. In this case, and depending on the sector to which the directive relates, the relevant government departments are responsible for transposition. When this work involves local government, the Local Government Association is consulted.

2.2 Legal instruments designed to prevent the State being in breach of Community law through the fault of regional or local authorities

As there is no written Constitution, all matters are regulated by the doctrine of *ultra vires*, according to which sub-national governments may only do what has been decided by Parliament through legislation or the approval of secondary legislation.

More recently, local governments have been given what equates to general power, although this is limited in terms of its operation.

Unlawful practices by local governments are generally rare or well concealed, since few cases receive widespread public attention. Those that do are wide-ranging and spectacular cases of corruption and are generally very rare. There is a strong normative presumption that public officials and those in elected offices, at all levels of government, will act in accordance with the law: those who do not, especially if elected, may suffer serious consequences ranging from loss of office to imprisonment.

PART THREE

OBSERVATIONS AND FINAL PROPOSALS

OBSERVATIONS AND FINAL PROPOSALS

1. The aims of the study. – 2. The participation of regional ministers in Council sessions. – 2.1 The solutions adopted in Austria and Germany. – 2.2 The Belgian model. – 3. The Committee of the Regions and its delegations. – 3.1 The legislative basis. – 3.2 The composition of the delegations. – 4. Regional participation in national delegations and the Permanent Representations. – 5. Informing regional and local authorities and involving them in the internal part of European decision-making. – 6. Division of powers for the enforcement and implementation of EU legislation – 7 Legal instruments designed to prevent or limit breaches of Community law by the Regions. – 8. Judicial protection of regional and local powers in case of infringement by Community legislation. – 9. The subsidiarity principle.

1. The aims of the study

Parts One and Two illustrate the various means by which regional and local authorities are able to take part in European policy-making. Part One, which contains a comparative analysis of the various means of participation, highlights the similarities and differences between the various solutions adopted by the Member States.

The purpose of Part Three, which forms a brief conclusion, is to use this comparison as a basis for evaluating the various models and judgments, and to identify the "best practice" which the White Paper on European Governance requires from the Committee of the Regions.

We will begin therefore by revisiting the topics examined earlier, before weighing up the advantages and disadvantages of each of the models identified. There is one caveat to all this, however, and that is that the solutions adopted by the national legal systems cannot be considered "independent variables", given that they are influenced by the specific requirements of the institutional system of which they are part. As a result, the temptation to export them to other systems should be treated with caution.

In the analysis that follows, we will keep to the same order as in previous sections.

2. The participation of regional ministers in Council sessions

As we have seen, only sub-state bodies in three federal States (Germany, Austria and Belgium) can currently take advantage of this form of participation, whereas the United Kingdom, which is partially regionalised, has only recently begun to make fairly regular use of this option, with representation by ministers from Scotland and – to a lesser extent – Wales, who, while participating in Council sessions, cannot chair the UK delegation. It is also worth noting that, under the December 2004 agreement, this option has also been extended to Spain's Autonomous Communities.

The greatest difficulty that national legal systems face, once sub-state bodies are allowed to take part in the decision-making process, is coordination between the latter and the Member State itself. The problem has been addressed in a variety of ways, although these are usually based on the internal division of powers.

2.1 The solutions adopted in Austria and Germany

In Austria, as mentioned earlier, the *Länder* may participate in the Council of Ministers only with regard to matters that lie within their legislative remit. Even in these cases, co-decision is limited. In effect, the *Länder* cannot participate autonomously in the Council, but only in tandem and by agreement with the Federal Government representative (Article 23d, Federal Constitution).

In Germany, if Community proposals relate to the exclusive legislative powers of the *Länder*, the Federal Republic will be represented in the European Union by a *Länder* representative, designated by the *Bundesrat* in consultation with the Federal Government and with due regard to the Federal Government's responsibilities; the Federation also presides over the German delegation, thus safeguarding the power of foreign representation of the "*Bund*".

We can therefore see that in Austria and Germany, direct participation in the Community decision-making process is either limited (Austria) or subsidiary (Germany).

2.2 The Belgian model

An alternative solution has been adopted by the Belgian legal system. Belgium is represented within the Community by its Federal Government only in matters of exclusive federal responsibility or in matters of joint responsibility on which no agreement can be reached as to which federal representative to send (Woelk).

In Belgium, in order to select delegates, the Councils of Ministers are divided into four separate groups, according to the division of powers between the State and Regions. In the first group, it is the Federal Government which sends delegates. In the second, the delegation is headed by a central government minister, accompanied, however, by a representative of one of the sub-state bodies which take it in turns. In the third group, the head of the delegation is a minister from one of the sub-state bodies (in turn), assisted by a delegate from the Federal Government. Finally, in the fourth group, Belgium is represented by sub-state bodies. The rotation system also means that the entities most concerned by a particular issue can enjoy greater representation at the relevant Council meetings.

In Belgium, therefore, depending on the matters which are from time to time the subject of Community action, "the players change" (Woelk). In other words, owing to the clear separation of areas of responsibility, there is a marked preference for multi-level consultation and genuine co-decision – with *ad hoc* coordination procedures – to enable federal bodies to take part in Community decision-making.

Nevertheless, it would be wrong to conclude that the solution of choice for sub-state bodies is the one adopted by Belgium and that, to put it differently, this model is the one most suited to "challenging the state monopoly in the EU" (Woelk).

It is true that only in this system are federal bodies granted the option of *chairing the*

delegation at Council sessions⁽¹⁾, whereas in Germany⁽²⁾, Austria⁽³⁾ and the United Kingdom⁽⁴⁾ this does not happen. Therefore, to the extent that the sub-state level is allowed, in these systems, to take part in Community decision making, it is clear that only in Belgium does almost equal participation exist⁽⁵⁾, so much so that, at least in the fourth category of the Council of Ministers, Belgian sub-state bodies almost appear to rank alongside State players, rather than at the "third level" characteristic of regional bodies (Nagel).

Nevertheless, even the Belgian model has significant limits. The various levels of Belgian government are coordinated by the Department of European Affairs at the Federal Ministry of Foreign Affairs (referred to as "P-11"). Even in Belgium, sub-state bodies can act on an equal footing with second-level representatives only on one condition: that they "reach an agreement".

Thus, under the Belgian model, unlike the German and Austrian models, there is a high price to pay if agreement cannot be reached: Belgium's inability to act or failure to implement Community policy.

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- (1) Article 81(6) of the Special Law on institutional reform of 8 August 1980, amended by the Law of 5 May 1993, states that (Community and regional) governments are authorised to bind the State within the Council of the European Communities, where one of their members represents Belgium, in accordance with the cooperation agreement provided for by Article 92a(4a).
 - (2) 'In fact, the law and the 1993 agreement between the Federation and the *Länder* only provide that the Federation must allow a minister from a *Land* "to start negotiations" in respect of specific topics, while the Federation continues to "preside over the German delegation"' (Nagel). Incidentally, it is pointed out that the problem of the democratic legitimacy of the *Land* minister has also arisen, as he or she is 'democratically accountable to his or her own Parliament, takes decisions on behalf of the Federation, and yet may not be called to account by the Federal Parliament (Bundestag)' (Nagel; P. M. Huber).
 - (3) In fact, "until now, there has been only one case where a *Land* minister has taken part in a Council of Ministers on a matter of regional policy, in an Austrian delegation chaired by a Federal Government minister. Seemingly, negotiations have never been entrusted to a *Land* representative. More over the *Länder* have not even claimed this" (Nagel).
 - (4) In fact 'there is no provision for the new ministers of regional governments, who are accountable to their parliaments, being allowed to chair the British delegation, even if they take part in Council proceedings' (Nagel).
 - (5) So much so that 'when, in the second half of 2001, Belgium assumed the Presidency of the Council, many sessions were chaired by regional ministers' (Nagel).

3. *The Committee of the Regions and its delegations*

3.1 *The legislative basis*

As we have already seen, the existence of a legislative basis to regulate the composition of national delegations lends greater stability to the procedures for appointing members, as well as to the composition of the delegations themselves.

Furthermore, in decentralised States, the type of instrument containing this set of rules is important: it is clear that the preferred solution for sub-state bodies is for the rules to be set out in a rigid constitution, which, binding as this is on the national legislative authority, safeguards them to a greater extent than rules contained in secondary instruments.

Constitutional rules currently exist only in Austria. The majority of decentralised States have enacted legislation (Belgium, Germany) or introduced regulations (Italy), not to mention the fact that in two Member States where regions have legislative powers – Spain and Portugal – the appointment of members to the respective delegations takes place in accordance with two parliamentary resolutions that are not legislative in nature (a motion by the Senate in Spain and a resolution of the National Assembly in Portugal). Finally, although legislation exists in the United Kingdom, it is incomplete.

3.2 *The composition of the delegations*

As highlighted in Part One, Chapter I, in federal and regional States, the most prevalent model consists in providing the Regions with individual representation in the national delegations. However, this does not always mean that these outnumber the local contingent, since in Member States which are only partially regionalised – Portugal, the United Kingdom and Finland – the Regions, while able to take advantage of individual representation, are too few in number to tip the balance of the membership of the national delegation in their favour.

The model of individual representation of the Regions is infinitely preferable to that of collective representation, since only the former allows each Region to express its own particular needs, which may not necessarily be the same as those of other Regions. As

a result, in Italy the decision to strike some kind of balance – if not an entirely equal one, then at least one which is not greatly distorted – between the local contingent and the regional contingent has come at the expense of individual regional representation, with the sub-state bodies finding themselves worse off than their counterparts in other federal Member States. The contrast between the position of the Italian regions and that of regions in other States is even more stark when the comparison is made with Member States that allow their regions to be over-represented on the Committee. This is the case, for example, in Germany and Belgium. Not only does the German system give the *Länder* individual representation, but it also allows additional representation in the form of five seats allocated on a rotating basis according to the population of the *Länder* themselves. As for Belgium, suffice it to say that – by forgoing local representation completely – it offers Flanders and the Walloon Region/French Community additional representation.

It goes without saying that the over-representation of regional bodies comes at the expense of the local authorities, which find themselves penalised by this system. The most extreme case is Belgium, whose delegation only numbers local representatives among its alternate members. Germany also penalises local bodies: in its delegation of 24 full members, 21 seats are held by the *Länder* and only three by associations of local authorities.

4. *Regional participation in national delegations and the Permanent Representations*

In Part One, Chapter I, we explained that the participation of the regions in the preparatory phase of the decision-making process, through their involvement in national organisations responsible for decision making within the Community legal system (permanent representations and national delegations, as well as committees and working groups that assist the Council and the Commission), is receiving increasing recognition in the national legal systems of the Member States.

The highest level of recognition to which regional authorities can aspire is clearly that offered by the national constitution. This is currently the case in Germany, Portugal and Italy, whose constitutions allow regional representatives to join national delegations when the decision-making process involves matters of special interest to them. Meanwhile, in Austria, the possibility of *Länder* representatives being called

upon to participate at these levels, while not expressly provided for in the Constitution, has been ratified by an agreement between the Federation and the *Länder*.

Another important form of participation is provided by laws that have in various ways altered the composition of national permanent representations to take account of regional involvement. In Portugal, for example, a special position has been created: the "special adviser for matters relating to the Autonomous Regions of the Azores and Madeira". In other Member States, the solution has been to grant the regions the option of sending their own officials to the representation. This solution, adopted in Austria and Italy, was also recently proposed for Spain under an agreement between the State and the Autonomous Communities, ratified on 9 December 2004. These solutions have a partial precedent in the figure of the *Länder* observer (the *Länderbeobachter*) in Germany, who has the task of keeping the *Länder* up to date on Community activity in areas that concern them.

5. *Informing regional and local authorities and involving them in the internal part of European decision making*

The role of devolved bodies in the building of national policy is usually based on the internal division of powers.

As we have repeatedly pointed out, the legislative basis underpinning the right of regional and local authorities to be informed about and to take part in the creation of Community law has a fundamental role.

The explicit reference to a Government's duty to inform sub-state authorities is found in the Austrian and German Constitutions, where there is a sliding scale of participation rights – from information to consultation, and ultimately to direct representation in Community forums – differentiated according to the interests and powers of the *Länder* from time to time involved in Community decision making. Similar provisions can be found in other legal systems, either in legislative instruments (Belgium, Italy and Portugal) or non-legislative instruments (United Kingdom and Spain).

In general, it is the second chamber representing the regional institutions that acts as the preferred channel for sub-state authorities, not only for information purposes, but also for their participation in forming the policy to be pursued by the State in a European context. In this respect, the position of the German and Austrian *Länder* is particularly interesting, since these have a right of participation in the Community legislative process, usually via the *Bundesrat*.

In legal systems where there is no second chamber, there is a tendency to turn to joint bodies that usually act only in an advisory capacity, such as the *Conferenza permanente per i rapporti tra Stato e Regioni* (Standing Conference for Relations between the Italian State and Regions) or – particularly in legal systems characterised by "asymmetric" regionalism – direct consultation procedures (United Kingdom).

Among the methods that guarantee involvement in the domestic phase of European decision-making, it is worth noting the graduated participation rights' model used in Austria and Germany. In these States, the level of involvement of devolved authorities increases progressively in line with the weight accorded to the opinions of their representative institutions, either according to the subject-matter (as is the case with the *Stellungnahmen* of the German *Bundesrat*), or the degree of consensus achieved (as in the case of opinions issued by the *Integrationskonferenz* of the Austrian *Länder*, or IKL⁽⁶⁾). This method of participation, while having the advantage of compelling the Federation to give due consideration to the position of the *Länder*, protecting their interests and powers, does, however, have at least two limitations.

Firstly, for devolved authorities, the possibility of taking part in European decision making comes at the expense of their autonomy, since to have any real impact on Community decision making on the graduated scale we have seen, they have to adopt a common position, reaching an agreement with each other and often with the State as well (Nagel).

(6) As mentioned in Part Two, Chapter I of this study, the members of the IKL are the Governors (*Landeshauptleute*) of the *Länder* (with voting rights) and the presidents of the *Land* parliaments (without voting rights). However, this is in fact a "dormant" institution (Nagel). It has met only twice in its history, in 1994 and 1997 (Schäffer, Nagel, Woelk). Therefore, when the *Länder* want to exert a real influence on Austria's position within Europe, they do so via the traditional *Landeshauptleutenkonferenz*, the Conference of Governors of the *Länder*, in which decisions are taken by unanimous vote only.

Furthermore, "the co-decision option also comes at the cost of democracy" (Nagel), since the role of governments is often given preference at the expense of the regional parliaments (thus, in Germany, through the *Bundesrat*, or in Austria, through the Conference of Governors of the *Länder*, the *Landeshauptmännerkonferenz*, or LHK⁽⁷⁾).

6. *Division of powers for the enforcement and implementation of EU legislation*

Three years ago, the White Paper on Governance identified one of the objectives of the European Commission as greater openness of Community policy-making processes to sub-state bodies – recognising the fundamental role they play in the implementation of the policies themselves – and greater flexibility in the procedures for implementing Community legislation in a way which takes sufficient account of regional and local conditions.

In turn, the Constitutional Treaty has sought to redefine the subsidiarity principle, the application of which – by building on the provisions of the White Paper on Governance – is no longer limited to relations between the Union and its Member States, but is extended to relations with the regional authorities.

Since the White Paper on Governance was adopted, the European Union has been required to encourage Member States to involve their regional authorities more – albeit within the framework of their various national constitutions – in the preparation and implementation of Community policy.

In particular, in legal systems where sub-state entities have constitutionally guaranteed legislative powers, it is crucial that the European integration process does not irremediably subvert relations between central and regional government.

(7) As has already been noted, in practice, the IKL – made up of the governors of the *Länder* (*Landeshauptleute*), as well as the presidents of the *Land* parliaments who take part in meetings in an advisory capacity only, to make sure that the head of the executive, the *Landeshauptmann*, does not depart without reason from the directives issued by the *Land* parliament – is unimportant, since it meets only occasionally.

The solution adopted by national legal systems to ensure the implementation of Community legislation normally consists of the division of legislative powers provided for in the Constitution, given that primary Community law does not interfere with the division of powers established by individual Member States.

The main difference between these systems is the fact that in some legal systems, it is the Constitution which explicitly enshrines the rule whereby, when implementing Community law, the powers of regional bodies must be respected: this is the case in Belgium, Austria (following the 1994 reform), Germany, Italy (following the 2001 reform) and Portugal (following the reform approved in 2004).

This clearly offers a more solid guarantee than in countries where the lack of constitutional provisions has to be made good by case law (Spain).

7. *Legal instruments designed to prevent or limit breaches of Community law by the Regions*

The Member States of the European Union have legal instruments designed to prevent or limit breaches of Community law by the Regions and local authorities. However, *ad hoc* instruments are not often used. In addition, at times the instruments available do not permit timely compliance if autonomous bodies fail to act.

This is notably the case in Austria and Belgium.

In these legal systems, central government is authorised to act in substitution for the authority concerned only once the European Court of Justice has issued a ruling on the matter. This ruling by the supranational court is therefore considered a necessary precondition (or obligatory stage) before central government can act temporarily in substitution for the defaulting *Land* or devolved authority.

It seems immediately apparent that the mechanism adopted by these two legal systems – while ensuring scrupulous respect for the powers of the sub-state authorities – presents serious drawbacks, since central government cannot prevent breaches of Community law and is allowed to act only after the supranational court has established that a breach has occurred.

These drawbacks can be overcome in two ways.

First, the breach of Community law could be established by a *national* Court, as in Germany, where the Federation, using the general instruments available, has the power to invoke its responsibility for implementing Community law before the Federal Constitutional Court, citing infringement of the unwritten constitutional principle of "federal loyalty".

The other option is to provide suitable mechanisms enabling central government to adopt, in the place of the sub-state body, the legislative and non-legislative measures reserved for it by the Constitution. This solution has been adopted in Portugal and Italy, and, with less success, in Spain. The provision of these *ad hoc* instruments means the State can avoid being held accountable by the Community for non-compliance by a region, allowing it to enact additional laws (enforceable until the region replaces them with its own laws).

The solution adopted latterly in Italy is even more effective in ensuring prompt compliance. There, the State is given the option of a "preventive" substitute power by means of supplementary primary legislation enforceable in autonomous provinces and regions which do not have their own implementing legislation in place by the deadline set for the transposition of the Community law. As supplementary instruments, these can be replaced by the regions with their own implementing legislation at a later date.

8. *Judicial protection of regional and local powers in case of infringement by Community legislation*

Regional authorities' option to ask central government to bring an action before the Court of Justice against Community measures interfering in matters that lie within their remit, is a prerogative recognised and regulated in few Member States, the most notable examples being Austria, Belgium, Germany, Italy and Spain.

Of these, Belgium and Germany offer the regions most protection.

In Belgium, the initiative for taking legal action lies with the municipality or region concerned. In the event of any dispute over the proposed proceedings, the State is still obliged to act. Conversely, in the German legal system, if the areas of exclusive

legislative jurisdiction of the *Länder* are undermined by an action or omission by the Community institutions, only the *Bundesrat* has the power to propose legal action. This request is binding on the Federal Government, without prejudice, however, to its general responsibility for foreign, defence and integration policy. It should also be emphasised that in these cases, the Federal Government is also required to coordinate its procedural strategy (*Prozessführung*) with the *Bundesrat*.

The Austrian and Italian legal systems also offer the regions solid guarantees.

In Austria, for the Federal Government to be able to take action at the request of a *Land*, it is essential that the action itself is not opposed by any other *Land*. In reality, however, the Government could cite incontrovertible arguments of foreign policy or integration policy as reasons for not granting the request.

As for Italy, Law No. 131/2003 differentiates between cases where the request is made by a region and those where it is made by an absolute majority of the regions through the Italian State-Regions Conference. Only in the latter case, in fact, is the request binding on the Government, obliging it to take legal action.

In this respect the position of Spain's Autonomous Communities is far less advantageous; in view of the inadequacy of the underlying legal basis (a Resolution of the *Subsecretaría del Ministerio de Presidencia*), their requests are not binding on the State.

9. *The subsidiarity principle*

We have already pointed out (in Part One, Chapter I) that the Treaty establishing a Constitution for Europe has benefited local and regional self-government, and that Article I-5 of the Treaty recognises local and regional authorities as an integral part of the national identity of the Member States, finally enshrining application of the subsidiarity principle, even in relations between local and regional authorities and the European Union (Article I-11). Coupled with this is the fact that, under the Protocol annexed to the Treaty, the Committee of the Regions is assigned the task of

monitoring the application of the principle, with the option of bringing actions before the Court of Justice⁽⁸⁾.

Furthermore, the subsidiarity principle is not only a fundamental principle of the EU, but is also frequently applied to relations between the Member States and their own regional and local authorities.

The mechanisms on which it is based need to be distinguished, however.

Some legal systems make express provision for the subsidiarity principle (Germany, Portugal and Italy), while others consider it an implicit constitutional principle, albeit one that is not expressly sanctioned (Austria, Spain, France, and to a lesser extent, Belgium). The United Kingdom could also be included in the latter category since, in the absence of a written constitution, the subsidiarity principle is dealt with in legislative acts. Finally, we should not overlook the fact that elements of subsidiarity can also be seen in legal systems without autonomous regional authorities, such as Denmark and Sweden and Greece.

However, what merits the closest attention are the mechanisms that guarantee the enforceability of the subsidiarity principle, since without these the very provision of the principle would be pointless, even in constitutional laws. The problem – particularly where mechanisms are changing – is also relevant to the Community legal system itself.

In this respect a review of national legal systems proves disappointing.

While it is true that regional and local authorities are often allowed to refer infringements of their powers to the courts (unchanging mechanisms), the same cannot be said for systems which are subject to redefinition or change.

The only notable exceptions in this respect are Germany and Italy: in the former, there is express provision for the Federal Constitutional Court to review whether the criteria for legislative intervention by the Federal Government in matters of joint jurisdiction have been met; in the latter, the same effect has been achieved through case law. In

(8) Article 8 of the second Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing a Constitution for Europe.

Italy –as at Community level – the importance of laying down procedures for ensuring that the principle complied with through the courts is clear.

PART FOUR
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