

# European Territorial Co-operation between local government authorities: current practices and future perspectives in the view of the EU institutions and bodies

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## Abstract:

**Aim:** The aim of the present contribution is to evaluate a potential added value of European Territorial Co-operation (ETC) between local government authorities on the European integration process, notably in terms of polycentric development and governance in Europe.

**Design / Research methods:** The authors look into ETC (both at regional and local level, commonly referred to as EU regional cooperation) from the perspective of the EU institutions and bodies. Through the prism of ETC the authors analyse the status of regional and local authorities in the EU law, in particular in terms of the legal and institutional basis for such cooperation and the involvement of the said sub-national authorities in the EU decision-making process.

**Conclusions / findings:** Even though regional participation in EU decision-making is by and large limited to areas which directly concern sub-national authorities, the European Commission and the European Parliament seem to have gained reasonable awareness of the indispensable role that the “third”, regional level of governance has to play in the economic and political integration process. Such a new pattern of governance in the EU, stretching not only above, but also below the level of the nation state (Jeffery 1997: 2, cf. also Finck 2017) is not only a *conditio sine qua non* of a truly *multi*-level governance, but also potentially presents a real added value in terms of overhauling opportune interests of national politics running counter the interests of local communities.

**Originality / value of the article:** In literature the dominant trend is to present the bi-centric relationship between the Union and its Member States. This paper attempts to shed some light on a less evident, albeit arguably growing in importance relationship between the EU and a sub-national (local government) authority. The authors point to the role

of EU institutions in taking account of legitimate concerns of European regions by way of creating legal and institutional framework to, if not fully overcome, then at least mitigate the obstacles to regional interoperability.

*Keywords: European Territorial Co-operation (ETC), EU regional policy, the Committee of the Regions, multi-level governance in the EU.*

JEL: R5, F53, K00

## 1. Introduction

The last decade of the EU policy in the field of economic governance was dominated by financial and sovereign debt crises management, where the EU decision-makers have been by and large concentrated on monitoring the fiscal discipline of the Eurozone member states as well as on safeguarding the stability of the financial system and euro currency. Only at a later stage, when austerity threatened to lead to deflation and poverty, did the objective of sustainable and inclusive growth return on the EU crisis management agenda. There seems to be a reasonable consensus that a precondition of such growth is smart investment based on local needs and drawing on best practices at the grass roots level. That is why the European Commission and the European Parliament since the creation of the EC regional policy<sup>1</sup> have considered European territorial cooperation between local government authorities to be of high importance for the European integration process.

The aim of the present contribution is to look at the role of EU institutions and bodies in promoting European Territorial Co-operation (henceforth ETC) between regional and local authorities from different EU member states with a view to enhancing the role of sub-national levels of government in the EU policy making. ETC involves ‘territorial cooperation’ both within and outside the EU (notably with neighbouring and/or EU membership candidate countries). This contribution will mainly focus on the current legal and institutional framework for cooperation between regional and local authorities within the Union territory. While it by no means aspires to reflect all aspects and complexity of the input of the sub-national levels of government into European policy making, it is meant as a modest contribution to counterbalance the tangible research bias of presenting EU legal space as bi-centric interaction between the Union and its Member States (cf. Finck 2017: 1f).

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<sup>1</sup> Setting up of the European Commission directorate general for regional policy in 1968, creation of the European Regional Development Fund in 1975, see European Commission, history of Regional Policy, [http://ec.europa.eu/regional\\_policy/en/policy/what/history/](http://ec.europa.eu/regional_policy/en/policy/what/history/) [01.02.2018].

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## 2. From the concept of a *Europe of the Regions* to an EU regional policy

The development of an EU regional dimension is inherently linked to the concept of a *Europe of the Regions* which may be considered as a reactionist response to the traumatizing experience of the Second World War. Jean Monnet and other Founding Fathers of the European integration process considered the existence of sovereign nation states as a direct threat to a long-lasting peace on the European continent. It comes therefore as no surprise that the post-war Federalist Movement postulated regions rather than nation states as the core elements of the integrated Europe. As aptly put by Borrás-Alomar et al. (1994: 27-28), “behind the idea of a ‘Europe of the Regions’ lies the thought that subnational entities have little by little acquired greater protagonism in the political, economic, social and cultural arenas to the detriment of nation-states. The latter undergo a progressive erosion of their powers induced by two basic factors: on the one hand, the advances in European integration which limit the autonomous capacity of national governments to control their destinies independently, and, on the other hand, the greater dynamism of regional entities”. While heavily depending on the internal structure of national constitutions (federal state vs. unitary state), such dynamism generally results from a greater say of regional and local institutions in the management of their own affairs and the new territorially limited social movements (cf. Borrás-Alomar et al. 1994) which have a potential of obstructing the long established balance of powers between national and local government authorities<sup>2</sup>.

It is also noteworthy that at the early stages of the European integration, the concept of the Europe of the Regions was used by the European Commission as an instrument in its confrontation with the Council of Ministers (now the Council of the EU) over the enlargement of its authority. Whilst an argument implying that more powers to European level equals automatically more powers to the regions has never found reflection in the role of regions in the Community/ EU policy-making, some national governments ultimately welcomed the development of the Community regional dimension insofar as it promised perspectives for more European funding for their territories (cf. Borrás-Alomar et al. 1994: 27, 49). There was a growing awareness that

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<sup>2</sup> At the time of writing this article, the devolution movements in some regions within the EU are clearly accelerating, of which the pursuit of Catalanian independence is a perfect example. There are justified grounds to assume that similar developments may be awaited in Corsica in a foreseeable time horizon.

decision making on funding of regional development measures exclusively by national policy would inevitably lead to distortions in the common market that could only be overcome by a common authority coordinating development aids granted to lesser developed regions. One of the first steps to that end was the establishment of the European Regional Development Fund in 1975 (Regulation (EEC) no. 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund) aimed at correcting “the principal regional imbalances within the Community resulting in particular from agricultural preponderance, industrial change and structural under-employment” (Art. 1 of the Regulation (EEC) no. 724/75 establishing a ERDF). The Fund remains to date the major financial instrument aimed at supporting the convergence of the least-developed European regions (this objective of the Community policy was introduced in Art. 23 of the *Single European Act* of 17./28.2.1986<sup>3</sup>) and strengthening their competitiveness and attractiveness. The advancement of the European integration process, notably the accession of new Member States each time clearly exposed regional disparities across Europe<sup>4</sup> (the peak of which was attained with the enlargement to Central and Eastern European states), thus contributing to a more comprehensive approach to difficulties faced by regions within the Community.

The time between 1980s and 1990 was marked by decentralization of power in many Western European states, which fostered regional economic development and inter-regional cooperation. These developments were also strongly related to the intensification of European integration process (including the establishment of the common Internal Market), which in turn arose new expectations and political interests at sub-national levels of government (cf. Borrás-Alomar et al. 1994: 31). The growing impact of community legislation on the national legal order gave rise to concern notably in such regions that under the national constitutional order were exercising own legislative powers. The said expectations and concerns found their expression in pan-European regional postulates in the run-up to the Maastricht Treaty, which aimed to institutionalise the participation of European regions in the Community decision making, notably by creating mechanisms enabling them to safeguard their interests (cf. Gajda 2005: 33). The said postulates involved above all:

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<sup>3</sup> The quoted article inserts new articles 130a-d into the EC-Treaty establishing a proper legal base for the EC-regional policy.

<sup>4</sup> Cf. e.g. Gawlikowska-Hueckel (2005: 37-38, 40) for the disparities in the standard of living between Community Member States and the new acceding states e.g. in 1973 (the UK, Ireland and Denmark) and in 1986 (Spain and Portugal).

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- the enshrinement of the subsidiarity principle in the Treaty
- the direct participation of representatives of regional authorities in the Council of Ministers,
- the creation of a Committee of Regions and
- the right to directly access the European Court of Justice (the ECJ)<sup>5</sup>.

Except the direct access of regions to the ECJ (enshrined not earlier than by the Lisbon Treaty [Official Journal C 306 of 17.12.2007], cf. Art. 263(3) TFEU<sup>6</sup> and Art. 8(2) of the annexed Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality), all the aforementioned postulates were endorsed in the final Treaty on European Union signed in Maastricht on 7 February 1992<sup>7</sup>. However, it does not mean that all expectations of sub-state actors linked to the endorsement of the said postulates in the Treaty were satisfied. Firstly, the direct participation in the Council of Ministers was guaranteed to representatives at “ministerial” level only, thus excluding actors from mere administrative regions who would not be “authorized to commit the government of ... [their] Member State” (see Art. 146 of the Treaty Establishing the European Community, EC-Treaty, as amended by Art. G(43) TEU). As to the legal status of the newly established Committee of the Regions, it was designed as a mere advisory body (CoR does not have a status of an EU institution, Art. 198a of EC-Treaty, as inserted by Art. G(67) TEU). Finally, not only did the accepted formula of subsidiarity by no means reflect regional aspirations (under Art. 3b of the EC-Treaty, as inserted by Art. G(5) TEU, subsidiarity was construed as the basis for the division of competences between the Community and its Member States), but ultimately it also worked to the detriment of sub-state actors when it comes to the application of that principle. The Protocol on the application of the principles of subsidiarity and proportionality inserted by the Treaty of Amsterdam of 1997<sup>8</sup> generally referred to the obligation of each institution to respect the principles in question when exercising its competences. In addition, the Protocol required that “[f]or any proposed Community legislation, the reasons on which it is based shall be

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<sup>5</sup> Pursuant to the Treaty of Lisbon, the correct nomenclature is the Court of Justice of the European Union, CJEU.

<sup>6</sup> Under the cited provision, the Court has jurisdiction in actions brought by the ECB, the Court of Auditors and the Committee of the Regions for the purpose of protecting their prerogatives.

<sup>7</sup> Official Journal C 191 of 29.07.1992. The Treaty on European Union established the Committee of the Regions (Art. 198a), the right of sub-national authorities to participate in the Council (Art. 148) and subsidiarity as the principle determining the division of competence (Art. 3B). Office for Official Publications of the European Communities, Luxembourg 1995, Book I, Volume I.

<sup>8</sup> This protocol implements a political understanding which was reached by the European Council meeting of 11-12 December 1992 in Edinburgh, see Conclusions of the Presidency, Annex 1.

stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators”<sup>9</sup>. It is first under the Lisbon Treaty that under the pressure exercised by national parliaments a specific mechanism to supervise the correct application of the principles of subsidiarity and proportionality was introduced. That mechanism entrusts to an additional layer of state-level actors (namely national Parliaments) the power to scrutinise the correct application of the subsidiarity principle in the EU legislative process (see further Section 4). In that process the participation of the European regions is limited<sup>10</sup> to the CoR’s consultative powers. Only ex post has the Committee of the Regions the faculty, regarding legislative acts for the adoption of which it needed to be consulted, to bring action before the Court of Justice of the EU (CJEU) on the grounds of a violation of the principle of subsidiarity<sup>11</sup>.

Whilst the exhaustive discussion of the historical development of the Union’s regional policy is beyond the scope of this paper, suffice it to say here that the discussed framework notion of ‘Europe of the Regions’ by no means corresponds to the current phase of integration and regionalization in Europe. Even a quarter of the century later, the way to reflect upon the regional input into European Union decision-making may be by and large comparable to that of the post-Maastricht period, namely: “while some advances have been made, the overall picture remains dominated by the influence of national level (f)actors” (Borrás-Alomar et al. 1994: 25).

At the same time, the vital role of regions in the harmonious EU integration process has been more and more recognised by the EU institutions. At an earlier stage it was reflected *inter alia* in a stable increase in the volume of structural funds and allocating part of the ERDF to an exclusive disposal of the European Commission which could support its own priority regional initiatives. Even though the first reform of the ERDF in 1979 reserved only 5 % of the Fund’s volume for the Commission’s regional priorities, it is still rightly believed to be a turning point in the development of a Community regional policy (cf. e.g. Gawlikowska-Hueckel 2005: 41). On the one hand, the said reform put an end to the status of Structural Funds as mere support instruments of national

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<sup>9</sup> See points 1 and 4 of the Protocol annexed to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

<sup>10</sup> With the exception of regions being involved in the decision-making process at national level where the respective constitutions so provide.

<sup>11</sup> See the Protocol as amended by the Lisbon Treaty, in particular Art. 6-8. For further account, see Section 3.1. below.

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governments' regional policy. On the other hand, it opened the path for creating a direct relationship between the Community and the regions. The advancement of the European integration process, notably the deepening of the Internal Market and introducing the Economic and Monetary Union created a need to further buffer the less developed regions in an environment of increased competition. Whilst economic factors dominated the Community/EU regional policy to date, as will be argued later in this paper, sub-national politics and their impact on the present European order are likely to determine EU regional policy to come.

### 3. Level, categories and objectives of European Territorial Co-operation

In the view of the EU institutions, the harmonious development of the entire European territory and greater economic, social and territorial cohesion imply the strengthening of European Territorial Cooperation (ETC)<sup>12</sup>. One of the premises of such territorial cooperation is that sub-national authorities dispose of enough autonomy to decide in their own matters. This requires a certain level of regionalization of the Member States' territories, including the allocation of selected competences to regional/ local authorities instead to the central (state) level.

It follows from the foregoing that a point of departure for the ETC is the concept of the *region*, i.e. a certain sub-state level of territorial self-government. The concept in question is in so far problematic as any administrative arrangement with regard to the territorial division of an EU Member State results from the state's constitutional order (typically either federal or unitary<sup>13</sup>) and/or its policy on decentralisation of power (the level of commitment to the subsidiarity principle). Given the heterogeneous nature of such administrative-territorial arrangements within the Union territory, the Community (now Union) law does not spell out a general definition of the concept of the *region*. Public administration remains the exclusive competence of Member States. Still, for the purpose of implementation of regional policy within European Community, adopting some general conceptual framework of European regions was indispensable. Under Art. 1(1) of the *Community Charter for Regionalization* adopted by the European Parliament on 18 November

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<sup>12</sup> Cf. first recital of the Regulation (EC) no. 1082/2006 on EGTC cited *infra* note 29.

<sup>13</sup> In literature a third category is sometimes mentioned, namely a *regional* state, i.e. a state which combines features of both a unitary and federal state, with a characteristic far-reaching autonomy of regions (e.g. Italy or Spain) involving law-making, budgetary and administrative competences (cf. Gajda 2005: 28ff).

1988, the word *region* is construed as “a territory which constitutes, from a geographical point of view, a clear-cut entity or a similar grouping of territories where there is continuity and whose population possesses certain *shared features* and wishes to safeguard the resulting specific identity and to develop it with the object of stimulating cultural, social and economic progress” (Community Charter for Regionalization; emphasis added). The Charter conceives of “shared features” in terms of language, culture, historical tradition and interests related to the economy and transport, while not requiring concomitant co-existence of all these elements in every case (Art. 1(2)).

However, for the purpose of implementing its regional policy as well as better comparability of the European regions in terms of demographics, labour market, etc., the Community needed a more formal nomenclature of territorial units for statistics (from the French: Nomenclature des Unités territoriales statistiques, abbreviated NUTS)<sup>14</sup>. The legal basis for NUTS is laid down by Regulation (EC) no. 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), subject to regular updates<sup>15</sup>. This geographical nomenclature subdivides each Member States’s territory into economic regions at three different hierarchically organised levels: NUTS 1, 2 and 3 moving from larger to smaller territorial units (above NUTS 1, there is the “national” level of the Member States)<sup>16</sup>. The first criterion for the definition of territorial units are the already existing administrative units within each Member State, where “administrative unit” means a geographical area with an administrative authority that has the power to take administrative or policy decisions for that area within the legal and institutional framework of the Member State (Art. 3(1) of the Regulation). Member States are obliged to inform the European Commission about any changes in their administrative units or other changes at the national level that may affect the NUTS classification (Art. 5). The current NUTS 2016 classification applicable as of 1 January 2018 lists 133 regions at NUTS 1 (major socio-economic regions), 311 regions at NUTS 2 (basic regions for

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<sup>14</sup> For a comprehensive account, cf. e.g. Regions in the European Union – Nomenclature of territorial units for statistics – NUTS 2013/EU-28, European Union 2015, <http://ec.europa.eu/eurostat/web/products-manuals-and-guidelines/-/KS-GQ-14-006> [20.02.2018].

<sup>15</sup> The NUTS classification under the Regulation in question replaced the nomenclature established earlier by the Statistical Office of the European Communities in cooperation with the national statistical institutes of the Member States.

<sup>16</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Nomenclature\\_of\\_territorial\\_units\\_for\\_statistics\\_%28NUTS%29](http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Nomenclature_of_territorial_units_for_statistics_%28NUTS%29) [17.02.2018].

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the application of regional policies) and 1373 regions at NUTS 3 level (small regions for specific diagnoses)<sup>17</sup>. It should be noted here that support in the framework of cohesion policy is addressed at regions at NUTS 2 level (by way of example, for Poland *voivodeships*, for Germany *Regierungsbezirke*, for France *régions*).

ETC consists of different layers of cooperation between regions, which is commonly put in the following categories:

- cross-border cooperation,
- transnational cooperation,
- interregional cooperation,
- cooperation outside the EU<sup>18</sup>.

As suggested by its very name, *cross-border cooperation* of regions (frequently referred to as Interreg A) involves typically border (or adjacent) regions from at least two different Member States working together with a view to joint tackling of common challenges and/ or enhancing development opportunities. This type of cooperation should not be confounded with *regional cooperation outside the EU*, which is also typically a cross-border collaboration, albeit its main objective is to support regional development along the Union's external borders with both current or potential EU membership candidate countries, as well as non-EU countries such as Iceland, Norway, Switzerland, etc. For the current programming period of 2014-2020, the regional development cooperation programmes outside the EU involves Pre-Accession Assistance Instrument and European Neighborhood Instrument, which are allocated 11.7 billion euro and 15.4 billion euro, respectively<sup>19</sup>.

In turn, *transnational cooperation* of regions (or Interreg B) consists in regions from several EU member states forming bigger areas within which cooperation is established with a view to improved regional development and/or elaborating joint approach and priorities in handling common issues, thus enabling a coordinated strategic response to such issues or challenges (e.g. flood management). Interreg B covers 15 cooperation programmes financed through the European Regional Development Fund (ERDF) with EUR 2.1 billion for the period 2014-2020, whereby joint efforts of EU regions are supported in the following areas:

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<sup>17</sup> <http://ec.europa.eu/eurostat/web/nuts/overview> [17.02.2018].

<sup>18</sup> [http://ec.europa.eu/regional\\_policy/pl/policy/cooperation/european-territorial/trans-national/](http://ec.europa.eu/regional_policy/pl/policy/cooperation/european-territorial/trans-national/) [13.10.2017].

<sup>19</sup> Ibid.

- innovation (notably networks of universities, research institutions and SMEs);
- environment (with special emphasis on water resources);
- accessibility (by way of establishing communication corridors, including telecommunications and other networks)
- sustainable urban development<sup>20</sup>.

Regarding the last mentioned objective, *Twinning Cities* deserves to be mentioned as yet another form of European co-operation. The concept of city *twinning* involves cooperation between local municipality (city) authorities typically located in different EU Member States. It can focus on a whole range of issues (e.g. sustainable development, local public services, local economic development, art and culture, social inclusion, solidarity) and can involve a wide range of actors from two or more twinned communities.<sup>21</sup> An important added value of this form of cooperation is its commitment to directly involve citizens in the building up of such partnerships. In literature, however, *Twinning Cities* tends to be differentiated from European Territorial Cooperation programmes (cf. e.g. Płoszaj 2013).

As opposed to cross-border and transnational cooperation of regions within the EU, *interregional cooperation* (or Interreg C) covers all EU Member States and beyond (Norway and Switzerland are amongst non-EU countries participating in all interregional cooperation programmes). This pan-European initiative aims at establishing networks facilitating elaboration, exchange and transfer of good practices, knowledge and experience between regions. The overarching objective is to showcase the outstanding performance of regions so as to benefit other, less successful ones with the transfer of knowledge, thus contributing to the reinforcement of cohesion policy (cf. *supra* note 19).

#### **4. Legal and institutional basis for cooperation**

The status of regional and local authorities in the EU law may be inferred from primary law (treaty provisions) while the concrete levels of ETC (i.e. cross-border, transnational or interregional cooperation) and their operational rules are laid down by EU secondary (derivated) law.

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<sup>20</sup> Ibid.

<sup>21</sup> <http://www.twinning.org/en/page/a-quick-overview#.WncHkmaBj-a> [18.02.2018].

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## 4.1. Constitutional arrangements

Constitutionally the EU is a union between its Member States (Art. 1(1) TEU) and among the peoples of Europe (Art. 1(2) TEU, cf. e.g. Tsatsos 2009). Still, as opposed to Member States, sub-national authorities enjoy no formal legal status under EU law (Finck 2017: 2). Whilst the EU Treaty makes a direct reference to local and regional self-government (pursuant to Art. 4(2) TEU, the Union is obliged to respect constitutional, political and structural identities of its Member States, inclusive of regional and local self-government), Member States as the High Contracting Parties of the Treaties (see in particular Art. 1, 4(1) and 5(2) TEU) remain formally the exclusive political counterpart of the Union institutions. This fact becomes apparent in the light of the manner in which primary Community/EU law construes subsidiarity. As has already been stated, the principle of subsidiarity was first explicitly formulated in the Treaty of Maastricht, with Art. 3b thereof stipulating that:

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

Subject to obvious adjustment resulting from the Union replacing and succeeding the European Community, the wording of the cited provision as laid down under the Treaty of Lisbon currently in force has remained unchanged as regards the essence of the subsidiarity principle. The only relevant modification consists in introducing a direct reference to the role of regions in the European integration process, with the Union being empowered to act in areas where it does not possess exclusive competence “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved *by the Member States, either at central level or at regional and local level ...*” (Art. 5(3) TEU, emphasis added).

This modification was intended to avoid any misunderstanding in the sense that its application would be limited to the Member State and the Union would rule out the region as a potentially “better” level of government for some tasks (cf. in a different sense Borrás-Alomar et al. 1994: 36). Furthermore, the Article in question and Protocol no. 2 recognise the right of national

Parliaments to scrutinize compliance with the principle of subsidiarity in the course of Union legislative procedures, including those pertaining to ETC.

The modalities of that scrutiny are laid down in the Protocol no. 2 on the application of the principles of subsidiarity and proportionality, as inserted by the Lisbon Treaty. Under Art. 6 thereof, any national Parliament (or any chamber of a national Parliament in bi-cameral systems) may, within eight weeks from the date of transmission of a draft legislative act, transmit to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that a given proposal for a legislative act does not comply with the principle of subsidiarity. According to their respective constitutional systems, national Parliaments are to consult or not regional parliaments with legislative powers. For the reasons of different parliamentary systems in the EU (uni- or bi-cameral), each national parliament is allocated two votes. Where reasoned opinions on non-compliance of a proposal for a legislative acts with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, the draft must be reviewed. This threshold is a quarter in the case of a proposal for a legislative act submitted on the basis of Art. 76 of the TFEU on the area of freedom, security and justice (Art. 7(2) of the Protocol). Following such review, the Commission (or the group of Member States, the EP, the CJEU, the ECB or the EIB if the proposal for a legislative act originates from them), may decide to maintain, amend or withdraw the proposal. Reasons must be given for this decision (Art. 7(2) *in fine*). Where an EU legislative act is to be adopted under the ordinary legislative procedure (cf. Art. 294 TFEU), the proposal must be reviewed if reasoned opinions stating its non-compliance with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments. Once the proposal has been reviewed, the Commission may decide to amend, withdraw or maintain the proposal. In the latter case, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. Such reasoned opinion, as well as the reasoned opinions of the national Parliaments, are then to be submitted to the Union legislator (the European Parliament and the Council), for consideration whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission. If 55% of the members of the Council or a majority of the votes cast in the EP endorse the opinion that the proposal is not

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compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration (Art. 7(3) of the Protocol).

To sum up, despite limited progress in the formal status of sub-state authorities in EU law over years, their functional status may be described as that of the “insiders” of EU law (Finck 2017). Many of them are, indeed, maintaining offices in Brussels which closely liaise with EU institutions presenting their points of interest to them. It is noteworthy that when it comes to the division of competences between the Union and its Member States into exclusive Union competences and competences shared with its Member States (cf. Art. 3 and 4 TFEU), regional policy belongs to the latter category<sup>22</sup> where the Union and Member States undertake both joint, as well as separate initiatives in that field (see Mikołajczyk 2005: 185 and further literature references). It is arguable that ETC constitutes both a major drive and platform for such a *de facto* interaction of sub-state authorities with the Union and thus also their presence in the EU law. Consequently, decentralisation of EU cohesion policy and development of various forms of territorial cooperation in Europe was the objective of the new European Cohesion Policy as of 2004 onwards (see Pyć 2005: 203). In the following sections, most relevant legal and institutional basis for such cooperation is discussed.

### 4.2. Legal basis for EU regional policy

Since the entry into force of the Lisbon Treaty the specific legal basis for EU regional policy is provided under Title XVIII (Economic, Social and Territorial Cohesion) of the TFEU. Pursuant to Art. 174 thereof, the EU shall develop and pursue actions leading to the strengthening of its economic, social and territorial cohesion. To that end, the Union’s objective shall notably be “reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions”. Within that objective, particular attention is to be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps. The latter involve notably the northernmost regions and islands with very low population density as well as cross-border and mountain regions.

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<sup>22</sup> Pursuant to Art. 4(2)(c) TFEU, shared competence between the EU and its Member States applies inter alia to the area of economic, social and territorial cohesion.

In accordance with Art. 175 TFEU, action aimed at strengthening EU's economic, social and territorial cohesion are to be supported by the Structural Funds (in particular European Regional Development Fund and European Social Fund), the European Investment Bank (EIB) and the other existing Financial Instruments. Furthermore, under the cited treaty provision, the Commission is tasked to submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years regarding the progress made towards achieving these objectives and the manner in which the various means provided for under this Article have contributed to it. If the Commission believes specific actions outside the available Funds prove necessary, such actions may be adopted by the European Parliament (the EP) and the Council acting in accordance with the ordinary legislative procedure<sup>23</sup> and after consulting the Economic and Social Committee and the Committee of the Regions (Art. 175 TFEU *in fine*). The same procedure is applied to adopting regulations laying down the tasks, priority objectives and the organisation of the Structural Funds, including implementing regulations relating to the European Regional Development Fund (Art. 177 and 178 TFEU, respectively).

#### **4.3. European Grouping of Territorial Cooperation**

A legal instrument which substantially facilitated the implementation of the ETC between regional and local authorities was the European Grouping of Territorial Cooperation (henceforth EGTC). Established under Regulation (EC) no. 1082/2006, EGTC is a cooperation instrument allowing for creation of cooperative groupings on the Union territory by its members (located on the territory of at least two Member States) for the purpose of cross-border, transnational and interregional cooperation aimed at strengthening economic and social cohesion (see Art. 1 para 2 and Art. 3 para 1). To that end, the EGTC is tasked with the implementation of territorial cooperation programmes co-financed by the EU through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund. Since EGTC is vested with legal personality under the law of a Member State where it has its registered office, it possesses the capacity to act on behalf of its members of which it is composed. These could involve: Member

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<sup>23</sup> The legislative procedure under which both the EP and the Council act on equal footing (see Art. 294 TFEU), as opposed to special legislative procedure where the Council decides alone (at times after consultation of the EP) or in some cases with the consent of the EP, or even where the EP decides following the consent by the Council and the Commission.

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States, regional and local authorities, other public bodies and associations thereof. Pursuant to art. 1 para 4 of the Regulation, “EGTC shall have in each Member State *the most extensive* legal capacity accorded to legal persons under that Member State’s national law. It may, in particular, acquire or dispose of movable and immovable property and employ staff and may be a party to legal proceedings” (emphasis by the author). The fact that EGTC is conceived as a legal entity has enabled to overcome obstacles to territorial cooperation which were faced by the European economic interest grouping and other instruments governing such cooperation before 2007. Notably, unlike the earlier instruments, EGTC enables public authorities of various Member States to team up and carry out joint initiatives and projects without the necessity of a prior international agreement to be signed and ratified by national parliaments<sup>24</sup>. Any regional or local entity wishing to participate in an EGTC is, however, required to obtain the consent of the Member State under whose law it is formed. Withholding such approval by a Member State shall, however, be limited to situations when it considers that such participation by the prospective member is not in conformity with the Regulation (EC) no. 1082/2006 laying down the framework for EGTC or its national law (e.g. due to the prospective member’s powers and duties), or that such participation is not justified for reasons of public interest or of public policy (art. 4 para 3 of the Regulation in question).

### 4.4. Committee of the Regions

The European Committee of the Regions (CoR), which brings together representatives from the levels of government closest to the citizens (regional presidents, city mayors and local councillors) institutionalises the input of sub-state authorities into the EU regulatory and policy activities. In other words, CoR functions as a useful platform to involve local and regional authorities in European policy making, thus effectively endorsing both local experiences and concerns.

The formal status of the CoR is that of an advisory body. Pursuant to Art. 307 TFEU, the Committee must be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases in which one of the aforementioned institutions

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<sup>24</sup> [http://ec.europa.eu/regional\\_policy/en/policy/cooperation/european-territorial/egtc/](http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/egtc/) [21.01.2018].

considers it appropriate, notably those concerning cross-border cooperation. Moreover, when the Economic and Social Committee is consulted pursuant to Art. 304, the CoR must be informed by the EP, the Council or the Commission of the request for an opinion. Where the Committee considers that specific regional interests are involved, it may issue an opinion on the matter. It is noteworthy that CoR may issue an opinion on its own initiative if it considers such action appropriate. The opinion of the Committee, together with a record of the proceedings is forwarded to the EP, to the Council and to the Commission. Where the said institutions consider it necessary, they may set the CoR a time limit for the submission of its opinion, which may not be less than one month from the date on which the CoR's chair receives notification to this effect. The absence of an opinion after the expiry of the time limit specified for its submission does not prevent further action by the opinion-requesting institution.

Despite its name, the CoR consist of members (in the number not exceeding 350, see Art. 305 TFEU) representing not only regional, but also local bodies from all EU Member States who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly (Art. 300(3) TFEU). Typically delegations from federal or regionalised states represent regions, whereas those of unitary states (e.g. Denmark or Luxembourg) represent local authorities. The number of Committee members per each Member State is determined by way of a Council decision, with larger EU states being generally “underrepresented” to the advantage of the weight of influence (votes) by sub-state authorities originating from smaller states. By way of example, pursuant to the Council Decision of 16 December 2014 (2014/930/EU), the number of CoR members for Luxembourg equals 5, Denmark – 9, Poland – 21, Germany 24.

As a rule, the CoR holds 6 plenary sessions per year<sup>25</sup>. The Plenary Assembly decide by a majority of the votes cast, unless special provisions on voting apply (see Rule 22(1) of the Committee's Rules of Procedure adopted on 31 January 2014 by the Committee of the Regions on the basis of Article 306(2), of the TFEU). Any member prevented from taking part in a Plenary Session may be represented by an alternate from his/ her national delegation; he/she may also be represented for a period limited to individual days of the Plenary Session (Rule 5(1)).

In literature the lack of homogeneity of CoR's actors tends to be seen as its weakness in terms of the capacity to define their common interests (cf. eg. Jeffrey 1997: 5). However, by organising its members in political groups the Committee endeavours to identify common interests along

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<sup>25</sup> <http://cor.europa.eu/en/activities/plenary/Pages/plenary-sessions.aspx> [7.02.2018].

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political dividing lines. Aside the European Parliament, the Committee is a second political assembly at EU level which possesses democratic legitimacy and thus may both serve as a platform for and reflect the dialogue with the citizens. Interestingly, though, this is why it is said to be facing considerable suspicion from some representatives of the EP and the Member States (cf. Jeffrey 1997: 5), notably because of the fear that the EU decision making process which already is cumbersome enough, would become completely blurred if additional actors like national parliaments or the Committee of the Regions were given decision-making powers.

### **5. What added value of EU regional cooperation?**

The positive impact of the territorial cooperation between regional and local self-government authorities on the European integration process may hardly be overestimated. It is above all about winning a broader European perspective, while staying close at the grassroots level. Were it through its contribution to reducing regional disparities across Europe, or more proactive facilitating of regional interoperability and competitiveness, the ETC benefits directly local communities, thus illuminating the most tangible EU added value to the Union citizens. It is therefore not surprising that European sub-national authorities – as representatives of the level “closest to the citizen” – claim their share in providing the democratic legitimacy to the Union activity<sup>26</sup>. This pursuit has generally been welcomed by the European Parliament on the basis of two tenets. “First, by the perceived necessity to involve local and regional authorities in order to improve the effectiveness of specific policies of the European Union. This has been most notable in relation to the achievement of economic and social cohesion through the improved operation and implementation of the structural funds” (Farrows 1997: 41). The second tenet underpinning the EP’s approach is linked to the aforementioned need for an improved democratic legitimacy of the Union. For this reason, the EP appears to be in favour of promoting regionalisation which is not limited to the principle of local self-governance (Farrows 1997: 41), but comprises interregional cooperation. An example for added value by practical trans-border interregional cooperation is given in a recent study analysing the strategic role that the European Groupings of Territorial

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<sup>26</sup> See e.g. point 21 of the CoR’s Opinion: Reflection Paper on the future of EU finances, 127th plenary session – 31 January and 1 February 2018, COTER-VI/034.

Cooperation (EGTC) could play in the planning and implementation of cross-border investments (Carvalho et al. 2018).

The considerable impact that cooperation among local and regional levels thus may have on the process of European peoples growing closer together, justifies the claim to have local and regional levels adequately represented at a European Union level in order to dispose of a platform for appropriately voicing their concerns.

Given that the EU is one of the most urbanised areas in the world with more than 70% of Europe's citizens living in an Urban Area (and the trend further increasing)<sup>27</sup>, there is a perceived need to enhance future sustainable development of cities (in economic, environmental, and social terms) for the benefit of the European Union and its citizens (cf. Urban Agenda for the EU, Pact of Amsterdam agreed by EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam, the Netherlands). The Pact stresses that urban areas of all sizes can be engines of the economy which boost growth, create jobs for their citizens and enhance the competitiveness of Europe in a globalised economy. An increased attention to the role of cities in polycentric development and governance in Europe is also reflected by the report on the "Role of cities in the institutional framework of the Union" (Rapporteur, Kazimierz Ujazdowski) currently discussed in the EP's Committee on Constitutional Affairs (AFCO). The role of cities in EU policies is believed to have grown in areas such as: security, transport, immigration, the fight against exclusion, also due to unprecedented challenges which European cities are currently facing in those areas. Therefore, the EP rapporteur: [a]dvocates greater involvement for associations representing local authorities and urban interests in policy design, such as the Eurocities network and the Council of European Municipalities and Regions (CEMR), and considers that such associations should become permanent consultants of EU policies"<sup>28</sup>. Such involvement would, however, need to take into account the already heterogeneous nature of local representation in Europe, the difference between informed consultation and legislative co-decision and the unavoidable red tape linked to it, as well as respect the division of competences between the EU and the Member States<sup>29</sup>.

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<sup>27</sup> See the Preamble to the Urban Agenda for the EU. Pact of Amsterdam of 30 May 2016, [http://ec.europa.eu/regional\\_policy/sources/policy/themes/urban-development/agenda/pact-of-amsterdam.pdf](http://ec.europa.eu/regional_policy/sources/policy/themes/urban-development/agenda/pact-of-amsterdam.pdf) [28.02.2018].

<sup>28</sup> See recital 5 of the motion for a European Parliament Resolution on the role of cities in the institutional framework of the Union (2017/2037(INI)) of 12.2.2018.

<sup>29</sup> For a comprehensive account on the current EU institutional and practical framework for the participation of cities in EU policy-making, see Heinelt 2017.

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In an appropriate advisory capacity, European regional and local authorities are fully legitimate to participate in the debate on all relevant and topical issues concerning future EU policy making.

The regional impact on EU policy debate is in particularly tangible with regard to the ongoing discussions on the future Multiannual Financial Framework (MFF) after 2020. In its Opinion: Reflection Paper on the future of EU finances, the Committee of the Regions “emphasises the role of cohesion policy in generating European added value, which it achieves by implementing structural reforms, developing administrative capacity at all levels of governance (‘spillover effects’), and providing direct support e.g. under the ‘Lagging Regions’ initiative”<sup>30</sup>. At the same time CoR “notes with concern that cuts to the EU budget (including those related to Brexit) without an increase in financial means from own resources will increase the burden on Member States in the form of contributions, or will inevitably lead to constraints in terms of the policies that receive support”<sup>31</sup>.

Furthermore, in its resolution of 1 February 2018 the Committee of Regions supported the European Commission’s proposal of 20 December 2017 to the Council to adopt a decision under Art. 7(1) of the TEU based on an assessment that a clear risk of a serious breach of the rule of law exists in Poland in connection to the recent reform of judicial system<sup>32</sup>. Interestingly, however, CoR calls on the Polish government and the Commission to engage in a constructive dialogue so as to avoid “harmful spill-over effects” on the EU decision-making process, notably in terms of future spending of the Union after 2020 (the negotiations over the proposal to be presented by the Commission for the programming period after 2020 are scheduled as of March 2018). In concrete terms, the CoR opposed to “political ex-post conditionality, which would mean that local and regional authorities could be *held hostage* to policies pursued by national governments that would prompt a suspension of EU funding for cities and regions” (emphasis added). Furthermore, the CoR stressed that “[c]ohesion policy must not be subject to conditionalities at European level that cannot be influenced by local and regional authorities and other beneficiaries”. In this context the CoR drew attention to the already existing provisions in the partnership agreements which allow

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<sup>30</sup> See point 20 of the Opinion, 127th plenary session – 31 January and 1 February 2018, COTER-VI/034.

<sup>31</sup> *Ibid.*, point 8.

<sup>32</sup> See draft Resolution on the Commission proposal for a Council decision on the determination of a clear risk of a serious breach by Poland of the rule of law, RESOL-VI/30. The resolution was adopted with 77 voter “for”, 39 “against” and 26 abstentions (Agence Europe 02/02/2018).

funding to be suspended where local and regional authorities are themselves responsible for a breach of the rule of law<sup>33</sup>.

On 1 February 2018 the Committee of the Regions for the first time envisaged to make use of its prerogative to challenge the validity of an EU legal act at the Court of Justice on the grounds of an infringement of the principle of subsidiarity. In its resolution of that day on the Commission proposal for a regulation amending Regulation (EU) no. 1303/2013 of 6 December 2017 on the Common Provisions for Structural Funds (COM(2017) 826 final) the CoR highlighted that the aim of cohesion policy as defined in the Treaty is to “reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions” and not to finance general structural reforms in the Member States as stated in the Commission proposal. Taking the view that financing structural reforms is a matter for the Member States, the CoR concluded that the Commission proposal in its present form does not comply with the principle of subsidiarity and showed readiness to defend this position at the Court if the proposal were adopted in its present form.

## 6. Concluding remarks

The “map” of ETC within the EU is extremely complex and diverse, still it constitutes an important framework for a functional account of the status of local and regional authorities in the EU law. Given the dominant paradigm of bi-centric relationship between the Union and its Member States, in literature a sub-national authority is sometimes perceived as “a powerless entity, addressing purely ‘local’ issues, and the influence of which is confined to local territory” Finck (2017: 3). In formal terms, primary EU law seemingly entrenches this status of regional and local authorities in so far as it notably deals with the relationship between the Union and the States as policy actors. Nevertheless, sub-state levels of government are among the key beneficiaries of EU funding. Moreover, they *de iure* (e.g. Art. 117(5) Italian constitution) or *de facto* play an active and important role in the implementation of EU law. Given the impact that economic, social and territorial cohesion has on the harmonious European integration process as well as direct and indirect implications of EU regulatory activity for sub-national authorities, including difficulties of EU law implementation arising from its at times conflicting impacts, there is a growing awareness

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<sup>33</sup> Ibid.

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amongst EU institutions of the need to take account of regional and local authorities' concerns and interests (cf. e.g. Urban Agenda for the EU: 3). The polycentric nature of contemporary governance challenges has been stimulating the change in the role of regional and local authorities in EU law and policy making (cf. Finck 2017: 2). This role is certain to be further ascertained in the future, which is evident amongst others by a conspicuous presence of regional representations in Brussels, well acknowledged as partners of the European policy community (Huysseune, Jans 2008). It is also arguable that regional cooperation has the potential to contribute to a more equitable pattern of globalisation (Ashiagbor 2018). While the author construes the EU's cross-national market integration project in terms of "regional cooperation", the ETC – due to its scale and dimension – is potentially even more likely to counterbalance the negative effects of excessive market liberalism. Hence, as aptly expressed by Ashiagbor (2013; "[i]n industrialising states (...) it is necessary to explore political and economic constraints on regional integration which frustrate what could well be a genuine 'counter-movement' to ameliorate the fundamentalism of the market". At the same time, the ETC may only be effectively implemented providing sub-national authorities' autonomy surpasses competence to influence exclusively their own matters. In other words, even if very limited, some direct regional impact on EU policy-making may be desirable, notably when regional/ local community interests risk being compromised by opportune national politics<sup>34</sup>. It is thus for the EU institutions to take account of such legitimate concerns and work on creating legal and institutional framework to, if not fully overcome, then at least mitigate the obstacles to regional interoperability.

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<sup>34</sup> A most recent example involves the risk of re-establishment of an internal border between Ireland and North Ireland following Brexit.

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