

## Document of the European Convention on the regional and local dimension in Europe (29 January 2003)

**Caption:** Reflection paper on the regional and local dimension in Europe, forwarded to the Members of the European Convention on 29 January 2003 by its Praesidium, and intended to serve as a basis for the debate in the plenary session of the Convention on 6 and 7 February 2003. The paper analyses the various means of participation available to the regional and local authorities in drawing up and implementing Community decisions: partnership in the implementation of certain Community policies, in particular regional policy; participation in the decision-making process at both Community (Council and Committee of the Regions) and national (defining the national position) level; and the right to bring an action before the Court of Justice.

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## The regional and local dimension in Europe

### I. Introductory remarks

1. The aim of this note is to examine questions which might be discussed at the plenary on 7 February. It has been prepared in the light of the contributions submitted to the Convention <sup>1</sup>, proposals from the Committee of the Regions <sup>2</sup>, exchanges which took place in the Contact Group chaired by Vice-Chairman J-L. Dehaene, contributions to the Forum and discussions under way within the Institutions <sup>3</sup>.

2. Of the very wide range of proposals which have been put forward, mention is made only of those which form part of the constitutional debate conducted by the Convention and, at all events, those which respect the right of Member States to organise their internal structures themselves <sup>4</sup>. Among the issues raised, some concern all European regional or local authorities, others are specific to the regions with legislative powers, and others are specific to the Committee of the Regions.

3. The enlarged European Union will comprise nearly 100 000 regional or local authorities, of which the elected assemblies and executives have "the right and the ability [...] within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population." <sup>5</sup> Some of these have considerable economic and demographic weight. In many areas, such as economic development and regional planning, the environment, consumer protection, food safety, health, employment, the fight against poverty and exclusion and regional and urban transport, regional and local authorities have, in accordance with national constitutional or legislative provisions, legislative competence or administrative, fiscal or budgetary powers. By means of this complex, varied and modulated range of powers, the spheres of local and regional government within the Union help to implement Community legislation and policies.

4. Although in practice as years have gone by the Union Institutions have been taking increasing account – albeit indirectly – of the regional and local dimension (constant expansion of the areas in which the regional and local authorities are consulted, setting up of the Committee of the Regions, introduction of a partnership for certain policies, development of case law on a right of appeal), the question arises whether it would not be appropriate to draw the logical conclusions from this in the Constitution, so as to make that involvement more visible.

The issues raised are:

- respect for the identity of Member States and the organisation of their public authorities at national, regional and local level
- consultation and partnership
- the status and operation of the COR
- the right of appeal of regional and local authorities to a Community court.

### II. Place and role of the regional and local authorities

#### An explicit reference in the Constitution

5. In view of the increasing importance of the regional and local dimension in the life of the Union, there are grounds for asking whether it would not be appropriate to recognise this situation in the opening articles of the Constitution.

Already, the Charter of Fundamental Rights makes clear in its preamble that the Union contributes to the preservation and to the development of its common values while respecting "the national identities of the Member States and the organisation of their public authorities at national, regional and local levels."

In the light of the proposals coming from various directions, it is permissible to ask oneself whether it seems adequate to keep this provision relating to respect for the identities of the Member States and the

organisation of their public authorities in the preamble to the Charter of Fundamental Rights or whether it should be integrated into the opening articles of the Constitution. Thus, in its conclusions, the Working Group on Complementary Competencies proposed that the provision contained in Article 6(3) TEU that the Union respects the national identity of the Member States should be made more transparent by making clear that the essential elements of the national identity include "fundamental structures and essential functions of the Member States, notably their political and constitutional structure, including regional and local self-government ...".

### III. Participation in drawing up and implementing decisions

6. Some regions with legislative competence may play a major role in the decision-making process: according to the first paragraph of Article 203 TEC, "the Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State". This Treaty provision was amended at Maastricht to enable the Member States to be represented in the Council by regional ministers. Each Member State now determines who is qualified to represent it, in accordance with its national constitutional system. Whenever a minister of a region participates in the Council, he naturally represents the central State and not his region. Three Member States which are run on federal lines, namely Germany, Belgium and Austria, have adopted instruments enabling the federal entities to participate in the Council.

Other decentralised States ensure that their regions with legislative competence take part in the decision-making process by means of an internal procedure which enables the Government to consult them in cases involving their competence before deciding on the position it will adopt in the Council of the Union.

#### Partnership and consultation

7. For some time already, as part of the debate on governance, the European institutions and in particular the Commission have been considering the best way of involving the economic and social partners, but also and especially regional and local interlocutors, in framing and implementing policies. Their discussions have been based on wide experience and consultation at all levels.

8. In fact, regional and local partners are consulted at several levels:

- Member States inform and consult their local and regional authorities on Community affairs according to very varied procedures;
- they are also consulted via the Committee of the Regions;
- the Commission regularly organises consultations as part of the process of framing its policies, to such extent that this external consultation forms part of the final preparation for most of its activities.

9. The partnership principle which applies to implementation of the Structural Funds constitutes a very distinctive method of involving regional and local partners. Indeed, Article 8 of the general Regulation on the Structural Funds <sup>6</sup> stipulates that Community action shall be implemented in close consultation between the Commission, the Member State and the authorities designated by the Member State at national, regional and local level. Clearly, this article respects the internal division of competence within the Member States. It results in the setting up of "monitoring committees", which participate in the planning of aid and the implementation and evaluation of programmes and projects cofinanced by the Union. These monitoring committees are often at regional level and are made up of local and regional authorities, but also of representatives of the social partners and the sectoral (e.g. environmental) authorities, also at regional level.

10. Both the partnership principle and the consultation mechanisms are the application of techniques of decentralised governance based on the idea that the extent to which a policy is accepted by those to whom it is addressed, and consequently its effectiveness, is in direct relation to the extent of their involvement in its formulation. They also make it possible to take account of specific local characteristics when implementing Community policies.

11. In its most recent work on governance, the Commission proposes to extend techniques of this type with the aim of facilitating the implementation of certain Community policies while taking account of the diversity of regional and local situations which exist <sup>7</sup>. As far as consultation is concerned, on 11 December the Commission published a communication entitled "Towards a reinforced culture of consultation and dialogue" and announced that in February 2003 it would make known the specific consultation arrangements which it proposed for the regional and local authorities.

12. At the time of the debate on the White Paper on European governance the regional and local authorities asked for more systematic dialogue to be held with their representative associations. At the same time, in the light of experience with the partnership principle in the management of the Structural Funds, the Committee of the Regions and the main regional and local authority associations asked for the partnership technique to be used in the implementation of other Community policies.

13. Finally, two Convention Working Groups, on subsidiarity and simplification, have made proposals on the consultation of interested parties. The Working Group on Simplification felt in particular that consultation of the regional and local authorities upstream of the legislative process would improve the quality of European legislation. The Working Group on Subsidiarity, for its part, felt that the principle of subsidiarity would be applied all the better the earlier it was taken into account in the legislative process. It felt it was for the Commission to consult, as soon as possible, all the players, particularly local and regional authorities, which might be affected directly or indirectly by the legislative act being planned or drafted. As for the "subsidiarity sheet" accompanying any legislative proposal, the Group felt that it should "contain some assessment of its financial impact, and in the case of a Directive, of its implications for the rules to be put in place by Member States (at national or other level)."

#### **IV. The Committee of the Regions**

14. The Union Treaty (Article 263 TEC) established "a Committee consisting of representatives of regional and local bodies ... with advisory status". The Council (by a qualified majority after the entry into force of the Treaty of Nice) appoints the members of the Committee on proposals from the respective governments. One of the major challenges facing the Committee ever since its creation has been to represent all the richness and diversity which exists at regional and local level in the Union. In fact, its membership is extremely heterogeneous: although it is known as "the Committee of the Regions", some Member States do not have that regional level of government, whereas in others the regional level has legislative powers on a par with those of the central State.

15. In practice, the Committee is composed of both regional and local representatives from all the Member States, whatever their politico-territorial structure. It is, however, also true that, in certain federal or highly regionalised Member States (Germany, Austria, Belgium and Spain), all the regional entities are members, with representation of the local level being residual. Moreover, although in the case of those States the whole territory is represented, in the case of the other States the national delegation consists of a sample representation of the various territorial levels.

16. The composition of the Committee does not reflect the demographic realities of the Member States. The second paragraph of Article 263 TEC lays down the number of Committee members per State. The ratio of Committee member to number of citizens of the Member State varies widely <sup>8</sup>. The Treaty of Nice did nothing to change that and added members for the new States in proportions similar to the present ones. That Treaty also lays down now that the members of the Committee must either hold a regional or local authority electoral mandate or be political accountable to an elected assembly.

17. The Committee of the Regions participates in the Community decision-making process with advisory status. Its opinion is required (although not binding) in the cases specifically mentioned in the Treaty: common transport policy, employment, social policy, education, vocational training, public health, trans-European networks, economic and social cohesion and environment. However, the Commission, the Council or the Parliament may request its opinion on other matters and the Committee itself may decide to give its opinion when the opinion of the Economic and Social Committee is required.

18. The Committee of the Regions has called for its advisory powers to be strengthened, notably by an obligation upon the Commission and the Council to give reasons for their decisions not to follow its opinions. It has also sought the right of referral to the Court of Justice in defence of its own prerogatives. Such legal action<sup>9</sup> should be distinguished from that brought for non-compliance with the principle of subsidiarity, which has been the subject of proposals from the Working Group on the Principle of Subsidiarity as referred to in paragraph 20 below.

19. As representing regional and local interests and viewpoints within the architecture of the Union, the Committee has justified its institutional claims by the need to ensure better representation of regional and local interests. In contrast, others have pointed out that assuming new powers would call for a profound change in the very nature of its composition. They also believed that while its heterogeneity did not impair the exercise of its current advisory tasks, it would constitute an obstacle to the exercise of extended competences. Furthermore, the Committee of the Regions itself has expressed the desire to better reflect the diversity of local and regional governance by ensuring a better balance of regional and local representation in the composition of national delegations.

20. Finally, it should be pointed out that the Working Group on Subsidiarity has in the course of its work discussed at length the role to be attributed to the Committee of the Regions with regard to improved application of the principle of subsidiarity. Having given a hearing *inter alia* to representatives of the Committee of the Regions, who are observers to the Convention, the Working Group agreed that the Committee of the Regions would be given the right to refer a matter to the Court of Justice for violation of the principle of subsidiarity. This referral would relate to proposals which had been submitted to the COR for an opinion and about which, in that opinion, it had expressed objections as regards compliance with subsidiarity.

## V. Regions with legislative competences

21. Apart from their participation in Council proceedings in certain cases, the regions with legislative competence have, precisely on account of their competences, to transpose Community law. Nevertheless, while those obligations to transpose directives may, in federal States, require legislative action at the level of the regions rather than at the level of the federal State itself, this has not thus far impinged on the legal relationships existing between the Community and the Member States. Thus, the Court of Justice has ruled that even if it is incumbent upon all the authorities - central and regional - of the Member States to ensure compliance with Community law within their respective spheres of competence, it is not for the Community institutions to make pronouncement on the allocation of internal competences within each Member State. Consequently, the Commission may bring proceedings for failure to fulfil an obligation pursuant to Article 226 TEC only against the government of the Member State in question, even if the failure is the result of a region's action or omission; in the course of such proceedings, the Member State may not plead provisions existing in its internal legal system in order to justify the failure<sup>10</sup>.

22. Calls have been made to establish a specific right of appeal for the regions on the grounds that an act of the Union affects the exercise of their own powers that they enjoy by virtue of their respective constitutional law.

23. At present, regional entities may bring an action for annulment with the ECJ only by virtue of the fourth paragraph of Article 230 TEC as "legal persons" under the same conditions as any private individual, i.e. either if the disputed act is addressed to them or it is of direct and individual concern to them. Well-established case-law of the Court of First Instance<sup>11</sup> allows actions brought by the regions in one specific case, namely against Commission decisions on State aid prohibiting aid granted by those regions. Even if such a prohibition decision is addressed to the Member State and not to the region, case-law takes the view that it nonetheless affects the regional authority concerned if "*it directly prevents it from exercising its own powers*". Moreover, the Community court has stated in those cases that the regional authority bringing the action does have a separate interest, distinct from that of the Member State to which it belongs, "*where it possesses rights and interests of its own and the aid in question constitutes a set of measures taken in the*

*exercise of legislative and financial autonomy vested in the authority directly under the constitution of the Member State concerned.*" On the other hand, an action brought by a region is inadmissible if it relies only on the fact that the contested act has socio-economic repercussions on its territory and cannot invoke the exercise of its own powers <sup>12</sup>.

24. However, it is not clear whether this current case law can be interpreted to mean that a region with legislative competence would be entitled, pursuant to the fourth paragraph of Article 230 TEC, to challenge the legality of a directive (or, in the future: a framework law) which it would have to transpose, in accordance with the constitutional law of the Member State, and which would therefore, in its view, affect the exercise of its own legislative powers. The difficulty in such a case lies in the requirement that the act in question must be of "individual concern" (fourth paragraph of Article 230 TEC), since this term is interpreted very restrictively in the Plaumann case and that interpretation was recently confirmed by the Court of Justice <sup>13</sup>; moreover, this issue has already been mentioned in the Convention <sup>14</sup>.

25. It should be pointed out that the Working Group on Subsidiarity did not opt for the possibility of granting a right of appeal for violation of the principle of subsidiarity to regions which, within the framework of national institutional organisation, have legislative capacities.

## VI. Avenues to be explored

1. Should the opening articles of the Constitution contain a reference to regional and local authorities? If so, what reference? Do you consider the reference in the Charter sufficient?

2. Could the proposals relating to consultation and partnership with the regional and local authorities be accommodated, firstly, in Title VI of the draft Constitutional Treaty, which relates to the democratic life of the Union and, secondly, in the provisions on subsidiarity?

3. As regards the Committee of the Regions:

- does its membership have to be reviewed?
- notwithstanding the general obligation which Institutions have to give reasons for their decisions, is there a need to introduce the requirement that the Commission and the Council must give reasons when they decide not to comply with its opinions?
- can the right of the Committee of the Regions to bring an action before the Court in defence of its own prerogatives be incorporated in the constitutional treaty?

4. Should the regions be expressly mentioned in the fourth paragraph of Article 230 TEC? Would it be possible to settle the issue by following the suggestions mentioned in Working Group II's report that the right of natural or legal persons to institute proceedings, referred to in that Article, be extended in the case of measures of general application which apply directly to the individuals concerned?

<sup>1</sup> Cf. Bösch, Farnleitner, Kiljunen, Lamassoure, MacCormick, Speroni, and Teufel, contributions from the PPE and PSE and the Bruges speech given by Chairman V. Giscard d'Estaing.

<sup>2</sup> COR Opinion on "The role of the regional and local authorities in European integration" (Lord Tope).

<sup>3</sup> Resolution of the European Parliament of 14.1.2003 on the role of regional and local authorities in European integration.

<sup>4</sup> In this context, the Court has pointed out on several occasions that it is not for the Community institutions to give an opinion on the allocation of internal competence in each Member State.

<sup>5</sup> Cf. Article 3(1) of the European Charter of Local Self-Government of the Council of Europe.

<sup>6</sup> Council Regulation (EC) No 1260/1999.

<sup>7</sup> "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities" COM(2002) 709 final.

<sup>8</sup> For instance, in the case of Germany, this ratio is 3 418 000 whereas it is 71 500 for Luxembourg and 2 400 500 for Italy.

<sup>9</sup> Such a right would, for instance, allow the Committee of the Regions to request the annulment, on grounds of infringement of an essential procedural requirement, of an act adopted without prior consultation of the Committee in an area in which this is mandatory.

<sup>10</sup> Cf. C-227/85 - 230/85 Commission v. Belgium, ECR 1988, 1; C-211/91 Commission v. Belgium, ECR 1992, I-6757 C-95/97, ECR 1997, I-1787.



<sup>11</sup> T-214/95, Vlaams Gewest v. Commission, ECR 1998, II-717; T-609/97, Regione Puglia v. Commission, ECR 1998, II-4051; Freistaat Sachsen v. Commission, ECR. 1999, II-3663.

<sup>12</sup> T-238/97, Comunidad Autónoma de Cantabria v. Council, ECR 1998, II-2271; Freistaat Sachsen v. Commission, ECR 1999, II-3663, paragraph 87.

<sup>13</sup> This case law does not allow individuals to bring actions against measures of general application, even those which affect them directly, save in exceptional cases where they are affected " *by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.* " Cf. judgment of the Court of Justice of 25 July 2002 in Case C-50/00 P, UPA, confirming the Plaumann judgment, Case 25/62, ECR 197, and in opposition to the suggestions for a change in judicial attitude made by Advocate-General Jacobs in the case in question and by the CFI in the judgment of 3 May 2002 in Case T-177/01, Jégo-Quéré.

<sup>14</sup> See in particular the final report of Working Group II, CONV 354/02, pp. 15-16, with references to several contributions from members of the Convention on this subject.