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The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy-Making – Continuity or Change?

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A. Introduction

From the mid-1980s, European policy-making became increasingly subject to intense regional lobbying, in particular from strong legislative regions such as the German *Länder*. The growing regional interest in European Union (EU) affairs, the creation of institutions for regional representation such as the Committee of Regions and the reform of domestic provisions for regional involvement in EU policy-making led Marks to depict EU governance as multi-level, with regional, national and European actors interacting in various arenas.[1] However, while European integration is often seen as empowering constitutionally 'weak' regions, strong legislative regions are sometimes seen to lose competences to European and national actors. Jeffery claims that the increase in regional participation rights of the 1980s and 1990s has failed to counterbalance that loss and that strong regions have become increasingly frustrated with the process of European integration. He argues that, in the German case, the *Länder* have moved away from demands for more participation at the European level and for greater involvement in the definition of national positions towards a strategy of minimising the overlap between regional and European competences.[2] This strategy of separating rather than sharing may be seen as an attempt to disentangle the competences of the various levels – and hence as an attempt to limit the need for multi-level interaction. However, at the same time, demands for a greater role of the Committee of Regions were presented during the constitutional debate,

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1 G. Marks, *Structural Policy and Multilevel Governance in the EU*, *in* A. Cafruny & G. Rosenthal (Eds.), The State of the European Community, 391 (1993).

2 C. Jeffery, *A Regional Rescue of the Nation-State: Changing Regional Perspectives on Europe*, EUSA Tenth Biennial International Conference, Montreal (2007). C. Jeffery, *Regions and the Constitution for Europe: German and British Impacts*, 13 German Politics, 605 (2004). C. Jeffery, *Towards a New Understanding of Multi-Level Governance in Germany? The Federalism Reform Debate and European Integration*, 48 Politische Vierteljahreszeitschrift 17 (2007).

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pointing towards a complementing strategy of increasing regional participation in areas where competences have already been transferred to the European level. The question is thus whether the Lisbon Reform Treaty has led to a greater disentanglement and/or to what extent greater participation rights have been achieved in the areas of European competence.

Focusing on the regions of federal states, i.e. those regions with the greatest chances of influencing EU policies, we will adapt Putnam's model of two-level international negotiations to the context of EU policy-making.[3] We will then analyse to what extent the Lisbon Reform Treaty increases/reduces the scope for regional participation and whether it leads to a clearer division of powers amongst different territorial levels. It will be argued that the changes were mostly symbolic, resulting in limited new opportunities for regional participation. Overall, they are expected to have little impact on the nature of EU policy-making with regard to the multi-level governance (MLG) debate.

B. Multi-Level Governance in the EU: A Frustrating Experience for Strong Regions?

Gary Marks developed the concept of multi-level governance in 1992 and 1993 from the study of EU structural policy. He defines MLG as

> a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional and local – as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralised functions of the state up to the supranational level and some down to the local/regional level.[4]

Thus, different levels of government negotiate on several levels in a process that goes beyond formal relationships to include informal interaction.

While MLG shares with intergovernmentalist integration theory the acknowledgement that Member States remain for the foreseeable future "the *most* important pieces of the European puzzle,"[5] it shares with supranationalists the view that supranational bodies, and in particular the Commission, are capable of exerting independent influence by forming alliances with actors other than central governments. However, contrary to intergovernmentalist and neo-functionalist approaches that explain the process of European integration, MLG has started

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[3] R. D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 IO 427 (1988).

[4] Marks, *supra* note 1, at 392. *See also* G. Marks, *Structural Policy in the European Community*, *in* A. Sbragia (Ed.), The Political Consequences of 1992 for the European Community, 191 (1992).

[5] G. Marks, L. Hooghe & K. Blank, *European Integration from the 1980s: State Centric v. Multi-level Governance*, 34 JCMS 341, at 346 (1996). *See also* C. Jeffery, *Regional Information Offices in Brussels and Multi-level Governance in the EU: A UK-German Comparison*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 183, at 184 (1997).

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as a theory of policy-making in the EU as a political system and was only subsequently developed into a theory that addresses both European integration and the functioning of the EU.[6]

As a theory of European integration, MLG relies on an actor-centred approach to explain why central governments may agree to disperse authority within the process of European integration. It argues that government leaders may wish to disperse authority in order to avoid responsibility for unpopular decisions, to attempt to tie their successors' hands, or to tie their own hands in such a way as to reduce the scope of concessions that regional or supranational actors may ask of them in subsequent negotiations. Finally, government leaders may agree to transfer competences away from the central government if they regard it as necessary in order to achieve a highly desirable policy outcome or they may be unable to prevent the transfer of authority due to ambiguities in treaties exploited by supranational agents.[7]

As a result of the transfer of powers to the supranational level, sub-national actors will feel the need to adapt to the changing circumstances through contact with the new actors and modified national procedures. The supranational actors, and, in particular, the Commission, may engage in alliances with sub-national actors that allow both to circumvent central governments.[8] On this basis, scholars of MLG usually work with two hypotheses: (1) there will be direct interaction between sub-national and the supranational actors unmediated by central governments; and (2) this interaction will undermine the authority of central governments.

Over time, a more precise set of hypotheses has been developed, especially in relation to the question of regional influence on EU policy-making. Thus, a study of sub-national offices in Brussels by Marks, Haesly and Mbaye shows that an office's lobbying activity increases with the funds available. These funds tend to increase with the competences of a region.[9] Jeffery identifies four variables that have an impact on the level of influence of sub-national authorities (SNAs). Firstly, a strong constitutional position allows for more regional influence. Secondly, formal structures of intergovernmental relations are seen as resulting in greater regional influence than informal structures. Thirdly, administrative adaptation, leadership and coalition-building have an impact on the level of influence and, finally, legitimacy and social capital (historic background of a SNA, sense of identity, a well developed civil society, etc.) give greater credibility to sub-national demands.[10]

While these studies suggest that strong legislative regions invest more into lobbying at the European level and have greater influence than constitutionally

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6 S. George, *Multi-level Governance and the European Union*, *in* I. Bache & M. Flinders (Eds.), Multi-level Governance 107, at 113 (2004).

7 Marks, Hooghe & Blank, *supra* note 5.

8 *Id*.

9 G. Marks, R. Haesly & H. A. D. Mbaye, *What Do Subnational Offices Think They Are Doing in Brussels?*, 12 Regional and Federal Studies 1 (2002).

10 C. Jeffery, *Subnational Mobilization and European Integration: Does it Make any Difference?*, 38 JCMS 1, at 14-17 (2000).

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weak regions, Jeffery argues with regard to the German *Länder* that European MLG may nevertheless be a frustrating experience for constitutionally strong regions.[11] His argument is in line with the view that regional mobilisation may not just be due to the virtuous attempts of the European Commission to involve sub-national actors in its policies, but that it may be a bottom-up attempt by the regions to regain control over policies that have been moved to the European level,[12] and with the assumption that European integration – at least initially – entails a disempowerment of constitutionally strong regions.[13] However, Jeffery's work goes beyond this, suggesting that strong regions have come to see European integration as a threat that cannot be reigned in by participation rights and have therefore moved to a strategy of disentanglement of competences. Jeffery argues that "while regional governments set out 20 years ago with a transformative project designed to challenge the centrality of the member state in the EU, legislative regions have in the last few years come to endorse, even buttress the centrality of the member state."[14] In particular, while much of the MLG literature focuses on *implementation*, he regards legislative regions as having a distinctive interest in the preservation of "the meaning of regional *law-making* powers in the context of European integration."[15] According to Jeffery, from the mid-1990s, the German *Länder* realised that the enhanced domestic and European participation rights could not offset the transfer of competences to the European level and they embarked on a defensive strategy, supported by the Belgian and Austrian regions during the European constitutional debate. The core demands were the introduction of the 'new early warning system' for national parliaments, a clearly defined catalogue of EU competences, the restriction of the use of Arts. 94, 95 and 308[16] and the strengthening of the subsidiarity and proportionality principles with the goal of preventing further Europeanization of regional legislative competences.[17] Based on the analysis of the preferences of the German *Länder* in the European constitutional debate, Bauer concludes that "[a] sub-national government is expected to favour a more autonomy-orientated relationship with the European

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[11] *See* Jeffery, *Regional Rescue of the Nation-State; Regions and the Constitution for Europe* and *Towards a New Understanding of Multi-Level Governance in Germany?*, *supra* note 2.

[12] A. Bourne, *The Domestic Politics of Regionalism and European Integration: Introduction*, *in* A. Bourne (Ed.), The EU and Territorial Politics Within Member States: Conflict or Cooperation? 1, at 5 (2004).

[13] S. Weatherill, *The Challenge of the Regional Dimension in the European Union*, *in* S. Weatherill & U. Bernitz (Eds.), The Role of Regions and Sub-National Actors in Europe, 1 (2005).

[14] Jeffery, *Regional Rescue of the Nation-State*, *supra* note 2, at 1.

[15] *Id*.

[16] These three articles currently allow the EU to act in the absence of explicit competences where such action is required for the fulfilment of the internal market (Arts. 94 and 95 EC Treaty) or for the fulfilment of the objectives set out in the Treaties (Art. 308 EC Treaty). The regions see in them the danger of 'creeping' European competences, i.e. a transfer of competences that they cannot prevent in the absence of a formal modification of the Treaties.

[17] C. Jeffery, *Regions and the European Union: Letting them In, and Leaving them Alone*, *in* S. Weatherill & U. Bernitz (Eds.), The Role of Regions and Sub-National Actors in Europe (2005). M. Große Hüttemann & M. Knodt, *'Diplomatie mit Lokalkolorit': Die Vertretungen der deutschen Länder in Brüssel und ihre Aufgaben im EU-Entscheidungsprozess*, 7 Jahrbuch des Föderalismus 595, at 596-597 (2006).

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Union, the more its actual political room for manoeuvre is affected by further European integration."[18] The 'actual' political room for manoeuvre is determined by both the constitutional competences and the economic resources of a region. These preferences would be in stark contrast to the European Commission's vision as set out in the *White Paper on European Governance*, where one of its concluding statements is that "[I]n a multilevel system, the real challenge is establishing clear rules for how competence is *shared – not separated*; only that non-exclusive vision can secure the best interest of all the Member States and all the Union's citizens" (emphasis added).[19]

The aim of the third strategy would thus be to disentangle regional policy-making from national and European policy-making, or at least to prevent further entanglement. Legislative regions seem to want less MLG rather than more. Thus, in the face of these demands, the question is whether and to what extent the Lisbon Reform Treaty reduces regional-EU entanglement and hence MLG or strengthens MLG through further regional participation rights. In the following two sections, the existing channels of regional interest representation in the European Union and the resulting regional position in the decision-making game will be reviewed. We will then analyse the potential impact of the Lisbon Reform Treaty on this system before concluding with reflections on the implications of the Irish 'no' to the Treaty.

C. Channels of Regional Representation in the European Union

There are three main channels for regional engagement at the European level: the Committee of Regions, the regional information offices and (depending on domestic arrangements) the Council of Ministers. In addition, one could identify a number of regional networks as a means of cross-border coordination of regional positions. While some of the regional alliances are *ad hoc*, others have been institutionalised in networks such as RegLeg. However, in everyday policy-making regional participation in these networks will largely depend on and be coordinated by the regional offices in Brussels. As their role may vary widely depending on the policy sector and interests affected by EU legislation, they will not be reviewed separately here except to mention that they offer additional opportunities for collective regional lobbying.

The most *approachable* 'institutionalised' channel for sub-national authorities is the Committee of Regions (CoR).[20] Established by the Treaty of Maastricht, this advisory organ consists of representatives of the regional and local levels. Over

[18] M. W. Bauer, *The German Länder and the European Constitutional Treaty: Heading for a Differentiated Theory of Regional Elite Preferences for European Integration*, 16 Regional and Federal Studies 21, at 35 (2006).

[19] Commission White Paper of 25 July 2001, *European Governance – A White Paper*, OJ 2001 C 287/1 at 35.

[20] A. Sloat, Scotland in Europe – A Study of Multi-Level Governance 46 (2002).

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the years, the CoR has gained greater control over its own operation, obtaining its own resources and the right to establish its own rules of procedure in the Treaty of Amsterdam. The Commission and Council of Ministers are obliged to consult it on issues concerning employment, social policy, environment, transport, public health, structural funds, education and training (Art. 265 EC Treaty). It may also be consulted by the European Parliament and has the right to issue opinions of its own motion. The main merits of the CoR lie in its great symbolic value as the only supranational institution representing the sub-national level,[21] and in its capacity to provide a setting for coalition-building and the debate on sub-national issues at the European level.[22]

While Schausberger argues that the CoR has received growing recognition as a result of its constructive work during and after the European Convention,[23] most academics are sceptical about the influence of the CoR. Its diverse membership is seen as leading to a lack of cohesion. In particular, the mix of representatives of strong legislative regions, weak regions and cities reduces its usefulness as a political forum for strong regions.[24] As a result, legislative regions have occasionally demanded special treatment in the past – a tactic that undermines the credibility of the CoR.

Regional information offices are the main non-institutionalised channel of regional representation at the European level.[25] In the past, the regions of federal states have been eager to establish their own base in Brussels, and the German *Länder* in particular were among the first to do so in the 1980s.[26] In terms of structure and function, the regional offices vary widely across Member States. The functions of these offices include information gathering for the regional government at home, networking, assisting other, private actors at home (e.g. in applications for funding), active attempts at influencing policies and the general improvement of relations with other tiers of government.[27] While information gathering and networking, the 'bread-and-butter' activities of sub-national offices, are conducted by all offices, different types of regions attach varying degrees of importance to assisting private local and regional actors and, in particular, to

21 J. Loughlin, *Representing Regions in Europe: The Committee of the Regions*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 147, at 163-164 (1997).

22 P. C. Müller-Graff, *The German Länder: Involvement in EC/EU Law and Policy-Making*, *in* S. Weatherill & U. Bernitz (Eds.), The Role of Regions and Sub-National Actors in Europe 103, at 109 (2005).

23 F. Schausberger, *Der Ausschuss der Regionen im Jahr 2005 – gefragter Partner in einer kritischen Phase der EU*, 7 Jahrbuch des Föderalismus 576, at 592-594 (2006).

24 Müller-Graff, *supra* note 22, at 110. J. Nergelius, *The Committee of the Regions Today and in the Future – A Critical Overview*, *in* S. Weatherill & U. Bernitz (Eds.), The Role of Regions and Sub-National Actors in Europe 119, at 126 (2005).

25 C. Jeffery, *Conclusions: Sub-National Authorities and 'European Domestic Policy'*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 204 (1997).

26 Große Hüttemann & Knodt, *supra* note 17, at 595.

27 A. Benz & B. Eberlein, *The Europeanization of Regional Policies: Patterns of Multi-level Governance*, 6 Journal of European Public Policy 329, at 331 (1999).

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influencing policies.[28] Marks, Haesly and Mbaye find a weak negative association that suggests that offices "that emphasise political influence as a goal are *less* likely to report that finding funding opportunities is important to them, *less* likely to report that building ties with other regional or local representations is important for them, and *less* likely to report that responding to requests from people in their region is important to them."[29] Whether or not a regional office seeks political influence and how much it is willing to invest in this activity depends on the constitutional strength of the region.[30] The level of funding is important in that it translates into more staff and thus increased specialisation of officers in certain policy areas and the coverage of a broader spectrum of policy areas.[31] The work of regional offices is also designed to serve policy-shaping through domestic channels, by providing the necessary information for the effective use of existing Member State structures.[32]

The actual influence of regional offices is difficult to measure. Especially with regard to the relationship between the regional offices and the Commission – a central actor at the European level due to its agenda-setting ability – there are open questions with regard to the Commission's role and intentions. Some authors argue that the Commission champions the regional cause, contributes to regional mobilisation when looking for support for policies and "is eager for political allies to moderate state executive domination in the EU."[33] While it is true that regions can provide important grass-root information about the feasibility and implementation of policies, these assessments rely too much on the idea that regional and Commission preferences are similar. This also implies that regions are relatively powerless in cases where European policy does not coincide with regional preferences and where the Commission is going its own way.

The third possibility for regional engagement at the EU level is the involvement of regional representatives in the Council of Ministers. According to Art. 203 EC the Council of Ministers consists of one representative at the ministerial level from each Member State. It thus allows for representation at either the federal or the regional ministerial level. At first glance, this opportunity may seem to greatly empower regions, and Bullmann argued that strong regions may come to regard this channel as more important than a full-blown regional Third Chamber at the European level.[34] However, whether regional ministers are actually allowed to sit on the Council depends on domestic constitutional arrangements, with the result

[28] A. Heichlinger, A Regional Representation in Brussels: The Right Idea for Influencing EU Policy Making? 9-10 (1999).
[29] Marks, Haesly & Mbaye, *supra* note 9, at 8.
[30] *Id.*, at 15.
[31] Heichlinger, *supra* note 28, at 13.
[32] *Id.*, at 1.
[33] G. Marks & D. McAdam, *Social Movements and the Changing Structure of Political Opportunity in the European Union*, 19 West European Politics 249, at 267 (1996). *See also* I. Tömmel, *Transformation of Governance: The European Commission's Strategy for Creating a 'Europe of the Regions'*, 8 Regional and Federal Studies 52, at 72 (1998). Benz & Eberlein, *supra* note 27, at 331.
[34] U. Bullmann, *Introductory Perspectives – The Politics of the Third Level*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 3, at 16 (1997).

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that most regions do not have any access to the Council. Moreover, whichever minister sits in the Council has to be able "to commit the government of that member state" (Art. 203 EC). As only the national position may be represented and as the national vote cannot be split into regional elements, the regional representative in the Council has only a limited margin of manoeuvre. Due to the need to coordinate the national position internally before presenting it externally, participation in the Council is *de facto* an intra-state mechanism.[35]

As the opportunities for regional input at the European level are mainly advisory and rely on persuasion, the channels for influencing national positions on EU policies have to be considered. Below, the domestic provisions of Belgium and Germany will be analysed in turn, as the regions of these states are arguably the most powerful domestically and have therefore the greatest chances of influencing European policies.

In Belgium, the central coordinating role for Belgium's official position in the European Union is played by the Directorate for European Affairs (DEA) of the Federal Foreign Ministry. It is an administrative body composed of representatives of the federal, regional and community ministries and headed by a federal representative. Unlike in Germany, the Senate is not incorporated into the institutional settings of coordination.[36] In the DEA, decisions are taken by consensus, which confers an equal status on the regions, communities and the central government as neither entity can act without the consent of the others.[37] The federal level can only achieve a slight degree of primacy through the use of its monitoring and coordinating role.[38] In the absence of consensus, ministers from the different levels will discuss an issue at the Interministerial Conference for Foreign Policy. If no common position can be found, the Prime Minister and regional and community minister-presidents will meet in the Consultation Committee. However, failure to reach an agreement at the level of the DEA often leads to abstention in the Council. Yet, the vast majority of decisions are taken in the DEA and abstentions are rare.[39] The role of the DEA varies, however, across policy sectors. With regard to exclusive federated competences, decisions are often taken through non-formalized interaction between federated units and are subsequently formalized the DEA.

The involvement of federated entities in the Council of Ministers was regulated by the Cooperation Agreement Act of 8 March 1994 and then modified by the Lambermont Agreements of July 2001.[40] There are essentially four

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[35] M. Morass, *Austria: The Case of a Federal Newcomer in European Union Politics*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 76, at 84 (1997). T. Kovziridze, *Europeanization of Federal Institutional Relationships: Hierarchical and Interdependent Institutional Relationship Structures in Belgium, Germany and Austria*, 12 Regional and Federal Studies 128, at 136 (2002).

[36] Kovziridze, *supra* note 35, at 137.

[37] B. Kerremans & J. Beyers, *The Belgian Sub-National Entities in the European Union: Second or Third Level Players?*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 41, at 50 (1997).

[38] Kovziridze, *supra* note 35, at 138.

[39] *Id.*, at 137-138.

[40] Cooperation Agreement of 8 March 1994, OJ of 17 November 1994. In Belgium, most

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possible cases for representation and two exceptions: when an issue falls under the sole federal responsibility, the federal ministers sit on the Council. In case of exclusive regional competences, the regional ministers sit on the Council. When predominantly central competences are concerned, a national minister is assisted by a regional representative and lastly, for predominantly regional matters, a regional minister is assisted by a representative of the national level.[41] Equality between regions is ensured through a rotation system, where regional representatives replace each other every six months. In practice, though, there are often several regional representatives present at Council meetings to facilitate coordination.[42] The Lambermont Agreements created two exceptions to this rule. The federal minister leads negotiations on agricultural issues assisted by the Flemish and Walloon regional ministers. The Flemish government represents Belgium on fishery.

Overall, even though Belgium originally adopted a system of dual federalism, European integration has led to a greater prevalence of cooperation and joint decision-making in Belgium. The downside is that the reinforced interdependencies prevent regions from acting as fully-fledged EU level players.[43]

In Germany, the mechanisms of coordination in European matters are laid down in Art. 23 of the Basic Law (BL) and the *Law on Cooperation (LC) between the Bund and the Länder Concerning European Matters* of 12 March 1993. The coordination takes place between the federal government and the collective position of the *Länder* as expressed in the Bundesrat through a majority vote. Thus, unlike in Belgium, in Germany individual *Länder* do not enjoy equal status to that of the federal government.[44] If the European measure predominantly concerns a field of legislative and administrative power of the *Länder*, the statement of the *Bundesrat* has to be decisively taken into account ("*massgeblich zu berücksichtigen*") without compromising the federal responsibility for the entire Republic. In case of disagreement between federal government and *Bundesrat*, an arbitration procedure takes place. In the absence of a compromise, a two-thirds majority is required for the *Bundesrat* to confirm its original opinion. For concurring legislative powers, the *Bundesrat*'s statement has the same moderate weight as in the case of exclusive federal powers - it merely has to be taken into account – if the federal government has already legislated in the field or if there is a need for uniform regulation. Otherwise, the opinion of the *Bundesrat*

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comptences belong exclusively to either the regions or communities or the federal level. In order to allow for a coherent Belgian foreign policy, the regions, communities and the central government have entered into a number of cooperation agreements to lay down how these internal powers are to be exercised in the European Union and the international arena. In particular, these agreements usually specify who has the right to represent Belgium and how the national position is to be negotiated. The Belgian Constitution confers upon the agreements the status of 'special laws', which means that they can only be amended with special majorities. The Lambermont Agreements are the fifth Belgian state reform transferring also new powers to the regions.

[41] Kerremans & Beyers, *supra* note 37.

[42] Kovziridze, *supra* note 35, at 149.

[43] J. Beyers & P. Bursens, *The European Rescue of the Federal State: How Europeanisation Shapes the Belgian State*, 29 West European Politics 1057, at 1057-1059 (2006).

[44] Kovziridze, *supra* note 35 at 140.

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has to be decisively taken into account (Art. 23 BL and §5(2) LC).[45] Thus, the federal government can disregard the opinion of the *Bundesrat* in fields of federal competence, and even in fields where regional competences are concerned, the federal government has some say in the formulation of the German position.[46] However, there is also an array of non-formalized mechanisms, such as the Conference of Minister Presidents or the conferences of specialized ministers that often coordinate *Länder* positions prior to the meetings of the *Bundesrat*, and the *Bund-Länder* working groups that try to reach subject-orientated consensus.[47] In case of disagreement, solutions are sought in non-formalized settings and before the official procedure starts. Both non-formalized coordination amongst *Länder* and between the *Bund* and *Länder* strengthen the *Länder*, but in the case of conflict, the formal structures prevail.[48]

When it comes to representing the German position in the Council, the federal government is in an even stronger position. A regional minister represents Germany's position in three areas: school education, culture and broadcasting (Art. 23(6) BL). In all other areas, federal ministers will represent Germany on the Council.

Thus, Germany has developed a version of co-operative federalism for European policy formulation that takes internal competences into account. This is in line with the definition of European policies as 'European domestic policies' instead of classical foreign policies and with the demands of the *Länder* that their domestic competences be reflected in German EU policy-making.[49] However, while the *Länder* have the means of influencing the German position in areas where their competences are affected, they have to exercise these powers collectively. The input of each individual region is diluted at three stages: during the negotiations among regions, during the negotiations with the central government and then at the European level in negotiations with other Member States and European institutions. Thus, if a region wants to avoid the erosion of its impact on the final outcome, it has to enter into alliances with other actors with similar preferences to strengthen its bargaining power at each of these stages.

D. Towards a Model of Regional Engagement in EU Policy-Making: The Multi-Level Game

In his 1988 article on the logic of two-level games, Putnam describes domestic politics and international relations as "often somewhat entangled." According to

[45] *Id. See also* Müller-Graff, *supra* note 22.
[46] Kovziridze, *supra* note 35, at 141.
[47] R. Palmer, *European Integration and Intra-State Relations in Germany and the United Kingdom*, *in* A. K. Bourne (Ed.), The EU and Territorial Politics Within Member States: Conflict or Cooperation? 51, at 57 (2004). C. Jeffery, *Farewell the Third Level? The German Länder and the European Policy Process*, *in* C. Jeffery (Ed.), The Regional Dimension of the European Union – Towards a Third Level in Europe? 56, at 72 (1997).
[48] Kovziridze, *supra* note 35, at 142-143.
[49] Jeffery, *supra* note 47, at 216.

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him, dynamics in the domestic arena and dynamics in the international arena influence each other in a way that outcomes of international negotiations can only be explained by reference to both. Thus, "the politics of many international negotiations can usefully be conceived as a two-level game," with domestic groups pressuring the government at the national level, where politicians have to construct coalitions among those groups, and with "national governments seeking to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments" at the international level.[50]

In his work on international negotiations, Putnam identifies a certain number of concepts as crucial for analysing two-level games such as the role of win-win sets for ratification of an agreement and for the direction of international negotiations themselves, the risk of defection of players, the effect of package deals, the option of non-agreement, reverberation of the international game on the domestic game and *vice-versa*.[51] Below, Putnam's two-level game metaphor will be adapted to illustrate the options of regions in European decision-making. In the modelling of the European 'game' two elements have to be taken into account. First of all, decision-making in the EU is subject to a specific set of rules that differ in important ways from international negotiations as analysed by Putnam. The EU has become a complex political system that is in between an international organisation and a state.[52] Everyday EU decision-making more closely resembles decision-making in federal states than traditional international negotiations. Secondly, as the metaphor is applied to EU decision-making in general rather than used to analyse a particular instance of policy-making, the focus necessarily lies more on the rules of the game and opportunities than on specific win-sets or trade-offs. Further research is needed to determine how the various players play the game. In the short term, the model can help us understand why certain regions may come to feel disempowered by EU policy-making.

Putnam breaks his model of negotiations down into two stages: At Level 1, bargaining between the national negotiators takes place. At Level 2, discussions on the ratification of the agreement take place within each group of constituents, i.e. within each domestic setting. While it is possible that the negotiating position is agreed at Level 2 prior to the start of negotiations, and while it is likely that both Level 2 attitudes and Level 1 attitudes may evolve during the negotiations due to a mutual impact, Putnam assumes that the most important part of Level 2 negotiations – ratification – follows chronologically Level 1 negotiations.[53]

As mentioned previously, everyday decision-making in EU politics – as opposed to constitutional decision-making - follows somewhat different rules that impose different opportunities and constraints on players. In fact, when analysing the role of regions, it is useful to distinguish two types of game. Both types are two level games, involving negotiations on the domestic and European levels, but one conforms more to an intergovernmental idea of policy-making while the other comes closer to MLG.

50 Putnam, *supra* note 3, at 434.
51 *Id.*
52 N. Nugent, The Government and Politics of the European Union 512 (2003).
53 Putnam, *supra* note 3, at 435-436.

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Contrary to the idea of multi-level governance, *decision-making* in the narrow sense takes place mainly in a two-step process with regional involvement depending on domestic structures.[54] This game resembles Putnam's use of the metaphor in that there is a domestic level with negotiations between domestic actors and a supranational level with negotiations between the central governments and the supranational institutions. At the European level, the Commission formulates the policy proposal and the Council of Ministers and the European Parliament amend and adopt it (the exact modalities depending on the policy-area). As described above, certain regions may have the right to represent their Member State in the Council of Ministers, but they may only represent the state as a whole, not the region or regional position. Regions have therefore no 'hard' decision-making powers at this level. Before the Council of Ministers adopts a position, the national positions will be formulated according to the national sets of rules. Thus, regional influence at this level (Level 2), can range from virtually no involvement to co-determination. The strongest regions in this respect are the Belgian regions, followed by the German *Länder*. However, while each Belgian region could veto the national position, in the case of Germany even the majority position of the Bundesrat has only to be taken into account or taken into account to a large extent. Thus, even in the case of the relatively strong German regions, the central government acts as a gatekeeper. As there is no need to ratify European legislation, the bulk of Level 2 negotiations are thus conducted prior to Level 1 negotiations. At best, European framework legislation needs to be transposed into national law, but as a case can be brought before the ECJ for non-implementation and infringement, contrary to international negotiations, voluntary defection can be limited.[55]

Further differences between EU decision-making and international negotiations lie in the majority requirements. While international negotiations generally require unanimity, EU decision-making now mostly relies on qualified-majority voting. As a result national players can be outvoted and are less powerful than in international negotiations, where unanimity is the rule. In addition, the position of the European Parliament will often have to be taken into account. Consequently, national win-sets become less important. While Member States tend to still adopt policies by consensus as often as possible, if only one or two Member States are seen as blocking a decision, they risk being outvoted.[56] On the other hand, a government can justify adopting a more conciliatory stance than hoped for by the national parliament, regions or public opinion on the basis that this allows it to achieve at least some compromise, while it would simply be outvoted if it tried to adopt a more radical stance. Thus, EU decision-making rules seem to strengthen the government more in the face of domestic (and regional) demands than in the face of European pressure.

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[54] By 'decision-making' the process of actually taking a decision (i.e. voting, vetoing etc.) is meant. It is thus about 'hard' decision-making powers as opposed to 'soft' powers (consultation, advice, lobbying) involved in 'decision-shaping'.

[55] *Cf.* Putnam, *supra* note 3, at 438.

[56] B. De Witte, *Anticipating the Institutional Consequences of Expanded Membership of the European Union*, 23 International Political Science Review 235, at 242 (2002).

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Beyond this narrowly-defined formal game of decision-making, we can identify a partly formal and partly informal game of *decision-shaping*, i.e. influencing decisions in the broad sense. It is this game that is multi-level, with the interaction of several actors from different levels. Below, we will concentrate on regional and national governments and the EU institutions, as we are interested in the regional perspective. Of course, a variety of private actors are also promoting their interests through action on the national and European levels.

This decision-shaping game takes place in the context of the rules set by national constitutions, the European treaties and the grey areas left by them, which actors may be able to exploit as opportunities.[57] It takes place parallel to the decision-making game but relies on 'soft' powers, i.e. the capacity of an actor to persuade other players of the 'rightness' of its position or to convince them of the benefits of a particular course of action.[58] It is multi-level in the MLG sense – i.e. with interaction between the regional and European levels – with players being engaged in multiple relationships with other players. At the centre is a triangular relationship between Member States and EU institutions, Member States and their respective regions, and regions and the European institutions. From each of the corners, a variety of other relationships branch out in the form of alliance-building amongst Member States, amongst regions of the same state and/or regions of different states or alliances between regions and private actors.

At the domestic level, in addition to the above-mentioned formal mechanisms for influencing the national position, regions can of course submit their observations to the national government or officials on a less formal basis or try to increase their influence on the national position by entering into interregional alliances. In Germany, for example, this is facilitated by informal working-level meetings between national and regional civil servants and higher level Interministerial Conferences.[59]

As to the relationship between regions and European institutions, the Committee of Regions serves as a formal channel of regional consultation. Apart from this, regions can submit their observations to the Commission during consultations, invite European policy-makers to events or meetings at the regional offices in Brussels or establish regular informal contact with European officials through these offices. They can also enter into cross-national alliances and try to maximise the impact of their position through collective lobbying.

Overall, despite variations in regional competences and involvement across Member States, regions have 'hard' decision-making powers at best at the national level. This has led Jeffery to argue that "any significant difference made by sub-national engagement is likely to arise primarily from what SNAs [sub-national authorities] do in the field of European policy in the intra-state arena in their respective Member States."[60] Kerremans and Beyers agree with this assessment

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[57] For example, in the case of Germany, the right to establish regional information offices in Brussels, which was used to build up regional quasi-embassies.

[58] *Cf.* Putnam's concept of the 'restructuring' of other players' perception: Putnam, *supra* note 3, at 438.

[59] Kovziridze, *supra* note 35.

[60] Jeffery, *supra* note 25, at 205 and Jeffery, *supra* note 10.

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in the case of Belgium. They find that Belgian regions have only limited contact with other Member States, regions or supranational interest groups at the European level and point out that Belgian regions can only extend their domestic power to the European level if they act jointly.[61] However, Belgium is special in the sense that it has only three regions. The more regions have to come to an agreement – be it through voting or consensus – the less impact the individual regions will have. In addition, whatever impact a region manages to have on the collective regional position is likely to be eroded during the multiple negotiations with the national government, in the Council of Ministers, between the national government and the Commission and in the European Parliament. Finally, Jeffery himself admits in one of his articles the possibility that diverging regional interests might cancel each other out in collective policy-making and thus increase the importance of individual strategies.[62] Thus, if an individual region wants to make sure that its position is heard at the European level as well as at the national level, it has to use the 'soft' European channels in addition to national channels.

To conclude, when competences are transferred to the European level, legislative regions see their formal and substantial policy-making powers being replaced by an array of mostly advisory and often collectively exercised powers. In addition, they can use a number of informal and hence intrinsically advisory channels. As a result, from a policy-making perspective, it is in a region's interest to keep its own and European competences disentangled as far as possible. However, to date, a variety of regional competences have already been Europeanised. In these areas, regions will have to use a wide variety of channels if they want to make a difference, as none of the channels guarantees them an impact on European decision-making.

The Lisbon Reform Treaty offered regions an opportunity to push for change. In the following section, we will analyse whether the Lisbon Reform Treaty offers regions better participation rights in EU policy-making thereby strengthening the multi-level character of the European Union and/or if it provides a clearer delimitation of competences between the regional, national and European levels that would prevent European encroachment upon regional competences.

E. EU Policy-Making Post Lisbon: Continuity or Change?

The European constitutional debate saw the emergence of an array of regional demands, some aiming at a clearer separation of competences, others at enhanced participation rights. As this paper is less concerned with the process of negotiating the Constitutional Treaty and the Lisbon Reform Treaty than with the final outcome of the debate, we will only briefly review the key demands presented by the Committee of Regions and legislative regions – in particular the German

[61] Kerremans & Beyers, *supra* note 37, at 53.

[62] C. Jeffery, *Les Länder allemands et l'Europe: intérêts, stratégies et influence dans les politiques communautaires*, *in* E. Négrier & B. Jouve (Eds.), Que gouvernent les régions d'Europe? 55, at 59 (1998).

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regions – and then compare this with the actual changes introduced in the Lisbon Reform Treaty and their expected impact.[63]

The demands of the Committee of Regions are – unsurprisingly – about the improvement of the status and role of this body. The most ambitious demands included a right of veto over issues on which it has currently to be consulted and an extension of the areas of mandatory consultation as well as the right to bring cases before the European Court of Justice to review the legality of a European act.[64] The right to review the legality of legally binding acts adopted by the European institutions "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers" was hitherto reserved to the Member States, the Commission, the Council and the European Parliament (Art. 230 EC Treaty). In addition, the European Central Bank and the Court of Auditors could invoke it to protect their prerogatives. All other natural or legal persons could only bring an action before the ECJ to review the legality of an act if that act directly and individually affected them (Art. 230 EC Treaty). In the absence of this right for either the Committee of Regions or the regions themselves, it was difficult for the CoR to defend its right to be consulted or for regional actors to challenge an act as breaching the principles of subsidiarity and proportionality. In addition, the CoR demanded a special role in overseeing the principle of subsidiarity and the right to ask written and oral questions of the Commission.[65] While the fulfilment of the first of these demands would result in the emergence of a genuine 'third chamber' at the European level, the three following demands would give the CoR a stronger standing amongst the supranational institutions and bodies. More modest demands included, for example, a clearer definition of the subsidiarity principle and the obligation on the part of the supranational institutions to give an explicit reason if the opinion of the CoR is ignored.[66]

In the case of the German *Länder*, Bauer identifies 16 key demands.[67] Some of these are about autonomy, such as the respect for the principle of local and regional self-government, the clearer definition of the subsidiarity and proportionality principles and the abolition or restriction of use of Articles 94, 95 and 308 EC Treaty.[68] By contrast, the demands for a stronger CoR, the introduction of an early warning system for non-respect of subsidiarity involving national parliaments (i.e. also the *Bundesrat*) and the clarification of regional representation rights in the Council of Ministers are about the defence or extension of participatory powers.

[63] The German Länder are chosen as an example of the scope of regional demands, as – thanks to Bauer – a comprehensive summary of these regions' demands is available at the time of writing (*see* Bauer, *supra* note18).

[64] Committee of Regions Resolution of 21 November 2002, *In preparation for the Copenhagen European Council*, OJ 2003 C 73/12. Committee of Regions Opinion of 21 November 2002, *More democracy, transparency and efficiency in the European Union*, OJ 2003 C 73/17.

[65] *Id*.

[66] *See supra* note 64 and Committee of Regions Opinion of 9 October 2003, *CoR proposals for the Intergovernmental Conference*, OJ 2004 C 23/01. Committee of Regions Opinion of 17 November 2004, *On the Treaty establishing a Constitution for Europe*, OJ 2005 C 71/01.

[67] Bauer, *supra* note 18, at 25-28.

[68] *See supra* note 16 on Arts. 94, 95 and 308 EC Treaty.

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Finally, a certain number of demands would result neither in disentanglement nor in greater participation but would prevent further entanglement by maintaining the *status quo* of European competencies. These include the exclusion of the Open Method of Coordination from the Treaty, the rejection of '*passerelle*' clauses that would allow the Council of Ministers to agree unanimously on the use of qualified majority voting in certain areas and opposing further European competences in the areas of tourism and services of general interest.[69] Several of these demands were shared by other legislative regions and defended collectively through the Committee of Regions or the Conference of Regional Legislative Assemblies in Europe (CALRE).[70] CALRE represented all of the German, Belgian, Austrian, Italian and Spanish regions and also Scotland, Northern Ireland and Wales. It demanded a special status for constitutional regions in the EU treaties, a clearer division of legislative powers between the European, national and regional level and a right of appeal for the Committee of Regions.[71]

In terms of outcomes in the Lisbon Reform Treaty, the Committee of Regions has obtained the right to bring action before the European Court of Justice to have the legality of an act reviewed, if it is deemed to be in breach of the principle on subsidiarity and if it falls under an area where the consultation of the CoR is mandatory. In addition, the principles of subsidiarity and proportionality have been reformulated, the respect for regional and local self-government has been included in the Treaty and the definition of the division of competences between the European Union and the Member States has been reworded (Arts. 3-5 of the new TEU; Arts. 1-6 of the new TFEU). The *Protocol on the application of the principles of subsidiarity and proportionality* explicitly requires that the impact of measures on the regional level be addressed in impact assessments:

> This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by member states, including, where necessary, the regional legislation. [...] Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved. (Art. 5)

In addition, both the *Protocol on the application of the principles of subsidiarity and proportionality* and the *Protocol on the role of national parliaments in the European Union* give a greater role to national parliaments. In the case of bicameral systems, this may include a chamber representing regional governments, such as the German *Bundesrat*. Under the Lisbon Reform Treaty, national legislatures would obtain all documents of legislative planning and draft legislation. In addition, the *Protocol on the application of the principles of subsidiarity and proportionality* introduces an 'early warning system' for breaches of the principle of subsidiarity. After draft legislation has been made available to national parliaments, eight weeks have to elapse before the draft

69 Bauer, *supra* note 18, at 25-28.

70 P. Lynch, *Regions and the Convention on the Future of Europe: A Dialogue with the Deaf?*, 11 European Urban and Regional Studies 170 (2004).

71 *Id.*, at 173.

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can be put on the Council's provisional agenda for the adoption of a position. During this time, each national parliament or chamber of a national parliament can submit a reasoned opinion to the Presidents of the European Parliament, the Commission and the Council of Ministers if it finds the draft to be in breach of the principle of subsidiarity. According to Art. 7 of the Protocol, each national legislature receives two votes or, in the case of bicameral parliaments, each chamber one vote. If reasoned opinions from national parliaments amounting to at least one third of the total number of votes find the legislation in breach of the principle of subsidiarity, the draft must be reviewed (at least a quarter of votes in the case of issues in the area of freedom, security and justice). The institution or group of Member States from which the draft originated may then decide to confirm, amend or withdraw the draft.

However, there have also been changes that went against the preferences of the regions. Thus, the definition of the competences of the European Union and the legal instruments includes the Open Method of Coordination (Arts. 1-6 TFEU). More importantly, Art. 31 of the new TEU allows the Council to decide with unanimity to move to qualified majority voting in all areas that do not have military of defence implication. Finally, there has been a minor extension of the EU's competences in the areas of health and tourism (Titles XIV and XXII TFEU).

Overall, there have thus been amendments both to the advantage and to the disadvantage of the regions. A closer look reveals that these changes are unlikely to have a drastic impact on the position of regions in EU policy-making in the short-term.

With regard to the opportunities for regional involvement in European policy-making – and hence the potential strengthening of multi-level interaction in the European Union – the most promising change is the CoR's right to challenge the legality of European acts before the ECJ. Through the right of appeal of the Committee of Regions, regions and local authorities can now formally challenge European legislation through collective action. As such an action may lead to the annulment of EU legislation, regions have now, for the first time, gained 'hard' powers at the European level. In addition, they can use the threat of an appeal as a means to force the Commission and Council to take subsidiarity seriously and to prevent them from defining the principle too narrowly. If the Committee of Regions uses this new power (or the threat of it) effectively, it may raise its prestige in the eyes of the Commission and Council and give weight to its opinions. Finally, it could try to use the threat of an appeal as a means to increase its bargaining power on points of substance. However, the effectiveness of this tool is limited in scope by the fact that it can only be used for the principle of subsidiarity and only in those areas where the CoR has to be consulted. Its credibility will also greatly depend on how broadly or narrowly the ECJ is willing to define subsidiarity.[72]

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[72] At first sight, one might compare the CoR's right to appeal to the ECJ with important role that litigation has played in the development of the powers of the European Parliament (EP) (*Cf.* Judgment of 29 October 1980 in Judgment of 22 May 1990 in *Case 138/79*, *Roquette Frères SA* v. *Council* [1980] ECR 3333 and *Case 70/88*, *Parliament v. Council, 'Chernobyl'* [1990] ECR 4529 on the establishment of the EP's right to be consulted prior to a Council Decision and on its right to

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As to the second improvement in regional participation, while Cooper sees the early warning system as potentially leading to a "virtual third chamber" of national legislatures,[73] the impact on regional influence in EU policy-making is likely to be very limited. Only those few regional governments that are represented in a national parliament can make use of this system. This also increases the risk that specifically regional concerns will be in a minority within the procedure itself. In addition, it is a purely advisory system. Even if enough national parliaments submit reasoned opinions to reach a simple majority of total votes allocated, the draft will only be discarded if its authors agree to withdraw it or if 55 percent of Council members or a majority of votes cast in the European Parliament decide that it is not in line with the principle of subsidiarity. Thus, the national parliaments have obtained at best an 'advisory veto' concerning only subsidiarity, not proportionality. Furthermore, there is a risk that the mechanism will be inefficient if some national parliaments decide not to invest time and resources into the procedure, as this would reduce the chances of the remaining parliaments to succeed with a challenge.[74] On the positive side, while the parliaments can only challenge a draft for breaching the principle of subsidiarity, legislative regions could use subsidiarity as a pretext to voice concerns over the substance of the text. In the long term, the procedure may also have a socialisation effect through a regular dialogue and debate between the Commission and the national parliaments on the 'proper' scope of European legislation.[75]

One of the potentially negative changes with regard to regional participation in EU policy-making is the possibility to move to qualified-majority voting without a formal renegotiation of the Treaty. While a move to qualified-majority voting would have no effect on regional participation at the European level, it would have an indirect effect on regional participation in domestic European policy-making. As mentioned above, central governments can use the threat of being outvoted in the Council as a means to pressure other domestic actors into accepting a more

bring actions before the ECJ). After the Court confirmed its right to be consulted prior to a Council Decision, the EP used its right to be consulted as a means to delay decision-making when it wanted to exert pressure on the Council to incorporate some of its demands into the final outcome. The right to appeal allowed it to bring its case before the ECJ when it felt that a decision had been taken on a legal basis that allowed for less participation than a potential alternative legal basis (M. McCown, *The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies*, 10 JEPP 974, at 977 (2003)). It is, however, questionable whether the CoR will be able to create the same dynamic of empowerment. The European Parliament was trying to strengthen the principle of representative democracy when the political systems of all Member States rested on representative democracy. The CoR has the disadvantage of demanding more powers when the powers that regions hold domestically vary substantially between Member States. The more centralized states are likely to oppose any move beyond consultative powers, as such a development might lead to a situation where the European powers of their regions and local authorities would exceed their domestic powers. Such a situation might in turn fuel domestic pressures for decentralization.

[73] I. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 Journal of Common Market Studies 281, at 283 (2006).

[74] T. Raunio, *Much Ado About Nothing? National Legislatures in the EU Constitutional Treaty*, 9 European Integration Online Papers, at 6 (2005).

[75] *Id*., at 7. Cooper, *supra* note 73, at 282.

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compromising stance. The scope of the effect will, of course, depend on whether moves to qualified-majority voting take place and on the number of policy areas concerned.

Overall, regions have gained a minor increase in participation rights, with the precise impact of the changes depending on the interpretations of the Court of Justice. As a result, in those areas where competences have been moved to the European level, the multi-level character of the European Union has been strengthened. In particular, drawing on the adaptation of Putnam's model of two-level games to the European Union, regions have now gained 'hard' decision-making rights in EU policy-making. As a result, even the narrow definition of the process of 'policy-making' concentrating on 'hard' powers now includes a small element of multi-level governance. Depending on how effectively the right to appeal is used, it may also strengthen the regions' soft 'policy-shaping' powers in the medium term by increasing the importance of the CoR and its opinions in the eyes of the other actors. In addition, the early warning system will provide some regions with a new channel for policy-shaping through persuasion. Overall, the regions' ability to shape the final outcome of the decision-making procedure is nonetheless likely to remain small.

The changes introduced in the Lisbon Reform Treaty with regard to the German regions' defensive aim to achieve a clearer separation of powers, to prevent a further transfer of competences to the European level and to roll back some of its existing powers are even more balanced and moderate. Most of the accepted regional demands were 'soft' demands that Bauer describes as "vague legal self-commitments" to limit the scope of EU legislation in the future.[76] Thus, the impact of the rewording of the principles of subsidiarity and proportionality and the reference to the respect for regional and local self-government will depend on the willingness of the Commission, the Council and the European Parliament to apply these principles, especially since the Committee of Regions can only invoke the principle of subsidiarity before the ECJ. It is possible, however, that the stricter definition of the principles of subsidiarity and proportionality in combination with the commitment to respect regional and local self-government, the CoR's right to appeal to the ECJ and the early warning system may lead to a continuous and intensive dialogue between regional and European actors. In the medium term, such a dialogue might induce the European institutions to voluntarily limit the scope of EU legislation.

Furthermore, a new definition of the allocation of competences between the Member States and the European Union has been inserted into the Lisbon Reform Treaty (Arts. 1-6 TFEU). But at the same time, this definition allows recourse to the Open Method of Coordination in several areas (Art. 5 TFEU). As a result, European coordination can take place even in areas that are in principle a national prerogative. In addition, it is questionable whether this definition of European competences will prevent a further creeping transfer of competences to the European level, as those articles that have hitherto allowed for such a transfer of competences (Arts. 94, 95 and 308 EC Treaty) have been retained in the Lisbon

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76 Bauer, *supra* note 18, at 25.

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Reform Treaty (now Arts. 114, 115 and 352 TFEU). Finally, as mentioned above there have been some minor transfers of competences in the areas of tourism and health, where strong legislative regions tend to have legislative powers in the domestic arena. Overall, the Lisbon Reform Treaty seems to result in a limited transfer of competences to the European level and it leaves open the possibility for future 'creeping' transfers. The continued existence of the Open Method of Coordination as well as Arts 114, 115 and 352 still blurs the division of competences between the Member States and the European level. The strong legislative regions have thus failed to disentangle regional decision-making and competences from European decision-making and competences.

F. Conclusion and Outlook

Under the current regime, European decision-making consists of two different types of two-level games. On the one hand, a focus on 'hard' decision-making powers shows a state-centric, two-level game in which national governments can still act as gate-keepers, even in the most federalised Member States. On the other hand, a focus on 'soft' powers (i.e. advisory powers and lobbying) reveals multi-level interaction between regions, central governments and European institutions. However, for legislative regions, the lack of 'hard' powers in EU policy-making, especially at the European level, may result in disempowerment when traditionally regional powers are transferred to the European level. As a result, these regions pursue the double aim of improving their participation rights in EU policy-making and of obtaining a clearer delimitation of competences between the Member State and the European levels. A review of the Lisbon Reform Treaty has shown, however, that the defensive strategy of these regions has failed. The increased protection of regional competences through the improved subsidiarity provisions is offset by minor losses through the transfer of new competences and the continued existence of those articles that have so far allowed a creeping extension of EU competences.

While the defensive regional strategy has failed, the regions have gained some new participation rights. In the case of the early warning system they are limited to certain legislative regions and are still advisory. By contrast, the Committee of Region's right to challenge legislative acts before the European Court of Justice finally allows regions to collectively exercise 'hard' influence at the European level. Thus, even the first, narrow definition of European 'policy-making' focusing on 'hard' powers now includes a small element of multi-level governance. The full impact of the right to appeal will, however, only become apparent in the medium and long term, as it depends both on the use the Committee makes of its right and ECJ's definition of the principle of subsidiarity.

The overall impact of the Lisbon Reform Treaty on regional involvement in EU policy-making consists thus of a small increase in the participation rights of the regions. The rejection of the Lisbon Reform Treaty in the Irish referendum raises the question of whether these changes would have to be abandoned if the ratification process failed. In fact, as many of the changes that increase regional

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influence or protect regional competences either result in advisory powers or depend to a large extent on the goodwill and self-commitment of the European institutions for their success, most could be adopted on an informal basis. Thus, the Commission could incorporate the new definitions of subsidiarity and proportionality, as well as the requirements for the impact assessment of draft legislation in its own guiding principles of good governance. Even the early warning system can be put in place if the Commission is willing to regularly consult the national parliaments and take their opinions into account.[77] As it is difficult to take back concessions that have already been made in principle, it is likely that the early warning system would find its way into future Treaties should the Lisbon Reform Treaty fail. The only regional gain that would be hard to adopt in the absence of ratification is the right of the Committee of Regions to appeal to the European Court of Justice. Unfortunately, this is indeed the greatest change with regard to the involvement of regions in EU policy-making. However, as in the case of the early warning system, the regions should be able to defend this concession in the next round of Treaty negotiations.

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[77] Cooper, *supra* note 73, at 283.