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**Above and Below the Surface: Two Models of Subnational Autonomies
in EU Law**

Acknowledgements

Writing a doctoral thesis is often presented as a solitary enterprise. You read on your own, think on your own, and write on your own. While parts of that are certainly true, my experience was different in so many ways. Doing a doctorate allowed me to meet the most wonderful people in the most wonderful places, and I am deeply grateful for that.

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Abstract

This thesis examines the relation between subnational autonomies, that is to say regional and local authorities and the norms they create, and European Union law. The existence of local and regional autonomies within the various Member States of the EU is a factual truth. We know that they exist and co-exist with other levels of public authority, themselves generating norms. Yet, on its surface European Union law does not devise any substantive understanding of such autonomies. This stands in stark contrast to the relation between the Member States and the EU, which is governed by a complex catalogue of Treaty rules. As a consequence of European integration, however, subnational autonomies and EU law do interact, so that the latter cannot simply ignore the existence of the former.

This thesis sets out to determine the contours of their mutual relation through an analysis of EU procedural and substantive law. It uncovers that the relation between subnational autonomies and EU law is multifarious and diverges depending on whether we look at the surface of EU law, that is to say the Treaties, or whether we look below its surface, at the Court of Justice's rich case law or soft law instruments of the Commission. I map this conclusion through a modelling approach, relying on what I term the 'Insider Model' and the 'Outsider Model' respectively. These models underline that, in some areas of EU law, SNAs are seen to be outsiders to the project of European integration whereas other areas recognise SNAs and especially their norms to be the insiders of that project. The coexistence of both models forces us intellectually to rearrange things. It challenges our

‘constitutional imagination’. The key to understanding the coexistence of both models can be found in the evolution of EU law itself. While the Outsider Model remains attached to the public international law origins of the EU Treaties, the Insider Model captures the reality that not only States and citizens, but also SNAs, are integrated into the EU legal order.

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Chapter One

Prelude: Reconsidering *Omega*

Omega is one of those cases known to any student of EU law.¹ When the Court of Justice of the European Union (hereafter referred to as ‘the Court’ or ‘the CJEU’) decided in 2004 that the freedom to provide services, a cardinal principle of market integration, could be restricted by a national measure that aims at the protection of public policy and human dignity, scholarly ink was flowing eagerly.² Different authors have explored the case from different perspectives. Some were concerned with its implications for the fundamental economic freedoms, others with the classification of human dignity as a general principle of EU law, and yet others were interested in *Omega*’s consequences for the status of national constitutional identities under EU law.³ In light of such extensive commentary, an additional analysis of the judgment, over a decade after it was decided, might appear superfluous. The title of this introductory chapter, as well as its existence itself, accordingly merit some explanatory remarks.

¹ Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR-09609.

² As the CJEU explained, the order prohibiting Omega from operating its laserdrome affected both the freedom to provide services and the free movement of goods. It is settled case law that in such scenarios the measure will be examined in relation to just one of the fundamental freedoms if one of them is entirely secondary in relation to the other. In *Omega*, the freedom to provide services prevailed over the free movement of goods (paras 24-28 of the judgment).

³ For an overview of the literature see Thomas Ackermann, ‘Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of the Court of Justice (First Chamber) of 14 October 2004, nyr’ (2005) 42 Common Market Law Review 1107, Alberto Alemanno, ‘À la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts « Schmidberger » et « Omega »’ (2004) Revue du Droit de l’Union Européenne, Jürgen Bröhmer, ‘Anmerkung zum Urteil des EuGH vom 14.10.2004 in der Rechtssache C-36/02, Omega Spielhallen und Automatenaufstellungs-GmbH’ (2004) Zeitschrift für Europäisches Wirtschaftsrecht 755, H. Kranenborg M. Bulterman, ‘What if rules on free movement and human rights collide? About laser games and human dignity: the Omega case’ (2006) 31 European Law Review 93.

I will rely on *Omega* to point towards misconceptions and misunderstandings concerning the status of the Member States' regional and local authorities (also referred to as 'subnational authorities' or 'SNAs'⁴); and the norms⁵ they create in EU law. *Omega* illustrates that our understanding of EU law is shaped fundamentally by our 'constitutional imagination' thereof. This is a term to which I will continuously return so I should introduce it at this stage. Subnational, and maybe even more so local, autonomies challenge the manner in which we imagine EU law. In using the terminology of 'imagination', I refer to structural assumptions about EU law, which frame our understanding thereof.⁶ A central collective assumption about EU law is its bi-centric nature, according to which only States and the EU are constitutional actors. Local norms, and the fact that these norms influence regulation at other levels, including the supranational, do not sit easily with this image. This tension will be examined throughout this thesis.

We understand supranational law to be mostly about the interaction between Member State and EU norms. Naturally, this is the 'lens' that judges, lawyers, and scholars alike look through to understand conflicts between EU-level norms and norms originating within a Member State. Sometimes, however, the effort to press the facts of a given case into the moulds of familiar patterns makes us overlook the details of a given

⁴ I rely on the terminology of 'subnational' authority to refer to any level of public authority existing within the Member State, which is not the State itself. This encompasses local and regional authorities. This definition is adopted for the sake of simplicity and does of course not reflect the manifold decentralization structures that exist within the various Member States. This variety of domestic arrangements is engaged with further in the subsequent chapter.

⁵ Public authorities, including those at local and regional level, adopt a number of different legally binding instruments. For the sake of simplicity I will refer to all of these generically as 'norms' or 'regulation'.

⁶ See also Lorraine Weinrib, 'Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed.) *The Migration of Constitutional Ideas* (2006) 110 ('Constitutional conceptions organize our understanding of our particular domestic arrangements').

case. Grasping the point that not merely Member States and the EU but also subnational authorities can be generators of norms allows us to see *Omega*, but also the relation between subnational and supranational regulation, in a new light. This is so because the ban on lasergames at issue in *Omega* was not introduced by a Member State but a municipality. The consequences and implications of this fact are subject to analysis in this prelude.

It is well known that SNAs are: (a) creators of norms that affect their own territory; and (b) receivers and implementers of national and supranational norms. *Omega*, however, reveals that in addition SNAs generate norms, the impact of which does not remain limited to the subnational territory. Rather, due to EU law's polycentric structure, a process of porosity (which relates to the substance of norms) occurs through which subnational norms interact with and shape EU norms. This portrays EU law as polycentric and porous in character. Both concepts are introduced in detail in the subsequent chapter. Suffice it to note at this stage that *polycentricity* captures the coexistence of many levels of public authority within the European legal space while *porosity* denotes that these levels are permeable so that ideas and norms leak from one level to another, creating a dynamic process of cross-fertilization. My overview of *Omega* is structured as follows. The first section recalls the background of the case and draws attention to its local dimension. The second section subsequently ponders the consequences of *Omega*'s subnational dimension, illustrating that the acknowledgement thereof may alter our understanding of the judgment.

I. The Omega Case

Omega originated in a reference for preliminary ruling from the German Federal Administrative Court. Omega, a German company, operated a laserdrome in the city of Bonn, which is located in the Land North Rhine Westphalia. Laserdromes are installations in which ‘laser sport’ takes place, an activity where players use targeting devices to hit sensory tags fixed on the installations but also the jackets of other players. Members of the local population demonstrated in opposition to the Laserdrome, and as a consequence Bonn’s mayor⁷ ordered the company to provide a precise description of its activities.⁸ The municipality warned Omega that it would issue a prohibition should the installation operate games that ‘play at killing’ people. The operator stated that the game only involved hitting fixed sensory tags installed in the corridors. After the municipality discovered the untruthfulness of this statement, it forbade the operation of the game that in fact involved hitting sensory tags on individuals’ jackets. The city issued this prohibition on the basis of legislation of the Land North Rhine Westphalia, which entrusted localities with averting risks to public order within their territory.⁹ The local prohibition provided that lasergames constitute a danger to public order as they simulate homicide and trivialise violence and as such were ‘contrary to fundamental values prevailing in public opinion.’¹⁰

⁷ Referred to in the Judgment at times as the ‘police authority’.

⁸ Para 4 of the Judgment (‘Even before the public opening of the ‘laserdrome’, a part of the population manifested its opposition to the project’) see also Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR-09609, para 10 (‘protests were directed at the project by members of the public’).

⁹ Paragraph 14(1) of the *Ordnungsbehördengesetz Nordrhein-Westfalen*. For a commentary see Klaus Schönenbroicher: *Ordnungsbehördengesetz Nordrhein-Westfalen. Kommentar*. (Verlag Reckinger, Siegburg 2011).

¹⁰ Paras 6-7 of the Judgment.

An important caveat is in order at this stage. The description of the facts underlying *Omega* might create the impression that Bonn's exercise of its police power lacked any independent normative assessment.¹¹ This would echo the understanding of localities as administrative bodies that implement higher norms but which do not themselves determine the desirability of the introduction of certain regulation. However, the impression that in this case Bonn was simply following higher orders would be mistaken. In order to understand *Omega*, it is critical to realise that at the time there was no consensus in Germany regarding the regulation of lasergames. While this recreational activity was not widespread at the time, there was no federal or Land legislation outlawing the practice. The Federal Ministry of Justice had even announced that a federal law prohibiting lasergames was considered undesirable.¹² Further, 'paintball', a game that involves shooting bullets made of paint at individuals, was more widely operated in Germany at the time the facts occurred and had not been outlawed. A number of cities had however decided to ban lasergames. Local officials in Munich, for instance, considered that laserdromes constituted a grave danger for public order, as there allegedly was only a minimal leap from lasergames to 'real killing in Yugoslavia'.¹³ The judiciary was equally divided on the issue. A number of courts had confirmed that localities could ban lasergames¹⁴ whereas others reached the opposite conclusion.¹⁵ Still others adopted a

¹¹ This impression is reinforced by the terminology employed by the Court, which referred to Bonn as 'the Bonn police authority', see for instance para 18 of the judgment.

¹² Der Spiegel 13/1994 'Ewiger Streit' (1994), 93-95, available online: <http://www.spiegel.de/spiegel/print/d-13686882.html>.

¹³ Ibid.

¹⁴ See for instance VG Neustadt a. d. W., Beschluss vom 12.04.1994, Az.: 7L1161/94, Gew Arch 1994, 236; OVG Rheinland-Pfalz, Beschluss vom 21.06.1994, Az.: 11 B 11428/94, NVwZ-RR 1995, 30; OVG NRW Beschluss vom 28.06.1995, Az.: 5 B 3187/94, Gew Arch 1995, 470; OVG NRW, Beschluss vom 17.12.1999, Az.: 5 A 4915/98, NVwZ 2000, 1069.

¹⁵ See for instance, Bay VGH, Beschluss vom 04.07.1994, Az.: 22 CS 94.1528 NVwZ-RR 1995, 32 (1994), VG Köln, Beschluss vom 18.11.1994, Az.: 20 L 1955/94, Gew Arch 1995, 70 (71).

more nuanced position in holding that access to lasergames could be outlawed for minors, but not adults.¹⁶ It is worth noting that; beyond the German borders, lasergames were operated in many Member States of the EU.¹⁷ In Germany, perceptions regarding the desirability of lasergame bans were clearly fragmented. In proceeding to ban Omega's commercial activity, Bonn did not simply follow federal or regional legislative orders but autonomously evaluated the desirability of such a ban. This is no small detail – in fact, as will be seen below, both the fragmentation of regulatory approaches to lasergames and the local character of the ban have an impact on the understanding and resolution of the legal questions *Omega* presented.¹⁸

Omega appealed Bonn's order before the domestic courts and the dispute ultimately arrived at the Federal Administrative Court. As a result of the local order, a British provider could no longer deliver lasergame equipment to Omega, which put forward that the local order infringed the freedom to provide services under EU law.¹⁹ Raising this question in the context of a reference for preliminary ruling, the domestic court drew the CJEU's attention to the fact that the respect for human dignity constitutes a cardinal constitutional principle in Germany, which may be infringed if a behaviour is encouraged that denies the 'fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the

¹⁶ VG München, Beschluss vom 18.04.1994.

¹⁷ Para 14 of the Opinion.

¹⁸ The Advocate General indirectly recognized Bonn's regulatory function in referring to it on occasion as 'the regulatory authority'. On this see inter alia para 12 of the Opinion. At the same time, however, the Advocate General also referred to Bonn as an 'administrative authority' (para 15), 'the police authority' (para 22) or the 'public order authority' (para 39).

¹⁹ Article 56 TFEU.

purposes of a game.²⁰ The referring court considered that, in Germany, the respect for human dignity was so important that it could restrict economic freedoms under EU law. While the CJEU had already recognised that fundamental rights can restrict fundamental freedoms, it was unclear whether there needed to be agreement between the Member States on the importance and status of the fundamental right.²¹ Central to *Omega* was indeed the question whether, in order for a ground to be justified as a derogation under EU law, it must reflect a legal conception common to all Member States.²²

The formulation of the order for reference is of particular interest to this analysis. The Federal Administrative Court was unequivocal that, as a matter of domestic law, the protection of human dignity could justify Bonn's decision. This reflects the domestic court's desired outcome – that lasergames be banned but not however the state of the law in 2004.²³ The CJEU reformulated the question for preliminary reference as follows: 'the referring court asks, first, whether the prohibition of an economic activity for reasons arising from the *protection of fundamental values laid down by the national constitution*, such as, in this case, human dignity, is compatible with [EU] law'.²⁴ In light of the reference for preliminary ruling as well as the CJEU's reformulation thereof one could be tempted to think that the CJEU was simply not aware of the subnational dimension inherent in *Omega*. That would, however, be an over-hasty conclusion, as it seems that

²⁰ Para 12 of the Judgment.

²¹ Case C-112/00 Eugen *Schmidberger v. Austria* [2003] ECR I-5659. For other instances where the CJEU balances economic freedoms with fundamental rights, see: Case C-341/05 *Laval un Partneri Svenska byggnadsarbetareförbundet* [2007] ECR I-11767; and Case C-438/05 *International Transport Workers' Federation v Viking*, [2007]. For a scholarly comment, see Sybe de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 *Utrecht Law Review* 169.

²² Para 20 of the Opinion.

²³ The referring court subsequently decided the case accordingly.

²⁴ Para 23 of the Judgment (my emphasis).

the CJEU in fact had knowledge of the fact that there was no agreement in Germany as to how lasergames should be approached.²⁵ It had indeed been brought to the Court's attention that in domestic proceedings Omega had argued that the principle of equality before the law had been infringed as it had been 'put at a disadvantage compared to other laserdrome operators in Germany.'²⁶ Nonetheless, the CJEU's ruling does not engage with the regulatory fragmentation that was prevailing in Germany. Had the Court taken such fragmentation into account, it will be seen, some of the legal issues central to the case would have appeared in a different light.

In its decision, the CJEU confirmed that the local measure negatively affected the freedom to provide services.²⁷ This brought the matter within the scope of EU law. We must wonder whether the taking into account of *Omega's* subnational dimension would already have challenged this very conclusion. It is indeed not obvious that providers of services from other Member States were at a greater disadvantage than those established in Germany. The Court refrained from determining the discriminatory nature of this ban, not engaging with the cross-border element.²⁸ While a contrary approach might have resulted in shielding subnational measures to a greater extent from the application of EU law than national measures, the Court's reasoning hints at the fact that it often simply assimilates subnational and national norms.²⁹ The Court accordingly swiftly moved to the justification stage of its analysis. In examining possible justifications, it engaged in a

²⁵ This conclusion is not obvious from the case itself. I take this information from private correspondence with Omega's lawyer (on file with the author).

²⁶ Para 14 of the Opinion (acknowledging that Omega 'is claiming that the principle of equality before the law has been infringed by the fact that it has been put at a disadvantage compared to other laserdrome operators in Germany as well as operators of other games such as 'Paintball' or 'Gotcha').

²⁷ Paras 25 and 33 of the Opinion.

²⁸ Paragraph 25 of the Judgment.

²⁹ This will be observed and examined throughout this thesis.

confusing blending of principles. It examined the measure from the point of view of: the public order exemption in *Van Duyn*,³⁰ the limitation of fundamental freedoms by a fundamental right as seen in *Schmidberger*,³¹ and arguably also the protection of Germany's constitutional identity. The CJEU recalled that:

the competent authorities took the view that the activity concerned by the prohibition was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity.³²

Pursuant to that reasoning, *public order* had been infringed because, in accordance with *public opinion*, lasergames infringed human dignity, understood to be a fundamental value enshrined in the *national constitution*. This reasoning blends different considerations operating at different levels into a whole. The public opinion was that of a subset of the Bonn population, whereas the mayor of Bonn made a public policy assessment on the basis of a regional (Land) law that empowered it to do so. As the Court noted the grounds relied on by Bonn 'expressly mention the fact that the activity concerned constitutes a danger to public policy.'³³ It noted further that the notion of a danger to public policy also appears in Paragraph 14(1) of the North Rhine Westphalia law that empowered Bonn to issue the order.³⁴ The Court furthermore acknowledged that Article 52 TFEU allows for restrictions of the free movement of services on the basis of public policy, and recalled that this justification must be interpreted strictly and may solely be relied on 'if there is a genuine and sufficiently serious threat to a fundamental

³⁰ Case C-41/71 *Van Duyn v. Home Office* [1974] ECR 1337.

³¹ See n 20 *supra*.

³² Para 32 of the Judgment.

³³ Para 28 of the Judgment.

³⁴ *Ibid*.

interest of society.’³⁵ Moreover the specific circumstances which may justify recourse to public policy ‘may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.’³⁶

Omega is thus remembered for specifying that a ground does not need to reflect a legal conception common to all Member States for it to be acknowledged as justifying derogation under EU law.³⁷ There is a tension in the CJEU’s reasoning: on the one hand, it recognises that variation may solely exist between ‘countries’ – yet it also recognises that as a result the ‘competent national authorities’ are allowed a wide margin of discretion. The CJEU concluded its analysis by stating that ‘the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.’³⁸ This was so because it concerned merely one variant of lasergames, namely those that involve shooting individuals, and because, according to the referring court, the prohibition ‘corresponds to the level of protection of human dignity which the national constitution seeks to guarantee’.³⁹ Bonn’s order was accordingly compatible with supranational law. The remaining part of this short chapter outlines that in the CJEU’s reasoning the subnational dimension inherent to *Omega* got lost and then evaluates the consequences thereof.

³⁵ Paras 28-30 of the Judgment, citing Case C-54/99 *Église de Scientologie* [2000] ECR I-1335.

³⁶ Para 31 of the Judgment.

³⁷ Para 20 of the Opinion.

³⁸ Para 39 of the Judgment.

³⁹ *Ibid.*

II. *Omega*'s (Lost) Subnational Dimension

Omega has been examined by different authors from a number of different perspectives. Its implications for free movement law, general principles of EU law, and the protection of national (constitutional) identities under EU law have been documented – largely without accounting for its subnational dimension.⁴⁰ This section sets out that much is lost when the subnational dimension gets lost. It is in this spirit that it re-examines these issues, this time bearing the subnational dimension in mind. The renewed perspective will unveil yet unknown facets of *Omega*, which provide novel insights into the complex nature of the European legal space.

A. *Omega* and the Protection of National Identities Under EU Law

Omega has been said to be ‘the first case in which a Member State relies upon a value enshrined in its constitution to justify a derogation from the free movement provisions.’⁴¹ The understanding of *Omega* as pertaining to the protection of national identities under EU law relates to the fact that the standard of human dignity under German constitutional law is significantly stronger compared to the other Member States.⁴² This explains why *Omega* raised the question whether a common conception between Member States

⁴⁰ See Note 3 *supra*.

⁴¹ Kranenborg & Bulterman (n 3) 97.

⁴² As seen just below, this is due to the fact that human dignity is seen to be a foundation of the German constitution.

constitutes a precondition for a ground to be recognised as capable of limiting an economic freedom.⁴³

Whereas the respect for human dignity is a value common to the EU and all of its Member States, it enjoys a particularly prominent place in Germany's post-WWII constitutional order.⁴⁴ Article 1(1) of the German Basic Law enshrines the respect for human dignity⁴⁵, which is considered 'the most basic and foundational of rights'.⁴⁶ The German Federal Constitutional Court defined it as the 'highest value of the constitutional order'⁴⁷ as 'the Basic Law erected a value-oriented order that limits public authority'.⁴⁸ This value system, which 'centers upon the dignity of the human personality developing freely within the community' must be considered as a 'fundamental constitutional decision affecting all spheres of law'.⁴⁹ One of the aspects distinguishing human dignity in the German Basic Law compared to other national constitutions is that it is a fully justiciable right.⁵⁰

Advocate General Stix-Hackl rephrased the question for preliminary ruling as relating to the extent to which domestic courts can rely on 'values espoused by their national constitutional law in bringing in measures that help to safeguard public policy in

⁴³ Para 15 of the Judgment.

⁴⁴ Para 12 of the Opinion (describing human dignity as a 'fundamental value' in Germany).

⁴⁵ Article 1 (1) of the German Basic Law.

⁴⁶ Vicki Jackson 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 Montana Law Review 15, 18.

⁴⁷ BVerfGE 45, 187, *Lebenslange Freiheitsstrafe* (1977) (1 BvL 14/76).

⁴⁸ BVerfGE 6, 32 *Elfes* (1957) (1BvR 253/56).

⁴⁹ BVerfGE 7 198, *Lüth* (1958) (1BvR 400/51). For an English version of these decisions, refer to Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1997) 305, 315, 363.

⁵⁰ Kranenborg & Bulterman (n 3) 97.

the Member State concerned but at the same time adversely affect fundamental freedoms.’⁵¹ The referring court strongly emphasised human dignity’s constitutional dimension and indicated to the CJEU that lasergames offend ‘against the values enshrined in the constitution.’⁵² The CJEU recognised that the German standard of protection constitutes a legitimate aim under EU law. In doing so, it established that a legitimate aim does not need to be shared by all Member States to be able to limit a fundamental economic freedom.

Understanding the Court’s reasoning on this point poses a challenge, as it simultaneously addressed human dignity’s status in EU and German law. It affirmed that EU law ‘undeniably strives to ensure respect for human dignity as a general principle of law.’⁵³ The Court even stressed that the protection for human dignity is compatible with EU law, ‘it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.’⁵⁴ If the respect for human dignity amounts to a general principle of EU law, and is recognised in this capacity irrespective of domestic arrangements⁵⁵, we must wonder how far, if at all, *Omega* relates to Germany’s national identity. The answer lies in the detail. Whereas the *existence* of the general principle is protected under EU law, irrespective of the precise

⁵¹ Para 2 of the Opinion.

⁵² Para 17 of the Judgment.

⁵³ Para 34 of the Judgment and paras 82-91 of the Opinion.

⁵⁴ Ibid.

⁵⁵ See Walter Frenz, ‘Menschenwürde und Dienstleistungsfreiheit’ (2005) *Neue Zeitschrift für Verwaltungsrecht*, 50 (‘Menschenwürde setzt sich also nicht als nationale Verfassungsnorm durch, sondern im Gewande des Gemeinschaftsrechts.’), Kranenborg & Bulterman (n 3) 98 and Eric Carpano, ‘Droits fondamentaux et libertés communautaires de circulation : brèves remarques sur le développement du système communautaire de protection des droits fondamentaux’ (2005) *Les Petites Affiches*.

domestic context,⁵⁶ the *standard* to which it is applied takes the form of an expression of national identity.⁵⁷

The CJEU admitted that ‘it is almost impossible for the Court in this case – unlike in the *Schmidberger* judgment – immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognized in Community law.’⁵⁸ Clearly Germany’s standard of protection was considerably different from that existing as a matter of EU law.⁵⁹ In evaluating this standard, the CJEU clarified that it ‘is not indispensable’ for a restrictive measure ‘to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.’⁶⁰ This translates into the following. While human dignity is, as such, protected under EU law, Member States maintain discretion as to how to apply this imperative – notably with regard to lasergames. The fact that the German standard of protection was stronger than those found elsewhere in the EU accordingly did not, per se, preclude its ability to restrict the fundamental freedom.⁶¹ This implies that Member States can pursue objectives not shared by other Member States without this, as such, being contrary to EU law.

In this analysis the subnational dimension got lost. The fact that the *standard* of protection was not actually that of Germany but rather that of Bonn escaped the Court’s

⁵⁶ Opinion of Advocate General Stix-Hackl (n 7), para 83.

⁵⁷ See also Jürgen Schwarze, ‘Der Schutz der Grundrechte durch den EuGH’ (2005) 48 *Neue Juristische Wochenschrift* 3457, 3461.

⁵⁸ Para 92 of the Opinion.

⁵⁹ Para 3 of the Opinion.

⁶⁰ Para 37 of the Judgment.

⁶¹ Schwarze (n 3) 3461.

analysis. The question arises whether taking into account this fact would have altered the outcome of the Court's analysis. The CJEU evaluated whether disagreement on the standard of protection *between* Member States would have an impact on one Member State's ability to restrict the freedom to provide services. The Court's analysis indeed enshrined the assumption that the interpretation of human dignity is subject to unanimity in Germany. The actual, or at least parallel, question concerned the existence of such fragmentation *within* a Member State. The centrality of human dignity in Germany's post-WWII Constitution is free from doubt. In the absence of domestic consensus as to what this should mean with regard to lasergames, we must, however, wonder to what extent Bonn's assessment can be construed as an expression of national identity. Bonn's decision constituted but a particular, localised, conception of this fundamental constitutional value. The very fact that there was no agreement whether lasergames infringed human dignity begs an important question. We must indeed wonder whether the absence of consensus that human dignity is infringed by lasergames should not oppose a finding that the argument invoked by Bonn is really so fundamental to the German constitutional system that it justifies restrictions to an EU fundamental freedom.

B. The General Principle of EU law of the Protection of Human Dignity

While the application of human dignity to lasergames in Germany was subject to dispute, there was no doubt about the centrality of human dignity to Germany's constitutional order. However, as the CJEU and the Advocate General agreed, dignity is not only of central importance in Germany, but also more widely within the EU. As such, *Omega*

served as an opportunity for the CJEU to clarify human dignity's importance in EU law.⁶² The CJEU proclaimed that EU law 'undeniably strives to ensure respect for human dignity as a general principle of law.'⁶³ Also; the Advocate General established that 'protection of human dignity is afforded recognition as a general principle – and therefore forms part of primary legislation.'⁶⁴ *Omega* is rightly remembered as the case that confirmed that the protection of human dignity amounts to a general principle of EU law.⁶⁵ This conclusion remains unaltered by the case's subnational dimension. Taking this dimension into account is nonetheless relevant in order to understand how the general principle came to be recognised and to understand the relation between structure and substance in this respect. Indeed, as SNAs form part of the European legal order, subnational acts can affect the substance of EU law.

The legal dispute underlying *Omega* was triggered by a city's exercise of regulatory autonomy, which ultimately and indirectly led to the discovery of a general principle of EU law. The fact that a municipal order was at the origin of this finding might seem trivial. After all, what matters most from the perspective of EU law is the existence and contours of the general principle, not how it came to be discovered. The importance of the subnational dimension; however; should not be dismissed out of hand. Bonn operated a deeply normative assessment in applying a higher standard of human dignity to lasergames than it was required to do under Federal and Land law. Its

⁶² Para 34 of the Judgment and paras 82-91 of the Opinion.

⁶³ Para 34 of the Judgment.

⁶⁴ Para 93 of the Opinion.

⁶⁵ The Court had already affirmed in Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079 that 'It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.' This case however concerned EU secondary law which itself protected human dignity.

declaration of human dignity's heightened importance – of course indirectly and through a chain of events – led to the recognition of the general principle in supranational law. Subtle as it may be, the relation between the local claim and the EU principle points towards the interconnection and intertwining of the European and municipal legal orders.

I understand the relation between the local action and its supranational result to be a manifestation of porosity. As further illustrated below, porosity, alludes to the permeable nature of the various legal orders that coexist in the EU. Porosity allows processes of cross-fertilization to take place between the various levels. The importance that Bonn attributes to the concept of human dignity results – through the Court's classification of the principle as a general principle of EU law – in an increased gravity of human dignity in EU law, and therefore indirectly also in other Member States. These dynamics could even be construed as an instance of performativity, a concept that helps us to understand why local measures, even if devoid of legal force, can pollinate legal change at other scales.⁶⁶ According to Austin, performativity describes things that are brought into being by words. A performative utterance does not describe a reality but rather changes the social reality it describes.⁶⁷ Butler has further developed the concept in the context of gender studies and described performativity as 'a set of processes that produce ontological effects, that is, that work to bring into being certain kinds of realities, or (...) that lead to certain kinds of socially binding consequences.'⁶⁸

⁶⁶ I discuss this further in Michèle Finck, 'The Role of Localism in Constitutional Change: A Case Study' (2014) 15 *The Journal of Law and Politics* 53.

⁶⁷ J.L. Austin, *How To Do Things With Words*, Second Edition (Clarendon 1975) 4-7. This concept has been further developed by Judith Butler, 'Performative Agency' (2010) 3 *Journal of Cultural Economy* 147.

⁶⁸ Butler (n 67) 147, 147.

Whereas performativity is a concept of the philosophy of language, it can also be suitable to describe legal dynamics. Local measures, such as Bonn's order, can be performative. This is to say that local measures might express ideas that produce normative effects at other scales. Symbolic as local ideas first may be, they have the potential to set off a chain of causal events that breeds legal change elsewhere.⁶⁹ In such instances, legal change occurs by fiat – the local policy need not even be legal or upheld at a later stage for it to produce performative effects at other scales. It had indeed not mattered if the referring court had later found Bonn's measure to be unlawful. The declaration of a general principle of EU law would have, and has, continued to enshrine the heightened importance of human dignity in EU law. While a complete examination of performativity is outside the scope of this chapter, it should be noted that local measures are capable of triggering a chain of events that produces legal change. The importance that parts of Bonn's population and its mayor attributed to human dignity is magnified upon contact with the EU legal order. If the subnational dimension in *Omega* is accounted for, the connection between the local and supranational levels is unveiled. This will become clearer if we examine the public policy exemption that was invoked in *Omega*.

C. The Public Policy Exemption

Articles 52 and 62 TFEU allow Member States to derogate from the free movement of services on grounds of 'public policy'. Ackermann has stressed that what the CJEU

⁶⁹ Austin relies on performativity as an instant process – the assumption that an utterance is transformed into a reality as soon as it is made. When performativity is used in the legal context, its effects however take time.

refused to expressly acknowledge in *Schmidberger* ‘has now been unequivocally stated in *Omega*: the protection of fundamental rights belongs to the concept of public policy to which the relevant provisions of the Treaty refer.’⁷⁰ Since it proved impossible to equate the protection of human dignity under the German Basic Law with the version of dignity recognized under EU law,⁷¹ the Advocate General argued that the ‘circumstances of public policy invoked by the Member State by way of justification’ should be examined.⁷² The advantage of the public policy analysis is that it enables the Court to take into account circumstances specific to the relevant Member State.⁷³ *Omega* was one of the first cases in which States invoked the public policy derogation to restrict the economic activity of private firms.⁷⁴ The Court had, however, already established in *Van Duyn* that the concept of public policy ‘may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty’.⁷⁵ In *Jany* it had recalled that EU law ‘does not impose on Member States a uniform scale of values as regard the assessment of conduct which may be considered to be contrary to public policy.’⁷⁶ Member States hence enjoy a wide margin of discretion when they derogate from fundamental freedoms on the basis of public policy grounds. The question

⁷⁰ Ackermann (n 3) 115.

⁷¹ Para 92 of the Opinion.

⁷² Para 93 of the Opinion. See also Kranenborg & Bulterman (n 3) 97 (‘As it is impossible to equate the protection of human dignity under the German constitution as a justiciable fundamental right with the protection offered by EC law, Stix Hackl makes a plea to evaluate the measure of the Bonn authorities under the public policy exception.’).

⁷³ Ibid 97.

⁷⁴ Catherine Barnard, *The Substantive Law of the EU. The Four Freedoms*, Fourth Edition (Oxford University Press 2013) 509.

⁷⁵ Case 41/74 *Van Duyn* [1974] ECR 1337 paras 18-19.

⁷⁶ Case 268/99 *Jany* [2001] ECR I-8615.

that arises by implication is whether municipalities can equally invoke the public policy exemption and enjoy the same margin of discretion when they regulate.

After establishing that the respect for human dignity amounted to a general principle of EU law, the Advocate General argued that it must be possible ‘to admit under the public policy exception those considerations that relate to a right the protection and observance of which Community law itself demands.’⁷⁷ In this context, ‘national authorities’ have a discretion in assessing whether lasergames amount to a ‘genuine and sufficiently serious threat to a fundamental interest of society’,⁷⁸ an interest which is determined in the light of ‘national value judgments. There is no question here of any general opinion in the Member States.’⁷⁹ The Court recalled that Bonn itself relied on public policy as a basis for prohibiting lasergames and that the regional law granting it competence to do so was also concerned with public policy.⁸⁰ It added that this ground of derogation must be interpreted strictly⁸¹ as ‘public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’.⁸² The Advocate General stressed that lasergames ‘aroused public displeasure’⁸³ – however we know that such displeasure was expressed by merely a subset of Bonn’s population. *Omega* establishes that in order for social opposition to constitute the basis for the invocation of public policy, it need not be felt nationwide. One may further wonder whether a ‘sufficiently serious’ threat to a fundamental interest of society can really be

⁷⁷ Para 93 of the Opinion.

⁷⁸ Paras 100-101 of the Opinion.

⁷⁹ Para 105 of the Opinion.

⁸⁰ Para 28 of the Judgment.

⁸¹ Para 30 of the Judgment.

⁸² Para 30 of the Judgment, citing Case C-54/99 *Église de Scientologie* [2000] ECR I-1335.

⁸³ Para 108 of the Opinion.

found to exist where a measure is taken by a single locality. If we account for *Omega*'s subnational dimension, it becomes obvious that the public policy exception not merely allows us to account for those 'specific circumstances' of a 'Member State' but also those of a municipality. It follows from *Omega* that, when relying on the public policy exemption, municipalities enjoy the same margin of discretion as Member States. The margin of appreciation itself is interesting with regard to polycentricity and porosity. It attempts to guide the relationship between various actors but only with regard to objectives that are shared by the EU and the domestic unit.

D. The Justification of the Local Measure

In *Omega*, the CJEU proclaimed that the public policy exemption must be interpreted strictly.⁸⁴ The assessment of whether the measure was uniformly applicable as well as the necessity test show, however, that the Court swiftly turned its back on such strictness. This section examines both the necessity test as well as the argument made by some that a ground of derogation must be uniformly applicable.

Decided merely a year after *Schmidberger*, *Omega* confirmed that fundamental rights can limit fundamental freedoms.⁸⁵ Ackermann noted that *Omega* goes further than *Schmidberger*, as, due to the generic character of the concept of human dignity, State interference with the four freedoms is more difficult to control than with regard to a

⁸⁴ *Omega* (n 1) para 30.

⁸⁵ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-05659. For a comment, see Christopher Brown, 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court' (2003) 40 Common Market Law Review 1499, 1504.

‘conventional fundamental right.’⁸⁶ Once a derogation is invoked with regard to the fundamental freedoms, a court (in theory the referring court but in practice often the CJEU) determines whether the means chosen are suitable to attain the aim and whether they do not go beyond what is necessary.⁸⁷ In *Omega*, however, the Court omits to engage with this aspect. This has been subject to criticism as the CJEU accordingly failed to determine whether the measure was ‘really necessary to protect human dignity as guaranteed in the German constitution.’⁸⁸ While *Omega* clearly raised a number of sensitive questions, Kranenborg and Bulterman stressed that in other sensitive areas, such as gambling, the Court conventionally examines whether imperative requirements in the general interest ‘serve to limit betting activities in a consistent and systematic manner.’⁸⁹ As a consequence it has been put forward that a test assessing ‘whether the measure at stake forms part of a wider policy to restrict or prohibit games simulating the killing of human beings, such as violent video games or paint ball’ could have been employed.⁹⁰

Necessity seems to be of particular importance in this context, as according to Ackermann, the judgment ‘does not indicate any other criteria that could help us to find any limits for the protection of human dignity under Community law’.⁹¹ As the Advocate General herself recognised, ‘[t]here is hardly any legal principle more difficult to fathom in law than that of human dignity.’⁹² Bröhmer has even argued that in *Omega*, the CJEU gave Member States *carte blanche* to restrict the fundamental freedoms in the name of

⁸⁶ Ackermann (n 3) 1114.

⁸⁷ Barnard (n 74) 534.

⁸⁸ Kranenborg & Bulterman (n 3) 98.

⁸⁹ Case C-243/01 *Gambelli* [2003] ECR I-13031. See also *ibid* 98.

⁹⁰ *Ibid* 100.

⁹¹ Ackermann (n 3) 116.

⁹² Para 74 of the Opinion.

human dignity⁹³ and that the content of human dignity, as protected by EU law, remains obscure.⁹⁴ The neglect of the necessity test seems all the more surprising as the CJEU was aware of the nature of lasergame regulation in Germany. Taking into account *Omega*'s subnational dimension would have compelled the Court to engage with these aspects more assiduously and determine whether a measure can truly be 'necessary' if it is applied merely by a single city. This would, however, have entailed an evaluation of the internal institutional arrangements of a Member State, which would have stood in tension with the principle of national institutional autonomy that is introduced in the next chapter. I will discuss this principle, as well as its importance in EU law further in the subsequent chapter.

What is more, if a justification is invoked with regard to the freedom to provide services, it is sometimes considered that, in theory, one of the requirements is that the measure must be uniformly applicable.⁹⁵ The existence of this criterion is subject to controversy. In *Omega*, the Court referred to the uniformly applicable criterion without however discussing its application in light of the facts. Advocate General Stix-Hackl simply asserted that the public order notice 'undoubtedly constitutes a uniformly applicable measure',⁹⁶ and the CJEU proclaimed that the contested municipal order was not motivated 'by any consideration linked to the nationality of the providers or recipients of the service'.⁹⁷ This is somewhat confusing as the Court and the Advocate General were aware that *Omega* had been treated differently from other operators in Germany, and had

⁹³ Bröhmer (n 3) 756.

⁹⁴ Ibid 755-56.

⁹⁵ See by way of example Case 3/88 *Commission v Italy* [1989] ECR 4035.

⁹⁶ Para 109 of the Opinion.

⁹⁷ Para 29 of the Judgment.

claimed before domestic courts that as a result thereof it was put at a disadvantage.⁹⁸ In light of this fact, one would have expected the Court to engage with this issue more openly. Had it addressed this issue, the CJEU would have had to answer some challenging questions, for instance whether Omega was subject to the same rules as lasergame operators elsewhere in Germany. As Omega asserted that lasergames are similar to paintball, and that it was put at a disadvantage compared to paintball operators,⁹⁹ as well as video games and contact sports¹⁰⁰ these claims would also have had to have been examined. This factual knowledge did not, however, flow into the Court's assessment. If this had happened, the existence of different standards of human dignity within the same Member State would have come to light. This in turn would have compelled the CJEU to clarify whether such fragmentation within a Member State is approached from the same angle as fragmentation between Member States.

III. What the Subnational Dimension Tells Us

Thus far, my analysis has shown that the Court did not explicitly engage with *Omega's* subnational dimension. Interesting lessons can, however, be drawn if we relate the reasoning of the CJEU to the municipal origin of the restriction on the free movement of services. I claim that a paradox emerges in this regard. In treating Bonn's measure as if it were that of Germany, the Court actually respected the SNA's regulatory autonomy. This

⁹⁸ Para 14 of the Opinion.

⁹⁹ This is not mentioned in the Opinion or the judgment. I take this information from private correspondence with Omega's lawyer.

¹⁰⁰ Para 40 of the Opinion ('Omega argues that the simulation of killing and violence in films as well as in the visual arts and in contact sports and children's games is widespread and accepted in society; 'Lasersport' is no different from those activities.')

becomes evident when going over the individual aspects of the case that have already been examined.¹⁰¹ Nonetheless, they reflect the current state of the law as well as the wider conclusions that my thesis offers.

With respect to national identities, *Omega* establishes that elements of national constitutional law not shared by other Member States can limit a fundamental economic freedom. In neglecting the local origin of the order, the Court seems to operate on the assumption that any norm originating within a Member State is that of the Member State.¹⁰² As I establish later in my thesis, in certain circumstances, the Court considers States to be monolithic entities and remains blind to internal power-sharing arrangements. The Court did not enquire whether the standard of dignity applied was that of the Member State or the SNA. In omitting to operate a distinction on this point, the Court effectively treated any decision from within the Member State as that of the Member State. *Omega* appears to indicate that when an SNA creates a norm and the referring court endorses that norm as representing that Member State's national identity it does not matter whether it is homogenously applicable.

The CJEU entrusts the referring court with the determination whether Bonn's standard 'corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany.'¹⁰³ This confirms Besselink's claim that it is up to the domestic courts to 'decide the

¹⁰¹ Clearly, these conclusions presented here were at best incidental and at worst accidental effects of the judgment.

¹⁰² This also reflects the principle of national institutional autonomy. As will be seen below; however, the *Digibet* case took a somewhat different stance on this matter.

¹⁰³ Para 39 of the Judgment.

particular national constitutional rights involved; next it is the ECJ which determines the consequences of this state of affairs under EC law.¹⁰⁴ As a consequence, the CJEU did not enquire further – despite its awareness of internal regulatory fragmentation. Even though the German Federal Administrative Court subsequently confirmed that Bonn could interpret the constitutional protection of human dignity as authorising a ban of Omega’s commercial activity, internal regulatory fragmentation subsisted in Germany. There has never been a federal or Land law prohibiting lasergames so that to the present day, it remains up to localities to determine whether they tolerate lasergames within their territory. It follows that for a norm to represent a Member State’s national identity, no agreement on the necessity for such a norm within the State is required.

From this we might then conclude that the CJEU treats any measure from within a Member State as that of the Member State. At first glance, this might appear like a disempowerment of SNAs – the Court simply ignores the fact that it was the city that created the norm in the first place. This is, however, not necessarily so. If an action from within a Member State is equated with that of a Member State, SNAs are placed on the same footing as States, and can further independent policy goals and obtain derogations from EU law that allow them to do so. SNAs are treated in the same manner as the masters of the Treaties, a capacity of the Member States that the next chapter will engage with at further length and, provided that the referring court endorses their stance, can define policies that come to be recognised as the Member State’s national identity, and hence overriding imperatives of EU law.

¹⁰⁴ Leonard Besselink, ‘National and Constitutional Identity Before and After Lisbon’ (2010) 6 Utrecht Law Review 46. See also Vassilios Skouris, ‘Die Zusammenarbeit zwischen BVerwG und EuGH – eine positive Bilanz’ (2013) Neue Zeitschrift für Verwaltungsrecht, 33.

As regards the discovery of the general principle of EU law, one could understand the absence of engagement with the subnational dimension as an ‘immunity’ of EU law towards subnational norms. This would, however, be mistaken as EU law is in fact receptive to them. Even though the CJEU does not engage with the subnational dimension, the result of *Omega* was that, rather than being declared incompatible with EU law, the local norm was allowed to stand despite limiting the freedom to provide services. Moreover, in being treated as an act of the Member State, the local order, indirectly and through a chain of events, came to have an impact on the substance of EU primary law by giving rise to the recognition of a general principle of EU law. In being treated as the measure of a Member State, the local measure has the same effects as those that have been observed for Member State (constitutional) norms, leading to the creation of a general principle of EU law.¹⁰⁵

With regard to the public policy exemption, it should be noted that despite the absence of any explicit engagement with its subnational dimension, *Omega* exhibits that, via the public policy exemption, local objectives can outweigh European objectives – but only where the local objective is recognised as valid by EU law. The main motivation behind Bonn’s order was the desire to safeguard public order in its territory.¹⁰⁶ In recognising the compatibility of the local order with EU law, the CJEU allowed this local concern to limit a goal that ranks high on the agenda of European integration. Precisely because EU law treats a local measure as that of a Member State, SNAs are afforded the same discretion as the Member States in creating public policy. Under EU law, such

¹⁰⁵ Article 6(3) TEU.

¹⁰⁶ It has been seen that Bonn explicitly referred to public policy in its order and that the Land law, which provided the basis of the order was indeed also concerned with public order.

policies are then evaluated against the same standards as those of the Member States. As a municipality can exercise the same margin of discretion it has the same ability to frame policies limiting the EU fundamental freedoms as Member States.

Finally, we might note that, regarding the ‘uniformly applicable’ criterion, the assessment of whether the prohibition to which Omega was subject was uniformly applicable would have compelled the CJEU to address internal fragmentation and clarify whether fragmentation within a Member State should be approached from the same angle as fragmentation between Member States. This, of course, is an undertaking of a sensitive nature. As regulatory fragmentation was the direct consequence of German federalism, the CJEU would have had to pronounce on a Member State’s internal structure. According to the ‘uniformly applicable’ test, measures need to apply uniformly within but not between Member States. However, in declaring a measure that does not apply uniformly in Germany compatible with EU law, Bonn has the same discretion to formulate its policies as Germany would have. The application of the uniformly applicable test would indeed, as such, limit such SNAs regulatory autonomy they possess under domestic arrangements. This has not; however; happened. Rather, *Omega* indicates that regulatory fragmentation *within* Member States is tolerated under EU law to the same extent as regulatory fragmentation *between* Member States. The Court addressed some of these issues in 2014, in the *Digibet* case, which is examined in Chapter Five.¹⁰⁷

¹⁰⁷ Case C-156/13 *Digibet Ltd Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG* [2014] not yet reported.

Conclusion and Outlook

Omega reveals the interconnection and mutual cross-fertilization between the subnational and European legal spheres. This interlinking is possible precisely because of, rather than in spite of, EU law treating the local order as that of a Member State. The CJEU allowed Bonn to invoke the same derogations and rely on the same margin of discretion as Member States, underlining the polycentric nature of the EU legal order. This shows that neglecting the subnational origin of the norm, and hence equating SNAs with Member States, does not necessarily work to the detriment of local and regional authorities. In being treated like a Member State, Bonn is recognised as an autonomous regulator able to undertake independent interpretations of the federal constitution in the exercise of its public order competence, and benefit from the same margin of discretion under EU law. This challenges our constitutional imagination of SNAs as actors the relevance of which remains limited to the Member State. It is apparent from *Omega* that subnational norms exist within the same space as those of the EU and the Member States, they have, in some respects at least, become integrated into the European legal order. The CJEU's declaration of the general principle of EU law of human dignity underlines that SNAs play an active part in the EU's normative development, being active players in the game of European integration rather than mere passive onlookers standing at the sidelines. My thesis shows that also in other areas of EU law, SNAs can be perceived in the same manner. In others, however, a different picture of the relation between subnational and supranational norms emerges. The thesis will show that while the existence of local and regional autonomies is widely recognised in EU law, no fixed picture of their role

emerges. It will rather be seen that SNAs are simultaneously insiders and outsiders of EU law.

Chapter Two

Introduction

This doctoral thesis engages with the relation between subnational autonomies and European Union law. The term ‘subnational autonomies’ is understood to refer to subnational authorities and the legally binding policies they generate. The preceding case study of *Omega* already underlined that SNAs are sometimes generators of norms and that there is a potential for subnational regulation to enter into conflict with supranational regulation. The remaining part of my thesis examines other domains of EU substantive and procedural law to determine the status of subnational autonomies in EU law. In doing so, it reveals the absence of any fixed picture in this regard and claims that the interplay between subnational and supranational norms can be better understood through a reliance on a modelling approach which reflects that in some areas SNAs emerge as outsiders of EU integration, while in others they emerge as insiders thereof, as active participants in its normative development.

The EU is a union of States – the Member States, which, as masters of the Treaties, have assumed a unique status.¹ The term ‘masters of the Treaties’ that this thesis will continuously invoke refers to the fact that the Member States individually and collectively control the EU. It also recalls that the EU is but the creation of the (founding)

¹ Looking at EU *law* to determine the relation between various public authorities is appropriate as ‘Law determines the conditions in which political actors in the EU cooperate’. Gráinne de Búrca, ‘Rethinking Law in Neofunctionalist Terms’ (2006) 12 *Journal of European Public Policy* 310, 320.

Member States.² The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) reflect this spirit in referring primarily to the Member States and the Union itself, creating the impression that these are the only two existing levels of public authority in the EU.³ In this bi-centric structure, no mention is made of the pronounced autonomies that regional, but also local, authorities may dispose of under domestic arrangements.⁴ Member States are conceived as monolithic entities in accordance with the paradigm of sovereign statehood. This framework does not engage with the existence of entities, disposing of and exercising regulatory autonomies, which are not States. Subnational authorities, however, do have significant competences, including the power to generate norms as per the Member States' internal arrangements. Even beyond pronounced and formalized internal fragmentations of power, infra-State bodies, including localities, constantly produce regulation, which may enter into conflict with the norms existing at other scales, including in EU law.⁵

The existence of subnational autonomies is a factual truth. However, except for provisions such as Article 4(2) TEU and 5(3) TEU that are examined further below, the European Treaties do not engage with the relation between subnational autonomies and European Union law. This stands in stark contrast to the situation of the Member States,

² A more thorough overview of Member States' Status as masters of the Treaties follows just below.

³ Consolidated Version of the Treaty on European Union [2010] OJ C 83/01 (hereinafter TEU) and Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (hereinafter TFEU). Note however Article 4(2) TEU and Article 5(3) TEU, which are examined in further depth in the subsequent chapter.

⁴ It should be noted that the 'decentralized' structure is not always the result of decentralization, such as is the case in Italy for instance, but can also be the result of centralization, as is the case in Germany.

⁵ This thesis repeatedly refers to 'regulation' and 'regulatory competence'. While a number of definitions of these terms are possible, I rely on them due to their encompassing nature to refer to the establishment by a public authority of binding rules or principles that govern a behaviour or a practice. I understand regulation to include, for instance, legislation, decisions and regulations of public authorities.

the relation of which to the EU is governed by a complex catalogue of Treaty provisions. This captures the situation that triggered my interest in this research topic. On the one hand, subnational autonomies do exist within the various Member States. On the other hand, the EU, fashioned as a union of States, does not seem to account for their existence. In light of the lack of any explicit pronouncement on behalf of EU law regarding its relation to subnational autonomies, my thesis seeks to map how this relation can best be qualified.

My research shows that EU law frames subnational autonomies differently depending on the precise context at stake. In some scenarios, subnational autonomies emerge as ‘outsiders’, meaning that they are passive bystanders to EU law and integration, solely subjects and agents thereof. In other domains however, SNAs and their norms are insiders, that is to say active participants in EU law that actively contribute to the latter’s normative development, and more widely also European integration. In order to synthesise my research findings, I rely on two models: the ‘Outsider Model’ and the ‘Insider Model’. Each model plays out in EU law, albeit in different contexts and with varying force.

The Outsider Model reflects that in some circumstances subnational autonomies are framed as mere bystanders to the privileged interaction between the EU and the Member States. SNAs are considered to be unlike Member States, as they are not masters of the Treaties, and as a result thereof cannot aspire to have the same status and rights as a matter of supranational law. SNAs being outsiders, the resulting assumption is that EU

law is shaped solely by the interaction between the EU and the Member States. While the existence of subnational autonomies is acknowledged, it is understood to be solely a matter of relevance for the domestic sphere. EU law only recognises SNAs in a passive quality that is to say as recipients and implementers of EU law, not as autonomous generators of norms. It also ignores that regional and local norms contribute to the EU's normative development. The Insider Model portrays a different image. It captures that in some circumstances SNAs are assimilated to the Member States, the latter disposing of no special status by virtue of their capacity as the masters of the Treaties. The local and the regional are considered to be scales of public authority of relevance for EU law, not solely domestic law. The borders dividing this plurality of levels of public authority are considered to be porous as their respective norms mutually influence each other.

This introductory chapter introduces both models in turn. The subsequent chapters will thereafter illustrate in further depth how the Outsider Model and the Insider Model can be observed in different areas of EU law. Chapter Three will illustrate how the Outsider Model manifests itself in a number of areas of EU law and Chapter Four outlines the features and manifestations of the Insider Model. It will be seen that the Outsider Model largely corresponds to 'EU law above the surface' that is to say the European Treaties themselves, while the Insider Model rather plays out below the surface of EU law, such as for instance in the Court's internal market case law. Chapter Five rounds off the analysis by offering a conclusion. Before venturing on to that analysis, there remain two distinct tasks that this chapter needs to fulfil. First, I shall introduce my topic of study: subnational autonomies. Second, I shall clarify my methodological choice

to rely on models to frame my research findings, and introduce the Outsider Model and Insider Model in turn.

I. The Object of Study: Subnational Autonomies

Before diving into my analysis of how the Outsider Model and the Insider Model play out in various areas of EU law, an introduction to subnational autonomies, SNAs' norm-generating capacity, and their fate in a time of European integration is in order. This overview must be kept relatively brief as an exhaustive study of these elements is beyond the scope of this introductory chapter, and indeed the thesis. It is nonetheless necessary as the effort to frame the relation between EU law and subnational autonomies cannot be comprehensively grasped without realising the complexity of subnational arrangements within the various Member States. This overview seeks to outline two aspects that are critical for any understanding of SNAs. First, SNAs are very diverse entities that cannot be easily defined. This not only heavily burdens any definitional exercise but also lies at the root of the difficulty in making sense of SNAs and their status in EU law. The second goal of this introductory section consists in introducing the interconnection between SNAs within different Member States, but also with other levels of public authority, such as the EU. The first point is that subnational entities in the various Member States are very diverse with regard to their nature and powers.

A. A Wide Diversity of Subnational Autonomies

Member States' internal institutional arrangements are subject to pronounced variation. There can be no doubt that in the EU, there is a 'great deal of diversity in the territorial organisation of states'.⁶ In light of the 'enormous diversity of regional formulae and sub-State self-government typologies',⁷ Member States are not solely divided between those that are 'decentralised' and those that are 'unitary' in character. Rather, each State's structure is unique.⁸ Internal institutional arrangements take on different forms as the nature and amount of competences that are devolved vary, not only between but also within States.

Within a single Member State, devolution can be symmetric or asymmetric. In instances of symmetric devolution, such as the German variant of federalism, all SNAs of the same category (such as the sixteen German Länder) have the same competences. Importantly, even in cases of symmetric devolution, variation persists, such as for instance between regional and local authorities. In cases of asymmetric devolution, ad hoc formulae exist. In both Finland and Portugal, for example, there is no strong overall decentralisation arrangement but in each State a few islands, the Åland and Azores islands, respectively, dispose of a special status, accompanied by a catalogue of

⁶ John Loughlin, 'The Regional Question, Subsidiarity, and the Future of Europe' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 157. See also Stephen Weatherill, 'The Challenge of the Regional Dimension in the European Union' in Stephen Weatherill and Ulf Bernitz (ed), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 9-11.

⁷ Joxerramon Bengoetxea, 'Autonomous Constitutional Regions in a Federal Europe' in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 232.

⁸ And sometimes, those Member States we think of as 'unitary' States actually define themselves as having a decentralised structure (Article 1 of the French Constitution).

autonomous competences.⁹ The United Kingdom constitutes another example of asymmetrical devolution as its four composite parts have very different competences, illustrating its highly asymmetric pattern.¹⁰ In addition, the Greater London Authority has more competences than any other city in the UK.¹¹ Within the different Member States, a wide panoply of decentralisation arrangements can be observed as ‘Federal states may be centralised (Austria), decentralised (Belgium), and balanced (Germany). Unitary states may be centralised (Greece, Ireland, Portugal), decentralised (Scandinavian states and the Netherlands) and regionalised (Italy, Spain, France, and, now, the UK) unitary states.’¹²

Variation can also be detected concerning the nature of powers exercised by local and regional authorities. Some SNAs, such as the German *Länder*, the Italian regions or the Spanish autonomous communities, have important regulatory powers and can adopt regional constitutions or constitution-like charters.¹³ Other infra-State units dispose of much more limited competences, especially localities even though some of them undeniably have significant powers. To complicate matters further, different patterns not only exist with regard to the amount and structure of subnational autonomies but also the policy areas to which they apply. Different SNAs exercise competences in different

⁹ On the Åland Islands, see Jaakko Husa, *The Constitution of Finland. A Contextual Analysis* (Hart Publishing 2011). The status of the Azores islands is studied more fully in Chapter Five.

¹⁰ Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press 1999), Geoffrey Clark, ‘Scottish Devolution and the European Union’ (1999) 3 Public Law and Andrew Evans, ‘UK Devolution and EU Law’ (2003) 28 European Law Review 475.

¹¹ Greater London Authority Act 1999 and Greater London Authority Act 2007.

¹² Loughlin (n 6) 157.

¹³ For a comment on the Italian regional charters, see Giacomo Delledonne and Guiseppe Martinico, ‘Handle with Care! The Regional Charters and Italian Constitutionalism’s ‘Grey Zone’ (2009) 5 European Constitutional Law Review 218.

policy areas.¹⁴ In Spain, for instance, criminal law and procedure as well as the administration of justice are competences of the central State. However, these domains form part of the shared competences between the federal State and the Länder¹⁵ in Germany and in the UK they have been devolved to the Scottish Parliament, subject to the overriding legislative competence of Westminster.¹⁶ The same variation exists with regard to taxation powers.¹⁷ It should also be noted that SNAs are sometimes defined by diverging parameters as ‘economic (administrative and statistically defined) regions are not always co-extensive with constitutional regions. Linguistic and cultural regions (nations or ethnicities) in some cases are larger than political regions.’¹⁸ Beyond their formal competences, SNAs embody different political and economic gravity.¹⁹ In determining the relation between subnational autonomies and EU law formal labels, such as ‘federalism’, are not very helpful. The Austrian version of federalism does not guarantee the Länder a pronounced degree of independence vis-à-vis the State.²⁰ Things are very different in Belgium, where SNAs’ competences are actually more pronounced than those of the federal State.²¹ The Belgian State, it has been suggested, ‘has in some senses ceased to exist and has almost a residual existence’, all activity taking place ‘on

¹⁴ David Edward and Joxerramon Bengoetxea, ‘The Status and Rights of Sub-State Entities in the Constitutional Order of the European Union’ in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (ed), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart Publishing 2011) 29.

¹⁵ Ibid 29-30.

¹⁶ Ibid 29-30.

¹⁷ Ibid 29-30.

¹⁸ Bengoetxea (n 7) 232.

¹⁹ It has been pointed out that none of the German Länder is ‘as small as Malta or Luxembourg, even the small Hanseatic State of Bremen being twice as populous as the latter’. Peter-Christian Müller-Graff, ‘The German Länder: Involvement in EC/EU Law and Policy-Making’ in Stephen Weatherill and Ulf Bernitz (ed), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005) 104. (These numbers are however not or no longer accurate).

²⁰ Jan Erk, ‘Austria: A Federation without Federalism’ (2004) 34 *Publius* 1.

²¹ Laurence Sharpe, ‘The European Meso: An Appraisal’ in *The Rise of Meso-Government in Europe* (Sage Publications 1993).

the periphery with no centre'.²² This helps in explaining why the Belgian regions and communities rather than the federal level carry out most 'State' functions in that specific domestic arrangement.²³ Formal labels have accordingly only limited value in making sense of SNAs and their status in EU law.

While constitutional regions, that is to say those regions that have the ability to adopt constitutions²⁴ or constitution-like charters²⁵ exist, it is imperative to note that they remain an exception.²⁶ The large majority of SNAs are not such powerful regions. In the EU there are indeed only three formal federations (Austria, Belgium and Germany), two States that recognize legislative competences that are held by all of their decentralized authorities (Italy and Spain) and three that recognize such powers to some of their SNAs (Finland, the UK and Portugal). The overall number of SNAs, including localities, in the different Member States is significantly higher, adding up to about one hundred thousand.²⁷ My thesis does not solely focus on strong constitutional regions but equally engages with those disposing of more modest autonomies, such as Bonn's police power that gave rise to the *Omega* case. This also explains why the thesis focuses on local governments as well as regional governments. While this may challenge our constitutional imagination to the extent that we do not think about subnational regulation

²² Charlie Jeffrey, *The Regional Dimension in Europe: Towards a Third Level in Europe?* (Frank Cass 1997) 148, quoting Laurence Sharpe, *Decentralist Trends in Western Democracies* (Sage 1979).

²³ Loughlin (n 6) 157.

²⁴ Article 28(1)(1) of the German Basic Law allows for the adoption of constitutional documents by the Länder, provided that they comply with the principles of the republican, democratic and social *Rechtsstaat*.

²⁵ This is for instance the case for Italy and Spain. See further Martinico (n 13).

²⁶ Bengoetxea (n 7). Refer also to the 'Lamassoure Proposal' at the European Convention that would have created a special status for what it referred to as 'associated regions'. See Committee on Constitutional Affairs of the European Parliament, 'Report on the Division of Competences between the European Union and the Member States' [2002] 2001/2024 (INI).

²⁷ Ibid 232.

as contributing to the EU's normative development, this thesis will show that the norms created by constitutional regions have no higher importance in EU law than those crafted by small towns.

Localities are as varied as regions and Member States. There are many obvious differences between Paris and, say, a small Umbrian village. Furthermore, a single locality may appear, but should not be understood to necessarily be a homogenous entity. In particular large localities might be internally divided as regards policy-preferences but also wealth, size, and demographic composition. This is apparent from *Omega* as the protests against lasergames only concerned a sub-set of Bonn's population. Borders indeed not only exist between and within States but also within cities, whether they are of an express nature, such as the Berlin Wall or gated communities²⁸ or of an implicit nature such as socio-economic or cultural-ethnic divides. The role and status of local governments is explored in further detail just below.

There is accordingly a large variety of SNAs within the EU that not only have different sizes and powers, but might also wish to entertain different relations with the EU. Bavaria certainly has a different self-perception and claim of recognition vis-à-vis the EU from Oxford. In light of such diversity, denominations such as 'SNA', 'regions' or 'localities' can be but generic in nature. They are adopted purely for the sake of simplicity. The variety of subnational arrangements however not solely poses a

²⁸ Saskia Sassen, 'The City: Today's Frontier Zone' (2014) 1 *Glocalism: Journal of Culture, Politics and Innovation* 1, 4.

definitional challenge but also explains the difficulty to think and write about SNAs. As Bengoetxea has underlined:

The diversity of phenomena – regions, *Länder*, autonomous communities, provinces, departments, cities, conurbations, counties, towns, etc – is truly striking and poses a real challenge to any attempt at finding formulae that are simple enough to be institutionally practicable to ensure some representation, but complex enough to capture the multiplicity of competences, structures and idiosyncrasies they represent.²⁹

What is more, the contours of subnational autonomies are subject to constant negotiation and redefinition, as is most evident in the UK at this moment in time.³⁰ This burdens the quest to make sense of SNAs. It is true that the same diversity can be detected regarding Member States: Luxembourg is not Germany. Yet in this context the same conceptual challenges do not arise due to State sovereignty. Sovereign statehood, a concept examined further below, entails that Member States are seen as legal abstractions: from the perspective of EU law they are all the same.³¹ It has in this context been argued that only States ‘seem to offer a sufficient normative (and therefore also cognitive) stability when it comes to questions of definition, delimitation, and borders.’³² This thesis however makes clear that in some circumstances, namely those governed by the Insider Model, SNAs are in fact assimilated to the Member States. The large variety of subnational arrangements in fact does not prevent us from making sense of SNAs and the relation they entertain with EU law. In the quest to make sense of that relationship, it is imperative to grasp the norm-generating capacity of regional, but also local authorities.

²⁹ Bengoetxea (n 7) 233.

³⁰ This is apparent for instance regarding current redefinitions of the UK’s devolution arrangement.

³¹ Some exceptions apply to this rule, such as for instance the number of MEPs per Member State (Article 14(2) TEU), which is allocated according to a Member State’s population (and the Parliament represents European citizens, not States as per Article 10 TEU).

³² Bengoetxea (n 7) 232.

B. The Norm-Generating Capacity of Local Governments

Stating that SNAs generate norms will not surprise the reader. It is well known that SNAs such as Scotland or Tuscany legislate. The norm-generating capacity of such regions can be grasped relatively easily and most lawyers will have engaged with such norms in one way or another at some moment in time. What is less acknowledged is that localities also regulate.³³ Unlike the norm-generating activity of regions, that of localities is less documented in legal scholarship. Most existing studies on SNAs in the EU deal with regions or even just regions with particularly pronounced autonomies.³⁴ ‘Regions’ and ‘regionalism’ are words that spring to mind when thinking about SNAs in Europe, probably by reason of their geographical and economic size, legal competences and political power, which are on average more pronounced than those of localities. In this picture localities are sometimes overlooked.³⁵ This should not however be the case.³⁶ Localities regulate in many areas, also where we would expect it least, as was the case regarding the protection of human dignity by a municipality in *Omega*.

³³ Article 107(3) of the Luxembourg Constitution for instance empowers local governments to create local regulations and local taxes (taxes are subject to approval by the national level).

³⁴ See for instance Bengoetxea (n 7) who examines the role of ‘constitutional regions’ in the EU or Koen Lenaerts and Nathan Cambien, ‘Regions and the European Courts: Giving Shape to the Regional Dimension of Member States’ (2010) 35 *European Law Review* 609, examining the role of regions but not cities in EU law.

³⁵ Nicola argued that in EU legal studies ‘cities remain invisible as political communities to the European judiciary’. Fernanda Nicola, ‘Invisible Cities in Europe’ (2012) 35 *Fordham International Law Journal* 1286.

³⁶ Beyond the EU context, there is an emergent strand of literature that examines the capacity of localities, especially large cities, as norm-generators. See Yishai Blank, ‘Localism in the New Global Legal Order’ (2006) 47 *Harvard International Law Journal* 263, Judith Resnik, ‘Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry’ (2006) 115 *Yale Law Journal* 1564, Stacy Lozner, ‘Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative’ (2004) 104 *Columbia Law Review* 768.

Increased attention has recently been paid to the regulatory role of localities, in particular big cities.³⁷ It has for example been suggested that the planned new devolution arrangement in the UK, which will most likely attribute more autonomy to Scotland, should be accompanied by wider devolution, also granting a considerable amount of autonomy to Manchester and reinforcing those of London.³⁸ Others argue that a reframing of the House of Lords, permitting for the representation of cities and regions should be envisaged.³⁹ Nonetheless, the contours of local norm-generation have been explored less extensively by legal scholarship and this section briefly engages with them in preparation for subsequent analysis.

Localities create norms by virtue of the competences they have under domestic law. Often, such competences may not be particularly pronounced but municipalities can show much creativity in applying them. The norm-generating activity of local governments is not however limited to the exercise of their autonomous competences under domestic law. Local governments are for instance encouraged to regulate by international and transnational law, as they are ‘transforming into objects for international regulation and are increasingly used as a means for disseminating and implementing global political programs, financial schemes, and governance strategies.’⁴⁰ It is worthy of special note that the United Nations and the World Bank actively encourage the

³⁷ See *ibid.*

³⁸ Stephen Tierney, ‘Is a Federal Britain Now Inevitable?’ (*UK Constitutional Law Blog*, 27 November 2014), <<http://ukconstitutionallaw.org/2014/11/27/stephen-tierney-is-a-federal-britain-now-inevitable/>> (accessed 14 March 2015).

³⁹ Patrick Wintour, Miliband Calls for Second Chamber to Represent all UK’s Cities and Regions, (*The Guardian*, 31 October 2014), <<http://www.theguardian.com/politics/2014/oct/31/miliband-devolution-elected-second-chamber-regions>> (accessed 14 March 2015).

⁴⁰ Blank (n 36) 263.

delegation of regulatory competence to localities.⁴¹ Some have interpreted this as a ‘reshaping’ of localities which comes accompanied by a new set of ideas regarding the desirable relationship between the national and the local level ‘including the ideal level of local autonomy, the ideal division of power between national and local levels, and the amount of flexibility that should exist to adjust that division of power.’⁴²

Local governments throughout the world support each other in their regulatory function, for instance through cooperation in networks⁴³, which can either be of a general nature or have a thematic focus.⁴⁴ Such networks allow localities to collaborate on issues of common concern and to exchange experiences to engage in a process of mutual learning. Networks allow localities to unite and put pressure on States and international actors, for instance concerning climate change.⁴⁵ Through these different channels, ‘localities, from big cities to small towns, are entangled with the emerging global village.’⁴⁶ This has been understood to demonstrate that globalization ‘is not only imposed on passive localities by their states or by international institutions—it is also advanced from the ground up by localities themselves.’⁴⁷ This has in turn been

⁴¹ Ibid 264.

⁴² Ibid 264.

⁴³ See further David Smith and Michael Timberlake, ‘Hierarchies of Dominance Among World Cities’ in Saskia Sassen (ed), *Global Networks, Linked Cities* (Routledge 2002).

⁴⁴ Such as for example climate change networks. On this, see Helmut Philipp Aust, ‘Auf dem Weg zu einem Recht der Globalen Stadt? "C40" und der "Konvent der Bürgermeister" im Globalen Klimaschutzregime’ (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 673.

⁴⁵ Richard Stewart, ‘States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures’ (2008) 50 *Arizona Law Review* 681, Harriet Bulkeley and Kristine Kern, ‘Local Government and the Governing of Climate Change in Germany and the UK’ (2006) 43 *Urban Studies* 2237, Harriet Bulkeley and Vanesa Broto, ‘Governing by Experiment? Global Cities and the Governing of Climate Change’ (2012) *Transactions of the Institute of British Geographers* 361, Michele Betsill and Harriet Bulkeley, ‘Cities and the Multilevel Governance of Global Climate Change’ (2006) 12 *Global Governance* 141.

⁴⁶ Blank 268.

⁴⁷ Ibid 268.

interpreted as localities doing their part ‘to further disaggregate the waning Westphalian concepts of the unitary state.’⁴⁸ These accounts provide interesting evidence of the interconnection between various levels of public authority and that SNAs should not be understood as phenomena purely internal to the Member State.

While much local regulation relates to local public services and the operation and functioning of a municipality, localities also serve as alternative political scales, as fora that can reflect a different set of preferences from those endorsed at a national scale. Cities are not solely accumulations of buildings but also socio-political spheres.⁴⁹ Gerken observed in the U.S. context that localities can be sites where national or regional minorities constitute majorities.⁵⁰ Such minorities have the potential to influence the local policy-making process, whereas they could not have a similar influence on national policy-definition.⁵¹ Coming back to *Omega*, this makes us think about the fact that while there was no national or regional consensus that lasergames should be outlawed, Bonn decided to do so within its territory.

Local norms matter not least because they concern an increasing amount of individuals as ever-higher shares of the world’s population live in urban areas, a number expected to go up in the coming decades.⁵² All over the world, cities ‘are in a state of flux

⁴⁸ Ibid 268.

⁴⁹ Sassen (n 28) 2 -3.

⁵⁰ Heather Gerken, ‘Foreword: Federalism All the Way Down’ (2010) 124 Harvard Law Review 4.

⁵¹ Sassen (n 28) 3.

⁵² National Intelligence Council, *Global Trends 2030: Alternative Worlds*, available online: www.dni.gov/nic/globaltrends (2012) 27. Neil Brenner and Roger Kreil, ‘From Global Cities to Globalised Urbanization’ (2014) 1 Glocalism: Journal of Culture, Politics and Innovation 1, 1.

and exhibit complex dynamics'⁵³ as they welcome ever-larger shares of the world's population into their territory.⁵⁴ Local norms also matter as they regulate important sectors of the economy. Some '*megalopolis*' have more economic gravity than many regions, and even some States: suffice it to think of the City of London. More generally, 85% of European GDP is generated in urban areas, which are also home to three quarters of the EU's population.⁵⁵

Cities are becoming hugely important for innovation, be it of a scientific, technological or regulatory nature. It was observed that in the U.S. it is in the cities where the 'most significant 21st century trends – from deep inequality to cutting-edge innovation – are most vividly on display.'⁵⁶ Cities are not only sites of economic activity but also of social change, especially in the face of national inactivity. American cities push for minimum wage hikes as 'States and municipalities across the country are leading a localised push to raise the minimum wage'⁵⁷ and have played a not so subtle role in the promotion of gay rights.⁵⁸ The regulatory activity of American cities has attracted particular attention but similar dynamics can be observed across the EU where localities, such as the German town of Heidelberg, have been pushing for better climate change

⁵³ Andrea Caragliu, Chiara Del Bo and Peter Nijkamp, 'Smart Cities in Europe' (2013) 18 *Journal of Urban Technology* 65, 65.

⁵⁴ Urbanization leads to new forms of 'global connectivity – along with new patterns of disconnection, peripheralization, exclusion and vulnerability – among and within urbanizing regions across the global'. Kreil (n 52) 2.

⁵⁵ European Investment Bank, *Shaping Sustainable Cities* (2013). Report available online: http://www.eib.org/attachments/thematic/shaping_sustainable_cities_en.pdf, 1.

⁵⁶ Edward Luce, 'The Rise of a New US Federalism' *The Financial Times* (London, 19 January 2014).

⁵⁷ Mike DeBonis and Reid Wilson, 'Push for Minimum Wage Hike Led By Localities, Democrats' *The Washington Post* (Washington DC, 20 November 2013).

⁵⁸ For an overview of this phenomenon as well as of the existing literature, see Finck, 'The Role of Localism in Constitutional Change: A Case Study' (n 36).

adaptation and mitigation strategies.⁵⁹ With regard to climate change, the manifold urban schemes initiated over recent years ‘can be regarded as climate change experiments that are central to the ways in which mitigation and adaptation are being configured and contested.’⁶⁰ Even if local plans could sometimes not be concretised, urban responses have nonetheless resulted in experimentation, the influence of which extends ‘beyond the polity’ and leads to the ‘shifting and blurring of public/private authority and the restructuring of the (local) state, but also the emergence of new forms of institutional innovation emerging through experiments themselves.’⁶¹ This illustrates that the effect of local norms is not necessarily limited to the local territory. This is indeed a central point to note when studying local norms as we often presume that local norms stay confined within the territory of the locality and are accordingly of little interest for domestic constitutional law, and EU law.

This section aimed at introducing SNAs and the regulation they create. It has shown not only that localities produce regulation but also that such regulation may have effects that exceed the local borders. This underlines that within the EU many levels of public authority, including local governments and the EU, are interconnected. The interconnection between subnational autonomies and the EU is subject to analysis in the following sub-section that engages with the impact European integration has had on subnational autonomies.

⁵⁹ Finck, ‘Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation’ (n 45).

⁶⁰ Bulkeley and Broto (n 45) 362 (emphasis in original).

⁶¹ Ibid 373.

C. Subnational Authorities and European Integration

It has thus far been observed that a large variety of subnational arrangements exist within the various Member States. In times of European integration, the consequences of such autonomies do not remain confined to the domestic scale. Rather, they interact with the EU and its legal order in a variety of manners. The ensuing chapters of this thesis engage with such interactions in further depth. The aim of this short section is to establish that such interactions take place, and this in different forms and manners.

The links that exist between SNAs and EU integration are plurifaceted in character. First, it should be pointed out that EU integration has the capacity to impact on the very competences held by infra-State bodies. By virtue of the principle of conferral, the Union exercises those competences that the Member States have delegated to it.⁶² From a supranational point of view, it does not matter whether these powers were previously exercised by the State itself or an SNA as any competence transferred to the EU is seen to be that ‘of a Member State’.⁶³ Matters are however more complex from the domestic point of view, as a consequence of European integration, SNAs might no longer be able freely to exercise their powers. In a speech at Humboldt University in 2001, the then Minister-President of North Rhine Westphalia exposed how German regions had to ring-fence their competences against EU action.⁶⁴ As a matter of fact, many of the powers

⁶² Article 5(1) TEU.

⁶³ Crespo (n 217). See also Kottman, ‘Europe and the Regions: Sub-national Entity Representation at Community Level’ (2001) 26 European Law Review, 161.

⁶⁴ Wolfgang Clement, *Europa gestalten, nicht verwalten. Die Kompetenzordnung der Europäischen Union nach Nizza* (Speech in the Series Forum Constitutionis Europae, Walter Hallstein Institut für Europäisches Verfassungsrecht 12 February 2001), cited in Charlie Jeffery, ‘Regions and the European Union: Letting

delegated to the EU are, under internal constitutional arrangements, powers that formally belong to SNAs.⁶⁵ Such competence transfers can result in an ‘indirect skewing of the structure of intra-state authority in favour of the central State.’⁶⁶ It follows that many subnational competences are nowadays ‘shared, mixed or confused with the powers of the EU institutions.’⁶⁷

The same effects also occur more implicitly, not through an express transfer of competence but transfers of power that operate on a more subtle basis, such as for instance in the context of new governance methods. The Open Method of Co-Ordination (‘OMC’) has been shown to bear the potential to indirectly erode subnational competences. With regard to education, a typical subnational competence, OMC guidelines on educational quality have been developed. Dawson illustrated that while the OMC is often framed as an instrument of multi-level governance, ‘strategic decision-making and reporting’ thereunder is merely a Member State competence.⁶⁸ As a consequence the national level can reassert itself compared to SNAs on a supranational scale as SNAs have no active role in the OMC.⁶⁹ While they may have competence on educational matters that role is not reflected in the OMC.

them In, and Leaving them Alone’ in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 38.

⁶⁵ Jeffery, ‘Conclusions: Sub-National Authorities and European Domestic Policy’ (1996) 6 *Regional & Federal Studies* 204, 316.

⁶⁶ Ibid.

⁶⁷ Bengoetxea (n 7) 230.

⁶⁸ Mark Dawson, *New Governance and the Transformation of European Law* (Cambridge University Press 2011) 200.

⁶⁹ Ibid 199-203.

Third, supranational integration has had the effect of imposing obligations on regional and local authorities. While SNAs are bound to respect EU law due to primacy, they may also have implementing duties with regard to EU legislation. This is examined further in Chapter Three, in particular regarding direct and indirect responsibility for the incorrect implementation of EU law. Fourth, European integration has led to a reinforcement of national executives.⁷⁰ The EU has institutionalised ‘an arena within which national political elites, most prominently within the Council, have an opportunity to advance policies that might have been unfeasible had they been pursued solely within a domestic context.’⁷¹ As a consequence SNAs are subject to the same loss of control over policy-making as national parliaments and perhaps even ‘more so, since they are a step removed from the ability to exercise direct control over Ministers acting in Council.’⁷² Whereas national parliaments have a special status to check EU competence under the Early Warning System, the same is not true for regional parliaments, which may, at best only indirectly, contribute to this process.⁷³ As a consequence, SNAs are left ‘to seek protection from damage done by competence within the domestic system’.⁷⁴

⁷⁰ Andrew Moravcsik, *Why the European Union Strenghtens the State: Domestic Politics and International Cooperation* (Harvard University Center for European Studies, Working Paper Series #52 <https://www.princeton.edu/~amoravcs/library/strengthen.pdf> 1994) 1.

⁷¹ Stephen Weatherill, ‘Finding a Role for the Regions in Checking the EU's Competence’ in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 131.

⁷² Ibid 132.

⁷³ Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. This Protocol is subject to further analysis in the subsequent chapter.

⁷⁴ Weatherill, ‘Finding a Role for the Regions in Checking the EU's Competence’ (n 71) 148.

The combination of these different phenomena has led some to argue that SNAs are in a ‘plight’⁷⁵ vis-à-vis the EU as it is ‘very difficult for the regional authorities to protect the interests of their citizens where they are not supported by their Member States at EU level.’⁷⁶ SNAs, it has been said, have sometimes ‘been marginalised by an integration process founded on the interplay of Member States and European institutions.’⁷⁷ The different elements examined thus far indeed portray the restricting effects that EU integration has had on subnational autonomies. A number of Member States have created mechanisms to compensate these effects. In some States, the central level must inform SNAs of Union affairs that affect them.⁷⁸ Such obligations exist in Germany,⁷⁹ Belgium,⁸⁰ Austria,⁸¹ Italy,⁸² Spain,⁸³ the United Kingdom⁸⁴ and France⁸⁵. According to Italian law 11/2005, regions and localities must be informed of EU draft legislation that affects them so that they can issue comments.⁸⁶ Such mechanisms seek to ensure that subnational concerns can be voiced with regard to EU integration. In a

⁷⁵ See Jill Wakefield, ‘The Plight of Regions in a Multi-Layered Europe’ (2005) 30 *European Law Review* 406.

⁷⁶ *Ibid* 406.

⁷⁷ Jeffery, ‘Regions and the European Union: Letting them In, and Leaving them Alone’ (n 64) 34.

⁷⁸ Michael Tatham, ‘Devolution and EU Policy-Shaping: Bridging the Gap Between Multi-Level Governance and Liberal Intergovernmentalism’ (2011) 3 *European Political Science Review* 53, 58.

⁷⁹ Article 23(2) of the German Basic Law.

⁸⁰ Article 168 of the Belgian Constitution.

⁸¹ The Austrian government must inform local and regional governments both directly and indirectly through the Bundesrat. See Articles 23(d)1, 23(e)1 and 23(g) 1 of the Austrian Constitution.

⁸² By virtue of Law No 11/2005 that regulates regional participation in EU decision-making.

⁸³ Article 6 of Law 24/2009 of 22 December 2009 establishes a duty for the national Parliament to transmit any EU draft legislative acts to regional parliaments.

⁸⁴ Memorandum of Understanding paras 17-20 and Concordats on Co-Ordination of European Union Policy Issues (December 2001, Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee), paras B1.2, B1.4, B2.2, B2.4, B3.2, B3.4, 4.2, B4.3.

⁸⁵ Article 88(4) of the French Constitution.

⁸⁶ Article 5 of Law 11/2005.

number of Member States SNAs can also participate in EU policy making through their upper chambers, interregional or national-regional bodies.⁸⁷

In addition to this, an increasing amount of subnational authorities attempt directly to interact with the European institutions. This explains why many regional and local authorities have over the past decades established offices in Brussels, which ‘are in most cases of rather impressive nature’⁸⁸ and aim at promoting the respective infra-State body vis-à-vis the different EU institutions.⁸⁹ A number of reasons have been identified why the European Commission is interested in communicating with subnational representatives, such as the ‘desire to achieve better application of its policies, to gain first-hand information and to spread its ideas.’⁹⁰ When discussing the various manners through which SNAs interconnect with the EU, the Committee of the Regions must be introduced as the latter was created specifically to represent SNAs at EU level. It is the aim of the next sub-section to briefly do so.

⁸⁷ Nikos Skoutaris, ‘The Role of Sub-State Entities in the EU Decision-Making Process’ in Elke Cloots Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 214-219.

⁸⁸ Joakim Nergelius, ‘The Committee of the Regions Today and in the Future - A Critical Overview’ in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005) 124. For an overview of the German Länder’s offices in Brussels, see Martin Nagelschmidt, ‘Les relations internationales des Länder allemands et l’évolution du système fédéral dans l’Union Européenne: le cas du Bade-Wurtemberg’ (1999) 30 *Etudes Internationales* 679, 688.

⁸⁹ Nergelius (n 88) 124.

⁹⁰ Thomas Christiansen and Pamela Lintner, *The Committee of the Regions after 10 Years: Lessons from the Past and Challenges for the Future* (2005) EIPASCOPE 2005/1, 2.

D. The Committee of the Regions

The Committee of the Regions ('CoR') is a EU advisory body, created by the Maastricht Treaty.⁹¹ It advises the Commission, the Council and the European Parliament either where the Treaty expressly provides so or where this is considered appropriate.⁹² Primary law foresees that the CoR is to be consulted, inter alia, in the areas of transport⁹³ education and youth⁹⁴ economic and social cohesion⁹⁵ the environment⁹⁶ and infrastructure networks.⁹⁷ One of its main purposes is to ensure that SNAs 'have a political voice of their own at EU level.'⁹⁸ According to Article 300(3) TFEU, the members of the CoR should be 'representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.'⁹⁹ The name of the organ may thus lead to confusion, as it in fact not only includes representatives of regions but also of localities. Different Member States in fact send very different representatives to the CoR. While delegations from federal or regionalised States tend predominantly to represent regions, those of largely unitary States such as Denmark, Luxembourg and Ireland are made up exclusively of representatives of local authorities.¹⁰⁰ The number of representatives per SNA has been

⁹¹ Nergelius (n 88) and Thomas Christiansen, 'Second Thoughts on Europe's "Third Level": The European Union's Committee of the Regions' (1996) 26 *Publius* 93.

⁹² Article 307(1) TFEU.

⁹³ Articles 90-100 TFEU.

⁹⁴ Article 165 TFEU.

⁹⁵ Articles 174-178 TFEU.

⁹⁶ Articles 191-193 TFEU.

⁹⁷ Articles 170-172 TFEU.

⁹⁸ Nergelius (n 88) 123.

⁹⁹ No additional condition is imposed regarding membership, except that the CoR may have no more than 350 members. See Article 305 TFEU.

¹⁰⁰ A. D'Atena, 'Participation of Regional and Local Authorities in the Preparatory Phase of European Policy Making - European Side' in Instituto di Studi sui Sistemi Regionali Federali e sulle Autonomie (ed),

subject to controversy as ‘it is often argued by representatives of big Länder in Germany, like Nordrhein Westfalen with some 18 million inhabitants, that it has fewer members within the committee than Luxembourg, a country which is hardly characterised by regional diversity or internal disorder.’¹⁰¹

Some have praised that the creation of the CoR has strengthened the connection between the European Commission and SNAs, which sometimes cooperate in the EU policy process.¹⁰² It was also put forward that for local governments the CoR ‘provides a level of access to EU decision-making not available in the Member States.’¹⁰³ Others stressed that the CoR unites subnational voices, bringing together ‘a multitude of different actors from regional, local and intermediate levels of government’.¹⁰⁴ This has been said to have the merit of showing that SNAs are not a homogenous category.¹⁰⁵ The functioning of the Committee seems however to be based on the assumption that SNAs are of a homogenous scale and have homogenous concerns. The CoR acts with a single voice, which means that issues concerning an individual or a certain number of SNAs often get lost. An SNA on its own cannot have recourse to the advisory body to seek the protection of its own regulatory competence. Indeed, the Committee’s opinions on draft legislation ‘are somehow supposed to represent the views of the different regions throughout Europe.’¹⁰⁶ Additionally, the CoR’s prerogatives are to be exercised ‘in the

Procedures for Local and Regional Authority Participation in European policy Making in the Member States (Committee of the Regions 2005) 20-21.

¹⁰¹ Nergelius (n 88) 124.

¹⁰² Lintner 2.

¹⁰³ Jeffery, ‘Regions and the European Union: Letting them In, and Leaving them Alone’ (n 64) 39.

¹⁰⁴ Christiansen and Lintner (n 90) 1.

¹⁰⁵ Müller-Graff (n 19) 110. See also Peter-Christian Müller-Graff, ‘Die europäischen Regionen in der Verfassung der EG’ (1997) *Integration* 147.

¹⁰⁶ Nergelius (n 88) 124.

Union's general interest'.¹⁰⁷ It accordingly does not provide a mechanism for SNAs directly and individually to represent their own interests, along the same lines as Member States can.

What is more, the influence that the CoR exerts on the EU institutions is said to be 'severely limited'.¹⁰⁸ Whereas the creation of the body 'contained the promise that lower levels would be more directly involved in decision-making processes that concerned them but from which they had been excluded',¹⁰⁹ it is questionable whether this goal has been achieved, as some have deplored that the CoR 'has not established itself as an authoritative voice of the regions'.¹¹⁰ Many legislative regions, and even more so big legislative regions, feel that the CoR is a disappointment as their economic and political weight gets lost in wider subnational concerns. In Member States such as Belgium, Austria and Germany, the central and regional governments share the right to define the Member State's EU policy and it was argued that as a consequence 'regions can get more of what they want done through Member State channels than through the CoR'.¹¹¹ At the Convention for the Future of Europe it was recognised that the CoR's composition does not reflect demographic realities¹¹² and also the Conference of European Regions with Legislative Powers has denounced the failure of the organ, claiming that alternative mechanisms are needed.¹¹³ Yet there seem to be no plans to change the Committee's composition and functioning. As a consequence, especially the larger regions have sought

¹⁰⁷ Article 300 (4) TFEU.

¹⁰⁸ Nergelius (n 88) 125.

¹⁰⁹ Christiansen 95.

¹¹⁰ Jeffery, 'Regions and the European Union: Letting them In, and Leaving them Alone' (n 64) 36.

¹¹¹ Ibid 37.

¹¹² CONV 218/03, 7.

¹¹³ Political Declaration by the Constitutional Regions (2001).

alternative channels to cooperate with other SNAs, notably (but not exclusively!) in order to influence EU decision-making.

E. Associations of Regions and Localities

Especially the more powerful regions are frustrated with the Committee of the Regions' functioning and have sought other ways to exert influence on EU policy-making.¹¹⁴ Alternative mechanisms include the establishment of regional offices in Brussels and the creation of associations of SNAs.¹¹⁵ The responsibility of many infra-State bodies to implement EU law, Jeffery has claimed, was accompanied 'by repeated attempts by some regional governments' and in particular those with legislative competences 'to engage in constitutive politics at the European level.'¹¹⁶ Such SNAs want the EU 'to be sensitive not just to the balance between the Union and its constituent Member States but also to the regions which in some cases in turn constitute the Member States.'¹¹⁷ The creation of subnational associations, which are not formally recognised under EU law, has been said to be perhaps more significant in this regard than the existence of the CoR itself.¹¹⁸ While this section does provide a detailed overview of these various associations, some will be briefly introduced.

¹¹⁴ Nergelius (n 88) 124.

¹¹⁵ Ibid 124. See also Micheal Keating and Lisbeth Hooghe, 'By-passing the Nation-State? Regions and the EU Policy Process' in Jeremy Richardson (ed), *European Union - Power and Policy Making* (Routledge 1996).

¹¹⁶ Jeffery, 'Regions and the European Union: Letting them In, and Leaving them Alone' (n 64) 33.

¹¹⁷ Ibid 33.

¹¹⁸ Stephen Weatherill, 'The Challenge of the Regional Dimension in the European Union' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 2.

The Conference of European Regions with Legislative Powers (REGLEG) was created in 2001. Its members, all regions with legislative powers, encompass almost half of the Union's total population.¹¹⁹ The Assembly of European Regions (AER) emerged already in 1985. Contrary to REGLEG, which accommodates only the most powerful regions, AER is open to any European SNA, irrespective of whether it has legislative competence, and even counts member SNAs that do not form part of a EU Member State.¹²⁰ The AER actively seeks to promote interregional and local communication, having established an online 'Knowledge Center' that disseminates information on thematic issues.¹²¹ One of the many topics covered is 'Smart Specialisation' which is a concept to which this thesis will return in Chapter Four.¹²² In 2013, the association hosted a forum for cities and regions, intended to involve European and non-European stakeholders with smart specialisation strategies.¹²³ What is important to note for the purposes of this chapter is the collaboration and interconnection that takes place between SNAs that participate in such networks.¹²⁴

Also cities have united on a transnational scale to further their interests. EUROCITIES is a network composed of a number of major European cities. It was

¹¹⁹ The political network for regions with legislative powers, composed by 73 regions in 8 Member States (Austria, Belgium, Finland, Germany, Italy, Portugal, Spain and UK), representing 43.5% of the Union's total population. For further information, see www.regleg.eu.

¹²⁰ The website of the AER can be found at <http://www.aer.eu/en/home.html>

¹²¹ The website of the Knowledge Centre can be found at <http://www.aer.eu/en/knowledge-centre/thematic-expertise-thematic-issues/economy-research-innovation.html>

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Scholarly literature has started to examine the contribution of individual SNAs in such networks. For an overview of the Basque Country's involvement in associations of SNAs, see Bengoetxea, 'The Participation of Infra-State Entities in European Union Affairs in Spain: the Basque Case'. On Scotland, see Cairtriona Carter and Aileen McLeod, 'The Scottish Parliament and the European Union: Analysing Regional Parliamentary Engagement' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005).

founded in 1986 by Barcelona, Birmingham, Frankfurt am Main, Lyon, Milan and Rotterdam and now comprises over 130 cities in addition to 40 partner cities in 35 countries, both EU and non-EU. The network aims at sharing knowledge and exchanging ideas as well as shaping ‘the opinions of Brussels stakeholders and ultimately shift the focus of EU legislation in a way which allows city governments to tackle strategic challenges at local level.’¹²⁵ The Council of European Municipal and Regional Authorities (CEMR) on the other hand represents the interests of European local and regional authorities and associations in 41 countries within and outside the EU. It aims at promoting exchanges between elected representatives, seeing itself as a forum for debate at transnational scale and seeks to influence European policy and legislation.¹²⁶

In addition to these general networks, thematic collaborations between SNAs have emerged, for instance with regard to climate change policy. The C40 is an international network that brings together 69 large cities from around the world.¹²⁷ It was created in 2005 as the result of an initiative of former Mayor of London Livingstone, and New York City Mayor Bloomberg served as its chair from 2010-2013.¹²⁸ On top of such thematic networks, collaborations between neighbouring SNAs have developed, such as the Öresund Committee, established in 1993 between Denmark and Sweden, which is composed of Swedish and Danish political office-holders at regional and local level. The Committee does not have a formal task but rather constitutes a loose form of cooperation within a transnational region that encompasses the cities of Copenhagen, Malmö and

¹²⁵ The website of EUROCITIES is online at http://www.eurocities.eu/eurocities/about_us.

¹²⁶ The website of the Council of European Municipal and Regional Authorities is at <http://www.ccre.org/en/activites/index>.

¹²⁷ Their website can be found online under <http://www.c40.org/cities>. See also Aust (n 44).

¹²⁸ Ibid.

Helsingborg. With the support of civil servants of the two countries, the Öresund Committee establishes policies to further economic growth and integration for the entire region. The Committee's first, rather impressive; project consisted in the initiation of the construction of a bridge connecting Denmark and Sweden, which opened in 1999. This infrastructural connection between the two territories sought to further integration and the stimulation of economic cooperation and development in the transborder region.¹²⁹ According to the former Vice-President of the European Commission Almunia, the bridge has 'fostered regional integration between Denmark and Sweden' which is why public financing granted by Sweden and Denmark for its construction was found to be in line with the EU State aid rules.¹³⁰ Another interesting instance of cross-border cooperation is the Saar-Lor-Lux forum that was established between the German Land Saarland, the French region Lorraine, and Luxembourg, which aims primarily at economic development but also includes other projects, such as for instance those of a cultural nature.¹³¹ The Saar-Lor-Lux project was financed by the INTERREG III A, showing that the EU actively encourages such cooperation.¹³² These are but two of the many examples of interregional and interlocal cooperation. The EU, in recognising the

¹²⁹ Linze Schaap, Casper Geurtz, Laurens de Graaf and Niels Karsten, *Innovations in Sub-National Government in Europe. A quick Scan* (http://www.rob-rfv.nl/documenten/migratie/innovations_in_subnational_government_in_europe.pdf October 2009) 16.

¹³⁰ European Commission, State Aid: Commission Approves Public Finance of Öresund Fixed-Road Link Infrastructure Project (2014) Press Release available online under http://europa.eu/rapid/press-release_IP-14-1156_en.htm (accessed 18 March 2015).

¹³¹ See for example, the cooperation between the German Land Saarland, the French région Lorraine and Luxembourg under the Saar-Lor-Lux cooperation, the website of which is under <http://www.saarlorlux.biz/cgi-bin/cms> (accessed 18 March 2015).

¹³² INTERREG III A (2000-2006) was a EU initiative that sought to foster the balanced development of the continent through cross-border, transnational and interregional cooperation. See Communication of 28 April 2000 from the Commission to the Member States laying down guidelines for a Community Initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory (Interreg III) [2000] OJ C 143.

value of such initiatives, recognises that SNAs play an active role regarding the shaping of economic policy.¹³³

In fact, the EU encourages in fact cooperation between local and regional authorities in a number of ways. Regulation 1082/2006 on European groupings of territorial co-operation (EGTC) for instance allows SNAs to establish an EGTC, which enjoys legal personality under EU law. The EGTC is able to act either ‘for the purpose of implementing territorial cooperation or projects co-financed’ by the Union, notably under the Structural Funds or ‘for the purposes of carrying out actions of territorial cooperation which are at the sole initiative’ of Member States or the Sub-State entities.¹³⁴ These interregional and intercity networks further cooperation between different scales of public authority and illustrate how various levels of public authority cooperate and influence each other on a number of issues.¹³⁵ The collaboration of SNAs in transnational networks raises the question of their competence to do so. We must indeed wonder why SNAs are able to collaborate with public authorities abroad given that this constitutes an expression of ‘international relations’, which are usually thought of as being the sole prerogative of the sovereign Member State. The overview of SNAs’ international relations capacity below provides an interesting illustration of the competences of SNAs, as well as how they exercise their competences through the collaboration with other levels of public authority.

¹³³ The website is under <http://www.interreg3a-delux.org/projekte/wirtschaftsportal.shtml>.

¹³⁴ On the EGTC see Committee of the Regions, *The European Grouping of Territorial Cooperation* (Committee of the Regions 2007), Davide Strazzani, ‘Harmonising Trends vs Domestic Regulatory Frameworks: Looking for the European Law on Cross-Border Cooperation’ (2011) *European Journal of Legal Studies* 151.

¹³⁵ Blank (n 36) 268.

F. SNAs and International Relations

The ability to engage in international relations is often thought of as a quintessential prerogative of the sovereign. The foreign policy prerogative has traditionally been ‘located among the executive prerogatives of the central national State. (...) The result has been an indirect skewing of the structure of intra-state authority in favour of central State institutions.’¹³⁶ This would mean that only Member States, not SNAs engage in international relations. The above section already hinted that this statement is not quite true. Infra-State bodies conduct international relations between each other but also with transnational, supranational and international bodies, and sometimes also other States.¹³⁷ SNAs also engage in international relations in contributing to networks or ad hoc collaborations with a wide range of actors. Evans noted that there is ‘an increasing tendency for regions to identify and pursue interests divergent from those expressed in international and European organizations by the central institutions of their States.’¹³⁸ Over the past decades, local and regional authorities have noticeably diversified and multiplied the relations they entertain beyond their own State.¹³⁹ Over the past few decades, a ‘European paradiplomacy’ has developed, a sort of ‘sub-national constitutional

¹³⁶ Jan Kottmann, ‘Europe and the Regions: Subnational Entity Representation at Community Level’ (2001) 26 *European Law Review*, 161. Note however the engagement of SNAs in foreign relations, as set out in the previous chapter.

¹³⁷ The relations SNAs entertain with EU institutions, for instance through their representation offices in Brussels are another manifestation thereof. Nikos Skoutaris, ‘Comparing the Sub-National Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs’ (2012) 4 *Perspectives on Federalism* 239, 257.

¹³⁸ Andrew Evans, ‘Regional Dimensions to European Governance’ (2003) 52 *International and Comparative Quarterly* 21, 21.

¹³⁹ Silvia Raich, *Grenzüberschreitende und Interregionale Zusammenarbeit in einem "Europe der Regionen"* (Nomos 1995) and Bernd Gros and Peter Schmitt-Egner, *Europas Kooperierende Regionen: Rahmenbedingungen und Praxis Transnationaler Zusammenarbeit Deutscher Grenzregionen in Europa* (Nomos 1994). See also Nagelschmidt (n 88) 680, Skoutaris (n 137) 239.

space' that allows local and regional authorities to participate in the international arena.¹⁴⁰

SNAs' capacity to take part in international relations varies from one State to another. In some contexts the *in foro interno in foro externo* doctrine applies, that is to say that an SNA can engage in international relations in the same fields of competence it has autonomy to regulate under domestic provisions. In other contexts ad hoc formulae have been developed. Belgium is considered to be the Member State in which SNAs have the most expansive international relations prerogatives. Its regions and communities enjoy 'strongly developed constitutional rights to maintain autonomous foreign relations worldwide' under Article 167 of the Belgian Constitution.¹⁴¹ Since the 1993 reform that transformed Belgium into a federal State 'the regions are not just entitled but even compelled by the constitution to manage their own external relations.'¹⁴² Not only does the *in foro interno in foro externo* doctrine apply but there is also an absence of hierarchy between the federal and the regional level regarding foreign affairs.¹⁴³ The Belgian communities and regions have been eagerly exercising their constitutional international relations competence and have developed 'a wide range of instruments, networks and activities via which they interact upon the international scene.'¹⁴⁴ By 2010 Flanders had concluded 33 international Treaties, the Walloon Region 67 and the French-speaking

¹⁴⁰ Skoutaris (n 137) 240.

¹⁴¹ Skoutaris, 'Comparing the Sub-National Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs' (n 137) 244, Stéphane Paquin, 'Paradiplomatie identitaire et diplomatie en Belgique fédérale: le cas de la Flandre' (2003) 36 Canadian Journal of Political Science / Revue canadienne de science politique 621, 627.

¹⁴² David Crikemans, 'Foreign Policy and Diplomacy of the Belgian Regions; Flanders and Wallonia, (2010) Netherlands Institute of International Relations 'Clingendael', 2.

¹⁴³ Ibid 2.

¹⁴⁴ Ibid 3.

community 51.¹⁴⁵ It is noteworthy that Wallonia and Flanders have chosen different, rather than the same, formal and informal instruments to advance their interests abroad.¹⁴⁶ Of particular importance for Wallonia is for instance the ‘Grande Région’, the collaboration it entertains with the Grand Duchy of Luxembourg, the German Länder Saarland and Rheinland-Pfalz as well as the Belgian French-speaking community and the Belgian German-speaking Community.¹⁴⁷ In addition to conducting their own international relations the Belgian regions have the capacity to determine the composition of the Belgian multilateral negotiation delegations.¹⁴⁸ They can moreover appoint ‘diplomatic representatives’ abroad that are placed on the diplomatic lists of the Belgian embassies.¹⁴⁹ While SNAs enjoy pronounced independence, interdependence also qualifies this domain as various actors collaborate and need to reach agreement on the framing of international relations. Crikemans considers that the Belgian central government ‘has successfully transformed itself into a coordination centre which guides all external contacts under an atmosphere of federal loyalty.’¹⁵⁰

In Germany, Article 32(3) of the Basic Law expressly enables the Länder to conclude Treaties with other States, subject to the approval of the federal level, in those domains that fall within their competences.¹⁵¹ Bavaria, for example, has developed a

¹⁴⁵ David Crikemans, ‘Foreign Policy and Diplomacy of the Belgian Regions: Flanders and Wallonia’ (2010) Discussion Papers in Diplomacy The Hague Institute of International Relations 20.

¹⁴⁶ Crikemans (n 142) ‘2010’ 4.

¹⁴⁷ Ibid 27.

¹⁴⁸ Ibid, 7. See also D. Crikemans and T. Salomonson, ‘La Belgique, la Flandre et les forums multilatéraux’ (2001) 10 Bulletin d'histoire politique 125.

¹⁴⁹ Skoutaris, ‘Comparing the Sub-National Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs’ (n 137) 256.

¹⁵⁰ Crikemans (n 142) ‘2010’ 29.

¹⁵¹ As per Art 32(1) of the German Basic Law the federal level remains the predominant actor in this domain. For instances of transnational cooperation of the German Länder see Nagelschmidt (n 88) 681 and

number of formal relations with infra-State bodies across the EU and the wider world.¹⁵² In the UK on the other hand, the central government enjoys exclusive competence over international relations so that none of the devolution agreements provides for subnational Treaty making powers.¹⁵³ The devolved territories may nonetheless conclude cooperation agreements with SNAs elsewhere and Scotland has for instance signed a Treaty with the Chinese province of Shandong.¹⁵⁴ This indicates that subnational authorities interrelate with SNAs elsewhere but also with other States. This challenges our constitutional imagination in so far as regions and localities are not only active within the confines of their own national territories but interact with SNAs in other Member States, and beyond.

In addition SNAs influence their national governments' international relations by virtue of domestic provisions that mandate that they be consulted in the context of Treaty negotiations. Article 10(3) of the Austrian Constitution provides that the federal government shall allow the Länder to present their views before the conclusion of Treaties likely to affect regional competences. Regional and local authorities must be informed through the Bundesrat on EU Treaties.¹⁵⁵ The case of the Finnish Åland islands provides a maybe more unexpected example.¹⁵⁶ Åland actually had a say in whether the Treaty of Lisbon would be applicable in its territory. As a condition of its agreement, the regional government put forward four requests to the Finnish government, three of which

Rudolf Hrbek, 'The Federal Republic of Germany' in Hans Michelmann (ed), *Foreign Relations in Federal Countries* (McGill-Queen's University Press 2009) 147.

¹⁵² Skoutaris (n 137) 244.

¹⁵³ Section 3 of Schedule 2 of the Northern Ireland Act 1998.

¹⁵⁴ Charlie Jeffery, 'Scotland's European and International Policy' in Requejo Ferran (ed), *Foreign Policy of Constituent Units at the Beginning of the 21st Century* (Col·lecció Institut d'Estudis Autònoms 2010) 116.

¹⁵⁵ Article 23 of the Austrian Constitution.

¹⁵⁶ On the particular constitutional status of the Åland islands, see Husa (n 9) 121-29.

were successful, namely a right for the SNA to appear before the CJEU, participate in the Early Warning System and in the meetings of the Council. The request that was not accepted was a seat for the region in the European Parliament.¹⁵⁷ Åland's right to participate in the preparation and negotiation of EU Treaties is of course based on Finnish law. From a EU point of view, this 'is an example of national mercy, not of European right.'¹⁵⁸ Also in other Member States, such as Belgium, SNAs are involved in the ratification of the European Treaties.¹⁵⁹ From the perspective of EU law, only the Member State are however involved in Treaty conclusion and ratification as a result of their status as masters of the Treaties. Below the surface of this simplified image, SNAs can nonetheless be actively involved in such matters. While from above the surface they at best appear as passive actors, a look below the surface unveils that they can in fact be active players – only, however, within the confines of their Member State.

Local and regional authorities' capacity to engage in international relations can be understood as an instance of institutional structure having an impact on legal substance. As Skoutaris has noted 'European paradiplomacy has been progressively developing not least because of the institutional opportunities that the Union composite constitutional order provides for the participation of the regional tier in its decision-making processes.'¹⁶⁰ This presents an interesting parallel with an observation Resnik made in the American context, precisely that 'federalist structure also serves as a path for the

¹⁵⁷ Skoutaris (n 137) 210, Pia Alilontinen and Savino Ruà, 'Lisbon Treaty Ratification: Will the Åland Islands Become Finland's Greenland?' (2008) The Centre for European Policy Studies 1/2008.

¹⁵⁸ Niilo Jääskinen, 'The Case of the Åland Islands - Regional Autonomy versus the European Union of States' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005) 98.

¹⁵⁹ Piet van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts' (2001) 38 Common Market Law Review 871, 882.

¹⁶⁰ Skoutaris (n 137) 240.

movement of international rights across borders.’¹⁶¹ This, she claims requires ‘revisiting legal doctrines that presume the exclusivity of national power in foreign affairs.’¹⁶² The fact that SNAs situated within the EU engage in international relations results from the very structure of the EU, which allows for this. However, it also challenges the notion of sovereign statehood according to which solely States engage in international affairs as well as the view that SNAs only have regulatory powers within their own territory.

This short section has offered but a brief overview of the manifold interactions that exist between infra-State bodies and the European Union. The following chapters will engage with these dynamics in further depth and provide further illustrations of how they relate to each other. Before venturing on to that analysis, this introductory part evaluates a claim that is often made, namely that decentralisation is an increasingly common phenomenon, which is driven by EU integration. I address this question here not only because it delivers further insights into the connection between the subnational and supranational scales but also because it points towards a more general pattern in contemporary governance structures, namely the coexistence of small-scale and large-scale governance. These patterns lead to a questioning of the regulatory monopoly of the State.

¹⁶¹ Resnik (n 36) 1564.

¹⁶² Ibid 1564.

G. The Prominence of Subnational Governance

In an ‘increasing number of Member States’, Lenaerts and Cambien have written, ‘important competences are allocated to subnational entities. This is true, first of all, in those Member States which are federal in structure, but the same happens to a lesser extent in those Member States with a strong unitary tradition.’¹⁶³ Also, others have claimed that ‘federalisation is increasingly common in Europe.’¹⁶⁴ It is true that many Member States, such as Belgium,¹⁶⁵ Italy,¹⁶⁶ Spain,¹⁶⁷ and the United Kingdom¹⁶⁸ have over recent decades decentralized competences to levels of public authority that reside below the central State. This presents a certain contrast to the starting point of European integration where the founding States were generally more centralized and unitary, Germany being the sole Member State with a truly decentralised structure (which is the result of centralisation, the Länder having founded the Federal Republic, not decentralization).¹⁶⁹ Over time, some formerly unitary States have delegated considerable competences to the subnational level.¹⁷⁰ Some have consequently observed a ‘centrifugal

¹⁶³ Lenaerts and Cambien (n 33) 609.

¹⁶⁴ Schaap et al. (n 129) 14.

¹⁶⁵ Belgium is a federal system, subdivided into both three linguistic communities (French, Flemish and German) that were established by the Second Gilson Act 1963 as well as economic regions (Brussels, Flanders and Wallonia). Refer to the two opening Articles of the Belgian Constitution.

¹⁶⁶ Italy is composed of 20 decentralized authorities. Five are constitutionally granted a special status and increased autonomy (Articles 123 and 116 of the Italian Constitution). The ordinary regions were created in 1970 and dispose since 2001 of residual legislative competences (see Article 117 of the Constitution).

¹⁶⁷ The 1978 Spanish reforms that led to the composition of seventeen quasi-federal autonomous communities that keep calling for more autonomy and in many cases refer to themselves as ‘Nations’.

¹⁶⁸ For Scotland, see the Scotland Act 1998, the Constitutional Reform Act 2005 as well as the Scotland Act 2012. For Wales, see the Government of Wales Act 1998 as well as the Government of Wales Act 2006. For Northern Ireland, see the 1998 Belfast Agreement as well as the St Andrews Agreement of 2006.

¹⁶⁹ See by way of example Theodor Maunz, *Deutsches Staatsrecht*, 12th edition (Verlag C H Beck 1964) 1, 6, 9.

¹⁷⁰ Charlie Jeffrey, ‘Sub-national Mobilization and European Integration: Does it Make Any Difference?’ (2000) *Journal of Common Market Studies*, vol. 38, No.1, 1-23, Micheal Keating, ‘The Regional Change in

trend' according to which 'powers which were previously exercised by the central authorities have thus been devolved to regional authorities' in many Member States.¹⁷¹

A dominant strand of opinion in federalism studies considers it to be common 'for systems of multi-level governance to drift power towards the centre.'¹⁷² In the EU, this would correspond to the reallocation of competences from the national to the supranational scale. Bogdanor predicted that the State-centric nature of EU law could lead to a 'centralising effect in relations between central, regional and local government'.¹⁷³ This however has not been the case and there are even indications that European integration increases rather than decreases decentralisation within the various Member States. According to Keating the EU has acted as a catalyst promoting regionalization within Member States.¹⁷⁴ He claimed that '[a]s Europe is increasingly regionalized, regions are europeanized and the State is both regionalized and europeanized',¹⁷⁵ alluding to the intertwining of different spheres of public authority.

According to these dynamics, all levels of public authority are subject to mutation and redefinition as a consequence of EU integration. The OECD had suggested that the

Central and Eastern Europe', in M. Keating and J. Hughes (eds.), *The Regional Challenge in Central and Eastern Europe* (Presses Universitaires Européennes, 2003) 56.

¹⁷¹ Koen Lenaerts, 'EU Federalism in 3-D' in Elke Cloots, Geert de Baere Stefan Sottiaux (ed), *Federalism in the European Union* (Hart Publishing 2012) 15.

¹⁷² Weatherill, 'Finding a Role for the Regions in Checking the EU's Competence' (n 71) 133. See also Stephen Breyer, 'Does Federalism Make a Difference?' (1999) Public Law 651, Sandra Day O'Connor, 'Altered States: Federalism and Devolution at the Real Turn of the Millenium' (2001) 60 Cambridge Law Journal 493, George Bermann, 'Proportionality and Subsidiarity' in Catherine Barnard and Joanne Scott (ed), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002).

¹⁷³ Bogdanor (n 10) 279.

¹⁷⁴ Micheal Keating, 'Europe's Changing Landscape: Territorial Restructuring and New Forms of Government' in Carol Lyons and Neil Walker Paul Beaumont (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

¹⁷⁵ Michael Keating, *The New Regionalism in Western Europe - Territorial Restructuring and Political Change* (Edward Elgar 1998) 183.

relationship between the subnational and the national is subject to change in those Member States that are recipients of the EU Structural Fund and Cohesion Fund ('the Structural Fund').¹⁷⁶ The Structural Fund provides financing to implement the Union's regional policy, with the aim of reducing regional disparities in terms of wealth, income and opportunities.¹⁷⁷ According to the OCED, the EU 'has actively supported the regionalisation trend' through this fund, and this in particular with regard to innovation as 'many regional innovation strategy initiatives began through participation in EU regional policy programmes.'¹⁷⁸

There are also indications that the introduction of tripartite contracts and agreements has increased subnational autonomies.¹⁷⁹ Tripartite contracts are concluded between the EU, the Member State and a regional or local authority. Via these contracts, SNAs are encouraged 'to play a growing role in the framing and implementation' of EU policies, while the EU ensures that SNAs enjoy more 'flexibility in the means provided for implementing legislation and programmes with a strong territorial impact, provided the level playing field at the heart of the internal market can be maintained.'¹⁸⁰ SNAs are seen as implementers of common norms while at the same time having distinct interests that EU law attempts to accommodate, where possible. The aim behind the introduction of tripartite contracts consists in 'implementing EU legislation with enhanced efficiency

¹⁷⁶ See further Gary Marks, 'Structural Policy in the European Community' in A.M. Sbragia (ed), *Euro-Politics: Institutions and Policymaking in the 'New' European Community* (Brookings Institution 1992).

¹⁷⁷ Article 174 TFEU.

¹⁷⁸ OECD, 'OECD Reviews of Regional Innovation: Regions and Innovation Policy' (2011) 118.

¹⁷⁹ On the Commission's initiative to further recognize the subnational dimension, see also: European Commission, 'A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities' COM (2002) 709 final.

¹⁸⁰ Ibid.

and flexibility.’¹⁸¹ They entail ‘a more direct, active and horizontal partnership between levels of government within the European Union.’¹⁸² The first agreement was signed in 2004 between the Commission, Italy and Lombardy in the context of sustainable mobility.¹⁸³ The contract concerned the putting into place of ‘an innovative, open and efficient governance of the mobility sector’ as at the time, mobility in Lombardy had ‘significant shortcomings with regard to its effectiveness, transparency, openness and coherence.’¹⁸⁴ Lombardy itself had initiated the conclusion of the contract in order to innovate with regard to its mobility sector.¹⁸⁵ The region accordingly took on an active, rather than purely passive role, in seeking support from the EU in furthering its policy objectives. While Member States are involved in this process, the relation between the SNA and the EU is nonetheless of a direct nature as they communicate directly with each other. Such direct contact has been said to provide ‘solid evidence that state governments have lost control of the relations between European agencies and sub-national actors’.¹⁸⁶ While tripartite agreements do not actively encourage decentralisation as such, they help regions seeking to innovate and regulate autonomously, within the limits set by EU law.

While these are merely some examples of how EU integration may indirectly have an impact on domestic institutional structures, they indicate that there is some merit

¹⁸¹ Martino Mazzoleni, ‘The First Tripartite Agreement in the EU. An Actor-Centred Analysis of an Experimental Multi-Level Interaction’ (2006) 16 *Regional and Federal Studies* 263, 264.

¹⁸² *Ibid*, 263.

¹⁸³ *Ibid*, 263.

¹⁸⁴ *Ibid* 270.

¹⁸⁵ *Ibid* 264.

¹⁸⁶ *Ibid* 275.

to claims that supranationalism empowers subnationalism.¹⁸⁷ We can also perceive in other domains that EU actively encourages subnational regulatory experimentation.¹⁸⁸ These dynamics should not however be understood as a one-sided enforcement of subnational autonomies. Rather, they are but one facet of the increased interconnection and mutual influence between different levels of public authority. While a reinforcement of local and regional governance as a consequence of supranational integration can be observed in many instances, the opposite is also true. European integration does in fact have the potential to reduce subnational power. According to an alleged structural deficit in the EU, it has been argued that over the course of the past decades ‘more and more competences have been transferred to Brussels without regard to the national constitutional structures of the Member States.’¹⁸⁹ Kottmann interpreted this as a ‘loss of sub-national authorities’ competence through European integration.’¹⁹⁰

Martinico and Pierdominici illustrated that the current financial and economic crisis has led to ‘centralization and compression of subnational spaces of autonomy’.¹⁹¹ EU measures aimed at combatting this crisis had an impact on Italy’s decentralised structure and created incentives for regions to make choices consistent with EU policy

¹⁸⁷ See also Guiseppe Martinico, ‘The Impact of ‘Regional Blindness’ on the Italian Regional State’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012).

¹⁸⁸ Such as for instance through the Joint Programming Initiative that encourages research coordination to transform cities into ‘centres of innovation and technology’. The website of this initiative can be accessed online under <http://jpi-urbaneurope.eu/>.

¹⁸⁹ Jan Kottmann, ‘Europe and the Regions: Subnational Entity Representation at Community Level’ (2001) 26 *European Law Review*, 159.

¹⁹⁰ *Ibid* 160.

¹⁹¹ Guiseppe Martinico and Leonardo Pierdominici, ‘Crisis, Emergency and Subnational Constitutionalism in the Italian context’ (2014) 6 *Perspectives on Federalism* 116.

rather than regulate independently.¹⁹² Italy is composed of regions, provinces, and municipalities.¹⁹³ The ECB emphasised that Italy needed ‘a strong commitment to abolish or merge some intermediate levels of administration (such as the provinces)’.¹⁹⁴ This subsequently led to domestic reform aimed at transforming the provinces into institutions that merely direct and coordinate the municipalities.¹⁹⁵ Legislation was moreover adopted that establishes ‘città metropolitane’ and new unions of municipalities (‘unioni di comuni’) the competences of which overlap with those of the provinces.¹⁹⁶ While the provinces remain in existence, they have been transformed into ‘second-level authorities, with not directly elected organs but composed of representations of the relative municipalities.’¹⁹⁷ It hence appears fair to conclude that EU integration impacts on domestic institutional structures, but also that such impact takes on different forms and can either reinforce or restrict subnational autonomies.

The patterns observed above should not be understood as specifically European in character. It is my impression that they are rather an expression of a phenomenon that occurs more widely, namely the coexistence and interconnection between governance on smaller scales and governance on larger scales. Subnational governance cannot be understood in isolation from phenomena such as ‘globalisation’ or ‘transnationalism’. According to de Búrca, over the past decades, there have been ‘separate and apparently

¹⁹² Ibid 124.

¹⁹³ See Article 5 of the Italian Constitution.

¹⁹⁴ Martinico and Pierdominici (n 191) 126.

¹⁹⁵ Decree-law n. 201/2011.

¹⁹⁶ Law n. 56/2014.

¹⁹⁷ Martinico and Pierdominici (n 191) 128-129.

opposite trends in government and governance'.¹⁹⁸ The first trend consists in 'the internationalisation or globalisation of government in certain spheres, with an increasing number of issues being allocated to or addressed by international and supranational levels of authority'.¹⁹⁹ In parallel, 'localisation, in the sense of the emergence of stronger local and regional politics, with a renewed interest in more direct democratic participation under the influence of republican and communitarian political theories' has emerged.²⁰⁰ According to Sassen the international economic system, which used to be 'ensconced largely in this inter-state system' has changed dramatically 'as a result of privatization, deregulation, the opening up of national economies to foreign firms, and the growing participation of national economic actors in global markets.'²⁰¹ In this context, she observed a

re-scaling of what are the strategic territories that articulate the new system. With the partial unbundling or at least weakening of the national as a spatial unit due to privatization and deregulation and the associated strengthening of globalization come conditions for the ascendance of other spatial units or scales. Among these are the sub-national, notably cities and regions; cross-border regions encompassing two or more sub-national entities; and supra-national entities, i.e. global digitalized markets and free trade blocs. The dynamics and processes that get territorialized at these diverse scales can in principle be regional, national or global.²⁰²

This connection between governance on larger scale and governance of smaller scales, sometimes also named 'glocalisation' manifests itself in a number of ways.²⁰³ Transnational regulation often imposes obligations on localities, which have been said to

¹⁹⁸ Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (2000) Harvard Jean Monnet Working Paper 7/99 2.

¹⁹⁹ Ibid 2.

²⁰⁰ Ibid 2.

²⁰¹ Saskia Sassen, 'The Global City: Introducing a Concept' (2005) XI Brown Journal of World Affairs 27, 27.

²⁰² Ibid 27.

²⁰³ See by way of example Kim van der Leeuw, Joyeeta Gupta and Hans de Moel, 'Climate Change: a 'Glocal' Problem Requiring 'Glocal' Action' (2007) 4 Environmental Sciences 139.

be ‘transforming into objects for international regulation and are increasingly used as a means for disseminating and implementing global political programs, financial schemes, and governance strategies.’²⁰⁴ As a consequence, SNAs are no longer merely agents of their state but also of the international or transnational regulatory systems. This ‘reshaping’ of localities is accompanied by a ‘new set of ideas about the desirable relationship between state and local governments’.²⁰⁵ It should also be noted that the United Nations and the World Bank encourage the delegation of regulatory authority to cities.²⁰⁶ Local governments are indeed ‘increasingly becoming major actors in the emerging global legal order’ as a number of international organizations ‘are beginning to view local governments as vehicles for the advancement of policies on a global scale.’²⁰⁷ Subnationalism and transnationalism can mutually empower themselves.

The growth of the global scale appears to empower SNAs as cities obtain ‘international duties, powers, and rights; enforcing international standards; forming global networks involved in the creation of international standards; and becoming objects of international regulation.’²⁰⁸ As a consequence, the traditional legal focus on States under international law ‘is shifting on to local governments, giving them independent legal status in the new global order.’²⁰⁹ Subnationalism however also drives globalization as new forms of ‘global connectivity – along with new patterns of disconnection, peripheralization, exclusion and vulnerability’ emerge.²¹⁰ Globalization

²⁰⁴ Blank (n 36) 263.

²⁰⁵ Ibid 264.

²⁰⁶ Ibid 264.

²⁰⁷ Ibid 263.

²⁰⁸ Ibid 263.

²⁰⁹ Ibid 263.

²¹⁰ Kreil (n 52) 2.

cannot be understood without considering the role of localities, ‘which have become prime vehicles for the dissemination of global capital, goods, work force, and images.’²¹¹ Resnik further illustrated that SNAs ‘serve as both importers and exporters of law.’²¹² Local initiatives to enforce international standards have indeed become widespread.²¹³ In the U.S. some municipalities²¹⁴ have for instance incorporated the standards of the CEDAW²¹⁵ or the Kyoto Protocol²¹⁶ into local law despite the federal government’s failure to implement these norms.

These combined dynamics lead to a questioning of the regulatory monopoly of the State. In accordance with the Westphalian ideal, the competence to regulate lies exclusively with the State as the sole bearer of sovereignty. ‘Glocalisation’ however seems to erode the assumption that ‘the nation state is the primary and most appropriate locus of authority for political decision-making.’²¹⁷ According to the OECD, glocalization constitutes a characterizing feature of contemporary governance structures²¹⁸ as the ‘nation-state is not best equipped for dealing with many of the challenges and opportunities of the twenty-first century.’²¹⁹ As a consequence ‘cities and regions need to develop flexible, tailored and integrated strategies to compete in an

²¹¹ Blank (n 36) 263.

²¹² Ibid 1576.

²¹³ Blank (n 36) 268 and Resnik (n 36). See also Sarah Cleveland, ‘Norm Internalization and U.S. Economic Sanctions’ (2001) 26 *Yale Journal of International Law*, Peter Fitzgerald, ‘Massachusetts, Burma and the World Trade Organization: A Commentary on Blacklisting, Federalism and Internet Advocacy in the Global Trading Era’ (2001) *Cornell Journal of International Law* 1.

²¹⁴ See for instance the San Francisco, California, Administrative Code § 12K.4 (2005).

²¹⁵ Resnik (n 36).

²¹⁶ Ibid.

²¹⁷ De Búrca 2 (n 198). See also Joanne Scott, ‘Member States and Regions in Community Law: Convergence and Divergence’ in Carol Lyons, Neil Walker and Paul Beaumont (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 27.

²¹⁸ OECD, ‘Devolution and Globalisation. Implications for Local Decision-Makers’ (2001) 25.

²¹⁹ Foresight for Regional Development Network Guide European Commission, ‘A Practical Guide to Regional Foresight’ (2001) 10.

increasingly rapidly-moving and internationally-open economic environment.’²²⁰ Globalisation is likely here to stay. The U.S. National Intelligence Council predicted that ‘as power becomes even more diffuse than today, a growing number of diverse state and nonstate actors, as well as subnational actors, such as cities, will play important governance roles’ as there is an ‘increasing number of players needed to solve major transnational challenges – and their discordant values – will complicate decisionmaking.’²²¹ This thesis will map a number of instances where the supranational and subnational interrelate.

This introductory section on SNAs has sought to illustrate two aspects: first, that SNAs are diverse entities that cannot be easily defined. Contrary to Member States, which dispose of sovereign statehood, no abstract definitions can be operated concerning regional and local authorities. This not only heavily burdens any definitional exercise but also lies at the root of the difficulty to make sense of SNAs, and their status in EU law. The second goal of this introductory section was to underline the interconnection that exists between SNAs within different Member States, but also with other levels of public authority. This intertwining of different scales of public authority, as well as the fact that SNAs are diverse bodies pursuing diverse policies will become clearer throughout the analysis that this thesis undertakes. Before venturing on to that analysis, I will now introduce the two models I rely on to capture my research findings.

²²⁰ OECD (n 231)10.

²²¹ National Intelligence Council (n 52) vii.

II. SNAs as Outsiders and Insiders of EU Law

This section explains my methodological approach as well as the two models that I introduce to make sense of my research findings. My research topic, the relation between subnational autonomies and supranational law, has already been introduced. In addition, the first part of this chapter has provided an overview of subnational autonomies, and their status at a time of European integration. The remaining part of the thesis is then concerned with the two models. This section sets out their contours and the following chapters illustrate how the two models play out in various areas of EU procedural and substantive law. Before introducing the modelling approach that allows me to make sense of my research findings, I will say a few words with regard to my research objectives.

The aim of my research, and of the two models that serve to introduce its findings, is to observe and systematize the law as it currently operates. It follows that this is a thesis about what the law is and not about what it ought to be. My thesis constitutes a snapshot of our world and of how the law attempts to make sense of it, distanced from prior preconceptions or normative visions. In trying to understand and describe the relation between subnational autonomies and supranational law, as well as the dynamics that are generated when both sets of norms interact, I have found it useful to rely on models as framing devices to make sense of the complex material that is examined. These models are introduced subsequent to an introduction to the modelling approach itself.

A. The Role of Models

The two models on which I rely have a descriptive purpose. They constitute a lens that helps me to make sense of the materials I examine, a tool that allows me to share my understanding of the correlation between subnational autonomies and EU law. I see them as 3D glasses. Indeed, as will become apparent throughout this thesis, the connection between subnational autonomies and EU law varies depending on whether we look at ‘the surface’ of EU law – that is to say the Treaty provisions and the case law that deal explicitly with SNAs respectively the special status of the Member States, and EU law ‘below the surface’ that is to say those areas of the EU substantive law that have developed on the basis of the Treaties but acquired a life of their own.²²² I refer to the law that has developed on the basis of the Treaties, but goes further than what is literally enshrined in them, as EU law ‘below the surface’. EU law at the surface can be seen and studied more easily – it suffices to open a copy of the Treaties. It has however taken me more time to see and understand the dynamics occurring below the surface, and even more time to situate them vis-à-vis what is happening above the surface. The Insider Model and the Outsider Model are two lenses through which we can see the relation between EU law and SNAs. I should stress that these models are models about subnational autonomies and their connection with EU law. The models do not undertake any wider modelling of EU law, nor do they aim to offer any overarching theories with respect to the latter.

²²² I have also developed that distinction in Michèle Finck, ‘Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation’ (2014) 26 *Journal of Environmental Law* 443.

Some valuable literature on models has emerged, which shows that they can have a number of underlying purposes. As the U.S. National Research Council has stated, models are ‘a simplification of reality that is constructed to gain insights into select attributes of a particular physical, biological, economic or social system.’²²³ In some contexts, models serve as tools to map reality, provide a fictional overview of ideal situations or have an educational, clarifying purpose.²²⁴ In this doctoral thesis, they fulfil the latter role. My modelling exercise allows me to convey the outcome of the analysis I have undertaken, namely that the relation between subnational autonomies and EU law is not the same in all areas of EU procedural and substantive law. Rather, two general and overarching prisms emerged that qualify the relation between my two objects of study. The two models enable me to convey the patterns I have observed in the course of my research. Such reliance on models without a doubt results in oversimplification and leaves out some aspects that some may feel should be included. What is more, the dynamics associated with the models play out to a stronger or weaker degree depending on the precise area concerned so that the two models do not represent strict patterns.

That said, the Insider Model and the Outsider Model have the advantage of underlining that the status of subnational autonomies has to be seen differently depending on the relevant context. They provide a lens through which divergences become apparent. As Bogojević has noted, the role of models can be better understood by reference to

²²³ National Research Council, *Models in Environmental Regulatory Decision Making* (National Academies Press 2007), 31. I take this quote from Elizabeth Fisher, Pasky Pascual and Wendy Wagner, ‘Understanding Environmental Models in Their Legal and Regulatory Context’ (2010) 22 *Journal of Environmental Law* 251, 253.

²²⁴ On the role of models in legal scholarship, see further Sanja Bogojević, ‘Ending the Honeymoon: Deconstructing Emissions Trading Discourses’ (2009) 21 *Journal of Environmental Law* 443, 450-452.

Mashaw's comment on Picasso's portrait of Gertrude Stein. Mashaw explains that even if many would disagree with the manner in which Picasso portrayed Stein, the way in which he did still shaped our perceptions so that ultimately we are likely to see her in the same way in which Picasso portrayed her. This is so because '[w]e are often the captives of our own pictures of the world, and in the end, if the world does not look *just* like them, their influence on our perception is nevertheless profound.'²²⁵ This underlines the impact of our own imagination of legal matters, but also the diverging imaginations that others have of these same matters. This of course relates back to the theme of constitutional imagination. After introducing my modelling approach, it is time to move on to the introduction of the models themselves. I will first introduce a model that others have considered useful in explaining the relation between subnational autonomies and EU law: the blindness model. After rejecting its usefulness, my own two models are discussed.

B. The Blindness Model

In 1966, Ipsen stated that the EU and its legal order are *landesblind*, that is to say blind towards the presence of (local and) regional authorities within the Member States.²²⁶ While this assertion dates back to the early stages of European integration, it was also affirmed more recently that EU law manifests 'blindness towards the internal distribution of competences within the Member States'.²²⁷ For some, EU integration initially

²²⁵ JL Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press 1997) 1. This reference came to my attention in reading Bogojević (n 224).

²²⁶ Vienna Convention on the Law of the Treaties (1969). See further, H. Ipsen, 'Als Bundesstaat in der Gemeinschaft' in *Festschrift für Walter Hallstein zu seinem 65. Geburtstag* (Caemmerer 1966) 203, 248, 256.

²²⁷ Jan Kottmann, 'Europe and the Regions: Subnational Entity Representation at Community Level' (2001) 26 *European Law Review*, 161.

‘neglected anything other than State-national governments’.²²⁸ This is in line with some aspects of public international law, such as Article 27 of the 1969 Vienna Convention, which manifests a similar blindness.²²⁹ Indeed, at least on their face, EU and public international law ‘choose to treat the State as a single entity, fully responsible for securing conformity with the law on its own territory.’²³⁰ Following these assumptions, some have characterised the EU as a federal polity in which ‘the only relevant actors for its governance are the states and the federal government.’²³¹ Martinico explained territorial blindness as ‘the fact that, traditionally, from a ‘formalistic’ point of view, the sub-State level has been neglected in the EU law context.’²³² This blindness was ‘confirmed in the Treaties (especially former Article 10 EC Treaty), which designate the Member States as the subjects of the EU legal order’²³³ and ‘constitutes just one element of the democratic deficit of the EU.’²³⁴ The absence of a ‘strong legal status for the regions’, Martinico stated further, is ‘one of the most important ‘constitutional wounds’ of the EU’.²³⁵

²²⁸ Joxerramon Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’ in Geert De Baere Elke Cloots and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 235 (stating further that ‘The initial scenario was one of regional blindness’).

²²⁹ This provision reads as follows ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ See also R Jennings and A Watts, *Oppenheim’s International Law*, Ninth Edition (Longman 1992) 84-5 and A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) Chapter 10.

²³⁰ Stephen Weatherill, ‘The Challenge of the Regional Dimension in the European Union’ in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 2.

²³¹ Nicola (n 35) 1285.

²³² Guiseppe Martinico, ‘The Impact of ‘Regional Blindness’ on the Italian Regional State’ in Elke Cloots Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 364.

²³³ Ibid 364.

²³⁴ Ibid 364.

²³⁵ Ibid 364.

The notion of blindness thus continues to loom in the background of studies of SNAs in EU law and conveys how some see the relation between subnational autonomies and supranational integration. None of these authors suggested that blindness is absolute and all-encompassing.²³⁶ There certainly are varying degrees of agreement as to how far the notion reflects reality. Nonetheless the blindness model frequently functions as a starting point for the study of subnational autonomies in EU law. Leaving open the question whether the EU ever was completely blind towards subnational autonomies, this thesis shows that blindness does not accurately describe the current relation between subnational autonomies and EU law because the existence of SNAs is nowadays widely recognised.²³⁷ Regional blindness is neither a feature of the Outsider Model nor of the Insider Model. On the contrary, the existence of subnational authorities is recognised under both models, but the capacity in which they are recognised varies.²³⁸ Now that it has been established that EU law's eyes are open, rather than closed, towards the existence of subnational autonomies, it must be enquired how exactly the latter are seen by EU law.²³⁹

²³⁶ Weatherill (n 241) 5. ('it is plain that that the Court has been very active in interpreting both primary and secondary EC law in a manner that greatly enhances its scope for direct application against public authorities in the Member States that are situated below the central level', which leads to the interrogation 'just how 'blind' to the regional dimension EC law truly is in practice').

²³⁷ This can be supported by the wording of Article 4(2) TEU and Article 5(3) TEU, which in fact do refer to the subnational dimension.

²³⁸ Already the Treaty of Rome could not be characterized as completely landesblind as its preamble stipulated that: to ensure [a] harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions.' This depends on what the object of blindness is: existence of SNAs, their role as implementers and subjects of EU law, or their norm-generating capacity. Different things and thesis shows that degree to which SNAs are visible to EU law vary depending on the area at stake.

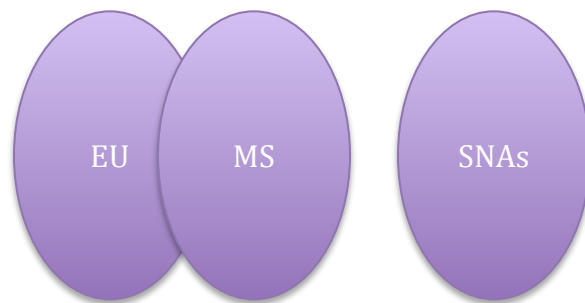
²³⁹ There is no harm in re-examining cases that one thought to already have been understood. See Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 *Oxford Journal of Legal Studies* 231, 242 ('The task for the lawyers is to develop a conception of the legal order which can adequately reflect the sophistication of new models and go beyond the old simplicities of the unified legal order').

The preceding pages have already revealed the names of the two models introduced in this section: the ‘Insider Model’ and the ‘Outsider Model’. This terminology merits some explanatory remarks. First I must clarify with regard to what structure the insider/outsider status is assessed. This structure is the relation between the EU and the Member States, acknowledged and governed by the Treaties, which determines the shape of the EU and its legal order. The criterion relied on to determine whether SNAs are insiders or outsiders of EU law is whether they are seen as active participants in the latter (‘insiders’) or whether they are merely passive recipients of EU obligations and norms (‘outsiders’). My research reveals that by and large EU procedural law, such as the rules on standing, frames local and regional *authorities* as outsiders of the EU legal order. SNAs cannot actively participate in the shaping of EU law, unlike the Member States and the EU itself. SNAs are purely passive bystanders as they are subject to the norms the EU and the Member States have created and they must enforce the latter. Subnational norms on the other hand have an insider status as they are engaged in a symbiotic relationship with *norms* generated by the Member States and the European Union. These are no fixed paradigms however, as when it comes to the duty of loyal cooperation, also subnational authorities and not solely their norms are seen as insiders. Further, in some circumstances the subnational prerogative of self-government is recognised by EU law in a manner that frames SNAs as insiders.

The Insider Model maps that subnational norms form an integral part of the polycentric and porous European legal space. Before moving on to introduce these two models in turn, I should explain why each of them is relatively brief and does not touch

upon wider themes of EU law and EU constitutionalism. It is true that, to a certain degree, my research topic relates to these wider themes. However, engaging with them in depth carries the risk of overshadowing my actual research focus, which in turn might result in rendering us blind towards SNAs yet again. It is for this reason that the two models, which I now introduce in turn, are focused solely on the status of subnational autonomies in EU law.

C. The Outsider Model



The Outsider Model illustrates that, in their capacity as masters of the Treaties, the Member States have a special, and privileged position in EU law, which entails a number of consequences, including their exclusive interaction with the EU, the entity that the Member States have created and collectively continue to control. The EU and the Member States are considered to have, to a certain extent, fused into a composite entity. Their mutual relations are characterised by both independence and interdependence. It is fundamentally interdependent since the EU is but the product of the Member States, and their legal orders and mutual interests have fused, at least to a certain degree. There remains, however, also some independence of the Member States from the EU, illustrated

by the existence of spheres of competences that at least in theory only belong to the EU or the States, or the latter's capacity ultimately to leave the EU if they so desire.²⁴⁰

In the context of their common relations, the EU and the Member States have undertaken a number of mutually-enforceable rights and obligations. Member States must for instance comply with EU law and will be held responsible where they fail to do so. In the latter scenario, Member States will be liable under EU law.²⁴¹ The EU on the other hand must carry out the tasks that its Member States entrust to it and may not overstep the boundaries of its own competence. As a control mechanism, Member States have the right to nullify EU acts that are outside of the domain of the EU's conferred competences.²⁴² The close relation between the EU and the Member States continues to be shaped by the fact that the Member States are the masters of the Treaties, which have created the EU and continue to collectively determine its shape. This bipolar interaction is reflected by the European Treaties, which largely portray EU law as being composed of and shaped by the interaction of two levels of public authority only. The therefrom-resulting partial symbiosis is bi-centric in nature to the extent that the domestic and EU legal orders are not entirely separate and their norms interact with one another. This phenomenon however includes only two scales of public authority, namely the EU and the Member States. There is accordingly no room for local and regional authorities as active agents so that, unlike the Member States and the EU, SNAs are merely passive bystanders to EU integration.

²⁴⁰ Article 50(1) TEU. Unilateral State control has however diminished in light of the Commission's autonomy, the rising power of the Parliament and Qualified Majority Voting.

²⁴¹ This is examined further in Chapter Three.

²⁴² This is examined further in Chapter Three.

This does not however mean that SNAs remain ignored or untouched by EU law and European integration. Rather, they are situated outside the privileged sphere of interaction between the EU and the Member States. The very existence of local and regional authorities is acknowledged – hence countering any theory of blindness. Infra-State entities are however recognised in two capacities only. First as subjects of EU law, bound to comply with its inherent rules and second as implementers of the obligations arising under supranational law. Unlike the Member States, they cannot aspire to many of the rights and obligations that only the masters of the Treaties have under EU law. The relation between regional and local authorities and the EU is accordingly of a passive nature. SNAs are subject to a number of obligations, but, and unlike the Member States, they do not actively participate in the crafting of the rules giving rise to these obligations.

The three characterising features of the Outsider Model are that (1) Member States are perceived to be sovereign equals, subject to the principle of national institutional autonomy (2) the division of public authority in the EU is bipolar – even if porosity occurs it is ‘bi-centric porosity’ rather than ‘polycentric porosity’ and (3) subnational authorities cannot be assimilated to Member States.

1. Member States as Sovereign Equals and the Principle of National Institutional Autonomy

The first characteristic of the Outsider Model is the special status of the Member States as sovereign equals. Bengoetxea claimed that the EU Treaties ‘largely ignored the regional

issue’ under the influence of ‘two important principles of international law also valid in Community law: the institutional autonomy of the State, and the principle of international legal personality of the State.’²⁴³ These two principles derive from the doctrine of sovereignty.²⁴⁴ Two main consequences that flow from sovereign statehood are examined here: first, the principle of sovereign equality, and, second, the principle of national institutional autonomy.

According to the doctrine of sovereign equality, all States are considered equal, notwithstanding their economic, political, geographical or demographic characteristics. This echoes a perception of sovereignty as being indivisible in nature.²⁴⁵ As per Rousseau ‘whenever one believes sovereignty to be divided, one is mistaken’.²⁴⁶ EU law reflects a certain attachment to these notions as ‘European constitutionalism still insists on the indivisibility of (State) sovereignty’.²⁴⁷ Member States’ sovereign equality is anchored in primary law via Article 4(2) TEU according to which ‘[t]he Union shall respect the equality of Member States before the Treaties’. The EU is composed of its Member States, and the obligations and responsibilities of membership are the same for each of them.

²⁴³ Bengoetxea (n 7) 235.

²⁴⁴ Suzanne Kingston, ‘The European Court of Justice and the Devolution of Taxation Powers’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 250 (‘[t]he constitutional law of the EU has, therefore, long grappled with the difficulties of reconciling its nature as a Union of Member *States* with the particularities of these Member States’ constitutional settlements that challenge traditional notions of sovereignty’).

²⁴⁵ J. Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, J. Franklin (ed), (Cambridge University Press 1992) (‘sovereignty is the absolute and perpetual power of a commonwealth (...), that is, the highest power of command’).

²⁴⁶ J.-J. Rousseau, *Du Contrat Social*, (Flammarion 2001) Chapter 2 (my own translation). This was echoed by Article 1-III of the French Constitution of 1791 that stated that ‘la souveraineté est une, indivisible, inaliénable et imprescriptible’.

²⁴⁷ Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 345.

In their capacity as masters of the Treaties, the Member States have created and continue to shape EU law. As each Member State, at least in theory, exercises the same control over the EU, they are treated as sovereign equals – creating a perception of the States as a monolithic entity. The monolithic nature of statehood is also reflected by the principle of national institutional autonomy.²⁴⁸ According to this principle, ‘the EU cannot look into the internal organisation of its Member States.’²⁴⁹ It follows that ‘the State is free to organise itself as it pleases internally, as long as it honours its international obligations.’²⁵⁰ The European Commission has confirmed that it is not for the EU ‘to interfere in the distribution of powers between the central, regional, or local authorities in the Member States.’²⁵¹ It ensues that even ‘constitutional regions’ that is to say regions with pronounced legislative or constitutional competences, are considered to be ‘purely internal phenomena’.²⁵² Differentiated treatment of a Member State depending on whether it is of a unitary or decentralised nature would violate sovereign equality. It also follows however that while Member States must take all appropriate measures to ensure the fulfilment of their Treaty obligations, they can freely determine which domestic institution is to adopt the measures.²⁵³ The specificities of this process are solely a matter for Member States’ constitutional systems.²⁵⁴ As such, ‘constitutional regions are purely

²⁴⁸ Charlie Jeffery, ‘Conclusions: Sub-National Authorities and ‘European Domestic Policy’ in Charlie Jeffery (ed), *The Regional Dimension of the European Union* (Cass 1997) 208.

²⁴⁹ Bengoetxea (n 7) 231.

²⁵⁰ Ibid 235.

²⁵¹ Charlie Jeffery & Stephen Collins, ‘The German Länder and E.U. Enlargement: Between Apple Pie and Issue Linkage’ (1998) 7 *German Politics* 86, 87.

²⁵² Bengoetxea (n 7) 230.

²⁵³ Joined Cases 51-54/71 *International Fruit Company II* [1971] ECR 1107, para 4 and Case 96/81 *Commission v. Netherlands* [1982] ECR 1791, Case 13/68 *Salgoil* [1968] ECR 661, Case 179/84 *Bozzetti* [1985] ECR 2301.

²⁵⁴ Ibid.

internal phenomena, of little interest to the European institutions’ as the EU remains a constitutional order of States.²⁵⁵ The CJEU has repeatedly confirmed that the principle of national institutional autonomy must be reconciled with the need for uniform application of EU law.²⁵⁶ EU law consequently does not look beneath the veil of statehood to identify the form of domestic structures.²⁵⁷ According to the principle of national institutional autonomy, the States’ internal composition is irrelevant from the perspective of EU law – at least as long as this does not threaten the uniform application of EU law.²⁵⁸

It is apparent that sovereignty continues to exercise a strong hold on the nature and perception of statehood in the EU. While, as will be seen below, some have argued that European integration weakens State sovereignty, others maintain the opposite view. Evans put forward that Member States’ participation in the EU can be interpreted as an exercise of their autonomy.²⁵⁹ This parallels the perception of sovereignty recently exposed by the Czech Constitutional Court, which stated that the transfer of certain state competences, ‘that arises from the free will of the sovereign and (...) is not a conceptual

²⁵⁵ Bengoetxea (n 7) 230.

²⁵⁶ Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633.

²⁵⁷ Maite Zelaia Garagarza, ‘The Spanish State Structure and EU Law: The View of the Spanish Constitutional Court’ in Elke Cloots Geert de Baere and Stefan Sottiaux (ed), *Federalism in the European Union* (Hart Publishing 2012) 385.

²⁵⁸ See further F Hinsley, *Sovereignty* (Cambridge University Press 1986) and Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).

²⁵⁹ Andrew Evans, ‘Regional Dimensions to European Governance’ (2003) 52 *International and Comparative Quarterly* 21, 21.

weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.’²⁶⁰

Pursuant to the Westphalian ideal, the competence to regulate lies with the State as the sole bearer of sovereignty.²⁶¹ This excludes that, from an external perspective, such as that of EU law, the regulatory activity of sub-State bodies is acknowledged. It follows that only the EU and the Member States are insiders of EU law, actively shaping it and being subject to a number of mutually enforceable rights and obligations. As only sovereigns are insiders to the EU, SNAs cannot be. As there is no role for subnational autonomies to acquire an insider status in this structure we must conclude that the division of public authority in the EU is bi-centric.

2. The Bi-Centric Interaction Between the EU and the Member States

Bi-centricity refers to the structure of the European legal order, composed by solely two levels of public authority: the EU and the Member States. Local and regional authorities are situated outside of this structure. In some regards, the EU and its Member States can be understood as ‘two independent and autonomous spheres of power’²⁶², which however also interconnect. SNAs are situated at the outside of the resulting symbiosis. The exclusion of infra-State bodies from the exclusive relationship between the EU and the

²⁶⁰ Nález Ústavního soudu [Constitutional Court] čj. 19/08 / 2008 / Sbírka nálezů a usnesení Ústavního soudu (Cz.); *available at* http://angl.concourt.cz/angl_verze/doc/pl-19-08.php (in English, with the specific text at paragraphs 101, 102, 108).

²⁶¹ The Westphalian paradigm is used in reference to the Peace of Westphalia of 1648, which ended the Thirty Years’ War. It refers to an international legal reality constituted solely by sovereign Nation-States. See further Kanishka Jarasuriya, ‘Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) 6 *Indiana Journal of Global Legal Studies*, 425.

²⁶² Nicola (n 35) 1286.

Member States reflects that the EU Treaty system ‘contemplates only two levels of government – the European Community and the Member States.’²⁶³ Article 1 TEU reflects this state of affairs in providing that the Member States, as High Contracting Parties, establish the EU among themselves and confer competences on it ‘to attain objectives they have in common.’ Article 4(1) TEU underscores this bi-centric division of public authority in stating that ‘competences not conferred upon the Union in the Treaties remain with the Member States.’²⁶⁴ The Treaties make clear that there are two different levels at which regulatory authority is exercised: the EU and the Member States.

This bipolar structure prevents local and regional authorities from playing an active role in shaping the European legal order. They are left outside of the sphere in which regulation is crafted, so that as a matter of EU law they are solely entities that are subject to EU law and must implement the latter. Looked at from the perspective of the outward SNA, the privileged interaction between the Member States and the Union is characterised by bi-centricity and exclusivity. While the relation between the EU and the Member State is considered to be of a direct nature, the relation between the EU and SNAs is at best indirect and only occurs via the Member State, and only where the latter allows for this to happen. While Member States are insiders actively shaping EU law, SNAs remain at the outside looking in. They are solely passive bystanders to EU integration. It follows that Member States and SNAs constitute two different categories of public authority in EU law, and that they cannot be assimilated.

²⁶³ Andrea Ross and Mayte Salvador Crespo, ‘The Effect of Devolution on the Implementation of European Community Law in Spain and the United Kingdom’ (2003) 28 *European Law Review* 210, 216-17.

²⁶⁴ See also Article 5(1) TEU ‘Union competences are governed by the principle of conferral’.

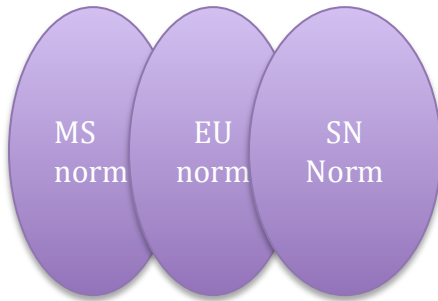
3. Member States and SNAs Have a Different Status in EU Law

The Member States are the masters of the Treaties; sovereign equals that continue to collectively determine the shape of EU law and its legal order. Together with the Union itself, the Member States make up the European Union and its legal space. Local and regional authorities are of a very different kind. They are solely subjects and agents of EU law. By virtue of the principle of national institutional autonomy, EU law cannot look inside Member State structures and treat the States differently depending on whether they are of a decentralised nature. The Insider Model however shows that this conclusion is not valid when it comes to the interaction between EU law and subnational norms and the perception of SNAs in some domains of EU law. With regard to local and regional norms, it should be said that these are considered to be solely of relevance for the domestic legal order. No direct interaction between subnational and EU norms is acknowledged to occur, so that there is no consideration for scenarios such as observed in *Omega*, where a subnational norm interacts with and influences an EU norm, contributing to the European legal orders' normative development. The Outsider Model denotes that, as SNAs do not form part of the same sphere as the Member States and the EU, they have not been fully integrated.

The Outsider Model is thus characterised by three different features that define the relationship between subnational authorities and EU law, namely Member States' sovereign equality and the principle of national institutional autonomy, bi-centricity, and the impossibility to assimilate local and regional authorities to the Member States. In

some areas of EU law, SNAs and their regulation emerge in a different light. While SNAs are considered to be outsiders to the EU legal order their norms are not.

D. The Insider Model



Under the Outsider Model, there is no consideration that direct interactions between subnational and supranational norms occur, and that the former contribute to the normative development of the European legal order. As such the Outsider Model is incapable of explaining a phenomenon such as that observed in *Omega*. The Insider Model serves to underline that other areas of EU law acknowledge the direct interaction between EU and subnational norms. It illustrates that SNAs exist within the same sphere of interaction as the Member States and the European Union. Their insider status transforms subnational authorities into active participants in the project of European integration. Local and regional norms are not considered to be of relevance only for domestic law, but also for EU law, considering the direct interaction they entertain with the latter. It follows that under the Insider Model, local and regional authorities are not solely considered to be passive bystanders of EU integration, standing on the sidelines

and observing the game of the European Union and the Member States, but rather also as active players in that game. They have been integrated into the project of European integration. The ‘Insider Model’ is characterised by three main features: (1) polycentricity; (2) porosity; and (3) the assimilation of subnational norms with those of the Member States. In what follows below the three characterising features of the Insider Model are set out.

1. Polycentricity

It will be seen throughout this thesis that EU and subnational norms often stand in conflict, giving rise to a direct relation between them. In such scenarios, EU law cannot ignore the existence of local and regional regulation. In the face of the inability of bi-centricity to explain such scenarios, polycentricity emerges as a more suitable description of a European legal space that includes SNAs, stressing the existence of a plurality of centres of public authority within the EU, not just two. The concept captures that regulation originates at a multitude of centres of public authority – international, supranational, national, regional, local. Vincent Ostrom, Tiebout and Warren first introduced polycentricity, as applied here, in 1962.²⁶⁵ In the context of my research I borrow the subsequently developed definition of Elinor Ostrom who stated:

Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit (see Ostrom, 1999). Each unit within a polycentric system exercises considerable independence to make norms and rules within a specific domain (such as a family, a firm, a local government, a network of local governments, a state or province, a region, a national

²⁶⁵ C. Tiebout and R. Warren V. Ostrom, ‘The Organization of Government in Metropolitan Areas: A Theoretical Inquiry’ (1961) 55 *The American Political Science Review* 831. The notion also appeared in Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* and M. Polanyi, *The Logic of Liberty* (University of Chicago Press 1951).

government, or an international regime). Participants in a polycentric system have the advantage of using local knowledge and learning from others who are also engaged in trial-and-error learning processes.²⁶⁶

Contrary to Ostrom, I solely concentrate on public authority, not private or hybrid initiatives, without however denying their importance in many regulatory fields. It is evident from Ostrom's definition that polycentricity can encompass many systems in which public authority is divided, including systems of multilevel governance and federalism. This naturally begs the question why I rely on polycentricity, a relatively new concept in EU law²⁶⁷ rather than the, to the EU lawyer, better-known theories of multi-level governance²⁶⁸ or federalism.²⁶⁹ I find both of these concepts problematic in the context of my research on SNAs.

Theories of multi-level governance go beyond 'the purely public institutional dimensions, embracing civil society and non-State actors.'²⁷⁰ The explicit focus on civil society extends beyond the scope of my own research.²⁷¹ The problem with federalism is

²⁶⁶ Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 *Global Environmental Change* 550.

²⁶⁷ New concepts are, however, nothing to fear. On this, see Matej Avbelj and Jan Komárek, 'Introduction' in Matej Avbelj and Jan Komárek (ed), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 1 ('New concepts are frequently born to provide tools for grasping and at the same time potentially changing the social reality').

²⁶⁸ L. Hooghe G. Marks, K. Blank, 'European Integration from the 1980s: State-Centric v. Multi-Level Governance' (1996) 34 *Journal of Common Market Studies* 341, L. Hooghe G. Marks, 'Unraveling the Central State, But How? Types of Multi-Level Governance' (2003) *American Political Science Review* 233, A. Jordan, 'The European Union: an Evolving System of Multi-Level Governance....or Government' (2001) 29 *Policy&Politics* 193.

²⁶⁹ The literature on federalism in the EU is endless. By way of example, see Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205 and Schütze (n 247).

²⁷⁰ Bengoetxea (n 7) 233.

²⁷¹ For an account of multi-level governance including civil society, see Paul Stephenson, 'Twenty Years of Multi-Level Governance: 'Where Does It Come From? What Is It? Where Is It Going?'' (2013) 20 *Journal of European Public Policy* 817, 819.

its emotive nature as well as the large variety of definitions thereof.²⁷² Federalism however means different things to different people.²⁷³ In the EU context it is often tainted by normative colours, which I find problematic as I seek to provide a descriptive, not normative, account of the status of subnational autonomies in EU law. It could be said that since federalism has been relied on to define all sorts of structures, it has become so elastic that it really offers no descriptive value at all.²⁷⁴ Polycentricity on the other hand is free of any normative preference towards centralization or decentralization. The advantage of the concept is that it is not yet widely known in EU law, and as such not connected to prior preconceptions. As Ostrom noted herself, '[n]o a priori judgment can be made about the adequacy of a polycentric system of government as against a single jurisdiction.'²⁷⁵ Polycentricity – really – just means that there are many coexisting spheres of public authority.

Polycentricity captures that various legal orders coexist and overlap. Subnational norms coexist with those created at other levels. Polycentricity is a phenomenon that extends beyond the EU context, including the transnational and international scales. As de Búrca has observed 'the relevant centres and dimensions of political and legal decision-making' have grown 'in number and complexity' as not only 'local and regional entities, along with nation states and supranational players' play a role in governance but

²⁷² Francois-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space' in Loic Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 266 ('[f]ederalism is one of those blurred concepts of public law that are highly difficult to grasp').

²⁷³ In the EU context federalism is indeed frequently associated with centralization whereas in the US it stands rather for decentralization. Heather Gerken, 'Our Federalism(s)' (2012) 53 William & Mary Law Review 1550. (noting that even within a single federal system, multiple different 'federalisms' have been found to exist by different commentators).

²⁷⁴ It is true that I could also simply argue that the EU is *sui generis*, a purely descriptive notion. Schütze has however shown that 'there are serious problems with the *sui generis* argument.' Schütze (n 247) 59.

²⁷⁵ V. Ostrom (n 265) 838.

also the international and transnational spheres.²⁷⁶ Polycentricity is not limited to the interaction between the supranational, national and subnational but more generally refers to the co-existence of a plurality of norm-generating instances.

The polycentric nature of public authority is reinforced by the polycentric nature of contemporary policy challenges, such as for instance climate change.²⁷⁷ Indeed '[I]n controversies over topics as diverse as the use of the Internet, immigration policy, terrorism, and the current financial crisis, policy-makers struggle with the appropriate role of multiple levels of government.'²⁷⁸ As a result, regulatory regimes covering these issues coexist at different scales. Polycentricity is accordingly not the result of coincidence but rather arises because it is mandated in the contemporary world where many problems necessitate regulation on larger and smaller scales.

Polycentricity accordingly focuses on the fact that, in the EU, norms are created at a plurality of centres of public authority, not just two. Importantly, these norms then interact with each other. Contrary to the Outsider Model, the Insider Model contains no presumption that such interactions occur only between EU and Member State norms.²⁷⁹

The second characteristic of the Insider Model, porosity, underscores that the dividing

²⁷⁶ De Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (n 198) 5.

²⁷⁷ On this, see by way of example Joanne Scott, 'The Multi-Level Governance of Climate Change' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (Oxford University Press 2001), Joyeeta Gupta, Michele M. Betsill & Harriet Bulkeley, 'Cities and the Multilevel Governance of Global Climate Change' (2006) 12 *Global Governance* 141.

²⁷⁸ Hari Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585, 589.

²⁷⁹ The recognition that there is a multiplicity of scales of public authority also leads to a multiplication of borders between them, somewhat countering the presumption that we are navigating towards a world without borders. See further Saskia Sassen, 'The City: Today's Frontier Zone' (2014) 1 *Glocalism: Journal of Culture, Politics and Innovation* 1, 4.

borders between the different levels of public authority are permeable, allowing for symbiosis to take place not solely between EU and Member State norms but also those of regional and local authorities.

2. Porosity

Porosity alludes to the interconnection and intertwining of the norms of different levels of public authority. This denomination flags that the various scales of public authority that polycentricity captures are permeable rather than self-contained. Porosity enables policies to leak from one level to another, leading to a dynamic and creative process of cross-fertilization. In this process, experimentation and mutual learning take place. Porosity accordingly describes the dynamics that arise as a consequence of the interaction of international, EU, national and subnational norms. As recognised by the OECD, subnational autonomies 'should not be seen as a simple transfer of powers from central to city and region level, but rather as a process that requires multi-level partnership and networking'.²⁸⁰ The creation of norms at different scales leads to their mutual interaction and the fact that subnational norms can influence EU norms.

It is of course hardly a novel statement that the domestic and European legal orders are interconnected.²⁸¹ Porosity is also recognised under the Outsider Model with

²⁸⁰ OECD, *Devolution and Globalisation. Implications for Local Decision-Makers* (2001) 10.

²⁸¹ Capturing the literature on this aspect in a footnote is an impossible task, so that I will solely refer to some examples of such literature: see for instance Jörg Gerkrath, 'The Figure of Constitutional Law of the 'Integrated State': The Case of the Grand Duchy of Luxembourg' (2014) 10 *European Constitutional Law Review* 109, Monica Claes, 'The Europeanization of National Constitutions in the Constitutionalization of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15' (2007) *Croatian Yearbook of European Law and Policy* 1, Jacques Ziller (ed.), *L'eupéanisation des droits*

regard to Member State and EU norms. This bipolar porosity has been widely documented. It is, for instance, evident with regard to the EU's fundamental rights regime, which is composed by the Charter, general principles that are inspired by the constitutional traditions of the Member States, and also the ECHR.²⁸² The influence domestic constitutional concepts have had on the general principles of EU law is widely accepted.²⁸³ A more recent recognition of the interpenetration of the European and the national (constitutional) legal orders comes from Lord Reed of the UK Supreme Court who argued that one of the greatest challenges domestic supreme courts face 'is to understand their role in an era when the law is permeated by rules and principles falling within the scope of the supranational courts in Luxembourg and Strasbourg'.²⁸⁴ Lord Reed recognises that judicial decisions are affected by porosity.²⁸⁵ Referring to the *Gerichtsverbund*, a notion first crafted by German legal scholars (a reference that in itself is indicative of porosity), he went on to state that there is 'a collaborative rather than hierarchical or competitive relationship between national apex courts and the Court of Justice'.²⁸⁶ Transnational judicial dialogues more generally can be understood as

constitutionnels à la lumière de la Constitution pour l'Europe (L'Harmattan 2003) and also M. Avbelj and J. Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

²⁸² Article 6 TEU. See also Paul Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' (2014) 51 Common Market Law Review 13, 13-14 (arguing that the Accession Agreement 'constitutes the last step of a growing interlocked system of fundamental rights.'). The exact contours of porosity between EU and ECHR law are less easy to define after Opinion 2/13 on the Accession of the EU to the ECHR [2014] ECLI:EU:C:2014:2454.

²⁸³ There is an abundant literature engaging with these dynamics. For an example, see Jacques Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 European Constitutional Law Review 247, 452.

²⁸⁴ Lord Reed, 'EU Law and the Supreme Court' (2014), Sir Thomas Moore Lecture.

²⁸⁵ Ibid ('the national courts and the Court of Justice have interlocking roles, which have to operate in combination').

²⁸⁶ Ibid. Similar statements have been made by judges in other Member States, see for instance Paul Kirchhoff, 'The Balance of Powers Between National and European Institutions' (1999) 5 European Law Journal 225, Andreas Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäischer Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175.

instances of porosity as they allow norms from one level to influence the interpretation or content of norms initiated at a different level.²⁸⁷ The interaction between Member State and EU norms has also been documented extensively by legal scholarship.²⁸⁸ The doctrine of constitutional pluralism, for instance, recognizes the coexistence of a multiplicity of legal frameworks and a plurality of legal sources that intertwine and overlap.²⁸⁹ According to Pernice, ‘the national constitutions and the European constitutional level are closely interwoven and interconnected in both their institutions and their substantive law.’²⁹⁰ Besselink has stated that ‘the European constitution is more than the constitution of the organization entitled the EU; it also includes the constitutions of the Member States.’²⁹¹ To a certain degree, porosity is even recognised in EU primary law.²⁹² We know that European integration has led to a certain fusion of the EU and Member State legal orders, and this is recognized also under the Outsider Model, if only with regard to the EU and the Member States.

The Insider Model, on the other hand, underlines that the fusional relationship between different legal orders is not limited to Member States and the EU but also encompasses SNAs. As polycentricity creates opportunities for engagement between the

²⁸⁷ On judicial dialogues in the EU context, see Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191, Anne-Marie Slaughter, ‘Judicial Globalization’ (2000) 40 *Virginia Journal of International Law* 1103, Monica Claes and Maartje de Visser, ‘Are You Networked Yet? On Dialogues in European Judicial Networks’ (2012) 8 *Utrecht Law Review* 100.

²⁸⁸ See for instance Ingolf Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2009) 15 *Columbia Journal of European Law* 349, 374.

²⁸⁹ See Avbelj&Komarek (n 281), Julio Banquero Cruz, ‘The Legacy of the Maastricht Urteil and the Pluralist Movement’ (2008) 14 *European Law Journal*, Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review*, Miguel Poiares Maduro, ‘Contrapunctual Law: Europe's Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003).

²⁹⁰ Pernice (n 288) 379.

²⁹¹ Leonard Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) 4.

²⁹² Article 120 TFEU.

regional, local, national, supranational and international regulators, porosity allows the norms of these levels to interact. The communication between different levels – whether implicit or explicit – allows norms to influence each other, channelling agreement or disagreement. Porosity also extends to the international context as international and transnational law-making increases.²⁹³ SNAs elsewhere have been found to have domestic authority based on international obligations undertaken by their state under customary international law.²⁹⁴ Resnik has observed in the U.S. context that ‘laws (like people) migrate, and seepage is everywhere.’²⁹⁵ She further noted that ‘like acid rain’ norms ‘do not respect lines that people draw across land’ illustrating the existence of a direct relationship between various levels of public authority.²⁹⁶

In the EU context at least, porosity’s influence is not limited to the mere substance of norms, but also extends to institutional structures. I interpret the fact that German federalism has been subject to variation as a result of EU integration as an instance of porosity.²⁹⁷ This can be observed with regard to Article 23 of the German Basic Law, which was reformulated in 1992 to reconcile federalism with EU integration.²⁹⁸ Porosity can also be spotted in the context of the EU’s redistributive policies as ‘Member State’ money (which can be composed domestically according to a

²⁹³ De Búrca (n 198) 6.

²⁹⁴ See *Canada Ltee v. Hudson (Ville)* [2001] 2 S.C.R. 241. Case heard by the Supreme Court of Canada, where the Court inferred an authorization of the municipality to act on matters of environmental protection based on the evolution of international environmental law.

²⁹⁵ Resnik (n 36) 1576.

²⁹⁶ *Ibid* 1576.

²⁹⁷ Federalism constitutes one of the three foundational principles of the 1949 Basic Law. See Article 79 (3) of the German Basic Law. On the changes it has been subject to as a result of European integration, see Martin Nagelschmidt, ‘Les relations internationales des Länder allemands et l’évolution du système fédéral dans l’Union Européenne: le cas du Bade-Wurtemberg’ (1999) 30 *Etudes Internationales* 679, 684-685.

²⁹⁸ *Ibid*, 684-685. On the reform of Article 23 of the German Basic Law, see further Ingolf Pernice, ‘Die Beteiligung der Länder in Angelegenheiten der Europäischen Union’ (2004) WHI - Paper 8/04.

number of formulae, also touching on regional and local finances) flows to the EU, which subsequently flows back to SNAs to carry out projects and policies that are approved by the EU.²⁹⁹ Porosity further occurs with regard to economic forces that cannot be contained in accordance with territorial borders.³⁰⁰ The fact that subnational policies interact with those at other levels to the same extent as Member State norms do hints at the third characteristic of the Insider Model, namely the assimilation of Member State and subnational regulation.

3. The Assimilation Between Subnational and Member State Norms

The Outsider Model posits Member States and subnational authorities as levels of public authority of a fundamentally different nature. The Member States, as masters of the Treaties, have a privileged status to which SNAs cannot aspire. The Insider Model underscores that the central characteristics of the relation between the EU and SNAs cannot be transposed to their respective norms. In its case law, the CJEU treats subnational norms in the same manner as those of the Member State, attributing them the same value and respect, even though the regulatory capacity of SNAs is, as such, not protected under EU law whereas Member States' regulatory capacity is. It is not obvious that Member State norms have a superior status by virtue of the Member States being the masters of the Treaties. In allowing subnational norms to interact with EU norms in the

²⁹⁹ See for instance the partnership principle that has been enshrined in Council Regulation (EC) 1260/1999 laying down general provisions on the Structural Funds [1999] OJ L 161/1, art 8 which stipulates that supranational 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.

³⁰⁰ Neil Brenner and Roger Kreil, 'From Global Cities to Globalised Urbanization' (2014) 1 *Glocalism: Journal of Culture, Politics and Innovation* 1, 5.

same manner as Member State norms, subnational norms can influence the EU's normative development. Furthermore, the fact that SNAs exist within the same sphere as the EU and the Member States, and that their status does not diverge from that of the latter, shows that they too have been integrated.

Conclusion

This thesis makes sense of the relation between subnational autonomies and EU law by relying on two models: the Insider Model and the Outsider Model. This table helps to illustrate the main characteristics of both models:

Outsider Model	Insider Model
Member States are sovereign equals	Polycentricity
Bi-Centricity	Porosity
SNAs and MS cannot be assimilated	SNAs and MS can be assimilated

The Outsider Model shows the strong attachment that EU retains towards sovereign statehood, explained by Member States' capacity as masters of the Treaties. This results in the application of the paradigm of sovereign equality between the Member States as well as the principle of national institutional autonomy. The Outsider Model presumes that EU law is mainly shaped through the bi-centric interaction between the Member States and the EU. While the existence of SNAs is recognized, they fall outside

that relation. It follows that subnational authorities cannot be assimilated to Member States.

The Insider Model, on the other hand, directs attention to the fact that, in some areas of EU law, the relation between subnational autonomies and EU law does not correspond to the Outsider Model. In these domains, the relation between different norms is characterized by polycentricity as the norms of many levels of public authority, rather than just two, coexist. Porosity is another characterizing feature of the Insider Model and draws attention to the fact that the dividing lines between the multiple coexisting levels of public authority are permeable, allowing for processes of cross-fertilization to take place. In addition, under the Insider Model, SNAs and their norms are assimilated to Member States and their norms. The States enjoy no special status by virtue of being the masters of the Treaties.

The subsequent chapters will illustrate the dynamics inherent in these two models in further depth. Throughout the thesis it will be seen that we encounter the Outsider Model most prominently when dealing with ‘EU law at the surface’ that is to say the EU Treaties and the case law that has evolved in close attachment to the Treaties. The Insider Model on the other hand manifests most clearly ‘below the surface’ of EU law, that is to say those areas of EU law, including case law and secondary law, which have evolved on the basis of the Treaties, yet acquired an existence of their own in some respects. I will return to this theme in further detail in the concluding chapter of this thesis.

Chapter Three

Subnational Authorities as Outsiders

Chapter Two introduced two models that I consider to be helpful in understanding the differentiated relation between subnational autonomies and EU law. It has been seen that pursuant to the Outsider Model, the European legal order is shaped by the interaction between the EU and the Member States only. Local and regional authorities are unlike Member States as they are situated outside of the sphere of privileged interaction between the Member States and the EU. They do not contribute to the latter's normative development. This chapter engages with manifestations of SNAs' outsider status in EU law. It will point towards utterances of bi-centricity in EU law, which can be located in the rules on Treaty revision, the make-up of the EU institutions, the division of competence in the EU, the rules on direct and indirect responsibility, the standing rules and the closer cooperation mechanism. In these areas, the law has remained closely attached to the formulation of EU law at its surface: the Treaties. My survey reveals the primacy of two levels of public authority: the Member States and the EU. While the existence of local and regional authorities is acknowledged, contradicting any theory of pure blindness, they are not perceived in the same capacity as Member States, which are the only active participants in the EU legal order. SNAs, on the other hand, are envisaged as subjects and agents of EU law, that is to say as passive by-standers to EU integration. The chapter will accordingly confirm that '[t]he system established under the Treaty of

Rome contemplates only two levels of government – the European Community and the Member States.’¹

I. The Bi-Centric Structure of EU Law: SNAs as Outsiders

This section examines a number of areas of EU law that portray the EU and the Member States as the leading partners in the European project that have assumed a number of mutually enforceable rights and obligations. It confirms that the EU ‘is constitutionally a Union between Member States, and arguably between their peoples.’² In this union there is no formal constitutional space for SNAs. My study also reveals that only the EU and the Member States are perceived as norm-generators in these domains, envisaging regulatory authority to be divided between the EU and the States, not however subnational authorities, which do not contribute to the EU’s normative development. The existence of local and regional authorities as well as their norm-generating capacity are not accounted for in those domains that are an expression of the Outsider Model in EU law. Where SNAs are acknowledged, they are not seen as Member States’ equals. Rather than being insiders to the privileged sphere of interaction between the EU and the Member States, infra-State authorities stand on the outside thereof, looking in. This, it will be argued, is anchored in Member States’ status as the masters of the Treaties. It follows that this notion must be introduced first.

¹ Andrea Ross and Mayte Salvador Crespo, ‘The Effect of Devolution on the Implementation of European Community Law in Spain and the United Kingdom’ (2003) 28 *European Law Review* 210, 216-17.

² Niilo Jääskinen, ‘The Case of the Åland Islands - Regional Autonomy versus the European Union of States’ in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 89.

A. The Member States as Masters of the Treaties

The Member States are the masters of the EU Treaties. They have founded the Union between them through the conclusion of international Treaties, and continue to determine the competences, shape and objectives of the European Union on the occasion of Treaty revisions.³ The consequences of the exclusive status Member States acquire by virtue of that capacity will be explored throughout this chapter. It will be seen that through their privileged status, the States have reserved for themselves a number of rights. However, Member States are also subject to various obligations by which they have agreed to be bound under the Treaties. It follows that the conclusion of the European Treaties gave rise to a number of mutually enforceable rights and obligations between the Member States and the EU.

Primary law makes Member States' special status explicit. Article 1 TEU provides that the Member States have established the EU between themselves and conferred competences on it to realise their common objectives.⁴ The Treaty opens with a reminder that the EU is but the product of the States' common action – States that continue collectively to control the fate of their supranational enterprise. According to the principle of conferral, embodied in Article 5(2) TEU, the Union shall act only 'within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties

³ See further Gráinne de Búrca and Bruno de Witte, 'The Delimitation of Powers between the EU and its Member States' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002).

⁴ See also Article 2 TEU.

remain with the Member States'.⁵ The EU's powers derive from those of the sovereign Member States, which allow the EU to exercise some of their competences. Unlike many national legislatures, the Union does not dispose of a general law-making competence. All of its legal authority derives entirely from the Member States.⁶ As affirmed in the German Constitutional Court's seminal *Maastricht* decision, each Member State has preserved 'the quality as a sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 2(1) of the United Nations Charter.'⁷ The importance of Member States' status as sovereign equals should not be underestimated, as 'the European Court of Justice, and Union practice generally tend to attach [importance] to state sovereignty'⁸ and 'this tendency has formal support in Treaty provisions'⁹ such as under Article 1 TEU.¹⁰

A number of Treaty provisions substantiate Member States' position as masters of the Treaties. Article 10(2) TEU determines that they are represented in the European Council, an institution that determines EU action, among other things through the initiation of legislation.¹¹ Article 13(1) TEU constitutes a reminder that the EU must serve the objectives of the Member States in providing that the EU shall promote its

⁵ On the principle of conferral, refer to Article 5(1) TEU and Article 4(1) TEU. This statement does not account for the phenomenon of 'competence creep'. On this, see Stephen Weatherill, 'On Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1.

⁶ See BVerfGE 89, 155 (Maastricht Decision) [1994] CMLR 57 (judgment in English). For an analysis in English, see U. Everling, 'The Maastricht Judgment of the German Federal Constitutional Court and the Significance for the Development of the European Union' (1994) 14 Yearbook of European Law.

⁷ Ibid 91.

⁸ Andrew Evans, 'Regional Dimensions to European Governance' (2003) 52 International and Comparative Quarterly 21, 21.

⁹ Ibid 21.

¹⁰ This provision stipulates that the High Contracting Parties establish among themselves a European Union 'on which Member States confer competences to attain objectives they have in common'.

¹¹ The role and composition of the European Council is looked at in further detail in the section that engages with the make-up of the EU institutions below.

values and objectives, serve its interests, but also ‘those of its citizens and those of the Member States.’ SNAs are not referred to in this regard. They have not established the EU and have no direct say in its operation. This state of affairs also explains why the substantive goals of the EU refer only to the EU and the Member States, and now also in some regards to EU citizens. Article 3 TEU determines that the internal market aims at promoting ‘economic, social and territorial cohesion, and solidarity among Member States.’¹² The reference to ‘among Member States’ is of crucial importance. It will indeed be seen in the chapter that engages in an analysis of internal market case law that often the question arises whether the EU’s economic objectives should only be applied as between Member States or also between SNAs. While the CJEU’s answer to these questions is examined at a later stage, it must be noted here that under Article 3 TEU, the internal market is solely considered to play out ‘among Member States’ echoing a bi-centric vision of supranational law – at least at its surface.¹³ The internal market is defined with regard to the States, not reflecting that the latter are again subdivided into smaller parts – and also markets – that are equally affected by economic integration.¹⁴ After having briefly having introduced Member States’ status as masters of the Treaties it is time to move on and illustrate how that specific status plays out in numerous areas of EU law, starting with a number of Treaty provisions that engage with regions and localities. It should be noted that Article 4(2) TEU and Article 5(3) TEU, the most

¹² Article 3 TEU.

¹³ This should be contrasted with Article 26(2) TFEU according to which ‘[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.

¹⁴ The State-centric focus of the EU’s economic aims underlies the doctrine of purely internal situations, which is examined further in the subsequent chapter.

prominent examples of references to SNAs in EU primary law, are examined separately in the next chapter.

B. References to SNAs in the EU Treaties

Despite the overall bi-centric structure of EU primary law, a number of Treaty provisions explicitly refer to subnational authorities. They are examined in this section in order to determine whether local and regional authorities are conceived of as insiders or outsiders through these provisions. The first allusion to SNAs occurs already in the Preamble, which provides that the Member States, in setting up the EU, are anxious ‘to strengthen the unity of their economies and to ensure their harmonious development by *reducing the differences existing between the various regions and the backwardness of the less favoured regions*’.¹⁵ While this provision does refer to regions, and action to be taken in their regard, it envisages that such action is initiated by the EU and the Member States rather than the SNAs themselves, keeping up the bi-centric nature of EU law. According to Article 13 TFEU, the EU and the Member States shall, in the context of the formulation and implementation of policies relating to agriculture, fisheries, transport, the internal market, research and technological development and space policies, ‘pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and *regional heritage*’.¹⁶ As per Article 13 TFEU, the EU and the Member States are perceived as regulators and

¹⁵ Emphasis added.

¹⁶ Emphasis added.

implementers, SNAs solely being referred to as sites where heritage is located rather than sites of autonomous regulation.¹⁷ Pursuant to Article 167(1) TFEU:

The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and *regional diversity* and at the same time bringing the common cultural heritage to the fore.¹⁸

Article 167(1) TFEU imposes a duty on the EU to balance the common cultural heritage between the Member States against the respect of their national and regional diversity. It is somewhat obscure what this provision entails in legal terms, yet it does not refer to regulatory powers of any scale but rather to respect for cultural diversity.¹⁹ Article 191(3) TFEU obliges the EU to take into account the different ‘environmental conditions in the various regions of the Union’ when formulating environmental policy. Just as with many of the previously mentioned references to SNAs it is worth noting that the Treaty refers to the regional but not the local scale in this regard. Article 191(3) TFEU recognizes that regions can have particular environmental characteristics that should be taken into account when the EU regulates. This statement gives expression to a view of the EU as the regulator and the region as the scale on which regulation is imposed, underlining their passive status. The provision can also be considered to acknowledge regions’ role as implementers of EU norms, as it states that such implementation should not have undue impact on regional environmental conditions. The existence and passive capacity of SNAs as outsiders is acknowledged. Article 39(2)(1) TFEU embodies the same logic in providing that when the EU formulates its common

¹⁷ Interestingly the provision merely recognizes regions as sites of expression of heritage, not localities so that a distinction is operated between these two scales.

¹⁸ Emphasis added.

¹⁹ Only regions, but not localities, are seen as sites capable of having a distinctive cultural heritage.

agricultural policy, it shall take into account the particular nature of agricultural activity, which results inter alia from ‘structural and natural disparities between the various agricultural regions’.

Article 196(1)(a) TFEU foresees that the Union shall, in encouraging cooperation between Member States regarding the prevention and protection from natural or man-made disasters ‘support and complement Member States’ action at national, regional and local level in risk prevention. Article 196(1)(a) TFEU recognises that localities and regions play an important role in the prevention and response to such disasters, which themselves are usually localised or regionalised phenomena. However it conceives action taken at these scales as Member State action, not that of the subnational authorities. According to Article 170(1) TFEU, the EU shall contribute to the establishment of trans-European networks in the areas of transport, telecommunications and energy infrastructures to allow citizens, economic operators, but also ‘regional and local communities’ to derive the full benefit of the internal market. Again, while this provision does refer to SNAs, it does not frame the EU nor SNAs as regulators.

The brief overview of these various provisions confirms rather than denies the bi-centric dynamics inherent in the Outsider Model. The existence of SNAs is recognised, but SNAs are at best considered to be implementers of EU law rather than as autonomous regulators. Subnational authorities are recognised to exist – proving any theory of blindness to be mistaken. SNAs are, however, recognised solely as agents and subjects of EU law, as outsiders, rather than active insiders that shape the EU’s development. The

ensuing section examines the rules on Treaty revision to show how these provisions reflect Member States' status as masters of the Treaties.

C. The Pivotal Role of the Member States in EU Treaty Revision

Member States' special status as the masters of the Treaties can nowhere be seen as lucidly as with regard to the rules on the revision of the European Treaties. The importance of such revision should not be underestimated. As de Witte noted, the main instrument of constitutional change in the EU is the 'revision treaty, that is, an international agreement between the Member States of the European Union making amendments to the so-called 'founding treaties'.²⁰ This is in accordance with a principle that was already established a long time ago in *Defrenne*, namely that 'apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with [Article 48 TEU]'.²¹ This section only looks at formal constitutional change, excluding from its scope informal change, which occurs on a constant basis, inter alia via the evolving jurisprudence of the CJEU and inter-institutional arrangements.²²

The two procedures to amend the EU Treaties are foreseen in Article 48 TEU, which lays out the 'ordinary revision procedure' and the 'simplified revision procedures'.

²⁰ Bruno de Witte, 'Treaty Revision in the European Union: Constitutional Change Through International Law' (2004) 35 *Netherlands Yearbook of International Law* 51, 51-52.

²¹ Case 43/75 *Defrenne* [1976] ECR 480, para. 57. For an overview of the Maastricht Treaty amendment, see J. Winter et al. (eds), *Reforming the Treaty on European Union - The Legal Debate* (Kluwer 1996).

²² There is of course an overlap between these two techniques of constitutional change as the Treaties may codify changes previously brought about through other means. The codification of the EU's duty to respect the national identity of the respective Member States may constitute an example thereof as it reflects the opinion of a number of Member State constitutional courts.

The ordinary revision procedure is the general amendment procedure, which for instance governed the revisions carried out under the Lisbon reform.²³ Under the ordinary revision procedure, any Member State, the European Parliament or the Commission may submit to the Council a proposal for Treaty amendment.²⁴ If the European Council, in consultation with the Parliament and the Commission, decides by a simple majority to examine the proposed amendment, the president of the Council convenes a Convention that comprises representatives of national parliaments, the heads of State or government of the Member States as well as Commission and Parliament representatives.²⁵ By consensus, the convention adopts a recommendation to a conference of representatives of the Member State governments. The European Council may however also decide to not convene a Convention ‘should this not be justified by the extent of the proposed amendments.’²⁶

The subsequent stage of the ordinary revision procedure is the convention of a conference composed of the representatives of all Member States by the Council, which decides on the amendments to be made.²⁷ At this stage, every single Member State needs to express consent to the Treaty revision in order for it to move forward. Even if the EU institutions intervene in the revision process, Member States clearly have the final say, and this on two occasions. Not only do they need to agree on it in the context of this conference, but the amendments must also be ratified by every single Member State in

²³ For an overview of the existing literature on the Lisbon Treaty, see Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) and Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

²⁴ Article 48(2) TEU.

²⁵ Article 48(3) TEU.

²⁶ Ibid.

²⁷ Article 48(4) TEU.

accordance with their respective domestic procedures.²⁸ Member States consequently determine whether Treaty amendment under the ordinary revision procedure can move forward, unequivocally reflecting their position as masters of the Treaties. They are portrayed as monolithic entities as EU law is not concerned with how such agreement comes about internally and which actors are consulted, merely whether the Member State agrees to the Treaty change. In exercising their amendment prerogative, the Member States can modify EU primary law in any manner they wish, even to reduce the Union's competences. Article 48(2) TEU indeed explicitly states that revision may 'serve to increase or to reduce the competences conferred on the Union in the Treaties.' Article 48 TEU hence binds Member States as regards the form of Treaty revision, but not regarding substance as they can amend primary law in whatever way they want to, as long as they can unanimously agree on the proposed direction.²⁹ This reflects the bi-centric structure of EU law according to which two main categories of actors intervene in its shaping: the Member States and the EU itself. While the existence of the Outsider Model can be inferred from the operation of the ordinary revision procedure, it also becomes apparent in the context of the simplified revision procedures.

Under the simplified revision procedures, also governed by Article 48 TEU, certain Treaty provisions can be amended without fulfilling all the requirements of the ordinary revision procedure, such as the convention of an intergovernmental conference or the need for all Member States to ratify the amendments.³⁰ Under Article 48(6) TEU, Member State governments, the Parliament or the Commission may submit to the

²⁸ Ibid.

²⁹ De Witte (n 20) 56.

³⁰ Article 48(6) TEU.

Council proposals for the revision of the internal policies and actions of the EU. The Council may then adopt a decision amending all or part of the provisions of Part III of the TFEU. The Council acts by unanimity after consulting the Parliament and the Commission. Unlike the ordinary revision procedure, the decisions adopted under the simplified version must not ‘increase the competences conferred on the Union’.³¹ However, even in this context, the decision to modify primary law can only enter into force after having been approved by all Member States. Just as under the ordinary revision procedure, Member States retain the final say on Treaty revision under the simplified revision procedure. Both procedures should consequently be understood as evidence of the Outsider Model regarding SNAs in EU law.

It is of interest to note that the bi-centricity inherent in the Outsider Model is no necessity but rather derives from a choice on behalf of the Member States. From a legal perspective, Treaty revision constitutes an amendment of an international Treaty, governed by Article 39 of the Vienna Convention on the Law of the Treaties. According to this provision, the contracting parties are free themselves to determine the rules applicable to the amendment of their Treaties.³² International law does not impose any conditions on how Treaty change is to be brought about. The Member States themselves have determined the two revision procedures, reflecting their preference to – each on their own – keep absolute control of the process, underscoring their attachment to their status as masters of the Treaties.³³ Despite the relatively advanced stage of EU integration, Member States are unwilling to give up their controlling grip on the evolution

³¹ Ibid.

³² See further Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) 214.

³³ De Witte (n 20).

of the EU. It is true that also other actors are involved in the process of Treaty revision. However, and unlike Member States, they are not in control of this process and its outcome. The fact that Member States continue to dominate the process reflects bi-centricity and the Outsider Model.

Member States' pivotal position in Treaty revision could be observed on the occasion of the Convention for the Future of Europe, the body established in 2001 by the European Council as a result of the Laeken Declaration to produce a draft constitution for the EU, which has since failed.³⁴ At the Convention for the Future of Europe, local and regional representatives were hardly visible. Whereas in the early stages of the Convention a proposal had emerged that would have attributed a special status to 'associated regions', that is to say those regions with particularly pronounced competences on a domestic scale, this was subsequently abandoned.³⁵ It has been stated that as a consequence, 'the Convention itself barely recognised the regional dimension to the constitutive politics of the EU.'³⁶ While one or two regional members 'got there by wearing non-regional hats', the Committee of the Regions could not gain strong visibility as it was merely allowed to send six observers to the Convention and these 'won the right to speak only rarely.'³⁷ This reflects that in the European Union 'the dominant legal and

³⁴ On the draft constitution, see Anneli Albi and Jacques Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law International 2007).

³⁵ This proposal was referred to as the 'Lamassoure Proposal'. See Committee on Constitutional Affairs of the European Parliament, 'Report on the division of competences between the European Union and the Member States' ('the Lamassoure report'), 2001/2024 (INI), 24 April 2002.

³⁶ Charlie Jeffery, 'Regions and the European Union: Letting them In, and Leaving them Alone' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 39.

³⁷ Ibid 39.

political paradigm remains a Europe of the States³⁸, illustrating that the paradigm of Member States' sovereign equality and their status as masters of the Treaties remain very much intact.

The EU rules on Treaty revision illustrate that Member States are perceived as monolithic entities that act with a single voice. In this area, local and regional authorities are but outsiders. They have no right to be involved in this process as *a matter of EU law*. Local and regional authorities' involvement in Treaty revision is accordingly limited to the national level. As seen in the previous chapter, SNAs may indeed have a right to participate in that process according to domestic procedures. One example that was given was that of Finland, where the Åland islands need to consent to be subject to the European Treaties.³⁹ It was noted that other Member States have similar procedures in place that allow for the consultation of infra-State authorities.⁴⁰ While below the surface SNAs may indeed have a say as regards the normative development of the EU, this is not obvious from the surface of EU law. Indeed, from the perspective of EU law, the Member State acts with a single voice. In accordance with the Outsider Model, local and regional authorities are unlike Member States; they are outsiders to the process of Treaty revision, not being involved in it at all, at least from the perspective of EU law. The subsequent

³⁸ Stephen Weatherill, 'The Challenge of the Regional Dimension in the European Union' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 2. This seems to reflect the consensus at the Convention on the Future of Europe which asserted that the EU should not intervene in Member States' internal arrangements. See CONV 548/03 of 13 February 2003, 'Summary Report on the Plenary Session of 6 and 7 February 2003'.

³⁹ See Nikos Skoutaris, 'The Role of Sub-State Entities in the EU Decision-Making Process' in Elke Cloots Geert de Baere and Stefan Sottiaux (ed), *Federalism in the European Union* (Hart Publishing 2012) 210. See also Pia Alilontinen and Savino Ruà, *Lisbon Treaty Ratification: Will the Åland Islands Become Finland's Greenland?* (2008) (The Centre for European Policy Studies 1/2008).

⁴⁰ Piet van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts' (2001) 38 Common Market Law Review 871, 882.

section detects similar dynamics regarding the structure and composition of the EU institutions.

D. The Bi-Centric Structure of the EU Institutions

This subsection provides a brief overview of the organisation and structure of some of the Union's institutions, which, as will be seen, represent either EU or Member State interests. This underlines bi-centricity and the stronghold that the States continue to exercise over the EU. Where the institutions represent Member State interests, the latter are perceived as monolithic entities speaking with a single voice. As a consequence, only the Member States and the EU are perceived as active makers and shakers of EU integration. While they consequently emerge as insiders, SNAs can be but outsiders, passive by-standers to the decisions made by the Member States and the EU.

Article 13 TEU establishes a number of EU institutions, which make, execute and arbitrate EU law. It provides that the EU has an institutional framework, which aims to promote its values, objectives and interests as well as 'those of its citizens and those of the Member States'. The EU institutions include the European Parliament, the European Council, the Council, the European Commission, the CJEU, the European Central Bank and the Court of Auditors.⁴¹ The survey of some of these institutions underlines that solely the Member States and the EU are insiders to the EU's institutional framework, there being no mention of SNAs at all, underlining bi-centricity, one of the key features of the Outsider Model.

⁴¹ Article 13(1) TEU.

The task of making legislative proposals is, with minor exceptions, the Commission's prerogative. The Commission consists of one national per Member State, which must be 'completely independent'.⁴² Member States must respect that independence.⁴³ The tasks of the Commission consist, *inter alia*, in the promotion of the EU's general interest, ensuring the application of the Treaties, and the adoption and pursuance of measures adopted by the EU institutions. The Commission moreover executes the budget, manages EU programmes and exercises coordinating, managing and executive functions.⁴⁴ While the different Commissioners are nominated by the Member States, they represent and act on behalf of the EU's interests. The same is true for the Commission itself, which represents the EU, the structure that the Member States have created.

The Heads of State or Government of the different Member States make up the European Council, which originally developed outside of the EU's institutional framework but is now formally a EU institution.⁴⁵ As a general rule, its decisions are adopted by consensus.⁴⁶ The European Council provides the EU 'with the necessary impetus for its development and shall define the general political directions and priorities thereof.'⁴⁷ It is clear from its make-up that the European Council represents the Member States, which, being the masters of the Treaties, determine the general political direction of the Union they have created. A conclusion reached in the preceding chapter, namely

⁴² Article 17(3) and 17(4) TEU.

⁴³ Article 245 TFEU.

⁴⁴ Article 17 TEU.

⁴⁵ Article 13(1) TEU.

⁴⁶ Article 15(4) TEU.

⁴⁷ Article 15(1) TEU.

that the EU empowers national executives to pursue their interests outside of the domestic realm where they face domestic opposition, also becomes apparent with regard to the functioning of the European Council. The resulting consequence for SNAs is that while they may have domestic competence on certain matters, the national executive can, as a matter of EU law at least, exercise this competence at supranational level despite being unable to do so on a domestic scale.

The Council, composed of ministers of the different Member States, has an intergovernmental character. The Council's functions are as follows: it shall, 'jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.'⁴⁸ The make-up of the Council is of particular interest. In accordance with Article 16(2) TEU, it 'shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.'⁴⁹ The reference to representatives 'at ministerial level' was introduced under the Maastricht Treaty, under the pressure of the German Länder, to allow Member States to send regional ministers to participate in the Council.⁵⁰ We must wonder whether Article 16(2) TEU elevates SNAs from an outsider to an insider status. According to Skoutaris, 'it is difficult to overstate the constitutional significance of this amendment that has survived all subsequent Treaty modifications. In essence, it questions – at least partially – the 'federal blindness'

⁴⁸ Article 16(1) TEU.

⁴⁹ Article 16(2) TEU.

⁵⁰ The Council's rules of procedure also foresee that ministers may be accompanied by 'officials who assist them' which allows sub-national representatives to travel with them. Also in this scenario, what is visible at EU level is the representative of the Member State. Annex to Council Decision 2009/937/ EU adopting the Council's Rules of Procedure [2009] OJ L325/34, art 5(3).

thesis.’⁵¹ While Skoutaris does not elaborate further on this claim, it is only partly convincing, as subnational representatives are not present in the Council in their subnational capacity but rather as representatives ‘of the Member State’. Article 16(2) TEU allows regional officials to sit in the Council, but the crucial point is that, from the point of view of EU law at least, they do not sit there as representatives of the SNA but of the Member State. This confirms rather than denies the monolithic conception of statehood and the principle of national institutional autonomy. No direct relation between the EU and SNAs emerges that would transform the latter into insiders as EU law views them as representing the Member State, upholding bi-centricity.

The European Parliament can informally propose new legislation⁵² and votes on the Commission’s legislative proposals.⁵³ It represents neither the EU nor the Member States but the European citizens.⁵⁴ This analysis has however revealed that those EU institutions that represent levels of public authority either represent the EU or the Member States. Where the Member States are represented, they are perceived as monolithic units, speaking with a single voice, and this even under Article 16(2) TEU, which was intended to make room for subnational representation. In accordance with the Outsider Model, Member States have a particular status in the EU institutional framework, including privileges of representation to which regional and local authorities cannot aspire. The consequence of this institutional configuration is that local and

⁵¹ Skoutaris (n 39) 219.

⁵² Article 225 TFEU.

⁵³ Refer by way of example to Article 19 TFEU.

⁵⁴ According to Article 14(2) TEU it is composed of ‘representatives of the Union’s citizens’. The number of seats in the European Parliament is determined by the Council in light of the population of each Member State.

regional authorities cannot directly intervene in the supranational law-making process and they are not active contributors to its normative development. This reflects that within the EU, decision-making is State-centric.⁵⁵ Sovereign statehood is strengthened according to de Witte, as European integration leads

to a reinforcement of the central State in its relation with autonomous sub-national institutions. Both the central State and the autonomous regions see an erosion of their existing powers by the Community, but central government compensates this by playing a decisive role in Community decision making, while the regions are excluded from the institutional structure of the EC and yet have to accept the consequences flowing from Community acts which they did not help to shape.⁵⁶

The EU's institutional make-up underlines that, due to their outsider status, SNAs do not play an active role in the definition of supranational policy, the shape of which is determined by the bi-centric interaction of the EU and the Member States. While this may negatively affect SNAs' competences under domestic arrangements, some justifications for the bi-centric structure of the EU institutions have been brought forward. According to Weatherill, the main argument for denying SNAs any formal role in this process is that 'such intrusion would slow the process down and that it would create a risk of driving particular local preoccupations into the heart of a system that is meant to function on behalf of all European citizens.'⁵⁷ From the perspective of EU law, infra-State bodies are comprised within the monolithic Member States, which prevents

⁵⁵ Daniel Wincott, 'The Governance White Paper, the Commission and the Search for Legitimacy' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 379.

⁵⁶ Bruno de Witte, 'Community Law and National Constitutional Values' (1991) 18 *Legal Issues of Economic Integration* 1, 13.

⁵⁷ Stephen Weatherill, 'Finding a Role for the Regions in Checking the EU's Competence' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 149.

them from independently contributing to the shaping of EU law. In this bi-centric structure, there is no room for subnational involvement. The next section examines the distribution of regulatory competence, as envisaged by the European Treaties and concludes that also this domain is also characterised by the Outsider Model.

E. The Division of Competence in the EU

The preceding sections already indicated that the shape of EU law is to a large degree determined by the interaction of the EU and the Member States, leaving subnational authorities on the outside. This bipolar make-up is also reflected in the division of regulatory competence. The EU is a Union of conferred powers that can only exercise those competences that the Member States have conferred upon it.⁵⁸ The Treaties indeed map regulatory authority as being divided between two scales: the Member States and the EU. In the resulting scheme, Member States and the EU emerge as the only two levels of public authority with norm-generating abilities, leaving out any consideration for SNAs' regulatory autonomies. This finding is corroborated by an analysis of the various Treaty provisions that engage with regulatory competence. This brief overview solely engages with the textual formulation of the allocation of competence. The connected but separate issue of the exercise of these competences is considered more fully at a later stage in this chapter, which engages with the principle of subsidiarity.

⁵⁸ See Article 4(1) TEU as well as Article 5(1) TEU and Article 5(2) TEU.

Enumerations of competence in constitutional documents are common in national constitutional systems.⁵⁹ Since the Lisbon Treaty revision, also the European Treaties enumerate the competences of the European Union. This cataloguing of competences was considered necessary in order to counter ‘competence creep’, that is to say the gradual acquisition of increased power by the EU in areas where competence had not unequivocally been conferred to it.⁶⁰ To this end, a number of Treaty provisions have been inserted into the framework of EU primary law that seek to determine the respective competences of the EU and the Member States. The important aspect to note for my purposes is that competence is attributed either to the EU or the Member States and accordingly divided in a bi-centric fashion. According to Article 4(1) TEU for instance ‘competences not conferred upon the Union in the Treaties remain with the Member States’ – giving rise to the presumption that only the EU or the States dispose of regulatory competence. The formulation clearly does not account for SNAs’ ability to craft regulation under domestic power-sharing arrangements.

Competences in the EU are subdivided according to a number of different formulae, although all of them reflect bi-centricity. Article 2 TFEU lists four distinct competence categories: exclusive, shared, coordinating and complementary

⁵⁹ Articles 70-74 of the German Basic Law, which enumerates the powers of the federal government and catalogues the concurrent competences of the Länder. See also Section c.46 of the Scotland Act 1998.

⁶⁰ See further Weatherill, ‘On Competence Creep and Competence Control’ (n 5) and Mark Pollack, ‘Creeping Competence: The Expanding Agenda of the European Community’ (1994) 14 *Journal of Public Policy*. Joschka Fischer stressed the need for clear definitions of competences in his famous speech given at Humboldt University in Berlin. See Joschka Fischer, Speech on the ultimate objective of European integration at Humboldt University Berlin, available online: http://www.cvce.eu/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html (12 May 2000).

competence.⁶¹ In the area of exclusive competence, only the EU has regulatory authority. According to Article 2(1) TFEU in some circumstances, ‘only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.’ Spheres of exclusive EU competence, as defined by Article 3 TFEU, include the customs union, the establishment of competition rules in the internal market and the common commercial policy. The EU is empowered to regulate in these domains whereas the Member States are excluded from doing so. This does not however, at least in theory, deny Member States’ status as masters of the Treaties as, pursuant to Article 48 TEU, they may revoke any of the EU’s competences at any point.⁶²

The ‘ordinary’ mode of competence division is that of shared competence. Shared competences, also referred to as ‘concurrent competence’, are governed by Article 4 TFEU, which provides that where the Treaties confer a competence on the EU that is neither exclusive nor complementary, it is shared between the EU and the Member States. The precise contours of shared competence are determined in accordance with Article 2(2) TFEU and Protocol No 25 on the exercise of shared competence.⁶³ The area of shared competence encompasses domains such as the internal market, social policy, environmental and consumer protection as well as the area of freedom, security and justice.⁶⁴ Article 2(2) TFEU provides that in instances of shared competence ‘the Union

⁶¹ Article 2(4) TFEU acknowledges a separate competence category for the EU’s common foreign and security policy.

⁶² On exclusive competences, see further Robert Schütze, ‘Dual Constitutionalism Constitutionalised: the Emergence of Exclusive Competences in the EC Legal Order’ (2007) 32 *European Law Review* 3.

⁶³ Protocol (No 25) on the Exercise of Shared Competence.

⁶⁴ Article 4(2) TFEU.

and the Member States may legislate and adopt legally binding acts'. The Member States however shall 'exercise their competence to the extent that the Union has not exercised its competence' or when 'the Union has decided to cease exercising its competence.' Yet Article 2(2) TFEU does not capture that, on a domestic scale, it may be a subnational authority rather than the State itself that regulates on matters relating, for instance, to environmental or market policies.

Article 5 TFEU governs the coordinating competences, which are defined in Article 2(3) TFEU. They include the domains of economic, employment and social policy. According to primary law, it appears that in these domains, the EU has competence only to provide 'arrangements' for the Member States to exercise their competences in a coordinating manner. The exact scope of the coordinating competences is still somewhat unclear.⁶⁵ Notwithstanding the scope to be allocated to coordinating competences it is apparent that there is no space for any consideration of subnational autonomies. The provision only envisages the Member States as regulators, and ignores that infra-State bodies may for instance regulate on matters of social policy. The subsequent chapter will however examine a number of cases pertaining to social policy that underline that this assumption is mistaken as SNAs are indeed often in charge of defining social policies within the different Member States. The European Treaties do not acknowledge these competences that SNAs may have domestically.

⁶⁵ Craig has situated them somewhere between shared and complementary competences. Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *European Law Review* 338.

Article 6 TFEU governs those areas where the EU can merely ‘support, coordinate or supplement’ Member States’ competences. They include the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth, civil protection, and administrative cooperation. In these domains the EU shall merely have ‘competence to carry out and to support, coordinate or supplement the actions of the Member States’.⁶⁶ This is sometimes referred to as a ‘complementary competence’ on behalf of the EU. However, Article 2(5) TFEU specifies that this shall ‘not entail harmonisation of Member States’ laws or regulations.’ These provisions of EU primary law again do not allow for any recognition that local and regional authorities, rather than the central State, may be responsible for matters such as tourism or education. Member States are considered as monolithic entities as any regulation originating within the State is presumed to be that of the State, leaving no consideration for the regulatory capacity of SNAs. The resulting picture of EU law is dominated by bi-centricity, the exclusive interplay between the EU and the Member States, in line with the Outsider Model.

Next, a brief look should be had at the division of competence between the EU and the Member States in the context of the internal market. The subsequent chapter will engage with internal market law and will examine a large number of CJEU judgments that concerned conflicts between subnational norms and EU internal market law. In anticipation of that analysis, I should briefly introduce the division of competence that the Treaties operate with respect to the internal market. According to the EU Treaties, the competence to regulate on matters relating to the internal market is shared between the

⁶⁶ Article 6 TFEU.

EU and the Member States. Article 120 TFEU provides that ‘Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union’. The exact scope of that provision is subject to controversy. Bieber recalled that it is unclear how economic policy competences are to be divided between the Member States and the Union,⁶⁷ as there remain ‘fundamental and enduring controversies over the distribution of economic policy competences between the Member States and the Union that go beyond the normal tensions between the centre and the periphery within a federation.’⁶⁸ Thus, while the exact boundaries of the dividing lines between Member State and EU competence are subject to controversy, and still evolving, the assumption remains that they are divided between the EU and the Member State only to the exclusion of SNAs. This underlines both the active role that Member States take on as insiders to the EU legal order and the existence of bi-centricity as regulatory authority is divided between Member States and the EU only. The regulatory authority of the outsider SNAs is not acknowledged, even though, as the next chapter will amply confirm, SNAs as a matter of fact frequently regulate in this domain. This illustrates that while the surface of EU law (the Treaties) portray internal market law as bi-centric with only the EU and the Member States intervening as active participants, below this surface the CJEU recognises a polycentric and porous variant of EU internal market law in its case law.

⁶⁷ Roland Bieber, ‘The Allocation of Economic Policy Competences in the European Union’ in Loic Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 86 (Article 3(4) TEU and Article 120 TFEU ‘reflect fundamental and enduring controversies over the distribution of economic policy competences between the Member States and the Union which go beyond the normal tensions between the centre and the periphery within a federation’).

⁶⁸ Ibid 86.

It emerges from this brief overview that the division of competences inherent to the EU Treaties is bi-centric and reflects the Outsider Model. The Member States and the EU are portrayed as norm-generators; local and regional authorities however are not. Any regulatory autonomy within a Member State is seen as that of the Member State – underlining the monolithic nature of statehood as well as the principle of national institutional autonomy. This ignores that, on a domestic scale, regulatory competence may be fragmented.⁶⁹ A similar picture emerges in the context of an analysis on the rules on direct responsibility.

F. Direct Responsibility

The preceding section outlined that the EU has competence to regulate on a rather large number of matters. In these contexts, the EU may pass secondary legislation that Member States are subsequently obliged to implement and respect. This section examines the consequences that arise when Member States fall short of doing so correctly. The examination of the rules on direct responsibility unveils that EU law recognises that SNAs can be implementers, that is to say passive recipients, of EU norms and agents of EU law. However it also makes clear that in the event infra-State authorities fail to implement EU norms correctly, the Member State will be responsible for such failure vis-à-vis EU law.⁷⁰ As a result of their status as masters of the Treaties, the States must

⁶⁹ Article 4(3) TFEU and Article 4(4) TFEU provide a somewhat more nuanced version of that principle. They provide that with regard to research, technological development, and space as well as development cooperation and humanitarian aid, the exercise of EU competence ‘shall not result in Member States being prevented from exercising theirs.’ This principle is, however, limited to individual thematic spheres and it is somewhat uncertain how it applies in practice.

⁷⁰ See, by way of example, Case C-302/97 *Konle* [1999] ECR I-3099, para 62 (a territorial decentralised body may be held liable); Case C-424/97 *Haim* [2000] ECR I-5123, paras 61-62 (a functionally

ensure compliance with the objectives of EU law. No direct relation exists between EU law and SNAs, as when the latter breach supranational law, the EU will assess the consequences of such a breach with the Member State as its sole interlocutor.

Where EU secondary legislation touches upon a matter that belongs to the competence of subnational authorities the latter are often responsible for the transposition and implementation thereof on a domestic scale. With regard to Spain it has been argued that the ‘implementation of EU law by the regions is common practice’.⁷¹ The same is true in almost all other Member States.⁷² Subnational authorities indeed often have an implementing capacity, especially in those instances where the EU directive at issue relates to a subnational competence.⁷³ The duty of infra-State bodies to respect and implement EU law is subject to further analysis in the subsequent chapters. It constitutes a prime feature of the Outsider Model, attributing SNAs solely a passive, rather than an active role in securing the success of EU law. While SNAs must, as agents of EU law, implement and observe supranational obligations, they are not direct interlocutors of EU law.

Under Article 258 TFEU, the EU Commission may, when it considers that a Member State has ‘failed to fulfil an obligation under the Treaties’ deliver a reasoned

decentralised body may be liable); Case C-224/01 *Köbler* [2003] ECR I-10239, paras 44-47 and 50.

⁷¹ Maite Zelaia Garagarza, ‘The Spanish State Structure and EU Law: The View of the Spanish Constitutional Court’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 386.

⁷² Jääskinen (n 2) 89. (noting, with regard to the Finnish Åland islands that they are ‘obliged to implement Community legislation falling within its competence without having direct Community law-based access to decision-making processes and adjudication at the EU level’).

⁷³ Article 23(6) of the German Basic Law for instance attributes responsibility for the implementation of European directives to the Länder wherever they concern an area of their competence.

opinion, after which the State has an opportunity to submit observations. If the Member State does not comply with the opinion, the Commission may bring the matter before the CJEU. This is commonly referred to as the ‘infringement procedure.’ As masters of the Treaties, the Member States consent to being bound by the obligations inherent to primary law. The obligations arising under the Treaties are addressed to the States, which bear sole responsibility for their breach. This state of affairs corresponds very much to orthodox conceptions of public international law, reflecting the maxim of *pacta sunt servanda*. However it also reflects the concern for the *effet utile* of EU law. Assessing responsibility with regard to the central level no matter which domestic authority is responsible for a breach further responds to efficiency concerns, as the EU need not concern itself with the question of which domestic authority has caused the breach.

SNAs are subject to EU law. They are ‘part and parcel of a Member State’ and as such bound by the Treaties.⁷⁴ This passive recognition of SNAs, which is in line with the Outsider Model, has been amply confirmed in CJEU case law, for instance with regard to EU secondary legislation, such as regulations and directives.⁷⁵ According to Article 288(2) TFEU, a regulation ‘shall have general application’ and ‘be binding in its entirety and directly applicable in all Member States.’ No transposition measures are needed for regulations to produce legal effects within the Member States.⁷⁶ The obligation that such effects do come about rests on the State, which will be liable for breaching

⁷⁴ Lenaerts (n 4) 16.

⁷⁵ Article 288 TFEU. According to this provision, the EU can also adopt decisions, recommendations, and opinions.

⁷⁶ This is not merely unnecessary but also impermissible as transposition would cast doubt on ‘both the legal nature of the applicable provisions and the date of their coming into force.’ See Case 39/72 *Commission v. Italy* [1973] ECR 101, paras 16-17.

its obligations under the EU Treaties if, for any reason whatsoever, the regulation is not complied with. Article 288(3) TFEU is concerned with directives. It provides that a directive is ‘binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’ The wording of this provision is revealing. Whereas it states that a directive binds the ‘Member State’ it also provides that the choice of forms and methods as to how to achieve its objectives are left ‘national authorities’. The formulation of Article 288(3) TFEU is indicative of the relation between EU and subnational authorities with regard to responsibility claims. EU law recognises that local and regional authorities may be in charge of implementation on a domestic scale, and does not oppose this. Article 288(3) TFEU is accordingly no witness of regional blindness but acknowledges SNAs as implementers of EU law. Time and time again, the CJEU has however reaffirmed that when an SNA fails to implement European acts, the Member State is responsible for such failure.⁷⁷ A Member State, which is perceived as a monolithic entity by EU law, cannot hide behind its internal structure to escape the finding of an infringement of EU law⁷⁸ or to avoid bringing the infringement to an end.⁷⁹ In addition, Member States cannot argue in their defence that they have no competence to bring an SNA’s infringement to an end.⁸⁰

⁷⁷ See by way of example Case C-358/03 *Commission v. Austria* [2004] ECR I-12055, para 13; Case C-87/02 *Commission v. Italy* [2004] ECR I-5975, para 38.

⁷⁸ See by way of example Case 69/81 *Commission v. Belgium* [1982] ECR 153, para 5; Case C-247/98 *Commission v. Spain* [2000] ECR I-2823, para 20; Case C-383/00 *Commission v. Germany* [2002] ECR I-4219, para 18; Case C-388/01 *Commission v. Italy* [2003] ECR I-721, paras 25-26; Case C-357/03 *Commission v. Austria*, not reported, para 10; Case C-358/03 *Commission v. Austria* [2004] ECR I-12055, para 13.

⁷⁹ Case 96/81 *Commission v. Netherlands* [1982] ECR 1791, para 12; Joined Cases 227-230/85 *Commission v. Belgium* [1988] ECR I, paras 9-10.

⁸⁰ Case C-323/96 *Commission v. Belgium* [1998] ECR I-5063, paras 40-42 (in which judgment was given against Belgium because the Flemish Parliament had infringed EU public procurement rules). See also

In 1982, Advocate General Capotorti already recognised that the implementation of directives ‘by means of legislative measures of a regional nature’ is ‘acceptable from the Community point of view’⁸¹ as ‘each Member State is free to distribute legislative powers within its territory as it thinks best’.⁸² This affirms the importance of the principle of national institutional autonomy in this area of the law. The domestic distribution of legislative powers cannot however alter the provision in Article 258 TFEU that ‘Member States’ are responsible for any failure to comply with the obligations arising under EU law, including the obligation to transpose directives into domestic law. An ample body of case law confirms that Member States are liable for the failure of any national authority to implement a directive or to do so correctly, confirming the monolithic nature of statehood. This does not however mean that EU law is blind to the implementing capacity of local and regional authorities. The existing case law on these matters indeed confirms (i) that EU law recognises SNAs as implementers of EU norms, however (ii) only Member States are liable for breaches of EU law. The same rationale can be encountered in areas other than the transposition of EU secondary law (iii). This view of SNAs fits with the dynamics inherent to the Outsider Model as SNAs are portrayed as passive by-standers to EU integration, obliged to respect and give effect to EU norms.

Case C-236/99 *Commission v. Belgium* [2000] ECR I-5657, para 22).

⁸¹ Opinion of Advocate General Capotorti in Cases 68-73/81, *Belgium v Commission* [1982] ECR 153, para 162.

⁸² *Ibid.*

(i) EU Law Recognises SNAs As Implementers of EU Norms

EU law recognises the existence of subnational authorities, as well as the fact that they implement EU norms into domestic law. This can be best illustrated by having regard to some CJEU decisions. In *Hansa Fleisch* (1992), a dispute had arisen between a private company and a German local authority.⁸³ It concerned fees payable by the company to the locality after health inspections had been carried out on its premises, a slaughterhouse. Under a EU Directive, administrations were authorised to collect fees related to the costs occasioned by health inspections.⁸⁴ Whereas guidelines for the calculation of the fees were provided, Member States were explicitly allowed to depart from the predetermined fee level.⁸⁵ Under German law, the Länder were responsible for specifying the amount of these fees. In Schleswig-Holstein, the criteria for their calculation were fixed by a regional law, on the basis of which Hansa Fleisch received an invoice. The company argued that this demand was unlawful because the fees exceeded the amount provided for under EU secondary law. It was in this context that the CJEU had to determine whether the local invoice was compatible with EU law. It first recalled the principle of national institutional autonomy in stating that

each Member State is free to allocate powers internally and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly.⁸⁶

⁸³ Case C-156/91 *Hansa Fleisch v Landrat des Kreises Schleswig-Flensburg* [1992] ECR I-5567.

⁸⁴ Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultrymeat [1985] OJ L 32.

⁸⁵ Article 2(2) of Council Decision 88/408/EEC of 15 June 1988 on the levels of the fees to be charged for health inspections and controls of fresh meat pursuant to Directive 85/73/EEC [1988] OJ 1988 L 194.

⁸⁶ *Hansa Fleisch*, para 23.

Germany accordingly could delegate its implementing authority to a SNA. This, as such, does not create a situation of unlawfulness under EU law. The existence of SNAs as implementers of EU law is thus acknowledged. The remaining issue was whether the regional fee level was consistent with EU law. Secondary legislation provided that in some scenarios ‘Member States’ may depart from the EU levels ‘through increases or reductions up or down to the real figure for inspection costs’. It is particularly noteworthy that the ability of ‘Member States’ to adjust the provisions of the directive to their respective needs was explicitly recognised under EU secondary law, and it was held that also SNAs can benefit from this interpretative leeway. No provision of EU law, the CJEU stated, prevents Member States ‘from entrusting to regional or local authorities the powers to derogate from the standard levels of fees, under the conditions and within the limits’ set by EU law.⁸⁷ The relevant EU decision allowed a State to delegate ‘to regional or local authorities the exercise of the power conferred on it by that provision’ including the definition of the fee level.⁸⁸ This amounts to an expression of the Insider Model as the EU decision recognises that just like Member States, SNAs regulate. With regard to the discretion that SNAs exercise when implementing, SNAs and Member States are assimilated, in line with the Insider Model. The next chapter will indeed illustrate more extensively that the norms created by SNAs are considered to have the same status as those created by the Member States.

It is worthy of special note that, in *Hansa Fleisch*, the German government underlined that the decentralised implementation of EU secondary law presents intrinsic

⁸⁷ *Hansa Fleisch*, para 24.

⁸⁸ *Hansa Fleisch*, para 26.

advantages, as ‘the fixing of fees at the level of the individual *Länder* is the most appropriate way of ensuring (...) that fees correspond to real inspection costs.’⁸⁹ The flexibility provided by EU law, aimed at adapting prices to local circumstances, could be better fulfilled at a sub-national rather than national scale. EU law accordingly not only recognised that SNAs can be implementers of EU norms but further that there might be advantages to the subnational implementation of such norms, underlining the benefits of polycentricity. This does not however prevent the application of the rationale inherent to Article 258 TFEU above the surface, namely that Member States are responsible for breaches of EU law committed within their territory, in line with the Outsider Model.

(ii) Only Member States Incur Direct Liability Under EU Law

Even if EU law recognises that local and regional authorities can be implementers of EU norms, only the Member State will incur direct responsibility where it falls short of doing so correctly. This has been affirmed on numerous occasions. A brief overview of a few cases serves to illustrate this point. It is a coincidence that the cases outlined below all pertain to environmental matters. At the same time, this is not at all surprising since environmental governance is often per se an area where polycentricity powerfully plays out due to the very nature of environmental issues, which do not occur in accordance with jurisdictional borders.⁹⁰

⁸⁹ Opinion of AG Jacobs, para 28.

⁹⁰ One example that powerfully underlines this point is that of climate change. On this, see Kim van der Leeuw, Joyeeta Gupta, Hans de Moel, ‘Climate Change: a 'Glocal' Problem Requiring 'Glocal' Action’ (2007) 4 Environmental Sciences 139.

Commission v. Belgium (1981) concerned a EU Directive that aimed at protecting human health and the environment against the harmful effects of waste.⁹¹ The Directive required Member States to adopt measures that appropriately encouraged the prevention, recycling and processing of waste. When Belgium had to present itself in front of the CJEU for failing fully to implement the Directive, it argued that it was prevented from doing so because of difficulties arising from its internal devolutionary process. Important institutional reforms concerning the redistribution of powers between national and regional institutions had been initiated at the time but not yet completed. The federal government put forward that as long as these reforms had not been finalised, subnational governments were not in a position to exercise their powers and to implement the Directive correctly.⁹² The CJEU held that although these circumstances may as a matter of fact explain the difficulty of implementation, ‘they do not expunge the failure of the Kingdom of Belgium to fulfil its obligations.’⁹³ It went on to recite its locus classicus in responsibility cases, namely that ‘a Member State may not plead provisions, practices or circumstances in its internal legal system to justify failure to comply with obligations under Community directives.’⁹⁴ Internal arrangements, no matter of what nature, may not lead to the exemption of responsibility of a Member State that fails to comply with its obligations under EU law. As masters of the Treaties, States are accountable.

In *Commission v. Netherlands* (1982) the Netherlands was found to have failed to transpose a European Directive concerning the quality of bathing water into domestic

⁹¹ Case C-69/81 *Commission v. Belgium* [1981] ECR 153.

⁹² *Ibid* para 4.

⁹³ *Ibid* para 5.

⁹⁴ *Ibid* para 5.

law.⁹⁵ In the Netherlands, the supervision of water quality was operated in a decentralised manner even if SNAs were under the control of national authorities.⁹⁶ The CJEU announced that ‘each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional and local authorities.’⁹⁷ This, however, does not ‘release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature.’⁹⁸ Similarly, where the Italian Abruzzo region fell short of carrying out environmental impact assessments that were mandatory under EU secondary law, Italy was found to have failed to comply with its obligations under EU law.⁹⁹

The CJEU has also held that where a State does not comply with a judgment, it cannot blame its lack of compliance on domestic institutional arrangements.¹⁰⁰ In one instance, Belgium had argued that the delay in remedying its omission to transpose a Directive was ‘the result of special difficulties arising out of the transfer of a substantial number of powers to the new regional institutions in Belgium’.¹⁰¹ Belgian legislation did not empower the federal executive to compel regional authorities to implement the Directive, and the federal government also found itself unable to itself transpose the Directive instead of its infra-State authorities.¹⁰² The Court considered that these grounds could not exempt the State from responsibility. While Member States are free to delegate powers internally as they see fit, issues arising from devolution do not release States

⁹⁵ Case 96/81 *Commission v. Netherlands* [1982] ECR 1791.

⁹⁶ *Ibid* para 11.

⁹⁷ *Ibid* para 12.

⁹⁸ *Ibid* para 12.

⁹⁹ Case C-87/02 *Commission v Italy* [2004] ECR I-05975.

¹⁰⁰ Joined Cases 227-230/85 *Commission v. Belgium* [1988] ECR 1.

¹⁰¹ *Ibid* para 6.

¹⁰² *Ibid* para 8.

‘from the obligation to ensure that the provisions of the directive are properly implemented in national law.’¹⁰³ Member States’ direct responsibility extends to financial responsibility. Where a Member State omits to rectify its failure to comply with EU law after a judgment has been issued against it, it is financially liable, notwithstanding which organ caused the failure.¹⁰⁴

In some scenarios, States transpose directives themselves but impose on SNAs the task to ensure compliance therewith. This happened in Spain in the context of a European Directive on water pollution.¹⁰⁵ The Directive had been transposed at national level by a law that attributed competence to the autonomous regions to establish the action programmes required by the Directive.¹⁰⁶ When some autonomous communities failed to establish such programmes, Spain was found to be in breach of its obligations under EU law, including the duty of loyal cooperation.¹⁰⁷ Spain’s argument that it was unable to ensure the creation of action programmes was rejected¹⁰⁸ as the CJEU reiterated that internal domestic arrangements cannot be relied on to justify a failure to comply with obligations under EU law.¹⁰⁹ Indeed, ‘neither the division of powers as between the State and the autonomous regions nor the obligation to comply with directions given in the

¹⁰³ Ibid para 9.

¹⁰⁴ Under Article 260 TFEU the Member State will be financially liable to pay a lump sum or penalty payment. This provision, inserted by the Maastricht Treaty, was first deployed by the Court in Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

¹⁰⁵ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ 1991 L 375.

¹⁰⁶ Case C-274/98 *Commission v. Spain* [2000] ECR I-2823.

¹⁰⁷ Then still enshrined in Article 10 EC. See paragraph 12 of the judgment.

¹⁰⁸ Paras 17-18 of the judgment.

¹⁰⁹ Paras 19 of the judgment.

national legislation transposing the directive into national law can serve to justify failure to comply with the obligations imposed by the directive.’¹¹⁰

As the fields of competence addressed by an EU Directive do not necessarily reflect divisions of competences on a national scale, a single directive often has to be transposed by a number of public authorities, in line with their respective competences. Some elements of the EU Directive on the prevention of major accidents which involve dangerous substances¹¹¹ was implemented at federal level in Germany whereas other provisions thereof were implemented by the *Länder*. When some *Länder* failed to implement correctly, Germany was declared to be in failure of its obligations under EU law.¹¹² The Court did not accept that ‘by reason of the number and complexity of the implementing measures necessary both at the federal and the *Länder* level, there were special circumstances in this case which the Commission should have taken into account in accordance with the principle of cooperation.’¹¹³ The German government had further argued that it had drawn the regional authorities’ attention towards the urgent need for implementation.¹¹⁴ The CJEU stated that a declaration of responsibility ‘must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes.’¹¹⁵ However, as a State may not plead internal arrangements ‘including those resulting from its federal organisation’ to justify failures to comply with

¹¹⁰ Paras 20 of the judgment.

¹¹¹ Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances [1997] OJ 1997 L 10.

¹¹² Case C-383/00 *Commission v. Germany* [2002] ECR I-721.

¹¹³ Para 15 of the judgment.

¹¹⁴ Para 15 of the judgment.

¹¹⁵ Para 16 of the judgment, citing Case C-110/00 *Commission v Austria* [2001] ECR I-7545, para 13, and Case C-423/00 *Commission v Belgium* [2002] ECR I-593, para 14.

EU law, Germany was responsible.¹¹⁶ In accordance with the principle of loyal cooperation, the Commission and Member States must indeed ‘work together in good faith, such cooperation must be in full compliance with the Treaty and secondary legislation.’¹¹⁷ The national government cannot excuse its failure in stating that under domestic law, it cannot compel SNAs to transpose or adopt transposition measures on their behalf¹¹⁸, nor can the fact that the central State attempted to compel SNAs to put an end to the existing infringement.¹¹⁹ Such accountability is directly related to Member States’ status as masters of the Treaties in accordance with which they undertake the burden of being bound by EU law. The Outsider Model can further be located in this area of EU law as the perception of the Member State that is operated here is monolithic – no matter which State organ is responsible for the breach EU law will assume that the breach was committed by the central State itself.

EU law goes further than merely holding Member States responsible for breaches of EU law committed by public authorities within its territory. It has moreover imposed an obligation on States to watch over local and regional authorities where they implement EU secondary law, and this even in case where Member States are not competent to do so under domestic power-sharing arrangements. This illustrates the impact that EU integration has on national devolutionary structures, according to which Member States

¹¹⁶ Para 18 of the judgment.

¹¹⁷ Para 18 of the judgment.

¹¹⁸ This was confirmed in Case C-358/03 *Commission v. Austria* [2004] ECR I-12055 (the CJEU rejected Austria’s argument that in light of domestic law it could not compel the regional government of Carinthia to adopt the measures necessary to transpose a European directive).

¹¹⁹ Case C-103/01 *Commission v Germany* [2003] ECR I-5369 (the German *Länder* were in charge of transposing a directive dealing with protective equipment for fire fighters but failed to do so adequately as some of them added requirements not foreseen by the directive. Germany was found to be in violation of EU law despite proving its efforts that the SNA align its legislation with the directive).

are seen in an active, and SNAs in a merely passive, role. The *Suckler Cow Premium* case established that Member States are under an obligation to watch over SNAs' implementation of supranational obligations.¹²⁰ Pursuant to the duty of loyal cooperation between the EU and the Member States, which is enshrined in Article 4(3) TEU, Member States must supervise the application of EU law in their respective territory¹²¹ and bring possible infringements to an end.¹²² This conclusion is derived from the States' obligation to comply with obligations arising under the Treaties. However, it stands somewhat in contrast with the Court's ruling in *Fratelli Costanzo*, a case examined in the next chapter, in which SNAs were recognised in the same capacity as Member States with respect to Article 4(3) TEU.¹²³ It follows that the conception of SNAs under the duty of loyal cooperation depends not so much on the provision itself but the context in which it is relied on, and whether this area is governed by the Insider Model or the Outsider Model. Above the surface of EU law, the attachment to the Outsider Model remains strict.

The overview of the law on direct responsibility underlines that whenever events within a Member State cause a breach of EU law, the Member State will be responsible vis-à-vis EU law. The resulting perception of the State is monolithic as EU law does not envisage the coexistence of autonomous levels within a single State. Two central features of the Outsider Model accordingly find expression here: the monolithic conception of statehood and the bi-centric structure of EU law. EU law does not preoccupy itself with

¹²⁰ Case C-8/88 *Germany v Commission* (Suckler Cow Premium) [1990] ECR I-2355, para 3.

¹²¹ In this regard, see also Case C-33/90 *Commission v Italy* [1991] ECR I-05987 where the Court held that Italy has a duty to supervise the correct implementation of EU legislation concerning toxic waste in the region of Calabria.

¹²² On this, see Case 96/81 *Commission v. Netherlands* [1982] ECR 1791, para 12; Joined Cases 227-230/85 *Commission v. Belgium* (1988) ECR I, paras 9-10.

¹²³ Case C-103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR I-1839.

the modalities of implementation on a domestic scale, and accepts that by virtue of the principle of national institutional autonomy, implementation may be carried out by SNAs. This cannot however prevent a finding of State responsibility. The stance of EU law is unequivocal: it is solely interested in the result of the implementation process rather than the precise contours of the process itself.¹²⁴ This constitutes one important aspect of the principle of national institutional autonomy, namely that EU law does not concern itself with the internal causes for non-compliance with EU law, solely with the consequences thereof. This firm adherence to the letter of Article 258 TFEU, the surface of EU law, serves to protect the Treaties' institutional balance as the Commission, the watchdog of the Treaties, verifies whether the States comply with the obligations, to which they are subject in their capacity as the masters of the Treaties. This procedure seeks to honour the principle of *pacta sunt servanda* and further echoes the fact that 'it is not the task of the Community institutions to rule on the division of powers by the institutional rules proper to each Member State'.¹²⁵ As masters of the Treaties, the Member States bear the duty to assure compliance with the legal framework they have concluded, and by which they have agreed to be bound. SNAs are recognised to exist but not as independent authorities, of the same standing as Member States, to the extent that they cannot be found responsible and Member States must watch over their implementation of EU law. A similar conclusion emerges from a survey of direct responsibility beyond the confines of the implementation of EU secondary law.

¹²⁴ Sacha Prechal, *Directives in EC Law* (Oxford University Press 1995) 69.

¹²⁵ Case C-95/97 *Région Wallonne v Commission* [1997] ECR I-1789 para 7 see in this respect also Case C-8/88 *Germany v Commission* [1990] ECR I-2321, para 13 and Case C-33/90 *Commission v Italy* [1991] ECR I-5987, para 24.

(iii) Beyond the Implementation of EU Secondary Law

Member States' responsibility for the shortcomings of their subnational authorities extends beyond the implementation of EU secondary law. Italy was for instance found to have engaged in discrimination on the basis of nationality and to have infringed the freedom to provide services when some cities, such as Florence, Venice and Padua, set preferential rates to access museums, parks and galleries for nationals of a Member State or residents above a certain age (hence excluding those of the same age living abroad).¹²⁶ Similarly, when the Flemish Parliament did not respect EU public procurement law in the context of the construction of its own premises in Brussels, Belgium was liable notwithstanding the fact that according to domestic legislation, it could not adopt decisions concerning the conclusion and performance of contracts with regard to legislative bodies in light of the independence and supremacy of legislative authority under the Belgian constitution.¹²⁷ The CJEU has reaffirmed repeatedly that in such contexts, Member States 'cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations and time-limits laid down by a directive'¹²⁸ nor 'rely on its own legal system or an interpretation thereof in order to justify conduct which is contrary to Community law.'¹²⁹ This confirms the application of the principle of national institutional autonomy to this area of the law as well as the bi-centric nature of EU law according to which SNAs are outsiders rather than insiders.

¹²⁶ Case 388/01 *Commission v Italy* [2003] ECR I-723 (Italy was liable for the actions of Florence, Venice and Padua which infringed EU law).

¹²⁷ See paragraph 40 of the judgment.

¹²⁸ Para 42 of the judgment, referring to Case C-144/97 *Commission v France* [1998] ECR I-613, para 8.

¹²⁹ Para 17 of the Opinion.

This section has examined the law on direct responsibility in EU law under Article 258 TFEU. It has established first that EU law does recognise the existence of SNAs (hence proving wrong blindness theories) and that, according to domestic law, they might be in charge of the transposition and implementation of EU norms into the domestic setting. EU law respects, and does not oppose, Member States' choice in this regard. Second, this respect of national institutional choices does not however release the Member State of direct responsibility under EU law. Member States, as the masters of the Treaties, are compelled by the obligations the latter give rise to. It has been pointed out that the complete and effective implementation of EU law 'is more difficult in those Member States where power is shared or devolved to one or more sub-national bodies'¹³⁰ and can even be a 'source of conflict' in these States.¹³¹ This is however for Member States to resolve internally – reflecting the Outsider Model as from the perspective of EU law the Member State is a monolithic, unitary entity even though from a domestic perspective it may not be. Many Member States have indeed established domestic mechanisms that allow for local and regional authorities to internally be held liable for a failure to comply with EU law.¹³² Allowing Member States to rely on internal arrangements to excuse the non-compliance with EU law would result in 'severe inequality in the treatment of States were one to admit the opening up of the unitary façade on which the law currently insists.'¹³³ This is why the Court has repeatedly insisted that a Member State may not hide behind its domestic structure when it fails to

¹³⁰ Crespo (n 1) 210.

¹³¹ Ibid 212.

¹³² See in this regard Article 169 of the Belgian Constitution, Article 117 (5) of the Italian Constitution and Article 23d (5) of the Austrian Constitution.

¹³³ Weatherill, 'The Challenge of the Regional Dimension in the European Union' (n 38) 2.

comply with its obligations under the Treaties. Even if a failure to comply with EU law can be explained, this will not prevent the CJEU from making a finding of infringement¹³⁴ or to hold that the Member State is under an obligation to bring such an infringement to an end.¹³⁵ States may accordingly not rely on internal constitutional arrangements to justify breaches of EU law.¹³⁶ This reflects the legal indivisibility of the Member State, which has been introduced as one of the constitutive features of the Outsider Model. The legal indivisibility of the State can be perceived beyond the case law examined in this section and also applies to horizontal divisions of authority within a Member State.¹³⁷ The law on direct responsibility consequently provides an instance of the operation of the Outsider Model.

G. Indirect Responsibility

The study of indirect responsibility under EU law unveils the same patterns regarding SNAs' relation with EU law as those that have been observed in the context of direct responsibility. Local and regional authorities are recognised as implementers of EU norms, but the Member State will be responsible vis-à-vis EU law where the SNA fails

¹³⁴ Case C-69/81 *Commission v. Belgium* [1981] ECR 153, para 5.

¹³⁵ Case 96/81 *Commission v. Netherlands* [1982] ECR 1791, para 12. Joined Cases 227-230/85 *Commission v. Belgium* [1988] ECR 1, paras 9-10. This was established in Case C-69/81 *Commission v. Belgium* [1981] ECR 153, para 5 and has been amply confirmed, such as for instance in Case C-274/98 *Commission v. Spain* [2000] ECR I-2823 para 20, Case C-383/00 *Commission v. Germany* [2002] ECR I-721, para 18, and Case C-358/03 *Commission v. Austria* [2004] ECR I-12055, para 13.

¹³⁶ This was established in Case C-69/81 *Commission v. Belgium* [1981] ECR 153, para 5 and has been amply confirmed by subsequent case law, such as Case C-274/98 *Commission v. Spain* [2000] ECR I-2823 para 20, Case C-383/00 *Commission v. Germany* [2002] ECR I-721, para 18, and Case C-358/03 *Commission v. Austria* [2004] ECR I-12055, para 13.

¹³⁷ The CJEU for instance did not accept as a defence for failure to comply with obligations arising under the Treaties Belgium's argument that the dissolution of the national parliament prevented the transposition of EU law into domestic law, constituting a case of force majeure. Case 77/69, *Commission v Belgium* [1970] ECR 237, para 15.

correctly to apply the norm. The doctrine of indirect responsibility was initially developed in *Francovich* and subsequently refined through cases such as *Brasserie du Pêcheur* and *Köbler*.¹³⁸ Indirect responsibility arises whenever ‘the State’ breaches a provision of EU law that confers rights upon individuals if the breach is ‘sufficiently serious’ and there is a direct causal link between the breach and the harm. According to this doctrine, domestic courts must entertain suits for financial compensation that individuals bring against a State that fails to comply with its obligations under EU law. The doctrine of indirect responsibility is said to safeguard individual rights and the efficiency of the Treaties as these claims ensure that failures to comply with EU law are rectified.¹³⁹ In holding the masters of the Treaties responsible, the Treaties’ institutional balance is safeguarded and it is made sure that the objectives pursued under EU law are achieved. *Brasserie du Pêcheur* affirmed that the State is financially liable, ‘whatever be the organ of the State whose act or omission was responsible for the breach.’¹⁴⁰ The notion of ‘organ of the State’ has ‘both a horizontal and a vertical dimension. It encompasses all three branches of government but also decentralised entities and public emanations.’¹⁴¹ This monolithic conception of the State, its legal indivisibility, confirms that the Outsider Model plays out in this domain.

¹³⁸ Joined Cases C-6/90 and 9/90 *Francovich & Bonifaci v Italy* [1991] ECR I-5357 and Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v Germany/Factortame III* [1996] ECR I-1029, Case C-224/01, *Gerhard Köbler v Austria* [2003] ECR I-10239. For an overview of the literature on State liability, see Carol Harlow, ‘Francovich and the Problem of the Disobedient State’ (1996) 2 *European Law Journal* 199, Georgios Anagnostaras, ‘The allocation of responsibility in State liability actions for breaches of Community law’ (2001) 26 *European Law Review* 138.

¹³⁹ This rationale was already present in Case 26/62 *Van Gend en Loos* [1963] ECR 1, para 13 where the Court found that ‘the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Article 169 and 170 to the diligence of the Commission and the Member States.’

¹⁴⁰ Para 32 of the Judgment.

¹⁴¹ Anagnostaras (n 138) 139.

The Member State will invariably be the defendant to an action of indirect responsibility, notwithstanding whether the administration¹⁴², the legislature¹⁴³ or the judiciary¹⁴⁴ are at the origin of the breach. Member States must ensure that individuals obtain reparation for damage caused to them due to non-compliance with EU law, no matter which organ is at the origin of that breach. For the purposes of this determination, it does not matter, from the perspective of EU law, which public authority is responsible for the breach and which public authority is, according to domestic arrangements, responsible for providing reparation for the damages flowing from the breach.¹⁴⁵ As a corollary of their direct responsibility under Article 258 TFEU, States are liable to pay damages for a breach of EU law. *Konle* established that Member States are subject to an obligation to make good damages caused by the unlawful actions of decentralised authorities.¹⁴⁶ The CJEU held that the State cannot ‘plead the distribution of powers and responsibilities between the bodies that exist in its national legal order to free itself from liability on this basis.’¹⁴⁷ As a consequence,

[i]t is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation.¹⁴⁸

¹⁴² Case C-5/94, *Hedley Lomas* [1996] ECR I-2553.

¹⁴³ Cases C-178, 179, 188-190/94, *Francovich, Brasserie du Pêcheur, Denkvit Internationaal BV and Others v. Bundesamt für Finanzen* [1996] ECR I-5063.

¹⁴⁴ *Köbler* (n 70).

¹⁴⁵ Case C-302/97 *Konle* [1999] ECR I-3099 para 62 and Case C-424/97 *Haim* [2000] ECR I-5123 paras 61-62.

¹⁴⁶ *Ibid.*

¹⁴⁷ Para 62 of the Judgment.

¹⁴⁸ Para 62 of the Judgment.

Whereas the obligation to ensure that individuals obtain reparation lies exclusively with the State, the pecuniary funds do not necessarily have to stem from the latter. Rather, subject to the principles of equivalence and effectiveness, Member States can delegate the execution of their obligation to provide compensation to SNAs. A number of Member States dispose of mechanisms that allow the national government to act against the SNA committing the breach of EU law on a domestic scale.¹⁴⁹ By virtue of their capacity as masters of the Treaties, States must ensure that the Treaties are respected on a domestic level. *Haim* and *Fuß* confirmed that, as a matter of EU law, Member States' obligation to provide reparation holds true notwithstanding which public authority is at the origin of the breach and responsible for providing reparation under national provisions.¹⁵⁰ This reflects the Outsider Model as SNAs are not assimilated to Member States. It is true that both Member States and SNAs are recognised as implementers of EU law, however, only Member States and not SNAs can be responsible for a failure to implement correctly as a matter of EU law.

It is worthy of special note that in *Haim* Advocate General Mischo recommended that SNAs be seen as insiders in the context of claims for indirect responsibility. He argued that in a democratic system, liability should be the corollary of power and that there is a paradox in holding the State responsible for entities whose autonomy it must respect under national law.¹⁵¹ This is interesting as the underlying assumption of this proposition is that SNAs have the same 'power' as Member States from the perspective

¹⁴⁹ See in this regard Article 169 of the Belgian Constitution, Article 117 (5) of the Italian Constitution and Article 23d (5) of the Austrian Constitution.

¹⁵⁰ Case C-424/97 *Haim* [2000] ECR I-05123 and Case C-424/09 *Günther Fuß* [2010] ECR I-12167.

¹⁵¹ Opinion of AG Mischo in Case C-424/97 *Haim* [2000] ECR I-05123.

of EU law – assuming that they are insiders too. This view was however never adopted by the CJEU. As a matter of EU law, the corollary between power and responsibility is not given effect due to the attachment to the monolithic conception of Member States, which are the sole masters of the Treaties, as well as concerns for practical effectiveness. This would have let the effect of subnational norms, rather than the status of public authorities determine the responsibility public authorities under EU law. It would indeed be unfeasible for the Commission and the Court to investigate who, internally, was at the source of the failure to comply with the Treaties. As a consequence it seems fair to conclude that EU law maintains ‘the traditional rule of international law that the Member States must be regarded as entities as regards to the fulfilment of obligations deriving from European law, as they are party to the treaties establishing the European Union.’¹⁵²

Just as under the rules on direct responsibility, those on indirect responsibility reflect the characteristic features of the Outsider Model. The existence of subnational authorities is recognised and EU law does not interfere with their respective autonomies. EU law does however refuse to recognise that as a consequence of such autonomies, local and regional authorities should have the same capacity of responsibility. Member States have a special status by virtue of them being the masters of the Treaties to which SNAs cannot aspire. While Advocate General Mischo suggested considering SNAs as insiders, the law continues to perceive them as outsiders, illustrating a strong attachment to the public international law roots of EU law. The same conclusion is also drawn from a case study of the rules on standing before supranational courts.

¹⁵² Maartje Verhoeven, ‘The ‘Costanzo Obligation’ and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?’ (2010) 3 Review of European Administrative Law 23, 25.

H. Standing Under Article 263 TFEU

Member States, as masters of the Treaties, are able to control whether the EU exceeds the powers they have conferred on it under the Treaties.¹⁵³ Article 263 TFEU governs the admissibility of actions challenging the legality of acts of the European institutions.¹⁵⁴ Its second paragraph attributes a general and unlimited right of action to the so-called privileged applicants, namely the Member States; the European Parliament; the Commission and the Council. These actors do not need to demonstrate an interest to bring an action, the only condition that needs to be fulfilled is the lapse of a two-month time limit within which the action can be brought.¹⁵⁵

Unlike the Member States, local and regional governments do not qualify as privileged applicants.¹⁵⁶ They also do not qualify as semi-privileged applicants under Article 263(3) TFEU.¹⁵⁷ While a number of options remain available for SNAs to defend their interests in front of the European courts, none allows them to directly and individually defend their interests – including their regulatory competence – on a supranational scale. Only Member States have that privilege. SNAs are unlike Member States in this regard, reflecting one feature of the Outsider Model. Member States’

¹⁵³ This reflects that the EU is an entity of conferred power, only able to exercise those competences the Member States have delegated to it. On this, see Article 5(1) TEU and Article 4(1) TEU.

¹⁵⁴ See more generally Margarita Canedo, ‘L’intérêt à agir dans le recours en annulation du droit communautaire’ (2000) 36 *Revue Trimestrielle de Droit Européen* 451.

¹⁵⁵ Case 131/86, *United Kingdom v. Council* [1988] ECR 905 para 6. For Art. 38 ECSC Treaty, see Case 230/81, *Luxembourg v. European Parliament* [1983] ECR 255 paras 24–25.

¹⁵⁶ This was confirmed by the Court in Case C-406/07 *Landtag Schleswig-Holstein v. Commission*, Order of 8 February 2007 (unpublished).

¹⁵⁷ This provision states that ‘The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.’

privileged status is the logical corollary of them being the masters of the Treaties as a consequence of which they have an interest in safeguarding the Treaties' institutional balance as well as the dividing lines between EU and Member State competence. According to Van Nuffel, Member States' privileged standing confirms their pivotal role within the EU, illustrating 'the responsibility that the Member States retained for themselves, at the moment of the foundation of the Communities, to see that the Community institutions do not overstep the powers the Member States were willing to surrender'.¹⁵⁸ States accordingly assume the unique role of checking that the EU institutions do not violate the division of competence. This stance was said to reflect the States' position 'as Founding Fathers rather than their ongoing involvement with the functioning of the European Union.'¹⁵⁹ Member States accordingly have access to a mechanism to ensure that their norm-generating capacity is not endangered through supranational action. Local and regional authorities cannot equally defend their norm-generating autonomies, underlining the bi-centric conception of EU law inherent to the Outsider Model.

Advocate General Léger confirmed in *Nederlandse Antillen* that just like the EU institutions, Member States 'enjoy a irrebuttable presumption' that they have a legal interest in bringing proceedings, given that '[a]s parties to the Treaty, the Member States have an obvious interest in upholding the terms of an agreement to which they are parties.'¹⁶⁰ This privilege is exclusively reserved to States 'to the exclusion of

¹⁵⁸ Nuffel (n 40) 875.

¹⁵⁹ Ibid 877.

¹⁶⁰ Opinion of Advocate General Léger in Cases C-301/97 and C-452/98, *Netherlands and Nederlandse Antillen v. Council* [2001] ECR I-8853, para 53 (stating that as Contracting Parties to the Treaty, the

governments of regions or of autonomous communities, irrespective of the powers they may have'.¹⁶¹ The Court itself has recognised that if the contrary were true,

it would undermine the institutional balance provided for by the Treaties, which determine the conditions under which the Member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.¹⁶²

SNAs have attempted to challenge this principle, but have been unsuccessful in doing so. In one instance, Wallonia argued that, as it had taken over the responsibilities in a given domain from the Belgian government, it could bring an action for annulment in the same capacity as a Member State. The CJEU however denied it the ability to do so. Contrary to Wallonia, which claimed that the notion of 'the Member State' should be interpreted widely to encompass SNAs exercising certain competences, the CJEU held that

it is apparent from the general scheme of the Treaties that the term 'Member State', for the purpose of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the government of regions or autonomous communities, irrespective of the powers they may have.¹⁶³

This underlines that the relevant question from the perspective of EU law is not who actually exercises regulatory authority but rather what the status of the relevant public authority is – whether it is the insider Member State or an outsider SNA.

Member States have an evident interest to safeguard the contents of the agreement to which they acceded).

¹⁶¹ Ibid para 56.

¹⁶² See Case C-95/97 *Région Wallonne v Commission* [1997] ECR I-1787, para 6, and Case C-180/97 *Regione Toscana v Commission* [1997] ECR I-5245, para 6. For a case comment, see Joanne Scott, 'Case C-95/97 *Région Wallonne v. Commission of the European Communities* [1997] ECR I-1787 (ECJ) and Case T-70/97 [1997] ECR II-1513 (CFI)' (1999) 36 Common Market Law Review 227.

¹⁶³ *Région Wallonne*, para 6.

Otherwise, the Court went on to argue, the Treaties' institutional balance would be undermined as '[i]t is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.'¹⁶⁴ The privileged applicant status is attributed to the States in order to safeguard the institutional balance inherent in the Treaties. The fact that local and regional authorities cannot benefit from the same possibilities illustrates that they are not considered fully to form part of that institutional balance, that is to say the bi-centric make-up of the EU legal order. There are however alternative options available to SNAs wishing to challenge EU acts in the absence of the possibility to initiate direct actions under the privileged claimant status. These different avenues are briefly introduced in turn. SNAs can act under Article 263(4) TFEU, as an agent for their Member State, through their Member State, or through the Committee of the Regions. It will be seen that none of these options allows SNAs to individually protect their norm-generating capacity as Member States can by virtue of being privileged claimants.

Article 263(4) TFEU allows any natural or legal person to institute proceedings against (i) an act addressed to that person of which is of direct and individual concern to them, or (ii) against a regulatory act which is of direct concern to them and does not entail implementing measures.¹⁶⁵ Just like any legal person, sub-State entities may act before the CJEU on the basis of Article 263(4) TFEU, provided that they dispose of legal

¹⁶⁴ *Région Wallonne*, para 6.

¹⁶⁵ The meaning of this last category has been made clear(er) by Case T-262/10 *Microban v. Commission* judgment of 25 October 2011; and Case T-18/10 *Inuit Tapiriit Kanatami and others v. Parliament and Council* Order of the General Court of 6 September 2011.

personality under national law.¹⁶⁶ It is however well known that the CJEU interprets this provision rather strictly.¹⁶⁷ What is more, under this provision SNAs have, if at all, the same opportunities to challenge EU acts as any other legal person, not a special status, like the States have, to protect their regulatory competences from EU intrusion. SNAs are unlike Member States, in line with the Outsider Model.

There seems to be ample agreement in legal scholarship that infra-State entities could act as agents of their States in front of the European courts.¹⁶⁸ This would parallel the already existing possibility for SNAs to represent their national government in the Council.¹⁶⁹ If the Court would not recognize this possibility, it would interfere with Member States' internal institutional structure hence infringing the principle of national institutional autonomy. As an agent of their State, sub-State entities need approval to bring an action, and would thus have a limited possibility to defend their interests where these collide with those of the State. Interestingly, SNAs would act as a Member State in this scenario, which would allow them to benefit from one of the privileges of membership conferred on the States. The fact that SNAs would act as their Member State reflects the monolithic conception of statehood under EU law as well as its bi-centric structure, features inherent in the Outsider Model.

¹⁶⁶ See Cases T-288/97 *Friuli Venezia Giulia* [1999] ECR II-1871, para 42; T-214/95 *Het Vlaamse Gewest* [1998] ECR II-717, para 28 and T-238/97 *Comunidad Autonoma de Cantabria* [1998] ECR II-2271, para 43.

¹⁶⁷ Stefan Enchelmaier, 'No-one slips through the net? Latest Development, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC' (2005) 24 *Yearbook of European Law* 173.

¹⁶⁸ See in this regard Nuffel (n 40) 880, Koen Lenaerts and Nathan Cambien, 'Regions and the European Courts: Giving Shape to the Regional Dimension of Member States' (2010) 35 *European Law Review* 609, 619.

¹⁶⁹ For an overview of how such arrangements operate in domestic contexts, see Nuffel (n 40) 880-881 and Article 23 (6) of the German Basic Law.

Moreover, some Member States have created mechanisms that allow SNAs to compel the national executive to defend their interests by bringing a direct action before the CJEU.¹⁷⁰ Such arrangements exist for instance in Austria¹⁷¹ and Belgium.¹⁷² In Germany, Article 52(3)(a) of the German Basic Law and Rule 45 of the Rules of Procedure of the Bundesrat allow the regional chamber to compel the federal government to bring an action before the CJEU where it believes that Länder competences have been infringed.¹⁷³ In Belgium¹⁷⁴ even a single region can compel the central State level to bring such an action before the Court.¹⁷⁵ These options are however purely the result of domestic arrangements, as from the point of view of EU law, the Member State is acting on its own. As such, the legal indivisibility of the Member State, in accordance with the Outsider Model, is confirmed.

The Treaty of Lisbon has elevated the Committee of the Regions to the status of a semi-privileged applicant,¹⁷⁶ so that it may henceforth bring actions to protect its own prerogatives.¹⁷⁷ Moreover since the entry into force of the Lisbon Treaty and more

¹⁷⁰ For a comprehensive overview of this, as well as Regions' standing before the European Courts in general, see Anne Thies, 'The *Locus Standi* of the Regions Before EU Courts', in Carlo Panara and Alexander De Becker (eds), *The Role of the Regions in EU Governance* (Springer 2011).

¹⁷¹ On this, see Rainer Schweizer and Stephan Brunner, *Die Mitwirkung der Bundesländer an EU-Vorhaben in der Bundesrepublik Deutschland und Österreich: Ein Modell für die Mitwirkung der Kantone in der Aussenpolitik* (Stämpfli Verlag 1998) 52-53.

¹⁷² Art.81,§7,Bijzondere Wet Hervorming Instellingen.

¹⁷³ Schweizer and Brunner (n 171) 33-34.

¹⁷⁴ Van Nuffel (n 52) refers to Art. 81 § 7 *Bijzondere Wet Hervorming Instellingen* according to which the central government can bring an action in consultation with the Regions. Anne Thies cites the *Samenwerkingsakkoord* (Cooperation Agreement) (1994) according to which where a region requests that an action be brought in the context of exclusive regional competences.

¹⁷⁵ For a more detailed analysis of this, see Nuffel (n 52).

¹⁷⁶ Article 263(3) TFEU.

¹⁷⁷ This would be the case if supranational institutions would disregard their obligation to consult the CoR, which constitutes an 'essential procedural requirement' according to Article 263 (3) TFEU.

specifically its Protocol No 2¹⁷⁸, the Committee may act where legislative acts for which it must be consulted infringe the subsidiarity principle.¹⁷⁹ While these prerogatives allow the Committee to initiate direct action in front of the Court of Justice, they are not tools that local and regional authorities can individually rely on. It follows that infra-State bodies cannot act on their own but merely collectively via the intermediary of the Committee of the Regions.

This section has underlined that local and regional authorities dispose of a number of options to bring actions in the supranational courts. Their ability to do so is however significantly more limited than that of the Member States, as SNAs have no possibility of defend their autonomous competences against EU intrusion. The limited rules on standing can be criticised on functional grounds as widening SNAs' standing before supranational courts could generate new information about the implementation of EU acts for the CJEU, so that the latter could make more informed decisions. The current state of the law does not however reflect such concerns, and some, such as Jääskinen consider the limited rules on standing to be justified. He put forward that

regions with legislative competences should *not* be given the same standing before the European Court as is currently granted to the Member States. Legally, these regions do not have a sphere of competence that is protected by Community law and that could directly be infringed by new Community legislation. In this respect, the position of the regions is different from that of the Member States. The latter possess a general exclusive competence in all matters regarding which the EU has not been attributed special powers by the Treaties.¹⁸⁰

¹⁷⁸ Article 8(2) of Protocol No. 2.

¹⁷⁹ Article 307 TFEU.

¹⁸⁰ Jääskinen (n 2) 100.

This rationale is reflected in the current state of the law. The examination of the rules on standing has revealed that they reflect Member States' exclusive status as masters of the Treaties, which enjoy protection of their autonomous regulatory competences in line with the Outsider Model. As masters of the Treaties, the States have conferred upon the EU a number of competences, including the ability to issue secondary legislation. As a consequence the Member States have the capacity to bring direct actions against the EU institutions to ensure the respect of the principle of conferral, and their own competences. The rules on standing reflect the protection EU law affords to the retained sphere of competence of the masters of the Treaties. The flipside of that rationale is that for subnational authorities, the regulatory competence of which is not recognised under EU law, there is no such protective mechanism. This confirms the bi-centric division of public authority between the EU and the Member States as well as the fact that SNAs, which are not included in this group of privileged actors, are considered to be unlike Member States and outside of the EU legal order. The rules on standing accordingly constitute an illustration of the operation of the Outsider Model in EU law. Another such instance can be located in the rules on closer cooperation.

I. Only Member States Can Engage in Closer Cooperation

As a general rule, all twenty-eight Member States participate in the creation of EU secondary legislation. This statement does not however account for the enhanced cooperation procedure. Article 20 TEU authorizes enhanced cooperation, which aims to

further the aims of the EU, protect its interests and reinforce the integration process.¹⁸¹

Under this procedure, a group of at least nine Member States can legislate in common where agreement among all twenty-eight States is impossible.

Enhanced cooperation can only be relied on as a last resort, after the Council has established that the objectives that are subject to such cooperation cannot be attained through the collaboration of all States within a reasonable time frame.¹⁸² A minimum of nine Member States must wish to cooperate and, according to Article 328 TFEU, the cooperation must be open to any Member State, at any time. The acts adopted under the enhanced cooperation procedure only bind those States that participate. It further follows from Article 326 TFEU that enhanced cooperation has to comply with the Treaties and EU law and shall not undermine ‘the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.’ Enhanced cooperation must also ‘respect the competences, rights and obligations of those Member States which do not participate in it.’¹⁸³

The enhanced cooperation procedure has until this stage been considered in the context of harmonisation of the law applicable to divorce and legal separation, the creation of a European patent, a European financial transaction tax, a common

¹⁸¹ Article 20(1) TEU.

¹⁸² Article 20(2) TEU.

¹⁸³ Article 327 TFEU, which further provides that those Member States not participating in it ‘shall not impede its implementation by the participating Member States.’ The CJEU has made clear in Joined Cases C-274/11 and C-295/11 *Spain & Italy v. Council* [2012] not yet published, that it will apply a very soft standard of review to the decisions of the Member States to engage in enhanced cooperation, allowing generous space for such coordination in the future.

consolidates corporate tax base, the creation of a European Public Prosecutor's Office, a framework decision on certain procedural rights in criminal proceedings throughout the EU, a European company statute, the European Arrest Warrant, and a convention on cross border security co-operation.¹⁸⁴ The first time that the EU has taken a decision to authorise enhanced cooperation by means of EU secondary law was divorce.¹⁸⁵ Enhanced cooperation gives rise to regulatory fragmentation, which has become a more general phenomenon, a version thereof also being found under the various opt-outs.¹⁸⁶ As a consequence of this procedure some Member States are subject to harmonised legislation whereas others are not – leading to the coexistence of various legal regimes within the EU. Unlike opt-outs such differentiation takes place through secondary law, explaining why it has been labelled as a form of 'secondary law differentiation'.¹⁸⁷

In the context of the enhanced cooperation mechanism, the autonomous regulatory capacities of the Member States are plainly recognised. Under Article 20 TFEU, States can decide to exercise their competences collectively even where this is impossible at supranational level for the lack of participation of some of them. Enhanced cooperation allows these parties nonetheless to move forward and exercise this competence in sub-groups. SNAs cannot participate in that process. Member States have regulatory competence, and they might wish to exercise this competence in pursuing their policies outside of the domestic context. Subnational authorities have similar

¹⁸⁴ For an overview, see Daniela Kroll and Dirk Leuffen, 'Enhanced Cooperation in Practice. An Analysis of Differentiated Integration in EU Secondary Law' (2014) *Journal of European Public Policy* 1.

¹⁸⁵ OJ [2010] L 189/12, adopted in July 2010.

¹⁸⁶ On this more generally, see Filip Tuytschaever, *Differentiation in European Union Law* (Hart 1999), Alexander Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* (Palgrave 2002).

¹⁸⁷ Kroll and Leuffen (n 184) 1.

competences under domestic law. However, as these competences are not recognised under EU law, an SNA competent for the definition of family law under internal arrangements would not have been able to join the enhanced cooperation initiative on divorce. This set of circumstances reflects that subnational authorities are not recognised as norm-generators under EU law and further that Member States are regarded as monolithic entities. Indeed, as the enhanced cooperation procedure makes clear, EU law operates a presumption that the national level is the only domestic scale at which regulation is issued. EU law does not recognise SNAs as regulators, even where they have regulatory capacity according to domestic law. Similar dynamics can also be observed in other areas of EU law that allow Member States to cooperate, such as Article 73 TFEU according to which Member States may ‘organize between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate’ in the context of national security. This confirms local and regional authorities’ outsider status, as, notwithstanding the competences that they have under domestic arrangements, these are not recognized by EU law to the effect that they could participate in enhanced cooperation, a prerogative reserved to the Member States.

Conclusion

This chapter has examined a number of areas of EU law. It started with an introduction of the Member States’ status as masters of the Treaties and established that this special status finds expression in a number of areas of EU law. The domains looked at were the rules pertaining to Treaty revision, the make-up of the EU institutions, the division of

competences in the EU, the rules on direct and indirect responsibility as well as standing and the closer cooperation mechanism. The survey of these aspects of European Union law has revealed the predominance of two actors in EU law: the Member States and the EU. It is true that EU law acknowledges the existence of local and regional authorities, proving wrong any presumption of regional blindness. Crucially however, infra-State bodies are not seen by EU law in the same capacity as Member States. The States are the masters of the Treaties, which are considered to be monolithic entities from the perspective of the EU. While Member States are in a privileged position as masters of the Treaties, SNAs are outside of the European legal order. It will however be seen in the subsequent chapter that some provisions of EU primary law make explicit reference to subnational autonomies. The next chapter will enquire whether such recognition has the potential to contradict the conclusions that have thus far been offered.

Chapter Four

Article 4(2) TEU and Article 5(3) TEU

This chapter investigates whether the express references to subnational authorities in Article 4(2) TEU and Article 5(3) TEU contest the inference that at the surface of EU law, SNAs are considered to be outsiders to the European legal order. An analysis of these provisions unveils that this interrogation must be answered negatively. It will indeed be seen that while both provisions are an attempt to recognise local and regional authorities more fully in EU law, they fall short of recognising them as insiders.

I. Subnational Autonomies and the Respect of National Identities Under Article 4(2) TEU

The first sentence of Article 4, paragraph 2 TEU, which was inserted into the framework of EU primary law in 2009, is phrased as follows:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

It is obvious that Article 4(2) TEU refers to subnational autonomies in a different manner from the provisions of primary law envisaged in the preceding chapter. Rather than portraying regions and localities in a purely passive capacity, that is to say as subjects and agents of EU law, this provision recognises that, on a domestic scale at least,

SNAs have an active role, namely that of carrying out their own ‘self-government’. The Charter of Fundamental Rights of the European Union reproduces another version of what seems to be the same principle. According to the preamble of the Charter, the EU contributes to the preservation and development of common values

while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels (...).

Article 4(2) TEU and the Charter mandate that the EU must respect Member States’ national identities, inclusive of regional and local self-government. These two provisions certainly contradict any theory of regional blindness.¹ From a terminological perspective, both clauses are particularly interesting as, unlike the provisions examined in the past chapter, they recognise infra-State bodies as sites of self-government, rather than just as agents and subjects of EU law. While definitions of the notion of ‘self-government’ may vary, it indeed seems plausible to assume that it can be understood to encompass regulatory autonomy. The question then arises: what are the implications of this recognition of subnational authorities as site of self-government? I should state from the outset that a number of interpretations are possible, ranging from hard binding rules to softer interpretative principles, and anything in between. The analysis below outlines what is considered the most likely interpretation, taking into account the textual formulation as well as existing judicial interpretations.

¹ Ingolf Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2009) 15 Columbia Journal of European Law 349, 394 (stating that the reference to local and regional in Article 4(2) as a sign that the EU is no longer ‘landesblind’).

Kingston has noted that Article 4(2) TEU ‘represents a considerable strengthening of emphasis’ compared to its pre-Lisbon form that simply obliged the EU to respect the national identities of its Member States ‘with no specific mention of regional and local self-government.’² The explicit reference to SNAs is noteworthy as a simple reference to ‘national identity’ could on its own have been understood to encompass domestic institutional structures, at least in those Member States of a federal or quasi-federal nature. The explicit reference to local and regional self-government accordingly puts a strong emphasis on SNAs. For my purposes the relevant question is whether Article 4(2) TEU recognises local and regional authorities as insiders of the EU legal order, that is to say as units that form an integral part of the EU and its legal order, actively contributing to the latter’s development. I believe that this interrogation is to be answered negatively. Article 4(2) TEU’s reference to subnational self-government forms part of a (open?) list of elements that make up a State’s national identity. By virtue of this new identity clause, EU law is obliged to respect Member States’ identities – as expressed through their political and constitutional structures, and also ‘regional and local self-government’. This is quite different from a direct respect for subnational authorities and their regulatory autonomies. Under Article 4(2) TEU, the recognition of subnational autonomies is merely of an indirect nature, devolutionary arrangements being considered as one of various characteristics that form part of national identity. This finding also seems to be confirmed by the reference to national identity in the Charter as this provision more clearly supports such an interpretation. It is indeed unlikely that the framers of the Treaty of Lisbon would have intended to insert two references to national identity into the

² Suzanne Kingston, ‘The European Court of Justice and the Devolution of Taxation Powers’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 250.

Treaties, each with a different meaning.

Mandrino has advanced a different interpretation of Article 4(2) TEU. He claimed that ‘the new Treaty considers the regional and local dimension as an integral part of the complex institutional building of the EU.’³ Recognising SNAs as integral components of the EU’s constitutional setting would mean that they are recognised as Member States’ equals and as insiders. It has indeed been seen that at present, only the Member States and the EU itself constitute integral parts of the EU’s complex institutional building, unlike SNAs. Should Article 4(2) TEU be interpreted in this manner, the status of subnational authorities would be significantly altered – and indeed be aligned with that of the EU and the Member States, elevating SNAs to an integral part, an insider of the European legal order. Mandrino’s interpretation does not however attract consensus. According to Lenaerts, Article 4(2) TEU should be understood as imposing ‘a general obligation on the Union to respect the fundamental political and constitutional structures of the Member States as regards ‘regional and local self-government’, which are an inherent part of their national identity.’⁴ This, he goes on to argue, signifies that EU law does not as such oppose internal devolutions of power to SNAs.⁵ This is very different from arguing that SNAs are insiders. According to that reading, EU law does not oppose the existence of subnational autonomies but does not recognise them as the Member States’ equals either. Bengoetxea, while arguing that the reformulation of Article 4(2) TEU has ‘brought about some important changes and may be considered as a gaining of a

³ Claudio Mandrino, ‘The Treaty of Lisbon and the New Powers of Regions’ (2008) 10 *European Journal of Legal Reform*, 519.

⁴ Koen Lenaerts, ‘EU Federalism in 3-D’ in Elke Cloots Geert de Baere Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 16, referring to Article 4(2) TEU.

⁵ *Ibid* 16, referring to Article 4(2) TEU.

more realistic vision of the regions’⁶ agrees that it merely constitutes as ‘a duty to respect national identity, including regional and local autonomy’.⁷ Under these interpretations, local and regional authorities are not elevated to the same status as the Member States – they are recognised and respected – but they remain on the outside of the bipolar relationship between the Member States and the EU.

SNAs are hence only recognised indirectly through the Member State’s domestic arrangements, as outsiders rather than directly as insiders. This conclusion seems to find support in two elements that relate to the drafting history behind the provision: first, the initial formulation of Article 4(2) TEU under what was still the draft Constitutional Treaty, and second by the first application that the CJEU has made of Article 4(2) TEU in the context of subnational autonomies. The very first draft of the Constitutional Treaty, which was published in early 2003, stated in its Article 9 that

The Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.⁸

The reference to ‘public administration’ appears to confirm the view of SNAs as sites of administrative action, largely passive implementers rather than active creators of norms. This interpretation seems to be confirmed by the CJEU’s first application of Article 4(2) TEU in the context of subnational autonomy, the *Digibet* case. Whereas this

⁶ Joxerramon Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’ in Gaert De Baere Elke Cloots and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 238.

⁷ Ibid 238.

⁸ CONV 528/03 of 6 February 2003, Draft to Articles 1 to 26 of the Constitutional Treaty, available online: <http://www.whi-berlin.de/documents/cv00528.en03.pdf>.

case is examined in further depth in Chapter Five, it should be noted that the Court here considered that ‘the division of competences between the [German] *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU.’⁹ The CJEU accordingly interprets this provision as meaning that EU law cannot oppose Germany’s federal structure – this constituting an element of its national identity, very much in line with what Lenaerts predicted to be the correct interpretation to be given to Article 4(2) TEU.

It is true that many questions remain open with regard to Article 4(2) TEU, such as for instance the definition of national identity in those Member States that have been said to not have a singular constitutional identity, such as (and maybe only) Belgium.¹⁰ If the assumption that Belgium does not have a singular constitutional identity were accepted by the CJEU, then it would have to determine whether to accept the identity of a region as that of the State.¹¹ If at all, such questions can only be answered by future case law. While only time will tell how Article 4(2) TEU, and in particular its subnational dimension, will be given judicial meaning, it appears unlikely that SNAs’ outsider status will be altered. For the time being, SNAs are recognised only indirectly, as component parts of the Member States. The latter’s special status in EU primary law, resulting from their capacity as masters of the Treaties, is not called into question. Doing so would indeed risk infringing another aspect of Article 4(2) TEU, namely the respect it allocates

⁹ Case C-156/13 *Digibet Ltd Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG* [2014] not yet reported, para 34.

¹⁰ Stefan Graziadei, ‘Belgian Constitutional Court Upholds the “Essential Elements” of Power Sharing Deal’, I-CONnect Blog (28 January 2015), available online: <http://www.iconnectblog.com/2015/01/belgian-constitutional-court-upholds-the-essential-elements-of-power-sharing-deal/> (accessed 19 March 2015).

¹¹ *Ibid.*

to the ‘equality of Member States’. Such equality, sovereign equality, mandates that Member States be treated as monolithic and abstract entities. Should SNAs be directly recognised as sites of self-administration that entertain a direct relation with the EU, Member States would be denied their sovereign equality as they would be treated differently depending on their domestic structures.

It follows that despite its express reference to local and regional authorities, Article 4(2) TEU remains attached to the Outsider Model. Member States entertain a direct relation with the EU by virtue of being the masters of the Treaties. While the reference to subnational authorities in Article 4(2) TEU has to be understood as an attempt to recognise the existence of localities and regions in EU law, it falls short of granting them an insider status.

II. Subnational Autonomies and the Principle of Subsidiarity

The reason why the principle of subsidiarity must receive some detailed attention in the context of this thesis is the following. Subsidiarity is frequently cast as the posterchild of subnational autonomies, and the coexistence of different scales of public authority, in the EU.¹² This triggers the interrogation whether it can be seen as an utterance of the Insider Model in EU law. My research reveals that while the principle itself, especially its revised post-Lisbon formulation, can be understood as an attempt to move away from the bi-centric Treaty framework that represents the public international law roots of EU law,

¹² This is not least reflected by Article 5(3) TEU, which henceforth refers also to the local and regional levels of government.

subsidiarity, even in its newly revised form, fails to establish SNAs as insiders in the EU legal order. Subsidiarity thus has to be understood as representing the Outsider Model paradigm. As a consequence of the Lisbon Treaty revision, the principle of subsidiarity henceforth also applies to SNAs, which was not previously the case. Article 5(3) TEU reads as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

This provision can be interpreted in a number of ways and only time will reveal the interpretation the EU institutions will make thereof. Looking at its textual formulation however, it appears that it should be understood along the same lines as Article 4(2) TEU, that is to say as recognising the existence of SNAs, but only indirectly through the Member State – as outsiders, not insiders. Some indeed see subsidiarity as a (more or less successful) attempt to move away from bi-centricity, one of the characterising features of the Outsider Model. Subsidiarity was designed as a pre-legislative device. Its primary role consists in the regulation of the exercise of regulatory competence rather than the allocation of such competence, which, as has been seen, is dealt with elsewhere in primary law.¹³ In areas of non-exclusive EU competence, such as customs policy and competition policy¹⁴, subsidiarity unveils which level of public authority should realize a

¹³ Subsidiarity is formulated as a principle ‘which does not govern the exercise of powers which have been conferred but oversees the actual conferment of powers.’ Koen Lenaerts & Piet Van Nuffel, *Constitutional Law of the European Union*, Second Edition (Sweet & Maxwell 2005) 102. See also Vlad Constantinesco, ‘La subsidiarité comme principe constitutionnel de l’intégration européenne’ (1991) 46 *Aussenwirtschaft* 411.

¹⁴ See Article 3 TFEU.

given objective.¹⁵ Despite subsidiarity taking on such a limited role in EU law, it has acquired an almost mystical existence that is accompanied by the presumption that the spirit inherent in subsidiarity operates on a much larger scale than the pure pre-legislative setting.¹⁶ The normative considerations attached to subsidiarity, for instance that it can be ‘a way of enhancing pluralism and the diversity of national values’¹⁷ are seen to have a wider meaning in EU law. For our purposes it is of interest to note that subsidiarity has been labelled as ‘a principle constitutive of a multilevel governance in Europe’¹⁸ an ‘opponent’ to sovereignty¹⁹ that ‘works as an element connecting the different levels of governance and government and as a technique of making flexible the map of competences drawn by the treaties or the constitutions.’²⁰ This raises the interrogation whether subsidiarity accommodates polycentricity and porosity and might in fact recognise SNAs as insiders to the EU legal order. I do not believe this to be the case. As de Búrca has noted, Member States’ attempt to set clear competence boundaries in the Treaties ‘reflects a more fundamental wish to protect the integrity of the boundaries of the state polity.’²¹ By definition the protection of the boundaries of the State militate against any independent recognition of the subnational entities making up the State.

¹⁵ Subsidiarity constitutes a ‘filter between Community competence and the possibility of exercising that competence.’ See Van Nuffel (n 52) 101.

¹⁶ See inter alia Gráinne de Búrca, ‘Reappraising Subsidiarity's Significance After Amsterdam’ (2000) Harvard Jean Monnet Working Paper 7/99.

¹⁷ Paul Craig, ‘Subsidiarity: A Political and Legal Analysis’ (2012) 50 *Journal of Common Market Studies* 72, 73.

¹⁸ Ken Endo, ‘Subsidiarity and Its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?’ (2001) EUI Working Paper RSC 2001/24, 24.

¹⁹ Ibid.

²⁰ Guiseppe Martinico, ‘Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union’ (2011) 6 *European Public Law* 652.

²¹ Gráinne de Búrca, ‘Setting Constitutional Limits to EU Competence?’ (2001) Faculdade de Direito da Universidade Nova de Lisboa Francisco Lucas Pires Working Paper Series on European Constitutionalism Working Paper 2001/02, 12.

Indeed, subsidiarity should be understood as being in line with the Outsider Model, and not the Insider Model.

This conclusion is anchored in the fact that Article 5(3) TEU establishes a two-part, not a three-part test. It enquires whether the goals of the proposed action can be sufficiently achieved by the Member States (either at central, regional or local level) and that if this is not so, then it is for the EU to regulate. The provision does *not* ask whether (i) the objectives can be best achieved at subnational level, (ii) if not at national level, and that if that is not so then (iii) the case for supranational legislation is made.²² The local and regional level are recognised to exist, but only indirectly as it is for the Member States to decide whether they should be considered as potential regulators. This choice is however purely for the Member States to operate, and not the EU. Under Article 5(3) TEU either the national or the supranational is the appropriate scale of regulation. In the former scenario, it is for the State to decide whether to regulate in a centralised or decentralised manner. This maintains the monolithic conception of statehood inherent in the Outsider Model as from the perspective of EU law the Member State is the regulating instance. While the State may designate SNAs as regulators, EU law does not engage directly with their norm-generating capacity as from its perspective, it does not matter whether the Member State legislates at central, regional or local level. Any such regulation is considered to be that of the Member State, in line with national institutional

²² This gives rise to a presumption that the Member State should in principle regulate unless there are compelling reasons for the EU to do so. As seen further below, this is not however how the principle operates in practice. On this see also Adam Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36 *European Law Review* 478, 481. (The wording of subsidiarity 'prima facie, suggests a presumption against EU action, but, since the Treaty of Maastricht, the precise meaning of subsidiarity has been the subject of much debate).

autonomy. This sketches a division of public authority alongside two centres: the national and the supranational. Article 5(3) TEU admits the existence of SNAs but only recognises them in a passive vein as it does not itself designate them to constitute norm-generating scales.

While subsidiarity may recognise decentralised law making as preferable in some circumstances, it only takes into account the bi-centric division of public authority between the EU and the States. Article 5(3) TEU leaves it to the Member States to ‘decide according to their own constitution whether to apply the principle domestically as well’.²³ While leaving Member States the option to decide whether to regulate in a decentralised manner subsidiarity embodies a bi-centric rationale, in line with the Outsider Model, that reflects the desire to establish coherent and formal jurisdictional lines between the EU and the Member States.²⁴

This does not deny that the insertion of Article 5(3) TEU into the framework of EU primary law might have been an attempt to move away from the State-centric, public international law dominated, Outsider Model paradigm. It is true that the very motivation behind the introduction of the principle into primary law was to safeguard the autonomy of smaller units²⁵ and to counter the fear of over-centralization.²⁶ The German Länder indeed played a prominent role behind the insertion of subsidiarity into the Maastricht

²³ Reimer von Borries and Malte Hauschild, ‘Implementing the Subsidiarity Principle’ (1999) 5 *Columbia Journal of European Law* 374.

²⁴ See also de Búrca (n 22) 12.

²⁵ Antonio Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford University Press 2002) 80.

²⁶ Endo (n 18) 25.

Treaty.²⁷ Subsidiarity has not however been able to change the status of SNAs from that of outsiders to insiders of EU law. Some have put forward that with the entry into force of Article 5(3) TEU, ‘subsidiarity now penetrates below the Member State level, and requires examination of the regional issues’.²⁸ It has however been seen that this conclusion does not seem to be supported by the textual formulation of the principle. Rather, Article 5(3) TEU applies in a bi-centric fashion and leaves it to the Member States to apply it internally. A similar conclusion emerges from the examination of the Protocol No 2 on the application of the principles of proportionality and subsidiarity.

Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality

The new formulation of Article 5(3) TEU is not the sole innovation brought about by the Lisbon Treaty with regard to the principle of subsidiarity. Henceforth there is also a revised version of Protocol No 2 on the application of the principles of subsidiarity and proportionality, which leads to a procedural thickening of the principle.²⁹ This reinforcement of subsidiarity’s procedural dimension has been said to be ‘giving new shape to the principle of subsidiarity after Lisbon.’³⁰ Protocol No 2 refers, on a number of occasions, to the subnational levels of government.³¹ Article 2 of the Protocol for example provides that before proposing legislative acts, the Commission ‘shall consult

²⁷ Von Borries and Hauschild (n 213) 371-72.

²⁸ Bengoetxea (n 6) 238.

²⁹ This reinforcement of subsidiarity’s procedural dimension has been interpreted as ‘giving new shape to the principle of subsidiarity after Lisbon.’ See Sanja Bogojevic and Xavier Groussot, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in Loic Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 234.

³⁰ Ibid 234.

³¹ Protocol (No.2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206 (hereafter referred to as ‘the Subsidiarity Protocol’).

widely. Such consultation shall, where appropriate, take into account the regional and local dimension of the action envisaged'.³² This requirement mandates that the Commission consult a number of actors, including SNAs, in the context of its own legislative activity. This should not however be confused with an acknowledgement of SNAs as insiders: the regulating authority remains the Commission and SNAs are only considered to be actors upon which EU legislation has an impact – not actors that actively contribute to the shaping of EU legislation. Article 2 of Protocol No 2 accordingly pictures SNAs as outsiders.

Article 5 of Protocol No 2 establishes that EU directives must contain an assessment of 'the rules to be put in place by Member States, including, where necessary, the regional legislation'.³³ This requirement seeks to ascertain the impact of EU legislation on domestic authorities – in their implementing capacity – as the putting into place of legislation by domestic authorities here refers to their implementation of the directive. This reflects EU law's perception of SNAs in the context of the law on direct and indirect responsibility, where it is also recognised that sub-State bodies implement secondary legislation. This does not however transform SNAs into insiders, as they do not actively contribute to the shaping of EU law at a supranational scale. It sees them as entities obeying orders given by other scales rather than units having a say in the making of these orders. Article 5 of Protocol No 2 further provides that EU draft legislative acts shall take account of financial and administrative burdens 'falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be

³² Article 2 of Protocol No 2.

³³ Article 5 of Protocol No 2.

minimized and commensurate with the objective to be achieved.’ SNAs, just as the other actors referred to, are subject to EU law and the supranational legislative process should be sensitive towards the effects this will have on them – as outsiders.

Under Protocol No 2, the Committee of the Regions has been granted the power to, in some circumstances, bring actions before the Court for the infringement of Article 5(3) TEU.³⁴ This has already been examined in the section on locus standi and it has been seen that under some circumstances, this provision allows SNAs to collectively challenge a EU legislative act for if the subsidiarity principle has been infringed. It does not however assimilate SNAs to the insider Member States. These various provisions recognise the existence of the subnational levels of government and the impact that EU law has on them. The relationship between SNAs and the EU that is envisaged is however of a purely indirect nature and does not elevate them SNAs to be insiders, participating in the sphere of privileged interactions between the EU and the Member States and the creation of EU legislation. These provisions indicate the perseverance of the Outsider Model with regard to the principle of subsidiarity. Local and regional authorities are portrayed as passive outsiders rather than active insiders in EU affairs. The same conclusion will be reached after an examination of the Early Warning System, a new mechanism that arises under Protocol No 2.

³⁴ Article 8 of Protocol No 2.

The Early Warning System

Article 4 of Protocol No 2 obliges the Commission, the European Parliament and the Council to forward their draft legislative acts to national Parliaments.³⁵ Article 6 of Protocol No 2 sets out the modalities of this procedure.

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

This is commonly referred to as the ‘Early Warning System’ (‘EWS’), a ‘pre-legislative constitutional intervention device’³⁶ designed to give national Parliaments, which have lost power as a result of European integration, a say in the EU legislative process.³⁷ A looser form of cooperation with national parliaments had already entered into force in 2006 after the Commission declared in its Barroso initiative that it would welcome letters from national Parliaments as parts of a wider political dialogue.³⁸ This may have been a reaction to the decision of national parliaments in 2004 in the context of the half-yearly Conference of Parliamentary Committees for Union Affairs of

³⁵ Article 4 of Protocol No 2 moreover imposes an obligation on the Commission and the European Parliament to forward their amended drafts to national Parliaments.

³⁶ Cygan 481.

³⁷ The EWS has been described as a ‘sugar-coating’ for the bitter process that is EU integration for national parliaments. Philipp Kiiver, ‘The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity’ (2008) 15 Maastricht Journal of European and Comparative Law 77, 77.

³⁸ Communication from the Commission to the European Council - A citizens’ agenda - Delivering results for Europe COM (2006) 211 final.

Parliaments of the European Union ('COSAC') to select certain EU legislative proposals and examine them for subsidiarity compliance and could hence be a form of porosity.³⁹

Under its current form, the EWS allows national parliaments to issue a reasoned opinion when they believe that a EU draft legislative act violates subsidiarity. If more than one third of national parliaments raise a reasoned opinion, the proposal must be reviewed. The initiating institution can however decide to maintain, amend or withdraw the draft and must provide reasons for its decision.⁴⁰ According to language originating in football jargon, this is called a 'yellow card'.⁴¹ If the reasoned opinions represent at least half of all votes assigned to national Parliaments, the Commission must review the draft legislative act, and may decide to maintain, amend or withdraw the draft. If it decides to maintain the draft, it must issue a reasoned opinion on the draft's compliance with Article 5(3) TEU.⁴² The reasoned opinion is subsequently forwarded to the European Parliament and Council who have the final word on the matter.⁴³ This procedure is referred to as the 'orange card'.⁴⁴ This mechanism gives force to Article 12 TEU, pursuant to which national parliaments contribute actively to the good functioning of the Union. The first yellow card was issued in 2012 as a consequence of a EU legislative proposal on the right

³⁹ COSAC Secretariat, Report on the results of COSAC's Pilot project on the 3rd Railway Package to test the "Subsidiarity early warning mechanism" (2005).

⁴⁰ See Article 7(2) of the Protocol No. 2. According to Article 6 of the Protocol, national parliaments have eight weeks from the date of transmission of a draft legislative act to send a reasoned opinion. The threshold is $\frac{1}{4}$ in the case of a draft legislative act based on Art. 76 TFEU.

⁴¹ Jean-Victor Louis, 'The Lisbon Treaty: The Irish 'no': National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits' (2008) 4 European Constitutional Law Review 429, 438.

⁴² Article 7(3) of the Protocol No. 2.

⁴³ The legislative proposal can be halted by a vote of 55 percent of the votes in the Council or a majority in the Parliament.

⁴⁴ Louis (n 41) 438 (arguing that the orange card owes its name to the Dutch name of the complementary mechanism).

to strike.⁴⁵ Article 6 of Protocol No 2's reference to 'national' parliaments triggers the question whether, and if so to what extent, regional parliaments participate in the operation of the EWS. Regional parliaments are indeed just as likely as national parliaments to lose some of their decision-making abilities as a consequence of European integration. Cygan has stated that subsidiarity could henceforth be understood as follows:

Because the post-Lisbon version of Article 5 TEU explicitly refers to the legislative capacity of regional governance, this means that formal consideration of regional competences, together with the legislative capacity of regional institutions, is now an integral part of the legislative process. This ranges from the consideration of regional impact of a legislative proposal within the Commission's Impact Assessments, to the ability of the CoR to seek judicial review of a legislative proposal for non-compliance with the principle of subsidiarity. It is perhaps the ability of the CoR to engage in subsidiarity monitoring under Protocol 2 and alongside national parliaments which offers the most effective opportunities.⁴⁶

This statement in part reflects what would be the three-part subsidiarity test, not however the two-part test actually reflected by Article 5(3) TEU. Importantly, why one may observe such operations of the principle, for instance on a domestic scale or maybe in Impact Assessment, is not at all obvious from the Treaties, the surface of EU law, which is examined here. Despite the possibility of SNAs to, depending on domestic arrangements, engage in the EWS, they remain outsiders. Five distinct avenues exist for SNAs in this regard. First, Article 6 of Protocol No 2 provides that it is for each national parliament 'to consult, where appropriate, regional parliaments with legislative powers.' This reflects that European integration not only affects national, but also subnational

⁴⁵ Federico Fabbrini and Katarzyna Granat, 'Yellow Card, But No Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common Market Law Review 115.

⁴⁶ Adam Cygan, 'The Regions Within Multi-Level Governance: Enhanced Opportunity for Improved Accountability?' (2014) 21 The Maastricht Journal of European and Comparative Law 265, 268.

political power. Subnational competence is however only recognized in an indirect manner.⁴⁷ It is through the State that regional parliaments are consulted, not directly by the EU, and States have discretion whether they wish to do so. No direct relation between the subnational and supranational scales emerges. Second, SNAs may participate in the EWS in those Member States with a bicameral parliamentary system in which one chamber is composed of regional representatives. In this case this chamber will have one of the two votes attributed to each national parliament in the context of the EWS. This is for instance the case in the German Bundesrat and the Austrian Bundesrat.⁴⁸ Kiiver has looked into the involvement of the Austrian Bundesrat in the context of the yellow card issued with regard to planned EU secondary legislation on the right to strike. He found that, like a number of national parliaments, the Austrian Bundesrat reached the conclusion that ‘there were insufficient cross-border aspects in this matter since each Member State was itself responsible for its own seasonal workers and their equal treatment with its own nationals.’⁴⁹ The EWS allows regional parliaments to intervene in EU decision-making and have their vote cast in the context of the EWS. However, from the perspective of EU law, they fall under the definition of ‘national’ parliament. They act on behalf of the State where this is provided for under domestic procedures. From the perspective of EU law, however they act as a Member State parliament rather than that of an SNA.

⁴⁷ On this, see also Bengoetxea (n 6) 238.

⁴⁸ See also Josu Osés Abando, ‘Early Warning and Regional Parliaments: In Search of a New Model. Suggestions from the Basque Experience’ (2013) 5 Perspectives on Federalism 74.

⁴⁹ Philipp Kiiver, ‘The conduct of subsidiarity checks of EU legislative proposals by national parliaments: analysis, observations and practical recommendations’ (2012) ERA Forum 535, 544.

Third, regional parliaments can be considered to be national parliaments and accordingly directly participate in the EWM. Declaration 51, which only applies to one Member States, provides that:

Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.

Belgium has created an avenue for its regional parliaments to be recognised as ‘national parliaments’. This allows regional legislatures to directly intervene in the EWS without the need to pass through a secondary chamber at national level. Just as under Article 16(2) TEU, which allows regional ministers to act as Member States ministers in the Council, Declaration 51 allows the involvement of regional parliaments not in their own capacity but representing the Member State. Indeed, they will be recognised as ‘national’ parliaments from the perspective of EU law. If such a regional parliament issues a reasoned opinion, the EU institutions will consider this opinion to be that of the Member State rather than the region.

Fourth, a number of procedures within the respective States allow SNAs to transmit their concerns concerning EU draft legislative acts to the national parliament, which may then take them into account in its own reasoned opinion. Some of the Spanish regions’ statutes of autonomy for instance include provisions concerning participation in subsidiarity control.⁵⁰ Abando has noted that this has allowed the Basque chamber to

⁵⁰ Abando (n 49) 78.

make ‘specific contributions’ with regard to subsidiarity monitoring but also that this mechanism ‘does not guarantee the taking into account of the contributions by the regional parliaments’.⁵¹ This in turn has led to a certain disillusionment on behalf of the Basque Country, which has ‘reached a point of lack of efficacy and confidence.’⁵² From the perspective of EU law, such procedures are invisible: what the EWS sees is solely the final reasoned opinion submitted by the national Parliament. The former Commission President Barroso recognised in 2012 that the Commission ‘has no information as to the involvement of the respective regions in the elaboration and adoption of these opinions’.⁵³ In 2011, the Commissioner for Interinstitutional Relations and Administration stated that ‘the Commission does not take account of the extent to which opinions of the regions are reflected in reports forwarded by the Member States’.⁵⁴ While all of these evolutions are of much interest, they occur within a State, which EU law continues to see as a monolithic entity. SNAs remain outsiders, only involved in EU legislative affairs indirectly through the Member State.

Finally, SNAs participate in subsidiarity review indirectly and collectively through the Committee of the Regions, which can bring actions against legislative acts for the adoption of which the Treaties provide that it is to be consulted.⁵⁵ This avenue,

⁵¹ Ibid 74.

⁵² Ibid 74 (referring to the Statutes of Andalusia (Art. 237), Aragon (Art. 93), Balearic Islands (Art. 112, mentioned is only the subsidiarity principle), Castilla and Leon (Art. 62), Catalonia (Art. 188), Navarra (Art. 68.6) and Valencia (Art. 61).

⁵³ Question for written answer by MEP Izaskun Bilbao Barandica (ALDE) on the statistics on the early warning process, no. E-5865/2010, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2010-5865+0+DOC+XML+V0//EN>.

⁵⁴ Question for written answer E-009555/2011 on the Committee of the Regions and early warning system: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-009555+0+DOC+XML+V0//EN>.

⁵⁵ Article 8 of Protocol No 2.

which has already been examined, does not form part of the EWS but it is worth briefly mentioning it since it also engages with subsidiarity review.⁵⁶ However, as has already been seen, SNAs can only act collectively and indirectly through this mechanism, as they need to agree on the action with the other members of the CoR and then act as the CoR, not individual SNAs.

The overview of the above provisions has confirmed Cygan's statement that Protocol 2 is a 'state-centric process of subsidiarity review whose objective is to improve the accountability of, and inject democratic legitimacy into, what continues to be an equally state-centric legislative process.'⁵⁷ While the EWS offers a number of options for SNAs to indirectly participate in subsidiarity review, these avenues differ greatly from those offered to the Member States. This lack of direct intervention has been criticised by a number of associations representing SNAs. Especially regions with legislative competence consider the current state to be unsatisfactory. A number of calls for reform have been voiced. The Conference of European Regional Legislative Assemblies (CALRE) demanded that regional parliaments with legislative competences should be able to take legal action before the CJEU in areas falling within the scope of their competences.⁵⁸ The Committee of the Regions (CoR) has also repeatedly called for an extension of SNAs' standing⁵⁹, both indirectly through the CoR but also directly by

⁵⁶ On this, see also Cygan, 'The Regions Within Multi-Level Governance: Enhanced Opportunity for Improved Accountability?' (n 46) 265.

⁵⁷ Ibid 274.

⁵⁸ CALRE, Declaration of Innsbruck (2009) 5, available under <http://www.calrenet.eu/index.php/documents/declarations>.

⁵⁹ Opinion of the Committee of the Regions on the Revision of the Treaty on European Union and of the Treaty establishing the European Community (1996) OJ C100/1, Opinion of the Committee of the Regions on The 2000 Intergovernmental Conference (2000) OJ C156/6, para.5.13; Opinion of the Committee of the Regions on the Draft Report of the European Parliament on the Division of Powers between the European

granting sub-national actors with legislative powers direct standing before the Court. The current state of affairs is however that while SNAs may intervene in the EWS in a way or another, they do not do so in the same capacity as the Member States, which directly and in their own name participate in subsidiarity review. Even though there is a clearer acknowledgement of the subnational dimension under the EWS than in the areas of EU law examined thus far, SNAs cannot aspire to the privileged status that Member States occupy by virtue of them being the masters of the Treaties.

This section has revealed that while subsidiarity can be seen as a mechanism supposed to recognise SNAs in EU law, they in fact remain outsiders. Article 5(3) TEU mandates that the Member States – either at central or subnational level – should achieve the objectives of the proposed action, and that, if this proves impossible, it is for the Member States to fulfil that task. This formulation makes clear that there are two levels at which objectives can be achieved: either the Member State or the EU. When the Member State is considered the appropriate scale, it is for the latter to decide the modalities of such action, and evaluate whether it should do so in a centralised or decentralised manner. Article 5(3) TEU merely recognises that choice of the Member State, rather than the ability of local and regional authorities to participate in the EU legal order. The same conclusion has been reached with regard to the EWS, which, while creating a number of options for SNAs to intervene in this process indirectly, offers no direct avenues of participation to them – they remain outsiders.

Union and the Member States (2002) OJ C192/31, para.3.11; Opinion of the Committee of the Regions on the Treaty establishing a Constitution for Europe (2005) OJ C71/1, para.1.28.

This chapter has exposed a number of areas of EU law in which local and regional authorities emerge as outsiders of the EU legal order. This does not mean that EU law is blind towards the existence of SNAs. Rather, the notion of outsider reflects that SNAs do not form part of the privileged relationship between the Member States, and the European Union, the structure that the Member States have created and continue to control. In accordance with the Outsider Model, Member States are seen as sovereign equals, a status deriving from their capacity as masters of the Treaties. EU law perceives them as monolithic entities. Each State has the same status, rights and obligations irrespective of their geographical and demographic size, economic magnitude and internal structure. This monolithic conception of the State is also anchored in the principle of national autonomy. As a consequence thereof, the EU and the Member States are the only two levels of public authority the existence of which is integrally acknowledged by EU law. EU law emerges as a bipolar structure in which there is no space for regional and local authorities. As a consequence of SNAs' outsider status, they are primarily conceived of as actors that implement – and are subject to – EU norms. Unlike Member States, EU law does not consider the regulatory autonomies that SNAs have to constitute a limit of EU law worthy of protection. SNAs are outsiders to the institutional balance between the EU and the Member State; they are passive recipients of EU law. The subsequent chapter, however, illustrates that this conclusion is not valid for all areas of EU law.

Conclusion

This brief chapter has examined two provisions of the European Treaties that, at first sight, seem to be a manifestation of the Insider Model at the surface of EU law. Articles 4(2) TEU and 5(3) TEU indeed give the initial impression that they recognise local and regional authorities as insiders of EU law. While both provisions can be understood as attempts to move away from the bi-centric, public international law, origins of EU law, they have not succeeded in turning SNAs from outsiders to insiders of EU law. It has indeed been observed that with regard to both provisions, SNAs entertain only an indirect relation to the EU, in opposition to the direct relation between the Member States and the EU. Despite the attempt of Articles 4(2) TEU and 5(3) TEU to recognise local and regional authorities within the different Member States more fully, such SNAs remain outsiders of the European legal order. The national and supranational levels are considered to be engaging in self-contained relations in which there is no space for SNAs.

Chapter Five

SNAs as Insiders of EU Law: Internal Market Case Law

The analysis of *Omega* in the opening chapter has revealed that a subnational norm can be an insider in the EU legal order. It indicated that the compatibility between a domestic norm and EU law does not hinge on the fact whether the norm is of a national or subnational origin. The CJEU did not preoccupy itself with the origin of the lasergame ban but rather treated the municipal measure as if it were that of a Member State. Further, the local norm ultimately contributed to the EU's normative development in giving rise to a general principle. This does not reflect the characteristics of the Outsider Model, which to a large extent operates below the surface of EU law. The present chapter examines a relatively large sample of internal market case law and confirms that the pattern observed in *Omega* plays out more widely in EU law. When the compatibility of a subnational measure is assessed, EU law relies on the same criteria as are applicable to Member State norms. The latter enjoy no special status by virtue of the issuing authority being a master of the Treaties. Subnational norms form an integral part of the EU legal order just as Member State norms do. The study of internal market case law reveals the presence of the Insider Model in EU law, the three characterising features of which, that is to say polycentricity, porosity, and the assimilation between Member State and SNA regulation, will be documented throughout this chapter. Through porosity, subnational norms can also directly influence and interact with EU norms.

Under the EU Treaties and in accordance with the Outsider Model, SNAs are acknowledged as subjects and agents of EU norms but not as independent regulators. The survey of internal market case law however reveals that sometimes, EU law fully recognises the regulatory autonomy that many SNAs enjoy. While some have suggested that ‘cities and local policies disappear’ in internal market cases as ‘the local sphere is irrelevant to the Luxembourg courts concerned with balancing Member States versus European interests or domestic policies versus individual rights of EU citizens’⁶⁰ this chapter proves the opposite to be the case. Where subnational and supranational norms enter into conflict, the Court balances the subnational norm against the EU objective; in the same manner it would examine Member State norms. This provides a stark contrast to the Outsider Model, which is characterised by bi-centricity and the exclusive interaction between the EU and the Member States. EU law, as it plays out below the surface of the Treaties, has developed to a stage where the presumption of bi-centricity cannot prevent processes of interdependence and interpenetration between norms from different origin occurring. This indicates that in addition to the Treaty framework that reflects the Outsider Model, a parallel world of EU law, structured alongside the Insider Model, exists. In this parallel world, national and subnational norms are equals and subnational objectives can outweigh EU objectives, just as it is possible for Member State objectives to do so. This portrays SNAs as active insiders of EU integration, assuming an active role in the shaping of the EU and its legal order. This conclusion can be drawn from the analysis of EU internal market case law. Before diving into that analysis, the methodological reasons for relying on internal market law as the object of study in this chapter and the next are set out.

⁶⁰ Fernanda Nicola, ‘Invisible Cities in Europe’ 35 *Fordham International Law Journal* (2012) 1284, 1285.

I. Subnational Norms and EU Internal Market Law

This and the next chapter rely primarily on internal market law to illustrate that subnational norms can have an insider status in EU law. This chapter will focus primarily on the Court's case law dealing with a number of different internal market matters whereas the next chapter will focus on EU State aid law, the duty of loyal cooperation, and a number of soft law instruments of the European Commission that relate to economic matters. The choice to focus on EU internal market law has been a deliberate one. The internal market has long been considered the backbone of the European integration project and as such exposes revealing patterns regarding the latter. Article 3(3) TEU mandates that the EU establish an internal market and, as per Article 26 TFEU:

The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Before the 2009 Lisbon reforms, economic integration was in strict constitutional terms a means to an end rather than an end in itself, illustrating the close connection between internal market law and European integration.⁶¹ The Court stated that the free movement of goods is 'one of the foundations of the system'⁶² and even went as far as to argue rather controversially that the completion of the internal market is 'the fundamental aim of the Treaty'.⁶³ The centrality of the internal market to the constitutional

⁶¹ Refer to the original version of Article 2 EEC.

⁶² Case C-194/94 *CIA Security International v Signalson & Securitel* [1996] ECR I-2201, para 40.

⁶³ Joined Cases C-403/08 & C-429/08 *FA Premier League et al v QC Leisure et al, Karen Murphy v Media Protection Services Ltd*, judgment of 4 October 2011, para 115.

development of the European Union has led some to observe that the EU has an ‘economic constitution’.⁶⁴ For my purposes, it should be noted that looking at internal market law further has the benefit of taking me below the surface of EU law as the vast domain of internal market law is located in the Court’s broad case law on such matters, as well as EU secondary law.

Given its importance to the wider project of European integration, internal market law is an area that allows us to reflect upon the nature of the European legal order more widely, and indeed provides opportunities for the Court of Justice to do the same. Such deeper interrogations relate, for instance, to the need for common regulatory standards to achieve a unified market, and their implications for the autonomies of Member States, but also SNAs. Kingston has stated that from an EU perspective, subnational autonomies ‘perhaps pose the greatest challenge’ where they enter into conflict with internal market law.⁶⁵ In such circumstances, she asked, how does one respect ‘the Article 4(2) TEU principle in light of the ECJ’s consistent jurisprudence that the specificities of national law cannot lead to differences in the application of rules that lie at the core of the EU Treaties?’⁶⁶ This will make plain that the tension between the respect of subnational autonomies and the concern for the effective and homogenous application of EU law are recurrent in the CJEU’s case law.

⁶⁴ Miguel Poiars Maduro, *We The Court, The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998).

⁶⁵ Suzanne Kingston, ‘The European Court of Justice and the Devolution of Taxation Powers’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 250, 250-51.

⁶⁶ *Ibid* 250-51.

Furthermore, the choice to rely on internal market law was motivated by the fact local and regional policies often risk limiting the objectives inherent to EU internal market law, such as the free movement of goods⁶⁷, the free movement of workers⁶⁸, the free movement of capital⁶⁹, the right of establishment and freedom to provide services⁷⁰ can be compromised by domestic policies, be they initiated at national or subnational level. The third motivation behind the decision to focus on internal market law is that the cases emerging in this area are well known to the EU lawyer, even if their subnational dimension may not be. Relying on such familiar cases to pinpoint their subnational dimensions that EU lawyers tend not to think of serves to underline the difficulties lawyers and legal scholars face in coming to terms with SNAs and their norms. This relates back to the theme of constitutional imagination as we might previously have thought of at least some of these cases as relating to the relation between EU law and Member State autonomies whereas they actually concern SNAs.

Finally, a quick word about methodology is in order. In light of the rather large amount of judgments concerning conflicts between subnational regulation and EU internal market law, it proved impossible to take into account all cases that have arisen in this respect. In operating my case-selection choices, I took into account two main considerations. First, I have tried to rely on cases that allow me to go through a number of different areas of EU internal market law. Second, I relied on cases that should be familiar to EU lawyers, for the reasons outlined above. This chapter proceeds by

⁶⁷ Articles 34-36 TFEU.

⁶⁸ Article 45 TFEU.

⁶⁹ Articles 63-66 TFEU.

⁷⁰ Articles 49-56 TFEU.

examining a number of cases with a subnational dimension that have arisen before the European courts. It examines them individually and seeks to determine the relation between subnational and supranational norms therein. My analysis starts off with the examination of a case that embodies a conflict between EU internal market law and subnational social policies. This survey will reveal how subnational norms emerge as insiders of EU law.

A. Subnational Social Policy and EU Internal Market Law

When it comes to social policy, that is to say those policies pursuing redistributive objectives in a number of forms, Member States retain a rather large degree of regulatory autonomy, enabling them to organise their internal systems as they see fit. Article 153(1)(c) TFEU merely entitles the EU to support and complement the activities of the States, a competence that has not been exercised as of yet.⁷¹ It has already been seen that from the perspective of EU law, regulatory competence resides either with the Member States or the European Union. In light of Article 153(1)(c) TFEU, the national level seems to be the instance at which social policy is defined. On its surface, EU law hence only recognises Member States as regulators in the context of social policy, making no allusion to the subnational scale. Subnational authorities will nevertheless sometimes be competent to initiate social policies according to domestic arrangements. Indeed, ‘in both

⁷¹ Herwig Verschueren, ‘The Impact of EU Law on the Devolution of Social Powers in the Member States’ in Elke Cloots Geert de Baere and Stefan Sottiaux (ed), *Federalism in the European Union* (Hart Publishing 2012) 263.

regionalised and non-regionalised Member States, local authorities have also introduced some social benefits, albeit usually limited to residents of their territory’.⁷²

This triggers the question whether, as a matter of EU law, subnational authorities have the same regulatory autonomy as that recognised as held by the Member States. Three cases are examined that will provide a clear answer to this question. I will first look at two relatively recent judgments that have determined the contours of subnational autonomies in the context of social policy, namely the *Flemish Care Instance* and *Kamberaj* cases. Subsequently, I will examine an older but nonetheless pivotal case, *Casagrande*. While this case is well known for having established the doctrine of implicit powers under EU law, it also contains a less familiar subnational dimension, which the CJEU explicitly engaged with at the time. Through the examination of these three cases, I seek to verify Verschueren’s claim that since the *Flemish Care Instance* the ability of SNAs to, just like Member States, set up their own social policy schemes ‘is no longer a foregone conclusion.’⁷³

1. *Flemish Care Insurance* and the Ability of SNAs to Define Social Policy

Flemish Care Insurance concerned a decree of the Flemish Parliament from 1999 that set up a care insurance scheme in Belgium’s Dutch-speaking region and the bilingual region of Brussels-Capital.⁷⁴ The scheme conferred entitlement, up to a certain amount, to have

⁷² Local governments indeed frequently have the power to create social policies. See Verschueren (n 71).

⁷³ Verschueren (n 71) 272.

⁷⁴ Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*, [2008] ECR I-1683. For a comment, see D. Martin, ‘Comments on Gouvernement de la Communauté

an insurance fund cover certain costs incurred in case of a state of dependence for health reasons, such as home-help services or the purchase of products and equipment that are needed in such circumstances. Only residents of those two regions could be affiliated to the scheme. As a consequence, residents of Belgium's Walloon Region were excluded from its benefits, even if they were employed in Flanders or Brussels. Individuals residing in another Member State could however rely on the insurance provided that they were employed in the Dutch speaking or bilingual region. The Belgian Cour d'arbitrage⁷⁵ referred a preliminary question to the CJEU to enquire about the compatibility of the regional scheme with EU law. For Advocate General Sharpston, the question arising in this case was not solely whether the regional care insurance scheme was compatible with EU law, but

A broader issue is whether Community law prevents an *autonomous entity of a Member State* from making the grant of social security benefits conditional on residence in the territory of the autonomous entity concerned or in the territory of another Member State, thereby excluding persons working in the autonomous entity in question who are resident in another part of the national territory. Still more broadly, what is the *impact of Community law on the federal or decentralised structure of a Member State* and on what is deemed to be a 'purely internal situation' outside the scope of Community law?⁷⁶

These introductory statements recognize the existence of a direct relation between subnational and supranational norms. Polycentricity and porosity are visible to the extent that dynamics arising in EU law affect subnational autonomies and vice-versa. For one,

française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)' (2008) 10 European Journal of Migration and Law 365, Camille Dautricourt, 'La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Gouvernement de la Communauté française et Gouvernement wallon contre Gouvernement flamand' (2008) 3 Revue du droit de l'Union européenne 603, Herwig Verschueren, 'La régionalisation de la sécurité sociale en Belgique à la lumière de l'arrêt de la Cour de justice européenne portant sur l'assurance-soins flamande' (2008) Revue belge de sécurité sociale 173.

⁷⁵ Which is now the Cour constitutionnelle.

⁷⁶ Paras 2-3 of the Advocate General opinion (emphasis added).

the Advocate General acknowledged that EU law can ‘prevent’ an SNA from autonomously exercising its autonomous regulatory competence, that is to say to limit a power an SNA disposes of as a matter of domestic law. In addition, the Advocate General recognized the possibility for EU law to have an impact on a Member State’s decentralized structure, in preventing SNAs from exercising their autonomous competences in a manner contrary to EU law, again acknowledging the direct interaction between the subnational and the supranational. Subnational autonomies have an impact on EU law and EU law can affect subnational autonomies. They influence their respective normative content. This hints at the relation between structure and substance as the fact that public power in the EU is polycentric influences how the substance of the law is affected. The Advocate General’s statements envisaged SNAs to be insiders in the EU legal order, having a direct and active relation towards EU law. Subnational norms are considered to be active participants rather than passive bystanders to the EU legal order. The doctrine of purely internal situations, the application of which in *Flemish Care Insurance* was subject to debate, is however based on the opposite presumption, which led the Advocate General to criticise its rationale.

The Doctrine of Purely Internal Situations

The Flemish government argued that the consequences attached to its insurance scheme were of a purely internal nature, and hence fell outside the scope of EU law. According to the doctrine of purely internal situations, the rules on the fundamental freedoms cannot be applied ‘to activities which have no factor linking them with any of the situations

governed by [EU] law and which are confined in all relevant respects within a single Member State'.⁷⁷ The consequence of this doctrine, which has been subject to considerable criticism in recent years, is that subnational norms that discriminate against individuals, products or services from other SNAs in the same Member State are not caught by EU law unless they also impact on other Member States.⁷⁸ The doctrine can be read as a corollary of the principle of national institutional autonomy, according to which EU law does not involve itself in matters purely internal to a State. This reflects the Outsider Model to the extent that there is a presumption that subnational norms and EU norms exist in different spheres and that as a result, subnational policies cannot impact upon, and undermine, EU objectives, to the contrary of Member State measures. Under this doctrine subnational measures are treated unlike those of the Member States, as EU law does not apply to them. In *Flemish Care Insurance*, Advocate General Sharpston criticised the doctrine openly⁷⁹, stating that:

I must confess to finding something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement between Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them within Member States. One might ask rhetorically, what sort of a European Union is it if freedom of movement is guaranteed between Dunkirk (France) and De Panne (Belgium), but not between Jodoigne and Hoegaarden?⁸⁰

⁷⁷ Para. 33, citing Case 20/87 *Gauchard* [1987] ECR 4879, paras 12-13, and Case C-18/95 *Terhoeve* [1999] ECR I-345, para 26. The doctrine of purely internal situations was first uttered in Case 175/78 *R. v. Saunders* [1979] ECR 1129, para 11.

⁷⁸ See Alina Tryfondiou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe' (2008) 35 *Legal Issues of Economic Integration* 43, Miguel Poiars Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Tonia Noviz Claire Kilpatrick, Paul Skidmore (eds), *The Future of European Remedies* (Hart Publishing 2000), Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 *Common Market Law Review* 731.

⁷⁹ As Advocate General Tesouro had previously done in his opinion in Joined Cases C-363, 407-411/93 *Lancry & Others v. Direction Générale des Douanes & Others* [1994] ECR I-3957, I-3960, para 28.

⁸⁰ Opinion of Advocate General Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683, para 116.

This statement is noteworthy, not only for addressing the status of subnational regulatory autonomies under EU law, but also because it utters a vision of the European Union according to which the latter cannot be fully integrated if the Member States are integrated but SNAs can shield themselves from the application of EU law. Such shielding, which can be interpreted as SNAs remaining at the outside of the internal market enterprise and thus EU law, can, in the eyes of the Advocate General no longer be accepted in the contemporary EU. While SNAs might, through the doctrine of purely internal situations, be *de jure* outsiders of EU law, they are *de facto* insiders. The Advocate General acknowledged this *de facto* insider status in pointing towards the fact that subnational measures have the same effects on the internal market as national norms.

SNAs are perceived as insiders. The Advocate General argued that the entities between which barriers to the free movement need to be abolished ‘are not necessarily always the Member States, but the entities that have the *relevant regulatory authority* (be these Member States or decentralised authorities within a single Member State).’⁸¹ The abolition of the doctrine of purely internal situations would lead to taking polycentricity seriously in recognising each component part thereof in its entirety. Indeed, the Advocate General remarked that, in light of the parallels between national and subnational norms, the latter should not benefit from an exemption under EU law that Member States cannot invoke. This constitutes an implicit assimilation between national and subnational norms, one of the characterising features of the Insider Model. SNAs are insiders in the EU legal

⁸¹ Para 117 of the Opinion, emphasis in original.

order, and as a result thereof, they may not take actions that limit any of the four freedoms. Otherwise, the Advocate General argued,

The beneficial effects of dismantling barriers to freedom of movement between Member States can easily be undermined if decentralised authorities of Member States have the relevant competences and are free to establish such barriers between themselves. In the light of trends towards regional devolution in several Member States, this may be a serious issue. However beneficial devolution may be from the perspective of subsidiarity and democratic accountability, it must not come at the cost of (de facto) endangering the area of freedom of movement or the *effet utile* of Community law.⁸²

This recognises that, by virtue of porosity and SNAs' insider status, subnational norms can create effects that may undermine EU objectives and integration. This insider status should be recognised through the abolition of the doctrine of purely internal situations, as otherwise the detrimental effects that EU norms may have on supranational integration may go unsanctioned, whereas the effects created by Member State norms are subject to scrutiny. Because SNAs are insiders (structure) they influence EU law (substance). The end of the doctrine would entail the assimilation between Member State and SNA norms. The Advocate General already explicitly assimilated regional authorities and Member States in her analysis in stating that, since the Belgian Communities and Regions act as

autonomous legislators within their spheres of competence, their position is, in that respect, equivalent to that of a Member State. Were Flanders an independent Member State of the Union, the impossibility for those living in Wallonia but working in Flanders to affiliate to the Flemish care insurance scheme would clearly fall foul of the Treaty.⁸³

⁸² Para 118 of the Opinion.

⁸³ Para 120 of the Opinion.

This amounts to a clear deviation from the Outsider Model, in which Member States and SNAs have a distinctively different status. The Advocate General assumes that SNAs and Member States should be assimilated and their respective regulatory autonomies be similarly subject to scrutiny under EU law. A number of arguments supporting this stance can be identified, for instance that despite being *de jure* outsiders of EU law, SNAs have become *de facto* insiders. Furthermore, there is relatively large agreement in legal scholarship that, as a consequence of EU integration, the shielding of subnational norms from EU law is no longer tenable.⁸⁴ This relates back to the earlier argument of Advocate General Sharpston that despite the efforts to abolish trade barriers between Member States as a result of which the States and their markets have been integrated, barriers to trade can continue to exist between SNAs.

The CJEU chose not to follow the Advocate General's bold suggestion to mark the end of the doctrine of purely internal situations.⁸⁵ The Grand Chamber rather argued that the situation was only in part internal, notably as regards the exclusion of Belgian nationals that work in Flanders or Brussels and live in the French or German speaking regions and had never exercised their freedom to move within the EU. This, the Grand Chamber conceded, was in fact a purely internal situation.⁸⁶ The situation of those Belgian nationals who had exercised their Treaty freedoms before returning to Belgium

⁸⁴ See footnote 14 *supra*.

⁸⁵ See also Thomas Vandamme, 'Case C-212/06, Government of the French Community and the Walloon Government v. Flemish Government, judgment of the Court of Justice (Grand Chamber) of 1 April 2008, nyr' (2009) 46 Common Market Law Review 287, 296.

⁸⁶ Paras 37-38 (The CJEU added: 'It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court).

as well as of nationals from other Member States was to the contrary considered to fall within the ambit of EU law.⁸⁷ According to the CJEU, the likelihood that the Flemish scheme affected at least some individuals falling within the second scenario was strong. As such, the regional insurance scheme could not be qualified as being outside the scope of EU law. The Court's attachment to the doctrine of purely internal situations suggests that while SNAs are outsiders of EU law in the (hypothetical?) scenario where their measures do not affect other Member States and their citizens, they are transformed into insiders as soon as such effects arise.

Under the doctrine of purely internal situations as it currently stands, SNAs are treated unlike Member States in the sense that they can, at least hypothetically, create policies that do not fall within the scope of EU law whereas they would if they were the measures of the Member State. While the doctrine, which is itself a manifestation of the Outsider Model as it reflects the Treaties' bi-centric structure accordingly continues to exist, its practical importance is severely limited. The Courts interpret it in a very narrow manner so that, irrespective of the nationality of a European citizen and their place of residence, it suffices that they have exercised a fundamental freedom to fall within the scope of the European Treaties.⁸⁸ Finding the doctrine not to apply to the main proceedings, the CJEU went on to examine the conflict between the subnational policy and the EU free movement imperative. In doing so, it treated the subnational norm as if it were that of a Member State.

⁸⁷ Paras 34-39 of the Judgment.

⁸⁸ Case 115/78 *Knoors* [1979] ECR 399, para 24; Case C-19/92 *Kraus* [1993] ECR I-1663, paras 17-18; Case C-419/92 *Scholz* [1994] ECR I-505, para 9; Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*, [2008] ECR I-1683, paras 33 and 34.

Subnational Norms are treated as Member State Norms

The non-application of the doctrine of purely internal situations meant that the regional regulation was examined pursuant to the same standards that the Court applies to the regulation of Member States. As per the Grand Chamber, the Flemish scheme restricted the free movement of workers under Article 45 TFEU and the freedom of establishment under Article 49 TFEU. Both of these measures refer only to the Member States as agents that must ensure the free movement of workers and freedom of establishment, not recognising the regulatory activity of local and regional authorities that may have an impact on these aims. Any measure, even if not discriminatory on the basis of nationality in its application, which hinders or renders less attractive the exercise of a fundamental economic freedom, is incompatible with EU law.⁸⁹ The Flemish measure produced such effects as it potentially deterred those contemplating moving to certain parts of Belgium from doing so for fear of not being eligible for care insurance.

One of the arguments put forward by the Flemish government was that, due to internal distributions of competences, it was unable to provide insurance for residents of Wallonia. The Grand Chamber rejected that line of argument, reiterating that ‘Member States’ cannot plead provisions, practices or situations within their domestic structure to justify a failure to comply with obligations arising under the Treaties.⁹⁰ The Advocate General connected this rule to the fact that Member States alone are responsible for

⁸⁹ Paras 54-55. See also Case C-19/92 *Kraus* [1993] ECR I-1663, para 32

⁹⁰ Para 57-59.

fulfilling obligations arising under the Treaties.⁹¹ This looks like a manifestation of the Outsider Model: solely Member States exist from the perspective of EU law, which does not take into account subnational autonomies. The Flemish government opposed this in arguing that this interpretation of EU law ‘would make it de facto impossible for Member States to adopt a federal structure.’⁹² The Advocate General countered that EU law

has not made it impossible for other federal Member States, and/or their decentralised authorities, to exercise their competences as defined by national law. However, a Member State cannot use its decentralised structure as a cloak in order to justify a failure to comply with its obligations under Community law.⁹³

This statement, and the CJEU’s subsequent reasoning illustrate that *Flemish Care Insurance* is governed by the Insider Model. First, the Advocate General’s statement explicitly recognises the norm-generating capacity of subnational authorities and states that EU law does not limit those, as such. However, the mere existence of such autonomies cannot be advanced to justify the breach of an obligation arising under EU law. This in fact constitutes a parallel with the situation of Member States, which cannot argue that they have competence over social policy to justify an infringement of Article 45 TFEU or Article 49 TFEU. Just like national measures breaching these provisions, those of a subnational nature can be justified if they relate to a ground of justification EU law considers as legitimate. In this sense, local and regional authorities enjoy the same status of autonomy as Member States, also with regard to the definition of social policy.

⁹¹ Para 101 of the Opinion.

⁹² Para 104.

⁹³ Para 105 of the Opinion.

The Court noted that while Member States ‘retain the power to organise their social security schemes’ they must nonetheless exercise that power in conformity with EU law.⁹⁴ EU law of course precludes measures that place EU citizens at a disadvantage compared to nationals when they wish to pursue an economic activity in another Member State.⁹⁵ It opposes any measure, even if it does not discriminate on grounds of nationality, which is capable of ‘hindering or rendering less attractive the exercise by [EU] nationals of the fundamental freedoms.’⁹⁶ The loss of a social security advantage as a consequence of an EU citizen’s exercise of her free movement rights constitutes such an obstacle.⁹⁷ This was found to be the case of the Flemish law ‘inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence’.⁹⁸ It is noteworthy that the relevant framework of analysis relied on by the Court is the subnational territory. It considered that migrant workers ‘contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement’.⁹⁹ The national territory is not examined as a whole in this respect but it is rather acknowledged that it is composed of different SNAs with autonomous regulatory powers.

Measures, be they of a national or subnational nature, found to restrict the fundamental economic freedoms under Article 45 TFEU and Article 49 TFEU can in principle be justified if they pursue a policy considered legitimate from the point of view

⁹⁴ Para 43-44.

⁹⁵ Para 44.

⁹⁶ Para 45.

⁹⁷ Para 46.

⁹⁸ Para 47.

⁹⁹ Para 48.

of EU law, and that the legitimate objective is implemented in a proportionate manner. While on their surface these provisions relate only to Member States, SNAs are assimilated to them below the surface of the Treaties in the Court's case law. In *Flemish Care Insurance*, the sole ground of justification put forward was that 'the Flemish Community could exercise no competence in relation to care insurance in respect of persons residing in the territory of other linguistic communities', a line of argument rejected by the CJEU.¹⁰⁰ The Court established that the existence of domestic decentralization arrangement cannot per se justify a failure to comply with the Treaties.

In light of this finding, Verschueren interpreted *Flemish Care Insurance* as establishing that 'the principle of the free movement of persons within the European internal market takes precedence over the internal constitutional organisation of a Member State.'¹⁰¹ It is true that Member States' internal organization, per se, cannot, except for the possible application of Article 4(2) TEU, be invoked to excuse violations of a free movement imperative. This does not however limit the regulatory autonomies of SNAs any more than those of the Member States. Verschueren predicted that 'the mandatory application of EU internal market law to relationships between a Member State's subnational entities would render meaningless the federal structure of that Member State.'¹⁰² For the purposes of my analysis, it is however this very fact which explains that SNAs are insiders, not outsiders. Indeed, all the Court is saying is that SNAs are subject to the free movement rules, and that they may not claim the existence of their

¹⁰⁰ Para 57-58.

¹⁰¹ Verschueren, 'The Impact of EU Law on the Devolution of Social Powers in the Member States' (n 71) 275.

¹⁰² Ibid 284.

regulatory autonomies, as such, to be exempted from obligations arising under EU law. This is the same situation as that of the Member States. EU law does not restrict subnational autonomies any further than it restricts subnational autonomies.

Flemish Care Insurance establishes that subnational norms are, other than in the case of a purely internal situation, treated in the exact same manner as Member State norms. It indeed seems likely that if a Member State were to advance the argument that it could not comply with EU law because it did not have competence to regulate (presumably because an SNA would be competent in this respect) this would be similarly rebutted by the CJEU. Member States and SNAs are assimilated in this area of EU law. Verschueren's claim that SNAs are treated as 'fully-fledged Member States' appears 'to be contrary to the EU Treaty.'¹⁰³ He accordingly rightly detects a tension between the surface of EU law – the bi-centric Treaties that solely account for the existence of Member States and the EU – and that such Treaty provisions are also applied to SNAs. While the Treaties align with the Outsider Model, *Flemish Care Insurance* illustrates that below its surface, EU law operates in accordance with the Insider Model. *Flemish Care Insurance* is accordingly an interesting illustration of how the Outsider Model and the Insider Model coexist in EU law, which can give rise to some tensions, such as those observed with regard to the doctrine of purely internal situations. The case further illustrates the competing objectives of market integration and recognising domestic institutional structures and substantive objectives, which are also apparent in the *Kamberaj* decision.

¹⁰³ Ibid 284.

2. *Kamberaj* and Subnational Housing Benefits

The *Kamberaj* case further defined the boundaries of subnational regulatory autonomies vis-à-vis EU law in the context of social policy.¹⁰⁴ It originated in a reference for preliminary ruling from an Italian court. In accordance with Article 117 of the Italian constitution, the central State determines the minimum level of benefits related to civil and social rights that are granted throughout the national territory. The Italian regions can however regulate beyond that threshold and allocate more generous benefits. A presidential decree laid down a special status for Trentino-South Tyrol and the Province of Bolzano on account of the specific composition of their population, which is subdivided into three linguistic groups: the Italian, German and Ladin speaking communities. This decree, which has a constitutional status, empowers the two regions to legislate on public assistance and allowances. The decree however mandates that the Province of Bolzano must use its funds for welfare, social and cultural aims in direct relation to the size of each linguistic group and according to the needs of each group.¹⁰⁵ We can understand this decree as a manifestation of porosity, illustrating that in the context of their autonomies, SNAs may be bound to legislate in accordance with objectives enunciated at the national level (which in turn might be influenced by EU law).

In accordance with Bolzano's regional law, housing benefits for low-income tenants were allocated 'among the applicants from the three linguistic groups in

¹⁰⁴ Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233.

¹⁰⁵ Para 24 of the Judgment.

proportion to the weighted average of their numbers and the needs of each group.’ The needs of every linguistic group were determined annually, having regard to the applications submitted in the previous ten years. If EU citizens residing and working in the province wished to obtain the benefit, they had to produce a declaration that they ‘belong or elect to join one of the three linguistic groups.’ The amount of funds reserved for third country nationals and stateless persons was determined on a yearly basis taking into account their number and needs.¹⁰⁶ Third country nationals needed to have resided permanently and lawfully in the province for at least five years before they could apply. This illustrates the polycentric nature of social security legislation, which is crafted at a number of different levels. As already apparent from factual background of the *Flemish Care Insurance* case, Member States do not have the monopoly of defining social security regimes. Further, when SNAs or the Member States craft such regimes, they must take into account policies created by the supranational level, for instance those relating to the treatment of third country nationals, which is indicative of porosity as norms generated by one level of public authority have an impact on those defined at another level.

Mr Kamberaj, an Albanian national, had resided and worked in the Autonomous Province of Bolzano since 1994, and held a residence permit for an indefinite period.¹⁰⁷ Between 1998 and 2008 he received the housing benefit but his application for 2009 was rejected as the funds for third country nationals were exhausted.¹⁰⁸ Mr. Kamberaj

¹⁰⁶ The EU directive concerning the status of third-country nationals who are long-term residents was incorporated into Italian Law via legislative decree.

¹⁰⁷ Para 31.

¹⁰⁸ Para 32-33.

subsequently sought a declaration from a domestic tribunal that this rejection amounted to discrimination, contrary to Directives 2000/43 and 2003/109 as his treatment as a third country national who has been a long-term resident was less favourable than that granted to EU citizens with regard to the housing benefit.¹⁰⁹

Under Article 11(1) of Directive 2003/109 long-term resident third-country nationals are to enjoy equal treatment with nationals in the context of social security, social assistance and social protection, although these concepts are defined under domestic law.¹¹⁰ The reference to concepts ‘as defined under domestic law’ is crucial to the understanding of *Kamberaj* as the CJEU noted that where the EU legislature expressly refers to domestic law, ‘it is not for the Court to give the terms concerned an autonomous and uniform definition under European Union law’.¹¹¹ This is indicative of the fact that the EU legislature ‘wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question.’¹¹² It follows that Member States retain some control over these sensitive policy issues, as the Directive explicitly granted them leeway to adapt the goals inherent to the directive to national law. It will be seen that the same leeway applies to SNAs where they have the relevant regulatory authority under domestic law, illustrating that in this area of EU law, SNAs are assimilated to Member States, which do not benefit from a special status by virtue of being the masters of the Treaties.

¹⁰⁹ Para 34. See Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180 and Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L16.

¹¹⁰ Para 76.

¹¹¹ Para 77.

¹¹² Para 77, referring to Case 327/82 *Ekro* [1984] ECR 107, para 14.

The Grand Chamber reiterated that SNAs must exercise their autonomy in respect of certain boundaries created by supranational law. The reference to domestic definitions regarding the concepts of social security, social assistance and social protection may not ‘undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision’.¹¹³ ‘Member States’ moreover ought to respect the provisions of the Charter of Fundamental Rights¹¹⁴, such as its Article 34(4) that protects the right to social and housing assistance.¹¹⁵ Since both the Directive and the Charter referred to national law, it was for the referring court, ‘taking into account the integration objective pursued by that directive’ to assess whether the housing benefit fell within the ambit of the Directive.¹¹⁶ The CJEU hence established that EU law leaves a certain degree of autonomy to domestic authorities to define social benefits that third country nationals can obtain, reflecting the politically sensitive nature of the topic and the fact that different States, but also different SNAs, may have different policy preferences.

The CJEU was also asked to determine whether Bolzano could limit the application of the principle of equal treatment under the Directive¹¹⁷ in applying a provision of the same Directive¹¹⁸ that allows ‘Member States’ to limit social assistance and social protection to ‘core benefits’ that do not include housing support.¹¹⁹ While on the surface of the Directive this option is solely available for the States, *Kamberaj* underlines that also SNAs can rely on it. The Grand Chamber engaged with the

¹¹³ Para 78.

¹¹⁴ Pursuant to Article 51(1) of the Charter this obligation arises whenever Member States are implementing European law.

¹¹⁵ Para 80. See also Article 34(3) of the Charter of Fundamental Rights.

¹¹⁶ Para 81.

¹¹⁷ Article 11(1)(d) of Directive 2003/109.

¹¹⁸ *Ibid*, Article 11(4).

¹¹⁹ Para 82-84.

subnational dimension in determining that ‘a public authority, at national, regional or local level, can rely on the derogation’ but only if ‘the bodies in the Member State concerned responsible for the implementation of that directive have stated clearly that they intended to rely on that derogation.’¹²⁰ Below the surface of the Directive SNAs emerge as entities assimilated to the Member States, in line with the Insider Model. SNAs can in fact rely on the same exceptions to derogate from EU law as Member States.

SNAs’ status flows directly from their capacity as implementers of EU norms, as the Court stressed that only the implementing bodies can rely on derogations. In this scenario, the Directive was transposed at national level so that this option would not be available to the SNA if it had not been foreseen by the legislative decree. The reference to public authorities at all scales is nonetheless striking as it explicitly acknowledged that public authorities other than the Member States implement and interpret EU law, and also regulate autonomously, recognising polycentricity. The CJEU was clear that EU law is not bi-centric as also local and regional authorities actively define social security policies. The fact that Treaty law solely recognises the Member States to be regulators in this regard does not prevent the CJEU from openly acknowledging that SNAs may perform the same function. The ability of an SNA to rely on the derogation, and its decision to do so, amounts to a policy choice akin to those undertaken by Member States. The authority exercises discretion, inspired by its own policy preferences, when taking such decisions. The policy choice can solely be made by virtue of the competences the SNA has under domestic arrangements. The Court also recognized that SNAs are autonomous regulatory

¹²⁰ Para 87.

actors when examining whether ‘Member States’ may limit the equal treatment of long-term third country nationals. It recognised polycentricity in noting that they may do so

with the exception of social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health.¹²¹

The CJEU concluded by holding that the relevant provision of Directive 2003/109 ‘must be interpreted as precluding a national or regional law’ which provided for a different treatment regarding housing benefits for third-country nationals compared to nationals ‘residing in the same province or region when the funds for the benefit are allocated’ if the benefits falls under the ambit of the directive.’¹²² The CJEU thus acknowledges in many respects that SNAs make their own autonomous policy choices – accepting them to constitute a relevant level of public authority in the polycentric EU. Clearly, EU law is not considered to be bi-centric. As, by virtue of porosity, these choices may however affect EU objectives, certain limits are imposed on SNAs’ regulatory discretion. It is noticeable that the same limits are imposed on SNAs as is the case with Member States, illustrating their analogous status in this regard. SNAs emerge as insiders to the extent that they can exercise the same policy considerations as States, which do not, as masters of the Treaties, have more freedom to determine domestic social policies than SNAs. This conclusion is also apparent in a much more dated judgment, *Casagrande*.

¹²¹ Para 91.

¹²² Para 93.

3. *Casagrande* and Subnational Education Policies

It has already been seen that, while from a supranational perspective any competence transferred to the EU is that ‘of a Member State’, things appear more complicated when viewed through the lens of domestic arrangements because, as a consequence of European integration, SNAs might no longer be able freely to exercise their powers. This is not only true for the EU’s exclusive competences and those shared between the Member States and the Union but also for those competences retained by the Member State under Article 6 TFEU, such as education. Müller-Graff for instance noted that EU directives on the mutual recognition of diplomas touch on the German Länder’s competences on education.¹²³ The connection between subnational competence on matters of education and EU law dates back to the early stages of EU integration, as *Casagrande* underlines.¹²⁴

Donato Casagrande, an Italian national born to Italian parents in Bavaria, attended a secondary school in Munich. His father was employed in Germany. Under the Bavarian law on educational grants, a child attending secondary school that does not have sufficient financial means was entitled to an educational grant. Casagrande claimed this sum from the city of Munich but was refused the grant. Polycentricity already becomes apparent at this stage as the law at issue was that of a German Land, Bavaria, and the decision that was challenged as being incompatible with EU law, was that of a

¹²³ Peter-Christian Müller-Graff, ‘The German Länder: Involvement in EC/EU Law and Policy-Making’ in Ulf Bernitz and Stephen Weatherill (eds), *The Role of Regions and Sub-National Actors in Europe* (Hart 2005) 107.

¹²⁴ Case 9/74 *Donato Casagrande v. City of Munich* [1974] ECR 773.

municipality. Munich refused the grant as the Bavarian law provided that only German nationals, stateless persons, and aliens permanently residing in Bavaria that were recognized to enjoy the right to asylum, could benefit from the grant. In the context of a reference for preliminary ruling, the CJEU had to pronounce on the compatibility of this regional law with the EU provisions on the free movement of workers. In doing so, the subnational dimension of the case in no way got lost but the CJEU openly engaged with it.

The Court observed that, as EU secondary law stood at the time, it merely provided a right for the children of migrant workers to be admitted to educational courses in the host State but not to receive individual educational grants.¹²⁵ The EU regulation at issue however also required Member States to encourage ‘all efforts to enable such children to attend these courses under the best possible conditions.’¹²⁶ On the surface of the Directive, this obligation is thus only imposed on Member States, not local and regional bodies. The European Court noted that the very objective behind these provisions was that the right to freedom of movement should not be restricted by the inability of the worker’s family to be integrated in the host country.¹²⁷ Such integration, the Court argued, presupposed that the children of foreign workers should be entitled to benefits provided by the laws of the host country, also those relating to educational grants, subject to the same conditions as nationals.¹²⁸ This not only included measures

¹²⁵ Para 5 of the Judgment.

¹²⁶ Para 5 of the Judgment.

¹²⁷ Para 6 of the Judgment.

¹²⁸ Para 7 of the Judgment.

relating to the admission of students but also those intended to facilitate educational attendance.¹²⁹

The central argument brought forward in this respect was that educational policy is one of the reserved competences of the Member States.¹³⁰ *Casagrande* is in fact best known as the case that gave rise to the doctrine of implied powers of the EU. In light of the fact that education is a reserved competence, the question that arose was whether the EU had stepped beyond its own competences in issuing secondary legislation that indirectly related to educational matters. As per the CJEU's assessment, although 'educational and training policy is not as such included' in the spheres of EU competence, it does not follow that the exercise of EU competence 'is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training.'¹³¹

It follows that the supranational objective of workers' ability to move freely within the EU cannot be impeded for the sole reason of it touching on a Member State competence.¹³² Weiler has described this phenomenon of jurisdictional mutation as 'absorption'.¹³³ The terminology of absorption reflects that national policies that conflict with EU law, even in domains in which the EU has no competence, 'will be absorbed and

¹²⁹ Para 9 of the Judgment.

¹³⁰ Para 10 of the Judgment.

¹³¹ Para 12 of the Judgment.

¹³² See Koen Lenaerts, 'Education in the European Community After 'Maastricht'' (1994) 31 Common Market Law Review 7, 11-12, Paul Windolf, 'Wer ist der Schiedsrichter in der Europäischen Union? Der Konflikt Zwischen Europäischen Gerichtshof und Bundesverfassungsgericht' (2000) 40 Kölner Zeitschrift für Soziologie und Sozialpsychologie 39, 44.

¹³³ Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2440.

subsumed by the [EU] measure’.¹³⁴ This can be observed in *Casagrande* as ‘the national educational policy was impinging on [EU] free-movement policy and thus must give way.’¹³⁵ The facts of *Casagrande* make clear that, due to porosity, subnational measures can be ‘absorbed’ by EU objectives just like Member State measures. Such absorption would however not be possible if they did not form part of the same regulatory space, underlining the insider status of SNAs. Further, absorption can only occur due to the porous borders between the subnational and supranational legal orders, as a direct relation exists between them. Another aspect of *Casagrande* is of particular interest, namely its explicit engagement with the subnational dimension. The CJEU noted that

In the Federal Republic of Germany such policy is largely within the competence of the *Länder*, and therefore it must be asked whether [the regulation] applies not only to the conditions laid down by laws emanating from the central power but also to those arising from measures taken by the authorities of a country which forms part of a Federal State, or of other territorial entities.¹³⁶

There was an explicit recognition that, in Germany, the *Länder* are competent when it comes to educational matters. Also, the Advocate General engaged with the subnational dimension. On occasion, he referred to the term ‘State organs’ rather than ‘Member States’ and justified this terminological choice as follows:

I use the expression ‘State organs’ to denote all organs of government, whether national or local, for I do not overlook that the defendant in the present case is the city of Munich or that the statute in question is a Bavarian one.¹³⁷

¹³⁴ Ibid 2440.

¹³⁵ Ibid 2440.

¹³⁶ Para 11 of the Judgment.

¹³⁷ Opinion of Advocate General Warner in Case 9/74 *Donato Casagrande v. City of Munich* [1974] ECR 773.

This triggered the interrogation whether, as a matter of EU law, local legislation is evaluated according to the same standards as Member State laws. The Court specified that it was a matter ‘for the authorities competent under national law’ to apply the regulation, but that notwithstanding the nature of that authority, the regulation must be applied ‘without discrimination between the children of national workers and those of workers who are nationals of another Member State who reside in the territory.’¹³⁸ Member States and SNAs are accordingly explicitly assimilated for these purposes. This is so because from the perspective of EU law, it is

irrelevant that the conditions in question are laid down by rules issued by the central power, by the authorities of a country forming part of a Federal State or of other territorial entities, or even by authorities which the national law equates with them.¹³⁹

This provides an interesting analogy to *Omega*. Given that Member State norms and subnational norms are insiders to the EU legal order, they produce the same effects. In the polycentric legal order, EU law does not distinguish between measures created at a national, regional, and local level. The origin of a given measure is not determinative for the assessment of its compatibility with EU law: only its effects are. EU law is consequently not concerned with engaging with the origin of regulation, but rather with the assessment of whether the free movement of workers under Article 45 TFEU has been restricted, and if this is so, whether any justifications are available on which the domestic regulating authority can rely. This confirms the assimilation between Member State and subnational norms. The analysis of the *Casagrande* case underlines the

¹³⁸ Para 14 of the Judgment.

¹³⁹ Para 15 of the Judgment.

existence of polycentricity and porosity in showing that subnational norms form a constitutive part of the polycentric legal order, and interact directly with EU norms. This can result in the limitation of the supranational objectives through a subnational objective and in the absorption of the subnational measure into EU norms. The test applied to verify whether the regional measure unduly interferes with EU objectives is the same test that is applied to Member State measures, illustrating that in this area, the latter enjoy no special status by virtue of being the masters of the Treaties. The same conclusion emerges from an analysis of subnational regulation and its relation to the EU principle of non-discrimination.

B) Subnational Regulation and the Principle of Non-Discrimination

This section examines a conflict that has arisen between the EU principle of non-discrimination in its manifold manifestations and local and regional regulatory policies.¹⁴⁰ Article 2 TEU provides that the EU is founded on the value of non-discrimination, illustrating its centrality in the enterprise of European integration. The principle of non-discrimination applies to individuals but also more widely, such as for instance to economic goods.¹⁴¹ While this section will not go into the details of this principle and its wider significance, it will be seen that, as a consequence of porosity, subnational, just like national, norms have the potential to limit the EU imperative of non-discrimination. Numerous cases have arisen in which the tension between the EU

¹⁴⁰ Article 3(3) TEU provides that the EU shall combat discrimination. For an overview of EU anti-discrimination law, see Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law*, Second Edition (Oxford University Press 2012).

¹⁴¹ Article 10 TEU. See also Article 21 of the Charter and Article 37 TEU.

principle and local or regional policies arises. This section illustrates that in examining such conflicts, EU law treats subnational norms in the same manner as those of the Member State to determine their compatibility with EU law. It also clarifies that just like Member States, SNAs must respect the principle of non-discrimination. Due to concerns of space only one case relating to the EU principle of non-discrimination can be addressed here.

1. *Horvath* and the Common Agricultural Policy

The *Horvath* case raised important questions regarding the degree of autonomy that SNAs enjoy in the context of the implementation of European regulations, and the relation between such autonomies and the principle of non-discrimination.¹⁴² In addressing these questions, the CJEU indicated that SNAs are insiders in the polycentric and porous EU legal order. The case did not as such concern autonomous regulation of an SNA but rather the autonomy that authorities may enjoy regarding the implementation of EU secondary law. While, contrary to directives, regulations do not need to be transposed into domestic legislation, national authorities are nonetheless required to take action to enforce them.¹⁴³ In this context national authorities enjoy a varying degree of interpretative autonomy, depending on the degree of precision of the provisions of the regulation. The less precision there is, the higher is the likelihood that the regulation will be interpreted in different manners by the various implementing authorities.

¹⁴² Case C-428/07 *Horvath* [2009] ECR I-06355.

¹⁴³ See further Article 288 TFEU.

Decentralisation may accordingly entail that, within a single Member State, there may be a plurality of implementing authorities, which operate diverging interpretative choices.

Horvath is to be placed in the context of the Common Agricultural Policy ('CAP'). A Regulation on import support schemes for farmers had not been implemented at central level in the UK but by the different devolved territories, which did not agree on the interpretation to be given to some of the provisions of the regulation. As a result, farmers in England were subject to different rules from those in the rest of the UK. The question that arose as a consequence thereof was whether the treatment of English farmers constituted discrimination contrary to EU law. An English farmer had claimed that he was in a less favourable position than farmers in Scotland, Northern Ireland and Wales, for the sole reason of his geographical location. The Grand Chamber was called upon to determine whether this difference in treatment, which was the direct result of the decentralized implementation of the Regulation, amounted to discrimination under EU law. Answering this question in the affirmative would have entailed that the decentralised implementation of EU secondary law is, as such, contrary to EU law unless all authorities interpret and apply secondary law in the exact same manner. This in turn would of course have rendered devolution arrangements somewhat redundant. The Court's answer to the reference for preliminary ruling was structured along two lines of argument: first, the principle of national institutional autonomy; and, second, the benefits inherent in a decentralised application of EU regulations.

The Court and the Advocate General underlined the importance of the principle of national institutional autonomy. According to the Grand Chamber, this principle implies that EU law does not per se oppose the implementation of EU standards by SNAs provided that they are implemented correctly.¹⁴⁴ It is for the Member States, not EU law, to designate bodies exercising implementing authority. EU law's sole concern is the correct implementation of the regulation. This conclusion was reinforced by the fact that the Regulation itself stated in its text that 'Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition'.¹⁴⁵ The Advocate General interpreted this flexibility as a sign that the EU legislature 'did not consider a uniform regulatory approach within each Member State to be necessary, but instead wished to leave each Member State to choose the appropriate regulatory level within its own political system'.¹⁴⁶ As a consequence, 'the rules adopted by those authorities may differ as between the regions concerned'.¹⁴⁷ The Court even stressed that the definition of minimum requirements 'at national or regional level' must, as foreseen by the regulation, account for 'the specific characteristics of the areas concerned'.¹⁴⁸ 'Member States' are bound by the requirements of the regulation, but 'it nevertheless leaves them, by using general concepts and terms, a certain discretion with regard to the actual determination of those requirements.'¹⁴⁹ Decentralised

¹⁴⁴ Para 48-50, citing Joined Cases 51/71 to 54/71 *International Fruit Company and Others* [1971] ECR 1107 and Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567.

¹⁴⁵ Article 5(1) of Council Regulation (EC) No. 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No. 2019/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) No. 1868/94, (EC) No. 1251/1999, (EC) No. 1254/1999, (EC) No. 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001 [2003] OJ L270.

¹⁴⁶ Para 91 of the Opinion.

¹⁴⁷ Para 53 of the Judgment.

¹⁴⁸ Para 25 of the Judgment.

¹⁴⁹ Para 26 of the Judgment.

implementation, as such, is not contrary to EU law. Not only does EU law respect this as a general matter, but the specific Regulation even made express provision for Member States' devolutionary choices, recognising that public authority in the EU is polycentric.

Turning to the examination of whether the decentralised implementation had resulted in discrimination,¹⁵⁰ the Grand Chamber considered that the prohibition of discrimination does not concern disparities in treatment that result 'between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it.'¹⁵¹ Regulatory fragmentation between Member States is accordingly tolerated, and does not automatically result in discrimination. In *Horvath*, however, different regions within the same State had interpreted the regulation differently, which led to fragmentation not only *between* but also *within* Member States. The Grand Chamber was unequivocal that local and regional authorities can make use of the same interpretative autonomy as Member States. As long as the different minimum standards applied throughout the UK remained compatible with the European regulation, no discrimination could be established.¹⁵² It followed that 'divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination'.¹⁵³ From the perspective of EU law, regulatory fragmentation within a single Member State is accordingly treated in the same manner as regulatory fragmentation between the different Member States.¹⁵⁴

¹⁵⁰ Para 54 of the Judgment.

¹⁵¹ Para 55 of the Judgment.

¹⁵² Paras 47-57 of the Judgment.

¹⁵³ Para 47 of the Judgment.

¹⁵⁴ Save for the application of the doctrine of purely internal situations, which was not at issue here.

Horvath establishes that SNAs have the same interpretative autonomy as Member States in implementing EU secondary law, underlining their aligned status in line with the Insider Model. Just like the States, SNAs can autonomously interpret EU secondary law. Whereas this finding recognises the implementing function of SNAs, also recognised under the Outsider Model, it also acknowledges their interpretative, and thus to some degree regulatory competence. The latter aspect, related to the Insider Model, finds a particularly strong expression in the opinion of Advocate General Trstenjak who relied on *Azores*, a case examined further below, which was thought of as being specific to the area of State aid law, in this context.¹⁵⁵ She justified her reliance on the ‘*Azores* test’ in stating that the criteria the Court employs when assessing the compatibility of subnational norms with EU law are, irrespective of ‘sector-specific terminology’ ultimately ‘no more than a difference in treatment between economic operators.’¹⁵⁶ She went on to argue that

A devolved organisation of agricultural law takes account not least of the increased importance of the regions within the European Union, which finds expression, for example, in the principle of subsidiarity being enshrined by the Treaty of Maastricht, the creation of the Committee of the Regions, the responsibility of the regions for the implementation of Community law and the possibility of representation in the Council under Article 203 EC. In addition, it takes into consideration the present moves towards decentralisation in the Member States, such as in the United Kingdom, largely following a similar political logic, which suggests a convergence in developments at Community level and at national level.¹⁵⁷

The Advocate General’s reference to the ‘convergence’ between increased fragmentation of public authority within the Member States as well as EU law’s effort to accommodate these evolutions relates to porosity, as evolutions occurring at one scale

¹⁵⁵ Opinion of AG Trstenjak in Case C-428/07 *Horvath* [2009] ECR I-06355.

¹⁵⁶ Para 106 of the Opinion.

¹⁵⁷ Para 94 of the Opinion.

trigger change at another. The Advocate General also gave recognition to polycentricity as she assumed that not only Member States and the EU, but also insider SNAs, have a role to play with regard to the CAP. She indeed recognised the relation between structure and substance as polycentricity is considered to benefit the substantive success of EU law through innovation and experimentation by SNAs within the limits of the common framework. The Advocate General referred to ‘the demands of the CAP for devolved and differentiated implementation’ in addition to the respect the EU owes to Member States’ constitutional autonomy.¹⁵⁸ She recalled that the decentralised and flexible implementation of the CAP is inherent to the Agenda 2000 and that the Regulation at issue ‘implements this ‘political concept’ by explicitly authorizing Member States to define minimum requirements ‘at national or regional level’.¹⁵⁹ The devolved organisation of agricultural law ‘takes account of the fact that regional differentiation is entirely necessary’ as ‘account is to be taken of the structural and natural disparities between the various agricultural regions.’¹⁶⁰ SNAs are actively involved in the delivery of EU policies in their capacity as insiders of the European legal order and they are considered to fulfil roles Member States cannot. Moreover, the margin of discretion that the Regulation accorded to ‘national and regional decision-makers for implementation also contributes to a differentiation corresponding to the needs of each region.’¹⁶¹ Porosity is evident as an EU objective filters down to the subnational scale where it is complemented by subnational objectives. This amounts to a rejection of the Outsider

¹⁵⁸ Para 89 of the Opinion.

¹⁵⁹ Para 89 of the Opinion.

¹⁶⁰ Para 92 of the Opinion.

¹⁶¹ Para 92 of the Opinion.

Model as SNAs are considered to be insiders, which play an active role in the definition and administration of agricultural policy.

The CJEU joined the Advocate General in underlining the benefits of a decentralized implementation of EU secondary law. It noted that regulations leave room for interpretative freedom so as to create ‘the possibility of taking into account the regional differences which exist on their territory.’¹⁶² The CJEU and the Advocate General agreed that EU law not only accepts the decentralised implementation of EU goals out of a respect for Member States’ national institutional autonomy, but also in recognition of the fact that decentralized implementation entails benefits that cannot be achieved through implementation by the Member State, showing that SNAs fulfil a function Member States cannot. The polycentric structure is considered beneficial for EU substantive law. For the Advocate General, as long as the common supranational aims are observed, ‘the greater closeness of national, regional and local decision-makers to the situation and to the citizen, the simplification of legislation and the easing of the burden on the administration, might suggest a devolved organisation of agricultural law.’¹⁶³ The statements of the Court and its Advocate General amount to a clear manifestation of the characteristic features of the Insider Model. Not only are SNAs considered to form part European legal space but there is also a recognition that subnational implementation can fulfil objectives that implementation by the Member States cannot. This relates to polycentricity as it considers that a multitude of levels of public authority exist and that

¹⁶² Para 48 of the Judgment.

¹⁶³ Para 93 of the Opinion.

some, in this case the subnational, might be better suited to fulfil certain substantive objectives than others.

An interesting contrast emerges between *Horvath* and an earlier decision of the Court. In *Milk Marketing Schemes* the Court had established that different territorial authorities in the UK could not establish diverging standards regarding the milk-marketing schemes under the CAP.¹⁶⁴ The practices regarding the marketing of milk of the various UK milk marketing bodies diverged to a certain degree.¹⁶⁵ There was then a difference of opinion between the European Commission and the milk marketing board of England and Wales whether, pursuant to a European regulation, milk marketed by producers in liquid form came under the exclusive purchasing rights of the board.¹⁶⁶ Supporting the position of England and Wales, the UK accepted that the different policies of its milk marketing bodies diverged¹⁶⁷ but that it could not prevent the milk marketing bodies, ‘from asserting in good faith rights conferred by the Community legal order. Its duty of supervision does not require it to intervene in national proceedings between private parties concerning the scope of those rights or to take such steps as the Commission suggests.’¹⁶⁸

Determining the underlying reason of the diverging conclusions in *Milk Marketing Schemes* and *Horvath* is not without difficulty. An important element to

¹⁶⁴ David Edward and Joxerramon Bengoetxea, ‘The Status and Rights of Sub-State Entities in the Constitutional Order of the European Union’ in Catherine Barnard, Anthony Arnall, Michael Dougan and Eleanor Spaventa (ed), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 36.

¹⁶⁵ Case C-40/92 *Commission v. United Kingdom* [1994] ECR I-989.

¹⁶⁶ Paras 9-12 of the Judgment.

¹⁶⁷ Para 22 of the Judgment.

¹⁶⁸ Para 23 of the Judgment.

consider is that in *Milk Marketing Schemes*, the boards were defined as ‘private persons’ rather than public authorities. Second, the question was not whether different standards resulted in discrimination but rather whether they, on their own, were compatible with the European Regulation, something that was not at issue in *Horvath*. In *Milk Marketing Schemes*, the Court indeed had to recall that the UK was ‘required to comply strictly with the obligations’ imposed on it via the regulation’.¹⁶⁹ The UK however ‘tolerated differences in the application of the Milk Marketing Schemes’ even though the regulation made clear that one of its objectives was to ensure that milk marketing boards ‘do not apply the rights granted to them in a manner incompatible with the general principles of the Treaty and Community law, in particular the principle of non-discrimination’.¹⁷⁰ The Court concluded that ‘by allowing the MMBs to pursue divergent policies’ the UK was in breach of EU law.¹⁷¹ It appears that the main difference between both cases was that in *Horvath* the different interpretations were all considered to be compatible with the Regulation itself even though they diverged among themselves. In *Milk Marketing Schemes* some interpretations were simply not compatible with the Regulation, which mandated uniformity.¹⁷² This indicates that SNAs may be cast in a different light depending on the area of EU secondary law concerned. Where a regulation calls for differentiation, SNAs are insiders – actors that help achieve such differentiation, and this maybe even better than the Member State could. Where EU secondary law however mandates that there be uniformity SNAs are seen as outsiders for the danger that decentralised implementation may pose for the achievement of EU law’s aims.

¹⁶⁹ Para 26 of the Judgment.

¹⁷⁰ Para 29 of the Judgment.

¹⁷¹ Para 30 of the Judgment.

¹⁷² Para 28 of the Judgment.

Horvath outlines that SNAs can be perceived as insiders in the EU legal order. In the polycentric EU, not only Member States but also SNAs are implementers of EU law – rebutting the predominance of bi-centricity as well as the monolithic nature of statehood, which are inherent in the Outsider Model. Porosity is recognised to occur between the EU and the subnational scale for EU law empowers the SNA to exercise discretion, yet at the same time it is recognised that subnational norms can limit EU objectives. In this picture, local and regional authorities appear to be in the same position vis-à-vis EU law as Member States. This finding can also be reached through an analysis of the relation between subnational tax law and supranational law.

C. Subnational Fiscal Policies and EU Law

Subnational authorities often hold fiscal competence under domestic power-sharing arrangements. This allows local and regional authorities to express policy choices, for instance in determining the level of property tax and to employ the tax revenue to further redistributive objectives. Clearly, different SNAs may have different needs and preferences in this regard, and fiscal devolution allows them to further their objectives. Through tax revenues, SNAs acquire some of the material support necessary to self-administer themselves. In accordance with Tiebout's model of decentralization, localities should have discretion over local taxation and the provision of public services so as to allow citizens to choose which package of public goods they desire by 'voting with their feet.'¹⁷³

¹⁷³ Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *Journal of Political Economy* 416.

The setting of (lower) tax rates at subnational level can also constitute a mechanism to attract economic operators to the subnational territory, which, as will be seen further below, bears the risk of conflicting with EU State aid law. Taxation is accordingly a domain that matters for SNAs for it allows them to express policy preferences and organise themselves as an autonomous scale of government. Yet, due to porosity, subnational fiscal policies run the risk of negatively affecting EU objectives, notably the functioning of the internal market. This explains why EU law limits the ability of SNAs to set taxes. An examination of a sample of cases in which a conflict between subnational taxation and EU internal market law has played out reveals that EU law treats SNAs in the same manner as Member States in relation to the compatibility of their respective tax schemes. As a consequence of such assimilation, it can be concluded that infra-State bodies enjoy the same autonomy under EU law to define their fiscal policies as the Member States do – illustrating another manifestation of the Insider Model.

1. *Carbonati Apuani* and Municipal Taxation

In *Carbonati Apunani*, sometimes also referred to as the *Carrara Marble* case, the CJEU refused to save a municipal tax measure from the application of EU law by declaring it to fall under the doctrine of purely internal situations.¹⁷⁴ An Italian law had empowered the Carrara municipal council to set a tax on the marble excavated within, and transported from, its territory. Carrara in fact imposed a tax, applicable only to marble transported out

¹⁷⁴ Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027.

of the municipal territory, not the marble used within this territory.¹⁷⁵ This tax was challenged under the argument that it was incompatible with EU law. In the context of a reference for preliminary ruling, the CJEU had to ascertain whether a tax ‘levied solely in one municipality of a Member State and imposed on one class of goods’ constitutes a charge having equivalent effect to a customs duty contrary to Article 30 TFEU.¹⁷⁶

The municipality and the Italian government argued that the tax applied without distinction to marble exported to other parts of Italy and other Member States and could as such not fall within the ambit of Article 30 TFEU.¹⁷⁷ The ‘chargeable event’, it was claimed, did not consist in crossing the borders between two States but that of the municipality.¹⁷⁸ The Italian government and Carrara attempted to position the municipality as an outsider of the EU legal order to prevent porosity from occurring when the local measure enters into conflict with EU law. As such it should not be of interest for EU law. The CJEU however reiterated that any pecuniary charge, ‘however small, and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense’ constitutes a charge having equivalent effect.’¹⁷⁹

Article 30 TFEU refers solely to the Member States. It provides that

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

¹⁷⁵ Paras 3-6 of the Judgment.

¹⁷⁶ Para 15 of the Judgment.

¹⁷⁷ Para 16 of the Judgment.

¹⁷⁸ Para 18 of the Judgment.

¹⁷⁹ Para 20 of the Judgment.

As per the Treaty, customs duties are solely prohibited between Member States, envisaging only the States, not SNAs as bodies with taxing power. Nonetheless, the CJEU rejected the argument that Article 30 TFEU applies merely to customs charges levied between Member States, as ‘any pecuniary charges imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.’¹⁸⁰ The effect between national and subnational taxes is the same from the perspective of EU law, as both sets of policies have an insider status. The Court indeed recalled that Article 30 TFEU requires that the free movement of goods be ‘ensured within the union generally, not in trade between Member States alone, but more broadly throughout the territory of the customs union.’¹⁸¹ If the Treaties only make express reference to the Member States, the Court explained, ‘that is because the framers of the Treaty took it for granted that there were no charges exhibiting the features of a customs duty in existence within the Member States.’¹⁸²

Special note should be taken of that statement. The Court explains that the bi-centric wording and structure of Article 30 TFEU, which reflect one of the key features of the Outsider Model, is due to the framers’ worldview according to which only the EU and the States have the capacity to regulate. The constitutional imagination of the drafters was bi-centric, in line with the Outsider Model. Regions and cities on the other hand are not seen as creators of norms, explaining why the Treaties did not preoccupy themselves with the existence and effect of such norms. This does not however prevent subnational

¹⁸⁰ Para 22, citing Joined Cases 2/69 and 3/69 *Brachfeld and Chougol* [1969] ECR 211, para 14, and Joined Cases C-363/93, C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957, para 25.

¹⁸¹ Para 22.

¹⁸² Para 22.

norms from acquiring an insider status. *Carbonati Apuani* underscores that despite the fact that the Treaty framers did not foresee the possibility of conflict between subnational and supranational norms such conflicts nonetheless arise. In that event, subnational norms are evaluated in the exact same manner as the Member State norm. The CJEU found support for its equation of subnational and national norms in the fact that Article 26(2) TFEU defines the internal market as an ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.’¹⁸³ Since Article 30 TFEU must be read in conjunction with Article 26(2) TFEU, the optimal functioning of the internal market presupposes that there be no charges between Member States but also other territorial units.¹⁸⁴ This turns SNAs into insiders as it considers that also local and regional territories, not just Member States, are integrated into the EU internal market. Given that subnational norms are insiders, their norms can, due to porosity, constrain EU objectives to the same degree as those of Member States. The conception of fiscal policy in the EU context is polycentric as a multitude of levels of public authority are recognised to create tax legislation and all of them are inside the European legal space – giving rise to a direct relation with EU law and the possibility for EU objectives to be confined by subnational action.

The ruling in *Carbonati Apuani* was not surprising as the CJEU had already affirmed in *Legros*,¹⁸⁵ *Lancry*,¹⁸⁶ and *Simitzi*,¹⁸⁷ cases which concerned some of the EU’s

¹⁸³ Para 23 of the Judgment.

¹⁸⁴ Para 24 of the Judgment (‘the absence of charges – whether between States or within a State – exhibiting the features of a customs duty is a precondition essential to the realisation of a customs union in which the free movement of goods is ensured’).

¹⁸⁵ Case C-163/90 *Legros and Others* [1992] ECR I-4625.

¹⁸⁶ Cases C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957.

¹⁸⁷ Case C-486/93 *Simitzi* [1995] ECR I-2655.

outermost regions, that is to say those Member State territories situated outside the European continent, that a charge imposed on a good when crossing a territorial boundary within a Member States amounts to a charge having an equivalent effect to a customs duty.¹⁸⁸ Just like those measures, the Carrara tax, albeit of minimal impact on the internal market, might ‘create an impediment to trade in the form of customs duty, unilaterally imposed by a competent public authority of a Member State’.¹⁸⁹ Indeed, for the purposes of classifying a tax as a charge having effect equivalent to a customs duty, ‘the size of the territorial administrative authority which levied the tax is therefore immaterial, in so far as that tax constitutes an obstacle to trade in the internal market.’¹⁹⁰ *Carbonati Apunani* thus establishes that notwithstanding its actual impact on the internal market, any measure, notwithstanding whether of a national or subnational nature, that has the potential to hinder trade within the internal market is contrary to EU law. The Treaties’ bi-centric structure, itself the direct result of the framers’ constitutional imagination, did not stand in the way of this conclusion. This relates back to the tension between EU law above the surface and EU law below the surface. While the surface of Article 30 TFEU frames the Member States and the EU as the only relevant levels of public authority for the purposes of the EU’s internal market enterprise, giving the impression that SNAs are outsiders, this initial impression is proven wrong by the examination of the law unfolding below the surface of Article 30 TFEU in the Court’s adjudicatory practice. On the basis of the case law in this area, such as *Carbonati Apunani*, it becomes apparent that SNAs

¹⁸⁸ Para 25. For an overview of EU law and the EU’s outermost regions, see Dimitri Kochenov, *EU law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer 2011).

¹⁸⁹ Para 28 of the Judgment.

¹⁹⁰ Para 28 of the Judgment.

are in fact insiders in an area of EU law that is typified by polycentricity and porosity. The same conclusion can be reached from the case that is examined just below.

2. *Regione Sardegna* and Regional Taxation

Regione Sardegna is another instance of the potential of subnational fiscal measures to conflict with supranational economic aims. *Regione Sardegna* arose out of a domestic dispute between the Italian government and the insular region of Sardinia.¹⁹¹ Two actions had been brought before the Italian constitutional court, in the context of which the President of the Council of Ministers raised the question of the constitutionality of fiscal legislation passed by Sardinia. The Sardinian law imposed a tax on undertakings that operated pleasure boats or airplanes, which do not have their tax domicile in Sardinia. Undertakings having their tax domicile in Sardinia did not have to pay the tax. It was argued, *inter alia*, that this legislation violated EU law, both regarding the free movement of services and the prohibition on State aid. A reference for preliminary ruling, the first ever by the Italian Constitutional Court, ensued.¹⁹² These factual circumstances are in themselves of interest as they relate to porosity and polycentricity. The President of the Council of Ministers raised the question of the constitutionality of the regional law, also submitting that the Sardinian law failed to comply with EU law. Porosity can be observed in this regard as the Italian central executive did not limit its claim to its own legal order but moreover relied on EU law to strengthen its argument. The invocation of EU law in the context of a domestic dispute allows the national executive to do away with a

¹⁹¹ Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I-10821.

¹⁹² Paras 1 and 21 of the Opinion of AG Kokott in Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I-10821.

subnational measure with which it takes issue. EU law is ‘imported’ into the domestic context to support the central executive’s claim, as domestic law does not allow bringing the law down on its own. In addition, a manifestation of polycentricity can be tracked down here, as through the constitutional court’s reference for preliminary ruling, the domestic dispute is exported to an additional, ‘exterior’, scale, the EU courts. As a result the interaction between EU and domestic law, but also of European and domestic courts, comes to determine the outcome of the dispute.¹⁹³ At this stage, *Regione Sardegna* is examined with regard to free movement law. The aspects relating to State aid law are examined at a later stage in the section of the subsequent chapter that engages with this domain of EU law more comprehensively further below.

The referring court had enquired whether the freedom to provide services, enshrined in Article 56 TFEU, ‘must be interpreted as precluding tax legislation, adopted by a regional authority, (...) which provides for the imposition of a regional tax (...) where that tax is imposed only on undertakings which have their tax domicile outside the territory of the region.’¹⁹⁴ The CJEU declared the regional law to fall within the scope of Article 56 TFEU, which refers only to Member States, not SNAs.¹⁹⁵ Examining whether the regional measure actually restricted the freedom to provide services, the Court recalled that in this field ‘a national tax measure restricting that freedom may constitute a prohibited measure, whether it was adopted by the State itself or by a local authority.’¹⁹⁶

¹⁹³ Para 22 of the Opinion ([t]he present case is a particularly good illustration of the fact that, also in proceedings before national constitutional courts, questions of Community law may arise that are decisive for the outcome of the constitutional dispute in question’).

¹⁹⁴ Para 19 of the Judgment.

¹⁹⁵ Para 20 of the Judgment.

¹⁹⁶ Para 29 of the Judgment.

As national and subnational measures have the same effects in EU law, they are equally considered insiders of that legal order. Advocate General Kokott agreed that when determining whether a national measure is contrary to EU law, it ‘is irrelevant whether the tax measure in question was adopted by a local authority or by the State itself.’¹⁹⁷ Regional and national norms being insiders to the European legal order, they entertain a direct relation with EU objectives, and are similarly capable of limiting them. In light of their identical potential to restrict the freedom to provide services within the EU internal market, rendered possible through porosity, EU law treats them analogously. Moreover, the recognition that fiscal policies are crafted at national and subnational level underlines the existence of polycentricity.

The Advocate General went on to rule out the application of the doctrine of purely internal situations as the Sardinian tax was found to ‘affect the cross-border provision of services, for example, between Sardinia and the French island of Corsica’.¹⁹⁸ As a consequence, the regional fiscal regime made ‘the provision of services between Member States more difficult than that within one Member State or a part of it’.¹⁹⁹ Referring to *Carbonati Apuani*, the Court noted that while the tax ‘is applicable only in a particular part of a Member State’ it applied to aircraft and boats irrespective of whether they came from another Italian region or another Member State.²⁰⁰ In such circumstances, ‘the regional character of the tax does not mean by definition that it cannot impinge on the

¹⁹⁷ Para 49 of the Judgment.

¹⁹⁸ Paras 54-55 of the Opinion.

¹⁹⁹ Paras 54-55 of the Opinion.

²⁰⁰ Para 30 of the Judgment.

freedom to provide services.’²⁰¹ SNAs are not located outside the EU legal order as their policies can limit EU objectives by virtue of porosity. As a logical consequence, SNAs are subject to Article 56 TFEU to the same extent as Member States.

The CJEU and the Advocate General were in agreement that regional tax measures cannot evade the application of EU law by virtue solely of their regional character. While this aspect of fiscal policy may lead to the application of the doctrine of purely internal situations, which may indeed shield subnational measures from the application of EU law, this was not the case in *Regione Sardegna*. Rather, the Sardinian tax was considered to limit the freedom to provide services for it made ‘the provision of the service more costly for those liable to pay the tax, that is to say those undertakings having their tax domicile outside of the region’ and consequently created an advantage for operators established in the insular territory.²⁰² Sardinia attempted to save its tax regime in claiming that it sought to protect the environment, a ground of justification accepted by EU law. The Court however disagreed. It noted that the obligation to pay the tax arose on account of stopovers so that, in terms of environmental consequences, all natural and legal persons receiving the services were in an objectively comparable situation, and this irrespective of where they were established.²⁰³ Sardinia’s claim that the measure aimed at the protection of public health was equally rejected, pollution being caused regardless of the origin of the boats and aircraft.²⁰⁴

²⁰¹ Para 30 of the Judgment.

²⁰² Paras 31-32 of the Judgment.

²⁰³ Paras 35-37 of the Judgment.

²⁰⁴ Paras 40-45 of the Judgment.

Similarly, the CJEU rejected the argument that the Sardinian tax could be justified on the ground that it assured the cohesion of the tax system. It is of special interest to note that the scale of assessment relied on in this regard was that of the regional, not national, territory. The parallels the situation for Member States, the regulation of which is assessed having regard to the national territory – in both scenarios the relevant reference framework is that of the regulating authority. Sardinia put forward that the tax was necessary to ‘preserve the cohesion of its tax system’.²⁰⁵ The argument made was that the imposition of the tax only on those having their tax domicile outside of Sardinia was necessary given that ‘residents of the region pay other taxes which contribute to operations for the protection of the Sardinian environment.’²⁰⁶ The Court pointed to the absence of a direct link between the tax advantage and the offsetting of that advantage, which is required under EU law for such arguments to be successful.²⁰⁷ Yet in this scenario, ‘the regional tax on stopovers does not pursue the same objectives as the taxes paid by taxpayers who are resident in Sardinia, which serve to fund the State budget in a general way and thereby to finance all the activities of the Region of Sardinia.’²⁰⁸ As a consequence, the non-imposition of the tax on those established in Sardinia could not be justified. The Court however showed a willingness to examine the case with reference to a regional background, hence giving the SNA the same opportunities to exercise its autonomous competences as is the case for Member States. This illustrates that as insiders to the EU legal order, Member State and subnational norms are treated alike, the former enjoying no privileged status by virtue of being issued by a master of the Treaties.

²⁰⁵ Para 46 of the Judgment.

²⁰⁶ Para 46 of the Judgment.

²⁰⁷ Para 47 of the Judgment.

²⁰⁸ Para 48 of the Judgment.

The regional tax was accordingly classified as a restriction on the freedom to provide services that could not be justified under EU law.

Regione Sardegna confirms, in line with the Insider Model, that subnational fiscal measures are considered as aggregate building blocks of the European legal order, having the same status as the Member States, the policies of which are examined in the same light as that of Sardinia. By virtue of EU norms and subnational norms interacting in the same legal space, and the porous nature of their respective borders, regional norms can endanger the internal market imperative. The next sub-section examines the relation between subnational public health and environmental policies and EU law.

D. Subnational Public Health and Environmental Measures and EU Law

This section outlines two instances where subnational authorities have attempted to establish their own public health or environmental policies and explores the potential limitations that EU law imposes on them. In the context of the definition of their autonomous policies, local and regional authorities may wish to pursue agendas that seek to protect the (subnational) environment or the health of their population. EU law does not prevent subnational authorities from pursuing measures aimed at the protection of the environment to public health, which are considered worthy by EU law. However, due to porosity, subnational measures are likely to have a negative impact on EU aims, such as the functioning of the internal market. As a consequence, EU law imposes conditions that domestic regulatory authorities must respect when exercising their regulatory

autonomies. The remaining freedom for SNAs to pursue autonomous regulatory strategies is the same as that available to Member State, illustrating SNA's insider status in the EU legal order.

1. *Walloon Waste* – SNAs as Allies or Pursuers of Independent Goals?

Walloon Waste concerned a regional measure aimed at the protection of the regional environment. Wallonia, a Belgian region, had passed a law that prohibited the storage, tipping and dumping of waste from other Member States, or other regions in Belgium within its territory.²⁰⁹ The measure targeted hazardous as well as non-hazardous waste. The European Commission argued that Belgium had failed to comply with its obligations under EU secondary law as well as the free movement of goods.²¹⁰ Directive 75/442/EEC had been adopted in 1975 to approximate laws on waste disposal across the Union. In *Walloon Waste*, it appears that the regional measure is recognised by the Court as a policy addressing regional concerns, which stand in conflict with EU law. A second look however reveals that the Court's judgment may be motivated by the fact that the regional measure gave effect to the same concerns contained in the Directive on hazardous waste and also general waste as regards the principle of disposal close to source. According to this view EU and subnational goals are aligned rather than standing in opposition. Notwithstanding the interpretation adopted, it must be concluded that subnational norms are insiders of the EU legal order.

²⁰⁹ Case C-290 *Commission v. Belgium* [1992] ECR I-4431.

²¹⁰ Council Directive 75/442/EEC on waste [1975] OJ 1975 L194 and Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste [1984] OJ L 326.

Advocate General Jacobs considered the regional law to be of equivalent effect to a quantitative restriction.²¹¹ He argued that if a measure has the effect of restricting imports from other Member States, it must be qualified as a measure of equivalent effect, it being irrelevant whether it ‘also restricts trade as between the regions of the Member State concerned.’²¹² He even considered that the ban on waste imports from other regions is capable ‘of reinforcing the ban on imports from other Member States, in that it will prevent the treatment of waste from other Member States in the Flanders or Brussels regions, followed by final disposal in Wallonia.’²¹³ Rather than seeing SNAs outside of the EU legal order and its internal market, Advocate General Jacobs considered that by virtue of their insider status, they are in a position to adversely affect EU objectives. In the exercise of their autonomous competences, SNAs cannot rely on the argument that they also discriminate against goods of their neighbouring regions to evade the application of the free movement rules.²¹⁴ SNAs benefit from no advantage vis-à-vis Member States as the grounds of derogation that they can invoke, and the conditions according to which these are applied, are the same for national and subnational authorities.

The CJEU disagreed with its Advocate General. It concluded that in adopting the regulation, ‘the defendant State’ had met the imperative requirements of environmental protection and the protection of health that are considered to be legitimate objectives

²¹¹ Para 17 of the Opinion of 10 January 1991.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ The doctrine of purely internal situations constitutes an exception to this rule.

under EU law.²¹⁵ When a region fails to comply with its obligations under the Treaties, the Commission always addresses its action for non-compliance to the Member States.²¹⁶ Belgium was hence the ‘defendant State’ in *Walloon Waste*, which explains the Court’s language. The adoption of this formulation does not however mean that the CJEU was blind to the dispute’s subnational dimension as it referred to the ‘limited capacity of each region or locality for waste reception’.²¹⁷ This confirms that as regards subnational measures, the CJEU’s framework of reference is the subnational scale. The Court moreover recognized that Wallonia was subject to an ‘abnormal large-scale inflow of waste from other regions’ and that ‘there was a real danger to the environment, having regard to the limited capacity of that region.’²¹⁸ The CJEU consequently found the regional measure ‘well founded.’²¹⁹ The Court’s ruling however leaves unanswered the question whether such recognition is anchored in the EU aim of environmental protection, in the principle of self-sufficiency in regard to waste, or whether it is rather acknowledged as an independent exercise of regulatory discretion of the SNA.²²⁰

It is unclear whether the regional measure was tolerated because it pursued an autonomous aim, recognised under EU law, namely environmental protection, notwithstanding the fact that this protective goal limited EU internal market aims. On the other hand, the regional measure could have been considered to contribute to a common supranational aim, the disposal of waste close to its source. Article 5(2) of the 1975

²¹⁵ Para 29 of the Judgment.

²¹⁶ Article 258 TFEU.

²¹⁷ Para 30 of the Judgment.

²¹⁸ Para 31 of the Judgment.

²¹⁹ Para 32 of the Judgment.

²²⁰ I discuss this further in Michèle Finck, ‘Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation’ (2014) 26 *Journal of Environmental Law* 443.

Waste Directive already enshrined this principle at the time of *Walloon Waste*. The CJEU indeed explicitly recognised that according to the former Article 130r(2) of the Treaty, ‘it is for each region, municipality or other local authority’ to ensure that its own waste is collected, treated and disposed of ‘as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste.’²²¹ According to this alternative reading, SNAs are seen as partners in achieving a EU aim rather than autonomous regulators whose policies are upheld under EU law but which conflict with the free movement of goods. This is revealing in respect of polycentricity and porosity as the EU objective can be achieved more efficiently with the help of the subnational scale rather than by virtue of EU law alone. Polycentricity facilitates the achievement of a EU substantive aim. The fact that the EU goal can inspire subnational action is in turn indicative of porosity. Notwithstanding the interpretation adopted, Wallonia and its law emerge as insiders of the EU legal order. Should it be considered that the SNA pursued an autonomous policy it does so as an insider as its policy is evaluated against the same standard as national policies are. The subnational measure produces direct impacts on EU internal market law and can only do so because they co-exist inside the same space. Should *Walloon Waste* however be understood as an instance where a regional policy furthered a EU goal, this is still illustrative of the Insider Model as SNAs collaborate towards the realisation of an aim created by and existing within EU law. The insider status of subnational bodies and their regulation is also apparent from another case in which a region pursued public health objectives, *Aragonesa*.

²²¹ Para 34 of the Judgment.

2. *Aragonesa* and Regional Public Health Measures

Aragonesa arose out of a dispute between a company operating advertising hoardings and the Spanish Autonomous Community of Catalonia.²²² Catalonia had imposed administrative fines on the company after the latter had infringed a Catalan law that prohibited the advertisement of strong alcoholic beverages in the media, streets, highways, cinemas and public transport.²²³ The company put forward that the regional law infringed the free movement of goods under Article 34 TFEU in limiting the marketing opportunities for beverages from other Member States. As such the regional measure's compatibility with EU law had to be examined. The question that arose was whether, and if so in which manner, EU law limits the capacity of subnational authorities to initiate measures aimed at the protection of the health of their citizens. This also raised the question whether SNAs were subject to the same rules as Member States.

In its reply to the reference for preliminary ruling, the CJEU first took care to emphasise that all authorities within a Member State, also SNAs, are bound to comply with EU law. Article 34 TFEU may 'apply to measures adopted by all the authorities of the Member States, be they the central authorities, the authorities of a federal State, or other territorial authorities.'²²⁴ SNAs are subject to EU law, just as Member States are. It follows that 'national measures' with a 'limited territorial scope' cannot 'escape being

²²² Joined Cases C-190 and C-176/90 *Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151.

²²³ Law No 20/85 enacted on 25 July 1985 by the Parliament of the Autonomous Community of Catalonia on prevention and assistance with regard to substances likely to lead to dependency (DOG No 572, of 7 August 1985, p. 465). The prohibition applied to any drink having an alcoholic strength superior to 23 degrees. Para 3 of the Judgment.

²²⁴ Para 8 of the Judgment.

characterized as discriminatory or protective for the purposes of the rules on the free movement of goods’ as they equally affect the sale of products ‘from other parts of the national territory and the sale of products imported from other Member States’.²²⁵ As insiders to the EU legal order, subnational measures have the same potential to hinder trade within the internal market as those of the Member States.²²⁶ It ensures that their regulatory autonomies are subject to the same restrictions.²²⁷ *Aragonesa* confirms that EU law acknowledges SNAs as implementers of common EU norms and objectives, which contribute to ensuring the uniform application and *effet utile* of EU law. This is indicative of the Outsider Model. At the same time however, SNAs norm-making capacity is accounted for, which in turn symbolises their insider status.

In casu, the regional measure was found to amount to a measure having an equivalent effect to a quantitative restriction under Article 34 TFEU.²²⁸ The measure was however found capable of justification as it sought to protect public health, a goal recognised by Article 36 TFEU.²²⁹ While the SNA was subject to the same restrictions as the Member States, it could also justify its measures to the same extent as States can under Article 36 TFEU. The CJEU first proceeded to an analysis of whether the measure constituted a restriction, and then examined whether it could be justified. Indeed, as the analysis of cases such as *Omega* already indicated, when a domestic measure clashes with EU law, only those pursuing an objective that EU law considers to be ‘legitimate’ can be justified.

²²⁵ Para 24 of the Judgment.

²²⁶ Para 11 of the Judgment.

²²⁷ Paras 22-23 of the Judgment.

²²⁸ Para 11 of the Judgment.

²²⁹ Para 13 of the Judgment.

In the absence of harmonization, Member States retain the ability to define the appropriate degree of public health protection and the manner in which such protection is to be achieved, provided that the principle of proportionality is respected.²³⁰ *Aragonesa* establishes that the same is true for SNAs. As per the CJEU, the ‘national measure’ could not be criticized for being ‘disproportionate to its stated objective’ given its limited impact on trade. Indeed it merely concerned beverages with strong alcoholic content and only targeted advertisements in specific locations, such as those frequented by motorists and young persons.²³¹ In addition, the measure was not discriminatory or protective in character.²³² The fact that ‘that part of the Member State’ produced more alcoholic beverages that fall below the threshold of alcohol content that triggers the application of the law was not in itself sufficient to constitute arbitrary discrimination or a disguised restriction on trade.²³³ This reasoning underlines that where an SNA issues regulation, the subnational territory constitutes the relevant threshold for the examination of that regulation. This parallels the Court’s stance when it examines Member State measures where the national territory will be the relevant threshold. This approach accounts for the subnational dimension and recognises that SNAs can regulate as far as their own territory is concerned.

Aragonesa underlines that subnational regulation can be understood as policy innovation and experimentation. In coming up with a formula thought of as suitable to prevent alcohol related diseases Catalonia pursued one possible option. It is well known

²³⁰ Para 16 of the Judgment.

²³¹ Para 17-18 of the Judgment.

²³² Para 24-25 of the Judgment.

²³³ Para 25 of the Judgment.

that there is no magic formula to prevent alcohol addiction and the related physical and mental problems. It is also possible that the triggers of alcoholism may be influenced by factors that differ from one region to another.²³⁴ As a consequence policy experimentation is desirable, as is variation as different solutions might produce different results according to the respective audience. It is plain from *Arargonesa* that EU law leaves space for Member States and SNAs alike to do so and come up with innovative solutions that might be better suited than those currently in force. The polycentric structure allows for the substance of a norm to be more adequately suited to the territory to which it applies. The next section examines the relation between regional linguistic policies and EU law.

E. Subnational Language Policies and EU Law

It has been seen that subnational autonomies take on a number of different forms and shapes within the European Union's different Member States. Their autonomies can be shaped by a number of factors, such as geographic or linguistic reasons. Sometimes, linguistic divides help to explain domestic decentralisation arrangements. Language can be one of a number of factors underlying claims for autonomy and self-determination. In this regard, it is no surprise that language policies are close to some SNAs' hearts and that they try to regulate in a manner that seeks to protect their own language.

²³⁴ Such as for instance the small amount of daylight in winter in some parts of Europe, not Catalonia.

1. *Anton Las* and the Protection of Regional Language

In *Anton Las* the CJEU was called upon to assess the compatibility of a Flemish law with workers' free movement rights, enshrined in Article 45 TFEU.²³⁵ The regional legislation required all employers established in Flanders to draft employment contracts in Dutch, one of Belgium's three official languages, and the standard language in Flanders.²³⁶ Such legal requirements could evidently dissuade foreign employers and employees from joining the Flemish labour market²³⁷, yet reflected Belgium's linguistic and national identity, which EU law is bound to respect in accordance with Articles 3(3) and Article 4(2) TEU. The requirement that all employment contracts be drafted in Dutch was embedded in a 1973 Flemish law that implements Article 129(1) of the Belgian Constitution according to which the French and Flemish Communities regulate the use of languages in a number of fields, including labour relations. The French Community had created a similar requirement for employment contracts, which, just as in the Flemish case, was sanctioned by the nullity of the contract. Despite Belgium's nature as a multilingual State, the existence of monolingual communities is well established and constitutionally protected.

From the perspective of EU law, the question was whether a regional law protecting linguistic identity, which in turn reflects the national identity of a Member

²³⁵ Case C-202 /11 *Anton Las v. PSA Antwerp NV* [2013] not yet published. For a comment, see Elke Cloots, 'Case C-202/11, *Anton Las v. Psa Antwerp NV*, Judgment of the Court of Justice (Grand Chamber) of 16 April 2013' (2014) 51 *Common Market Law Review* 623.

²³⁶ Article 4 of the Belgian Constitution divides Belgium into four language areas: the Dutch language area, the French language area, the bilingual (French and Dutch) language area of Brussels-Capital and the German language area.

²³⁷ Para 22 of the Judgment.

State, could be reconciled with the free movement imperative.²³⁸ The CJEU acknowledged that the different objectives enshrined in the Flemish law, including the protection of a national language but also the protection of employees and the effective supervision by national authorities were objectives recognized by EU law.²³⁹ The objective pursued was as such, justified, and accordingly capable of limiting the free movement of workers provided that the measures that are adopted were proportionate in nature.²⁴⁰ This entails that, just like Member States, subnational authorities can limit the free movement of workers in the EU to further autonomous objectives. Member States enjoy no special status by virtue of being masters of the Treaties in this respect. However, both infra-State bodies and States can only exercise their regulatory autonomies provided that they do so within the limits prescribed by EU law. National and subnational authorities are assimilated, in line with the Insider Model.

The Court indicated that EU law in principle accepts that the protection of a language common to merely part of a Member State can justify restrictions upon the fundamental freedoms.²⁴¹ This had previously merely been recognised with regard to languages spoken throughout an entire State.²⁴² In holding that an SNA can regulate to protect its linguistic identity, the Court confirmed that from the perspective of EU law, SNAs have the same regulatory capacity as Member States. Just as in *Omega*, an

²³⁸ For a closer examination of this dilemma, see Cloots (n 235).

²³⁹ Paras 24-28 of the Judgment.

²⁴⁰ Para 29 of the Judgment.

²⁴¹ Para 26 of the Judgment ('According to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States (see, to that effect, C-391/09 *Runevic- Vardyn and Wardyn* [2011] ECR I-3787).

²⁴² See by way of example *Runevic-Vardyn and Wardyn*, *ibid*.

expression of national identity, that is to say the Dutch language, not shared by the entire Member State, is found capable of justifying limitations upon the fundamental freedoms. The subnational measure is examined against the subnational framework, Dutch being the standard language in Flanders. SNAs are insiders, which enjoy the same regulatory freedom as Member States under EU law, underlining that the EU is polycentric in nature as composed by a variety of different scales of public authority. According to Advocate General Jääskinen, the

Protection of an official language, whether national or regional, is an objective of general interest which the Court has accepted as a legitimate justification for adopting a policy for the protection and promotion of a language.²⁴³

However, in order for such a subnational exercise of regulatory authority to be compatible with EU law, the measure taken must be ‘duly justified by legitimate objectives and by the use of means which are both appropriate and proportionate to their attainment.’²⁴⁴ This proportionality test applies equally to Member States and SNAs. In casu, the Flemish law was considered disproportionate to the aims it sought to achieve. As parties to cross-border employment do not necessarily have knowledge of Flemish, the Court concluded that the legal requirement that such contracts be concluded in Dutch may prevent workers from consenting to the contract in an informed manner.²⁴⁵ The Flemish law consequently went beyond what was strictly necessary to achieve its declared aim and was precluded by Article 45 TFEU.²⁴⁶ It follows that the compatibility of the regional measure with EU law was assessed having recourse to the same proportionality test as applied to Member State measures. Flanders is treated as if it were

²⁴³ Para 55 of the Opinion.

²⁴⁴ Para 23 of the Judgment.

²⁴⁵ Para 32 of the Judgment.

²⁴⁶ Paras 33-34 of the Judgment.

a Member State in this respect, allowing it to operate the same policy choices as a matter of EU law as Member States. *Anton Las* can thus be understood as an illustration of the Insider Model in EU law. The subsequent sub-section reveals that some cases that have arisen in the context of public order protection embody further manifestations of the Insider Model in EU law.

F. Subnational Public Order Measures and EU Law

This subsection brings us back to the protection of public order by an SNA, a topic already encountered in the analysis of *Omega*. More cases have emerged before the CJEU in which the latter had to pronounce on the compatibility between subnational public order measures and EU law. These cases are of obvious importance for local and regional authorities as many of them are competent to issue regulation with respect to their own internal public order. Furthermore, these cases offer an interesting insight into SNAs' insider status in EU law.

1. *Josemans* and SNAs as Allies of EU Objectives

Cities are often at the forefront of the regulation of the soft drug cannabis. A number of European cities triggered media attention in the past years when reframing their policies on the soft drug cannabis to oppose that prevailing at national level. For instance, when the new mayor of Kreuzberg, one of Berlin's districts took office in 2013, she announced

plans to open a coffee shop to address illegal drug-dealing in a near-by park.²⁴⁷ A number of Dutch cities have also reframed their cannabis policies in recent years, restricting access to the drug, whereas in the Netherlands a policy of tolerance prevails in this regard. This is the background to the *Josemans* judgment.²⁴⁸

Josemans depicts an interesting facet of the interaction between local and supranational policies. In contrast to the other cases examined in this chapter, the local exercise of autonomous regulatory competence inherent in *Josemans* was not considered to conflict with EU objectives but rather to contribute to the achievement of a supranational goal.²⁴⁹ The city emerges as an insider capable of promoting the EU objective as polycentricity facilitates the successful achievement of a EU policy. It has already been seen that subnational objectives are only weighed against supranational objectives if they are considered ‘legitimate’ from the perspective of EU law. In order for any subnational measure to be admitted to the stage where it is weighed against a EU goal, it must accordingly be seen to help achieve a supranational objective. *Josemans* however goes further in associating the subnational and supranational objectives, first because there is no finding that the local measure conflicts with EU law, and second because of the more explicit association between the local and the supranational objectives, making reference to Article 71(5) TFEU.

²⁴⁷ Lavinia Pitu for Deutsche Welle, ‘Cannabis cafes could set up shop in Berlin’ [2013] <http://www.dw.de/cannabis-cafes-could-set-up-shop-in-berlin/a-17089498>. (accessed 2 April 2015).

²⁴⁸ Case C-137/09 *Marc Michel Josemans v. Burgemeester van Maastricht* [2010] ECR I-13019. For a case comment, see Luke Haasbeek, ‘Soft Drugs under Scrutiny: How ‘Easy Going’ Is the Court?’ (2011) 38 *Legal Issues of Economic Integration* 389.

²⁴⁹ *Ibid.*

Josemans arose out of a local regulation on the sale of cannabis. The Dutch city of Maastricht had introduced a narcotics policy via municipal regulation that stood in opposition to the policy prevailing in the Netherlands at the time. Under a 1976 law²⁵⁰, the Netherlands operated a policy of tolerance regarding the sale and consumption of cannabis in coffee shops.²⁵¹ The municipal council of Maastricht had chosen to derogate from this policy in light of problems associated with drug tourism. Maastricht, which is situated in close proximity to Belgium and Germany, attracted many visitors from its neighbouring regions, who cannot lawfully buy and consume cannabis in their home State. Considering the number of foreign visitors to be excessive, the city decided in 2006 that coffee shops should solely admit and serve residents of the Netherlands excluding those residing elsewhere.²⁵²

The factual background of the case underlines that porosity also occurs on a domestic scale as after Maastricht's decision a number of policy changes took place in the Netherlands, which were triggered by Maastricht's initial stance. A number of other Dutch municipalities subsequently revised their own drug policy on the basis of the Maastricht model. Rotterdam had forced half of all coffee shops within its territory to close by 2009.²⁵³ The border towns of Roosendaal and Bergen op Zoom also drastically revised their drug policies.²⁵⁴ This in turn put the cannabis debate on the national

²⁵⁰ 1976 Law on opium (Opiumwet 1976) and para 15 of the judgment.

²⁵¹ Coffee shops are institutions in which consumers can buy and consume cannabis in the same manner as food and non-alcoholic beverages.

²⁵² Paras 18-19 and 57 of the judgment.

²⁵³ Molly Moore, The Washington Post, 'Changing Patterns in Social Fabric Test Netherlands' Liberal Identity (2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062202015_pf.html (accessed 2 April 2015).

²⁵⁴ ABC News, 'Dutch Towns Close Coffee Shops in 'Drug Tourists' Crackdown' (2008) <http://www.abc.net.au/news/2008-10-24/dutch-towns-close-coffee-shops-in-drug-tourists/180830>,

political agenda, culminating in a parliamentary debate.²⁵⁵ In 2011, the Dutch government announced that tourists would henceforth be banned from coffee shops ‘in order to tackle the nuisance and criminality associated with coffee shops and drug trafficking’.²⁵⁶ The Dutch judiciary subsequently validated these policy changes.²⁵⁷ While these evolutions are not directly related to *Josemans*, they illustrate that municipal action can trigger national policy changes through a performative process. The local idea of the necessity of revising the policy of tolerance creates discussion and political pressure, which ultimately triggers legal change at the national level.

Back to *Josemans*. Mr Josemans, the owner of a coffee shop in Maastricht, argued that the municipal measure restricted his freedom to provide goods and services to individuals residing in the neighbouring countries. This CJEU did not validate this argument. It rather considered that the freedom to provide services does not apply to coffee shops that sell the soft drug. The Court recalled that all Member States (ignoring the Netherlands’ more nuanced position) as well as various international agreements consider cannabis to be a dangerous narcotic.²⁵⁸ It further underlined that the combat of drug trafficking and addiction are EU objectives.²⁵⁹ In light of the very nature of cannabis, a coffee-shop proprietor cannot rely on the freedoms of movement or the

http://vorige.nrc.nl/international/Features/article2035693.ece/Selling_soft_drugs_is_not_a_right_even_in_the_Netherlands (accessed 2 April 2015).

²⁵⁵ NRC, More Pressure on Cannabis Coffee Shops (2008) http://vorige.nrc.nl/international/article2055680.ece/More_pressure_on_cannabis_coffee_shops (accessed 2 April 2015).

²⁵⁶ Sky News, Tourists Face Weed Ban in Dutch Coffee Shops (2011) <https://uk.news.yahoo.com/tourists-face-weed-ban-dutch-coffee-shops-023932774.html> (accessed 2 April 2015).

²⁵⁷ BBC News, Dutch Cannabis Café Owners Fight Changes (2012) <http://www.bbc.com/news/world-europe-17865663> (accessed 2 April 2015).

²⁵⁸ Paras 36-37 of the judgment.

²⁵⁹ Paras 3-11 of the judgment and paras 26-29 of the Opinion.

principle of non-discrimination ‘in so far as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings.’²⁶⁰ In itself, this finding was unsurprising in light of the CJEU’s earlier case law that had already established that trade in narcotics does not fall within the scope of EU law.²⁶¹ The merits of that statement, which denies that the lawful purchase of the soft drug in the Netherlands should be considered as trade from the perspective of EU law, is not discussed here. The Court then proceeded to evaluate whether the local measure was constitutive of discrimination on the basis of nationality. It is well established that, in principle, distinctions based on residence violate this principle of equal treatment.²⁶² Having established that drug trade does not fall within the ambit of EU law, the CJEU merely had to assess this question with regard to the marketing of non-alcoholic beverages and food in coffee shops.²⁶³

70% of all Maastricht coffee shop visitors are not resident in the Netherlands and there was no question that the local measure was directed at them.²⁶⁴ Under EU law, such restrictions can nonetheless be justified by legitimate interests.²⁶⁵ According to the Court, the municipal measure was ‘intended to put an end to the public nuisance caused by the large number of tourists wanting to purchase or consume cannabis’.²⁶⁶ Combatting drug tourism and the accompanying public nuisance ‘concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and

²⁶⁰ Para 42 of the Judgment.

²⁶¹ Case C-289/86 *Vereniging Happy Family Rustenburgerstraat* [1988] ECR 3655 and Case C-158/98 *Coffeeshop ‘Siberië’* [1999] ECR I-3971.

²⁶² Paras 58 and 59 of the Judgment.

²⁶³ Para 56 of the Judgment.

²⁶⁴ Para 63 of the Judgment.

²⁶⁵ Para 59 of the Judgment.

²⁶⁶ Para 63 of the Judgment.

also of the European Union.²⁶⁷ The CJEU found that in light of the EU and the Member States' commitment to combat drug tourism, these objectives constitute legitimate interests that justify restrictions upon obligations imposed under EU law.²⁶⁸ The protection of EU public order is accordingly carried out in a polycentric fashion, by the EU and the Member States, but also SNAs – the latter emerging as insiders of EU drug policy.

The local measure was found to be proportionate to the aim it pursued as refusing non-residents access to coffee shops 'constitutes a measure capable of substantially limiting drug tourism and, consequently, of reducing the problems it causes.'²⁶⁹ The protection of public order certainly amounted to a local concern of Maastricht as the consequences of cannabis consumption play out on its territory. Along the lines of *Omega*, the Court accepted that such concerns can justify limitations of fundamental principles recognised under EU law. Just as in *Aragonesa*, the Court recognised that subnational public health concerns can limit supranational economic objectives. According to the Court, Maastricht's measure however not only contributed to the protection of local public order but also to a supranational objective. According to Advocate General Bot, the measure supported the combat against 'drug tourism and the criminal activities which accompany it'.²⁷⁰ Maastricht's regulation, he argued further,

²⁶⁷ Para 65 of the Judgment.

²⁶⁸ Para 66 of the Judgment.

²⁶⁹ Para 75 of the Judgment.

²⁷⁰ Paras 6-8 of the Judgment.

expressed the municipality's 'duty to contribute to the maintenance of European public order' under Article 71(5) TFEU.²⁷¹

Pursuant to Article 71(5) TFEU, the protection of the European public order is a common enterprise of the Member States. This provision, the surface of public order protection in EU law, only makes reference to Member States and not the EU. This creates an impression of bi-centricity according to which SNAs would be outsiders. That impression is however mistaken as a look below the surface of Article 71(5) TFEU reveals that this provision applies equally to SNAs that collaborate directly with the EU to achieve public order objectives in the polycentric Union. In *Josemans*, the CJEU underlined that from the perspective of EU law, any subnational measure that contributes to the achievement of this aim is welcome, notwithstanding its relation to national policies. This underlines the direct relation between the EU and the municipality as well as the fact that, as they are immediate partners of the EU in pursuing European public order, SNAs are insiders.

Josemans constitutes an intriguing manifestation of porosity as the subnational and the EU measures connect, notwithstanding any opposing policy at Member State level. Some would contest such a reading. Nicola, for instance, has argued that in declaring Maastricht's policy to be in line with the supranational objective of combatting drugs, the Court 'transformed a contested local interest, namely the fight against drug tourism, into a European goal of preventing and eliminating the trafficking of drugs in the

²⁷¹ Para 8 of the Judgment.

Union.’²⁷² One may indeed wonder whether Maastricht really had these overarching goals in mind when formulating its policy. Its main aim doubtless consisted in the protection of its own – local – public order. The Court’s technique here is very similar to that observed in *Omega*. It connected the local public policy with wider, overarching, aims of the European legal order and presents the local action as a specific manifestation of that wider aim. Nicola further stresses that *Josemans* ‘intervened profoundly in state-local matters’ as it empowered Maastricht, as well as those cities with similar policies, at the expense of other cities, such as Amsterdam, which ‘embrace their history of tolerance towards soft drugs and which have profitable commercial activities deriving from drug tourism.’²⁷³ While Nicola’s point raises a number of wider issues, it does underline that a EU judicial decision may have an impact on domestic policy-definition – yet another manifestation of porosity and utterance of the Insider Model.

If we only look at the language – or surface – of *Josemans*, this dimension goes unnoticed. While at times the CJEU refers to the subnational nature of the measure, at others, it employs State-centric language, for instance in stating that ‘Member States cannot be denied the possibility of pursuing the objective of combating drug tourism and the accompanying public nuisance by the introduction of general rules which are easily managed and supervised by the national authorities.’²⁷⁴ It becomes obvious from the analysis of the Court’s case law this chapter undertakes that very often, the Court does not acknowledge the subnational origin of a norm and refers to it as that of the Member State. The oddity of that approach is particularly striking in the context of *Josemans* as

²⁷² Nicola (n 60) 1321.

²⁷³ Ibid 1321.

²⁷⁴ Para 82 of the Judgment.

the local norm was only adopted because of the existing, contrary, regulation at national level. This language – reflecting the Outsider Model – may be the reason why Nicola argued that in *Josemans*, ‘the court showed little deference to conflicting local interests.’²⁷⁵ She stresses that the CJEU confused the local with the national policy, leading to an ‘overreliance by the CJEU on a national mandatory interest: the fight against drug tourism’.²⁷⁶ Yet, she deplores, what the Court ‘confused for a statewide policy was in reality an open struggle among cities with conflicting agendas towards the sale of soft drugs.’²⁷⁷

I am not convinced that there was really confusion about the origin of the case. Contrary to other cases, such as *Omega*, the facts of *Josemans* leave no doubt about the norm’s subnational origin. Rather, the bi-centric language relied on by the Court underlines that any measure from within a Member State will be treated as that of the Member State, and evaluated pursuant to the same conditions. The fact that on a domestic scale the local measure stands in conflict with the national measure does not alter the CJEU’s approach of treating them that way. The fact that the local measure, allowed to stand under EU law, then contributed to a changed policy at national level in the Netherlands is but a manifestation of porosity and confirmation of the Insider Model, which can also be located in another public order case: *Digibet*.

²⁷⁵ Nicola (n 60) 319.

²⁷⁶ Ibid 1321.

²⁷⁷ Ibid 1321.

2. *Digibet* and Subnational Gambling Laws

Digibet presented some aspects similar to those in *Omega*.²⁷⁸ Strikingly however, in the 2014 case, which arose in the context of gambling regulation, the CJEU adopted an approach different from its chosen path in *Omega*. Gambling is a sensitive issue, on which different Member States have adopted diverging domestic regimes. This is possible as gambling regulation is not harmonised at supranational level, so that States retain a rather extensive degree of regulatory autonomy in this domain. As ‘significant moral, religious and cultural differences between the Member States’ persist and in the absence of harmonization, it is for each State to determine in accordance with its ‘own scale of values, what is required in order to ensure that the interests in question are protected’.²⁷⁹ In reality, not only Member States but also subnational authorities have regulatory competence with regard to gambling. Gambling regulation is accordingly polycentric in nature. As a result of different constitutional arrangements, gambling and games of chance are regulated in a centralised manner in some Member States, whereas in others SNAs are competent. In Germany, gambling is addressed by the different *Länder* and not at federal level, in accordance with the Basic Law.²⁸⁰ Gambling regulation in the EU is accordingly of a polycentric character.

In 2008 all sixteen German *Länder* adopted a Treaty on games of chance, which expired in 2011.²⁸¹ In 2012, a new Treaty entered into force and was ratified by fifteen *Länder*, with the exception of Schleswig-Holstein, which had decided to adopt its own

²⁷⁸ Case C-156/13 *Digibet Ltd Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG* [2014] not yet reported.

²⁷⁹ Para 24 of the Judgment.

²⁸⁰ In accordance with Articles 70 and 72 of the German Basic Law.

²⁸¹ Paras 4-5 of the Judgment.

legislative regime instead. This Schleswig-Holstein law liberalised the legal framework of gaming in establishing rules less restrictive than those foreseen by the Treaty.²⁸² One of the main differences between both sets of rules concerned advertising, which was in principle authorised under the regional law but not the Treaty.²⁸³ Although advertising remained conditional upon prior authorisation, it was granted to any citizen or legal person in the EU ‘if certain objective conditions were met’.²⁸⁴ In 2013, Schleswig Holstein discontinued the application of its law and ratified the Treaty. During the time period that the regional legislation was in force, the Land had issued a number of authorisations to offer games of chance online that remained valid for a transitional period after the repeal of its legislation.²⁸⁵ Litigation proceedings arose between the public lottery company of North Rhine-Westphalia and Digibet before domestic courts in the context of which the compatibility of the Treaty with the freedom to provide services was questioned.²⁸⁶

The *Digibet* case begged some pertinent questions regarding the relation between subnational gambling laws and the EU Treaties’ provisions on the freedom to provide services. Due to the nature of these questions the CJEU had to engage with some of the sensitive questions it had managed to evade in *Omega*. The reference for preliminary ruling in *Digibet* essentially enquired whether the fragmented nature of a Member State’s gambling regulation influences its compatibility with EU law. Under European law, gambling regulations must indeed be justified by legitimate public interest objectives.

²⁸² Paras 5-6 of the Judgment.

²⁸³ Para 7-9 of the Judgment.

²⁸⁴ Para 8 of the Judgment.

²⁸⁵ Para 10 of the Judgment.

²⁸⁶ Paras 11-14 of the Judgment.

The referring court suspected that if the public interest prevailing within a State genuinely mandates restrictive gambling legislation, then this public interest should arguably be perceived homogenously throughout the national territory. Despite the fact that no Advocate General opinion was deemed necessary, *Digibet* addresses a number of important questions regarding the relation between subnational regulatory autonomies and EU law.

First, *Digibet* raised the question of the framework that should be applied to the determination of the public interest criterion. The referring court enquired whether Schleswig Holstein's adoption of its own law had an impact on the public interest justification in the Treaty. The question to be answered was hence whether a public interest must be homogenously perceived within a State for it to be valid under EU law. The second point of interest in *Digibet* concerned the principle of national institutional autonomy. As the question referred to the Court directly and explicitly related to an aspect of domestic institutional organisation, the Court could not ignore the latter so that, despite its best efforts not to do so, it had to abandon the principle of national institutional autonomy. Third, *Digibet* raised the question whether regulatory fragmentation *between* Member States, which undoubtedly is tolerated as regards games of chance, and regulatory fragmentation *within* a Member State enjoy the same status under EU law. Fourth, *Digibet* is one of the few cases in which the Court has applied the first sentence of Article 4(2) TEU, and the only one in which this provision was applied concerning subnational autonomies.

The Framework of Analysis of the Public Interest Criterion

National legislation that restricts access to gambling can be justified under EU law by requirements in the public interest, such as the prevention of gambling addiction, consumer protection or the prevention of fraud and incitement to squander money on gambling.²⁸⁷ In *Digibet*, the order for reference explicitly raised the question whether the fact that domestic gambling regulation is heterogeneous within, rather than just between Member States, affects this finding. The German Federal Supreme Court recalled that under EU law, legislation that limits gambling must ‘achieve the legitimate objectives of public interest that it pursues’²⁸⁸ and wondered whether ‘the different legal position in one Land as compared with the others’ could result in an infringement of the freedom to provide services as ‘a ban on the facilitation and organisation of games of chance on-line would be without foundation.’²⁸⁹

If the public interest is assessed looking at the entire national territory, the consistency of the public interest argument must be questioned if a part of the national territory temporarily does not perceive this interest to exist. In *Omega*, the CJEU chose not to engage with this sensitive question in ignoring that Bonn’s interpretation of human dignity as applicable to lasergames was not that of all of Germany. As the referring court in *Digibet* explicitly put its finger on the consequences of such fragmentation from a EU law perspective, the CJEU could not evade the question this time around. The referring Court also noted that requiring that a public interest be felt homogeneously throughout the national territory would restrict subnational competences, as it would prevent them from

²⁸⁷ Para 23 of the Judgment.

²⁸⁸ Para 15 of the Judgment, citing Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, para 106.

²⁸⁹ Para 15 of the Judgment.

determining ‘whether it is appropriate to ban certain gaming activities’.²⁹⁰ The referring court warned that a different conclusion would severely limit the autonomy of its Länder.

The CJEU confirmed that the German Treaty constitutes a restriction on the freedom to provide services under Article 56 TFEU²⁹¹ but recalled that such restrictions can be justified under Articles 51 TFEU and 52 TFEU as well as under its own case law in the presence of overriding reasons in the public interest.²⁹² Restrictions ‘imposed by the Member States’ must however always comply with the principles of proportionality and non-discrimination.²⁹³ This is so because due to porosity, domestic gambling regimes may hinder their achievement of EU objectives. In referring to the ‘Member States’ at this stage of its analysis, the CJEU adhered to the principle of national institutional autonomy, which, as will be noted, is abandoned later on. The Court then went on to examine whether the proportionality of the Treaty is called into question by Schleswig Holstein’s temporary liberal law.²⁹⁴ Digibet argued that the temporary regulatory fragmentation clashed with *Carmen Media Group* where the CJEU had established that regional and federal authorities are jointly required to fulfil Germany’s obligation not to infringe Article 56 TFEU.²⁹⁵ As a consequence, SNAs and Member States are under a duty to coordinate the exercise of their respective competences.²⁹⁶ *Digibet* further recalled that ‘rules of national law, even of a constitutional order, cannot be allowed to

²⁹⁰ Cited at para 16 of the Judgment, referring to *Carmen Media Group* para 58.

²⁹¹ Para 20 of the Judgment.

²⁹² Para 22 of the Judgment.

²⁹³ Paras 25-26 of the Judgment.

²⁹⁴ Para 27 of the Judgment. (‘The referring court therefore wishes to know whether the proportionality and consistency of the restrictive legislation at issue in the main proceedings, seen as a whole, is called into question given the existence, for a limited period, of more liberal legislation only in the *Land* Schleswig-Holstein’).

²⁹⁵ Paras 69-70 of the Judgment.

²⁹⁶ Para 28 of the Judgment.

undermine the unity and effectiveness of EU law’.²⁹⁷

According to the CJEU ‘the particular nature of the gambling sector’ where the presence of harsh competition between the different operators might increase ‘consumers’ expenditure on gaming and the risks of their addiction.’²⁹⁸ The CJEU hence recognised that there is a public interest in restricting gambling. As Member States are free to organize themselves internally as they see fit,

the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State.²⁹⁹

Here, the principle of national institutional autonomy was upheld and prevented the CJEU from engaging in an analysis of whether the Schleswig Holstein law impacts on the compatibility of the German Treaty with EU law. Indeed according to the CJEU, a Member State may consider that ‘it is for the *Länder* rather than the Federal authorities to adopt certain legislative measures.’³⁰⁰ As regards the *delegation* of a competence, it is hence solely for the Member States to decide how they wish to organise themselves internally. This is no matter for EU law. This implies that while polycentricity is recognised, EU law does not rule on whether bi-centricity would in fact be a preferable paradigm.

In adopting the perspective of national institutional autonomy – a blindness as to how exactly competences are devolved on a domestic scale – the Court avoided having to

²⁹⁷ Para 29 of the Judgment.

²⁹⁸ Para 31 of the Judgment.

²⁹⁹ Para 33 of the Judgment.

³⁰⁰ Para 33 of the Judgment.

declare at which scale a public interest needs to exist for it to serve as a justification for a derogation under EU law. It appears however that the result of *Digibet* is the same as those encountered in cases such as *Omega* and *Josemans*.³⁰¹ As the CJEU did not enquire whether the public interest was homogenously perceived, those public interests not shared by an entire national territory are validated. Having held otherwise would have meant that SNAs could no longer exercise some of their competences. Under the CJEU's approach however, they can do so to the same degree as Member States. Accordingly EU law would equate any public interest perceived within a State to be that of the State. What we see play out in this regard is the Insider Model under which SNAs and Member States are assimilated.

The Abandonment of the Principle of National Institutional Autonomy

Thus far, the reasoning in *Digibet* reflects the principle of national institutional autonomy, which is firmly anchored in EU law, as the CJEU established that Member States are free to devolve legislative authority regarding gambling to SNAs. This, as such, is no matter for EU law. As a consequence, the Court's subsequent abandonment of the principle of national institutional autonomy is a surprise. After having stated that Member States can organise themselves internally as they see fit, the CJEU took the surprising step of reflecting upon the limited and localized application of the Schleswig Holstein law. It conceded that

even assuming that the existence of legislation of one *Land*, which is more liberal than that in force in the other *Länder*, might damage the consistency of the

³⁰¹ Even though no public interest question was at stake here, also cases such as *Horvath* can be interpreted along these lines.

legislation at issue as a whole, it must be observed that, in the circumstances of the case in the main proceedings, such damage to consistency was limited *ratione temporis* and *ratione loci* to a single *Land*. Therefore, it cannot be argued that the derogating legal situation in one *Land* seriously affects the appropriateness of the restrictions on games of chance applicable in all the other *Länder* to achieve the legitimate public interest objectives that they pursue.³⁰²

This amounts to a noticeable deviation from the principle of national institutional autonomy and the monolithic perception of statehood as the Court explicitly engaged with the fact that the regions, not the State were the regulating authority and accordingly constitute insiders in the polycentric EU. It is noticeable that the CJEU here addresses the exact issue it had successfully evaded in *Omega*. The deviation from these principles in *Digibet* did not alter the conclusion that the restriction on the freedom to provide services may be justified under EU law.³⁰³ Nonetheless it constitutes an interesting evolution, a step away from national institutional autonomy and monolithic conceptions of statehood by virtue of which EU law treats any exercise of public authority within a State as that of the State. The changed approach in *Digibet* raises a number of important questions. One may for instance wonder what the assessment would have been had the regulation not been of a temporarily limited nature. While it is customary in many areas for the German *Länder* to exercise their autonomous competences collectively, this is not so in other Member States. One may thus wonder about the Court's approach to a Member State in which all regions adopt different legal regimes, all based on a public interest criterion. Treating those differently from systems like Germany would stand in stark contrast to the principle of Member State equality, which is enshrined in Article 4(2) TEU. Further, the Court's approach in *Digibet* appears to contrast with that in *Azores*, which is examined in

³⁰² Para 39 of the Judgment.

³⁰³ Para 39 of the Judgment.

the next chapter. Under *Azores*, the determining criterion is whether the SNA is sufficiently autonomous in the eyes of EU law whereas under *Digibet* the relevant criterion seems to relate not to institutional arrangements but the effect of legislation. *Digibet* thus leaves many questions open, that could however soon be addressed as the European Commission announced that it would verify the legal situation of the German Treaty and possibly introduce a legal challenge against it in the future.³⁰⁴ Further clarification might hence come about swiftly. The CJEU's comments on the nature of the regional law might however have been but a side note, as its remaining reasoning in *Digibet* affirmed the principle of national institutional autonomy.

Fragmentation Within Member States is Tolerated to the Same Extent as Fragmentation Between Member States

The referring court had remarked that in sectors that are not harmonized, such as gambling,

the practical consequences of any inconsistencies caused by the differences between the *Länder* of a Federal State for the internal market should not be distinguished from any diverging laws which may exist between large and small Member States and which must be accepted in EU law.³⁰⁵

If EU law tolerates fragmentation, fragmentation within a Member State should not be treated differently from that between Member States, the argument goes. In line

³⁰⁴ Press Release of the European Gaming and Betting Association '*EuGH-Urteil im Digibet-Fall: Lösung für EU-rechstkongforme Glücksspielregulierung in Deutschland weiterhin offen*' (12 June 2014), available online under <http://www.presseportal.de/pm/65869/2759741/eugh-urteil-im-digibet-fall-loesung-fuer-eu-rechstkongforme-gluecksspielregulierung-in-deutschland>.

³⁰⁵ Para 17 of the Judgment.

with this stance, the CJEU should not enquire into the exact contours of a fragmented regime and proceed to different legal assessment depending on whether the dividing lines between regimes run between or within States. This view is echoed in the outcome of the reference for preliminary ruling, according to which the measure was held compatible with EU law as well as with some statements of the Court, such as its affirmation that Member States decide freely how to allocate competences internally³⁰⁶ and that this choice is protected under Article 4(2) TEU.³⁰⁷ This in turn confirms that where SNAs dispose of the corresponding competences under domestic law, EU law will treat their legislation as legislation of a Member State, assimilating both levels of public authority. Bracketing out the side-note about the effect of subnational fragmentation, *Digibet* can still be understood as a judgment that embodies the Insider Model. Similar cases also exist in the context of the CJEU's case law on public procurement law.

F. Subnational Autonomies and Public Procurement Law

European public procurement law regulates the purchasing of goods and services by public authorities within the Member States. It seeks to eliminate discrimination based on nationality regarding public work contracts, by opening calls for tender to any economic operator in the EU. The rationale behind these rules is to eliminate restrictions that exclude or limit the possibility for operators established in one Member State to participate as contractors or sub-contractors in contracts awarded by another Member

³⁰⁶ Para 33 of the Judgment.

³⁰⁷ Para 34 of the Judgment.

State, or legal persons governed by public law in this State.³⁰⁸ The purchasing of virtually all goods and services by public actors is subject to these rules.³⁰⁹ European public procurement regulation has become an important building block of the internal market enterprise and is mainly governed by what are commonly referred to as the two ‘Procurement Directives’, composed by the Directive on utilities and the Directive on supplies, services and public works.³¹⁰ Procurement matters for SNAs as it is a tool they need to rely on to give shape to their policies, but also just in the context of their own operation. This section examines two cases that have arisen with respect to public procurement: *Rüffert* and *Mobistar Belgium*, which expose another variant of SNAs’ insider status. Here, they are not perceived as insiders because the norms they create have an insider status as was observed in the cases examined thus far. Procurement indeed does not involve normative activity but rather SNAs’ capacity of self-government, which, as this section shows, is respected by EU law to the same degree as that of the Member States. Local and regional authorities are accordingly also to be considered insiders in the EU legal order by virtue of their right to self-government that is respected under EU law.

³⁰⁸ Peter Trepte, *Public Procurement in the EU: A Practitioner's Guide* (Oxford University Press 2007) 28.

³⁰⁹ With the notable exception of military equipment.

³¹⁰ See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 351/44 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134.

1. Rüffert and Social Standards in Public Procurement

Rüffert is mainly known for forming part of a series of cases that started with *Viking* and which have triggered the attention of EU and labour law scholars over recent years.³¹¹ *Rüffert* concerned legislation of the German Land Niedersachsen (Lower Saxony) that provided that public building contracts awards exceeding a certain financial threshold could only be awarded to contractors that respect that those employed on the contract touch at least the same level of pay as workers employed in the place where the contract was performed, Lower Saxony. This level of remuneration had been set out in a collective agreement as a so-called *Tarifstreueklausel* to prevent the undercutting of wages. In many of the other German Länder procurement legislation contained similar clauses.³¹² In 2003, following a public invitation to tender, Lower Saxony awarded a contract for the construction of a prison to a German company that subcontracted it to a Polish undertaking. The contract provided that the *Tarifstreueklausel* had to be respected. In violation of that clause, the Polish undertaking was employing workers hired in Poland to work on the construction and paid them less than half of what was required by the *Tarifstreueklausel*. As a consequence, both the German company and Lower Saxony terminated the contract. Before a regional court, *Rüffert* (the liquidator of the German undertaking) claimed that the requirement to comply with such collective agreements was in breach of the freedom to provide services. The CJEU had to decide whether Article 56

³¹¹ Case C-346/06 *Rüffert* [2008] ECR I-1989. See also Cases C-438/05 *Viking* [2007] ECR I-10779; C-341/05 *Laval* [2007] ECR I-11767. For a comprehensive analysis of the public procurement issues involved in *Rüffert*, see Christopher McCrudden, 'The Rüffert Case and Public Procurement' in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011), Claire Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights: As Good as It Gets?' (2011) EUI Working Paper, Law 2011/04.

³¹² See J. Steiff and T. Andre, 'Konsequenzen aus dem EuGH-Urteil zur Tarifstreue', (2008) 9 Neue Zeitschrift für Baurecht und Vergaberecht 364.

TFEU precludes ‘an authority of a Member State’ from adopting legislation that requires contracting authorities to designate as contractors only those that agree to respect the domestic level of wages.³¹³

Given the presence of posted workers on the contract, the Posted Workers Directive (PWD) was also applicable.³¹⁴ The PWD regulates the situation of workers that move across borders with their employers to carry out projects in a Member State other than the one in which they were hired. Article 3(1) PWD provides that, whatever the law applicable to the employment relationship, the undertaking posting workers to another Member State must ensure that those workers benefit from the host Member State’s conditions of employment that are laid down in law, regulations and administrative provisions, or collective agreements or arbitration awards that have been declared ‘universally applicable’. Article 8 of the PWD clarifies that collective agreements that have been declared universally applicable are those that must be observed by all undertakings in the geographical area and profession or industry concerned. In light of the factual circumstances, the interrogation emerged whether regional legislation could be considered universally applicable. Central to *Rüffert* was thus the determination of the framework relied on to determine whether a measure is universally applicable, and more precisely whether measures of a subnational authority can be found to be universally applicable despite applying only to part of the territory of a Member State.

³¹³ Para 17 of the Judgment.

³¹⁴ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1pp 431-436. Under EU law, workers who move cross-border with their employers to carry out projects are referred to as ‘posted workers’. This underlined that their base remains that of the state they come from (the home-state) and not the one where they are carrying out the project (the host-state). In such a scenario, there is a choice as to which employment standards should be applied to posted workers: those of the home-state, those of the host-state, or some combination of the two.

Advocate General Bot noted that most collective agreements in Germany have a limited territorial scope and that usually they are not declared universally applicable.³¹⁵ He considered that Article 3(7) PWD allows for enhanced protection provided by the regional legislation.³¹⁶ Regarding the freedom to provide services, Advocate General Bot remarked that a measure can be justified if it attempts, in a proportionate manner, to protect workers and prevent social dumping.³¹⁷ The Advocate General explicitly engaged with the subnational dimension, recognizing that Lower Saxony ‘does not have competence to declare a collective agreement to be universally applicable.’³¹⁸ The Land therefore ‘sought to give mandatory force in a field within its competence, namely public procurement, to the collective agreement applicable at the place where the services are performed’.³¹⁹ Lower Saxony was accordingly not incompetent to determine such matters under EU law but rather because domestic law prevented it from relying on the exemption available under supranational law, which as a matter of principle applies to any level of public authority. The Advocate General’s position reflects the Insider Model as he assumed that EU law does not distinguish between Member States and SNAs where SNAs exercise the competences that EU law leaves for the Member States. He went however further in diving into an analysis of domestic competence-division, seeking to understand Lower Saxony’s position.

The Court took a different approach. It found that since the regional standard was not universally applicable (without noting that SNAs are unable to declare such standards

³¹⁵ Paras 24-26 of Opinion of AG Bot of 20 September 2007 in Case C-346/06 *Rüffert* [2008] ECR I-1989.

³¹⁶ Para 94 of the Opinion.

³¹⁷ Para 119 of the Opinion.

³¹⁸ Para 129 of the Opinion.

³¹⁹ *Ibid.*

universally applicable as a matter of domestic, not EU, law) it was incompatible with the PWD as it applied solely to a specific part of the construction sector and a limited geographical area.³²⁰ According to Kilpatrick,

The collective agreement in question was not universally applicable, as the power to make collective agreements universally applicable is not available to *Länder*. Ominously for the division of powers between different levels of public authority, the Court found that where a Member State had the power to make collective agreements universally applicable, as in Germany, no collective standards other than those in universally applicable collective agreements could be applied.

In Germany, only the federal level is competent to declare collective agreements universally applicable. Consequently, any subnational legislation of a similar nature is incompatible with Article 56 TFEU as well as the PWD. This entails that the *Länder* can no longer regulate social and labour policy in this manner as a matter of EU law.³²¹ *Rüffert* is a somewhat puzzling case that may remind more of the Outsider Model than the Insider Model. It is however important to operate a nuanced assessment. The Directive does not provide that standards need to be uniformly applicable throughout the Member State. Rather Article 3(8) of the PWD refers to the ‘geographical area concerned’ not the Member State as the relevant framework of assessment regarding the ‘universally applicable’ criterion. This does consequently allow collective agreements concluded solely within a region to withstand scrutiny by EU law. It is only in the absence of such agreements that the PWD requires that Member States base themselves on collective agreements ‘which are generally applicable to all similar undertakings in the

³²⁰ Paras 27-29. See also Kilpatrick (n 311) 22.

³²¹ See further T. Blanke, ‘Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert – Domestizierung des Streikrechts und europaweite Nivellierung der industriellen Beziehungen’ (2008) 18 Oldenburger Studien zur Europäisierung und zur transnationalen Regulierung.

geographical area and in the profession or industry concerned’ or collective agreements concluded ‘at national level and which are applied throughout national territory.’³²² While the effect of *Rüffert* is that the regional measure could not stand this is the effect of the combined application of EU and national law rather than national law itself. EU law does not oppose that SNAs have an insider status in this domain. It rather leaves it to the Member States to determine whether their own SNAs should be insiders or outsiders, depending on whether they have the competence to declare collective agreements universally applicable. The EU Directive provides very narrow circumstances in which regions can regulate – and under German competence-division arrangements the Länder do not have such competences. The result certainly is that regions cannot regulate autonomously in these precise circumstances but this cannot be said to stem from an opposition to subnational powers under the PWD. If domestic law confers upon the SNA the competence in question, EU law will respect this domestically enshrined right to self-government to the same extent as the right to self-government of the Member States is respected. The latter enjoy no special treatment due to their capacity as masters of the Treaties in the context of procurement law, again confirming that *Rüffert* is an Insider Model decision. The same conclusion must be reached regarding *Coditel Brabant*.

2. *Coditel Brabant* and Municipal Television Networks

Coditel Brabant concerned the application of EU public procurement law to municipal television networks.³²³ The dispute involved the private company Coditel Brabant, the

³²² Article 8 of the PWD, emphasis added.

³²³ Case C-324/07 *Coditel Brabant* [2008] ECR I-8457.

municipality of Uccle, the Belgian region of Brussels-Capital and an inter-municipal cooperative in charge of managing municipal television networks. In accordance with Belgian law, inter-municipal cooperatives may form associations with specific objects in the municipal interest, which do not have a commercial character. Between 1969 and 1999 the municipality of Uccle had authorized Coditel Brabant to operate a cable television network in its territory. In 1999 the municipality however decided to purchase the network itself. In order to operate the network, it launched a call for tenders to find a concessionaire. Four companies, including Coditel, submitted tenders. Uccle however subsequently decided against the award of the concession and was determined to sell it instead. In the context of a new call for tenders, five operators, including Coditel Brabant, submitted purchase bids. Brutélé, an inter-municipal cooperative society also submitted an offer of affiliation as an associated member instead of a purchase bid. Uccle considered that four of the five bids were inadmissible and that Coditel's bid was too low. It consequently decided to become a member of Brutélé, entrusting the latter with the management of the cable television network. These decisions were all expressions of Uccle's prerogative of self-government (rather than its norm-generating capacity), its right of autonomous administration, which entails the capacity to make independent decisions regarding its own organization and functioning. In *Coditel Brabant* the CJEU had to decide whether this capacity should be limited through the application of the EU public procurement rules.

After Uccle's decision to join the cooperative society, Coditel brought a legal action challenging the decision, taking issue in particular with the failure of the

municipality to compare the advantages of the inter-municipal network with its own offer. This, Coditel claimed, infringed the principle of non-discrimination as well as the obligation of transparency under EU law.³²⁴ The referring court took the view that Uccle's affiliation to the cooperative constituted a public service concession rather than a public service contract. The consequence of this finding would be that the EU public procurement directives did not apply. However, the CJEU had established in *Telaustria and Telefonadress* that the principle of non-discrimination on grounds of nationality implies an obligation of transparency also regarding public service concessions.³²⁵ This would have resulted in an obligation on behalf Uccle to examine whether the award of the concession to economic operators other than Brutélé would have been a more attractive course of action. It is in this context that the Belgian Conseil d'Etat asked the CJEU whether these requirements should be set aside as a consequence of the *Teckal* judgment. In *Teckal*, the CJEU had indeed found that such requirements do not apply where the concession-granting public authority exercises control over the concessionaire and where the concessionaire carries out the essential part of its activities in that authority (the so-called 'in house exception').³²⁶

The CJEU accordingly needed to determine whether a municipality's affiliation to an inter-municipal cooperative constitutes a concession, governed by EU procurement law, or whether it amounts to a situation that can be equated with in-house performance and is therefore exempt from the EU public procurement imperatives. It qualified Uccle's membership of the cooperative as a public service concession, which did not fall within

³²⁴ Para 19 of the Judgment.

³²⁵ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

³²⁶ Case C-107/98 *Teckal* [1999] ECR I-8121.

the scope of the EU public procurement directives.³²⁷ The Court nonetheless specified that this qualification did not relieve national authorities from complying with Treaty obligations, such as the respect for equal treatment and non-discrimination on grounds of nationality as well as the concomitant obligation of transparency.³²⁸ According to the CJEU, it follows from *Telaustria and Telefonadress* that while there might not necessarily be an obligation to invite tenders, the obligation of transparency requires the concession-granting authority to ensure ‘a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed’.³²⁹ However, if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities, then the concession partly escapes the application of these principles.³³⁰ This was found to be the case regarding the control Uccle held over Brut  l  .³³¹ The public procurement rules accordingly did not apply to the Belgian municipality so that its decision to join the cooperative was not precluded by EU law. It could consequently exercise its right to self-government without any interference from EU law.

The Advocate General was explicit about the consequences that a different finding would have had for the municipality. Her opinion contained an entire section on

³²⁷ Paras 24-25 of the Judgment.

³²⁸ Para 25 of the Judgment.

³²⁹ Para 25 of the Judgment.

³³⁰ Para 26 of the Judgment.

³³¹ Paras 27-50 of the Judgment.

the ‘value of inter-municipal cooperation’.³³² This illustrates EU law’s appreciation of the benefits flowing from cooperation between different actors in the polycentric EU legal space and the resulting experimentation and adaptation benefits that are rendered possible through porosity. The Advocate General recalled that while public procurement is ‘one of the most influential policy instruments of the Member States and institutions of the EU in the process of European integration’, it should not be used ‘indiscriminately; rather its purpose must be brought into harmony with the values of other policy areas.’³³³ The benefits of EU public procurement law must thus be balanced against other elements EU law considers to be of benefit, such as, in the opinion of the Advocate General, public procurement law. Were such agreements to be subject to EU public procurement law, ‘then inter-municipal cooperation would in future be rendered virtually impossible. For it is an important feature of genuine cooperation that decisions are made as equals and that one of the partners in the cooperative does not dominate.’³³⁴

The *Teckal* criterion, the Advocate General went on to state, should not be construed so narrowly to attach disproportionate weight to competition law objectives at the same time as interfering too much with the municipalities’ right to self-government and with it in the competences of the Member States.³³⁵ This right to municipal self-government, the Advocate General argued, is reflected by the laws of the Member States but also in the European Charter on Local Self-Government from the Council of Europe, which was signed by all Member States and ratified by most of them. Further, she drew

³³² Paras 80-87 of the Opinion.

³³³ Para 81 of the Opinion.

³³⁴ Para 82 of the Opinion.

³³⁵ Para 84 of the Opinion.

attention to the existence of the Committee of the Regions, arguing that its existence entailed ‘a certain recognition of self-government alongside the possibility of providing institutionalised machinery for bringing to bear regional and municipal perspectives.’³³⁶ Finally, she claimed that the Treaty of Lisbon, which had not yet entered into force ‘stresses the role of regional and local self-government for the relevant national identity to which heed is to be paid.’³³⁷ This led the Advocate General to conclude that

Municipalities have themselves to decide whether they wish to carry out their general-interest tasks with their own administrative, technical and other means, without being compelled to have recourse to external establishments that do not form part of their own departments, or whether they wish to carry them out with the assistance of an establishment legally distinct from them in their capacity as public entity awarding the contract or concession.³³⁸

Coditel Brabant affirms SNAs’ right to self-government, which includes the right freely to determine the manner in which a public authority wishes to provide public goods and services to its inhabitants. This right must certainly be balanced against EU objectives, such as public procurement law. The same is true for Member States. The explicit acknowledgement of subnational authorities’ right to self-government however makes clear that infra-State bodies have the same right as Member States to self-government, as a result of which both levels figure as insiders of EU law. While *Coditel Brabant* does not concern subnational norms but rather SNAs’ right to self-government it still amounts to an expression of the Insider Model in EU law. The next chapter will examine the probably best known cases about SNAs in EU law, which at the same time

³³⁶ Para 85 of the Opinion.

³³⁷ Para 85.

³³⁸ Para 86.

might be the most difficult to understand for the subnational dimension is dealt with in a different manner from the cases examined up until this stage.

Conclusion

This chapter has unveiled that some areas of EU law do not correspond to the dynamics observed in the last chapter, which have been regrouped under the Outsider Model. Rather, a number of domains of EU law are governed by polycentricity and porosity rather than bi-centricity. In these domains, SNAs and Member States are assimilated to each other and the Member States do not benefit from a special status as a consequence of their capacity as masters of the Treaties. The Insider Model, which has already been introduced in the introductory chapter, captures these features. After the preceding chapter has outlined the manifestation of the Outsider Model in EU law, this chapter has illustrated that other areas are shaped in accordance with the Insider Model. This establishes that both models coexist in EU law, underscoring that no generalised statements regarding the relation between SNAs and EU law can be made. It is however striking that some differences between those areas in which the Insider Model operates and those areas in which the Outsider Model operates can be identified. The Outsider Model appears to apply to what I refer to 'EU law on the surface' that is to say the Treaty provisions and the case law that has developed in close attachment to them. The Insider Model on the other hand appears to rather govern those areas of EU law the details of which are less visible by looking at the surface. While internal market law is

strongly anchored in the Treaties, a wide body of case law and secondary legislation that seems to depart from the Outsider Model has become attached to it.

Chapter Six

SNAs as Insiders of EU Law: State Aid, Article 4(3) TEU and Soft Law

This chapter sets out where the last chapter left off. It examines other areas of EU law that are in line with the Insider Model. Three areas are considered. First, EU State aid law, second the duty of loyal cooperation as enshrined in Article 4(3) TEU and third a number of soft law instruments of the European Commission that deal with the internal market. The reason why the material in this chapter and the material covered in the last chapter are broken up into two different chapters is purely of an organisational nature as covering them in a single chapter would have made that chapter too long. Whereas the previous chapter focused exclusively on judgments of the Court of Justice that contain a subnational dimension, the choice of the three areas covered here might appear a bit more ad hoc. While the three areas relate to different domains of EU law with different rationales, covering them at this stage helps to illustrate that the Insider Model plays out in very different domains of EU law.

I) EU State Aid Law

The judgments on State aid examined here are those CJEU cases the subnational dimension of which has been documented most extensively.³³⁹ EU State aid law is an

³³⁹ For comments on these cases, see inter alia: Saturnina Moreno González, 'Regional Fiscal Autonomy from a State Aid Perspective: The ECJ's Judgment in Portugal v. Commission' (2007) 47 *European Taxation*, Andrea Biondi, 'The Rationale of State aid Control: A Return to Orthodoxy' (2010) 12

important area for subnational authorities to consider when they make policy choices, for the risk of being caught by the provisions on State aid law.³⁴⁰ This fact is of no small detail as fiscal decentralisation is increasingly common in Europe, notably in the otherwise ‘centralised’ countries of Central and Eastern Europe.³⁴¹ Despite the importance of this domain for subnational autonomies, uncertainty prevailed for a long time as to how State aid law was to be applied to SNAs, in particular those in Member States with an asymmetric devolutionary structure. This changed in 2006 when the Grand Chamber decided *Azores*.³⁴² In doing so, it established that if an SNA is sufficiently autonomous, then this status of autonomy is to be taken into account by EU law to determine whether the measure amounts to State aid.³⁴³ To this date, *Azores* remains the Court’s most explicit engagement with subnational autonomies and was even interpreted as ‘the most important legal development of the regional question up to that point by any of the EU institutions.’³⁴⁴ It will however be seen that the Court in fact went less far here in recognising subnational autonomies compared to other areas of its case law. In State aid law, it appears that SNAs have a status that reflects features of the Insider Model and the Outsider Model at the same time. The reluctance to recognise SNAs as fully-fledged

Cambridge Yearbook of European Legal Studies, Koen Lenaerts and Nathan Cambien, ‘Regions and the European Courts: Giving Shape to the Regional Dimension of Member States’ (2010) 35 *European Law Review* 609, Andreas Bartosch, ‘With Greetings from the Azores’ (2006) *European State Aid Law Quarterly* 667, Julie Bousin and Jorge Piernas, ‘Developments in the Notion of Selectivity’ (2008) *European State Aid Law Quarterly* 634.

³⁴⁰ For an example, see Peter-Christian Müller-Graff, ‘The German Länder: Involvement in EC/EU Law and Policy-Making’ (n 131) 107 (‘[t]he control of state aids in the case of local public banks (*Sparkassen*) may cause conflicts with competences in local government law.’) (emphasis in original).

³⁴¹ Linze Schaap Casper Geurtz Laurens de Graaf and Niels Karsten *Innovations in Sub-National Government in Europe. A quick Scan.* (http://www.rob-rfv.nl/documenten/migratie/innovations_in_subnational_government_in_europe.pdf October 2009) 15-16.

³⁴² Case C-88/03 *Portugal v Commission* [2006] ECR I-7115. For a comment, see Kingston (n 65), Jan Winter, ‘Case C-88/03 Portuguese Republic v. Commission’ (2008) 45 *Common Market Law Review* 183, González (n 339).

³⁴³ *Ibid.*

³⁴⁴ Joxerramon Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’ in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 239.

insiders, it will be argued, is due to the fact that State aid law amounts to one of the few exclusive competences of the EU.

A brief excursion into the law on State aids is necessary in order to grasp the impact of *Azores*. Article 107(1) TFEU sets out a general prohibition for Member States to allocate State aid. In order for State intervention to constitute aid, it (i) must be granted by the State or through State resources³⁴⁵, (ii) confer an advantage on the recipient³⁴⁶, (iii) be selective in nature³⁴⁷, (iv) and have an effect on intra-Union trade and distort competition within the internal market.³⁴⁸ This prohibition seeks to prevent Member States from providing financial assistance to economic operators so as to further domestic policy objectives. Selectivity plays on many levels. A measure can be selective in favouring a certain sector, certain goods, but also by virtue of its geographic dimension.³⁴⁹ For a long time it was uncertain how the criterion of geographic selectivity should be applied to regional tax schemes that are by definition geographically selective as they solely apply to a regional, as opposed to national, territory. Before *Azores*, the Court had never explicitly considered the question of the circumstances in which regionally specific tax measures are selective. This was in part due to the relative absence of asymmetrically devolved taxation schemes in the various Member States.³⁵⁰ In fact, in those Member States with symmetrical fiscal decentralisation, such as Germany for instance, there is no national tax rate, in comparison to which the regional tax rate can be

³⁴⁵ This criteria means that the measure must be imputable to the State. On this see by way of example Case C-482/99 *France v Commission* ('*Stardust Marine*') [2002] ECR I-4397 para 51.

³⁴⁶ Opinion of Advocate General Jacobs in Case C-256/97 *DMT* [1999] ECR I-1627, para 29.

³⁴⁷ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

³⁴⁸ Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, para 55.

³⁴⁹ Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, para 38.

³⁵⁰ Kingston (n 65) 252. See also para 43 of the Opinion.

considered selective. In these circumstances a subnational measure is not per se geographically selective, simply for the lack of a reference framework to determine selectivity. This is different in those Member States, such as Portugal, where there is a national tax rate, but some regions, such as the Azores islands, have competence to set independent rates.

The Court had only ruled a few times on the relation between the selectivity criterion and SNAs before 2006. In 1987, it had affirmed in *Germany v. Commission* that aid granted by the Land North Rhine-Westphalia constituted ‘aid granted by the Member State or through State resources’ under Article 107(1) TFEU, provided that ‘the conditions laid down in that provision are satisfied.’³⁵¹ This was later confirmed in a case concerning Wallonia.³⁵² Whereas these cases were not concerned with selectivity, they are interesting as regional measures are considered to be those of the State. This, as will be seen throughout this chapter, constitutes a key characteristic of the CJEU’s case law involving SNAs. In *Territorio Histórica de Álava*, the General Court had moreover held that regional measures fall within the ambit of Article 107(1) TFEU ‘in the same way as measures taken by the federal or central authority.’³⁵³ The Court thus associated a subnational measure with that of a Member State. The Court’s early case law on State aid and SNAs clearly denotes a desire to capture subnational policies under the State aid provisions to prevent that, solely that by virtue of a measure being initiated by an SNA rather than a Member State, they can bring distortion into the internal market.

³⁵¹ Case C-248/84 *Germany v Commission* [1987] ECR 4013, para 17.

³⁵² Joined Cases 62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECR 1573.

³⁵³ Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórica de Álava – Disputación Foral de Álava and Others v. Commission* [2002] ECR II-1275.

In 2000 the Court was faced with a dispute that concerned the same legal question as that which later emerged under *Azores*. In *Juntas Generales de Guipúzcoa*, the compatibility of provincial legislation adopted by three Territories belonging to the Spanish Autonomous Community of the Basque Country was at stake.³⁵⁴ Advocate General Saggio took the view that devolution did not constitute ‘any specificity’ of these Territories.³⁵⁵ He recalled that such measures bring about an advantage, ‘which companies intending to carry out similar economic operations in other areas in the same State cannot enjoy.’³⁵⁶ The Advocate General concluded that

The fact that the measures at issue were adopted by regional authorities with exclusive competence under national law is, as observed by the Commission, merely a matter of form, which is not sufficient to justify the preferential treatment reserved to companies which fall within the scope of the provincial laws. If this were not the case, the State could easily avoid the application, in part of its own territory, of provisions of Community law on State aid simply by making changes to the internal allocation of competence on certain matters, thus raising the 'general' nature, for that territory, of the measure in question.³⁵⁷

The CJEU never had to rule on *Juntas Generales de Guipúzcoa* as the reference for preliminary ruling was withdrawn before it had an opportunity to do so. In the decades prior to *Azores*, the Commission’s practice reflected Advocate General Saggio’s concern for the efficiency of State aid law. When assessing the selectivity of a subnational measure, the Commission used the national level as a benchmark, but only if

³⁵⁴ Joined Cases C-400/97, C-401/97 and C-402/97 *Juntas Generales de Guipúzcoa and Diputación Foral de Guipúzcoa* [2000] ECR I-1073.

³⁵⁵ Para 38 of the Opinion. This statement has been describes as ‘cynical’ by Kingston (n 65) 253.

³⁵⁶ Para 35 of the Opinion.

³⁵⁷ Para 37 of the Opinion.

there was one: that is to say solely in instances of asymmetrical devolution.³⁵⁸ Alongside Advocate General Saggio, the Commission considered that a measure's subnational dimension should merely be considered a matter of form.³⁵⁹ As a consequence, the Commission continued to declare the fiscal policies of the Basque Country to be incompatible with the EU State aid rules because of their geographical selectivity.³⁶⁰ The Commission's practice with regard to subnational fiscal measures had established that advantages only available to operators in a limited geographical area of a Member State were automatically selective and hence contrary to EU law.³⁶¹ Over a long period, a conflict between a subnational norm and the EU State aid regime automatically signified the end of the subnational measure. As a consequence, in systems of asymmetrical devolution, the fiscal competences SNAs had on a domestic scale were rendered meaningless by virtue of the application of the EU State aid rules.³⁶² This practice, taking the national territory as the relevant framework of analysis, severely limited any fiscal competences SNAs had according to domestic arrangements.

The Union's highest court had however never validated the Commission's interpretation of regional selectivity. When it finally had the opportunity to pronounce on the matter in *Azores*, it established that a tax regime implemented on a regional scale is not per se selective. Rather, if an SNA is sufficiently autonomous, selectivity should be

³⁵⁸ This was supported by both case law of the Court (see for example Case C-73/03 *Spain v Commission* [2004] (unreported), para 28) and soft law of the Commission such as the Commission notice on the application of the state aid rules to measures relating to direct business taxation [1998] OJ C 384 (para 17).

³⁵⁹ This position has found support in academic writing, see Biondi (n 339) 50.

³⁶⁰ See for example Decision 93/337, OJ L134/25, 1993, Decision 2000/795, OJ L318/36 or Decision 99/718, OJ L292/1 (1999).

³⁶¹ See also Case 248/84 *Commission v Germany* [1987] ECR I-4013.

³⁶² Para 60 of the Opinion.

assessed against a regional rather than a national background. The relevant framework of analysis was accordingly no longer the national but the regional scale. The Court argued:

It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.³⁶³

This paragraph expresses a strong rebuttal of the regional blindness theory. The Court explicitly acknowledged that the measure at issue was adopted by an SNA and evaluated the consequences of that fact. *Azores* clearly recognised that SNAs, rather than Member States, may have competence to determine tax rates under domestic provisions, recognising their norm-generating capacity in line with the Insider Model. Strikingly, however, for a subnational regulatory autonomy to be recognised under EU law, the contours of its autonomy under domestic arrangements are not decisive, deviating from instances of the Insider Model examined in the previous chapter. This scepticism towards domestic constitutional structures is puzzling and stands in conflict with both the doctrine of national institutional autonomy and the Court's stance in other areas of internal market law. This is not the straightforward assimilation between Member State and subnational norms that we observe under the Insider Model. To the contrary, and out of a concern that Member States may modify their internal structures to avoid the application of the EU State aid regime, the Court developed its own test to determine whether an SNA should

³⁶³ Para 58 of the Judgment.

be recognised as an independent generator of norms for the purposes of the EU State aid law regime. This reflects the importance of the effectiveness of State aid law, a common concern in this area of EU law. A number of conditions, referred to as the ‘sufficiently autonomous test’ must be fulfilled in this regard. In order to establish whether an SNA is sufficiently autonomous EU law takes into account three factors, being the: (i) institutional; (ii) procedural; and (iii) economic/financial autonomy of the SNA.³⁶⁴

The ‘Sufficiently Autonomous’ Test

The first criterion, ‘institutional autonomy’, refers to an SNA’s capacity to formulate its own fiscal policies independently of the central State. *Azores* established that this criterion requires that the political and administrative status of a region be constitutionally separate from that of the Member State.³⁶⁵ The subsequent ruling in *UGT-Rioja*,³⁶⁶ which is looked at in further detail below, confirmed this test and established that the Basque Country is institutionally autonomous from Spain.

The second criterion is ‘procedural autonomy’,³⁶⁷ which mandates that the central government must not influence the content of regional policies. No autonomy can be established if the SNA must obtain prior authorization from the central authority to pursue a given policy choice.³⁶⁸ *Unión General de Trabajadores de la Rioja* clarified that

³⁶⁴ Whereas the AG referred to ‘true autonomy’ in this respect, the CJEU, at paras 64-66 of its judgment, favoured the terminology of ‘sufficiently’ autonomous.

³⁶⁵ Para 67 of the Judgment.

³⁶⁶ Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja* [2008] ECR I-06747.

³⁶⁷ Para 47 of the Judgment.

³⁶⁸ Para 67 of the Judgment.

the SNA should be under no obligation to take into account the interests of the national State when formulating its own policies.³⁶⁹ This criterion serves to establish that there is a genuine delegation of fiscal competences and that the regional policy was adopted ‘without the central government being able to directly intervene as regards its content’.³⁷⁰

The final criterion relates to the ‘economic’ or ‘financial autonomy’ of the SNA. This appears to be the most difficult criterion to satisfy. The SNA must illustrate that it bears, at least to some extent, the financial responsibility for its fiscal policies. The financial consequences of a reduction of the national tax rate must not be offset by financial transfers from other SNAs or the central State. Economic independence presupposes that ‘the infra-State body (...) assumes the political and financial consequences of such a measure.’³⁷¹ The Azores islands were found not to be sufficiently autonomous under this criterion of the test.

Subsequent Case Law

The Azores test has been subsequently confirmed and refined. *Unión General de Trabajadores de la Rioja*, for instance, concerned fiscal legislation passed by some of the Basque Country’s Autonomous Territories that applied a lower corporation tax and a more favourable regime of tax deductions than elsewhere in Spain. The domestic court referred a question on the applicability of the *Azores* test to the CJEU. The Luxembourg court reiterated that ‘the reference framework need not necessarily be defined within the

³⁶⁹ Paras 85-97 of the Opinion.

³⁷⁰ Para 67 of the Judgment.

³⁷¹ Paras 67-68 of the Judgment.

limits of the Member State concerned, so that a measure conferring an advantage in only one part of the national territory is not selective on that ground alone'.³⁷² Consequently, an SNA may be sufficiently autonomous for the subnational territory to serve as the framework of analysis to determine the existence of State aid. The goal of the sufficiently autonomous test, the Court specified, is to ascertain whether the SNA 'plays a fundamental role in the definition of the political and economic environment in which the undertakings operate.'³⁷³ The difficulty in this case resided in the fact that it was unclear which infra-State body was to be taken into consideration to determine selectivity.³⁷⁴

The Autonomous Community of the Basque Country is made up of three provinces Álava, Vizcaya and Guipúzcoa. The boundaries of these provinces coincide with those of the historical territories, 'bodies which enjoy rights of ancient origin called 'fueros', entitling them to levy and collect tax'.³⁷⁵ The Historical Territories are however solely competent for matters of taxation, while the Autonomous Community has competence in other matters of an economic nature.³⁷⁶ This, the Court found, precluded the Historical Territories from being considered 'sufficiently autonomous' as they did not 'assume responsibility for the political and financial consequences of a tax reduction measure' due to their lack of competence over budgetary matters, that is to say revenue and expenditure.³⁷⁷ However, the Court went on to state, the sharing of competence between the Historical Territories and the Autonomous Community 'necessitates close

³⁷² Paras 46-48 and 50 of the Judgment.

³⁷³ Para 55 of the Judgment.

³⁷⁴ Para 65 of the Judgment.

³⁷⁵ Para 66 of the Judgment.

³⁷⁶ Paras 66-67 of the Judgment.

³⁷⁷ Para 67 of the Judgment.

collaboration between the different bodies.³⁷⁸ As such reference should be made to both communities to determine whether ‘the infra-State body made up of those Historical Territories and that Community enjoys sufficient autonomy to constitute the reference framework in the light of which the selectivity of a measure adopted by one of those Historical Territories should be assessed.’³⁷⁹ This finding is important as a different conclusion would have made it by definition impossible for a body competent to levy taxes to do so as its autonomy would not have been recognized under EU law. The CJEU noted that it is for the referring court to determine the outcome of the application of the ‘sufficiently autonomous’ test to domestic institutional arrangements.

The institutional autonomy of the Basque institutions was not particularly contentious. Regarding procedural autonomy, the Court seemed to adopt the view that as long as the central State cannot veto a subnational tax measure, this criterion is fulfilled.³⁸⁰ Finally, with regard to economic and financial autonomy, the Court restated that this requirement is met when the ‘financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.’³⁸¹ Holding that the mere existence of financial transfers between the SNA and the Member State is insufficient to negate the requirement of economic autonomy, the Court, however recalling that it is for the national judge to interpret national law, seemed to consider that the Basque measure was not geographically selective. Advocate General Kokott’s opinion considered that

³⁷⁸ Para 70 of the Judgment.

³⁷⁹ Para 75 of the Judgment.

³⁸⁰ Para 109 of the Judgment.

³⁸¹ Para 123 of the Judgment.

The main innovation of the *Azores* judgment is that the Court did not consider that the Member State as a whole had to be the reference framework. Instead, it also considered it possible that for tax rules adopted by a local or regional authority its territory alone forms the reference framework if that authority is sufficiently autonomous.³⁸²

This is of interest as, as earlier chapters already illustrated, it is common for the Court to take the subnational as the relevant reference framework in examining the compatibility of subnational and supranational regulation. This is a feature that can be observed in those cases that symbolize the Insider Model. Taking the regional scale as the relevant framework of analysis, she continued to argue, it flows from the fact that the EU ‘must respect the national identities of its Member States.’³⁸³ In this spirit, the EU cannot ‘encroach on the constitutional order of a Member State’ including its decentralized structure and division of competences.³⁸⁴ This, she stated, must be reconciled with the established rule that Member States ‘cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State’ to justify a failure to comply with EU law.³⁸⁵ According to Advocate General Kokott, *Azores* strikes a ‘reasonable balance’ between these two concerns.³⁸⁶ Vilaca has noted that the test applied in *Unión General de Trabajadores de la Rioja* is somewhat less strict than that defined by the Court in *Azores*, which may be due to the application of different standards of judicial review. While the latter concerned

³⁸² Para 43 of the Opinion.

³⁸³ Para 54 of the Opinion.

³⁸⁴ Para 54 of the Opinion.

³⁸⁵ Para 55 of the Opinion.

³⁸⁶ Para 56 of the Opinion.

a reference for preliminary ruling the former was a direct action for annulment of a Commission decision.³⁸⁷

Azores has in the meantime also been applied in *Regione Sardegna*, which has already been examined for its implications for the law on the freedom to provide services above, and *Gibraltar*.³⁸⁸ *Gibraltar* concerned a reform of corporate taxation that had been adopted by Gibraltar, a British overseas territory. According to Article 355(3) TFEU, the EU Treaties apply to Gibraltar. The initial decision by the General Court was appealed to the CJEU, which needed to determine whether a territory within the meaning of Article 355(3) TFEU that does not ‘form part of the territory of a Member State’ can be used as a reference framework for the application of Article 106 TFEU.³⁸⁹ The question accordingly was whether it should be considered ‘that the United Kingdom and Gibraltar formed a unit, or whether it should be accepted that Gibraltar was the appropriate reference framework.’³⁹⁰ The Commission had maintained that Gibraltar’s measure was regionally selective ‘since it provides for a system of corporate taxation under which companies in Gibraltar are taxed, in general, at a lower rate than those in the United Kingdom’.³⁹¹ The measure was eventually declared incompatible with Article 106(1) TFEU on grounds of material selectivity. The General Court’s conclusion, that the

³⁸⁷ José Luís da Cruz Vilaca, ‘Material and Geographic Selectivity in State Aid - Recent Developments’ (2009) *European State Aid Law Quarterly*, 450.

³⁸⁸ Case T-211/04 *Government of Gibraltar v. Commission* [2008] ECR II-3745, Joined Cases C-106/09 P and C-107/09 P, *European Commission, Kingdom of Spain v. Government of Gibraltar and United Kingdom* [2011] ECR I-11113 For comments, see John Temple Lang, ‘The Gibraltar State Aid and Taxation Judgment - A ‘Methodological Revolution?’ (2012) *European State Aid Law Quarterly* 805, Pierpaolo Rossi-Maccanico, ‘Gibraltar: Beyond the Pillars of Hercules of Selectivity’ (2012) *European State Aid Law Quarterly* 423.

³⁸⁹ Opinion of Advocate General Jääskinen in Joined Cases C-106/09 P and C-107/09 P, *European Commission, Kingdom of Spain v. Government of Gibraltar and United Kingdom* [2011] ECR I-11113, para 2.

³⁹⁰ Para 54 of the Opinion.

³⁹¹ Para 20 of the Judgment.

measure was not regionally selective, was not however overturned by the CJEU on appeal.³⁹²

In *Regione Sardegna* the referring court had further enquired whether Article 107 TFEU must be interpreted as meaning that ‘tax legislation, adopted by a regional authority, which establishes a regional tax on stopovers, (...), to be imposed only on operators whose tax domicile is outside the territory of the region’ constitutes State aid.³⁹³ The Court recalled the four criteria that serve to determine whether a measure amounts to State aid.³⁹⁴ Regarding the use of State resources, the Court examined whether there was an ‘intervention’ using ‘regional resources’, underlining again that the regional framework matters when it comes to the assessment of such matters.³⁹⁵ It then held that ‘the exclusion from tax liability’ of the regional operators might be regarded as State aid.³⁹⁶ Regarding the selectivity criterion, the CJEU applied *Azores*, and held that the Sardinian measure was not geographically selective.³⁹⁷ This did not however prevent the Court from declaring the tax to be materially selective as it did not apply to all operators of boats or aircraft stopping over in Sardinia. As a consequence, the Sardinian measure was considered to constitute State aid for the purposes of EU law.³⁹⁸

³⁹² The CJEU did not have to pronounce on this matter after finding that the regional measure was in fact materially selective.

³⁹³ Para 51 of the Judgment.

³⁹⁴ Para 52 of the Judgment.

³⁹⁵ Para 55 of the Judgment.

³⁹⁶ Para 58 of the Judgment.

³⁹⁷ Para 59 of the Judgment.

³⁹⁸ Para 60-64 of the Judgment.

The Implications of *Azores*

One remaining question is whether *Azores* solely applies to regions or also to localities. According to Winter, it is difficult to see why *Azores* would apply only to regions, but warns that it is necessary to interpret the sufficiently autonomous test ‘in a very strict way.’³⁹⁹ He argues that the smaller an SNAs is, ‘the more likely it is that their aid policies are undifferentiated and devoid of material specificity’⁴⁰⁰ as small SNAs which might wish to ‘attract investment in their area may be inclined to promise financial support to any type of company that will undertake operations boosting the local economy.’⁴⁰¹ It is unclear how this rationale plays out differently with regard to localities than it does in relation to regions or (small) Member State. The Court’s case law itself indicates that no distinction should be operated between local and regional governments. In *Azores*, the Court simply referred to ‘an infra-State body’⁴⁰² and the Advocate General invariably referred to ‘local authorities’ to designate any level of public authority situated below the central State.⁴⁰³ Further, in *Unión General de Trabajadores de la Rioja*, the Court considered that the *Azores* test concerned ‘the situation in which a regional or local authority adopts, in the exercise of sufficiently autonomous powers in relation to the central power.’⁴⁰⁴ In theory, it thus seems possible also for local measures to be subject to the *Azores* test. In practice, it nonetheless appears unlikely that any locality could ever fulfil the sufficiently autonomous test.

³⁹⁹ Winter (n 342) 196.

⁴⁰⁰ Ibid 196.

⁴⁰¹ Ibid 196.

⁴⁰² Para 58 of the Judgment.

⁴⁰³ See for instance paras 52 and 55 of the Opinion.

⁴⁰⁴ Para 49 of the Judgment.

There has been a rather large amount of scholarly commentary on *Azores*. Piernas, for instance, welcomed the case as ‘an even more respectful approach vis a vis the internal constitutional arrangements within a Member State’.⁴⁰⁵ According to Vilaca, however, ‘it is doubtful whether the concept of ‘sufficient autonomy’ can be deemed a useful tool to ascertain in every case the ‘selectivity’ of a regional tax measure’.⁴⁰⁶ Due to the uncertain contours of the test as well as its application on a case-by-case basis and apparently different standards depending on which sort of judicial review is involved, the test indeed striking in its lack of legal certainty. Winter remarked that *Azores* goes too far in recognising subnational autonomies and estimates that in combination with ‘the current trend towards greater decentralization or federalization in the Member States (Belgium?) it is likely to lead to a further erosion of the effectiveness’ of State aid law.⁴⁰⁷ Biondi also criticised the Court for having abandoned ‘its classic effects-based approach in favour of a complicated constitutional test.’⁴⁰⁸ State aid control, he went on to state, should not be mixed with alien concerns such as the respect of ‘constitutional diversities and the allocation of competence in different national systems.’⁴⁰⁹ This, he argued, ‘is in clear contrast to the internal market case law, whereby the Court has repeatedly established that the internal allocation of competence is irrelevant in determining the application of free movement rules.’⁴¹⁰ He claims that in this area, the case law is ‘very rigid in establishing that any internal constitutional differences need to be overlooked in the interest of the uniform application of EU law.’⁴¹¹ Bengoextea argued that together

⁴⁰⁵ Piernas (n 339) 651.

⁴⁰⁶ Vilaca (n 339) 449.

⁴⁰⁷ Winter (n 342) 195.

⁴⁰⁸ Biondi (n 339) 49.

⁴⁰⁹ Ibid 50.

⁴¹⁰ Ibid 50.

⁴¹¹ Ibid 50.

with *Gibraltar* and *Horvath, Azores* shows that ‘the principle of institutional autonomy of the State is in a process of silent transformation.’⁴¹² He observed that:

EU law is developing in a way whereby the international organisation of the Member States has direct implications in EU law as well. A new awareness of regional diversity is emerging. The Member State might still be free to organise as it pleases, but the EU, through its institutions, is now expected and even obliged to take into account how the State organises itself constitutionally; this follows from the obligation to respect the constitutional identity of the State.⁴¹³

According to this interpretation, SNAs are insiders and EU law must acknowledge this. Bengoetxea further underlined that Member States’ constitutional make-up is ‘no longer irrelevant’ as the EU must consider the latter to not ‘disrupt the institutional autonomy’.⁴¹⁴ He recalls in this respect that if EU law were to treat a decentralised Member State as if it were a unitary State, Article 4(2) TEU would be infringed.⁴¹⁵ I, however, argue that upon closer inspection it becomes apparent that neither the principle of national institutional autonomy nor Article 4(2) TEU were properly respected in *Azores*. This, it will be argued, is due to the special nature of State aid law, which constitutes one of the few areas of exclusive EU competence.⁴¹⁶

⁴¹² Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’ (n 344) 241.

⁴¹³ Ibid 242.

⁴¹⁴ Ibid 242.

⁴¹⁵ Ibid 242.

⁴¹⁶ In Case C-288/11 P, *Mitteldeutsche Flughafen*, judgment of 19 December 2012 (not yet published) the Court of Justice confirmed that the subsidiarity principle does not apply in the field of State aid, in which the Commission has exclusive competence. In this regard it is interesting to note that, according to Maduro, State aid law is one of the areas ‘which fits well with the majoritarian approach’ as ‘cases have been decided from a majoritarian point of view, taking the European Union as the relevant political community.’⁴¹⁶ Miguel Poiares Maduro, *We, The Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998) 76.

Critique of the Sufficiently Autonomous Test

At first sight, *Azores* may appear to be the most wide-ranging recognition of subnational regulatory autonomies in EU law and an illustration of the Insider Model. It explicitly recognises such autonomies, rejecting any theory of blindness, and develops a framework within which they are to be taken into account by EU law. In order for such recognition to occur, the CJEU has however developed a number of – rather stringent – condition, weakening SNAs' insider position in this domain although without denying it altogether. *Azores* is strikingly different from the Court's prevailing approach to subnational norms, for three reasons.

First, the Court did not equate the subnational measure with that of the Member State, a technique observed elsewhere under the Insider Model, but stated that by virtue of the measure being of a regional nature, it must be examined according to different criteria from those applicable to Member States. This stands in contrast with the assimilation between Member State and subnational measures observed elsewhere in the Court's case law. As such *Azores* does not clearly appear to be a case governed only by the features of the Insider Model but also displays one central to the Outsider Model, that is to say the divergent status of SNAs and Member States and their respective norms. While the fiscal competence of the Member State is immediately recognised, that of a regional authority is only required if it corresponds to some pre-determined criteria under EU law. At the same time however, SNAs are still recognised as insiders to the extent that their norms directly interact with supranational norms. Polycentricity is

acknowledged as it is accepted that in addition to the States, SNAs are generators of tax regimes, and so is porosity for these measures are seen to impact on internal market objectives. At the same time however, the assimilation between Member State and SNA norms is absent from the judgment so that *Azores* displays hybrid features, with elements both of the Outsider Model and the Insider Model, rather than clearly belonging to one of the two models.

Second, the creation of a special test which verifies whether an SNA is ‘sufficiently autonomous’ for it to be recognised by EU law stands in contrast with the Court’s approach in other cases simply to examine the regional measure as if it were that of the State. As indicated above, this means that the automatic assimilation between Member States and subnational norms that relates to the Insider Model is absent from this line of cases. Further, while *Azores* was interpreted as an expression of the paradigm inherent in Article 4(2) TEU, we must question whether that is really the case as the respect for national constitutional identities rather seems to imply that EU law recognises the choices Member States make regarding their own internal structures rather than requiring the Member States to have this choice fit into pre-determined moulds established under EU law. The Court significantly interferes with internal domestic structures in examining whether they correspond to a certain standard under EU law rather than accepting the choice that the Member State made.

Third, *Azores* devised a special status for those regions with a pronounced degree of autonomy. As such, it creates three categories of SNAs. The first category is that of

SNAs which form part of a system of symmetrical devolution. These subnational State aid regimes will be examined in the same manner as those of a State in light of the absence of a national tax regime capable as serving as a reference framework. The second category is that of SNAs that form part of asymmetrical fiscal regimes and are deemed ‘sufficiently autonomous’ from the perspective of EU law. These measures are then examined against the same standard as those of the Member States. Third there is the category of SNAs forming part of asymmetrical devolutionary regimes that, despite having fiscal competences on a domestic scale, are not considered to be ‘sufficiently’ autonomous in order to be recognised as such under EU law. It follows that where there is symmetric decentralisation⁴¹⁷, EU law simply validates domestic institutional choices and treats a subnational tax regime along the same lines as Member States’ tax regimes. Where there is asymmetric devolution, the Court gets involved in Member States’ choices regarding domestic structure, disregarding the principle of national institutional autonomy. The rationale for such discrepancy is unclear and no parallel tests can be observed in other areas of the law.⁴¹⁸ This moreover implies that some SNAs are insiders whereas others are outsiders. While fiscal regimes that stem from symmetric devolutionary structures as well as those complying with the *Azores* test are insiders, treated analogously to those of the Member States, those deriving from asymmetric decentralisation that are not considered sufficiently autonomous emerge as outsiders. This is so because they are declared incompatible with EU law, denying their existence, as such but also within the European legal space.

⁴¹⁷ As is the case in Germany for instance.

⁴¹⁸ Refer also to paras 50-54 of the Opinion.

The above-described fragmentation presents a striking contrast with the general stance in EU internal market case law that any measure from within a State will be treated as that of the Member State. Any Member State measure – whether federal or central, big or small – is treated in the same manner under EU law in accordance with the paradigm of sovereign equality. Under the *Azores* test, the same is not however true for SNAs. It appears from this critique that while polycentricity and porosity are recognised under State aid law; SNAs are not necessarily assimilated to the Member States. As explained further above, it is assumed that the Court’s approach in *Azores*, which diverges from that adopted elsewhere is due to the fact that State aid law is an exclusive competence of the EU, as a result of which Member States but also SNAs enjoy less regulatory autonomy in this domain. The next section examines the duty of loyal cooperation and observes another illustration of the Insider Model in EU law.

II. SNAs and the Duty of Loyal Cooperation

Thus far it has been observed that local and regional authorities can be considered as insiders to the EU legal order on two grounds: first, because their norms are insiders of EU law, and, second, because EU law recognises SNAs’ right to self-government just as it recognises that of the Member States. This section will outline another area of EU law in which infra-State bodies emerge as insiders: the, admittedly somewhat hazy, area of the duty of loyal cooperation, a duty that has been extended to SNAs by the CJEU below the surface of the Treaties, which themselves impose it only on the States. The Court has established that in the exercise of their autonomous competences, SNAs are, just like

Member States, bound to comply with the duty of loyalty. This duty is enshrined in Article 4(3) TEU, which provides that

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

In accordance with Article 4(3) TEU, Member States moreover ‘shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’.⁴¹⁹ Furthermore, Member States must ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’⁴²⁰ Article 4(3) TEU hence imposes a positive obligation on Member States to contribute to the success of the European project and to achieve its goals. This is what the Member States have bound themselves to in their capacity as masters of the Treaties, a role associated with the Outsider Model. Given that this duty pertains to the role of the Member States as masters of the Treaties, the extension of the duty to subnational authorities is somewhat unexpected. The latter at least primarily constitutes an attribute of EU membership, a requirement of good faith that Member States must have both towards the EU and other Member States.

Given that the obligation of loyal cooperation pertains to Member States’ role as masters of the Treaties, the extension of the duty to subnational authorities might appear nonsensical. Nonetheless, in 1989 a judgment was delivered that established that

⁴¹⁹ Article 4(3)(a) TEU.

⁴²⁰ Article 4(3)(b) TEU.

subnational authorities are also subject to this legal obligation. *Fratelli Costanzo* concerned a reference for preliminary ruling from the Lombardy regional administrative tribunal in a dispute between a private company and the city of Milan (Italy) in the context of an award of public work contracts.⁴²¹ In preparation for the 1990 FIFA World Cup, the city of Milan had issued a call for tenders to undertake alterations on its football stadium. Costanzo was excluded from the call and subsequently argued that its exclusion was illegal because based on a national law that was incompatible with EU secondary legislation. The referring court enquired whether ‘administrative authorities, including municipal authorities, are under the same obligation as a national court’ to apply the EU Directive, and in particular also ‘to refrain from applying provisions of national law which conflict with them.’⁴²² The CJEU recalled that in *Becker*⁴²³ and *Marshall*⁴²⁴ it had established that where the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, an individual may rely on them against ‘the State’ in domestic proceedings if the State fails to implement the directive after the end of the implementation period.⁴²⁵ The *Fratelli Costanzo* solution hence corresponds to the consequences that arise after the failure of a Member State to implement EU law. It has indeed been seen in the preceding chapter that no matter which organ of a State fails to implement the directive, responsibility always falls upon to the State that, from the perspective of EU law, is considered to be monolithic in accordance with the principle of national autonomy and the dynamics inherent in the Outsider Model.

⁴²¹ Case C-103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR I-1839.

⁴²² Para 28 of the Judgment.

⁴²³ Case C-08/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

⁴²⁴ Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

⁴²⁵ Para 29 of the Judgment..

Individuals may rely on a directive's provisions because 'the obligations arising under those provisions are binding upon all the authorities of the Member States.'⁴²⁶ As the Court went on to note in *Fratelli Costanzo*, there would be a contradiction in allowing individuals to rely on a directive against administrative authorities but to 'hold at the same time that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them.'⁴²⁷ Accordingly, when the conditions under which individuals may rely on directives in domestic proceedings are fulfilled and the transposition period has expired, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions.'⁴²⁸ This directly recognises SNAs as components of the polycentric EU legal order and imposes an active obligation on them: to apply the provisions of a EU directive. SNAs are insiders because they will in such a context be the public authority giving effect to EU law – underlining porosity. Local and regional authorities import supranational norms into the domestic legal order where the Member State fails to fulfil its role as importer, showing that the polycentric structure can benefit the achievement of the EU's substantive goals.

Fratelli Costanzo even goes further than merely subjecting SNAs to the duty of loyal cooperation, as the CJEU insisted that local and regional authorities must indeed disapply internal law which conflicts with EU law, and this even without securing an

⁴²⁶ Para 30 of the Judgment.

⁴²⁷ Para 31 of the Judgment.

⁴²⁸ Para 31 of the Judgment.

order from a competent court.⁴²⁹ According to Verhoeven this is paradoxical, as ‘European law is generally not concerned with the internal state structure of the Member States.’⁴³⁰ The *Fratelli Costanzo* solution may be better explained by looking at the objectives it fulfils. The obligation can be seen to safeguard the protection of individual rights that emerge under a Directive but also the efficacy of the European legal order as it sees to the application of a given norm where the Member State has failed adequately apply it. Crucially, the insider SNA is the organ that will ensure the efficacy of EU law in this domain, as its action is necessary to further goals inherent to EU integration. The exact contours of the *Fratelli Costanzo* obligation remain however somewhat foggy.

Subsequent case law has confirmed that where a domestic administrative authority finds a conflict between a national and a EU norm, it must consistently interpret the national norm in light of EU law, or set aside the incompatible national norm and apply the directly effective provision of EU law instead.⁴³¹ Nonetheless, the future of the *Fratelli Costanzo* doctrine seems a bit uncertain as it has never been as reaffirmed as explicitly as it was first stated in *Fratelli Costanzo* in 1989. In a case involving an administrative body, not an SNA, the Grand Chamber applied the doctrine in *Petersen* however only to state that there is a duty for national courts to apply national law.⁴³² In *Fuß*, the CJEU confirmed that municipalities must directly apply a directive instead of

⁴²⁹ Stephen Weatherill, ‘The Challenge of the Regional Dimension in the European Union’ in Stephen Weatherill and Ulf Bernitz (ed), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005) 5.

⁴³⁰ Maartje Verhoeven, ‘The ‘Costanzo Obligation’ and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?’ (2010) 3 *Review of European Administrative Law* 23, 23.

⁴³¹ Case C-224/97 *Ciola* [1999] ECR I-2517 and Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-8055.

⁴³² Case C-341/08 *Petersen* [2010] ECR I-0047, paras 80-81.

conflicting national law.⁴³³ Pursuant to Article 4(3) TEU, the CJEU found that ‘all authorities of the Member State’ must achieve the result envisaged by the European directive.⁴³⁴ Where national authorities are unable to interpret and apply national law in compliance with the requirements of EU law ‘it is for the national courts and administrative bodies to apply EU law in its entirety and to protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law.’⁴³⁵ This was also affirmed by the second chamber in *Gaviero*.⁴³⁶ In *Amia*, the fourth chamber further confirmed that if the relevant provisions of a directive have direct effect, ‘they are binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply them.’⁴³⁷ Noticeably, however, the CJEU then applied *Fratelli Costanzo* only to state that the provisions of such directives may be directly relied on in front of a domestic court.⁴³⁸

It is also crucial to note that, in accordance with the case law on direct responsibility, the Member State will be liable under EU law where an SNA does not comply with its obligation of loyalty. Verhoeven put forward that because Member States have a duty to ensure that SNAs comply with EU law, ‘it is easily explicable and acceptable that the Member State itself, is responsible towards the European Union for the correct compliance with the *Costanzo* obligation.’⁴³⁹ According to Bengoxtea,

⁴³³ Case C-429/09 *Fuß* [2010] ECR I-12167.

⁴³⁴ Paras 38-39 of the Judgment.

⁴³⁵ Para 40 of the Judgment.

⁴³⁶ Case C-444/09 *Rosa María Gavieiro* [2010] ECR I-14031, para 73.

⁴³⁷ Case C-97/11 *Amia* [2012] not yet published, para 38.

⁴³⁸ Para 40-41 of the Judgment.

⁴³⁹ Verhoeven (n 430) 25.

Fratelli Costanzo constitutes a variant of the principle ‘according to which the whole of the Member State is responsible for breaches of EU law by any of its parts or emanations’.⁴⁴⁰ This principle, he argued, ‘was turned over and formulated as a positive obligation’ as also SNAs ‘were expected and obliged to observe [EU] law.’⁴⁴¹ Verhoeven stated further that an ‘interesting paradox’ results from the combination of national institutional autonomy – according to which only States bear direct responsibility under EU law – and the *Fratelli Costanzo* obligation: on the one hand, the EU ‘has a relationship with its Member States, and respects the internal state structure. On the other, obligations such as the *Costanzo* obligation are not addressed to the Member States themselves, but to the administrative authorities within these states.’⁴⁴² This is of interest for my purposes as the doctrine of national institutional autonomy is an element more clearly associated with the Outsider Model for it considers States as monolithic entities whereas *Fratelli Costanzo* does not see the SNAs as inevitably fused with the Member State, in line with the Insider Model. As in *Azores*, we see that the Insider Model and the Outsider Model are not separate worlds of EU law but that they do to a degree coincide and overlap.

It remains somewhat uncertain in which scenarios and to which extent the CJEU is willing to apply *Fratelli Costanzo*. It nonetheless appears that a few lessons can be learned from the judgment. First, it confirms that EU law imposes direct obligations on local and regional authorities, which help in ensuring the success of EU objectives. Second, SNAs are insiders of EU law – they are active participants in the project of EU

⁴⁴⁰ Bengoextea ‘Autonomous Constitutional Regions in a Federal Europe’ (n 344).

⁴⁴¹ Ibid 237.

⁴⁴² Ibid 61.

integration and the thereto-connected harmonisation of laws and must give effect to harmonising measures. In this regard, they fulfil an active role as insiders. Porosity is acknowledged as actions of SNAs may endanger the attainment of supranational goals. In the polycentric EU, SNAs are recognised as levels of public authority able to give effect to EU law where the Member States prove incapable of doing so. Unlike in the Outsider Model, there is no privileged sphere of interaction between the Member State and the EU as SNAs can readily step in where the Member State fails to comply with its obligations. In this scenario, local and regional authorities become the direct allies of the EU as they fulfil the Member State's obligation where the latter falls short of doing so.

In this context, it is interesting briefly to look at a more recent case, *Carmen Media Group* from 2010, which arose out of a refusal of the German Land Schleswig-Holstein to grant a licence to market sports bets via the internet.⁴⁴³ The dispute concerned the same regional law that was at stake in *Digibet* and the refusal was anchored in the fact that the Land held a public monopoly over receiving bets on sporting competitions.⁴⁴⁴ In this context, the CJEU had to determine whether Article 56 TFEU must be interpreted as precluding 'the establishment, by a regional entity, of a public monopoly on the organisation of bets on sporting competitions and lotteries' and whether the answer to that question may be affected by the fact that the regulation of those other games of chance falls at least partly within the competence of the federal State.'⁴⁴⁵ In this context, the Court held that

⁴⁴³ Case C-46/08 *Carmen Media Group* [2010] ECR I-8149.

⁴⁴⁴ Para 25 of the Judgment.

⁴⁴⁵ Para 53 of the Judgment.

whilst EU law does not preclude an internal allocation of competences whereby certain games of chance are a matter for the *Länder* and others for the federal authority, the fact remains that, in such a case, the authorities of the *Land* concerned and the federal authorities are jointly required to fulfil the obligation on the Federal Republic of Germany not to infringe Article 49 EC. It follows that, in the full measure to which compliance with that obligation requires it, those various authorities are bound, for that purpose, to coordinate the exercise of their respective competences.⁴⁴⁶

While neither citing Article 4(3) TEU nor referring to the duty of loyalty in this respect, the CJEU seems to consider that just like Member States, SNAs are bound to ensure the *effet utile* of EU law. Despite the uncertainty surrounding the precise obligation inherent in *Fratelli Costanzo*, the status of subnational authorities as insiders having to ensure that the obligations that arise under EU law are complied with seems well established. This situated SNAs as insiders in a EU legal space characterised by polycentricity and porosity. A similar conclusion arises from the examination of some soft law instruments of the European Commission.

III. ‘Smart’ SNAs and EU Law

This chapter has thus far engaged with manifestations of the Insider Model as apparent in the CJEU’s internal market case law. This last section of the chapter exposes that the Insider Model also plays out in other areas of the internal market, such as for instance the European Commission’s soft law that deals with SNAs and their potential as ‘smart regulators’. This terminology is introduced first before the section ventures on to show how local and regional authorities are considered to be insiders to the realisation and

⁴⁴⁶ Para 70 of the Judgment.

success of the internal market project. This polycentric structure benefits the achievement of EU economic goals.

A. ‘Smart’ SNAs

In recent times, the capacity of SNAs to act as ‘smart’ regulators has been presented as a factor underlining the value of subnational norm-generation, and accordingly of subnational autonomies. Infra-State entities are considered to be centres of economic power and innovation – and their autonomous regulatory capacities play a distinctive role in this regard. Defining a ‘smart SNA’ or ‘smart regulation’ is no easy undertaking. Various definitions have been put forward, for instance that a smart city is ‘well performing in a forward-looking way (...) built on the ‘smart’ combination of endowments and activities of self-decisive, independent and aware citizens.’⁴⁴⁷ Smart cities are also understood as examples of ‘good governance’ and frontrunners in ‘the use of modern technology in everyday urban life’.⁴⁴⁸ At the same time however, the designation is used with respect to smart systems of logistics and transport as well as efficient and sustainable energy systems.⁴⁴⁹ No definition of what constitutes a smart SNA attracts consensus.⁴⁵⁰ Despite the absence of such a straightforward definition, smartness can be said to generally refer to subnational regulatory innovation, innovation that is often forced by changing circumstances. Cities for instance are often compelled to

⁴⁴⁷ Fertner et al, *Smart Cities - Ranking of European Medium-Sized Cities* (Vienna University of Technology 2007) 11.

⁴⁴⁸ Ibid 10.

⁴⁴⁹ Ibid 10.

⁴⁵⁰ On this, see Andrea Caragliu, Chiara Del Bo and Peter Nijkamp, ‘Smart Cities in Europe’ (2013) 18 *Journal of Urban Technology* 65.

define solutions in light of urgencies created by urbanisation.⁴⁵¹ To solve problems associated with urban agglomerations and the urban economy, ‘creativity, human capital, cooperation (sometimes bargaining) among relevant stakeholders, and bright scientific ideas’ – ‘smart regulation’ – is necessary.⁴⁵² While this phenomenon has been documented primarily with regard to cities, regions may also have to adapt their regulation and define new solutions due to changing factors. The framing of innovative solutions to address economic, socio-cultural, geographical or also climatic circumstances often requires regulation that is itself innovative. In the context of smart specialisation, innovative regulation develops mechanisms to trigger innovation in a given domain or creates a new innovation framework.

The interconnection between the different actors in the polycentric EU becomes apparent when considering that subnational smartness is actively supported by the Union, and this in a number of ways. Nijkamp observed that the EU has ‘devoted constant efforts to devising a strategy for achieving urban growth in a “smart” way for its metropolitan areas.’⁴⁵³ These efforts are non-negligible, including a commitment of a budget of 8 million Euro to the creation of green, sustainable cities, a field of activity which the European Investment Bank has said lies at the heart of its investment activity.⁴⁵⁴ Smart cities further benefit from the Joint European Support for Sustainable Investment in City Areas (JESSICA) program, an initiative of European Commission, the European

⁴⁵¹ Hafedh Chourabi, ‘Understanding Smart Cities: An Integrative Framework’ Hawaii International Conference on Systems Sciences, available online: http://ieeexploreieeeorg/xpl/loginjsp?tp=&arnumber=6149291&url=http%3A%2F%2Fieeexploreieeeorg%2Fxppls%2Fabs_alljsp%3Farnumber%3D6149291 1.

⁴⁵² Nijkamp et al (n 450) 66.

⁴⁵³ Nijkamp et al (n 450) 67.

⁴⁵⁴ European Investment Bank, *Shaping Sustainable Cities* (2013). Report available online: http://www.eib.org/attachments/thematic/shaping_sustainable_cities_en.pdf, 1.

Investment Bank and the Council of Europe Development Bank.⁴⁵⁵ Moreover, a variety of sector specific instruments have been developed to support local innovation. The ELENA ('European Local Energy Assistance') program of the European Investment Bank for example helps SNAs prepare for energy efficiency or renewable energy projects, in particular through the provision of know-how and the capacity to implement large-scale projects.⁴⁵⁶

This must be seen in the context of the benefits often associated with subnational regulation. Some have argued that the regional and local levels offer 'the greatest prospect for devising governance structures able to facilitate and foster the transition to the new patterns of knowledge-based economic activity.'⁴⁵⁷ SNAs have the capacity to generate the conditions for innovation and economic growth.⁴⁵⁸ Subnational regulation further allows experimentation and innovation to take place.⁴⁵⁹ Local but also regional authorities indeed often function as 'laboratories of democracy' as regulatory solutions first crafted at subnational level are subsequently adopted at national, supranational and international level.⁴⁶⁰ This underlines that when regulating, SNAs often create new

⁴⁵⁵ See European Investment Bank, JESSICA: a Joint Initiative Between the EU Commission, the CEB and the EIB. The website of the initiative is online at <http://www.eib.org/infocentre/events/all/jessica-a-joint-initiative-between-the-eu-commission-the-ceb-and-the-eib.htm>.

⁴⁵⁶ The website of ELENA is online at <http://www.eib.org/infocentre/publications/all/elena.htm>.

⁴⁵⁷ P. Cooke and K. Morgan, *The Associational Economy* (Oxford University Press 1998).

⁴⁵⁸ Ibid, A. Amin and N. Thrift, 'Institutional Issue for the European Regions: From Markets and Plans to Socioeconomics and Powers of Association' (1995) 24 *Economy and Society* 41, M. Lorenzen, 'Localised Learning and Policy: Academic Advice on Enhancing Regional Competitiveness' (2001) 9 *European Planning Studies* 163.

⁴⁵⁹ See for instance OECD, *Cities and Regions in the New Learning Economy* (2001) ('the geographical regions in which learning is most effectively organised are not states, but rather regions.')

⁴⁶⁰ The idea of SNAs acting as a 'laboratory of democracy' can be traced back to U.S. constitutional law. In a famous statement, Justice Brandeis stated that a 'state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' See *New State Ice Co v. Liebmann*, 285 U.S. 262 (1932).

regulatory solutions that are sometimes subsequently adopted by other levels of public authority.

The role of norms in subnational smartness should not be neglected. Innovation indeed not only matters with regard to science or engineering but also regulation. Let me explain. When regulation is issued on a given topic, the regulatory solution itself can be innovative and turn out to be a better fit compared to existing regulatory solutions. New ideas are known to force change, and this is no different in the context of regulation. As a consequence, when local or regional authorities issue innovative regulation, the same kind of regulation will often also emerge elsewhere, underlining the porous boundaries between different scales of public authority. The law moreover sets the boundaries within which innovation can take place. The role of mutual support and inspiration, indicating porosity, becomes clearer through the subsequent overview of EU policies supporting subnational autonomies in a number of contexts. It exposes two initiatives of the European Commission that actively support and encourage SNAs to adopt smart regulatory solutions and provides a telling illustration of the operation of the Insider Model in EU law.

B. EU Soft Law and Smart SNAs

This section focuses on a few initiatives of the Commission that provide interesting insights into the Insider Model. Due to concerns of space not all initiatives can be evaluated and those that are covered are introduced only very briefly with the aim of

telling a story of the Insider Model's operation in EU soft law. My aim here clearly consists in that latter aspect rather than providing an overarching overview of this vast and complex domain of EU policy. Further, I am solely concerned with the wording and objectives of these initiatives. Their practical reality and success are matters to be examined on a different day.

Smart Specialisation

Smart specialisation is a concept of particular prominence in the EU context. It has been defined as 'an entrepreneurial process of discovery and experimentation, identifying where a region can benefit from specialising in a particular area that will enable each region to make the best out of their potential.'⁴⁶¹ In brief, smart specialisation stands for the idea that in the globalised economy areas that are smaller than States need to identify and develop their comparative advantage in order to boost their economy. SNAs identify their relative economic strength and then direct their policies towards the strengthening of that sector.⁴⁶² The rationale is that

by concentrating knowledge resources and linking them to a limited number of priority economic activities, countries can become – and remain – competitive in the global economy. This type of specialisation allows regions to take advantage

⁴⁶¹ Assembly of European Regions, Smart Specialisation Website, online at <http://www.aer.eu/en/knowledge-centre/thematic-expertise-thematic-issues/economy-research-innovation/smart-specialisation.html>.

⁴⁶² The concept of smart specialisation originated in the literature analysing the productivity gap between the United States and Europe. See Philip McCann and Raquel Ortega-Argilés, 'Smart Specialisation, Regional Growth and Applications to EU Cohesion Policy' (2011) Economic Geography Working Paper 2011: Faculty of Spatial Sciences, University of Groningen, http://wbc-inconet/attach/s3_mccann_ortegapdf, 5.

of scale, scope and spillovers in knowledge production and use, which are important drivers of productivity.⁴⁶³

The ‘abundant evidence towards the globalisation of economic processes’ does not imply that the ‘differentiation between localities is disappearing’.⁴⁶⁴ Rather one of the challenges of the globalised economies is for markets to establish themselves as leaders in a given, precise, domain. A successful regional economic and innovation policy ‘should be based on what is commonly called the *regional context*, namely the regional economy’s fundamental specifics.’⁴⁶⁵ Smart specialisation, the Commission hopes, will permit SNAs to ‘achieve economic growth and prosperity, by enabling regions to focus on their strengths.’⁴⁶⁶ Smart specialisation has become ‘central to economic development and growth policy-thinking in European circles.’⁴⁶⁷ It is a component of ‘Europe 2020’, the ten-year growth strategy that was launched in 2010.⁴⁶⁸ Smart specialisation intervenes as a means of designing innovation strategies and delivering a more targeted support by the Structural Fund.⁴⁶⁹ Further it has a central strategic function with regard to Cohesion Policy and the contribution of the latter to the Europe 2020 jobs and growth agenda,

⁴⁶³ European Union Smart Specialisation Platform, Guide to Research and Innovation Strategies for Smart Specialisation, (RIS 3) [2012] 12.

⁴⁶⁴ OECD, *Cities and Regions in the New Learning Economy* (2001) 7.

⁴⁶⁵ Martin Henning Jerker Moodysson and Magnus Nilsson, *Innovation and Regional Transformation. From Clusters to New Combinations* (Region Skane, printed by Elanders 2010) 13 (emphasis in original).

⁴⁶⁶ The respective website is online at http://ec.europa.eu/research/regions/index_en.cfm?pg=smart_specialisation.

⁴⁶⁷ McCann & Ortega-Argilés (n 472) 2 (emphasis in original).

⁴⁶⁸ Communication from the European Commission, *Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth* Com (2010) Final.

⁴⁶⁹ The Council Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Europe 2020 Flagship Initiative Innovation Union* COM (2010) 546 final.

which is expected to trigger the potential for smart growth and a knowledge economy in all EU regions.⁴⁷⁰

The EU's smart specialisation strategy frames SNAs as insiders in the EU and its internal market. Unlike in those areas of EU law that accord with the Outsider Model, the EU and the Member States do not have a privileged sphere of interaction in this domain. On the contrary, it could even be said that in these very specific areas, a privileged interaction exists between the Union and infra-State entities. The spotlight is on local and regional authorities, not Member States. The Commission has pointed out that 'the national level is ineffective when it comes to stimulating new regional poles of activity.'⁴⁷¹ Member States cannot be insiders in subnational smart specialisation tactics. Moreover, specialisation is not imposed 'through some form of top-down industrial policy that is directed in accord with a pre-conceived 'grand plan''.⁴⁷² It is rather for SNAs themselves to identify the sector in which they should specialise in, making them active participants in the achievement of the EU objective. Subnational economic growth and the success of the supranational internal markets are intertwined, underlining polycentricity and porosity as well as SNAs' insider status. It is true that on a domestic scale, the Member State may be involved in the definition of subnational specialisation strategies. However, from the perspective of EU law, only the SNA matters. The Commission has recognised that when it comes to smart specialisation, SNAs are not

⁴⁷⁰ European Union Smart Specialisation Platform (n 463) 10. See also the Council Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Regional Policy Contributing to Sustainable Growth in Europe 2020* COM (2011) 17 final.

⁴⁷¹ European Commission FOREN Network, 'A Practical Guide to Regional Foresight' (2001) 11, available online: <http://foresight.jrc.ec.europa.eu/documents/eur20128en.pdf>.

⁴⁷² Dominique Foray, Paul A. David and Bronwyn Hall, 'Smart Specialisation - The Concept' (2009) Knowledge Economists Policy Brief 9, 2.

merely ‘implementers’ but also ‘policy-makers’, underlining their active role in creating innovative regulatory solutions.⁴⁷³ In light of the predominantly bi-centric nature of the European Treaties, it may come as a surprise that the EU encourages subnational innovation and experimentation. Nonetheless, it considers that subnational innovation favours the economy as SNAs ‘that have sustained high investment in research and development (R&D) over the years are currently leading national and European economic growth.’⁴⁷⁴ SNAs are framed as active insiders regarding the generation of economic growth in the EU, paying a fundamentally important part in achieving the Lisbon goals.⁴⁷⁵ In exercising their autonomous competences, SNAs advance goals inherent in EU integration and are insiders in the success of the internal market.

The above overview illustrates that, over the past few years, a new economic agenda has emerged at EU level, which places considerable emphasis on innovation, specialisation and smart growth. Subnational authorities emerge as direct partners of the EU regarding the future of the internal market.⁴⁷⁶ They, rather than the Member States, are the direct interlocutors of the Union. They should identify their respective competitive advantage and exploit the latter to ensure economic prosperity – within their own territory but also the EU more generally. Such innovation and entrepreneurship have been described as ‘a crucial part of Europe’s response to the economic crisis’ as ‘having a strategic and integrated approach to innovation that maximises European, national and

⁴⁷³ European Union Smart Specialisation Platform, *Guide to Research and Innovation Strategies for Smart Specialisation (RIS 3)* (2012) 6.

⁴⁷⁴ Research EU Focus, *A Competitive Europe. Research Regionally Develop Globally* (March 2009) 5.

⁴⁷⁵ *Ibid* 6.

⁴⁷⁶ See also Council Conclusions on Innovation Union for Europe, 3049th Competitiveness Council Meeting. Brussels, 26 November 2010.

regional research and innovation potential.’⁴⁷⁷ A similar conclusion also emerges from the analysis of the EU Innovation Union and its ‘Regions of Knowledge’ initiative.

Regions of Knowledge

In the context of the EU Innovation Union agenda, SNAs are directly acknowledged as regulators the action of which creates effects within the EU internal market. They are insiders in the Innovation Union that commits the EU to increase investment in research to 3% of its GDP by 2020. The initiative is based on innovation and aims at strengthening research and boosting employment and growth. It is subdivided into 30 different activities, also called ‘commitments’.⁴⁷⁸ In the context of the ‘Regions of Knowledge’ the EU has underlined the ‘importance of the regions as key players for the enhancement of innovation in Europe.’⁴⁷⁹ The Regions of Knowledge (RoK) programme actively encourages regional and local innovation, acknowledging porosity. It was launched in 2003 and subsequently expanded in light of its success, now disposing of a budget of 126 million Euro.⁴⁸⁰ The RoK program seeks to bolster ‘the research potential of European regions, in particular by encouraging and supporting the development, across Europe, of regional ‘research-driven clusters’ associating universities, research centres, enterprises and regional authorities.’⁴⁸¹

⁴⁷⁷ Ibid 8.

⁴⁷⁸ This website is online at <http://cor.europa.eu/en/policies/growth-and-jobs/Pages/innovation-union.aspx>

⁴⁷⁹ European Commission, *Assessment of the Impact of the Regions of Knowledge Programme* (2011) 1.

⁴⁸⁰ Ibid 8-10.

⁴⁸¹ J. Gutiérrez-Fons and K. Lenaerts ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *Common Market Law Review* 1629, Annex 1.

These goals, which are closely aligned with smart specialisation, reflect that SNAs are ‘increasingly recognised as important players in the EU’s research and development landscape’, making them insiders.⁴⁸² Examples of subnational cooperation financed by the RoK program include the ‘Insular regions knowledge tracker’ a project between insular regions that establishes foresight methods and has promoted the formulation of knowledge-based regional policies, ensuring the support of local actors and stakeholders.⁴⁸³ The programme has coordinated efforts and fostered mutual learning experiences – illustrative of porosity – among Crete (Greece), Madeira (Portugal) the Canary Islands (Spain) and Sicily (Italy), the Baleraric Islands (Spain), Corsica (France) Sardinia (Italy) the Azores (Portugal) and the Highlands United Kingdom).⁴⁸⁴ This illustrates that the EU not only values subnational innovation but also the collaboration of SNAs across national borders. A further success story financed by RoK is the Dutch Food Valley, a combined centre of agro-scientific research, a food cluster, and an association of agro science start-ups, which is located in the Eastern Netherlands.⁴⁸⁵ The Dutch Food Valley, which has an international reputation, illustrates the potential of SNAs to fortify the EU’s position as one of the most advanced economic markets worldwide.

Communication and cooperation between the SNAs, which is rendered possible through porosity, is a central aspect that the RoK programme tries to promote.⁴⁸⁶ A recent

⁴⁸² Ibid, Annex 1.

⁴⁸³ Focus 12. The website of the project is available online under <http://www.intrack.org>.

⁴⁸⁴ Ibid 12. The website of the project is available online under <http://www.intrack.org>.

⁴⁸⁵ Ibid 23.

⁴⁸⁶ European Commission, *Regional Aspects in the 7th Framework Programme. Expert Advisory Group on 'Regions of Knowledge' - 2012/2013* (2011) 5.

review of the programme has confirmed its success in improving intra-regional communication⁴⁸⁷, as SNAs ‘have become increasingly aware of the enormous importance of regional interaction in research and innovation for their sustainable economic and social development.’⁴⁸⁸ More generally, the EU values the ‘exchange of know-how and experience’ such as for instance through secondments of research staff between regional research centres.⁴⁸⁹ This brief overview indicates that in the context of research-driven specialisation, SNAs are perceived to be insiders in this EU objective, collaborating directly with the EU institutions to this effect. Such collaboration between various SNAs presents a number of benefits that are valued by EU law, such as cross-border cooperation.

The Importance of Cross-Border Cooperation

The smart specialisation and Regions of Knowledge agenda place considerable emphasis on cross-border cooperation between SNAs. Such cooperation leads to the bundling of forces to advance a sector but also the exchange of knowledge. With regard to smart specialisation, it has been observed that the interconnection between various scales raises the question of ‘how patterns of learning – in a variety of senses – are implicated in the complex interactions between global and regional processes.’⁴⁹⁰ Such interconnection is not a completely novel process: since the late 1980s the European Commission allocated

⁴⁸⁷ European Commission, *Assessment of the Impact of the ‘Regions of Knowledge Programme’* (2011) 8, available online: http://ec.europa.eu/research/evaluations/pdf/archive/other_reports_studies_and_documents/assessment_of_the_impact_of_the_regions_of_knowledge_programme.pdf.

⁴⁸⁸ European Commission *Regional Aspects in the 7th Framework Programme. Expert Advisory Group on ‘Regions of Knowledge’* (n 486) 4.

⁴⁸⁹ Research EU Focus (n 474) 9.

⁴⁹⁰ Ibid 7.

substantial funds to promote cross-border cooperation between neighbouring border regions and assist them in the development of regional policies, such as the INTERREG initiative⁴⁹¹ or the PHARE and TACIS programmes for the States of Central and Eastern Europe.⁴⁹² Interconnection is a characterising feature of the EU innovation policy so that ‘all actors and all regions’ must be involved in the innovation cycle as what is necessary is that there be interconnection of

not only a few high-tech areas, but all regions in Europe and every Member State, each focusing on its own strengths (‘smart specialisation’) with Europe, Member States and regions acting in partnerships.⁴⁹³

Not only regions but also cities are called upon in this domain as some problems can only be addressed by the latter such as the ‘major climate change & energy challenge coming from cities’ which consume about 80% of the overall EU energy.⁴⁹⁴ The interconnection between various SNAs is mandated by the fact that economies are increasingly interlinked. In this context, ‘strategies aimed at fostering cross-sectoral or cross-border cooperation have proven to be successful in generating ideas for new innovative applications and integrated solutions.’⁴⁹⁵ It was claimed that the major aim of smart specialisation in the context of the EU cohesion policy was ‘to design policies which will foster maximum learning linkages both within the target regions as well as between regions.’⁴⁹⁶ Clusters enhance knowledge creation and diffusion and hence assist the innovation and production process.⁴⁹⁷ It follows that ‘the importance of the level of

⁴⁹¹ Ibid 88.

⁴⁹² Ibid 88.

⁴⁹³ Communication from the Commission to the European Parliament, *Europe 2020 Flagship Initiative Innovation Union*, 8.

⁴⁹⁴ Ibid 25.

⁴⁹⁵ European Smart Specialisation Platform (n 463)15.

⁴⁹⁶ McCann & Ortega-Argilés (n 472) 20.

⁴⁹⁷ Nilsson (n 465) 26-27.

connectedness of regions has increased dramatically during the last two decades.⁴⁹⁸ The interconnection between different SNAs but also SNAs and the EU underscores that the ‘nation-state is not best equipped for dealing with many of the challenges and opportunities of the twenty-first century.’⁴⁹⁹

Interconnection is also valued regarding good practices that strengthen sustainability.⁵⁰⁰ The Commission for instance lists under its good practices in the context of sustainable energy an initiative of the city of Barcelona in Spain that was adopted with the help of the Covenant of Mayors (an international network of mayors) as well as the ELENA facility.⁵⁰¹ Another example includes energy investments in residential buildings in Lithuania through a 227 million Euro JESSICA fund.⁵⁰² The polycentric nature of these projects is striking since they are local initiatives, supported by EU funds. Polycentricity and porosity also become obvious as many of the ‘determinants of their regional capacity are external to the region’, such as funding, investment and purchasing decisions which ‘shape the environment within which regions innovate.’⁵⁰³ Benneworth and Dassen have argued that transforming the EU into an Innovation Union ‘requires

⁴⁹⁸ McCann & Ortega-Argilés (n 472) 10.

⁴⁹⁹ European Commission FOREN Network, ‘A Practical Guide to Regional Foresight’ (n 471) 10.

⁵⁰⁰ In the context of the Structural and Cohesion Funds, see The Council Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Regional Policy Contributing to Sustainable Growth in Europe 2020 SEC (2011) 92 final* (COM (2011) 17 final 2011) 12.

⁵⁰¹ Ibid 7.

⁵⁰² Ibid 7.

⁵⁰³ Paul Benneworth and Adrie Dassen, ‘Strengthening Global-Local Connectivity in Regional Innovation Strategies: Implications for Regional Innovation Policy’ (2011) OECD Regional Development Working Papers 2011/1 9.

sustained effort, close co-operation and effective implementation at all levels (EU, national, regional)⁵⁰⁴. To this end, all

national, regional and local authorities should implement the partnership, closely associating parliaments, as well as social partners and representatives of civil society, contributing to the elaboration of national reform programmes as well as to its implementation.⁵⁰⁵

The OECD agrees that ‘regions and cities play new roles in terms of governance and intervention in order to promote learning, innovation, productivity and economic performance at the local level’.⁵⁰⁶ These statements provide powerful accounts of polycentricity and porosity. The European Commission hopes that through such dialogue between various levels of government EU priorities are brought closer to the citizens thus ‘strengthening the ownership needed to deliver the Europe 2020 strategy’.⁵⁰⁷

This overview of the smart specialisation agenda, the Regions of Knowledge programme, as well as the collaboration between SNAs and SNAs and the EU they encourage was very brief due to the limited space in this doctoral thesis. These overviews, which I plan to deepen at a later stage, nonetheless provide a quite powerful account of how EU soft law pictures SNAs as insiders of the internal market and its objectives. They show that autonomous decision and administration on the part of SNAs is necessary to maintain the competitiveness of the internal market, yet also underline that

⁵⁰⁴ Ibid 28.

⁵⁰⁵ Communication from the European Commission, *Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth* (Com (2010) 2020 Final 2010) 29.

⁵⁰⁶ OECD (n 464) 3.

⁵⁰⁷ Commission, *Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth* (n 505) 29.

SNAs do not act in isolation in this regard. Rather, they collaborate with other levels of public authority to this end.

Conclusion

This chapter has unveiled that also the law on State aids, the duty of loyal cooperation and a number of soft law instruments picture SNAs as insiders rather than outsiders of EU law. These domains of EU law are governed by polycentricity and porosity rather than bi-centricity. In these domains, SNAs and Member States are generally assimilated to each other and the Member States do not benefit from a special status as a consequence of their capacity as masters of the Treaties. The Insider Model captures these features.

Conclusion

This thesis set out to examine the relation between subnational autonomies and European Union law. My survey of EU substantive and procedural law has revealed this relation to be of a multifarious nature. While the existence of subnational autonomies is widely recognised in EU law, no fixed picture of their role emerges as no single pattern or all-encompassing rules can be identified. Rather, the relation between subnational autonomies and EU law can be best characterised through the reliance on two models, the Outsider Model and the Insider Model, which convey that a different picture of subnational autonomies emerges depending on the area under consideration.

The European Treaties that make up the surface of EU law picture subnational autonomies as outsiders to the European legal order. According to the Outsider Model, SNAs do not play an active part in the European Union's normative development but are mere subjects and agents thereof. They are bound to comply with EU law and implement EU law but do not play an active role in the normative development of the latter. Chapters Three and Four have outlined a number of areas of EU law in which local and regional authorities emerge as outsiders. In these areas, especially EU procedural law, Member States have a special and privileged position that derives from their capacity as masters of the Treaties. As a result of sovereign statehood, they are subject to the principle of legal indivisibility and national institutional autonomy, which precludes any direct interaction between SNAs and the EU. The EU and the Member States are considered to have, to a certain extent, fused into a composite entity from which

subnational authorities remain excluded. Interdependence and intertwining occur between the Member States and the EU, but SNAs are excluded from this symbiosis. In the context of their mutually assumed relations, the EU and the Member States have undertaken a number of rights and obligations, which do not however apply to SNAs. The bipolar interaction between the States and the EU, as reflected by the Treaties, portrays EU law as being composed of and shaped by the interaction of two levels of public authority only. The Treaties indicate that SNAs are merely passive by-standers to EU integration, being bound to follow and implement norms imposed on them.

Chapters Four and Five have however underlined that the Outsider Model is incapable of capturing all of the manifold interactions between the Member States and SNAs. Especially in the context of EU substantive law SNAs emerge as insiders. The same conclusion can be perceived in the CJEU's case law on the duty of loyal cooperation and SNAs' capacity of self-government. Under the Insider Model, SNAs are not solely passive bystanders but also active participants in EU integration. They create autonomous norms that interact and intertwine with EU norms, and in doing so determine the boundaries and shape of EU law. Polycentricity is evident in this domain. Furthermore the borders dividing these various levels of public authority are porous, allowing for processes of influence and cross-fertilization to occur. Given that subnational norms are insiders, they are assimilated to Member State norms, which do not enjoy any privileged status by virtue of stemming from the masters of the Treaties. Subnational norms, and the prerogative of self-government, as well as SNAs' duty of

loyalty towards the EU are perceived as active elements of the EU legal order, entertaining an active and dynamic relation with the latter.

Despite the distinctive spirit and features of the Insider Model and the Outsider Model, they should not be understood as completely separate but rather coexisting paradigms. The Insider Model nonetheless provides a telling account of European integration that is considerably different from the Outsider Model. Both models indeed not only tell different stories of SNAs but also of European law and integration as such and the recognition of SNAs as insiders goes hand in hand with the recognition of EU law as a legal order characterised by polycentricity and porosity. Under the Outsider Model the EU and SNAs are presumed to exist in different spheres, the active roles of SNAs being limited to the domestic realm. SNAs have not been integrated into the sphere of the EU and the Member States. The key reason for such separation lies in the sovereign States' status as masters of the Treaties, which not only grants the latter a distinct status but also creates a sort of impermeable banner preventing the supranational and subnational legal orders from direct interaction. Sovereignty has a shielding effect and the division between various legal orders plays out strongly in this domain. While Member States and the EU play the same game, SNAs stand on the sidelines.

Under the Insider Model, however, division cannot accurately describe the relation between various levels of public authority in the polycentric and porous European legal space. Rather, the word which more suitably describes this scenario is that of 'integration'. Subnational autonomies have come to be integrated into the

European Union's legal order. They do not passively stand at the sidelines of the game of EU integration but are active players just like the Member States and the EU are. Local and regional authorities actively contribute to the normative development of European Union law just as Member States do. The fact that subnational autonomies are henceforth integrated into the European legal order tells us something about the integration of the supranational legal order itself. The 'ever closer' union that EU integration has sought to achieve has not only occurred between States and citizens but also SNAs, which have not only been brought closer to each other through cross-border cooperation but also to the Union. *Fratelli Costanzo* has illustrated that SNAs are obliged to be loyal to the EU, but the opposite is also true. EU law not only sees SNAs as subjects and agents of EU law but also as active participants in its development. Instead of seeking to eradicate subnational autonomies, or keeping them at the outside of EU law, the Insider Model illustrates that SNAs have, in some respects at least, become fully integrated into the EU legal order and play valuable roles therein.

The European Treaties reflect the origins of the EU legal order, its creation by the Member States according to a public international law paradigm. The Outsider Model's main features, namely the attachment to State sovereignty, bi-centricity and the non-assimilation of Member States and SNAs relate to this paradigm. As European integration has progressed, a parallel world of EU law has however developed that is characterized by the integration paradigm. While EU law on the surface reflects a paradigm of division, a desire to create and police dividing boundaries of competence between the two constituent units, the spirit governing EU law below its surface is that of

integration. Two different models, one governed by separation and one governed by integration accordingly coexist in EU law. This coexistence challenges some key aspects of our common constitutional imagination of SNAs and EU law. SNAs are probably most often thought of as outsiders of EU law, if at all. The Insider Model points to the existence of a parallel space, which has emerged as a consequence of European integration, in which subnational authorities are active participants in the process of European integration. This not only challenges our perceptions of SNAs and some domains of EU law, but also of the fact that current legal dynamics between different scales of public authority can be explained by determining where the competence of one level starts and that of another level stops. Division cannot fully explain the relation between SNAs and the EU and might also prove insufficient in other domains. We simply cannot understand the Insider Model by relying on the idea of separation. Rather, the Insider Model compels us intellectually to rearrange our perception of sovereignty and division; paradigms we often just assume are an appropriate lens through which to understand EU law. What is instead needed is a realisation that integration and symbiosis occur and have progressed to a degree where division is no longer a useful paradigm. The polycentric and porous EU is not so much about the interaction between formally separate entities and the determination of their respective competences but rather concerns the coexistence of various entities in the same legal space. Due to polycentricity and porosity norm generation by a single scale can no longer be a purely internal fact as it is influenced by and will have an influence on norms existing elsewhere.

It was not the aim of this thesis to provide an exhaustive account of subnational autonomies and EU law but rather to shed light upon some aspects of the relation between subnational autonomies and European Union law that had not previously been documented. This thesis was a pursuit in understanding legal dynamics of which I was previously unable to make sense of. It has fulfilled this role for me and I hope that it will do the same for others. Rather than presuming to have once and for all defined the relation between subnational autonomies and EU law, the thesis has shed light upon some aspects that previously were lying in the dark and it is hoped that it will contribute to an understanding of how different scales coexist in our contemporary world.

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