First Draft – Comments most welcome!

Subsidiarity and the Constitutional Premise for ‘Regional Governance’ in Europe

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1. The Constitutional Premise for Regional Governance

While a consensual definition is still wanting, subsidiarity refers to the idea that political action takes place at the level most appropriate to the issue at hand. This idea is usually traced back to the Social Doctrine of the Catholic Church, notably the famous Encyclical *Quadragesimo Anno* which Pope Pius XI proclaimed in 1931. While several political thinkers had alluded to subsidiarity before, the Papal Encyclical not only explicitly named the principle of subsidiarity for the very first time; it also entails the most comprehensive understanding of the concept. On the one hand, subsidiarity shall protect the political autonomy of subordinate groups from unnecessary interventions of the State. On the other hand, however, subsidiarity shall also enable the State to intervene in affairs “that belong to it alone” because subordinate groups are not capable of effectively handling them.

Sustainable development certainly is an issue that ‘does not belong to the State alone’. In many ways, sustainable development is a generic regional concept and should be dealt with at the regional level accordingly. Yet, sustainable development implies ecological interactions across natural space and geography, rather than purely economic development within established administrative or political units. Thus, one may argue that regional authorities are not necessarily most effective in promoting sustainable development. At the same time, however, subnational entities, such as regions, provinces, autonomous communities, and

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2 “Therefore those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function”, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.” (Quadragesimo Anno, Para 80, emphasis added).

Länder hold important resources that are necessary to develop and implement sustainable development. It is not only their capacity to make and impose collectively binding decisions. Regional governments play a crucial role as interface coordinators or arenas for policy coordination among local actors with the necessary resources to make regional policies work (Kohler-Koch 1996; Kohler-Koch 1998; Börzel 2002). There is no regional governance without regional government.

Subsidiarity regulates the relationship between different levels of government, such as the European Union, the State, the region and the local authority, each of which is constituted by constitutional or legal institutions. Not only to these institutions define the boundaries and the material and legal resources upon which each of the levels can draw, but also prescribe the purpose they are to serve or the values that they are to consider in arriving at their choices. Even if we go back to the concept of subsidiarity in the Papal Encyclical, which referred to the delimitation between the public and private sphere rather than different levels of government, subsidiarity regulates the relationship between constitutionally defined entities: the State (regional authority), on the one hand, and the Church, private associations, or the citizens, on the other.

In sum, constitutionally or legally defined regional entities are the premise for both regional governance and the application of principle of subsidiarity. But what is the exact relationship between regional governance and subsidiarity? What role can subsidiarity play to promote sustainable development and regional governance in general?

Since sustainable development often cuts across the constitutionally defined territorial structures of European states, it requires coordinated action between public and private actors at different levels of government in order to be effective. Such forms of regional governance can only emerge, if regional actors are both willing and capable of engaging in political interaction. Given the topic of this paper, I focus on the second premise for regional governance. I argue that subsidiarity may enhance the political action capacity at the regional level by ensuring that regional actors have sufficient autonomy and resources (competencies,

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4 For the purpose of this paper, I define regional governance as patterned relationships that emerge from the policy-making (governing) activities of political, administrative and social actors within a territorially defined space located below the national and above the local level.

5 On the first premise, see the paper by Oldrich Jetmar on multilevel governance in the Czech Republic that presents an example where regional actors appear to be unwilling to invoke their newly devolved competencies.
financial means, expertise) to make sustainable development work. Yet, the ‘negative’ understanding of subsidiarity, which dominates academic and political debates and which takes subsidiarity merely as a means to prevent central intervention in regional affairs, won’t do the trick. What is required is a more ‘positive’ interpretation of subsidiarity that emphasizes mutual respect and support.

The paper is organized into three parts. The first part analyzes the effect of Europeanization on the political action capacity of the regions in the member states. It argues that the European system of multi-level governance tends to decrease rather than increase the political latitude of regional actors by making them more dependent on their central states. The second part challenges the principle of subsidiarity as a solution to the increasing centralization of regional responsibilities. Drawing on the federal experience of Germany, I claim that the traditional ‘negative’ understanding of subsidiarity as a means to prevent central intervention in regional affairs will do little to increase the latitude for regional governance. The paper concludes with a plea for an alternative reading of subsidiarity based on the principle of federal comity. Mutual respect and support appear to be more adequate to guide policy-making in systems of multi-level governance than trying to ‘ring-fence’ regional responsibilities against interventions of the EU and/or the central state.

2. Europeanization and Regional Governance

The impact of Europeanization on regional governance in the member-states can be conceptualized in terms of a redistribution of resources between the central state and its subnational authorities. Europe constitutes a political opportunity structure, which provides the regions with new constraints and opportunities (Marks et al. 1996; Börzel 1999). On the one hand, regions lose powers when their competencies are transferred to the European Union where central-state executives and European actors dominate decision-making. On the other hand, European institutions, such as the Commission, the European Parliament, and the Committee of the Regions, act as additional access points to the policy process, which the regions can exploit independently of, and even against the interests of their central governments. The changes brought about by the EU in the political opportunity structures of the regions, however, vary significantly between member-states depending on the domestic distribution of resources (Börzel 2002). Europeanization affects the regions with strong legislative and administrative competencies (Germany, Austria, Belgium, Spain, Italy, and
increasingly the UK) in a different way than the regions of unitary or weakly decentralized member-states. Since the focus of the paper is on subsidiarity and the constitutional premise for regional governance, I focus on those regions which enjoy constitutional or at least legal autonomy rather than being mere administrative units of the central state.

In the European Treaties, the member states conferred the European Union policy-making powers in a wide range of policy areas reaching from social regulation to macro-economic stabilization. The shift of policy competencies to the European level does not only involve competencies of the central state. There is practically no area of regional responsibility in which the European Union has not intervened.

Because their regions enjoy a relatively high degree of legal, administrative, and fiscal autonomy, the increasing transfer of policy competencies to the European level has led to a serious centralization of regional responsibilities in regionalized and federal member states. Both the central state and the regions lose policy-making power when their competencies are transferred to the EU. Yet, unlike the central state, whose government is compensated for the loss of its competencies by co-decision making powers in the Council of the European Union, the regions have no autonomous formal influence on the exercise of their former competencies at the European level. Moreover, European institutions allow central states to access exclusive regional competencies, which they could not regulate by domestic means because they were protected by the national Constitution (e.g., culture and media).6

While the regions in federal and regionalized member states have more to lose from Europeanization than subnational authorities with purely administrative functions, the former have the resources to establish and exploit direct relations with European institutions. Subnational authorities in unitary and weakly decentralized states, by contrast, not only often lack the organizational capacity (e.g., manpower, financial means, and expertise) to access the European policymaking arena directly, but their constitutions also do not permit them to conduct external relations, including official relations with European institutions. Institutionally well-entrenched regions, by contrast, have established direct channels of access to the European policy arena. However, (informal) consultations with the Commission and the European Parliament, or with the collective representation in the Committee of the Regions

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6 The European Broadcasting Directive “Television without frontiers” and the EC language programme LINGUA are two cases in point.
can hardly compensate them for the loss of their formal, domestic decision powers (Börzel 2001).

Not only do the regions lose autonomous decision-making powers when their competencies are transferred to the EU level. They are also affected in their discretion to implement central policies. The EU lacks a proper administration to apply and enforce its policies. The member states are liable to the EU for the effective implementation of European Law. In federal and regionalized member states, however, the regions are ultimately responsible for implementing most European policies. The central governments have only limited means for directly intervening in the way in which their regions apply and enforce European law. In order to ensure uniform implementation across the country, central governments have, therefore, centralized the transposition of European policies into national law and have prescribed detailed national regulations limiting the regions’ discretionary powers in implementation.

This strategy has had little effect, however. Even detailed national legislation has only limited influence on the way in which the regions implement European policies. As the main implementers, the regions usually bear a large share of the implementation costs. They have to provide, or build up, the administrative infrastructure to apply, monitor, and enforce European law. High costs, both material and political (i.e., opposition by powerful societal interests), are often a major source of implementation problems. Although the central government is liable to the EU for implementation failures, it cannot command the amount of resources (i.e., manpower, expertise, technology, and money) which the regions dedicate to the implementation of European regulations (cf. Börzel 1998).

In sum, Europeanization has serious consequences for regional governance by limiting the capacity of regions for autonomous action. It seems that European integration has curbed rather than spurred the hopes for a ‘Europe of the regions’, in which regions increasingly supersede the nation-state as the most important political actors. But unlike proponents of intergovernmentalist theories claim (Milward 1992; Moravcsik 1994), Europeanization has not really ‘strengthened the state’ either. Rather than being strengthened or weakened, central state and regions have become increasingly dependent on each other in European policy-making.

On the one hand, regions depend on their central government to get formal access to the EU decision-making process. While central-state executives do not exclusively control access to
European policy-making, they provide the regions with channels of influence that are more effective than direct contacts with the Commission and the European Parliament where regions have to compete with hundreds of pressure groups for access. As a result, the Belgian, German, Austrian, Spanish, and Italian regions have increasingly relied on their central governments to inject their interests into the European policy-making process (Börzel 2001). As members of the national delegation, regional representatives participate in European committees and sometimes (with the exception of Spain and Italy) even in the Council of the European Union. Domestically, they cooperate with the central government in formulating the national bargaining position on European issues. Moreover, since regions are often the main implementers of EU policies, they increasingly rely on the central state to share the costs (Börzel 1998). Not only are they able to pool certain resources (e.g., information and expertise) with the central government in designing policies to effectively implement European Law, but the central government also controls access to European funds, which are meant to compensate for some of the costs resulting from the implementation of European policies in economically weaker regions of the European Union.

On the other hand, however, the central state depends on its regions for the effective implementation of EU policies. In many cases, the regions are ultimately responsible for implementation failures, particularly when it comes to practical application and enforcement. Unable to fully ‘capture’ the responsibility for implementation, the central state has to rely on the cooperation of its regions to ensure the timely and uniform application of European Law across its territory.

The mutual dependence in European policymaking galvanizes the interest of both the central government and the regions in intergovernmental cooperation on European issues. In all federal and regionalized member states, central government and regions have established institutions to facilitate intergovernmental cooperation in EU policy-making. Even in countries like Spain, where the relationship between central state and regions are traditionally ridden by conflict and tension, the Autonomous Communities participate in the formulation and implementation of EU policies (Börzel 2000; cf. Börzel 2002). Because of this shift towards ‘cooperative regionalism’, subsidiarity in its negative understanding is unlikely to increase the latitude for regional governance.

[Figure 1 about here]
In areas which do not fall within its exclusive competencies, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community.

Art. 5 (2) EC-Treaty

3. Subsidiarity and Regional Governance

The Europeanization of public policy has caused the regions a significant loss of policy-making powers in favour of the central state and the European Union. The Maastricht Treaty responded to the demands of the regions to protect their autonomy against further centralization by introducing subsidiarity as a guiding principle of the European Union (Art. 5 EC-Treaty, ex-Art. 3b EU-Treaty). Yet, subsidiarity has done little to increase the political latitude of subordinate levels of government. The European Convention on the Future of the European Union, which is currently hammering out a European Constitution, has established an entire working group with the task of sharpening the principle of subsidiarity. A more effective application shall increase both the legitimacy and the effectiveness of EU policy-making. Yet, as long as it is only meant to ‘ring-fence’ national and regional responsibilities subsidiarity is unlikely to bring politics closer to the citizen nor will it ease the decision-making burden of an EU with 25 member states. Such a ‘negative’ understanding of subsidiarity is based on three major assumptions that are widely shared among academics and policy-makers alike:

(1) Subsidiarity is a constitutional principle for allocating competencies between different levels of government.

(2) Subsidiarity protects subordinate levels of government against centralization.

(3) Subsidiarity promotes democracy in a system of multi-level governance.

This section will take issue with each of the three assumptions arguing that they contain serious flaws.
3.1 Subsidiarity and the Distribution of Competencies

There are two fundamental ways, in which subsidiarity can regulate the relationship between different levels of government (cf. Scott, Peterson, and Millar 1994). First, subsidiarity as a ‘substantive principle’ is to determine which competencies shall be attributed to the centre and which competencies shall be left to subordinate units. Thus, subsidiarity serves as a principle to allocate exclusive competencies to different levels of government.

Second, subsidiarity as a ‘procedural devise’ is to determine the appropriate level that should take action in areas were competencies are shared or concurrent. It does not offer any guidance about what should be the objective of central policies or in what areas the central level should have competencies. Rather, subsidiarity is a criterion to guide the execution of already allocated competencies.

The European Treaties employ subsidiarity in both ways, but the procedural approach clearly prevails. Article 5 of the EC Treaty mandates that the European Union is to act in the pursuit of agreed objectives insofar as European action is the most effective means to achieving these objectives. In areas which do not fall under its exclusive competencies, the EU can only make use of its competencies if Community action is necessary, that is superior/better because the proposed action cannot be sufficiently achieved by the member states. Article 5 does not offer any guidelines for determining such agreed objectives but leaves it to the political discretion of the member states. The member state governments, however, have merely specified its procedural function.

The European Council of Edinburgh adopted some detailed guidelines on how to interpret and implement Article 3b (now Article 5) and to entrench the principle of subsidiarity in EU policy-making.7 The guidelines were attached in form of a protocol to the Amsterdam Treaty. According to the ‘Protocol on the Application of the Principles of Subsidiarity and Proportionality’, issues are better dealt with at the EU level if 1) they have a transnational aspect, and/or 2) actions by member states alone or the lack of Community action would conflict with the requirements of the Treaty, and/or 3) there are clear benefits by reason of scale or effects. Some procedural requirements are to ensure the effective application of these

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guidelines. The Commission shall consult more widely with the member states and other actors before proposing legislation, attach to each legislative proposal an explanatory memorandum, and submit an annual report on the application of the subsidiarity principle. These political controls notwithstanding, the European Court of Justice has the power to interpret the principle of subsidiarity and enforce it.

Only the Preamble of the Treaty of the European Union invokes the principle of subsidiarity in a more substantive way by emphasizing that political decisions shall be taken in the European Union “as closely as possible to the citizen in accordance with the principle of subsidiarity”. The more Eurosceptic member states, Denmark and the UK, together with regions, such as the German Länder and the Spanish Autonomous Communities, sought to strengthen the substantive meaning of subsidiarity in the Maastricht Treaty in order to check the expansion of EU powers, which they anticipated with the move toward Economic and Monetary Union. But they were not able to give the principle of subsidiarity a more substantive meaning. Like the principle of proportionality, subsidiarity entered the Maastricht Treaty as a criterion for determining the acceptable limits of EU intervention in areas of shared competencies. It shall work as a constraint (Kompetenzschanke) on the EU in exercising its competencies.

In subsequent Treaty revisions, the German Länder, supported by other regions with legislative competencies, renewed their attempts to establish subsidiarity as a substantive principle that regulates the allocation of competencies between the EU and the member states. In spring 2000, the Länder even threatened to veto the ratification of the Nice Treaty if the Intergovernmental Conference did not agree on a clear delimitation of competencies between the EU, the member states, and the regions that would strictly observe the principle of subsidiarity. Without such a Kompetenzkatalog (catalogue of competencies) laid down in the Treaty, the Länder feared that European integration would ultimately erode the federal structure of Germany. In a meeting in May 2000, the president of the European Commission, Romano Prodi, told the Länder that their concerns about a strict delimitation of competencies could not be addressed in this round of intergovernmental negotiations but be considered in the White Paper on European Governance, which the Commission prepared at the time. A month later, the Länder settled for a compromise: the Nice summit would commit itself to a second Intergovernmental Conference in 2004, which would deal with the delimitation of competencies and decide a comprehensive reform of the European Treaties.
The Declaration of the Nice Treaty on the Future of the European Union indeed called for a clear delimitation of competencies between the different levels of government in the EU. The call could be interpreted as a move towards a more negative understanding of subsidiarity as a device to regulate the allocation rather than the exercise of competencies in the EU.

The European Convention on the Future of the European Union, which has the task to prepare the Intergovernmental Conference of 2004, installed a working group on subsidiarity. Any attempts, however, to formulate a list of competencies, for which the German Länder had hoped for, have failed. The debates have merely focused on improving the application of the principle of subsidiarity in its current form.\(^8\)

But even if the member states ever agreed on a general distribution of competencies, it is highly questionable whether the principle of subsidiarity as a negative device to regulate the allocation of competencies in the European system of multi-level governance would do anything to stop the centralization of regional competencies.

### 3.2 Subsidiarity and Centralization

In the negotiations of the Maastricht Treaty, the president of the European Commission, Jacques Delors, and the British Prime Minister Margaret Thatcher, for once found themselves fighting side by side, both pushing subsidiarity to become a constitutional principle of the European Union. Mr. Delors had not given up his pro-integrationist agenda; nor had the Iron Lady, who criticized Delors’ European policies as ‘socialism through the backdoor’, suddenly forgotten her distaste for Brussels bureaucracy.\(^9\) Rather, the two politicians adhered to two fundamentally different interpretations of subsidiarity. Mrs. Thatcher understood subsidiarity as a purely negative concept that minimizes interference from Brussels. Mr. Delors, by contrast, stressed the positive side of subsidiarity as the possibility or obligation of the EU to intervene if the member states are not able to achieve issues at hand (Delors 1991: 9).\(^10\)

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\(^10\) Interestingly, the origins of subsidiarity appear to be closer to the positive concept. The Latin word *subsidium* or *subsidiaries* initially meant ‘something in reserve’, or more specifically, reserve troops. Later it acquired a broader sense of assistance or aid (Endo, Ken. 2001. *Subsidiarity and its enemies: To what extent is...*
The dispute between the two competing interpretations is by no means settled. While the German government (under pressure from the Länder), together with the British and the French, has pushed for the negative concept of subsidiarity, smaller and economically less developed member states have favoured a positive, pro-integrationist approach that allows the EU to take on policies which they are not able to deliver at the domestic level due to their constrained action capacities.

Different Member States and institutional actors have been able to seize upon different meanings of subsidiarity to justify developing (or not developing) the European Union in ways which reflect their own vision of the common good or serve their own interests (Scott, Peterson, and Millar 1994: 49).

Indeed, the wording of Article 5 EC-Treaty always allows member states with lower levels of socio-economic development and limited government capacities to claim that they are not able to sufficiently achieve objectives calling for Community action. The requirements for transnational aspects and benefits by reasons of scale or effect do not necessarily provide an effective protection against centralization either, since Community action can be easily linked to the ‘Four Freedoms’ that constitute the core of Community objectives. In other words, the decision whether the Community level is “better” or “more effective” in achieving a proposed action is ultimately a political one. Most lawyers accept the political content of the principle of subsidiarity that escapes judicial control. Federal constitutional courts, such as the German Bundesverfassungsgericht or the US Supreme Court, have not invoked subsidiarity as a legal constraint for the exercise of competencies either and have reduced their judicial review to the issue whether federal governments have made adequate use of their political discretion.

The inherently political nature of subsidiarity also shows in the disagreement among member states that share a negative interpretation of subsidiarity. Even though they agree that subsidiarity shall limit EU powers, not all of them are willing to extend its application to the regional and local level. While the German version of Article 5 EC Treaty authorizes the

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12 See e.g. the Aide-mémoire des pays de Benelux pour le sommet de Birmingham, 10 October 1992, the Greek Memorandum on Subsidiarity for the Birmingham European Council, 19 October 1992, and the Mémorandum de l’Espagne sur le principe de subsidiarité, 30 October 1992.
Community to take action only if “the proposed action cannot be sufficiently achieved at the level of the Member States” (“auf Ebene der Mitgliedsstaaten”, emphasis added), according to the English text the “proposed action cannot be sufficiently achieved by the Member States”.13 The different wording is no coincidence. The disagreement among the member states concerning the scope of the principle of subsidiarity became apparent once again in the negotiations on the Treaty of Amsterdam. Attempts to redefine of Art. 3b (not Art. 5) in the Treaty failed. The member states settled for a Protocol, to which a declaration was attached extending the application of the principle of subsidiarity to the regional and local level. Germany, Belgium, and Austria were the only countries that signed the political declaration.

In the negotiations on the Niece Treaty, the Committee of the Regions asked again for the principle of subsidiarity to be amended to formally recognize the role of regional and local authorities. While the initiative failed, the German Länder pushed the issue on the agenda for the next round of Treaty revisions (see above).

With the Declaration of the Niece Treaty, the Länder had finally succeeded in moving the EU towards a more substantive, negative interpretation of subsidiarity. Having fought a political victory, it seems somewhat ironic, though, that the German Länder of all European regions have insisted on a strictly negative interpretation of the principle of subsidiarity.

More than any other federal system, German federalism is characterized by the comprehensive interlocking of competencies between the federal and the state level of government. There are hardly any areas in which either level can autonomously legislate. The vast majority of competencies are shared and jointly exercised. As a brief overview of the evolution of the post-war German federal state shows that the constitutional provisions for subsidiarity were not able to prevent the progressing centralization of regional responsibilities. Nor were the Länder able to stop or reverse centralization. Rather, they settled for broad participatory rights in federal decision-making as a compensation for the losses of autonomous decision powers. It is precisely this logic of “compensation-through-participation” which characterizes the European system of multilevel governance and which is responsible for the fact that the European Union and the member states share competencies in virtually all areas.

13 The French version follows the English wording.
One of the core elements of German federalism is the state quality of the *Länder*, which is not merely derived from the German state as a whole. As a result, the German Constitution (Basic Law) provides the *Länder* with significant resources. They enjoy an independent *pouvoir constituant*, a proper constitutional court system, and a *Hausgut* (core) of ‘untouchable’ competencies. Consequently, *Länder* acquire responsibility for all state functions (Art. 30, 70, 83 GG). In order to protect their autonomous sphere of competencies, the Basic Law invokes the principle of subsidiarity, without referring to it explicitly, though.

The competencies of the *Länder* are not explicitly listed in the Basic Law; rather the *Länder* have the right to legislate insofar as the Basic Law does not confer legislative power to the *Bund* (Federation). Following the substantive concept of subsidiarity, Article 30, which defines the functions of *Länder*, stipulates:

The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder* in so far as this Basic Law does not prescribe or permit otherwise.14

The catalogue of exclusive competencies of the *Bund* is relatively short (Art. 73 GG).15 For the regulation of the large area of concurrent (Art. 74 GG) and shared competencies (Art. 75 GG), the Basic Law invokes subsidiarity as a procedural device, however, with a more positive connotation than Article 5 (2) of the EC-Treaty. Article 72 (2) specifies cases of shared and concurrent competencies, which may require federal legislation:

The *Bund* shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:
1. a matter cannot be effectively regulated by the legislation of individual *Länder*, or
2. the regulation of a matter by a *Länder* law might prejudice the interests of other *Länder* or of the people as a whole, or

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14 In a similar vein, the 10th Amendment to the US Constitution enshrines the principle by seeking to safeguard the powers to its individual states: “The powers not delegated to the United States by the Constitution, nor prohibited to by it to the States, are reserved to the States respectively, or to the people.”

15 The *Bund* holds exclusive responsibility for the territorial organization of the state (Art. 29 II GG), foreign policy and defence, citizenship (Art. 73.1.; Art. 24 I GG), customs (Art. 105 GG), freedom of movement, immigration and emigration, currency, money and coinage, weights and measures, trade and commerce, freedom of movement of goods, federal railroads and air transport, postal and telecommunication services, intellectual property rights, and the cooperation between *Bund* and *Länder* concerning criminal policy, the protection of the Constitution, and the protection against external challenges of the public security (Art. 73 GG). The *Bund* can delegate its legislative competencies to the *Länder* if regional policy solutions appear more appropriate (Art. 71 GG) – a possibility of which the *Bund* has hardly ever made use, though.
3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.

The Basic Law had given negative subsidiarity as a means to regulate the allocation of competencies between Bund and Länder a prominent role. However, positive subsidiarity as a device to regulate the exercise of shared and concurrent competencies soon became to dominate the evolution of German federalism, as a result of which Länder competencies became increasingly subject to centralization.

During the first 20 years, the Basic Law underwent a whole series of changes. Of the 34 amendments being passed till 1976, 17 were exclusively dedicated to enhance the legislative competencies of the central state. The Stabilitätsgesetz (Stability Law; Art. 109 GG), the Notstandsverfassung (Emergency Constitution; Art. 87a, 91 II GG), the Haushaltsgrundsätzegesetz (Law on Budget Guidelines; Art. 109, 110 GG), the Gemeinschaftsaufgaben (Joint Tasks, Art. 91a, b GG) and the Mischfinanzierung (unechte Gemeinschaftsaufgaben, mixed financing; Art. 104a IV GG) as well as several amendments of the concurrent legislation catalogue of Article 74 GG and the framework legislation of Article 75 GG considerably strengthened the Federal powers in public security, regional industrial policy, agricultural structural policy, university construction, housing, urban renewal, urban transportation, hospitals, education, and research funding, environmental protection, consumer protection as well as short-term economic stabilization. The spirit of substantive subsidiarity as it had been entrenched in Article 30 was unable to prevent these massive transfers of competencies.

Moreover, the Bund has fully exploited the possibility to legislate in the area of concurrent and shared competencies. It adopted a very broad interpretation of the subsidiarity clause of Article 72 (2) that was supported by the Constitutional Court, which left it to the discretion of the Federal legislator to decide whether a unitary Federal regulation was necessary. In other words, the Federal Constitutional Court interpreted subsidiarity as a political criterion and not as a constitutional principle.

16 BVerfGE 2, 213 (224/225); BVerfGE 4, 115 (127); BVerfGE 10, 234 (245); BVerfGE 33, 224 (229); BVerfGE 39, 96 (114/115).

17 In a similar vein, the US Constitutional Court has refrained from constraining the competencies of the US Government on regulating “Interstate Commerce”.
All in all, subsidiarity did not stop centralization in the 1960s and 1970s, which significantly curbed the area of exclusive Länder competencies. The driving force of centralization has been the pressure for ever greater uniformity in the provision of government services, coordinated planning for efficient use of resources, and centralized oversight of public expenditure having regard to the needs of economic management. The German Länder did not oppose the subsequent centralization of their legislative, and partly also administrative competencies. They approved all constitutional amendments with the necessary two-third majority in the Bundesrat, the second chamber of the German Parliament. Appeals to the Constitutional Court by the Länder against Federal interventions into their sphere of competencies have been the exception rather than the rule. Rather, in order to protect their political autonomy vis-à-vis the central state, the Länder treated their legislative competencies against participatory rights in Federal decision-making on policies subject to their previous competencies. This “compensation-through-participation” has prevented the Länder from being downgraded to mere administrative units of the central state.

At the end of the 1970s, the centralization of Länder competencies came to a halt. Joint decision-making and interlocking politics were called into question because the high need for consensus often resulted in ineffective policy outcomes and reform blockages. The “joint decision trap” (Scharpf, Reissert, and Schnabel 1976) triggered an intensive debate on the need for re-federalization and Entflechtung (disentanglement) at the beginning of the 1980s. 10 years later, German Unification opened another opportunity for federal reform. Yet, any attempt of strengthening the competencies of the Länder fell victim to the logic of the joint decision trap. Decentralization of policy competencies requires a certain redistribution of financial resources in order to enable the Länder with weaker tax and spending capacity to fulfill their new responsibilities. Given the heterogeneity of the Länder, such a redistribution would only be effective if it was accompanied by a territorial reorganization as a result of which some of the smaller Länder would cede to exist. Not surprisingly, the Länder have not been able to agree on any territorial restructuring.

In sum, despite a growing disenchantment with interlocking politics and joint decision-making, the institutions of cooperative federalism have remained highly stable and resilient against any reform attempts. Subsidiarity has not been able to stop the political dynamics of

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18 Exclusive Länder competencies comprise budget, culture and education, local government, police and public security, parts of the environment and the health sector as well as some issues of the economy and traffic.
centralization nor has it helped to fuel reforms for decentralization. Given the structural similarities between German federalism and the European system of multilevel of governance, we have little reasons to expect subsidiarity to protect the autonomy of regions against centralization. The subsidiarity principle has been in the European Treaties for more than 10 years but has not stopped the EU from steadily accumulating new powers.

*What German federalism Can Teach Us About the European Union*

Already 15 years ago, Fritz W. Scharpf pointed to the similarities between German federalism and the European system of multilevel governance (Scharpf 1988). Both present forms of cooperative federalism where competencies are shared rather than divided up between the two levels of government (cf. Börzel and Hösl 2003). The dynamics of centralization may be different. Rather than a by a strong preference for uniform living conditions, the Europeanization of national policy-competencies has been driven by the logics of market integration and the growing interdependence between spheres of policy. But the institutional responses to centralization are the same. The member states do not simply transfer their competencies to the European level. Like the German Länder, national governments retain strong co-decision powers in the Council of the EU as a compensation for their losses of autonomous competencies. The structural similarities between German federalism and EU multilevel governance have some major implications for the use of subsidiarity to regulate the relationship between the European, national, and regional levels of government.

First, any attempt to re-transfer European competencies to the member state level is likely to fall into the joint decision-trap. If the German Länder for more than 30 years have not been able to agree on the disentanglement of shared competencies, why should the member state governments be able to do so? Whereas particularly the Eurosceptic member states, like the UK, Denmark or Sweden, may be supportive of re-nationalization, the more pro-integration members as well as the “cohesion countries” take a reluctant position. Not surprisingly, the European Convention has swiftly buried the idea of a competence catalogue.

Instead, the Convention has discussed proposals for a new division of competencies according to which the EU should focus on its core competence for market integration while the member states would retain responsibilities that lie at the heart of traditional state functions, such as public health and social security, education, media, and culture. In these areas, the EU may at best complement or support member states’ activities. Such a division of labour, however,
presupposes a somewhat artificial distinction between market-making and market-correcting regulations: neoliberal market policies are made at the European level, while welfare state policies are left to the member states. Yet, market integration produces negative externalities, such as “social dumping”, which the member states cannot effectively address. They require some European-wide regulations on social security or health and safety issues, which also prevent the member states from using national regulations to impair the free movement of goods, services, capital or persons. Given the logic of market integration, EU-competencies are likely to be strengthened rather than weakened. The curbing and containing of EU-legislative powers would not only contradict the logics of market integration and the growing interdependence between spheres of policies, which have driven the Europeanization of national policy competencies in the first place. It is not necessarily desired by European citizens either (Commission 2000: 43).

Second, even if the member states agreed on some formal delimitation of competencies, it is unlikely to put a hold to the Europeanization of national policy competencies. Any intervention of the Bund into Länder responsibilities received the explicit consent of the Länder. Likewise; many EU-policies, which national politicians denounce now as overstepping the limits of European integration, were adopted with the consent of their governments. The formal exclusion of EU-action in some policy areas by inserting exclusionary provisions into treaty articles (see e.g. Art. 149 (4) on education or Art. 152 (4) on public health) has not prevented the member states from adopting EU-policy measures. There are several cases in which the national governments evaded and transgressed the limits on EU-regulatory powers, which they themselves had put into the Treaties to protect their state jurisdictions (see for instance the famous tobacco advertising directive, which was revoked by the European Court of Justice).

In sum, subsidiarity as a substantive principle with constitutional status that shall regulate the allocation of powers between the EU and its member states is of hardly any use to promoting regional governance in Europe. For the same reasons, subsidiarity as a procedural criterion that guides the exercise of shared and concurrent competencies has little effect if it is merely understood as a ‘negative’ concept to protect or ‘ring-fence’ national and regional autonomy. Nor will it provide a solution to the ‘democratic deficit’ of the EU.
3.3 Subsidiarity and Democracy

Both in its substantive and procedural meaning, subsidiarity is closely linked to the idea that political decisions should be taken as closely to the citizens as possible. Many democratic theorists and federalists see subsidiarity as a major means to ensure democracy in any multi-level system of governance (Scott, Peterson, and Millar 1994: 50-51). Its application shall promote transparency, accountability and representation (input legitimacy). Moreover, subsidiarity can increase the problem-solving capacity of policy-making by leaving political decisions to the level that is most effective in dealing with the issue under consideration (output legitimacy).19

Since the 1990s, subsidiarity has become a critical tool in the effort to enhance the EU’s legitimacy and close its ‘democratic deficit’.20 The Nice Declaration on the Future of the European Union explicitly refers to the principle of subsidiarity as a device to enhance both the input and the output legitimacy of the EU. Yet, for the same reasons that it cannot prevent centralization, subsidiarity is highly unlikely to help overcoming the democratic deficit in the EU either.

The EU is a multilevel bargaining system in which competencies are shared in a two-fold way. First, there are hardly any areas of exclusive EU-competencies; where the member states must not legislate. The vast majority of competencies are shared or concurrent. Second, even in areas where the EU holds exclusive competencies, the member states hold co-decision powers in EU-legislation. The sharing and joint exercise of competencies turns the EU into a multi-level system of joint decision-making and interlocking politics as we find it in cooperative federal states, like Germany (see above).

As any cooperative federal state, the EU system of multi-level governance suffers from two major deficiencies that are inherently linked (cf. Börzel and Hösli 2003):


• The dominance of territorially defined executive interests over functional interests (citizens, interest groups, companies).
• A high need for consensus in decision-making.

Taken together, executive dominance and high need for consensus give rise to policy processes that are informal, highly exclusive and tend to blur political responsibilities. The lack of transparency and accountability constitutes a major part of the legitimacy problem of the EU.

The Problem of Executive Dominance

European institutions have been designed in a way that member state executives dominate the policy-making process. The Council of the EU is their most important source of power. It resembles a Bundesrat-type second chamber of the European legislature: unlike in the Senate model, where state representatives would be directly elected and each state would have the same number of representatives, member states are represented by their executives, and their voting power is weighed according to population size. Like in other cooperative federal systems, the interlocking of policy competencies, the functional division of labour, and a Bundesrat-type second chamber all work in favor of a certain asymmetry in political representation, where territorially defined executive interests dominate over functional interests. The constrained financial autonomy of the EU vis-à-vis its member states underpins the dominance of territorial interests in European policy-making.

Certainly, the European Commission, the EP, and the ECJ represent functional rather than territorial interests in the EU (Sbragia 1993; Egeberg 2001). Yet, members of these institutions are appointed, or elected, on the basis of territorial representation. Most prominently, even the President of the Commission is nominated by member state governments – despite the EP’s increased leverage in the approval of Commissioners – and the Council President is determined by governments by definition (on the basis of the rotating principle among member states). Moreover, although the three major supranational EU institutions were able to gradually expand their powers, the Council of the EU, in practice, still is the EU’s most ‘weighty’ decision-making body. Its relationship with the Commission and the EP, in spite of the Treaties of Amsterdam and Nice, continues to be based on a somewhat asymmetrical balance of power.
The European Commission, as the ‘executive arm’ of the EU, has limited autonomy vis-à-vis the Council of the EU, notwithstanding its agenda-setting power, which is based on its right of legal initiative. As mentioned above, it neither derives its authority from the EP nor from direct elections, as a result of which it suffers from weak political legitimacy. Moreover, the Commission strongly depends on the member states for financing and implementation of its policies. Hence, it enjoys little ‘strategic autonomy’ as regards designing and pursuing bargaining strategies against the Council (Scharpf 1988: 255). The EP as a ‘nascent first chamber’ of an EU legislature has managed to gradually increase its co-decision powers in European policy-making. But nonetheless, EU policies cannot be adopted without the consent of the Council. And even within the EP, territorial politics are important, because an effective system of European party alliances has not developed as of yet (e.g. Hix 1999: 180-184).

Finally, the system of ‘comitology’ – the extensive network of committees linked to the Council and partially to the European Commission – enhances the extent of territorial interest representation in the EU: experts represented within these committees are usually selected by national governments and often serve in national administrations.

The dominance of territorially defined executive interests in the EU is even more pronounced than in established systems of cooperative federalism, where some countervailing remedies exist. In Germany, for example, the Länder enjoy strong representation in central level decision-making through the Bundesrat, the second chamber of the federal legislation. But the federation represented by the directly elected Bundestag (first chamber) and the federal government provide powerful counterweights to this, based not least on the political identity and legitimacy the federation generates, its dominance in the legislature, and its spending power. By comparison, neither the European Commission nor the EP are able to counterbalance the dominance of the Council. Moreover, political interest representation in Germany is based on a well-established system of vertical party integration in both chambers of the federal legislature. Finally, neo-corporatist forms of interest intermediation grant German economic interests privileged access to the policy process. The EU, by comparison, still lacks an effective system of vertical party integration. There is no central arena of party competition – neither within the legislature nor within the executive. Nor do European top industrial associations and trade union federations, such as UNICE or ETUC, effectively aggregate and represent the interests of European employers and employees in the European policy process.
Executive dominance in EU policy-making has resulted in intense inter-administrative coordination and deliberation among national bureaucrats. While such inter-administrative networks are highly exclusive and tend to blur political responsibilities, they facilitate the high level of consensus necessary for effective joint decision-making in multi-level systems of governance. Frequent personal contacts and similar professional perspectives allow for a depolitization in formulating and preparing decisions to be adopted by member state governments within the different constellations of the Council of the EU, for example. Restricted participation (generating problems of ‘input legitimacy’) and weak accountability have been largely justified by the achievement of efficient policy outcomes (‘output legitimacy’; cf. Scharpf 1999).

The efficiency of European policy-making is indeed quite extensive in some policy areas, given the diversity of interests among the member states (Héritier 1996). Yet, the problem-solving capacity of the EU is increasingly at stake since it does not have the power to perform important federal policy tasks such as macroeconomic stabilization and redistribution. At the same time, it increasingly inhibits member states from maintaining such functions (Scharpf 1996): the EMU largely deprives member states of the capacity for national macroeconomic stabilization, whereas the EU as a whole does not possess these instruments (yet). As a result, considerable legitimacy problems of the EU on the input side can no longer be compensated on the output side but, on the contrary, tend to be exacerbated by the decreasing problem-solving capacity of the EU (cf. Börzel and Hölsli 2003).

Using subsidiarity to disentangle EU and member state competencies appears to be an obvious solution to escape this double legitimacy trap. Yet, a clear delimitation of competencies on the basis of a negative understanding of subsidiarity can only increase transparency and accountability if either the legislative powers of the EU are curbed, i.e. significant policy competencies are re-transferred to the member states. Or the decision-making structures of the EU need to be disentangled, e.g. through replacing the Council of the EU by a directly elected Senate. Both options are hardly realistic. Given the logic of the joint decision-trap, member state governments are unlikely to agree either on their own disempowerment by replacing themselves with directly elected representatives or a re-nationalization of EU-legislative powers (see above).
If we accept that the EU is a multilevel system of joint decision-making and interlocking politics that renders the use of subsidiarity as a negative principle for regulating the allocation of competencies futile, we can endorse a more positive understanding of subsidiarity that emphasizes mutual respect and support.

4. Reinventing Subsidiarity

The German example clearly shows that negative subsidiarity, whether employed as a substantive principle or procedural device, is not able to break the logic of cooperative federalism with its dynamics of centralization, executive dominance, and high need for consensus. Nevertheless, regional governance is quite effective in Germany. The Länder have both the capacity and autonomy to make policies that address regional issues, such as culture, media, education, or sustainable development. The ‘secret of success’ is a more positive understanding of subsidiarity that favours mutual respect and support over insulation and rivalry over competencies.

4.1. Mutual Respect: Ensuring the Autonomy for Regional Governance

In the German system of multi-level governance, the vast majority of competencies are shared or concurrent (see above). While joint decision-making and interlocking politics prevail, the Länder enjoy political latitude for autonomous regional governance. In its jurisdiction, the Federal Constitutional Court established the “principle of federal comity” (Bundestreue) which shall prevent Bund and the Länder from recklessly exercising their competencies according to egoistic policy preferences.21 Federal comity obliges each level of government to respect the autonomy of the other. Unlike subsidiarity, the Constitutional Court has invoked federal comity as a legal constraint on the exercise of competencies (Kompetenzausübungsschranke) rejecting several federal laws as undue interferences with regional competencies.22 More importantly, the principle establishes certain standards for the appropriate use of competencies that guide the behaviour of Bund and Länder in the legislative process. Given the effectiveness of federal comity as a behavioural norm, judicial review has been the exception rather than the rule (cf. Börzel 2002).

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21 BVerfGE 31,314, 354-5.
22 BVerfGE 6, 309; BVerfGE 12, 205.
The European Treaties have no direct equivalent for the principle of federal comity. Article 10 EC Treaty (ex-Article 5) only obliges the member states to fulfil their duties under the Treaty and to support the Community in accomplishing its tasks. Moreover, Article 10 does not extend to the subnational level since European Law does not recognize the domestic structures of the member states. The principle of proportionality comes closest to the German principle of federal comity. Article 5 (3) requires that any action by the Community “shall not go beyond what is necessary to achieve the objectives of the Treaty”. It obliges the EU to choose the least intrusive means to implement an agreed upon goal.

If developed into a true principle of federal comity, proportionality could help to protect the autonomy of Europe’s regions. Unlike negative subsidiarity, it would not rule out Community action. Exclusive powers are likely to be the exception. The large bulk of competencies will remain shared and jointly exercised. Therefore, the question is not so much whether and what the EU should legislate, but how the various levels of government should exercise their shared competencies. In order to achieve both more transparency and effectiveness in the European system of multi-level governance, all levels of government should exercise their competencies in a way that Fritz Scharpf has called “autonomy-preserving and Community-friendly” (Scharpf 1993). European action should not overly intrude with the autonomy of the member states and their regions (autonomy-preserving), while national and regional measures must be compatible with the Community (Community-friendly). In areas of shared competencies, the European Union would essentially constrain itself to setting framework legislation, which defines the goals to be achieved but leaves it largely to the member states and their subnational authorities how to achieve them. In order to ensure compliance with EU-Law, framework legislation would enjoy supremacy over national law and have a direct effect at the domestic level if it is not implemented by the member states. Given the limited capacities of the Commission, the enforcement of EU-Law strongly relies on citizens who litigate before national courts against their governments for not implementing European legislation. But the member states would have enough room for legal development and differentiated implementation, e.g. by setting stricter standards. At the same time, they would have to ensure that their legislative and administrative measures do not infringe either European norms and rules or create negative externalities for other member states. Needless to say that the

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23 See the jurisdiction of the European Court of Justice, e.g. C-8/88, Germany vs. Commission or C-227/85 and C-227/85, Commission vs. Belgium.
principle of Community-friendliness should also apply to the exercise of any exclusive
competencies of the member states and their regions.

Note that the strength of federal comity lies in its procedural quality as a political constraint
on the exercise of allocated competencies; it establishes standards for appropriate behaviour
that guide the decisions of policy-makers ex-ante, i.e. before political action is taken. Ex-post
judicial review by the European Court of Justice should remain the exception to the rule.

But autonomy is only a necessary condition for regional governance in Europe. Regional
actors have to have the necessary capabilities to use their political latitude.

4.2. Mutual Support: Enhancing the Capacity for Regional Governance

Diverging governing capacity has been a major driving force of centralization in many federal
systems. In a European Union with 25 member states and over 300 regions, there will always
be a critical number of public authorities that do not feel able to adequately deal with an issue
at hand. Rather than taking on the responsibility, the central level should first of all seek to
support these authorities by enhancing their capacity for autonomous action.

Federal comity not only embodies mutual respect but a duty of mutual support and
cooperation. German federalism has developed various institutions to comply with these
obligation, of which joint taxing and fiscal equalization (\textit{Finanzausgleich}) are the most
important ones (cf. Börzel 2002). The \textit{Länder} considerably differ in size, population, per
capita income, and administrative capacity. A fiscal system of vertical and horizontal
equalization allows to balance resources between the two levels of government as well as
among the \textit{Länder} themselves (Article 106 Basic Law).

Unlike the United States, German fiscal federalism does not favour competition in performing
public tasks among the federal units, which have the right to levy their own taxes. Instead, the
Basic Law opted for a combination of \textit{Steuerverbund} (joint tax system) and \textit{Finanzausgleich}
(fiscal equalization). The most important taxes – income, corporation and turnover tax – are
joint taxes, whose revenues \textit{Bund} and \textit{Länder} roughly share by half. The system of joint or
shared taxes is completed by a financial equalization among the \textit{Länder}

\footnote{BVerfGE 1, 117; BVerfGE 1, 299.}
(Länderfinanzausgleich), which is to level out the differences in spending power among the Länder. The criteria for the resource transfer among the Länder are rather complicated and cannot be discussed here (cf. Ellwein and Hesse 1987: 535-542).

The introduction of the joint tasks (Gemeinschaftsaufgaben) as an instrument of co- and mixed financing in 1969 further strengthened the burden sharing between Bund and Länder. Joint tasks are concerned with economic and structural matters of general interest that require heavy public investments of the Länder and municipalities, above all in infrastructure projects. The joint tasks preview a financial participation of the Bund of at least 50%, depending on the task at hand (Art, 91a IV GG; cf. Scharpf, Reissert, and Schnabel 1976; Patzig 1981).

German unification in 1989 put solidarity and support to a hard test. The tax and spending capacity of the five new Länder is extremely low compared to their Western counterparts. Nevertheless, since 1995, the new Länder fully participate in the system of fiscal equalization. The appeal of Bavaria, Baden-Württemberg, and Hesse before the Constitutional Court was not intended as an assault against fiscal equalization as such but called for a more balanced distribution scheme.

In sum, the pooling of resources and the sharing of (financial) burdens, respectively, have enabled the small Länder in particular, to retain important regional responsibilities in areas such as culture, education, regional development, or environment.

European institutions embody elements of solidarity and mutual support. The Commission provides financial assistance under various funds and programmes. The ERDF (European Regional and Development Fund), the ESF (European Social Fund), and the Cohesion Fund shall help regions suffering from liberalization and deregulation under the Single Market Program to restructure their economies. Likewise, the Cohesion Fund and several Community programmes, such as MEDSPA, ENVIREG, or LIFE, provide(d) funding for assisting member states in complying with European environmental legislation. Compared to any federal system, however, the redistributive capacity of the EU is limited amounting to 1.27 percent of the Gross Domestic Product (GDP) generated by all member states (de facto, however, it lies at only 1.09 percent). A spending power comparable to the German federation, for example, would correspond to a share of about 20 percent of European GDP. It is highly
unlikely that member states would agree to such a sharp increase of the EU’s redistributive capacity. Enhancing the capacities for regional governance is likely to remain the responsibility of the member states. Not only do they have to provide their regions with sufficient competencies to manage their own affairs, they must also grant them the necessary resources to exercise these competencies. The asymmetry between the legislative powers of subnational authorities, on the one hand, and their tax and spending capacity, on the other, has characterized many federal and regionalized states, including Spain and Italy.

To conclude, subsidiarity will do little to promote regional governance in Europe if it is merely employed as a device to curb the powers of the European Union. A more positive understanding of subsidiarity is required that corresponds to the principle of federal comity and favours mutual respect and support over insulation and rivalry over competencies. Pope Pius XI made clear that positive and negative subsidiarity are two sides of the same coin. Negative subsidiarity shall ensure that “the State will more freely, powerfully, and effectively do all those things that belong to it alone”. Thus, limiting central intervention is not an end in itself but makes positive subsidiarity possible in the first place by enabling the central level to assist subordinate units in handling their own affairs, and to take on issues they cannot adequately deal with, respectively.

25 The plea of the President of the European Commission, Romano Prodi, for granting the EU a strong taxation and spending capacity, has so far been ignored by the member states; see Romano Prodi, ‘For a strong Europe, with a grand design and the means of action’, speech given at the Institut d’Etudes Politiques, Paris, May 29, 2001, (www.europa.eu.int/futurum). But Art. 38 of the draft for a Constitutional Treaty, presented by the Presidency of the European Convention, foresees that the EU shall have an independent source of revenue to finance its budget (http://european-convention.eu.int/docs/sessPlen/00369.d2PDF).

Figure 1
Regional Governance and the Challenges of Europeanization

EUROPEANIZATION
Transfer of domestic policy competencies to the European level

- Centralization of regional competencies in the hands of the central government
- Regions as main implementers of European policies
- Regions depend on central governments for effective access to European decision-making
- Central governments depend on regions for effective implementation of European policies

Mutual dependence of central state and regions in European policy-making
Regional participation in European policy-making through the cooperation with the central government

INTERGOVERNMENTAL COOPERATION

Bibliography


