RECENT DEVELOPMENTS IN COMMUNITY CASE-LAW CONCERNING THE STANDING OF EUROPEAN REGIONS BEFORE THE EUROPEAN COURTS

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1. Introduction

Problem. This paper addresses two questions: first, what remedies are available to a region with legislative powers to challenge a Community act, and second, what are the main legal ramifications of the political claim for the recognition of a privileged *locus standi* for such regions under Article 263.2 TFEU (ex 230.2 TEC).

The state of the matter. Eight Member States of the European Union have public territorial bodies with legislative and executive functions (Germany, Austria, Belgium, Italy, Spain, Finland, Portugal

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and the United Kingdom). Another two Member States (The Netherlands and Denmark) have "Overseas Countries and Territories" whose competences can be compared, to a certain extent, with a region with legislative functions. Any public regional body which plans to challenge a Community act which allegedly infringes its competences, can avail itself of two remedies: (i) it can request the central state bodies of the relevant Member State to bring a "privileged" action for annulment based on Article 263.2 TFEU (ex 230.2 TEC) on such public regional body's behalf; or (ii) it can bring a "non-privileged" action itself based on Article 263.4 TFEU (ex 230.4 TEC). The European courts have very often been called upon to decide on the admissibility of an action brought by central and/or regional bodies of a Member State in the frame of an alleged infringement of regional competences by a Community act.

Most Member States with regions with legislative powers have implemented internal co-ordination procedures setting forth the steps that need to be followed for an action to be brought before the European courts. Such co-ordination procedures enable the regional bodies to request, and sometimes even force, the central state bodies to bring a "privileged" action for annulment on their behalf pursuant to paragraph 2 of Article 263 TFEU (ex 230 TEC). Additionally, these procedures allow the regional bodies to avoid the burden of proving *locus standi* under paragraph 4 of Article 263 TFEU (ex 230 TEC), a requirement that they would need to satisfy when filing an action on their own. If such co-ordination procedures do not exist or if the relevant central state and regional authorities do not succeed in reaching an agreement, the regional authorities may opt to bring an action for annulment pursuant to paragraph 4 of Article 263 TFEU (ex 230 TEC), and frequently have done so in the past. Finally, the case-law has also registered a number of cases where the regional authorities have chosen to bring an action pursuant to paragraph 2 of Article 263 TFEU (ex 230 TEC), claiming the treatment of a "privileged applicant" of a Member State. It should be noted that privileged *locus standi* is an old aspiration of certain regions with legislative powers which has been intensely discussed ever since the Treaty of Maastricht.

Structure. This paper discusses the concept of region with legislative powers (2.), the typology and the common *petitum* of actions for annulment based on the infringement of regional competences (3.), the internal co-ordination procedures among central state bodies

and regional authorities (4.), the Community case-law on Article 230 TEC with regard to regional bodies (5.), the "political" claim of an action for annulment for regions with legislative powers (6.) and, finally, certain conclusions and *lege ferenda* approaches (7.).

2. A region with legislative powers

This section addresses the concept "region with legislative powers". A region with legislative powers can be defined as a public body of substatal level and, in particular, of a "regional" level. The term has been used on numerous occasions within the frame of the REGLEG[1] Conference and is referred to in the Laeken Declaration.[2] The features of a region with legislative powers vary according to the constitutional order of each Member State. REGLEG is a political network comprised by regions of eight Member States of the European Union which regard themselves as, and recognize each other the status of, a "region with legislative powers".[3] The Overseas Countries and Territories of two other Member States, Denmark and The Netherlands,[4] enjoy a number of powers comparable to the "regions with legislative powers" and Community case-law has put them a par on a number of occasions.[5]

1. Vid www.regleg.eu.

2. Laeken Declaration on the Future of the European Union, 14 and 15 December 2001. See http://european-convention.eu.int/pdf/lknen.pdf (Access date 11/30/2010).

3. REGLEG considers the following regions to be "regions with legislative powers": the 9 Austrian *Bundesländer*, the 16 German *Länder*, the 17 Spanish *Comunidades Autónomas*, the 3 Belgian Regions and the 3 Belgian Communities, the 20 Italian Regions, the 2 Portuguese Autonomous Regions, the 3 *Constituent countries* of the United Kingdom, i.e., Scotland, Northern Ireland and Wales (but not England) and the Finnish Åland islands. In addition, REGLEG considers the following Member States not to have regions with legislative powers: France, The Netherlands, Luxembourg, Denmark, Ireland, Sweden, Lithuania, Latvia, Estonia, Poland, Check Republic, Slovakia, Hungary, Slovenia, Cyprus and Malta.

4. Denmark: Faroe Islands and Greenland; The Netherlands: Dutch Antilles and Aruba.

5. See ECJ, C-180/00, Kingdom of the Netherlands *vs.* Commission, *ECR* 2005, I-6603; ECJ, C-452/00, Kingdom of the Netherlands *vs.* Commission, *ECR* 2005, I-6645; ECJ, C-26/00, Kingdom of the Netherlands *vs.* Commission, *ECR* 2005, I-6527; ECJ, C-147/96, Kingdom of the Netherlands *vs.* Commission, *ECR* 2000, I-04723; ECJ, C-142/00 P, Commission *vs.* Dutch Antilles, *ECR* 2003, I-3483; ECJ, C-451/98, Antillean Rice Mills NV *vs.* Council, *ECR* 2001, I-8949; CFI, T-32/98 and 41/98, Dutch Antilles *vs.* Commission, *ECR* 2000, II-00201.

3. Typology and petitum of an action for annulment

We now turn to the kinds of *petita* and the object of an action for annulment.[6] The non-privileged action for annulment grounded on Article 230.4 TEC represents by far, with its more than 40 cases decided by the EGC (formerly CFI) (and before 1989, by the ECJ), the most common *iter* of the regional authorities when challenging a Community act.[7] However, Community case-law has registered approximately 20 cases in which the central state bodies assumed the defense of certain regional authorities by bringing a "privileged" action for annulment under Article 230.2 TEC. In both *cas-de-figure* the most frequent *petitum* of the admitted actions was the annulment of certain decisions of the Commission on state-aids and structural funds.[8]

6. For further reference see Ordóñez Solís, D., "El Estado y las Comunidades Autónomas ante los tribunales europeos en materia de ayudas públicas: bellum omnium contra omnes", *Gaceta Jurídica de la UE y de la Competencia*, 8, March-April 2009, pp. 25-46.

7. To a lesser degree, this is also the most common *iter* used by local entities: ECJ, 222/83, Commune de Differdange and others *vs.* Commission, *ECR* 1984, 02889; ECJ, C-213/87, Gemeente Amsterdam and VIA *vs.* Commission, *ECR* 1990, I-221; CFI, T-155/96 R, Stadt Mainz *vs.* Commission, *ECR* 1996, II-01655; CFI, T-272/02 Comune di Napoli *vs.* Commission, not yet published; CFI, T-177/06, Ayuntamiento de Madrid, Madrid Calle 30, P.A. *vs.* Commission, not yet published.

8. Among actions brought by Member States, see ECJ, C-288/96, Federal Republic of Germany *vs.* Commission, *ECR* 2000, I-08237; ECJ, C-277/00, Federal Republic of Germany *vs.* Commission, *ECR* 2004, I-3925; ECJ, C-183/03, Federal Republic of Germany *vs.* Commission, OJ, C-146 of 21.06.2003; CFI, T-314/04 and T-414/04, Federal Republic of Germany *vs.* Commission, *ECR* 2006, II-103; CFI, T-366/03 and T-235/04, Land Oberösterreich and Republic of Austria *vs.* Commission, *ECR* 2005, II-4005; ECJ, C-439/05 P and C-454/05 P, Land Oberösterreich and Republic of Austria *vs.* Commission, OJ, C-269 of 10.11.2007, p. 9; ECJ, C-457/00, Kingdom of Belgium *vs.* Commission, *ECR* 2003, I-6931; ECJ, C-5/01, Kingdom of Belgium *vs.* Commission, *ECR* 2002, I-11991; ECJ, C-197/99 P, Belgium *vs.* Commission, *ECR* 2003, I-8461; ECJ, C-349/97, Kingdom of Spain *vs.* Commission, *ECR* 2003, I-03851; ECJ, C-130/99, Kingdom of Spain *vs.* Commission, *ECR* 2002, I-03005; ECJ, C-153/01, Kingdom of Spain *vs.* Commission, *ECR* 2004, I-9009; CFI, T-266/04, Kingdom of Spain *vs.* Commission, OJ, C-79 of 29.03.2008, p. 26; Action dated 28 June 2007, ECJ, T-227/07, Kingdom of Spain *vs.* Commission, OJ C 211 of 08.09.2007, p. 37; ECJ, C-298/00 P, Republic of Italy *vs.* Commission, *ECR* 2004, I-4087 and ECJ, C-372/97, Republic of Italy *vs.* Commission, *ECR* 2004, I-03679; ECJ, C-328/99 and C-399/00, Republic of Italy and SIM 2 Multimedia SpA *vs.* Commission, *ECR* 2003, I-4035; ECJ, C-15/98 and C-105/99, Republic of Italy and Sardegna Lines, Servizi Marittimi della Sardegna SpA *vs.* Commission, *ECR* 2000, I-8855; ECJ, C-242/96, Republic of Italy *vs.* Commission, *ECR* 1998, I-05863; CFI, T-215/04, United Kingdom *vs.* Commission, OJ, C-44 of 21.02.2009, p. 41; CFI, T-286/04, United Kingdom of Great Britain and Northern Ireland *vs.* Commission, OJ, C-251, 09.10.2004, p. 25. Among actions brought by regions, see ECJ, 62/87 and 72/87, Exécutif regional wallon and P.A. Glaverbel *vs.* Commission, *ECR* 1988, 01573; ECJ, C-180/00, Kingdom of the Netherlands *vs.* Commission, *ECR* 2005, I-6603; ECJ, C-452/00, Kingdom of the Netherlands *vs.* Commission; ECJ, C-26/00 Opinion, Kingdom of

4. Co-ordination procedures

This section describes the co-ordination procedures among central state bodies and regional authorities.[9] Most Member States with regions with legislative powers have implemented internal co-ordination procedures which allow regional authorities to take part in the judicial proceedings initiated before the European courts.[10] Pursuant to the internal co-ordination procedures implemented by certain Member States,

the Netherlands *vs.* Commission, *ECR* 2005, I-6527; ECJ, C-147/96, Kingdom of the Netherlands *vs.* Commission, *ECR* 2000, I-04723; CFI, T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH *vs.* Commission, *ECR* 1999, II-03663; ECJ, C-180/97, Regione Toscana *vs.* Commission, *ECR* 1997, I-05245; ECJ, C-95/97, Region Valone *vs.* Commission, *ECR* 1997, I-01787; CFI, T-214/95, Het Vlaamse Gewest *vs.* Commission, *ECR* 1998, II-00717; CFI, T-127/99, T-129/99 and T-148/99, Territorio Histórico de Álava-Diputación Foral de Álava, Comunidad Autónoma del País Vasco and others *vs.* Commission, *ECR* 2002, II-01275; CFI, T-346/99, T-347/99 and T-348/99, Territorio Histórico de Álava, Territorio Histórico de Guipúzcoa and Territorio Histórico de Vizcaya *vs.* Commission, *ECR* 2002, II-04259; ECJ, C-15/06 P, Regione Siciliana *vs.* Commission, *ECR* 2007, I-2591; CFI, T-417/04, Regione Autonoma Friuli-Venezia Giulia *vs.* Commission, *ECR* 2006, I-3881; ECJ, C-417/04 P, Regione Siciliana *vs.* Commission, *ECR* 2006, I-3881; ECJ, C-347/03, Regione Autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) *vs.* Ministero delle Politiche Agricole e Forestali, *ECR* 2005, I-3785; CFI, T-190/00, Regione Siciliana *vs.* Commission, *ECR* 2003, II-5015; CFI, T-341/2002, Regione Siciliana *vs.* Commission, OJEU, C-7, 11/01/2003; ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004; ECJ, 15/06 P, Regione Siciliana *vs.* Commission, not yet published; ECJ, C-142/00 P, Commission *vs.* Dutch Antilles, *ECR* 2003, I-3483; ECJ, C-451/98, Antillean Rice Mills NV *vs.* Council, *ECR* 2001, I-8949; CFI, T-37/04 R, Região autónoma dos Açores *vs.* Council, *ECR* 2004, II-2153; CFI, T-318/00, Freistaat Thüringen *vs.* Commission, *ECR* 2005, II-4179; CFI, T-228/99 and T-233/99, Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen *vs.* Commission, *ECR* 2003, II-435.

9. Denmark is the only Member State with regions with legislative powers which does not have an internal co-ordination procedure.

10. The internal co-ordination procedures currently in place are hardly used in half of the annulment proceedings based on the infringement of regional competences by a Community act. It is difficult to say whether the lack of use of such co-ordination procedures is a consequence of a number of intrinsic weaknesses of such processes or simply the expression of a failure to reach an agreement by the different national players. None of the co-ordination procedures currently in force foresees the possibility of delegating the privileged *locus standi* under Article 230.2 TEC to regional authorities. It appears that, until 2000, there was an internal co-ordination procedure in The Netherlands which allowed for the delegation of *locus standi* under Article 230.2 TEC from the government of The Netherlands to the government of the Dutch Antilles. The validity of this procedure was put into question by the ECJ. See Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Paras. 60 and 61. The Portuguese co-ordination procedure provides for the right of the Regiões autónomas of the Azores and Madeira to appoint the "Agent" for the purposes of Article 19 of the Statute of the ECJ. The candidate is then empowered by the Ministry of Foreign Affairs to represent the Republic of Portugal in the proceedings at hand.

regions are entitled –under certain circumstances– to force the Member State (i.e., the central state bodies) to bring an action for annulment and/or to influence, or participate in, the conduction of the proceedings through the appointment of representatives or the drafting of writs.[11]

Could a Member State choose to delegate the privileged *locus standi* under Article 230.2 TEC to regional authorities? In *Region Valone* and *Regione Toscana*, the ECJ ruled that, on the basis of the "general system of the Treaties", the term "Member State" for purposes of institutional provisions and, in particular, of the procedures of the European courts, is restricted to the central state bodies of the Member States and cannot be applied to regional authorities.[12] Advocate-General Ruiz-Jarabo Colomer established in his Opinion to *Regione Siciliana* that "a whole cannot be represented by a part".[13] In *Dutch Antilles*, Advocate-General Léger argued that *locus standi* may not be granted to a substatal entity through a co-ordination procedure, especially since the European courts are unable to rule on the internal distribution of powers and it cannot be expected that they assess this matter of national law.[14]

A possible objection against the positions advanced by Advocate-General Ruiz-Jarabo Colomer and Advocate-General Léger is that one should not equate the "*locus standi* of Member States" with the "*locus standi* of state central bodies". In fact, Member States should be able to

11. In some cases, regions can impose a duty upon the Member State to bring an action (Germany, Austria, Belgium, Italy and Portugal). In other cases, the co-ordination procedures simply provide for certain mechanisms of collaboration among the central government and the regional governments and the decision to bring an action ultimately remains with the central government (Spain and the United Kingdom). In Portugal, regions are entitled to bindingly appoint the "Agent", as used in Article 19 of the Statute of the ECJ.

12. ECJ, C-180/97, Regione Toscana *vs.* Commission, *ECR* 1997, I-05245; ECJ, C-95/97, Region Valone *vs.* Commission, *ECR* 1997, I-01787; Opinion of Advocate-General Dámaso Ruiz-Jarabo Colomer, ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Para. 37.

13. Para. 54: "Furthermore, acceptance of the proposition, as put forward by the appellant, that a region is capable of being regarded as a 'State' for the purposes of the second paragraph of Article 230 TEC would not open up the way for the region in this regard, since a whole cannot be represented by a part. What is more, as an integral part of the whole, a region has means of securing understanding and cooperation with the national government in political and administrative matters which may enable it to elicit from the national government the desired reaction of opposing the Community measure before the Court of Justice; this possibility is, in general, barred to citizens".

14. Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Paras. 60 and 61.

decide which authority is more suited to represent its interests before the European courts, given that neither the Treaties nor the Community procedural provisions contradict this possibility. Precisely because there is no such limitation in Community law, the European courts should have no ground to reject an action for annulment brought by any national authority (including substatal authorities, despite the *Dutch Antilles* precedent) if such authority is duly empowered under national law. This approach is consistent with the case-law handed down in *Kesko*, where the EGC decided to broaden the term "Member State" when testing the elements of *locus standi* of the Finnish competition authority.[15] As a separate argument, it must also be noted that the term "Member State" has already been interpreted to comprise substatal entities in other contexts.[16]

Since none of the internal co-ordination procedures currently in place foresees the possibility of transferring privileged *locus standi* to an entity other than the central state bodies, it is hard to imagine a scenario where a Community Court will be called upon to decide whether a regional entity may bring an action for annulment. However, if called upon to decide, the Community Court should no reject the admissibility of the action to the extent that it should be not be able to assess the internal distribution of powers.

5. Community case-law

Which approach have European courts taken when deciding on an action for annulment brought by a regional authority?

15. CFI, T-22/97, Kesko *vs.* Commission, *ECR* 1999, II-3775, Paras. 82 and 86.

16. Haguenau, C., *L'application effective du droit communautaire en droit interne; analyse comparative des problèmes rencontrés en droit français, anglais et allemand*, 1ª. Ed., Bruselas, 1995, p. 196; Ipsen, H. P., *Als Bundesstaat in der Gemeinschaft, in: Probleme des Europäischen Rechts, Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, 1966, p. 228 ss. See Opinion of Advocate-General Dámaso Ruiz-Jarabo Colomer, ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Para. 43: "Following that loose definition of 'State', the Court of Justice has likewise not hesitated in restricting the meaning of 'public authority', admittedly not entirely comparable with that of 'State', in the application of Article 39(4) EC, having held employment in the public service to mean all [posts] 'which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities'; (35) such public authorities include sub-State bodies, in particular local and regional bodies".

5.1. Article 230.2 TEC

After certain initial hesitance,[17] the case-law of the ECJ clearly established that a substatal entity cannot be equated with a "Member State" for the purposes of Article 230.2 TEC.[18] Consequently, an action for annulment brought by a regional public body must be assessed by the EGC and be grounded on Article 230.4 TEC.

5.1.1. Assessment of the case-law

As pointed out above, given the lack of a definition of "Member State" in the Community legal framework, Community case-law has already interpreted such term to comprise sub-state entities in other contexts.[19] Since neither the Treaties nor the rules of procedure of the European courts establish any limitation as to what national authorities should be able to bring a privileged action for annulment, it seems that the Community judge should not be able to reject an action for annulment grounded on Article 230.2 TEC, provided the acting national authority has been duly empowered under national law[20] (*vid*. supra 4.).[21]

The arguments which Community case-law has presented against the recognition of privileged *locus standi* under Article 230.2 TEC to a regional authority[22] include that such recognition would alter the

17. See, e.g., ECJ, 222/83, Commune de Differdange and others *vs.* Commission, *ECR* 1984, 02889; ECJ, 62/87 and 72/87, Exécutif regional wallon and P.A. Glaverbel *vs.* Commission, *ECR* 1988, 01573.

18. ECJ, C-95/97, Region Valone *vs.* Commission, *ECR* 1997, I-01787, Para.8; ECJ, C-180/97, Regione Toscana *vs.* Commission, *ECR* 1997, I-05245; CFI, T-81/97, Regione Toscana *vs.* Commission, *ECR* 1998, II-2889; ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Para. 21; Opinion of Advocate-General Dámaso Ruiz-Jarabo Colomer, ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Paras. 39-45; Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Para. 60.

19. Opinion of Advocate-General Dámaso Ruiz-Jarabo Colomer, ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Paras. 39-45.

20. See CFI, T-22/97, Kesko *vs.* Commission, *ECR* 1999, II-3775, Paras. 82 and 86.

21. See Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Para. 60.

22. Opinion of Advocate-General Dámaso Ruiz-Jarabo Colomer, ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Para. 44.

"institutional balance"[23] of the Community, or rather "a whole cannot be represented by a part"[24] or that 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".[25] These concerns could be avoided if the different national players can reach an agreement by means of an internal co-ordination procedure and the right to bring the action for annulment is finally granted to one or more of them. *Locus standi* may even be delegated to more than one national actor even if this entails the risk that certain conflicts of interests will need to be discussed at a Community level. The "institutional balance" would only be "threatened" when there has been no prior internal co-ordination procedure. The fact that such co-ordination procedure fails or there are different actors exercising a privileged *locus standi* and representing diverging interests is irrelevant. Since the position taken by a Member State in the Council does not affect its remedies for annulment, nothing can be objected to the representation of diverging interests at Community level. The key criterion is the compliance with a "formal guarantee" provided by the internal co-ordination procedure of the different national actors. When an agreement cannot be reached through such co-ordination procedure, the right to bring a privileged action for annulment would remain, in case of doubt, with the central state bodies.

5.2. Article 230.4 TEC

5.2.1. Individual concern

Community case-law has generally not objected to the recognition of an "individual concern" under Article 230.4 TEC to a

23. The principle of "institutional balance" seeks to guarantee certain balance between measures adopted by the Commission in its capacity as "Guardian of the Treaties", the responsibility of Member States with regard to compliance with Community law and the remedies available to regions. It is hard to see how the extension of privileged *locus standi* to regional authorities would lessen the responsibility of Member State and would, thus, affect the "institutional balance".

24. A rebuttal argument could be made that the exercise of privileged *locus standi* by a substatal entity is comparable to the "Lex Belgica" applied in the Council.

25. An argument against could be made that the number of Member States would remain unchanged irrespective of the extension of privileged *locus standi* to regional authorities, since the relevant regional authority would only act on behalf of a Member State.

region with legislative powers when the challenged act was a *decision*. The case-law has not registered cases where the challenged act was directly addressed to the regional authorities. Since most of the challenged decisions are usually addressed to the Member States, Community case-law has developed a number of special criteria to test the element of "individual concern" with regard to this type of Community act. The European courts have progressively coined the following formula: a regional entity is directly and individually concerned when "the relevant provisions of the contested decision not only affect measures adopted by the regional entity, but also prevent such regional entity from exercising, as it sees fit, its own powers, which it enjoys directly under national law".[26]

By contrast, the European courts have been reluctant to recognize the admissibility of an action for annulment brought by a regional entity when the challenged act was a *regulation.*[27] Although the European courts have usually considered the criteria applied in respect of decisions, they have typically adopted other approaches with respect to a challenged regulation. This diverging practice could obey to the significant factual differences related to the annulment of decisions and regulations, respectively. With regard to the annulment of decisions, the regional entity can, almost invariably, evidence the concern of a regional act, whereas in actions seeking to annul certain regulation, the regional entity can generally only prove a general interest in the economic and social development of its territory. According to the European courts, the fact that a regional entity may have certain powers over certain economic and social affairs of a particular region does not *per se* evidence the "individual concern" of such region and, consequent-

26. CFI, T-214/95, Het Vlaamse Gewest *vs.* Commission, *ECR* 1998, II-00717, Para. 28; CFI, T-288/97, Regione Autonoma Friuli-Venezia Giulia *vs.* Commission, *ECR* 1999, II-01871, Tenor; CFI, T-127/99, T-129/99 and T-148/99, Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99) and Daewoo Electronics Manufacturing España, SA (T-148/99) *vs.* Commission, *ECR* 2002, II-01275, Para. 50 and 55.

27. CFI, T-238/97, Comunidad Autónoma de Cantabria *vs.* Council, *ECR* 1998, II-02271, Para. 42; CFI, T-609/97, Regione Puglia *vs.* Commission, *ECR* 1998, II-04051, Para. 16; CFI, T-32/98, Dutch Antilles *vs.* Commission, *ECR* 2000, II-00201, Para. 43; ECJ, C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-08973.

ly, the admissibility of the action. The ECJ has also rejected a broader construction of the *Plaumann* formula, as implemented in *Piraiki Patraiki.*[28]

As of the date hereof, Community case-law has rejected all actions brought by regional authorities seeking the annulment of Community *directives*, although the elements of direct and individual concern have not yet been tested.[29]

5.2.2. Direct concern

The element of "direct concern" does not raise too much controversy in Community case-law as far as *locus standi* of regional entities is concerned. The majority of the annulment procedures initiated so far relate to the annulment of decisions of the Commission in the frame of state-aid procedures against regional entities.[30] Although

28. C-11/82, Piraiki Patraiki and others *vs.* Commission, ECR 1985, p. 207. See also: ECJ, C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-08973, Para. 70; Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Para. 100-105.

29. ECJ, C-298/89, Government of Gibraltar *vs.* Council, *ECR* 1993, I-03605, Para. 23.

30. ECJ, 62/87 and 72/87, Exécutif regional wallon and P.A. Glaverbel *vs.* Commission, *ECR* 1988, 01573; CFI, T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH *vs.* Commission, *ECR* 1999, II-03663; ECJ, C-180/97, Regione Toscana *vs.* Commission, *ECR* 1997, I-05245; ECJ, C-95/97, Region Valone *vs.* Commission, *ECR* 1997, I-01787; CFI, T-214/95, Het Vlaamse Gewest *vs.* Commission, *ECR* 1998, II-00717; CFI, T-127/99, T-129/99 and T-148/99, Territorio Histórico de Álava-Diputación Foral de Álava, Comunidad Autónoma del País Vasco and others *vs.* Commission, *ECR* 2002, II-01275; CFI, T-346/99, T-347/99 and T-348/99, Territorio Histórico de Álava, Territorio Histórico de Guipúzcoa and Territorio Histórico de Vizcaya *vs.* Commission, *ECR* 2002, II-04259; ECJ, C-15/06 P, Regione Siciliana *vs.* Commission, *ECR* 2007, I-2591; CFI, T-417/04, Regione Autonoma Friuli-Venezia Giulia *vs.* Commission, *ECR* 2006, I-3881; ECJ, C-417/04 P, Regione Siciliana *vs.* Commission, *ECR* 2006, I-3881; ECJ, C-347/03, Regione Autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) *vs.* Ministero delle Politiche Agricole e Forestali, *ECR* 2005, I-3785; CFI, T-190/00, Regione Siciliana/ Commission, *ECR* 2003, II-5015; CFI, T-341/2002, Regione Siciliana *vs.* Commission, OJEU, C-7, 11/01/2003; ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004; ECJ, 15/06 P, Regione Siciliana *vs.* Commission, not yet published; ECJ, C-142/00 P, Commission *vs.* Dutch Antilles, *ECR* 2003, I-3483; ECJ, C-451/98, Antillean Rice Mills NV *vs.* Council, *ECR* 2001, I-8949; CFI, T-37/04 R, Região autónoma dos Açores *vs.* Council, *ECR* 2004, II-2153; CFI, T-318/00, Freistaat Thüringen *vs.* Commission, *ECR* 2005, II-4179; CFI, T-228/99 and T-233/99, Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen *vs.* Commission, *ECR* 2003, II-435.

the challenged decision is usually addressed to a Member State, the mandatory content of the decision typically concerns a certain region, which has very often already been involved in an administrative procedure before the Commission in accordance with Article 88 TEC. In its allegations, the Commission does not usually raise objections to the element of "direct concern".

A regional entity is usually directly concerned by a Community measure when such measure affects the legal position of a regional entity without leaving any discretion to the addressees in charge of its implementation (i.e. the Member State).[31]

5.2.3. Assessment of case-law

The formula which is usually referred to by case-law when assessing the admissibility of an action for annulment brought by a regional entity against a decision was initially coined by the EGC in cases *Het Vlaamse Gewest*, *Friuli-Venezia Giulia* and *Territorio Histórico de Álava*. The formula consists of two basic prongs:

– "individual concern of a regional measure by the challenged Community act"; and

– "prevention of the regional entity from exercising, as it sees fit, its own powers, which it enjoys directly under national law".

31. CFI, T-214/95, Het Vlaamse Gewest *vs.* Commission, *ECR* 1998, II-00717, Para. 29; CFI, T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH *vs.* Commission, *ECR* 1999, II-03663, Para. 90; CFI, T-288/97, Regione autonoma Friuli Venezia Giulia *vs.* Commission, *ECR* 1999, II-01871, Tenor; CFI, T-127/99, T-129/99 and T-148/99, Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99) and Daewoo Electronics Manufacturing España, SA (T-148/99) *vs.* Commission, *ECR* 2002, II-01275, Para. 51; CFI, T-346/99, T-347/99 and T-348/99 Territorio Histórico de Álava - Diputación Foral de Álava, Territorio Histórico de Guipúzcoa - Diputación Foral de Guipúzcoa and Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya *vs.* Commission, *ECR* 2002, II-04259, Para. 37; ECJ, C-417/2004 P, Regione Siciliana *vs.* Commission, OJEU, C-300, 4/12/2004, Para. 32; CFI, T-366/03 and T-235/04, Land Oberösterreich and Republic of Austria *vs.* Commission, *ECR* 2005, II-4005, Para. 29; ECJ, C-439/05 P and C-454/05 P, Land Oberösterreich and Republic of Austria *vs.* Commission, OJ, C-269 of 10.11.2007, Para. 29.

This formula represents the current status of case-law with regard to the admissibility of an action brought against a Community decision and has been last reaffirmed in *Oberösterreich.*[32] The criterion related to "concern of a regional measure" does not seem ungrounded. The assessment comprises a compatibility test between the regional act and the challenged Community act.[33] The recognition of the competence of a regional entity is grounded on the principle of validity of a national administrative act (and this principle is part of Community law by virtue of Article 6.3 TEU). However, the second prong, that is the "prevention of the regional entity from exercising, as it sees fit, its own powers, which it enjoys directly under national law" seems to be in conflict with the inability of the European courts to assess the internal distribution of powers.[34] The review of the case-law shows that, when it comes to testing this element, the European courts usually rely on evidence referred to "concluded" facts. Considering that most cases relate to state-aid procedures before the Commission, the European courts tend to be satisfied if the applicant can show that it initiated the recovery proceedings of the granted aids. The examination of evidence based on "concluded" facts does not seem so much an "assessment" but a "confirmation *ex post facto*" of the internal distribution of powers. The determination, however, of whether the powers are "enjoy[ed] directly under national law" seems much more problematic, precisely because the assessment of the Community Court exceeds the presumption of validity of national administrative acts (as was the case in *Oberösterreich*).[35]

The European courts have not applied the line of thought developed with regard to decisions to the challenge of regulations and directives. This position reflects the generally restrictive approach of the European courts with regard to actions brought be non-privileged applicants. However, in the light of the case-law established in *Levende*

32. CFI, T-366/03 and T-235/04, Land Oberösterreich and Republic of Austria *vs.* Commission, *ECR* 2005, II-4005, Para. 29.

33. A similar assessment takes place in the frame of the legality test performed in an infringement procedure.

34. ECJ, C-8/88, Germany *vs.* Commission, *ECR* 1990, I-2321, Para. 13.

35. CFI, T-214/95, Vlaams Gewest *vs.* Commission, *ECR* 1998, II-717, Para. 30; CFI, T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH *vs.* Commission, *ECR* 1999, II-03663, Paras. 91 and 92.

Varkens[36] and *C-380/03, Germany vs. Parliament and Council,*[37] it cannot be totally excluded that the European courts may one day apply the criteria developed with regard to decisions to the annulment procedures of regulations and directives.[38]

6. Claim for a privileged action for annulment for European regions

At this point we must assess the question of who proposes and under what terms the recognition of a privileged action for annulment for European regions.

6.1. Introduction

The claim for privileged *locus standi* for regions that enjoy legislative powers aims to put such regions on equal footing with Member States for purposes of Article 263.2 TFEU (ex 230.2 TEC). Campaigners making this claim often argue that a region which enjoys certain powers under its national constitutional order should also be entitled to challenge any Community act which infringes such powers.[39]

36. Joined cases T-481/93 and T-484/03, Vereniging van Exporteurs in Levende Varkens and others *vs.* Commission, ECR 1995, p. II-2941.

37. ECJ, C-380/03, Federal Republic of Germany *vs.* European Parliament and Council of the European Union, ECR 2006, 2006 p. I-11573.

38. The numerous references to the criteria developed with regard to decisions in *Cantabria*, *Puglia* and *Freistaat Sachsen* make us think that the possibility of extending these criteria to the annulment procedures of regulations and directives is not completely excluded by European courts.

39. Burrows, N., "Nemo me impune lacessit: The Scottish Right of Access to European Courts", *European Public Law*, Volume 8, Issue 1, 2002, pp. 45-68: "… Where an obligation is imposed by Community law on a regional government, even if this imposed by virtue of the internal distribution of powers in a Member State, the regional government should in principle be entitled to question the underlying validity of the rule that imposes the obligation. This is all the more the case where Community procedures do not involve the regional level of government directly in the decision process. Such an anomaly has therefore given rise to an imbalance between the obligations imposed on regional governments and the rights to defend their interests." See Van Nuffel, P., "What's in a member state?" *Common Market Law Review* 38, 2001, pp. 871-901.

The aspiration to amend Article 263 TFEU (ex 230 TEC) so as to include the recognition of privileged access to European courts, was first articulated at a Community level in the frame of the declaration of the Conference "Europe of the Regions" in April 1990. The project was hailed with enthusiasm in the German *Bundesrat.*[40] The regions of the Member States were "recognized" for the first time in Primary law in the modification introduced by the Treaty of Maastricht. The Treaty of Maastricht introduced three novelties which increased notably the involvement of regional entities: (i) the principle of subsidiarity, (ii) the representation of the regional governments in the meetings of the Council, and (iii) the creation of the Committee of the Regions (CoR). The claim for a privileged access to the European courts by regional authorities was first discussed during the debates concerning the definition of the principle of subsidiarity.[41]

The claim for *locus standi* for certain European regions is one of the key items on the list of the common "political priorities" of entities such as the CoR[42] and REGLEG.[43] In most declarations, the CoR and

40. Declaration of a number of regional authorities of different Member States on April 24 and 25, 1990 in Brussels in the frame of the conference "Europe of the Regions", quoted in Borchmann, M., "Konferenzen 'Europa der Regionen' in München und Brüssel", *Dienstblatt der öffentlichen Verwaltung* (D.ö.V.), 1990, 879, Para. 882. The declaration did not include a proposal for a new wording of Article 173.2. The German *Bundesrat* joined this proposal in its declaration of August 24, 1990, see EuZW 1990, p. 431.

41. Aguilera De Prat, *vs.* R., "De la "Europa de las regiones" a la Europa con las regiones", *Revista d'Estudis Autonòmics i Federals* 2/2006, p. 51.

42. Opinion dated April 20, 1995 (CoR 89/95 fin); Resolutions dated December 10, 1997 (CoR 305/97 fin) and June 3, 1999 (CoR 54/99 fin); Resolution dated February 17, 2000 (CoR 53/99 fin); Resolution dated April 13, 2000 to the Commission report COM (1999) 562 final. (CoR 18/2000); Declaration of the Presidency of the CoR dated October 26, 2001 (CoR 191/2001); Resolution of the CoR dated February 17, 2000 (CoR 53/99); Resolution of the CoR dated October 9, 2003 (CoR 169/2003); Resolution of the CoR dated July 2, 2003 (CoR 19/2003); Opinion of the CoR dated November 14, 2001 (CoR 104/2001).

43. Common Position Paper of the Constitutional Regions Regarding the IGC. Brussels, September 20, 2000; Final Declaration of the First Conference of Presidents of Regions with Legislative Power. Barcelona, November 24, 2000; Colloquium of the Constitutional Regions: "Strengthening the role of the constitutional regions in the European Union". Brussels, February 22, 2001; Political declaration of the constitutional regions of Bavaria, Catalonia, North Rhine Westphalia, Salzburg, Scotland, Wallonia and Flanders. May 28, 2001; Resolution of the Second Conference of Presidents of Regions with Legislative Power. Liege, November 15, 2001. (I); Resolution on the organisational terms of the co-operation amongst Regions with Legislative Power. Liege, November 15, 2001. (II); Final Declaration of the Third Conference of Presidents of Regions with Legislative Power, Florence, November 14-15, 2002; Final Declaration of the Fourth Conference of Presidents of Regions with Legislative Power.

REGLEG refer in the same breath to the "*locus standi* of regions and the semi-privileged standing of the CoR".[44]

The recognition of privileged *locus standi* to regions has been rejected in all revisions of the Treaties since the Treaty of Amsterdam and, lately, in the Treaty of Lisbon. In the frame of the negotiations which led to the Treaty of Lisbon, the CoR has not raised this issue again and has limited itself to claim its own semi-privileged standing, which it has finally obtained.[45] The privileged action for annulment for regions were not part of the political priorities of the CoR for the period 2006-2008.[46]

The Barcelona Declaration of REGLEG regrets the failure to recognize *locus standi* for European regions with legislative powers in the Treaty of Lisbon and ranks it in the first place of its list of "historically disregarded claims".[47]

The declarations both of the CoR and REGLEG rarely include a detailed motivation of the right to such action for European regions and, even less, an alternative wording for Article 230 TEC. In view of the fact that these institutions do not lavish in legal dissertations, the common position on certain "regional interests in the European con-

Salzburg, November 12-13, 2003; Final Declaration of the Fifth Conference of Presidents of Regions with Legislative Power. Edimburgh, November 29-30, 2004; Declaració de Barcelona adoptada per la vuitena conferència de presidents de regions amb poder legislatiu 15 i 16 de novembre de 2007. See www.regleg.eu (Access date 10/03/2010).

44. For further reference see Cevilla Martínez, P. and Ballot-Du Fallet De La Tour, H., "Le Comité des Régions et le principe de subsidiarité", in Olesti Rayo, A., *La incidencia del Tratado de Lisboa en el ejercicio de las competencias autonómicas*, IEA, 2010, pp. 13-30.

45. Opinion, CoR 398/2006.

46. See Opinion, CoR 11/2006.

47. Declaration of Barcelona passed by the 20th conference of presidents of regions with legislative powers on November, 15 and 16, 2007: "[…] Malgrat aquests avenços en el reconeixement del paper institucional de les autoritats regionals, els Presidents lamenten que no s'hagi aprofitat el procés actual de revisió dels Tractats per incorporar altres demandes històriques de les regions amb poder legislatiu i, en especial, les següents: - l'accés directe de les regions amb poder legislatiu al Tribunal de Justícia de la UE en defensa dels seus drets i prerrogatives" ("[…] In spite of these improvements in the recognition of the institutional role of the regional authorities, the Presidents regret that it has not been taken advantage of the treaty revision procedure so as to include certain historical claims of the regions with legislative powers and, particularly, the following: - direct access of regions with legislative powers to the Court of Justice of the EU and defense of rights and prerogatives"). See www.regleg.eu/ (Access date 10/03/2010).

stitutional process" which was passed by REGLEG[48] in the debates prior to the Laeken Declaration become especially important. The common position even includes an alternative wording for Article 230 TEC.[49]

In the frame of the intergovernmental conference of Nice in November 2000, the representative of the Belgian government proposed a new wording for Article 230.2 TEC.[50] The proposal did not find the support of Member States and was not subject of further debate. However, the declaration of the representative of the Belgian

48. Common position paper of the constitutional regions regarding the IGC. Bruselas, September 20, 2000. "I.2. Independent right of constitutional regions to appeal to the European Court of Justice: Constitutional regions are – both de *iur*e and de facto – actors in the European decision-making process, in much the same way as are Member States for their areas of competence. The European Union promulgates many rules that are related to their areas of competence. As legitimate addressees of European legislation, constitutional regions are not only bound by these rules, but often confronted with the demand to transpose European rules into internal law as well. Likewise they can – through their Member State – be condemned for the incorrect or late transposition of European directives, just as failure to comply with European law can lead to a conviction (even resulting in a fine or penalty in the case of a second conviction). The possible expansion of the powers of the constitutional regions in the Union's federal member states will lead to a proportional increase in the impact of the European Union on them, and of the legal consequences thereof. In spite of this, constitutional regions do not yet have the corollary of the outlined legal obligations, i.e. cannot yet appeal directly against decisions of a general nature to the European Court of Justice (ECJ) if their interests are infringed or cannot defend themselves directly before the Court. We feel that this anomaly ought to be remedied by granting the constitutional regions their own independent right of appeal to the ECJ. To that effect we propose to amend Article 230 of the EC Treaty and its corollary articles accordingly. Therefore, Article 230 of the EC Treaty should be amended as proposed in the annex to this paper (no. 5). We emphasise though that the Court cannot in any case pronounce on the distribution of powers between the Member States and their federated states, as stated in Article 220 of the EC Treaty." See www.regleg.org (Access date 10/03/2010).

49. *Ibid*. I.2.: "5. Article 230 of the EC Treaty: right to appeal to the Court of Justice of the EC. The constitutional regions propose to insert between paragraph 2 and 3 a new paragraph stating the right of constitutional regions to appeal to the Court of Justice of the EC : 'For this purpose, the Court has also the right to pronounce a decision with regard to any appeal instituted by a regional body in so far as it has its own legislative power, assigned to it by national constitutional law, for reasons of lack of competence, the violation of essential formal requirements, the violation of this Treaty or of any regulations for its execution, or because of the abuse of power'".

50. Quoted in Burrows, N., "Nemo me impune lacessit…" (*op. cit*.), p. 45: "After the second paragraph of article 230 it was proposed to insert the following text: 'The Court shall for this purpose also have jurisdiction in any action brought by an entity of a Member State to the extent that it has its own law-making powers conferred on it under national constitutional law, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers'."

government became somewhat notorious when, in the frame of a CoR meeting which took place soon after, the Scottish Minster of Justice presented the proposal for debate in the plenum.[51]

With regard to the "legal" grounds of the "political" claim for privileged *locus standi* for European regions, it can be said that the minutes of the "Colloquium of the Constitutional Regions"[52] of February 22, 2001 are certainly exceptional. In his contribution, *Van Nuffel* summarizes the current status of Community case-law and analyzes the classification under Article 230.4 TEC of actions brought by European regions. In the Belgian case, the author pleads for an internal co-ordination procedure among the Belgian federal state and the Belgian Communities, which would allow such Communities to assume the privileged action for annulment before the ECJ, but he does not exclude the advantages of an express regulation of the action for annulment of European regions in the framework of the Treaties.[53]

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51. See (CONFER 4812/00), November 28, 2000.

52. Colloquium of the Constitutional Regions "Strengthening the role of the constitutional regions in the European Union", Minutes Brussels Plaza Hotel, Donderdag, February 22, 2001. See www.regleg.org (Access date 10/03/2010).

53. Colloquium of the Constitutional Regions / The European Court of Justice / The regions' access to the EU Court of Justice by Dr. Piet Van Nuffel: "Mr Van Nuffel said the constitutional regions already had access to the Court of Justice: either by referring a dispute to a national court and asking it to seeking a preliminary ruling from the Court, or approaching the Court directly, but subject to the conditions that apply to private persons and legal persons (demonstrating a direct and individual interest, as specified in Article 230(4) of the EC Treaty). This direct access 'through the backdoor' is, however, denied, given the difficulty that is generally experienced in trying to meet these conditions. Hence the call by the constitutional regions for direct access to the Court through the 'front door', on the same footing as the Member States (and the most important EU institutions), and without having to demonstrate such an interest (in keeping with Article 230 (2) of the EC Treaty). On 21 March 1997 (in a case involving the Walloon Community versus the Commission), the Court of Justice ruled by order that the concept Member States in Article 230 of the EC Treaty applied solely to 'government authorities in the Member States' and cannot be extended to cover 'governments of regions or autonomous communities, regardless of the powers they are assigned'. Normally, an amendment to the Treaty should be required so that the constitutional regions have direct access to the Court. Mr Van Nuffel nonetheless argued that it is possible that such a right is allowed without any need for an amendment to the Treaty. Article 17 of the statute of the Court of Justice states that the Member States are represented in the Court by a 'delegate for each case'. As this is now invariably a federal representative, Mr Van Nuffel claims there is nothing to prevent Belgium authorising a regional representative to appear in the Court for Belgium when a regional matter is on the agenda (as regional Ministers appear in the Council on behalf of Belgium and not in their own name). An internal Belgian system to allow such a mandate to be provided should, in other words, be enough to provide federated states with de facto access to the Court. Finally, there is the general principle for Europe

6.2. Contributions to the "Convention on the future of Europe"

The Laeken Declaration raised a number of questions which were to be discussed and analyzed in the frame of the European Convention.[54] Given that the local and regional authorities are, in many cases, the entities directly responsible for the implementation of Community projects, the Declaration set this discussion among the key-items of the agenda.[55] Apart from the CoR there was (and still is) no formal anchorage for regions within the system of the Treaties. The *Working Group Complementary Competencies* prepared a draft of a new Article 6.3 TEU (commonly referred to as the "Christophersen Clause"), which broadened the principle of respect to the "national identities of the Member States" to the "fundamental structures, political and constitutional, inclusive of regional and local self-government". The proposals of this working group would finally be incorporated in the new versions of Articles 4.2 y 5.3 TEU introduced by the Treaty of Lisbon. The recognition of this "material" legal position of the regions of the European Union was, however, not complemented with a procedural remedy.[56] This question was highly controversial in the debates of the European Convention.

(and for the Court), which recognises only the Member States and does not interfere with the internal arrangements within the Member States. Such an authorisation was not, however, given in the 1997 case, so the demand was then dismissed. Mr Van Nuffel does not, however, conclude that the judgement would have been different if the Walloon Region had appeared at the time as a formal representative of Belgium. Obviously a (further) change to the Treaty either offers more legal certainty, either through making the option thus created explicit (in parallel with the provisions in respect of the Council in Article 203 of the EC Treaty), or by providing for a formal right of access for the constitutional regions. Finally, Mr Van Nuffel referred to the disadvantage of the 'privilege' of having direct access to the Court, on the same footing as the Member States. Proceedings instituted by private persons and legal persons are judged by the Court of First Instance, with scope for a right to ask for a limited appeal in the Court of Justice. However, disputes referred by a Member State are presented in first and last resort to the Court of Justice. In other words; if the constitutional regions opt for the second solution, they forfeit the possibility of an appeal".

54. See http://european-convention.eu.int/pdf/LKNDE.pdf (Access date 20/03/2010).

55. Streinz, R., Ohler, C., Herrmann, C., *Die neue Verfassung für Europa*, Munich, 2005, p. 76.

56. One of the key objectives of the German *Bundesrat* was to obtain the recognition of privileged *locus standi* for regions with legislative powers. See BR-Drucks. 586/02, P.6; BR-DruckP. 1081/01, P.8. The president of the *Land* of Baden-Württemberg *Teufel*, in his capacity as representative of the German *Bundesländer* in the Convention, for a privileged *locus standi* for regions with legislative powers. This claim was not further discussed in the Plenum of the Convention. The representative of the German federal government, the minister of foreign affairs *Fischer*, favored the recognition of an independent action for annulment in the session of November 8, 2002. In the same session the representative of the Austrian government *Farnleitner* insisted on the importance of this claim.

Locus standi of European regions was paid more attention in the frame of the *Working Group Subsidiarity*, which dealt, among other issues, with the judicial review of the infringement of the principle of subsidiarity. Although some members of the Convention stood up for the recognition of a privileged action for annulment,[57] this issue would not be included in the final reports of the working group.[58]

The status of Community case-law as regards the standing of European regions was also discussed by the *Working Group Charter.*[59] The final report underlines the restrictive criterion adopted by Community case-law and tries to find a solution in the frame of the judicial review both of Justice and Home Affairs and of the principle of subsidiarity. The proposals of members *Farnleitner* and *Rack* are especially relevant. The members pleaded in favor of softening the element of "individual concern"[60] set forth in Article 230.4 TEC. Member of the Convention *Meyer* suggested that the elements of direct and individual concern should be subject to an alternative (instead of a cumulative) test.[61]

The Plenum of the Convention discussed the recognition of privileged *locus standi* to certain European regions in its debate of the regional and local dimension of the European Union of February

57. See, especially, contributions of *Farnleitner/Bösch*, CONV 241/02 CONTRIB 87, p. 8 f. as well as *Farnleitner/Tusek*, CONV 534/03 CONTRIB 227, p. 5, of *Garrido/Borrell /Carnero*, CONV 455/02 CONTRIB 169, p. 37 and CONV 329/02 CONTRIB 115, p. 44, of *Kiljunen* and other 14 representatives in the Convention, CONV 321/02 CONTRIB 109, p. 3, of *MacCormick*, CONV 298/02 CONTRIB 101, p. 5, of *Michel*, CONV 544/03 CONTRIB 236, p. 4 and of *Teufel*, CONV 530/03 CONTRIB 223, p. 4.

58. Such outcome is mainly attributable to the acute reticence to alter the status quo of representatives of Member States with active separatist movements in certain regions within their territory (see contributions of Garrido/Borrell/Carnero, CONV 455/02 CONTRIB 169, p. 37 and CONV 329/02 CONTRIB 115, p. 44).

59. CONV 354/02 WG II 16, p. 15 f. A working group was constituted under the presidency of Commissioner *Vitorino* with the purpose of studying the functioning of the ECJ; See CONV 543/03.

60. CONV 402/02 CONTRIB 141. This constitutes an elaboration of the contribution of *Farnleitner*, CONV 45/02 CONTRIB 25.

61. See contributions WG II – WD 17 and CONV 439/02 CONTRIB 160, proposing that the term "and" in Article 230.4 TEC be eliminated and replaced by "or".

7, 2003.[62] The old claim for *locus standi* of the CoR based on the infringement of the principle of subsidiarity was widely supported. However, the opinions were divided on the question of privileged *locus standi* for regions with legislative powers. Some members of the Convention openly pleaded for a privileged *locus standi* regulated in Article 230.2 TEC.[63] The representatives of the European Parliament suggested the recognition of a *tertium genus* action for annulment which should guarantee the defense of "its prerogatives before the Euro-

62. The working draft of the Praesidium CONV 518/03, P. 10 ss. analyzes the criteria developed by case-law on actions for annulment initiated by regional authorities: "21. […] Thus, the Court of Justice has ruled that even if it is incumbent upon all the authorities - central and regional - of the Member States to ensure compliance with Community law within their respective spheres of competence, it is not for the Community institutions to make pronouncement on the allocation of internal competences within each Member State. Consequently, the Commission may bring proceedings for failure to fulfill an obligation pursuant to Article 226 TEC only against the government of the Member State in question, even if the failure is the result of a region's action or omission; in the course of such proceedings, the Member State may not plead provisions existing in its internal legal system in order to justify the failure 1. 22. Calls have been made to establish a specific right of appeal for the regions on the grounds that an act of the Union affects the exercise of their own powers that they enjoy by virtue of their respective constitutional law. 23. At present, regional entities may bring an action for annulment with the ECJ only by virtue of the fourth paragraph of Article 230 TEC as 'legal persons' under the same conditions as any private individual, i.e. either if the disputed act is addressed to them or it is of direct and individual concern to them. Well-established case-law of the Court of First Instance allows actions brought by the regions in one specific case, namely against Commission decisions on State-aid prohibiting aid granted by those regions. Even if such a prohibition decision is addressed to the Member State and not to the region, case-law takes the view that it nonetheless affects the regional authority concerned if ,it directly prevents it from exercising its own powers'. Moreover, the Community court has stated in those cases that the regional authority bringing the action does have a separate interest, distinct from that of the Member State to which it belongs, ,where it possesses rights and interests of its own and the aid in question constitutes a set of measures taken in the exercise of legislative and financial autonomy vested in the authority directly under the constitution of the Member State concerned. On the other hand, an action brought by a region is inadmissible if it relies only on the fact that the contested act has socio-economic repercussions on its territory and cannot invoke the exercise of its own powers 1. 24. However, it is not clear whether this current case-law can be interpreted to mean that a region with legislative competence would be entitled, pursuant to the fourth paragraph of Article 230 TEC, to challenge the legality of a directive (or, in the future: a framework law) which it would have to transpose, in accordance with the constitutional law of the Member State, and which would therefore, in its view, affect the exercise of its own legislative powers. The difficulty in such a case lies in the requirement that the act in question must be of 'individual concern' (fourth paragraph of Article 230 TEC), since this term is interpreted very restrictively in the Plaumann case and that interpretation was recently confirmed by the Court of Justice 2; moreover, this issue has already been mentioned in the Convention 3".

63. CONV 548/03, p. 11.

pean courts under the authority of the respective Member State in accordance with its constitutional law and other national provisions".[64] The representatives of the Praesidium proposed in their draft of the Subsidiarity Protocol the figure of an action to be brought by Member States upon request of their national parliaments and in accordance with their constitutional law. The term "national parliaments" indicates that in a bicameral system both chambers would be entitled to raise such initiative.[65] Another group argued in favor of deleting the element of "individual concern" from Article 230.4 TEC, so as to allow any natural or legal person to challenge a Community act by which it was merely "directly concerned".[66]

Although regions with legislative powers have not been acknowledged privileged *locus standi* neither under the Constitutional Treaty nor under the Treaty of Lisbon, it seems that the new Article 263 TFEU softens to some extent the access requirements for non-privileged applicants to the European courts.[67]

6.3. New article 263.4 TFEU

Article 263.4 TFEU grants *locus standi* to any natural or legal person "against an act addressed to that person or which is of direct

64. See Opinion of the European Parliament of January 14, 2003 (P5_TA-PROV (2003)0009, "Napolitano Report").

65. This proposal reflects the regulation currently in force in Germany, where the federal government may in accordance with § 7 EUZBLG (Law on the co-operation of *Bund* and *Länder* in affairs of the European Union) bring an action for annulment before the ECJ at the request of the *Bundesrat* to the extent that a Community act or omission affects the legislative powers of a *Land* in respect of which the federation has no competence. The main problem of this regime is that it does not allow for a satisfactory solution of a conflict of interest and, thus, it must be settled at a Community level.

66. CONV 548/03, P. 11. The working paper of the Praesidium CONV 518/03, P. 10 ss. takes a similar position with regard to regional and local entities: "VI. Avenues to be explored: 4. Should the regions be expressly mentioned in the fourth paragraph of Article 230 TEC? Would it be possible to settle the issue by following the suggestions mentioned in Working Group II's report that the right of natural or legal persons to institute proceedings, referred to in that Article, be extended in the case of measures of general application which apply directly to the individuals concerned?".

67. For further reference see Beltrán García, S., "La inclusión de los principios de autonomía regional y local en el Tratado de Lisboa", in Olesti Rayo, A., *La incidencia del Tratado de Lisboa en el ejercicio de las competencias autonómicas*, Barcelona, IEA, 2010, pp. 31-56.

and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures". The term "regulatory act" has already been subject to controversy. Some legal writers consider that the term "regulatory act" is not equitable with "regulation" in the sense of Article 288 TFEU and, hence, that the non-privileged action for annulment against a regulation should still be subject, *inter alia*, to the evidence of a "direct and individual concern".[68] The interpretation of the concept "regulatory act" should therefore be restricted to certain implementing measures such as administrative acts "of regulatory nature". However, current requirements should continue to apply with respect to the challenge of a directive.[69]

7. Conclusions and *lege ferenda* proposals

7.1. Conclusions

The recognition of privileged *locus standi* primarily concerns regions with legislative powers of eight Member States –Germany, Austria, Belgium, Italy, Spain, Finnland, Portugal and the United Kingdom– as well as the Overseas Countries and Territories of two Member States –the Netherlands and Denmark– which in the last years have claimed a treatment similar to that of regions with legislative powers and which enjoy a similar constitutional status.

The more common *petitum* in actions for annulment brought both by central state and regional bodies on the grounds of an alleged infringement of regional competences is the challenge of decisions of the Commission in the areas of state-aids and structural funds.

After its initial hesitance, Community case-law has categorically established that the competent body for reviewing an action for annulment brought by a regional entity is the EGC and that the admis-

68. König, D., Nguyen, A., "Der Vertrag von Lissabon", *ZJS* (Zeitschrift für das juristische Studium) 2/2008, p. 140 ss.

69. For further reference see Cienfuegos Mateo, M., "El *ius standi* de las regiones de la Unión Europea, ¿mejorará el Tratado de Lisboa la legitimación de las Comunidades Autónomas?", in Olesti Rayo, A., *Las relaciones UE-CCAA después del Tratado de Lisboa*, EAP, 2010, pp. 131-156.

sibility of such action must be assessed in accordance with Article 230.4 TEC. The European courts have often agreed to review actions brought against decisions (which account for the larger part of all challenged acts), although they have generally rejected the challenge of regulations and directives. When assessing the elements of Article 230.4 TEC with regard to an action against a decision, the European courts have coined a standard formula which reads as follows: "a regional entity is directly and individually concerned when the relevant provisions of the contested decision not only affect measures adopted by the regional entity, but also prevent such regional entity from exercising, as it sees fit, its own powers, which it enjoys directly under national law".

In recent years the CoR and REGLEG have claimed for the recognition of privileged *locus standi* for European regions with legislative powers. This claim has been rejected in all reforms of the Treaties since the Treaty of Amsterdam and, lately, in the Treaty of Lisbon. Nonetheless, the struggle of CoR and REGLEG brought some fruits, if only in the political discourse. Three main positions were adopted concerning this question within the frame of the European Convention supporting, repectively, (i) the introduction of a privileged standing based on Article 230.2 TEC for those European regions with legislative powers; (ii) the creation of a *tertium genus* standing for regional entities under the supervision of the relevant Member State; and (iii) the mitigation or elimination of the elements of direct and individual concern of Article 230.4 TEC. The new Article 263 TFEU introduced by the Treaty of Lisbon softens to some degree the access requirements of non-privileged applicants.

7.2. Proposals *lege ferenda*

In view of the limited success of the proposal in the context of the latest Treaty reforms, it seems unlikely that Primary law will be amended in the near future so as to include regions with legislative powers among the privileged applicants. However, since simplifying the access to the European courts has proved to be among the long-term "political priorities" of many European regions, we shall now turn to analyze the main proposals which have been discussed in the European Convention as well as certain other, more modest, alternatives which may prove to be more efficient and easy to implement in the current scenario.

7.2.1. Perspectives in Community case-law

In *Dutch Antilles* the EGC and Advocate-General Léger rejected the possibility to "transfer" *locus standi* of Article 230.2 TEC from the government of the Netherlands to the government of the Dutch Antilles, even though an internal co-ordination procedure expressly allowed for that possibility.[70] It has been pointed out above that the European courts lack competence to object an internal delegation of authority made by a Member State for the purposes of Article 230.2 TEC. This position does not contradict the principle of "institutional balance" and is consistent not only with the unitary representation for purposes of both the international and Community policy of a Member State but with the principle that the European courts are not entitled to assess the internal distribution of powers of a Member State. Since no internal co-ordination procedure actually provides for the transfer of *locus standi* to regional authorities, this question is (for the time being) rather an academic one. However, if such a mechanism was to be created in the future, the European courts may re-consider the position of the case-law in this matter.

7.2.2. Perspectives in national law

The internal co-ordination procedures currently in place are hardly used in half of the annulment proceedings based on the infringement of regional competences by a Community act. It is difficult to say whether the lack of use of such co-ordination procedures is a consequence of a number of intrinsic weaknesses of such processes or simply the expression of a failure to reach an agreement by the different national players. A mechanism which could potentially be part of such co-ordination procedures is the "transfer" of *locus standi* for the purposes of Article 230.2 TEC to the regional authorities, although –as discussed above– this option has not yet been accepted in Community case-law.

The Portuguese co-ordination procedure provides for the right of the *Regiões autónomas* of the Azores and Madeira to appoint the "Agent" for the purposes of Article 19 of the Statute of the

70. Opinion of Advocate-General Philippe Léger, ECJ, C-301/97, Kingdom of the Netherlands *vs.* Council and others and C-452/98, Dutch Antilles *vs.* Council, *ECR* 2001, I-8853, Para. 60 and 61.

ECJ.[71] The candidate is then empowered by the Ministry of Foreign Affairs to represent the Republic of Portugal in the proceedings at hand. The Directorate General of European Affairs ("DGAE") is represented in the proceedings by the director of its Legal Service. In practice, this option leads to a result which is very similar to the "transfer" of *locus standi* described above. It seems that, through the collaboration of the DGAE, the unitary representation of the interests of a Member State is also guaranteed.

7.2.3. Perspectives in Community law

7.2.3.1. Modification of Article 230.2 TEC (now 263.2 TFEU)

The most controversial and intensely discussed modification of Primary law has been the inclusion of certain regions among the group of privileged applicants of Article 230.2 TEC. The precise definition of the relevant regions could be implemented through a list to be attached as a schedule to the TFEU. The "regional *locus standi*" may adopt two forms: (i) *locus standi* on equal footing with the rest of privileged applicants; or (ii) *locus standi* "under the authority of the respective Member State and in accordance with constitutional law and other provisions of national law".[72] From the point of view of the European courts, the full or partial recognition of privileged *locus standi* to "constitutional regions" would eliminate the current difficulties they face in connection with their inability to assess the internal distribution of powers. The very often repeated argument that "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", would not apply in this case since the number of Member States would not actually be increased; rather, only the number of privileged applicants would increase. However, the creation of this new action for annulment could entail the risk that regional and central state bodies represent diverging interests before the European courts. Despite its high political sensitivity, the advancement of diverging national interests before European courts should not

71. See related case-law: Order, C-363/06 P, Comunidad Autónoma de Valencia – Generalidad Valenciana *vs.* Commission, 20/02/2008.

72. See Opinion of the European Parliament dated January 14, 2003 (P5_TA-PROV(2003)0009, "Napolitano Report").

pose any difficulties for the Community judge, since these conflicts already exist in other contexts. In addition, it should be noted that Member States are not bound by their position in the Council or in other judicial proceedings. One could argue, however, that since all national actors are bound by the constitutional principles of loyalty and unitary representation of national interests, it seems more appropriate that they settle their conflicts of interest at a national level.

The recognition of *locus standi* to regions with legislative powers poses certain difficulties from an "institutional balance" perspective. On the one hand, the inclusion of certain regions in the category of privileged applicants of paragraph 2 would result in Member States with a high number of legislative regions having more possibilities to challenge Community legislation *vis à vis* more centralized Member States.[73] On the other hand, it must be emphasized that the recognition of privileged *locus standi* to substatal regions may interfere with certain "checks and balances" anchored in the institutional system of the Treaties, such as (i) the inspection rights of the Commission in an administrative proceeding; (ii) the right to appeal of the Commission and the Member States in infringement procedures; and (iii) the sole responsibility of the Member State for the compliance with European law in an infringement procedure. Regions with privileged standing would be entitled to an unrestricted standing against Community legislation, whereas the responsibility for complying with it would remain with the Member State and, thus, such regions could not be made brought before the European courts by the Commission and the other Member States. In addition, a hypothetical "institutional adjustment" with the purpose of equaling rights and obligations of such regions both in infringement and annulment procedures seems difficult because (i) neither the Commission nor the European courts can assess the internal distribution of powers; and (ii) even less can such assessment be expected from the other Member States.

7.2.3.2. Modification of Article 230.3 TEC (now 263.3 TFEU)

The inclusion of regions with legislative powers under paragraph 3 does not seem appropriate since their position is not comparable to

73. Van Nuffel, P., "What's in a member state?" (*op. cit.*), p. 898.

that of the ECB, ECA and CoR, since their powers do not derive from Community law and, thus, the European courts are not entitled to "safeguard their prerogatives".

7.2.3.3. Modification of Article 230.4 TEC (now 263.4 TFEU)

The mitigation of the requirements of paragraph 4 may be implemented either by eliminating or modifying the element of "direct and individual concern" or through the exclusion of certain Community acts from the test of such criteria. The elimination or adequate modification of the element of "individual concern" would have a similar result as the inclusion of regional entities in the category of privileged applicants. The only Community acts which would escape such amended action for annulment would be those provisions of a Community directive that are not a decision "in the material sense". The impact on the "institutional balance" of such a reform poses similar problems than those outlined above with regard to the inclusion of regions in the category of privileged applicants.

The elimination of the requirements of paragraph 4 with respect to regulations and directives (assuming that such a reform would also include decisions) would produce similar results. The exclusion of decisions from the test of "direct and individual concern" of paragraph 4 certainly represents a rather modest reform and would have less practical consequences (since Community case-law has rarely objected to the challenge of decisions), although, from the point of view of the Community judge, it would have the advantage of obviating the ever difficult assessment of the "internal distribution of powers".

As mentioned above, the Treaty of Lisbon has slightly softened the access of non-privileged applicants to the European courts. European Regions would therefore enjoy a standing against any regulatory act which does not foresee implementing measures, which admissibility would be solely restricted to the test of "individual concern". With regard to regulations and directives for purposes of Article 288 TFEU, the current restrictions do not seem to have changed.

Another *lege ferenda* proposal may be the inclusion of the formula coined in cases *Vlaams Gewest* and *Friuli-Venezia Giu-*

lia[74] in paragraph 4. In practice, this proposal would need to be complemented with a waiver from the Community judge to "assess" the internal distribution of powers and the limitation of the admissibility test to (i) the "*ex post facto* acknowledgement" of the existence of certain administrative acts passed by a national authority on the basis of a presumption of validity; and/or (ii) the assessment of evidence based on concluded acts.

7.2.3.4. Modification of Article 40.1 of the Statute of the ECJ

Access to the European courts for regions with legislative powers may be facilitated by means of the recognition of a right to intervene in proceedings to which its Member State is a party. The recognition of this right would "only" require a modification of Article 40.1 of the Statute of the ECJ, to be approved through a special legislative procedure. This right of intervention may adopt the form of an "unlimited" intervention, i.e. the region in question may either support or reject the claims of the other parties (including the Member State which is already a party to the proceeding) or limited to the support of claims defended by the Member State. The second option seems to safeguard better the principle of "institutional balance" and to allow the central state bodies not only to control the decision of bringing an action but also to guarantee the unitary representation of the interests of a Member State.

74. CFI, T-288/97, Regione autonoma Friuli Venezia Giulia *vs.* Commission, *ECR* 1999, II-01871.

ABSTRACT

This contribution offers a response to two questions: firstly, what forms of appeal does a region with legislative powers have to challenge Community legislation?; secondly, what does the call for of a privileged action for annulment consist of for certain regions in agreement with Art. 263.2 TFUE / 230.2 TCE? This contribution presents (1) the concept of region with legislative powers, (2) the most frequent *petitum* of the actions used for the infringement of regional powers, (3) the internal coordination procedures between the central government bodies and the regional authorities, (4) community jurisprudence on the subject of Art. 230 TCE with respect to regional bodies, (5) the "political" call for a privileged action for annulment for regions with legislative powers, and finally, (6) some conclusions and perspectives *de lege ferenda*.

Key words: regional with legislative powers; action for annulment; active legitimation; article 263 TFUE / 230 TCE; internal coordination procedures.

RESUM

Aquesta contribució es proposa respondre dues preguntes: primera, de quines vies de recurs disposa una regió amb competències legislatives per impugnar la legislació comunitària? i segona, en què consisteix la reivindicació d'un recurs d'anul·lació privilegiat per a certes regions d'acord amb l'art. 263.2 TFUE / 230.2 TCE? Aquesta contribució exposa (1) el concepte de regió amb competències legislatives, (2) el *petitum* més freqüent dels recursos interposats per vulneració de competències regionals, (3) els procediments interns de coordinació entre els òrgans centrals de govern i les autoritats regionals, (4) la jurisprudència comunitària en matèria de l'art. 230 TCE respecte a entitats regionals, (5) la reivindicació "política" d'un recurs de anul·lació privilegiat per a regions amb competències legislatives i, finalment, (6) algunes conclusions i perspectives *lege ferenda*.

Paraules clau: regió amb competències legislatives; recurs d'anul·lació; legitimació activa; article 263 TFUE / 230 TCE; procediment intern de coordinació.

RESUMEN

Esta contribución se propone responder a dos preguntas: primero, ¿de qué vías de recurso dispone una región con competencias legislativas para impugnar la legislación comunitaria? y segundo, ¿en qué consiste la reivindi-

cación de un recurso de anulación privilegiado para ciertas regiones conforme al art. 263.2 TFUE / 230.2 TCE? Esta contribución expone (1) el concepto de región con competencias legislativas, (2) el *petitum* más frecuente de los recursos interpuestos por vulneración de competencias regionales, (3) los procedimientos internos de coordinación entre los órganos centrales de gobierno y las autoridades regionales, (4) la jurisprudencia comunitaria en materia del art. 230 TCE con respecto a entidades regionales, (5) la reivindicación "política" de un recurso de anulación privilegiado para regiones con competencias legislativas y, finalmente, (6) algunas conclusiones y perspectivas *lege ferenda*.

Palabras clave: región con competencias legislativas; recurso de anulación; legitimación activa; artículo 263 TFUE / 230 TCE; procedimientos internos de coordinación.