The Routledge Handbook of International Local Government

Richard Kerley, Joyce Liddle, Pamela T. Dunning

Local government in the European Union’s multilevel polity

Publication details

Marius Guderjan
Published online on: 03 Sep 2018

How to cite :- Marius Guderjan. 03 Sep 2018, Local government in the European Union’s multilevel polity from: The Routledge Handbook of International Local Government Routledge
Accessed on: 26 Sep 2023
LOCAL GOVERNMENT IN THE EUROPEAN UNION’S MULTILEVEL POLITY

Marius Guderjan

Introduction

Public authorities on different levels are engaged with EU Member States in a complicated system of shared jurisdiction. Over the last three decades, European integration has led to emerging patterns of interaction between the local and European levels of government. As part of this dynamic, local authorities have entered the European Politikverflechtung – a compound, blurred governance arrangement under which actors and institutions from multiple levels cooperate formally and informally to conduct political and administrative tasks (Derenbach 2006: 77–78).

Two developments are particularly relevant. First, during the 1990s, the movement towards the ‘completion’ of the Single Market created a number of directives and regulations that affected the practices of local governments and prompted them to increase their engagement with EU policies (Münch 2006: 127; Rechlin 2004: 16ff.). EU directives and regulations have a direct impact on local activities, particularly in the fields of public procurement, state aid, human resources management, the provision of public services, housing, building and spatial planning. This puts local authorities in a position as both executing and shaping actors in Europe’s multilevel system.

Second, the EU’s regional and cohesion policy has provided local actors across Europe with a formal role in building proactive relationships with supranational institutions (Conzelmann 1995: 134–135; John 2001: 69; Bache 2004: 166ff.; Bache 2008: 23; Goldsmith and Klausen 1997: 1ff.). As the cohesion policy for 2007–2013 was made subordinate to the Lisbon Agenda and the subsequent ‘Europe 2020’ strategy, the ideas of partnership and dialogue also entered the EU’s economic strategies. As a consequence, the local level has gradually developed a greater role in the delivery of policy goals (Van Bever, Reynaert and Steyvers 2011: 236ff.).

As a result of these processes, more and more local authorities have adapted their politico-administrative structures by, for example, opening offices in Brussels, participating in networks, and developing strategies to promote their preferences on the European stage (Fleurke and Willemse 2006: 85; Marshall 2005: 669; Martin 1997: 63; Schultze 2003: 135; Sturm and Dieringer 2005: 282). The interaction between local and European actors has fostered the development of a compound polity that is commonly referred to as multilevel governance (Bache et al. 2011: 125–126). With national governments still in control over local government and their ability to participate effectively in European affairs (Atkinson 2002: 785ff.), the
question arises as to what extent, and in what ways, is local government part of the European ‘multilevel compound’ (Guderjan 2015: 951).

In order to enhance our understanding of the status of local government within Europe’s multilevel polity, this chapter begins by examining the role of local government as implementers of EU legislation and policies. It goes on to track local government’s constitutional status in European multilevel governance, particularly in relation to the principles of local-self-government and subsidiarity. Finally, the chapter focuses on the relevant institutional structures at different levels through which local governments participate in EU policy-making.

Local government as an implementer of EU legislation and policy

Guderjan (2015: 941) suggests that ‘the implementation of European legislation is the strongest link between local and European institutions.’ The EU depends on the administrative capacity of its Member States, which in turn depend heavily upon local authorities in order to implement EU policies. The European legislator frequently uses framework legislation that requires a division of responsibility between the EU as a policy initiator, central government as a ‘transposer’ and local government as an implementer. In this way, local authorities shape EU outputs to varying degrees (Goldsmith 1997: 5ff.; 2003: 121).

In the early 1990s, when the completion of the European Single Market brought a ‘flood of directives’ affecting local authorities (Alemann and Münch 2006: 17), local authorities became increasingly responsible for the execution of EU directives in the fields of trading standards, environmental standards and public procurement (Goldsmith 1997: 219). EU legislation significantly impacts upon water, gas and electricity supply, water and waste management, public transport, childcare facilities, education, cultural activities, and social and health care. Because the European legislator is often not familiar with the details of practice in local governments across all Member States, EU law causes some confusion and challenges municipal practice by creating a great deal of uncertainty within different local administrations (Fischer 2006: 106).

On many occasions, the European Court of Justice (ECJ) has clarified the application of directives, when existing practices were in conflict with EU legislation. For instance, compensation payment for public service delivery is regulated through Court rulings, such as the judgments on compensation payments Case C–107/98, Teckal v. Comune di Viano, [1999] and C–280/00, Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, [2003]. Subsequently, the Commission adopted the 2005 Monti-Kroes Package on rules governing compensation for public service obligations IP/05/937 and the 2011 Service of General Economic Interest Package IP/111571, in order to provide more legal clarity.

More recent directives relevant for public service delivery include Directive 2006/123/EC on services in the internal market; Directive 2014/24/EU on public procurement (formerly Directive 2004/18/EC); Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal service sectors (formerly Directive 2004/17/EC); and Directive 2014/23/EC on the award of concession contracts. All of these make municipal service delivery subject to European competition law. There are a number of examples that do not exclusively apply to public authorities, but strongly affect municipal practice, such as human resources management (the Working Time Directive 2003/88/EC and the Equal Treatment Directive 2006/54/EC) and social services (Directive 2011/83/EC on consumer rights).

Environmental law has further profound implications for the acquisition of products and services, planning, and municipal building. Examples of these include the Habitats Directive 92/43/EEC on the conservation of threatened or endemic animal and plant species; the Water

Whereas the above examples concern binding law, there has also been a growing agenda of non-binding policies relevant to the local level. Over time, the EU has become aware of local government’s potential role in realising its agenda with regard to social policy, poverty, employment, economic growth, energy, climate change, housing, health, transport initiatives, security and integration of migrants and refugees. The EU has very limited legal competence in these areas and promotes implementation in the context of cohesion policy, Europe 2020 and the new Urban Agenda. In order to qualify for funding, local authorities have to meet the strict requirements of EU policy schemes, and are thus bound to legal provisions. At the same time, the implementation of such policy initiatives requires stronger bottom-up involvement from local authorities.

Local self-government within multilevel governance

The constitutions of many Member States – Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden – recognise the right to local self-government or self-administration (CEMR 2007). Except for Monaco, Andorra and San Marino – all of which are too small for a useful subdivision into formalised local authorities – all Member States of the Council of Europe are signatories to the European Charter of Local Self-Government of 1985, Articles 2 and 3 of which state:

Article 2: The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

Article 3: Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

With the Lisbon Treaty, for the very first time the right to local self-government was mentioned in one of the EU’s treaties (Art. 4.2 TEU):

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

This reference to local self-government indicates its increasing role in EU affairs, and manifests the constitutional recognition of a ‘Europe of four levels’ (Hoffschulte 2006: 63). It acknowledges political autonomy and implies that although local authorities are subordinate to regional and/or national governments, they are not merely executing and implementing decisions made at higher levels, but they also take their own governmental action (Panara 2013: 371ff.). In some cases references to local self-government have been used to justify specific actions by local and regional authorities. For instance, C–156/13, Digibet v. Westdeutsche Lotterie [2014] (at 34) allowed the Land Schleswig-Holstein to temporarily adopt more liberal
The European Union's multilevel polity

game-of-chance policies than those of other German Länder. Another example is the Opinion of Advocate General Mengozzi on C–115/14, RegioPost v. Stadt Landau [2015] (at 82), which clarifies when a contracting authority can require businesses tendering for public services to comply with minimum wage special conditions.

The EU’s ‘partial’ or ‘complementary’ constitution (Bogdandy 2009: 24) is mainly concerned with the allocation of competencies across European and national institutions. However, constitutional questions are not exclusive to the European and national levels, but reach deep into the political-administrative structures of the Member States. As Panara (2015: 159) puts it:

Its constitutive elements stem from the combined and coordinated work of the national constitutional system(s) and of the EU. Only a holistic approach, the combined analysis of the domestic system(s) and of the EU, can provide a satisfactory answer in relation to the status of the sub-national authorities in the EU or in relation to the coordination between sub-national authorities and the EU. Multilevel governance is legally and methodologically part of the complex European constitutional space.

Although ‘multilevel governance’ is a widely acknowledged terminology in EU policies, it is not mentioned in its primary legislation. The acknowledgement of regional and local self-government by the Lisbon Treaty, however, can be interpreted as an implicit constitutionalisation of multilevel governance. The Commission has long recognised that multiple levels are not isolated from each other but are interacting. Throughout the 2000s, a number of initiatives have illustrated the intention of the Commission, and increasingly also the European Parliament (EP), to intensify cooperation with cities and municipalities. The 2001 White Paper on European Governance sought to enforce a true partnership, integrating different levels of government through systematic dialogues with regional and local representatives (Atkinson 2002: 782ff.; Karvounis 2011: 215ff.; Reilly 2001: 1). In 2009, the White Paper on Multilevel Governance, which was issued by the Committee of the Regions (CoR) to draw attention to local and regional government, stated:

Multilevel governance is not simply a question of translating European or national objectives into local or regional action, but must also be understood as a process for integrating the objectives of local and regional authorities within the strategies of the European Union. Moreover, multilevel governance should reinforce and shape the responsibilities of local and regional authorities at national level and encourage their participation in the coordination of European policy, in this way helping to design and implement Community policies.

(CoR 2009)

The state remains a strong gatekeeper for local involvement in European affairs (De Rooij 2002: 448–449; Fleurke and Willemse 2006). Even though subnational actors operate in interconnected policy arenas across different levels (Hooghe and Marks 2001: 3–4, 77ff.), they are set within a national constitutional context which both provides opportunities and defines limits to multilevel governance (Hague and Harrop 2007: 281–282). Whereas the interdependency amongst different levels has grown, this has not necessarily been accompanied by an increase in the actual influence of local governments.

The explicit acknowledgement of local self-government and the implicit recognition of multilevel governance have de jure limited the exercise of powers by the EU and by central governments. De facto, the application of multilevel governance varies strongly across Member

397
States. The EU cannot change domestic structures but can adapt existing procedures with the aim of providing subnational authorities with a greater role in making and implementing policies. Even though Union Courts can require an annulment of an EU Act if it infringes local self-government (Art. 4.2 TEU), Panara argues that if domestic litigation on the implementation of multilevel governance is transferred to the Court of Justice, it would have little leeway in the interpretation of multilevel governance:

"given that constitutional arrangements vary asymmetrically across the Union, the ECJ is likely to stick to a minimal notion of multilevel governance whilst applying it to a specific State context, rather than dictating prescriptive solutions for the Member States. The Union notion of ‘multilevel governance’ must necessarily be minimal and procedural."

(Panara 2015: 57)

Multilevel governance becomes more concrete in the context of cohesion policy, where we can find explicit and legally binding references. Regulation 1303/2013 requires Member States to establish multilevel partnerships with subnational authorities and other societal actors for the delivery of economic, social and territorial cohesion. Article 11 states:

For the Partnership Agreement and each programme respectively, each Member State should organise a partnership with the representatives of competent regional, local, urban and other public authorities, economic and social partners and other relevant bodies representing civil society, including environmental partners, non-governmental organisations and bodies responsible for promoting social inclusion, gender equality and non-discrimination, including, where appropriate, the umbrella organisations of such authorities and bodies. The purpose of such a partnership is to ensure respect for the principles of multi-level governance, and also of subsidiarity and proportionality and the specificities of the Member States’ different institutional and legal frameworks as well as to ensure the ownership of planned interventions by stakeholders and build on the experience and the know-how of relevant actors.

The partnership principle provides the most significant legal communitarisation of multilevel governance and moves beyond the informal patterns of what Benz and Eberlin (1999: 333) called a ‘loose coupling’. The Commission monitors compliance with the Code of Conduct on Partnership and may even suspend funding if Member States do not follow its recommendations (European Commission 2014). Governments would hardly want to miss out on the significant amounts of funding they acquire from the Structural Funds. In addition, legal action against Member States is possible if they completely fail to establish multilevel partnerships with subnational authorities and other societal actors. However, Partnership Agreements are designed in accordance with national law practices and leave room for generous interpretations. Various countries in south-east Europe (e.g. Greece, Slovenia, Croatia – see Bache et al. 2011) and central and eastern Europe (e.g. Estonia, Poland, Czech Republic, Hungary, Romania – see Dabrowski 2014) only fulfil the minimal requirements of the partnership principle and produce highly prescriptive operational programme objectives (Van den Brande 2014).

Overall, multilevel governance evolves through negotiations and network-building. Despite its advancement through the recognition of local self-government in the treaties and the legal requirements of the cohesion policy, multilevel governance remains a political rather than a legal principle and thus its implementation is subject to specific contexts.
The European Union’s multilevel polity

The relevance of EU subsidiarity for local government

In federal states, subsidiarity has been an established organising principle to guarantee the self-determination of regional and local levels of government. The underlying idea promotes the principle that higher levels of government should only rule over matters that cannot be dealt with by the lower level on its own. Subsidiarity has been an implicit norm for the EU since its early days as the European Coal and Steel Community, and it was later referred to explicitly in the Treaty of Maastricht to regulate the relationship between the EU and Members States. The Treaty of Lisbon extended subsidiarity to the regional and the local level, which, along with the recognition of legal self-government, advances the legal manifestation of multilevel constitutional space. Article 5.3 of the TEU states:

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

The legislator has to consider the appropriateness, necessity and proportionality of their actions, with Art. 5.4 TEU specifying that ‘[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. Consequently, the Commission has to ‘take into account the regional and local dimension’ within the consultations for legislative acts (Article 2 of the Protocol on the Application of the Principle of Subsidiarity and Proportionality).

Despite these provisions, the possibility for subnational government to challenge EU legislation is limited and is instead mainly reserved to Member State governments which represent their regional and local authorities before the Court of Justice. Regional, but not local, authorities can challenge EU legislation indirectly through the state (Panara 2015: 160), when represented in a federal co-legislating chamber.

Craig (2012: 74) argues that the Court of Justice does not apply a systematic review of subsidiarity in its judgements. It has never annulled a legal act because of an infringement of subsidiarity. First of all, hardly any legal cases have been forwarded on the grounds that the EU has breached subsidiarity. Secondly, in the few cases that have alleged such a breach of subsidiarity, this was not the first or principle plea and he cites fewer than 10 cases in 20 years (ibid.: 80). And finally, in those few cases, the Court decided that the EU was acting lawfully (Panara 2015: 82–83).

The CoR is the designated ‘watch dog’ of subsidiarity on behalf of local and regional government. It exercises this function through its consultative powers during the legislative stage, as well as through litigation before the Court when subsidiarity is not respected. Article 8 of the Protocol on the Application of the Principle of Subsidiarity and Proportionality states:

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act . . .

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.
Neither the CoR nor national parliaments have yet challenged an act for an infringement of subsidiarity. In 2012, the CoR warned of a violation of the subsidiarity principle by the so-called Monti Package II, which limited the right to strike for posted workers who are sent to provide a service in other Member States on a temporary basis. The CoR thus officially supported twelve national parliaments that used the ‘yellow card’ mechanism and for the first time threatened to take action for an ex-ante appeal before the Court (Piattoni and Schönau 2015: 97).

Whether the CoR appeals to the Court or not has to be decided by a majority of its appointed members. In 2013, for instance, a plenary session of the CoR voted not to challenge the EU’s right to make the acquisition of structural funds conditional on the compliance with the macro-economic objectives of the Stability and Growth Pact. It was believed that macro-economic conditionality in the 2014–2020 cohesion policy was not an infringement of subsidiarity (ibid.: 98).

Two reasons may explain why the CoR has never taken legal action on the grounds of a subsidiarity breach. First, it may be concerned that it risks losing its threat potential if its complaint is not successful. Second, the Commission frequently takes the CoR’s views into account when drafting legislation because it prefers to avoid legal disputes. The Lisbon Treaty has allowed the CoR to increase its influence in favour of subsidiarity through monitoring activities and using political leverage. Rather than blocking legislation within the inter-institutional arrangement, the CoR is more effective as an advocate for subsidiarity through propositions, negotiations and consultations (ibid.: 98ff.).

Like multilevel governance, subsidiarity remains subject to political rather than legal interpretation. Subsidiarity is not a ‘golden formula’ determining the allocation of competences, but a ‘useful device’ directing attention to national and local diversity and the legitimacy of EU intervention (Syrpis 2004: 334). Thus, cooperation and mutual understanding rather than conflict appears to be a more suitable means of guaranteeing an effective and reconcilable implementation of policies. As Panara (2015: 122) suggests:

In all the analysed multilevel systems, the appropriate locus for the enforcement of subsidiarity is not the courtroom but participation in the law-making and policymaking processes as required by the principles of ‘partnership’ and ‘loyal cooperation’. Judicial enforcement plays a role only if there is a ‘clear’ or ‘evident’ abuse; i.e., where the attribution of a certain power to the central authority is totally illogical or untenable.

**Local access to EU policy-making**

Formal access for local government actors to EU policy-making is limited. Local authorities are represented through their Member of the European Parliament, and municipal associations have an observer status at meetings of the Council of Ministers but no channels of direct influence. Since the early 1990s, the CoR remains the only formal representation of local government in the EU’s institutional set-up. The Lisbon Treaty strengthened its impact on legal proposals that affect subnational government (Neshkova 2010). However, there are three caveats to the CoR being an effective body to promote local policy preferences. First, it has only consultative powers and therefore cannot match the political weight of the EP, the Council or the Commission. Second, its diverse membership dilutes the specific interests of individual local authorities, which consequently prefer to work through European networks that better reflect their own properties and needs, such as EUROCITIES, the European Local Authorities Network (ELAN), the Centre of Employers and Enterprises providing Public Services (CEEP).
or POLIS, a network of cities and regions for public transport innovation. Third, depending on the Member State, it is often regional not local delegates who are represented on the CoR. For instance, whilst the UK sends all local councillors, only three of Germany’s 24 members are explicitly municipal representatives.

Callanan and Tatham (2014: 191) refer to ‘regulatory mobilisation’ when local mobilisation addresses EU policies and legislation, and speak of ‘financial mobilisation’ when local authorities aim to acquire EU funding. It is fair to say that most municipalities do not participate in EU policy-making, and have little influence over policy outcomes (Bache 2008: 31; Catalano and Graziano 2011: 6). A few highly engaged policy-makers and officers bypass the state level and have access to the supranational policy-making cycle on an ad hoc basis. But the most effective lobbying is done by domestic and transnational municipal association and networks, who can pool the political weight and expertise of their membership. Member States with particularly strong associations are Denmark, Finland, the Netherlands, the UK, Germany and Estonia (Kettunen and Kull 2009: 122; Eckert et al. 2013: 162; Callanan and Tatham 2014: 199; Guderjan 2015: 947ff.).

While it is up to national governments to create more participation channels for subnational authorities, or to strengthen existing ones (e.g. the CoR), it has become increasingly difficult to exclude local actors from EU policy-making (Schultze 2003: 135). As local authorities are pushing for more responsibilities to deal with European and global challenges, they have learned to deploy a variety of means to engage with EU institutions, either directly or indirectly through domestic channels (Eckert et al. 2013: 157; Van den Brande 2014: 6; Guderjan and Miles 2016: 643). European governance develops not only through a legal constitution, but also through a ‘living constitution’, and mutually reinforcing learning and practice (Miles 2011: 197). National governments prefer to keep control over local affairs, but they have also started to realise the potential that lies at the local level. As outlined above, the Commission and the EP have long promoted multilevel partnerships and a greater role for local government. This has been with the aim to increase the acceptance, legitimacy and effectiveness of an increasing number of policies that have direct effect within municipalities.

**Conclusion**

Local authorities are essential for executing EU legislation, and this in turn allows them to shape EU policies. This is particularly the case for laws related to the Single Market, which strongly affect public service provision, procurement and state aid, as well as environmental law. The EU has increasingly acknowledged the right to local self-government and the principle of subsidiarity for the purpose of allowing local authorities to conduct public services according to their domestic structures and politico-administrative traditions. Subsidiarity and multilevel governance have become part of the EU’s ‘constitutional compound’ but remain political rather than ‘hard’ legal principles.

The realisation of multilevel partnerships (particularly with regard to cohesion and economic policies) vary greatly across Member States. The involvement of subnational government in the implementation and making of EU legislation and policies depends on national governments and the competences of different local authorities. The EU cannot change domestic structures but it can adapt existing procedures to include local government, particularly in terms of the EU’s cohesion policy. Even though Member States can be brought before the Court if they completely fail to cooperate with subnational authorities, Partnership Agreements leave room for generous interpretations and may not necessarily empower local government in real terms.
The only institutionalised channel for local government to participate in EU policy-making on a regular basis is the CoR, which holds only consultative powers and is inconsistent in its usefulness to local government due to its diverse membership. The Lisbon Treaty has upgraded the Committee’s status and made it a ‘watchdog’ of subsidiarity, although it has not used its power to bring cases before the Court yet. Like local governments themselves, the CoR has learned to deploy the ‘living constitution’ and established informal links to more potent EU institutions (primarily the Commission and the EP) to promote subnational concerns.

There is only a minority of local authorities and their associations who seek to influence EU policies directly in Brussels, but the constitutional, legal and political developments over the last two decades indicate an emerging culture of cooperation across local and European levels. There has been an increasing awareness of local practice and attempts to improve the design and delivery of policies through the involvement of local government.

This chapter ends with a brief comment on local government in the light of Brexit. British local government, like that in other Member States, has become interlocked in the EU’s multilevel system and disentangling this relationship will not only be challenging for the UK Government but also for local authorities. These are likely to face severe economic, political and social consequences. For British local authorities, the future of funding is the primary issue: how and by whom will they be compensated for a potential loss of Structural and Social Funds and other EU resources? Will the UK Government negotiate future access or make its own commitment to allocate new financial means to the local level? If the UK is partially or completely cut off from the Single Market and trade barriers return, local authorities may further suffer under retreating foreign investment. Yet, local government across the EU will have little say over the conditions of Brexit. The CoR can adopt formal positions and voice local concerns, but it has no binding impact in the negotiations.

The future relationship will determine what European laws continue to apply for British local government. If the UK remains in the Single Market, which the current government rejects, most laws would stay in place. Even in the case of a ‘hard’ Brexit, the government may not automatically or immediately alter UK legislation implementing EU directives. However, over time it may amend or repeal existing legislation in the fields of procurement, service delivery, employment standards and environmental protection (Sandford 2016). While local councils have already started to demand new legislative freedoms and flexibilities after Brexit, they will be subject to legal uncertainty, and there is no constitutional guarantee or principle preventing a centralisation of powers.

Brexit may affect most local authorities in the EU at best marginally, except for existing cross-border cooperation with UK municipalities. The latter, however, can expect changing obligations, tasks and even powers, after they have left the EU’s multilevel polity. The UK’s departure from the EU will not only provide a unique occasion to understand European integration from a national perspective but it is also an opportunity to evaluate the status and relations of local government within the EU.

Notes

1 In the present case, the division of competences between the German Länder, for instance, cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government.

2 Article 5 further states: ‘Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.’
The European Union’s multilevel polity

References


