Regional Myopia instead of Regional Blindness?

The persistent obstacles for regions to be seen in EU law

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Regional entities are the foster children of EU law, even more so than individual persons. While the position of the latter has improved over time, and the CJEU is clearly interested in bringing them within the ambit of EU law, regions are still damned to a will-o'-wisp existence on the plane of EU law – now they are recognised and now they are not. A previous post on this BLOG used the relatively unknown *Landtag Schleswig Holstein* cases to illustrate the sometimes problematic and unsteady incorporation of national law concepts and doctrine in ECJ case law. The case at hand revolved around the notion of legal standing for sub-state actors like the *Landtag* Schleswig Holstein (the parliament of one of the German federated states) to challenge the legality of EU acts. The *Landtag* was denied *locus standi* as it (says the CJEU) lacked the required legal personality to do so under domestic law.

This particular judgment also gives us the opportunity to reflect on another fundamental issue of EU law, namely that of the realities of the regional dimension of the EU multi-level system. In times where 'multi-level governance' is the key concept for policy makers and science alike (political science; but also law), it may be remarkable that arguably the oldest form of multi-level governance, namely a full and fair involvement of the sub-state actors is still underdeveloped.

The 'regional blindness' of the EU is in fact an old criticism, discussed by Ipsen as early as 1966. It coined the call for a greater recognition on sub-state territorial powers. The merit of a true 'Europe of the Regions' or even a 'Europe with a multi-level democracy' (an appropriate term when it comes to the *Landtag Schleswig Holstein* case) lies of course in the enhancement of the legitimacy of the EU and its policies.

The theory of it sounds quite nice: for reasons of subsidiarity, the EU not only involves Member States but also regional authorities in the law making process. These regional authorities are also often tasked with implementing or enforcing that policy that was first agreed on at EU level. This way policies happen closer to the citizen, are more adapted to regional conditions and in the end everyone is happy.

True to this idea, over the years some changes have indeed been made to the EU institutional architecture improving (somewhat) the position of the regions and other sub-national entities. With the establishment of the Committee of the Regions in 1994 they obtained a direct voice in the EU law making process especially as the advisory powers of the Committee have increased steadily

to an ever greater number of EU policies. Also in EU secondary law the position of the regions has improved: today, the most vital policy area for the regions, the cohesion policy and the allocation of the structural funds, relies heavily on the 'partnership principle' under which regions must be involved in the preparation, implementation and monitoring of the various investment programmes.

Yet, the position of the sub-state actor is still all but satisfactory, certainly when it comes to its legal protection. As the *Landtag* case shows, recognising the importance of regional actors in policy making and implementation does not translate into even the basic decency of recognising the legal existence of these actors. As stated above, the Court ruled that the *Landtag* did not have legal personality because of an idiosyncrasy in German law. In effect this creates entities with obligations and responsibilities which are denied even the most basic of legal rights – that of legal existence. So, regional authorities are strongly relied on when drafting and implementing EU law, but are ignored (and that's actually a relatively weak word for what is happening) when they seek to defend their prerogatives in Court.

This asymmetry is particularly evident in cohesion policy where the Commission is particularly eager to engage the periphery of sub-national actors when things go well, so as to bypass the state and to promote supranational integration, but is equally eager to disengage when things go badly. In fact, there the General Court has on more than one occasion defied the ECJ by declaring sub-state actor's claims as admissible only to be reprimanded by the Court later (like in the Ville Vesuviane cases)

Because the *Landtag* case was not admitted, the merits got never debated. This is a pity because it would not have been trivial for the Commission to defend itself on more principled grounds regarding the refusal to access to documents. Given the case law on sincere cooperation and the consistency with which the Court ruled that the EU institutions have a general duty to cooperate with (sub)national bodies in the implementation of EU law, it is questionable whether the behaviour of the Commission could have survived scrutiny.

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