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Autonomous EU law concepts or deference to national law? The unsteady ground of CJEU judgments

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Recent legal development, involving opinion 2/13 on the accession of the EU to the ECHR, have put the relation between the EU and its Member States' legal systems centre stage again. As important as the discussions around human rights are, there are many more, smaller pieces to this puzzle. Indeed, it is time we learn to think more, and in less simplified terms, about the relationship between EU law and national law. One of the pieces of this puzzle is the way in which the CJEU engages with national law where it is necessary to interpret and

apply EU law. Unfortunately, the Court does not seem to have a coherent view on this matter.

This is exemplified when comparing two cases: The Court's reasoning in [Landtag Schleswig-Holstein](#) (T-236/06 appealed in C-281/08 P) is hard to consolidate with its rulings in *UPA*. Although the *Landtag* case received scarce attention at the time and predates (by one week) the entry into force of the Lisbon Treaty, there are good reasons to lift it from relative obscurity as it not only serves to critique the establishment of a 'Europe of the Regions' or a 'Europe with a multi-level democracy' (to which we will get in a follow up post) but also brings to surface the issue of the role of national law before the EU judicature.

The *Landtag* case dealt with the Landtag of Schleswig-Holstein, a parliament of one of the German federated states, that brought a case before the Court after the Commission had refused to give it (complete) access to certain documents. The *Landtag* was trying to get that decision (the denial of access) revoked, as it claimed to need the information for its own law making activities in the implementation of EU law.

And here something interesting happened; the *Landtag* was denied judgment on the merits because it was found to be lacking legal personality and thus standing to bring the matter to Court. Thus, the Court did not only deny standing, it denied *legal personality*. So, regardless of the fact that the *Landtag* had clearly been able to request a document which it deemed necessary to fulfil its legislative functions, and regardless of the fact that it had been perfectly capable of forming and defending a legal opinion, it was found to not be capable of bearing legal rights and obligations. What is even more remarkable is that the CJEU came to this conclusion on the basis of the partial legal personality that the *Landtag* enjoys under German law, even though this partial legal personality expressly does give it standing before German courts!

In the [UPA case](#) (dealing with *locus standi*) where the plaintiff's argument that it should be given standing as under national law there would otherwise be a denial of justice was quickly (and (in)famously) dismissed by the Court with the argument that it could not be expected to 'examine and interpret' national law when deciding on *locus standi* matters under 263 TFEU. Although Member States are obliged to organise proper legal procedures (a rule that has found its way into the current Article 19(1) TEU) the ECJ refused to assess whether this was indeed the case in *UPA* specifically.

This reluctance of the Court to delve into issues of national law is justifiable as it is indeed not within its mandate. Given the important but sometimes tenuous relation between national legal systems and EU law, this relation between EU and national law is an intricate question, and one which should be treated with consistency. Yet, it is this consistency that seems to be lacking. The question of legal personality is one issue where the Court has [in the past](#) taken a more open minded approach, looking beyond (national law) formalities while focusing more on material questions as the capacity of the 'entity' to be able to act as a representative body that is capable to act as an agent, thus prompting authors like Lenearts to state that the term 'legal person' has been given an 'independent Community meaning'. Yet, sometimes staying safe on EU law grounds is hardly possible, as EU norms themselves may embody by their very nature notions of national law, the most prominent example being the respect for national constitutional identity (article 4(2) TEU). Reliance upon national law then becomes inevitable. For situations like those, the possibility of a 'reversed preliminary reference' may be an interesting notion, where the CJEU refers to a national court for the interpretation of national law necessary for it to give a ruling under EU law. This mechanism as such does not exist, but the ECJ does have at its disposal the right to ask a question to 'Member State bodies, offices and agencies not party to the proceedings' under article 24 of the Statute of the Court of Justice.

If one accepts that a certain notion of EU law should be read with deference to national law, this bears the consequence that the CJEU is required to make choices which must be guided by national law. Of course this might be difficult to achieve, as the Court itself acknowledges. If the ECJ dismisses the notion of the autonomous EU legal concept, it should at least more readily use this mechanism. In fact, in *Landtag Schleswig Holstein* the ECJ may very well have erred in law – a case in point that it needs to accept the limits of its expertise more readily.

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