National procedural autonomy revisted: consequences of differences in national administrative litigation rules for the enforcement of environmental European Union law - the case of the EIA directive

Franziska Grashof, National Procedural Autonomy Revisited

Summary

This thesis examines the consequences of differences in national administrative litigation rules for the enforcement of the EIA Directive and questions whether it is necessary, desirable and possible to develop common rules of administrative litigation in environmental matters throughout the Union.

Part I of this thesis presents the steps and the content of the EIA procedure as prescribed by Union law. Being a directive, it leaves room for Member States as to the concrete means to comply with the rules, but it describes several steps which have to be uniformly followed in all Member States of the Union. It is explained how these steps of the EIA procedure were transposed in the national laws of Germany, the Netherlands and England and it is shown in how far the implementation and experiences differ between these Member States.

On the basis of this description, Part II of the thesis examines how the steps of the EIA procedure (focusing on the obligation to make a screening and an environmental statement) are enforced in the national courts of the three legal systems. For this purpose, this part begins with an examination of the Union standard for national procedural rules, followed by a comparative analysis of national litigation rules and an illustration of their application in EIA cases. The Union has to some degree interfered with the procedural competence of the Member States and created a common minimum standard for the enforcement of Union rules. This minimum standard consists of the principles of effectiveness and equivalence and the principle of effective judicial protection. In environmental matters, the requirements emanating from the Aarhus Convention provide for an additional procedural standard which the Member States have to adhere to. The Union requirements and independent national reforms have induced convergences between the litigation systems of the Member States but many differences between the legal systems remain. These remaining differences have three principal consequences. First, claimants are confronted with different rules and hurdles depending on the state in which they are bringing their claim, although the Union rule they try to enforce is the same. This means that there is procedural inequality under the same rule of Union law. Second, differences in national litigation rules result in different enforcement chances. For example, whereas in one legal system it is rather cheap to litigate, in another legal system, it is still rather expensive. Third, as a workshop organised with judges from the three legal systems has proven, judges come to different conclusions, not because of a different interpretations of the law, but because of different litigation rules. This is hardly compatible with the requirement that European law should be uniformly enforced throughout the Union.

On the basis of these results of Part II, it is questioned whether it is necessary, desirable and possible to go beyond the principle of procedural autonomy and to develop common rules of administrative litigation in environmental matters. In the beginning of Part III, it is asked whether the three legal systems currently comply with the requirements of Union law for administrative litigation. This can be

doubted as far as rules on standing and costs in Germany and rules on remedies in England are concerned. If the Court of Justice found incompatibilities, this would induce further convergences between the Member States. Nevertheless, differences between the three litigation systems would still continue to exist, and it can be assumed that differences are still extensive in a Union of 28 Member States. From the perspective of individual claimants and environmental organisations it is desirable if not necessary to create common rules of environmental litigation in order to ensure equal treatment under the same rule of Union law and to guarantee the same level of judicial protection and the availability of remedies throughout the Union. From the perspective of market players, common rules of litigation would be desirable, if not necessary, in order to foster transparency and legal certainty and for the purpose of avoiding extensive forum shopping. Common rules of administrative litigation could also be advantageous for Member States, as it is not sufficient to create common (substantive) rules to prevent pollution which does not stop at the nation state borders, but that are necessary to ensure that these rules are enforced on an equal basis. Common rules could either be adopted by implementing and concretising the requirements of the Aarhus Convention or, if a distortion to the internal market could be proven, on the basis of article 114 TFEU. Additionally, one may argue that article 192 TFEU provides for an implied competence to create rules ensuring the enforcement of rules adopted on this basis.

If one looks back to the beginning of European integration, and the ideas of the Union's "founding fathers", it becomes clear that the idea of equality between states and citizens was of paramount importance. Common rules, applicable in the same way to the states and people of the Union were seen as a means to achieve common goals. Gaudet stressed that these rules must be applied on an equal basis. This can only be achieved, considering the results of the thesis, in going beyond national procedural autonomy and in creating a common standard for administrative litigation in environmental matters.