Convergence or Divergence of National Legal and Administrative Structures? Europeanisation Effects of the Environmental Impact Assessment in Germany and England (Part 1)*

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In the past few years the effects of European integration on national legal and administrative structures have increasingly attracted the attention of legal and administrative analysts. One of the main topics of this branch of research based on the catchword 'Europeanisation' is the question whether and to what extent these processes have led to the approximation of national legal and administrative structures in the course of time. However, we still lack comprehensive findings as to whether and under what conditions the effects of European integration lead to domestic administrative and legal changes. It this paper, we try to address this research gap. We analyse whether and to what extent the implementation of European policies leads to an approximation of legal and administrative structures in the Member States. This question will be thoroughly elaborated by using the example of the implementation of directives related to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) in Germany and England.

I. Introduction

In the past few years the effects of European integration on national legal and administrative structures have increasingly attracted the attention of legal and administrative analysts.[1] One of the main topics of this branch of research based on the catchword 'Europeanisation' is the question whether and to what extent these processes have led to the approximation of national legal and administrative structures in the course of time.[2]

Regarding existing research results, a unified development has yet to be ascertained in this respect. Even though in some cases and certain policy areas (such as the regulation of the Common Market) a partial approximation of national regulatory patterns and structures can indeed be observed,[3] other studies point to the filtering effect of national institutions (such as legal and administrative traditions and sectoral regulatory styles), which lead to the same European regulations and measures being interpreted and implemented differently from

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1 For the debate from an administrative point of view, see Caporaso/Cowles/Risse (eds.), Transforming Europe. Europeanisation and Domestic Change, 2001; Knill, The Europeanisation of National Administrations. Patterns of Institutional Change and Persistence, 2001; Mény/Muller/Quermonne (eds.), Adjusting to Europe. The Impact of the European Union on National Institutions and Policies, 1996. From a legal perspective, Ladeur (ed.), The Europeanisation of Administrative Law, 2002; for a particular focus on environmental law see Barth/Demmke/Ludwig, Natur und Recht 2001, 133 ff.

2 For a general discussion on policy convergence, see Bennett, British Journal of Political Science 1991, 215 ff.; Drezner, The International Studies Review 2001, 53 ff.

3 See Héritier et al., Differential Europe. New Opportunities and Constraints for National Policy-Making, 2001; Schneider, Institutional Reform in Telecommunications: The European Union in Transnational Policy Diffusion, in: Caporaso/Cowles/Risse (eds.), Transforming Europe. Europeanisation and Domestic Change, 2001, 60 ff.

country to country. Thus, Europeanisation does not necessarily have to be accompanied by a convergence of national legal and administrative structures; it is in fact more conceivable that existing national differences remain intact or even increase (which in turn would result in a divergent development). In other words, up to now science has not yetconclusively determined whether and under what conditions the effects of European integration lead to an approximation of national administrations and national administrative law.

A thorough analysis of these questions is complicated by the fact that previous studies are frequently characterised by selective focussing in the object of investigation. For example, there are hardly any studies which shed light on both administrative and legal ramifications of Europeanisation. Instead, there is mostly a restriction to legal or administrative factors, thus omitting the fact that convergent or divergent developments can indeed also take place in an inconsistent manner within individual policy areas or even with respect to individual European measures. For instance, it is plausible that the implementation of a European directive does in fact lead to an extensive approximation of legal arrangements in the Member States, but that administrative structures and practices remain unaffected by this. As a consequence, the convergence of national administrative law can coincide with the divergence or continual differentiation of administrative structures. The exact opposite scenario is also plausible. Furthermore, convergent or divergent developments can take on a different character even within the legal or administrative area analysed.[4] Beside the obvious lack of detailed empirical studies on this subject, the legal and administrative sciences have yet to come up with satisfactory explanations for the great degree of variation among Europeanisation effects in the Member States.

It is this very research gap which the present paper would like to address. It analyses whether and to what extent the implementation of European policies leads to an approximation of legal and administrative structures in the Member States. This question will be thoroughly elaborated by using the example of the implementation of directives related to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) in Germany and England.

The selection of these directives for our analysis is substantiated by several different factors. First, the concept of the EIA, developed in the 1970s in the USA, provided the EU Member States with a new instrument comprising far-ranging legal and administrative implications. These particularly concerned the procedural governance approach of the concept, which aimed at the broadest possible public participation rather than the protection of subjective public rights, as well as the regulation of all elements of the environment. The introduction of the EIA at the European level thus essentially posed similar administrative and legal challenges to many Member States. Secondly, the focus on the EIA has the advantage that potential Europeanisation effects in the Member States can be observed over a comparatively long period of analysis. For example, the first EU measure to introduce the EIA was passed as early as in 1985. Thirdly, the EIA allows us to clearly trace the comprehensive administrative and legal implications associated with effective implementation at the national level. The nature of the concept itself results in clear requirements with respect to the participation of the public, the integration of environmental law procedures as well as the formation of administrative structures for all elements of the environment.

From a comparative point of view, it also makes sense to focus on Germany and England as countries of analysis, as both countries were characterised by clearly different, and in part even diametrically opposed patterns of environmental regulation at the time the first EIA directive was passed in the middle of the 1980s.[5] Analysing the situation in these two countries should therefore enable us to clearly observe the potential impact of European policies in terms of convergence of national arrangements.

In the following, we will firstly illustrate the content of the European EIA and SEA measures as well as the resulting legal and administrative implications. Subsequently, we will present the legal and administrative situation in both countries of analysis at the time the first directive was passed (1985). Against this background, we are able to identify the

4 See Knill/Becker, Die Verwaltung 36 (2003), 447 ff.

5 See van Waarden, National Regulatory Styles. A Conceptual Scheme and the Institutional Foundations of Styles, in: Unger/van Waarden (eds.), Convergence or Diversity? Internationalisation and Economic Policy Response, 1995, 45 ff.

respective need or pressure for adaptation with respect to existing environmental policy arrangements. The third step consists of a comparative analysis of the legal and administrative implementation of the European measures. In what areas does a convergence of the German and English legal and administrative structures take place, where do national differences persist or even grow? The final chapter serves to interpret and explain the empirical results.

II. Content and implications of the EIA directives

The EIA directives are aimed at an integrated examination of environmental problems. When approving projects with significant effects on the environment, their environmental compatibility is supposed to be considered not only with regard to individual elements of the environment (soil, water, air), but also across all these elements. As for its administrative style, the EIA can be described as a hybrid form of hierarchical and context-oriented governance. On the one hand, it contains hierarchical elements (the EIA is a prerequisite for approval), but on the other hand it stipulates procedures targeted at the regulatory transparency and participation of the public. The legal development took place in a sequential manner with the introduction of the EIA directive (EIA-Directive),[6] the EIA Amendment Directive,[7] the Directive on the Strategic Environmental Assessment (SEA Directive)[8] as well as the Directive on Public Participation (PubPar-Directive).[9]

1. Legal implications

According to the legal implications of the directives mentioned above, democratisation and integration should ensure improvements in environmental protection.[10] In this context, the requirements mentioned are founded on procedural and substantive content.

a. Procedural content

The fulfilment of the EIA obligation begins with the compilation and evaluation of the material required for an appropriate and environmentally sound decision. The envisaged material is not restricted to the harm it can do to individual elements of the environment, but – in line with the integrative approach – comprises all affected elements of the environment as well as any alternative projects that are taken into account.

The fundamental procedural element of the EIA furthermore is the participation of the public during the assessment procedure by means of a right to inspect and make statements (Article 6(2),(3), Article 9 EIA-Directive; Article 6(1),(2),(4) SEA-Directive). The decision to determine a facultative EIA duty (Article 4(4) EIA Amendment Directive; Article 3(7) SEA-Directive) as well as the decision taken (Article 9(1) EIA Amendment Directive; Article 9(1) SEA-Directive) must be announced to the public. This also entails the public's right to assert a legal examination of the procedure (Article 10 a EIA-Directive).

b. Substantive content

Besides these procedural arrangements, the directive is also founded on the notion that the extensive knowledge of the potential environmental consequences of a project gained at an early stage on the basis of an independent assessment programme in accordance with the stipulations in Article 2(1) of the EIA-Amendment Directive,[11] Article 8 of the EIA-Amendment Directive and Article 8 of the SEA-Directive can guarantee the adequate consideration of environmental concerns during the ulti-

6 Directive 85/337/EEC from 7/5/1985 on the Environmental Impact Assessment for certain public and private projects, OJ L 175/40.

7 Directive 97/11/EC of the Council of 3/3/1997 on the amendment of Directive 85/337/EEC of the Council of 6/27/1985 on the Environmental Impact Assessment for certain public and private projects, OJ L 73/5.

8 Directive 2001/42/EC of the European Parliament and the Council of 6/27/2001 on the assessment of the environmental impact of certain plans and programmes, OJ L 197/30.

9 Directive 2003/35/EC of the European Parliament and the Council of 5/26/2003 on the participation of the public in the elaboration of certain environmentally-related plans and programmes and on the amendment of Directives 85/337/EEC and 96/61/EC of the Council with respect to public participation and access to courts, OJ L 156/17.

10 See Sands, Principles of International Environmental Law, 2nd ed. (2003), 800. On the participation of the public, see Jendroska, 'Aarhus Convention and Community Law: the Interplay', JEEPL 2005, 12 ff.

11 See also the 5th Recital of the EIA Amendment Directive.

mate decision on the approval of an environmentally hazardous project.[12] The purely auxiliary function of the EIA, which lacks any means of overturning decisions or serving as a precedent for future cases,[13] does not negate the (equally) substantive component of the directive, which demands that national governments allow the EIA result to have an influence on the subsequent decision-making process.[14]

The EIA-Directive calls for the integration of a cross-media approach, as stipulated in Article 3 of the EIA Directive, into national law.[15] In line with the concept of 'mutual effects', it strives for an eco-system-based approach, which goes beyond the additive media-specific consideration of different environmental goods and places its focus on the protection of complex functional systems. Above all, the EIA attempts to prevent separate protective mechanisms from transferring pollution from one element of the environment to another.[16] Thus, it aims to protect the environment as an inseparable whole, in which no area, no development, and no action can be viewed as isolated from the others.[17] It is contested whether the integration principle is furthermore associated with the comparison of alternatives.[18] The fact that the overall comprehensive assessment of the environmental effects of a project does not seem possible until various alternatives have been compared and contrasted supports this view. Moreover, this concept appears to live up to both the notion of the best possible environmental protection and the proportionality principle.[19] With respect to the environmental compatibility of plans and programmes, an alternative assessment is henceforth explicitly required by Article 5(1) of the SEA-Directive.[20]

2. Administrative implications

In administrative and organisational terms, the EIA-Directive stipulates that one or more agencies exist that assess the impact and issuance of an authorisation. It does not call for the establishment of an 'EIA-Agency', but the integration principle as a procedural component requires the necessary linkage or coordination of the various procedures and thus of the involved agencies vested with with different powers depending on the element of the environment they are responsible for.

III. Initial situation in both countries

As a starting point for investigating potential changes at the national level, we firstly need to illustrate the overall legal and administrative circumstances in the countries of investigation at the time the EIA-Directive was passed.

1. Initial legal situation

a. Germany

The most important instruments which German environmental law makes use of to assess and protect environmental goods are preventive assessment procedures. Besides the "classic" conditionally programmed authorisation procedures[21] in the form of

12 Gaentzsch, Umwelt- und Planungsrecht 2001, 287, 291; Haneklaus, in: Hoppe (ed.), Umweltverträglichkeitsprüfungsgesetz, 2nd ed. (2002), Introductory remarks, sidenote 8.

13 Schoeneberg, Die Umweltverträglichkeitsprüfung, sidenote 30.

14 See Sands, supra note 10, 800. See also Ladeur, Zeitschrift für Umweltrecht 1998, 245, 245.

15 On the content of the integration principle see Volkmann, Verwaltungsarchiv 98 (1998), 363, 365 ff.; for a 'Criticism of integrated environmental protection' see Masing, Deutsches Verwaltungsblatt 1998, 549, 549 ff.

16 See Recital 7 of the IPPC-Directive (Directive 96/61/EC of the Council of 9/24/1996 concerning integrated pollution prevention and control, OJ L 257/26), which readdresses and elaborates on the notion of integration.

17 Volkmann, Verwaltungsarchiv 98 (1998), 363, 365.

18 Answering in the affirmative Erbguth, Neue Zeitschrift für Verwaltungsrecht 1992, 209, 219; Erbguth/Schink, Umweltverträglichkeitsprüfungsgesetz, 2nd ed. (1996), § 2 sidenote 22 ff.; Volkmann, Verwaltungsarchiv 89 (1998), 363, 392; answering in the negative Beckmann, in: Hoppe (ed.), 2nd Ed. (2002), § 12 sidenote 45; Elvin/Robinson, Journal of Planning & Environment Law 2000, 876, 878; Groß, Neue Zeitschrift für Verwaltungsrecht 2001, 513, 515. Explicitly on the implementation in German law, Bundesverwaltungsgericht, Neue Zeitschrift für Verwaltungsrecht 1999, 528, 531.

19 As opposed to the impending refusal of authorisation when environmental quality standards are exceeded, the assessment and discussion of alternatives with the petitioner is a more moderate approach.

20 See Siems, Zeitschrift für Europäisches Umwelt- und Planungsrecht 2005, 27, 27 ff.

21 For the significance of authorisation in German environmental law, see Kugelmann, Deutsches Verwaltungsblatt 2002, 1238, 1239; Wahl, Das deutsche Genehmigungs- und Umweltrecht unter Anpassungsdruck, in: Dolde (ed.), Umweltrecht im Wandel, 2001, 237, 237 ff.

control licences (Kontrollerlaubnis)[22] and exceptional authorisations (Ausnahmebewilligung),[23] which make the decision for approval subject to compliance with strictly worded requirements, the more deliberative and structure-oriented plan approval procedure (Planfeststellungsverfahren)[24] and planning procedure (Planungsverfahren)[25] also come to play a role as 'environmental law procedures' in the broadest sense.

German environmental law is generally characterised by a horizontal and vertical fragmentation into numerous differentiated and media-specific Federal and State Acts.[26] As a consequence, German environmental law is marked by a high degree of parallelism between different media-specific authorisation procedures including overlapping assessment and decision processes that carry the risk of coordination problems, contradictory decisions as well as procedural delays.[27] Attempts have continually been made to ensure the horizontal and vertical coordination of the procedures by means of administrative participation rights, consent provisions and monitoring measures.[28] Cross-media approaches, however, can only be found in the plan approval procedure (Planfeststellungsverfahren) and planning procedure (Planungsverfahren).

b. England

In contrast, the English system is generally characterised by a lower degree of 'legalisation' or legal codification of environmental policy, which becomes evident in the restricted number of relevant legal regulations adopted before the wave of legal measures that has taken place since the beginning of the 1990s.[29] Environmental law is thus mostly shaped by general principles of law or case law ('common law'). The coexisting legal provisions ('statute law') constitute only fragmentary and for the most part antiquated regulations.[30] The decisive feature is the flexibility granted to institutions to manage environmental problems, which is supposed to allow for a practical and case-based assessment of environmental problems in consideration of the 'best practicable means'. Along these lines, emission limits are stipulated in view of the situation at hand and with regard to the local conditions and realities as well as the financial resources of the individual industries.[31] In other words, the British system is traditionally less marked by legalisation or legal codification than by cooperation between the operators of facilities and regulatory authorities.[32]

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22 See e.g. § 6(1) of the Bundesimmissionsschutzgesetz (Federal Immission Control Act); §§ 6(1), 7(1) of the Atomgesetz (Atomic Energy Act); § 11(1) of the Gentechnikgesetz (Genetic Engineering Act); § 31(1) Kreislaufwirtschafts- und Abfallgesetz (Closed Substance Cycle and Waste Management Act) in conjunction with §§ 4, 6 of the BImSchG (Federal Immission Control Act); § 49(2) of the Kreislaufwirtschafts- und Abfallgesetz (Closed Substance Cycle and Waste Management Act). In a broader sense, the building permit also constitutes 'environmental law'; concerning the consideration of environmental protection in building law see Bönker, in: Hoppe/Bönker/Grotefels (eds.), Öffentliches Baurecht, 2nd ed., § 5 sidenote 180 ff., § 8 sidenote 338 ff.; Herrmann, in: Koch (ed.), Umweltrecht, § 13 in particular sidenote 33 ff.; Hoppe/Deutsch, Umweltschutz und Raumordnung sowie Bodennutzung, in: Rengeling (ed.), Handbuch zum europäischen und deutschen Umweltrecht II/2, § 87 in particular sidenote 18 ff.; Kloepfer, Umweltrecht, 2nd ed. (1998), § 10 sidenote 34 ff.; Schink, Umweltschutz im Bauplanungsrecht, in: Dolde (ed.), Umweltrecht im Wandel, 2001, 837 ff.

23 See e.g. §§ 7 f. of the Wasserhaushaltsgesetz (Water Management Act); § 31(1) of the Bundesnaturschutzgesetz (Federal Nature Conservation Act).

24 See e.g. § 17(1) of the Fernstraßengesetz (Highway Maintenance Act); § 18(1) of the Allgemeines Eisenbahngesetz (General Railways Act); § 28(1) sent. 1 of the Personenbeförderungsgesetz (Passenger Transport Act) (in conjunction with § 41 of the Personenbeförderungsgesetz [Passenger Transport Act]); § 31(2) sent. 1 of the Wasserhaushaltsgesetz (Water Management Act); § 14(1) sent. 1 of the Wasserstraßengesetz (Federal Waterways Act); § 9b(1) sent. 1 of the Atomgesetz (Atomic Energy Act); § 31(2) of the Kreislaufwirtschafts- und Abfallgesetz (Closed Substance Cycle and Waste Management Act); § 11a(1) sent. 1 of the Energiewirtschaftsgesetz (Energy Management Act).

25 See e.g. § 66(1) sent. 1 Baugesetzbuch (Federal Building Code); §§ 5(1), 10(1) Baugesetzbuch (Federal Building Code).

26 Concerning immission control (Bundesimmissionsschutzgesetz – Federal Immission Control Act), for water law (Wasserhaushaltsgesetz - Water Management Act and Landeswassergesetze – Water Acts of the Federal States), for soil conservation (Bundesbodenschutzgesetz – Federal Soil Protection Act) etc.

27 Bundesumweltministerium (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety [ed.]), Kommissionsentwurf zum Umweltgesetzbuch, Introduction, 76; Büllesbach, Die rechtliche Beurteilung von Abgrabungen nach Bundes- und Landesrecht, 1994, 302; Jarass, Konkurrenz, Konzentration und Bindungswirkung von Genehmigungen, 25; ibid., Wirtschaft und Verwaltung. 1984, 169 (169); Lämmle, Konkurrenz paralleler Genehmigungsverfahren, 4 ff.; Schmidt-Aßmann, in: Kloepfer/Kunig/Rehbinder/Schmidt-Aßmann (eds.), Umweltgesetzbuch-AT, 259.

28 See Barth/Demmke/Ludwig, Natur und Recht 2001, 133, 136 f.

29 Lomas, Deutsches Verwaltungsblatt 1992, 949, 949.

30 See e.g. the Clean Air Acts 1956 und 1968 as well as the Control of Pollution Act 1974.

31 Lomas, Deutsches Verwaltungsblatt 1992, 949, 949 f. See also Asby/Anderson, The Politics of Clean Air, 1981 and Vogel, National Styles of Regulation. Environmental Policy in Britain and the United States, 1986.

32 Röckinghausen, Integrierter Umweltschutz im EG-Recht, 1998, 21.

2. Administrative background

a. Germany

The administrative implications of the EIA Directive (and here in particular the requirement for a cross-media assessment of environmental problems) in several ways collide with the administrative structures in German environmental policy existing at the outset. Firstly, the structural guidelines of the integrated approach contradict the horizontal administrative traditions in environmental policy which are organised in an media-specific manner. Secondly, the impact of various projects on all elements of the environment is monitored on the basis of sectoral and decentralised authorisation procedures at the level of the Länder (Federal States), which are largely in charge of executing environmental laws within the federal system. To a varying extent depending on the individual Federal State, the executive tasks are then delegated to the local administrations, i.e. to the Landkreise (administrative districts) and kreisfreie Städte (urban districts).[33]

These structures are institutionally embedded by means of a multi-level hierarchical administrative framework at the level of the Länder. The administrative fragmentation is stabilised by means of various hierarchical 'pillars', which result from the basic principles of German administrative organisation.[34] The realisation of an integrated regulatory approach across all elements thus implies extensive legal and organisational reforms.

b. England

In contrast to the situation in Germany, the implementation of the EIA Directive in England clearly entails fewer changes to existing administrative structures at the point of departure. This is primarily due to the fact that the EIA was introduced as an instrument of planning law as early as in 1970, even though this was on a voluntary basis within the framework of the Town and Country Planning Act.[35] According to this Act, local authorities are generally in charge of planning law. Furthermore, local authorities are legally obligated to consult other authoritiesendowed with environmental missionswhen carrying out their environmental policy functions. Against this background, the introduction of the EIA as a legally binding instrument does not substantiateany extensive adjustments in existing administrative structures of planning law.[36]

However, the EIA Directive entails certain adaptations with regard to a better coordination of the assessment of environmental effects across all elements of the environment during the planning and facility authorisation procedure. For example, the authorisation of industrial facilities in England generally takes place in a two-level procedure. The first step consists of the authorisation in accordance with planning law, for which local authorities are responsible as a rule. The second step comprises the legal authorisation of the facilities. Depending on the size of the plant and the type of industrial firm, the bodies in charge are either local or central environmental authorities. In both procedures, different environmentally relevant aspects of the facilities are taken into consideration. Whereas planning law generally focuses on potential effects on nature and landscape protection in general, the authorisation of a plant is largely done on the basis of specific technical information (e. g. the level of harmful emissions). For an objective and comprehensive assessment of all elements of the environment, as intended in the EIA Directive, it is indispensable to find an integrated approach to the evaluation of these different environmentally relevant factors and pieces of information.[37] Especially in cases, in which different agencies are in charge of authorizing the plan and the facilities fa, the directive aims at improving the coordination between the administrative entities involved.[38]

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33 See Heinelt et al., Prozedurale Umweltpolitik der EU. Umweltverträglichkeitsprüfungen und Ko-Audits im Ländervergleich, 2000, 98.

34 See Ellwein, Verwaltungsarchiv 87 (1996), 1 ff.; Lehmbruch, From State of Authority to Network State: The German State in a Comparative Perspective, in: Muramatsu/Naschold (eds.), State and Administration in Japan and Germany: A Comparative Perspective on Continuity and Change, 1997, 39 ff.; Héritier et al., Die Veränderung von Staatlichkeit in Europa, 1994, 302 ff.

35 Haigh, The Manual of Environmental Policy: the EC and Britain, 1996; Turnbull, Environmental Impact Assessment in the United Kingdom, in: Clark/Herrington (eds.), The Role of Environmental Impact Assessment in the Planning Process, 1988, 17, 25.

36 Knill, supra note 1, 170.

37 Cupei, Vermeidung von Wettbewerbsverzerrungen innerhalb der EG durch UVP? Eine vergleichende Analyse der Umsetzung der UVP-Richtlinie in Frankreich, Großbritannien und den Niederlanden, 1994, 49.

38 Knill, supra note 1, 171.

3. Overall assessment

a. Preventive vs. repressive regulatory tradition

Without a licensing procedure, the EIA obligation of a project is essentially empty,[39] because the elements of the integration principle are attached to an authorisation requirement[40] and because there is no basis for the required assessment of the knowledge gained. This is consistent with the German system of preventive examination, which – as a rule – enables environmentally relevant action to be taken only after inspection and explicit authorisation in the form of a control licence (Kontrollerlaubnis) or exceptional authorisation (Ausnahmebewilligung). The English (environmental) law system, on the other hand, is generally characterised by a more repressive perspective,[41] which makes the introduction of the EIA requirement more difficult.

b. Substantial vs. procedural regulatory traditions

In its entirety, the EIA contains a procedural approach which is unknown in German administrative law.[42] The restriction of the procedure to an auxiliary function[43], which is prevalent here, results from the emphasis on decisions by agencies in the authorisation procedure. Here the procedure is basically limited to the obligation to give the concerned party a hearing (§ 28 Verwaltungsverfahrensgesetz – Administrative Procedure Act) as well as the substantiation of the decision (§ 39 Verwaltungsverfahrensgesetz – Administrative Procedure Act), as long as the complexity of the intended decision does not make it necessary to further 'proceduralise' the matter.[44] On the other hand, plan approval and planning procedures can indeed also be subject to detailed procedural demands.[45] However, the disregard for the procedural element in the German legal system is made clear by the diverse regulations to remedy procedural errors or make them irrelevant.[46] Since German administrative law aims at conformity of the decision with substantive law, procedural errors which might have occurred are accepted.[47] On the other hand, this corresponds with a very tight control by the administrative courts, which obligates the administrative courts to bear responsibility for the correctness of the decision.[48]

English law, on the contrary, is more oriented towards accentuating the procedural notion.[49] Basic procedural rules have their origin in common law, while special procedural rules coexist in written law.[50] Among the unwritten procedural principles are, in particular, the 'rules of natural justice', which comprise the obligation to hear all parties involved in the procedure as well as the ban on decisions on one's own behalf and/or the obligation to make an unbiased decision.[51] The first feature is only marginally comparable to the regulation of § 28 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz), because it leads to a much stronger position of the concerned party.[52] Any further public participation obligations, however, are generally of a rather weak nature.[53] Since the procedural requirements in English administrative law enjoy a high reputation, a procedure which contradicts the principles of fairness normally leads to the abrogation of the discretionary decision passed.[54]

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39 See Volkmann, Verwaltungsarchiv 89 (1998), 363, 378.

40 Explicitly in Volkmann, Verwaltungsarchiv 89 (1998), 363, 378. See also Article 4 ff. IPPC-Directive (see supra note 16), according to which authorisations and guidelines are to ensure the compliance of a project with the demands of integrative environmental protection.

41 Authorisation requirements only existed in exceptional cases, for example for waste disposal facilities according to part I of the Control of Pollution Act 1974.

42 See Barth/Demmke/Ludwig, Natur und Recht 2001, 133, 134.

43 See Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsidee, 1998, 6th chapter sidenote 99.

44 See e.g. § 10 of the Bundesimmissionsschutzgesetz (Federal Immission Control Act); Atomrechtliche Verfahrensverordnung (Ordinance on Atomic Energy Procedures)

45 §§ 3 ff. Baugesetzbuch (Federal Building Code); § 73 Verwaltungsverfahrensgesetz (Administrative Procedure Act)

46 See §§ 45 f. of the Verwaltungsverfahrensgesetz (Administrative Procedure Act), §§ 214 f. of the Baugesetzbuch (Federal Building Code).

47 See Barth/Demmke/Ludwig, Natur und Recht 2001, 133, 134 f.

48 Schmidt-Aßmann, supra note 43), 6th chapter, sidenote 113.

49 Ladeur, Zeitschrift für Umweltrecht 1998, 245, 247. See also Cane, An Introduction to Administrative Law, 3rd ed. (1996), 160: '(The) point of this rule is not just that justice (or fairness) should be done but that it should also be seen to have been done.'

50 Cane, supra note 49, 160.

51 Cane, supra note 49, 160 ff. Craig, Administrative Law, 5th ed. (2003), 407ff. See also Harlow, Proceduralism in English Administrative Law, in: Ladeur (ed.), The Europeanisation of Administrative Law, 2002, 46, 48 ff.

52 For example, the right to question a witness during cross-examination can also fall in this category. For the provisions to be complied with in individual cases, see Cane, supra note 49, 161.

53 Cane, supra note 49, 193 ff.

54 Brinktrine, Verwaltungsermessen in Deutschland und England, 1998, 499.

c. Conditional vs. final legal decision-making

The phenomena described above can also be explained by the significant contrast between conditional and final normative structure with regard to Germany and England.[55] Due to the divergent notions of democracy and the rule of law, we find on the one hand, strict legal obligations and, on the other, a greater scope for discretion for public administration, corresponding at the same time to a comprehensive or limited examination by the courts.

The low level of leeway for making independent decisions in German public administration, which is made apparent by the definition of concretely worded facts of the case and narrowly defined legal consequences,[56] is an expression of the legality of public administration resulting from the constitutional principle of the German 'Rechtsstaat' (State based on the rule of law) (Article 20 Para. 3, 2nd Clause of the Grundgesetz [German Basic Law]) as well as the corresponding substantive legitimacy approach of the principle of democracy. German environmental law is essentially marked by forms of conditional legal decision-making.[57] The eco-systematic approach of the EIA, however, must be realised by means of a more flexible system which can be found in a final structure of norms. For this reason, the German regulatory model, which essentially is conditionally structured, is basically poorly suited for the implementation of the integrated EIA approach as well as the necessary alternative inspection.[58] This becomes particularly evident when drawing up the control licence (Kontrollerlaubnis), which is characterised by strict legal obligations for the decision-maker without any scope for discretion.[59] With regard to the concerned basic rights, the authorisation requested cannot be refused in case all authorisation requirements have been fulfilled.[60] Thus, the institution of the control licence or Kontrollerlaubnis largely prevents cross-media assessments of matters of environmental law.[61] There are exceptions for planning and plan approval procedures. The German construction planning laws and the planning objectives and planning guidelines standardised in § 1 V, VI, § 1a of the German Building Code (Baugesetzbuch) and the imperative to weigh various options, which contains a certain element of discretion, are the clearest examples of this.[62]

English law, on the other hand, does not have any distinction between a "Tatbestandsseite" (facts of the case) and 'Rechtsfolgenseite' (legal consequences), but instead uses a broad and ambiguous concept of discretion.[63] The decision-making authority comes into play when special conditions ('conditions of jurisdiction') are fulfilled, which include both preliminary questions as well as objective limits to the fact-based decisional competence (e.g. according to 'ultra-vires').[64] Practicing 'discretion' is thus basically preceded by the establishment, interpretation and subsumtion of the facts. However, in some instances the administration is granted ultimate decision-making power already in this first stage.[65] This can take place e. g. by using 'subjective language', i. e. laws worded in a way that factual and legal demands are essentially subject to the subjective evaluation of the responsible administrative authorities. Besides, there is the use of so-called 'open standards',[66] which, according to the prevail-

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55 See a detailed analysis of this in Breuer, Archiv des öffentlichen Rechts 127 (2002), 523, 523 ff.

56 In fact, administration has its own limited leeway for decisions with regard to discretion and indefinite legal concepts only. As for the latter, an independent scope for judgement for the administration is generally rejected according to the prevailing opinion.

57 See only §§ 5, 6 of the Bundesimmissionsschutzgesetz (Federal Immission Control Act); §§ 7, 8 of the Wasserhaushaltsgesetz (Water Management Act); §§ 6, 7 of the Atomgesetz (Atomic Energy Act), for a more restrictive view Steinberg, Der ökologische Verfassungsstaat, 1998, 428 f.

58 See Erbguth/Schink, supra note 18), § 12 sidenote 40; Volkmann, Verwaltungsarchiv 89 (1998), 363, 387 ff.; Wahl, supra note 21, 237, 245. For a general analysis of the potential incompatibility of European law with national legal systems, see Ladeur, Introduction, in: Ladeur (ed.), The Europeanisation of Administrative Law, 2002, 1, 4 ff.

59 For more on the institution of the 'Kontrollerlaubnis' see Erbguth, Raumbedeutsames Umweltrecht, 153; Kloepfer, supra note 22, § 5 sidenote 48; Sparwasser/Engel/Voßkuhle, Umweltrecht, 5th ed. (2003), § 2 sidenote 65.

60 This primarily concerns Article 12 I, 14 I Grundgesetz. Critique Kugelmann, Deutsches Verwaltungsblatt 2002, 1238, 1242.

61 For example Beckmann, supra note 18, § 12 sidenote 68. See also Erbguth/Schoeneberg, Wirtschaft und Verwaltung. 1985, 102, 114 f.: ‚Harmonisierung von Konsequenzen des präventiven Verbots mit Erlaubnisvorbehalt … mit ressourcen-ökonomischen Erwägungen'. More restrictive Kugelmann, Deutsches Verwaltungsblatt. 2002, 1238, 1245 ff.

62 See Breuer, Archiv des öffentlichen Rechts 127 (2002), 523, 523ff.

63 For a more thorough analysis see Brinktrine, supra note 54, 181 ff.; Cane, supra note 49, 133 ff.; Riedel, Vorträge der Vereinigung Deutscher Staatsrechtslehrer 58 (1999), 180, 199 ff.

64 Brinktrine, supra note 54, 188.

65 See Riedel, Vorträge der Vereinigung Deutscher Staatsrechtslehrer 58 (1999), 180, 205 f.

66 The concepts 'imprecise statutory standards' or 'vague terms' are also used for this.

ing opinion, also grant the administration a significant degree of decision-making leeway. However, the previously practised extension of the monitoring power for the administration in the field of non-vague, objective concepts by categorising them as restrictedly controllable so-called "non-jurisdictional questions of law or fact" only meets with reluctant support.[67] Nevertheless, in numerous cases the executive is granted the ultimate decision-making power. The restrictive court control corresponds with this, because the 'discretionary power' is regarded as an indispensable element in administrative activities.[68] The court must also refrain from replacing the evaluation by the administrative authorities by its own assessment of the purposeful or correct realisation of the objectives. This creates an ample and independent leeway for the administration to make its judgement, because the defining feature of 'discretion' is the allocation of freedom of action, which is to be exerciseded on the basis of sound and good considerations.[69] The flexibility created by this for dealing with individual cases corresponds with a final normative structure,[70] which, on the one hand, allows for the incorporation of integrative elements[71]. On the other hand, their lower degree of legal attachment must be compensated for by strengthening the procedural component.[72] The primary function of the courts is accordingly focussed on examining the procedure rather than the result of the administrative decision.[73]

d. Media-specific vs. cross-media regulatory structures

German environmental law is primarily regulated by authorisation procedures and administrative structures, which promote a differentiation into individual environmental media.[74] This becomes manifest e. g. in the distribution of legislative powers between the Federation (Bund) and the Federal States (Länder). In contrast to this, British planning law in particular is characterised by a more integrative concept. The existing regulatory structures are more compatible with the requirements of the EIA Directive. A sectoral differentiation similar to that in German law cannot be observed. However, the coordination between local planning authorities and central authorizing authorities is not developed sufficiently.

e. Result: system compatibility of the EIA?

With its preventive regulatory approach, German environmental law does indeed offer suitable foundations for the integration of the formal EIA stipulated by EU law. However, its specifications, which call for broad administrative leeway to implement the integration principle,[75] contradict the German system of regulations which is essentially characterised by a final structure of norms and subsequently by strict obligations for the administration.[76] Hence, the European specifications are closer to the basic notions of English administrative law, although we should also consider that the participation of the public immanent to the EIA Directive is also relatively unknown to English procedural regulatory tradition.[77]

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67 For a more thorough analysis see Brinktrine, supra note 54, 219 ff.

68 Breuer, Archiv des öffentlichen Rechts 127 (2002), 523, 554. The court control is concentrated primarily on the adherence to procedural rules, see Harlow, supra note 51, 46, 65.

69 Brinktrine, supra note 54, 276 f.

70 Breuer, Archiv des öffentlichen Rechts 127 (2002), 523, 555.

71 See Ladeur, supra note 58, 1, 6.

72 Cane, supra note 49, 135, 160 ff.

73 Riedel, Vorträge der Vereinigung Deutscher Staatsrechtslehrer 58 (1999), 180, 201 ff.

74 See Zöttl, Journal of Environmental Law 2000, 281, 282.

75 For example Breuer, Entwicklungen des europäischen Umweltrechts – Ziele, Wege und Irrwege, 1993, 55: ‚Die Leitidee der … UVP-Richtlinie … besteht … in der finalen Programmierung administrativer, im Kern politisch zu verantwortender Abwägungs- und Gestaltungsentscheidungen.'

76 See Breuer, Archiv des öffentlichen Rechts 127 (2002), 523, 556 f.; Wahl, supra note 21, 237, 254 ff.

77 See Stookes, Journal of Environmental Law 2003, 141, 144: 'Until the mid-1980s and prior to the introduction of EIA any level of public participation in land use decision-making was rare.'