Book Reviews

Mariolina Eliantonio, *Europeanisation of Administrative Justice? – The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing, Groningen 2007), ISBN 978-90-76871-97-4, 416p.

Now here is a promising title. The EU legal order is interacting with almost every domain of national law. Accordingly, it seems well worth inquiring into whether EU law also affects administrative law in general and administrative justice in particular in the EU Member States. Moreover, the bottom up approach may be quite refreshing, especially for EU law experts. It is all too common to read in an ECJ judgment that 'it is for the national court to decide...'[1], but rarely EU law experts have more than anecdotal information on how exactly national courts do get about making the analyses and assessments the ECJ is expecting them to do. Therefore a book that seeks to find out how courts in a various Member States respond to the demands imposed on their legal systems by EU law is a welcome addition to any law library.

The question then is whether the book lives up to the expectations. Fortunately, *prima facie*, it does. The choice for the Italian, German and English legal systems seems an appropriate one. The author rightly justifies her choice by pointing out that they may represent three legal currents in administrative justice in Europe, and the wealth of national judgments that are presented against the wider background of those legal systems is a testimony to the wide grasp the author has of the niceties of these systems. Also when it comes to her analysis of the relevant ECJ case law the track record appears impeccable, with adequate descriptions of the state of the law.

Good descriptions of the national legal systems involved, however, do not yet make good comparative work – let alone interesting comparative research. And here my initial enthusiasm is waning. Because at the end of the day one may wonder what this ambitious study has revealed. The question mark in the book's title is no coincidence. The book finds only limited 'europeanisation' of administrative justice, or rather, it only finds limited traces of it in the five fields (access to justice, time limits, *ex officio* raising of EU law to assess the validity of an administrative measure, rules on evidence and interim relief), or the aspects of these fields that are studied. Moreover, the author seems constantly hedging her findings, suggesting that there may nonetheless be 'europeanisation' where she didn't find it, or other reasons to explain developments that do suggest 'europeanisation'. Finally, the comparison between the three systems at best results in overviews of differences and similarities, but the reader is left wondering what can be done with these findings next. Do they signal the need for legal reform in these, and perhaps other, similarly organised, Member States? Is there need

[1] See, for recent cases in administrative court proceedings, for instance, Case C-201/08 *Plantanol* [2009] ECR I-0000; Case C-336/07 *Kabel Deutschland Vertrieb und Service* [2008] ECR I-10889; Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561.

for a sea change in the ECJ case law on national procedural autonomy? At best there seems a modest suggestion that some further harmonisation may be on the horizon, but the analysis of the complications that may be posed by the division of competence suggests that this book is not likely to be of much assistance here either.

So why is it that this *in se* well-written and thoroughly researched book appears nevertheless somewhat off-target? In my view at least three options taken by the author may not – admittedly with hindsight – be the most fortunate.

First, the term 'europeanisation' as used by the author suggests a far broader approach than she is actually offering. While 'europeanisation' suggests a process whereby the rules concerning *in casu* administrative justice are becoming gradually more similar across Europe, probably because of a series of interlocking processes of harmonisation, comparative exchanges, legal reform, ECJ case law, the impact of the ECHR, and there are undoubtedly many more, the book is limited – as it subtitle admittedly acknowledges – to assessing the influence of the ECJ's case law on administrative justice. This semantic choice has, however, important consequences for her findings. When the author discovers, for instance, that all three countries in the study seem to comply with the *Borelli*[2] case law in that, subject to certain conditions, it is possible in all three legal orders for a preparatory measure to be challenged if it nevertheless affects the legal position of the applicant, she has to conclude nevertheless that no process of europeanisation is present. The level of protection in this field is thus similar across the three countries. This, one would think, is an important finding in terms of unveiling europeanisation of administrative justice in the broad sense, but it becomes a negative in this study as the author sees no direct impact of the ECJ case law. Moreover, while the author acknowledges some other processes, in particular the impact of the ECHR, she hardly seems to wonder why it is that the ECJ case law and the Member States are in agreement on this point. It should be clear that this is no coincidence. The ECJ always looks for a solution that it expects will be sufficiently acceptable for the Member States[3], and of course it, too, is under the influence of the ECHR.

The *Borelli* judgment[4] also sets us on the trail of a second issue. Admittedly, the easiest critique one can level at virtually any work is 'why haven't you investigated X instead of Y'. But here the selection of the themes and sub-issues may well help explain the hesitant conclusions. Simply by reading the opinion of the Advocate General in the case[5] it appears that it was already in doubt at the time whether the applicant's allegations that he was

[2] Case C-97/91 *Oleificio Borelli* v. *Commission* [1992] ECR I-6313.

[3] See in this respect K. Lenaerts and T. Corthaut, 'Rechtsvinding door het Hof van Justitie', *Ars Aequi*, 2006, 581-588.

[4] Case C-97/91 *Oleificio Borelli* v. *Commission* [1992] ECR I-6313.

[5] Opinion of AG Darmon in Case C-97/91 *Oleificio Borelli* v. *Commission* [1992] ECR I-6313.

precluded from attacking the measure properly before the national court, because it would be considered a preparatory act leading to a Commission decision, were well-founded. It is then unsurprising that, if this case is chosen to represent the theme of access to justice, nothing much revolutionary comes out. In the meantime, the ECJ has for instance delivered its judgment in *Unibet*[6], which has the potential of upsetting the rules on the conditions for challenging acts of a general scope and application in numerous Member States, but that judgment becomes just a side issue in the discussion on interim relief. The same goes for the section on evidence, where the author picks one issue – the use of experts – on which she acknowledges that the ECJ has left the issue entirely to Member States, only to find that there is no europeanisation in the strict sense of the word she is using it in.

Third, the book seems rather fuzzy and uncritical as to the fundamentals behind the judgments that are chosen. In particular, most of the judgments the author is relying on are expressions of the principle of national procedural autonomy, with its twin exceptions of equivalence and effectiveness. That is unsurprising and unobjectionable. What the reader does not get from her, however, is any coherent theory of what national procedural autonomy and its exceptions truly entail. As a result national procedural autonomy is not only considered as a given, hardly worthy of any critical assessment, its application in the various scenarios the author examines is, moreover, presented as a series of fragmented rules on evidence, time limits, *ex officio* application of EU law, etc..., each with their own logic, as if there is an independent case law in all these fields.

In my view, some further observations on national procedural autonomy, however, could really have made a difference, both in understanding the ECJ case law and in creating some coherence across the book. First, national procedural autonomy means just that, Member States are in principle free to device their own procedural rules. That is a crucial insight, as it immediately curtails any impact the ECJ case law may have on the matter. The example of the role of experts in administrative court proceedings is in this respect telling: the scant case law[7] – rightly so – leaves the matter in principle to the national legal order to determine. Secondly, the power of the principle of equivalence is usually underestimated. Here, too, this does not bode well for an examination of the impact of the ECJ case law on national law, as it boils down to the ECJ requiring the national court to apply equally favourable *national* rules (however they may look) to EU law cases. The case law concerning *ex officio* application of EU law is a case in point, the judgment

6 Case C-432/05 *Unibet* [2007] ECR I-2271.

7 Mariolina Eliantonio bases her argument almost exclusively on Case C-120/97 *Upjohn* [1999] ECR I-223 and the judgment and the Opinion by AG Darmon in Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava* [1994] ECR I-483.

in *i-21*[8] which the author analyses, another. I can only stress the importance of the judgment in *Van der Weerd*[9], where the ECJ rightly reduces most of the case law to requirements of national law. By contrast, the meaning of the principle of effectiveness is both over- and underrated. It is overrated in that it only applies in extreme cases. In this respect I am at unease with Prechal's assessment of *Van Schijndel and Van Veen*[10], which the author seems to take for granted, that there is such a thing as a procedural rule of reason[11]. That would mean that any procedural rule is suspect, unless it can be justified in the context of the national legal system. However, cases such as *San Giorgio*[12] rather show that rules, such as some of the rules on evidence in that case, that are clearly fishy[13] may well survive scrutiny as they do not as such render the application of EU law virtually impossible or excessively difficult. The confusion may perhaps come from the often overlooked point that national procedural autonomy only applies in the absence of harmonisation, whereas some of the most spectacular examples of for instance *ex officio* application of EU law are simply the result of statutory construction of the relevant EU legislation[14]. Yet, the principle is also underestimated, in that it is, in my view, in essence linked to essential values of the EU legal order, namely the primacy of the EU legal order and the protection of fundamental rights including the right to access to a court and due process. If the ECJ suggests that a rule of national law is problematic in the light of the principle of effectiveness, it basically says that the primacy of the EU legal order and its commitment, as a Union based on the rule of law, to effective judicial protection is in jeopardy. Respect for national procedural autonomy, which is part of the constitutional balance of the EU, dictates that this assessment is not made lightly, but also explains why, if it happens, the most dramatic

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8 Case C-392/04 and C-422/04 *i-21 Germany and ISIS* [2006] ECR I-8559.

9 Joined Cases C-222/05, C-223/05, C-224/05 and C-225/05 *Van der Weerd* [2007] ECR I-4233.

10 Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705.

11 S. Prechal, 'Community law in national courts: the lessons from Van Schijndel', *Common Market Law Review*, 1998, 681-706.

12 Case 199/82 *San Giorgio* [1983] ECR I-3595.

13 For the difficulties arising in the wake of Case 199/82 *San Giorgio* [1983] ECR I-3595, see *inter alia*, Case C-129/00 *Commission* v. *Italy* [2003] ECJ I-14637.

14 Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Joined Case C-240/98 to C-244/98 *Océano Grupo Editorial* [2000] ECR I-4941; Case C-473/00 *Cofidis* [2002] ECR I-10875; Case C-429/05 *Rampion and Godard* [2007] ECR I-8017. For more on this point, and national procedural autonomy more generally, see also T. Corthaut, *EU ordre public*, Kluwer, 2010, *forthcoming*; see also T. Corthaut, *EU ordre public*, PhD diss., KU Leuven, 2009, nrs. II-154 to II-185.

interventions in the national legal order may be necessary, as is evidenced by *Peterbroeck*,[15] *Factortame*[16] or *Unibet*[17].

As is clear from the foregoing the book does not really deliver what its title may suggest. It may not even fully deliver what its subtitle promises. However, as my response, within the constraints of this book review, demonstrates, the book is surely thought-provoking. It may not help to solve concrete problems of administrative law in either of the examined countries, as for that there are undoubtedly better textbooks on administrative justice in each of the jurisdictions; it may not give us much refreshing insights on EU law; and its comparative conclusions may appear a bit hazy. Yet, the book reminds us how difficult it is to fully grasp the interaction between the national legal orders and the Community. Any brave attempt to do so, even if the result is inconclusive, is worthy of respect.

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[15] Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

[16] Case C-213/89 *Factortame* [1990] ECR I-2433.

[17] Case C-432/05 *Unibet* [2007] ECR I-2271.

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