# A toolbox for administrative law cooperation beyond the state

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## 1. Introduction

Law has an important role in the process of internationalisation of administrative relationships. To a large extent, it is legal rules and principles and their implementation in the administrative field that make international exchange possible – or indeed impossible. To start with the latter, national administrative rules may be formulated as delimiting rules, excluding foreigners from benefits or stating that events outside the state territory are not covered by the rules.[1] In fact, this view, reflecting ideas of *territoriality*, has traditionally been the point of departure for discussions on international aspects of administrative law.[2] However, in today's world, legal rules and principles in many instances call for administrative law cooperation beyond the state. In legal scholarship, two main approaches to such international cooperation within administrative law have been prominent, with a focus on the development of *international administrative networks* and on the *conflict of laws* within administrative law respectively. In light of these two main approaches, this article discusses a number of mechanisms or tools that help in expanding the scope of administrative law beyond the state.[3]

The purpose of this article is to identify and look into the function of a number of means of legal international cooperation in administrative law. In this discussion on function, the roles and the interplay of the different tools are highlighted as striking a balance between international cooperation, national self-determination and individual rights.[4] On the one hand, states and their representing governments are interested in promoting their own values and their self-determination when it comes to standard setting or deciding on levels of protection concerning the environment, public safety, and education. On the other hand, states may have an interest in supporting

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1 K. Vogel, "Administrative Law, International Aspects," in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (Amsterdam: North-Holland, 1992) pp. 22-27, 25.

2 H. Wenander, "Recognition of Foreign Administrative Decisions," 71 *Heidelberg Journal of International Law/Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011) pp. 755-785, 763.

3 *Cf.* the similar approach within the framework of public international law, M. Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority," 9 *German Law Journal* (2008) pp. 1865-1908 [www.germanlawjournal.com/index.php?pageID=11&artID=1046 (accessed 10.1.2013)].

4 *Cf.* J. Pelkmans, "Mutual Recognition in Goods and Services: An Economic Perspective," in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Basingstoke: Palgrave Macmillan, 2005) pp. 85-128, 87 ff.

cross-border mobility and taking advantage of exchange with foreign states. Different legal tools may be used to balance these interests.[5]

Of course, there are a vast number of international administrative relationships and rules, making an exhaustive list of such tools unattainable.[6] Furthermore, not least in an international setting, it is not always clear what constitutes issues of administrative law, as opposed to issues of e.g. criminal law or private law.[7] Below, issues clearly falling outside the administrative scope, such as international cooperation in judicial matters within international courts, are not dealt with. In the same way, international cooperation structures between legislative political bodies are left aside.[8] This delimitation also means that the general treaty making power of national governments under domestic constitutional law and public international law will not be discussed.

Examples will be taken from different fields of administrative law. This kind of methodology may be seen as the core of administrative law scholarship, having served as a basis for the establishment of the structure of e.g., German, Scandinavian and European Union administrative law.[9] Concerning the internationalisation of administrative law, one could especially mention the early 20th century pioneer work of Karl Neumeyer, *Internationales Verwaltungsrecht*, in which he, using this kind of methodology, suggested a legal structure for international administrative legal relationships.[10] However, in today's diverse landscape of international aspects of administrative law, a general survey of all administrative fields would be a vast undertaking. As a solution to this methodological problem, Eberhard Schmidt-Aßmann has suggested a limitation to analyses of international aspects of administrative law to certain

5 A.-M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) p. 11; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) pp. 760 ff. and 784; A.M. Keessen, *European Administrative Decisions* (Groningen: Europa Law Publishing, 2009) p. 226 ff.

6 *Cf.* the overviews of various forms of international administrative cooperation in M.A. Glaser, *Internationale Verwaltungsbeziehungen* (Tübingen: Mohr Siebeck, 2010) covering (1) *international joint administration* ("internationale Verbundverwaltung"), (2) *transnational cooperative administration* ("transnationale Kooperationsverwaltung"), and (3) *administrative relations for the carrying out of international legal relations* ("Verwaltungsbeziehungen zur Durchführung zwischenstaatlicher Rechtsbeziehungen"); M. Kment, *Grenzüberschreitendes Verwaltungshandeln* (Tübingen: Mohr Siebeck, 2010) covering (1) *national administrative decisions and land use plans with an extraterritorial impact* ("Extraterritorial wirkende nationale Verwaltungsakte und Pläne"), (2) *respect for and recognition of foreign administrative decisions* ("Achtung und Anerkennung ausländischer Verwaltungsentscheidungen"), (3) *cooperative cross-border land use planning* ("Kooperative grenzüberschreitende Planung"), (4) *cross-border public law agreements* ("Grenzüberschreitende öffentliche Verträge"), and (5) *cross-border administrative factual conduct* ("Grenzüberschreitende Verwaltungsrealakte").

7 *Cf.* J. Schwarze, *European Administrative Law* (Revised 1st ed., London: Sweet and Maxwell, 2006) p. 11 ff.

8 On cooperation between parliaments, see Slaughter, *A New World Order* (*supra* note 5) p. 106 ff.

9 *Cf.* E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd ed., Berlin: Springer, 2006) p. 111; especially concerning international administrative relations C. Möllers, "Internationales Verwaltungsrecht. Eine Einführung in die Referenzanalysen," in C. Möllers *et al.* (eds.), *Internationales Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten* (Tübingen: Mohr Siebeck, 2007) pp. 1-6; O. Mayer, *Deutsches Verwaltungsrecht I–II* (3rd ed., München: Duncker & Humblot, 1924) p. 18 ff.; P. Andersen, *Dansk Forvaltningsret*, (4th ed., Copenhagen: Gyldendal, 1963) p. 12 ff.; Schwarze, *European Administrative Law* (*supra* note 7) p. 3 ff.

10 K. Neumeyer, *Internationales Verwaltungsrecht*, vol. I–IV ([1910-1936] facsimile, I–III, Berlin: J. Schweitzer, 1980, and IV, Zürich: Verlag für Recht und Gesellschaft, 1980), especially vol. I, p. IV (on methodology) and vol. IV, p. 473 ff. (on the different aspects of the suggested "international administrative law"); *Cf.* Vogel, "Administrative Law, International Aspects" (*supra* note 1) p. 24.



areas of reference.[11] Following this model, the discussion below primarily takes examples from environmental law, transport law and social security law. A common denominator of these fields of law is the conflict between national interests of maintaining certain levels of protection and international interests of cooperation resulting from the inherent international character of environmental problems, cross-border transport and social security aspects of migration. Using these reference areas, examples will be taken both from EU law and other forms of cooperation, especially from Nordic cooperation as manifested in multilateral treaties between Denmark, Finland, Iceland, Norway, and Sweden.

At least since the foundation of European nation states in the 16th and 17th centuries, there was a general perception that public law by the natural order of things was limited to the territory and the legal system of one state.[12] Traditionally, administrative law did not deal with the existence of other states or the content of their legal rules. Sometimes, the concept of sovereignty and non-interference under public international law was used as an argument for this.[13] The traditional view in administrative law was that the state was a closed system: administrative decisions and legislation in the administrative field normally took place exclusively within the legal sphere of one state. In such a closed state, administrative bodies were not supposed to have any further reaching contacts with their foreign counterparts.[14] To simplify a bit, international contacts were a matter for ministries of foreign affairs.

Such a limitation of administrative law to the territory and the state could cause legal problems for people moving to foreign countries or for companies trading internationally. Different legal requirements, standards, or social security systems may make international exchange legally unappealing or impossible. Furthermore, the limitation of the administrative sector to the own state may hamper the efficiency of the authorities, since they cannot act abroad or take immediate advantage of experience gained by foreign administrative bodies.

All this is well-known, as is the solution, namely international legal cooperation beyond the state. Within the larger framework of globalisation, internationalisation, or Europeanisation, the public law of western states, at least since the middle of the 20th century, has gradually opened itself to contacts with other legal systems. This is of course very much the case in EU law. Especially the rules and principles on the Internal Market may to a large extent be seen as ambitious attempts at limiting the drawbacks of the "closed state". In EU law, the principle of sincere cooperation found in Article 4(3) of the Treaty on European Union is important. Under this principle,

11 On this method, see Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (*supra* note 9) pp. 8 ff. and 111; Keessen, *European Administrative Decisions* (*supra* note 5) p. 10 ff.

12 K. Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* (Frankfurt/Main: Alfred Metzner Verlag, 1965) p. 43 ff.; K. Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (New York: Oxford University Press, 2009) p. 8 ff.

13 Schwarze, *European Administrative Law* (*supra* note 7) p. 3; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 763.

14 *Cf.* generally Vogel, "Administrative Law, International Aspects" (*supra* note 1) pp. 25-26.

national administrative bodies are expected to rely on mutual trust, maintain quality in decisions relating to other states, and establish effective contacts and exchange information between authorities. An important prerequisite for building networks of different kinds is the possibility of maintaining contacts on lower administrative levels.[15] Therefore, the principle of sincere cooperation means that possible limitations of direct contacts between authorities under national law or public international law do not apply within the field of application of EU law.[16] In this way administrative structures expand beyond the state and its territory. Consequently it has been necessary to adjust traditional views of administrative law. It is clear that old perceptions entailing that international contacts should be an exclusive task of the ministries for foreign affairs are long gone between EU member states. In some instances, states have explicitly agreed to allow direct administrative contacts outside EU law as well. One example is found in the Helsinki Treaty on Nordic Cooperation.[17]

As already mentioned, two main approaches may be identified in legal research on the internationalisation of administrative law. Some scholars have focused on rules dealing with collisions of national legal systems or conflicts of law, forming an administrative counter-part to private international law. This line of research has been especially vivid in German legal discourse, often using the term *Internationales Verwaltungsrecht* (literally "International Administrative Law").[18] Others have primarily looked into the development of new international or global administrative structures such as administrative networks and the administrative role of international organisations. This focus has been a feature of the Global Administrative Law research programme which was initiated at New York University.[19] This latter form of research on the internationalisation of administrative law comes rather close to discussions in international law, international relations and political science.[20]

Both perspectives may be subject to criticism. On the one hand, the concept of *Internationales Verwaltungsrecht* with its model based on private international law may be regarded as too limited to describe the legal aspects of the internationalisation of

15 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 768 ff.

16 E.g., ECJ Case 104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613 para 27; P. Mengozzi, *European Community Law from the Treaty of Rome to the Treaty of Amsterdam* (2nd ed., the Hague: Kluwer, 1999) p. 88.

17 Article 42 of the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden, Helsinki 23 March 1962, 434 *UNTS* 145.

18 M. Ruffert, "Perspektiven des Internationalen Verwaltungsrechts," in C. Möllers *et al.* (eds.), *Internationales Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten* (Tübingen: Mohr Siebeck, 2007) pp. 395-419, 397 ff.; *cf.* for criticism of the concept of *Internationales Verwaltungsrecht* Vogel, "Administrative Law, International Aspects" (*supra* note 1) p. 22 ff., also noting that the English term "International Administrative Law" often is used for a special aspect of international administrative relations, namely those concerning the internal administration of organisations under public international law.

19 B.W. Kingsbury *et al.*, "The Emergence of Global Administrative Law," 68 *Law and Contemporary Problems* (2004–2005) pp. 15-61, 20 ff.

20 Möllers, "Internationales Verwaltungsrecht" (*supra* note 9) p. 3; see A. Somek, "The Concept of 'Law' in Global Administrative Law – A Reply to Benedict Kingsbury," 20 *European Journal of International Law* (2009) pp. 985-995, criticising the broad scope of the Global Administrative Law model.



administrative relations.[21] On the other hand, the wide scope of the Global Administrative Law line of research has been criticised for obscuring the distinction between legal and non-legal relationships.[22] It should be noted that the two approaches do not exclude each other, since to a large extent they pose different questions in relation to the internationalisation of administrative relations. Against this background, there are advantages of combining elements from the two perspectives in order to establish a more accurate legal framework for international aspects of administrative law.[23]

Legal tools related to the two perspectives are discussed below. After looking into examples of mechanisms under the network perspective, tools related to the conflict of laws perspective are highlighted. In a concluding section, some general remarks are made.

## 2. The network perspective

A first group of legal tools reflect what is referred to as the network perspective here and create institutional structures for international administrative cooperation. The network concept, much discussed in social sciences, has increasingly been highlighted in legal discourse as well. Concerning the internationalisation of legal administrative relations, the rather vague notion of networks can be useful for describing cross-border contacts between national administrative bodies, and between such bodies and international organisations. In this context, an administrative network may be defined as a pattern of regular international contacts between public bodies.[24] In a legal perspective, the more formal structures, following from international agreements or legislation, are the focus of interest, although the distinction between formal and informal cooperation structures is not always clear.[25] After a discussion on international organisations as a framework for administrative cooperation below, the focus is turned to examples of network cooperation structures.

21 E. Schmidt-Aßmann, "The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship," 9 *German Law Journal* (2008) pp. 2061-2080, 2076 ff. [www.germanlawjournal.com/index.php?pageID=11&artID=1054 (accessed 10.1.2013)]; Ruffert, "Perspektiven des Internationalen Verwaltungsrechts" (*supra* note 18) p. 398 ff.

22 *Cf.* Möllers, "Internationales Verwaltungsrecht" (*supra* note 9) p. 3; Somek, "The Concept of 'Law' in Global Administrative Law" (*supra* note 20) p. 994 ff.

23 Schmidt-Aßmann, "The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship" (*supra* note 21) p. 2076 ff.

24 See the definition in Slaughter, *A New World Order* (*supra* note 5) p. 14; on the various understandings of networks, see F. Bignami, "Individual Rights and Transnational Networks," in S. Rose-Ackerman and P.L. Lindseth (eds.), *Comparative Administrative Law* (Cheltenham: Edward Elgar, 2010) pp. 632-638, 633. *Cf.* for criticism of using the network term in the legal context, instead suggesting the term "composite administration", A. von Bogdandy & P. Dann, "International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority," 9 *German Law Journal* (2008) pp. 2013-2038, 2018 [www.germanlawjournal.com/index.php?pageID=11&artID=1052 (accessed 10.1.2013)]; see also E. Schmidt-Aßmann, "Introduction: European Composite Administration and the Role of European Administrative Law," in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Cambridge: Intersentia, 2011) pp. 1-22, 22, stating that European composite administration is a network.

25 P. Craig, "Shared Administration and Networks: Global and EU Perspectives," in G. Anthony *et al.* (eds.), *Values in Global Administrative Law* (Oxford: Hart, 2011) pp. 81-116, 107.

## 2.1 International organisations as a framework for administrative cooperation

In the wide sense of the network concept used here, an international organisation for administrative cooperation may be seen as a highly formalised administrative network, gathering national experts in an international setting. To a certain degree, the national representatives in international organisations with administrative tasks keep their affiliation with the national administration of their home states.

Historically, there have been a number of international arrangements functioning as administrative unions with a sectorial or geographic scope. This kind of cooperation has been established since the late 19th century and has dealt with common interests such as postal services, telecommunications, and the administration of frontier rivers. Whereas the original administrative unions may have had an uncertain status, their counterparts in today's world would be categorised as international organisations in most cases. Therefore, the distinction between administrative unions and international organisations today in general is somewhat unclear.[26] This might also have to do with the difficulty of defining the concept of "administrative" law altogether. These discussions on terminology will be left aside here. It might however be noted that the composition of such organisations and their decision-making bodies might be very different. Whereas some such organisations operate on a governmental level through political representatives, others consist of representatives from national administrative organs. The description of such arrangements as administrative networks is more to the point in the latter case.[27]

In the field of environmental law, a Nordic example of an international organisation for administrative cooperation was the previous Finnish–Swedish Frontier River Commission, established through a bilateral convention.[28] This commission was responsible for certain decisions regarding fisheries and environmental issues in the rivers concerned.[29] Concerning transport law, on a European level, the international organisation Eurocontrol is responsible for certain aspects of air traffic control for several states.[30] On a global scale, also in the aviation field, one might mention the

26 F. Ermacora, "Confederations and other Unions of States," in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (Amsterdam: North-Holland, 1992) pp. 735-738, 737; R. Wolfrum, "International Administrative Unions," in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008) margin numbers 1-3 [online edition, www.mpepil.com (accessed 10.1.2013)].

27 In the public international law context, see E.D. Kinney, "The Emerging Field of International Administrative Law," 54 *Administrative Law Review* (2002) pp. 415-433, 425 ff.; especially on EU administrative networks, see Craig, "Shared Administration and Networks" (*supra* note 25).

28 Gränsälvsöverenskommelse mellan Sverige och Finland (Agreement between Finland and Sweden concerning Frontier Rivers), Stockholm 16 September 1971, 825 *UNTS* 272.

29 Lag 1971:850 med anledning av gränsälvsöverenskommelsen den 16 september 1971 mellan Sverige och Finland (Act concerning the Agreement between Finland and Sweden concerning Frontier Rivers of 16 September 1971 [now repealed]); *Cf.* lag 2010:897 om gränsälvsöverenskommelse mellan Sverige och Finland (Act on the Agreement between Finland and Sweden concerning Frontier Rivers).

30 The International Convention Relating to Co-Operation for the Safety of Air Navigation, Brussels 13 December 1960, 523 *UNTS* 117; *Cf.* H.C.H. Hofmann *et al.*, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011) p. 86.



International Civil Aviation Organization (ICAO) establishing standards for safety and coordinating the national supervision of aircraft.[31] The latter organisation belongs to the category of specialised organisations within the United Nations system, together with the Food and Agriculture Organization (FAO), the World Health Organization (WHO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO).[32] Some such international bodies have significant decision-making powers, e.g. the power of a committee within the UNESCO to inscribe properties on the World Heritage List.[33]

Beyond the category of such international organisations with administrative tasks within a special sector, there are international organisations with a more general scope. Such organisations may provide for formal and informal cooperation arrangements on administrative issues. This is, for example, the case in the Nordic cooperation within the Nordic Council of Ministers. The European Union, often labelled a *sui generis* form of international cooperation, makes up a special case in this context as well. In European Union law, the wide range of cooperation forms also includes elements of decision-making in administrative matters by independent organs, including the Commission. Firstly, the role of the Commission is, among other things, to suggest and adopt rules and to decide on a wide range of issues, many of an administrative character.[34] In some instances the Commission even serves as a counterpart to national supreme administrative bodies solving conflicts between subordinate authorities and having the final word on administrative decisions in individual cases. In such cases, the Commission is assisted by committees under the comitology system. An example of such an arrangement is found in environmental law concerning certain aspects of authorisations of genetically modified organisms.[35] Secondly, there are different kinds of independent EU bodies, which in part have decision-making or at least recommendatory power. There have been various attempts at categorising

31 P.M.J. Mendes de Leon, "International Civil Aviation Organization (ICAO)," in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008) margin number 24 ff. [online edition, www.mpepil.com (accessed 10.1.2013)]; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 766.

32 In general on UN specialised agencies, see M.N. Shaw, *International Law* (5th ed., Cambridge: Cambridge University Press, 2003) p. 1095 ff.

33 The Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value (World Heritage Committee), see Articles 8 and 11 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris 16 November 1972, 1037 *UNTS* 151; D. Zacharias, "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution," 9 *German Law Journal* (2008) pp. 1833–1864, especially p. 1844 and (concerning the legal effects of an inscription on the World Heritage List) 1856 [www.germanlawjournal.com/index.php?pageID=11&artID=1044 (accessed 10.1.2013)].

34 Article 17 of the Treaty on European Union (TEU) and Article 290 of the Treaty on the Functioning of the European Union (TFEU); K. Lenaerts and P. van Nuffel, *European Union Law* (3rd ed., London: Sweet & Maxwell, 2011) margin numbers 13–062 ff. and 17–008 ff. (pp. 505 ff. and 694 ff.).

35 Articles 18 and 30 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, *OJ* 2001 L 106/1; Keessen, *European Administrative Decisions* (*supra* note 5) p. 36 ff.; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 780; *Cf.* regarding such authorisations below (section 3.2).

the tasks of such EU bodies, especially those labelled as EU agencies.[36] An example from the reference areas treated in this article is the European Environmental Agency (EEA). This agency has the task of providing information to the EU and the member states on environmental issues, thus lacking decision or rule-making power.[37] In the transport sector, the European Aviation Safety Agency (EASA) has certain decisional powers concerning aircraft certificates.[38]

In social security law, an example of the difficulties of classification in the heterogeneous category of EU administrative bodies is the Administrative Commission for the Coordination of Social Security Systems, provided for in Regulation (EC) No. 883/2004. This body is, in the words of the Regulation, "attached to the [EU] Commission" and consists of one government representative from each member state. Its task is to deal with administrative issues, to solve interpretation issues and to promote cooperation between the member states in relation to the regulation.[39] For example, the Administrative Commission may assist the social security bodies of the member states in solving conflicts on the validity of a foreign document or on the determination of the applicable legislation.[40] To perform its tasks, the Administrative Commission adopts decisions that are non-binding but nevertheless may have considerable legal significance.[41] The tasks and structure of the Administrative Commission would seem to fall outside the categories of both committees under the comitology system and EU agencies.

36 Lenaerts and van Nuffel, *European Union Law* (*supra* note 34) margin number 13-123 (p. 558 ff.); See Commission Communication COM(2008) 135 final, *European agencies – The way forward*, distinguishing between (1) executive agencies and (2) regulatory agencies, the latter category being subdivided into (a) agencies adopting individual decisions which are legally binding on third parties, (b) agencies providing direct assistance to the Commission and, where necessary, to the member states, in the form of technical or scientific advice and/or inspection reports, (c) agencies in charge of operational activities, (d) agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information /networking, and (e) services to other agencies and institutions; the Commission's classification is criticised in P. Craig, *EU Administrative Law* (2nd ed., Oxford: Oxford University Press, 2012) p. 149 ff. where a distinction is suggested between (1) regulatory agencies, (2) decision-making agencies, (3) quasi-regulatory agencies, and (4) information and coordination agencies.

37 Article 2 of Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, *OJ* 2009 L 126/13; see Craig, *EU Administrative Law* (*supra* note 36) p. 151 ff. labelling the agency as an "information and co-ordination agency".

38 Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, *OJ* 2008 L 79/1. See Craig, *EU Administrative Law* (*supra* note 36) p. 150 categorising the EASA as a part decision-making agency, part quasi-regulatory agency.

39 Recital 38 and Articles 71 and 72 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ* 2004 L 166/1; *cf.* Article 1 of the Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, *OJ* 2010 C 213/20, describing the Administrative Commission as a "specialised body of the European Commission".

40 Article 76 of Regulation (EC) No 883/2004 (*supra* note 39); Articles 5 and 6 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems *OJ* 2009 L 284/1.

41 Article 72 (a) of Regulation (EC) No 883/2004 (*supra* note 39); Article 12 of the Rules of the Administrative Commission (*supra* note 39); *Cf.* for example Administrative Commission for the Coordination of Social Security Systems, Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, *OJ* 2010 C 106/01; *Cf.* on the non-binding force of the decisions ECJ Case 98/80 *Giuseppe Romano* v. *Institut national d'assurance maladie-invalidité* [1981] ECR 1241 para 20.



Through the establishment of specialised international organisations or EU bodies, whatever their categorisation, the responsibility for certain aspects of administrative activities is transferred from the state to a central organ on the international level. Thus, in the balancing of interest involved in international administrative relationships, the interest of international cooperation is given priority.[42]

The international organisations may involve national authorities in their decision-making. Beside the governmental cooperation, there is a system of specialised Committees of Government Officials (ämbetsmannakommittéer) assisting the various configurations of the Nordic Council of Ministers.[43] These committees consist of public officials from national governmental offices or administrative agencies. For example, in the social field, there is a Nordic Committee on Health and Social Affairs (Nordiska ämbetsmannakommittén för social- och hälsofrågor) and for environmental issues a Nordic Committee for Environmental Affairs (Nordiska ämbetsmannakommittén för miljöfrågor). The committees prepare the decisions of the relevant Council of Ministers, decide on issues by delegation from the Council of Ministers, and promote the interest of Nordic cooperation in other ways in the relevant field.[44] For example, in the field of social law, the competent committee has issued non-binding guidance notes to the Nordic Convention on Social Assistance and Social Services.[45] These cooperation arrangements in fact go even further, since the Nordic Council of Ministers or the committees may establish working groups for special tasks.[46] Such working groups may consist of lower tier national public officials from administrative agencies. In both the committees and the working groups, national public officials thus meet to discuss options for the adoption of rules for greater Nordic cooperation in the relevant sector. In this way, Nordic cooperation on the governmental level is underpinned by structures of cooperation between national administrative agencies. However, it might be noted that the committees and working groups in the reference areas discussed here in general do not coordinate the decision-making concerning individual administrative matters.

This administrative intertwining, meaning that international organisations involve national authorities in the decision-making, is even more present within the EU. An important feature of the European cooperation is the activities related to the comitology system. In these complex decision-making structures, national administrative representatives are involved in the Commission's implementation of EU legal

42 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 784.

43 Articles 60 and 63 of the Helsinki Treaty (*supra* note 17).

44 See further the information provided on the website of the Nordic cooperation at www.norden.org/en/nordic-council-of-ministers/commitees-of-senior-officials (accessed 10.1.2013).

45 Vägledande kommentar till den nordiska konventionen om socialt bistånd och sociala tjänster (Guidance Notes to the Nordic Convention on Social Assistance and Social Services), Nordic Council of Ministers, Copenhagen, 1997, TemaNord 1996:620; *cf.* the Nordic Convention on Social Assistance and Social Services, Arendal 14 June 1994, 1973 *UNTS* 319.

46 § 12 Arbetsordning för Nordiska ministerrådet (Rules of Procedure for the Nordic Council of Ministers), 4 March 1993, available in Swedish at www.norden.org/sv/nordiska-ministerraadet/om-nordiska-ministerraadet/arbetsordning-och-styrdokument/arbetsordning-foer-nordiska-ministerraadet (accessed 10.1.2013).

acts, concerning both rules with a general scope and individual cases.[47] In this way, administrative networks are established.[48] In the comitology system, the formal decision-making power rests by the Commission, whose real decision-making powers are limited by the network structures involving national administrative agencies.[49]

The constitutional challenges of international organisations trusted with legislative or decision-making power are well-known from the EU context. However, much more limited forms of internationalised decision-making may also give rise to constitutional concerns. This was the case in the seemingly uncontroversial regime on the Finnish-Swedish frontier river management, mentioned above. Through an amendment in the bilateral agreement, the Frontier River commission was, among other things, authorised to prohibit the use of certain fishing equipment in the frontier rivers. This amendment was incorporated in Swedish law through a governmental ordinance. In a Swedish criminal case concerning the use of forbidden fishing equipment, the legality of a decision of the Frontier River Commission prohibiting certain fishing equipment was contested. The Supreme Court held that the constitutional procedural requirements of transfer of public power to an international organisation were not fulfilled, since there was no parliamentarian participation in the decision-making.[50] In a similar fashion, constitutional aspects of the Eurocontrol cooperation regime have been assessed by the German Federal Constitutional Court in relation to the German Basic Law.[51]

Clearly, the work of committees and other bodies cooperatively drafting and adopting rules and deciding in individual cases could be labelled "administration beyond the state". This might raise issues on accountability of decision-makers and on the legitimacy of their work.[52] Of course, in the interest of legality, legitimacy and democracy, there must be limits to the scope of such cooperation.[53] However, the appointment of the members of the administrative bodies involved, as well as the actual change in national legislation or international agreements, must be formally acknowledged by the national government or administration.[54] In this way, the decision-making is not entirely cut loose from the traditional administrative structures of

47 Article 291 TFEU; Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* 2011 L 55/13; Lenaerts & van Nuffel, *European Union Law* (*supra* note 34) margin number 17–006 (p. 692 ff.).

48 Slaughter, *A New World Order* (*supra* note 5) p. 43 ff.; *Cf.* Hofmann *et al.*, *Administrative Law and Policy of the European Union* (*supra* note 30) p. 307, viewing networks as a phenomenon parallel to the comitology system.

49 Hofmann *et al.*, *Administrative Law and Policy of the European Union* (*supra* note 30) p. 282 ff.

50 See the Swedish Supreme Court judgment *NJA* 1996 p. 370; *Cf.* Chapter 10, Section 7 of the Instrument of Government (regeringsformen, the central constitutional act of Sweden); J. Nergelius, *Constitutional Law in Sweden* (Alphen aan den Rijn: Kluwer Law International, 2011) comment 23 (p. 22).

51 *BVerfGE* 58, 1 ("Eurocontrol I"); *BVerfGE* 59, 63 ("Eurocontrol II").

52 H.C.H. Hofmann and A. Türk, "The Development of Integrated Administration in the EU and its Consequences," 13 *European Law Journal* (2007) pp. 253-271, 263.

53 Concerning the problem of "agencies on the loose", see Slaughter, *A New World Order* (*supra* note 5) p. 48.

54 *Op. cit.*, pp. 11 and 18; see also Schmidt-Aßmann, "The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship" (*supra* note 21) p. 2067.



the states. Furthermore, it should be stressed that a closed state (see above, section 1) would also need technical, environmental or social expertise for deciding on administrative issues in the reference areas treated here. Also in a purely national setting, there might therefore be problems of accountability and legitimacy of experts. The conflicting ideals of democratic control and sectorial expertise would seem to be an inherent problem in administrative law, not only in international cooperation structures.

### 2.2 Examples of network cooperation structures

Within the organisational framework described in the previous section, different types of network cooperation structures may be identified.[55] In legal literature, several categories of administrative networks have been described, including what has been called enforcement networks, composite decision-making, and information networks.[56] Below, examples of those categories of networks are highlighted within the fields of reference discussed here.

Through *enforcement networks*, administrative bodies cooperate across borders in order to make international legal regimes work in practice.[57] On a global scale, examples of this category have been identified in national administrations engaging in international cooperation regarding training and capacity building in the administration of environmental law in foreign countries.[58] In the EU context, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) has developed from informal cooperation to a more organised network, aimed at contributing towards protecting the environment through effective implementation of EU environmental law. This shall take place through, among other things, joint enforcement projects, training of enforcers, and development of common standards on the application of EU law in order to achieve a more consistent approach.[59] Administrative networks may also be the result of European legislation. One example is found in the REACH Regulation, providing for the establishment of a Forum for Exchange of Information on Enforcement, which shall coordinate a

55 See also Slaughter, *A New World Order* (*supra* note 5) p. 45, discussing government networks within international organisations.

56 For further discussions, see *op. cit.* p. 51 ff. distinguishing between on the one hand, vertical and horizontal networks, and on the other hand, information, enforcement, and harmonisation networks; especially in the context of the EU, see Craig, "Shared Administration and Networks" (*supra* note 25) p. 84 ff.; see Hofmann *et al.*, *Administrative Law and Policy of the European Union* (*supra* note 30) p. 307 ff., discussing information, planning, and enforcement networks, and transterritorial administrative activity (recognition of foreign administrative decisions) as forms of networks under EU law.

57 Craig, "Shared Administration and Networks" (*supra* note 25) p. 88, taking as an example, the network structures under EU agricultural law, aimed at combating fraud.

58 Slaughter, *A New World Order* (*supra* note 5) p. 55.

59 See further the Statutes of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) [www.impel.eu/wp-content/uploads/2010/01/IMPEL-Statute.pdf (accessed 10.1.2013)].

network of national authorities in the field.[60] In the field of EU social security coordination, the cooperation between national social security bodies through administrative assistance and mutual cooperation serves as an important tool for the enforcement of the free movement of persons. The Administrative Commission referred to above (section 2.1) here serves as a node for the various network contacts.[61]

Under some legal arrangements within EU law, administrative cooperation takes place through national administrative agencies interacting with each other and EU bodies under what has been labelled as *composite decision-making*.[62] Under such arrangements, national administrative bodies cooperate with each other and the Commission and other EU organs in the decision-making process.[63] An example is found in the EU Directive on the deliberate release of genetically modified organisms (GMOs). A party which intends to place GMOs on the market for the first time shall submit a notification to the competent authority of the relevant member state. This authority shall then forward certain documents on the matter to the EU Commission and the competent authorities of the other member states. In this way, the Directive provides for a dialogue between the national administrative bodies and the Commission. This arrangement makes it possible for member states other than the decision-making state to present arguments against the GMO at issue.[64] A similar cooperative decision-making procedure is found in transport law in the EU regulation on the international market for coach and bus services. Also here, the competent authority shall forward applications for authorisations to the Commission as well as to other member states concerned, thus involving them in the decision-making process.[65]

60 Article 76(1) f of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, *OJ* 2006 L 396/1; *Cf.* generally on the administrative governance through network structures in the EU environmental sector Hofmann & Türk, "The Development of Integrated Administration in the EU and its Consequences" (*supra* note 52) p. 259 ff.

61 Article 76(2) and (4) of Regulation (EC) No 883/2004 (*supra* note 39); R. Pitschas, "Strukturen des Europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft," in E. Schmidt-Aßmann and W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden: Nomos, 1999) pp. 123-169, 147.

62 The term *composite decision making* is linked to the concept of European composite administration, which in turn is the English term coined for translating German *Verwaltungsverbund*, see Schmidt-Aßmann, "Introduction: European Composite Administration and the Role of European Administrative Law" (*supra* note 24) p. 1 ff.

63 The terminology varies, see for the term composite decision making Hofmann *et al.*, *Administrative Law and Policy of the European Union* (*supra* note 30) p. 405; S. Cassese, "European Administrative Proceedings," 68 *Law and Contemporary Problems* (2004–2005) pp. 21-36, 26 ff.; *Cf.* G. della Cananea, "The European Union's Mixed Administrative Proceedings," 68 *Law and Contemporary Problems* (2004–2005) pp. 197-217, 203 ff., using the term *hybrid proceedings*; G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Tübingen: Mohr Siebeck, 2004) p. 151 ff.; L. de Lucia, "Conflict and Cooperation within European Composite Administration (Between Philia and Eris)," 5 *Review of European Administrative Law* (2012) pp. 43-77, 44.

64 Articles 14, 15 and 18 of Directive 2001/18/EC (*supra* note 35); della Cananea, "The European Union's Mixed Administrative Proceedings" (*supra* note 63) p. 204; Cassese, "European Administrative Proceedings" (*supra* note 63) p. 29; Keessen, *European Administrative Decisions* (*supra* note 5) p. 36 ff.

65 Article 8 of Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006, *OJ* 2009 L 300/88.



In order to be able to cooperate on adopting rules, individual decisions and policies, national and international bodies in administrative networks need to exchange information and to establish international administrative *information networks*.[66] Those cooperation structures may range from the exchange of information on general issues in the relevant field to information concerning companies or natural persons in individual administrative matters. On a theoretical level, the cross-border handling of information has been identified as a central feature of international administrative cooperation.[67] Exchange of information may also serve as an alternative to the establishment of supranational databases on individuals.

The degree of formality in information networks may vary considerably. Generally speaking, information may be exchanged informally under the network structures discussed above (section 2.1). Besides the network arrangements provided for in legal instruments, there might be important informal cooperation structures, not directly provided for in international legal instruments. Administrative law cooperation would in many instances presuppose informal contacts and joint work to solve emerging problems to work in practice. Furthermore, the exchange of information and experience in the relevant field might be important.[68] These kinds of exchange networks may concern issues specific to the relevant administrative field. National experiences may thus be shared in order to develop common standards or best practices.[69]

There might also be more formal procedures for the exchange of information set out in treaties or EU legislation. Firstly, information exchange may be related to national legislation in a certain field. Under EU social security coordination, the national social security bodies shall communicate information to each other on national legislation related to the relevant EU regulation.[70] Secondly, the effective handling of an individual administrative matter may require international information exchange.[71] In environmental law, an EU member state that has received an application for a permit to conduct industrial activities with possible transboundary effects shall forward information regarding this application to the affected neighbouring country. This information shall then serve as a basis for bilateral consultations between the

66 See Craig, "Shared Administration and Networks" (*supra* note 25) p. 99 ff. discussing information networks as a "pooling of knowledge".

67 See E. Schmidt-Aßmann, "Principles of an International Order of Information," in G. Anthony *et al.* (eds.), *Values in Global Administrative Law* (Oxford: Hart, 2011) pp. 117-124, 118: "The major action modus of global governance has been collecting, processing and forwarding information."

68 Concerning the EU, see Hofmann and Türk, "The Development of Integrated Administration in the EU and its Consequences" (*supra* note 52) p. 258.

69 D. Zaring, "Best Practices," 81 *New York University Law Review* (2006) pp. 294-350, 314 ff.; concerning EU social security coordination, see R. Cornelissen, "Art. 72," in M. Fuchs (ed.), *Europäisches Sozialrecht* (6th ed., Baden-Baden: Nomos, 2013) margin numbers 1 ff. and 35 ff. (pp. 447 and 454 f.) on the role of the Administrative Commission in establishing best practices.

70 Article 76(1) of Regulation (EC) No 883/2004 (*supra* note 39); B. Spiegel, "Artikel 76," in M. Fuchs (ed.), *Europäisches Sozialrecht* (6th ed., Baden-Baden: Nomos, 2013) margin numbers 5-7 (pp. 474 f.).

71 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 783.

countries.[72] Also in the EU social security coordination regime, there are explicit general provisions on mutual information and cooperation.[73] In transport law, a Nordic agreement on the mutual recognition of driving licences provides that the countries shall notify each other of decisions concerning driving licences from other Nordic states.[74]

At least since the 1960s, electronic information exchange has been an increasingly important factor in national administrative law systems. This development is also noticeable in international administrative cooperation, especially in the EU.[75] Under the EU regime for social security coordination, there are far-reaching provisions on a technical infrastructure for cross-border information exchange in individual matters under the Electronic Exchange of Social Security Information (EESSI) system.[76] Also in environmental law and in transport law of the EU, there are examples of this development.[77] In this context, questions of collection of information, data protection for individuals, transparency, and safeguarding information quality have been identified as central issues.[78]

## 3. The conflict of laws perspective

A second group of legal tools for international administrative cooperation take the conflict of laws perspective (see section 1 above). They thus aim at bridging the gap between national administrative orders, which is a result of the "closed state" idea. These tools have been most frequently discussed within the line of research that is linked to the "International Administrative Law". Several of the tools are also important features of EU law. Below, the mechanisms of coordination, recognition of foreign administrative decisions, harmonisation, and application of foreign administrative law are discussed.

72 Article 26 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), *OJ* 2010 L 334/17. This example, as well as other forms of information cooperation in EU environmental law, is dealt with in J. Sommer, "Information Cooperation Procedures – with European Environmental Law Serving as an Illustration," in O. Jansen and B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Cambridge: Intersentia, 2011) pp. 55-89, 59 ff.

73 Article 76 of Regulation (EC) No 883/2004 (*supra* note 39); see further Pitschas, "Strukturen des Europäischen Verwaltungsrechts" (*supra* note 61) pp. 148-151; Spiegel, "Artikel 76" (*supra* note 70) margin numbers 17-22 (pp. 478 ff.).

74 Article 4 of the Agreement on reciprocal recognition of driving permits and vehicle registration certificates, Mariehamn 12 November 1985, 1600 *UNTS* 265.

75 See generally A. Saarenpää, "E-government and Good Government, An Impossible Equation in the new Network Society?" 47 *Scandinavian Studies in Law* (2004) pp. 245-273, at 450 f.

76 Article 78 of Regulation (EC) No 883/2004 (*supra* note 39); Article 4 of Regulation (EC) No 987/2009 (*supra* note 40); B. Spiegel, "Artikel 76" (*supra* note 70) margin numbers 1-27 (pp. 489 ff).

77 In environmental law, see J. Sommer, "Information Cooperation Procedures" (*supra* note 72) pp. 55-89, 61; concerning transport law, see Decision No 922/2009/EC of the European Parliament and of the Council of 16 September 2009 on interoperability solutions for European public administrations (ISA) *OJ* 2009 L 260/20.

78 Schmidt-Aßmann, "The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship" (*supra* note 21) p. 2074.



### 3.1 Coordination

In some important sectors, the legal structures leave to the states to decide on the content of the legislation, but stipulate coordination of the legal orders in individual cases. Such coordination rules entail provisions on determining the competent state in a certain situation and rules on the exclusive competence of this state (*"single-state rule"*). For example, concerning social security, the rights to some benefits are linked to work in the territory of a certain state, whereas other rights are based on residence. Accompanying the provisions on the competent state, rules on coordination might involve provisions on the legal effects of circumstances having occurred in other states. Furthermore, coordination regimes may provide for the transfer of cases to the competent authority. All those elements are found within the EU coordination of social security, where they are considered as being a part of the founding principles of EU social security law.[79]

Coordination may be seen as an alternative to harmonisation in fields where the involved states are not ready to change their domestic legal rules in substance, owing to politically and economically sensitive issues at stake. It is therefore natural that this tool is used in the fields of social security law.

Coordination, as other forms of administrative cooperation, presupposes a certain amount of trust. In order for systems based on coordination to work in practice, each state involved must be confident that the other states use their decision-making competence under the coordination regime in a reasonable way. It might be difficult to defend politically a rule meaning that the citizen of one state in certain situations should be covered by the social security system of another state if that system does not work in practice. In EU law, the Court of Justice has held that the principle of sincere cooperation (see above, section 1) and the coordination rules imply a duty of maintaining a certain quality in the decision-making of the involved states.[80]

In one perspective these coordination rules involve a rather small limitation on national self-determination and provide for a division of competences between states for the benefit of international cooperation. In another perspective, however, it might be difficult to maintain the differences between national systems, although precisely those differences have brought about the choice of the coordination tool in the first place. Legal scholarship has identified situations in social security law, where the coordination rules lead to the harmonisation of national rules.[81] Furthermore, under a coordination regime, there is always a risk that individuals will act in order to be covered by the most beneficial system, leading to problems of unwanted "forum shopping",

79 See recitals 8, 10, 18a, and 37 in the preamble to Regulation (EC) No 883/2004 (*supra* note 39); F. Pennings, *European Social Security Law* (5th ed., Antwerp: Intersentia, 2010) p. 6 ff.

80 ECJ Case C-202/97 *Fitzwilliam Executive Search Ltd* v. *Bestuur van het Landelijk instituut sociale verzekeringen* ["FTS"] [2000] ECR I-883 paras 51-54.

81 T. Erhag, "Legal Aspects of Cross-Border Rehabilitation to Work," 7 *European Journal of Social Security* (2005) pp. 139-165, 150 ff.

well-known in private international law.[82] Such behaviour may in turn necessitate changes in national and EU legislation.

### 3.2 Recognition of foreign decisions

Recognition of a foreign administrative decision may be defined as treating that decision as valid in the recognising legal system.[83] Without recognition, an individual active in several states may have to apply for permits or qualifications in every state where a certain activity is carried out, which creates a double burden for that individual and hampers international exchange. Correspondingly, administrative decisions that are burdensome to the individual, such as prohibitions, lack effects in other legal systems. Recognition thus constitutes a tool for overcoming the traditional limitation of administrative law and individual decisions to a certain state and its territory. The downside of the use of the recognition tool, however, is that the foreign decision is founded on foreign administrative law, and thus on assessments of safety levels, individual rights and other societal interests, that might differ from those of the recognising state. Also here, problems of "forum shopping" may arise.[84] The rules and principles of recognition of foreign administrative decisions thus clearly reflect the balancing of interests between the involved states and individuals identified in section 1 above.[85] Below, the duties of recognition, the limitations of those duties, and certain procedural aspects are outlined.

There are no generally applicable rules on recognition of foreign administrative law under public international law or EU law. Principles on international cooperation between national public administrations cannot independently imply recognition duties. Instead, such duties are to be found in international conventions and EU primary and secondary legislation, possibly supported by the principles on international and European administrative cooperation just mentioned.[86]

Under EU law, the treaty provisions on free movement are important in this context.[87] Related to those provisions and in light of the principles of sincere cooperation and equal treatment, a principle of mutual recognition has developed under the case-law

82 On private international law, see M. Bogdan, *Private International Law as Component of the Law of the Forum. General Course* (the Hague: Hague Academy of International Law, 2012) p. 260 ff.; *cf.* in the context of recognition of foreign administrative decisions Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 766 and below (section 3.2).

83 M. Ruffert, "Recognition of Foreign Legislative and Administrative Acts," in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008) margin number 2 [online edition, www.mpepil.com (accessed 10.1.2013)]; *Cf.* also, on a theoretical level, H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law," in S. Paulson & B. Litschewski Paulson, *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford: Clarendon, 1998) pp. 553-581, 580.

84 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 766.

85 M. Möstl, "Preconditions and limits of mutual recognition," 47 *Common Market Law Review* (2010) pp. 405-436, 409; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 761.

86 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 763 ff.

87 Articles 34-36 TFEU (goods), 45 TFEU (workers), 49 and 52 TFEU (establishment), 56 and 62 TFEU (services), and 63 and 65 TFEU (capital).



of the Court of Justice of the EU.[88] This last principle in brief means that a member state shall accept other member states' administrative decisions related to free movement, unless there are certain strong interests for not doing so. An important feature of the application of the principle is the assessment of equality between the foreign and the domestic decision in an individual matter.[89] In this way, the principle implies a duty of recognising foreign administrative decisions in some situations.

Along the same lines, there are many examples of provisions on the recognition of foreign administrative decisions under secondary EU law. In environmental law, examples of recognition of foreign decisions are found in EU legislation on permits related to biocidal products or genetically modified organisms.[90] Concerning transport, there are provisions on the recognition of driving licences, railway authorisations, and authorisations for coach and bus services from other member states.[91]

Concerning recognition duties under international law, there are important examples in transport law. Considering the importance of smooth international transport, without double burdens in the form of different requirements of driving licences between states, it is no surprise that for a fairly long time there have been rules on recognition of administrative decisions on the international level.[92] In the same way, there are international conventions requiring recognition of foreign authorisations related to civil aviation.[93]

As illustrated, there are examples of recognition of foreign administrative decisions in both environmental law and transport law. In contrast, such provisions in social security law are rare.[94] This relates to the politically and economically sensitive character of this field of law. As has been discussed above (section 3.1), the natural tool for administrative cooperation in this field has instead been coordination of the national rules.

The situations of recognition of foreign administrative decisions discussed so far concern decisions that are favourable to the individual. However, there has been an increased interest in EU legislation in particular for recognition of foreign burdensome

88 Articles 4(3) TEU (sincere cooperation) and 18 TFEU (equal treatment); ECJ Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* ("Cassis de Dijon") [1979] ECR 649; Cases 110/78 and 111/78 *Ministère public and "Chambre syndicale des agents artistiques et impresarii de Belgique" ASBL* v. *Willy van Wesemael and others* [1979] ECR 35, paras 29 and 30.

89 C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd ed., Oxford: Oxford University Press, 2010) p. 624 ff.; Möstl, "Preconditions and limits of mutual recognition" (*supra* note 85) p. 407 ff.; Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 770 ff.

90 Articles 27, 33 and 34 of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, *OJ* 2012 L 167/1; Article 19 of Directive 2001/18/EC (*supra* note 35).

91 Article 2 of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences, *OJ* 2006 L 403/18.

92 Article 24 of the Convention on Road Traffic, Geneva 19 September 1949, 125 *UNTS* 3; Article 41 of the Convention on Road Traffic, Vienna, 8 November 1968, 1042 *UNTS* 17; in the Nordic context, see also Article 1 of the Mariehamn Agreement (*supra* note 74).

93 Article 33 of the Convention on International Civil Aviation, Chicago, 7 December 1944, 15 *UNTS* 295.

94 See, however, Article 46(3) and Annex VII of Regulation (EC) No 883/2004 (*supra* note 39); T. Erhag, "Legal Aspects of Cross-Border Rehabilitation to Work" (*supra* note 81) p. 155 ff.; Pennings, *European Social Security Law* (*supra* note 79) p. 203.

decisions such as revocation of authorisations or other forms of sanctions.[95] As an example from transport law, one might mention the EU convention on driving disqualifications, which, however, has been ratified only by a minority of the member states.[96] A special category of burdensome decisions is administrative fees and charges of different kinds. Here, the EU rules on coordination of social security provide for the collection of contributions and recovery of benefits in other member states.[97]

There are different types of recognition mechanisms, reflecting the balancing of interests between the involved states and individuals. Firstly, there might be an act of explicit recognition, meaning that an authority in the recognising state formally decides to recognise the foreign decision.[98] Secondly, there is the mechanism of single licence recognition, meaning that the legal effects of a foreign decision follow already from a rule applicable in the recognising state. Sometimes in EU law, this is expressed as a decision being valid throughout the EU.[99] As a special variety of this mechanism, some of the EU regimes on recognition in the fields discussed here are based on a composite decision-making structure, involving both other member states and the Commission.[100]

As to the function of rules and principles implying recognition, academic discussions have highlighted the importance of principles on mutual recognition for the development of international administrative legal relationships, constituting a bridge between domestic and foreign law.[101] Recognition may thus be seen as a very convenient tool for international administrative cooperation, and for the balancing of interests discussed above. At the same time, it should not be forgotten that recognition regimes involve a transfer of public power to other states in individual administrative matters.[102] This, in turn, means that a certain amount of trust is a necessary part of a functioning system of recognition of foreign administrative decisions. In many situations, a certain amount of harmonisation is therefore needed for recognition regimes

95 Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 772; Möstl, "Preconditions and limits of mutual recognition" (*supra* note 85) p. 409.

96 See the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on Driving Disqualifications, *OJ* 1998 C 216/2; *Cf.* Commission interpretative communication on Community driver licensing, *OJ* 2002 C 77/5, 13.

97 Article 84 of Regulation (EC) No 883/2004 (*supra* note 39).

98 For an example, see Article 11(1) of Directive 2006/126/EC, *supra* note 91 (in the situation of exchange of a foreign driving licence to a domestic one); see further Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 759.

99 Article 23(1) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, *OJ* 2012 L 343/32; Article 19(1) of Directive 2001/18/EC (*supra* note 35). See further Wenander, "Recognition of Foreign Administrative Decisions" (*supra* note 2) p. 759.

100 Articles 18 and 30 of Directive 2001/18/EC (*supra* note 35); Article 8 of Regulation (EC) No 1073/2009 (*supra* note 65); on composite decision-making, see further *supra* section 2.2.

101 K. Nicolaïdis & G. Shaffer, "Transnational Mutual Recognition Regimes: Governance without Global Government," 68 *Law and Contemporary Problems* (2004–2005) pp. 263-317, 266 ff., linking the concept of mutual recognition to Immanuel Kant's theories: "In fact, mutual recognition may be the foremost legal incarnation of what Kant referred to as cosmopolitan law – that is, the law that exists between domestic and international law, the law that defines the obligations of a state regarding citizens of other states."

102 K. Nicolaïdis, "Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals," in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Basingstoke: Palgrave Macmillan, 2005) pp. 129-189, 133.



to work in practice.[103] Furthermore, the principle of mutual recognition may have harmonisation as a practical consequence.[104] Mutual recognition should therefore not be regarded as the universal tool for international administrative cooperation.

A frequent mechanism for balancing the conflicting interests of the involved states and individuals is the assessment of equivalence mentioned above. There are also limits to the recognition duties established in the case law of the ECJ, concerning situations of manifest errors in the decision related to EU law.[105]

### 3.3 Harmonisation

Among the different tools of international cooperation in general, harmonisation – sometimes also referred to as approximation – is one of the most important ones.[106] Generally, harmonisation may be defined as changing the legal rules in two or more legal systems in order to simplify contacts between the systems and persons moving between them. Normally, this change of rules will take place against the background of an international agreement or rules in EU law. Notably, harmonisation provisions in international legal instruments and EU legal acts are, to a large extent, adopted after preparatory work within international organisations with administrative tasks and administrative networks.[107]

Under administrative law, harmonisation does not necessarily imply the same thing as unification, the latter term denoting the introduction of a common legislation to several states.[108] Especially in the EU context, various forms of harmonisation with different intensity have developed. Those forms range from exhaustive to minimum harmonisation.[109] In this way, the rules may balance the national interests in light of the economic, social and technical preconditions in the involved states.

Under several international conventions, harmonisation has been used as a tool for international administrative cooperation. An example of this in transport law are the basic common standards for rules of the road and driving licences.[110] These rules constitute an example of minimum harmonisation. In contrast, there are few, or even no, such examples in social security law. This might be ascribed to the character of this field of law, already touched upon above (sections 3.1 and 3.2). The substantial differences between states concerning the financing, level of protection, and scope

103 Möstl, "Preconditions and limits of mutual recognition" (*supra* note 85) p. 407; Barnard, *The Substantive Law of the EU* (*supra* note 89) p. 624 ff.

104 P.J. Slot, "Harmonisation," 21 *European Law Review* (1996) pp. 378-387, 386.

105 ECJ Case 130/88 *C.C. van de Bijl* v. *Staatssecretaris van Economische Zaken* [1989] ECR 3039 para 27; Möstl, "Preconditions and limits of mutual recognition" (*supra* note 85) p. 427 ff.

106 On the interchangeability of these terms in EU terminology, see Barnard, *The Substantive Law of the EU* (*supra* note 89) p. 604.

107 *Cf.* Slaughter, *A New World Order* (*supra* note 5) p. 59.

108 Slot, "Harmonisation" (*supra* note 103) p. 379.

109 *Op. cit.*, p. 382 ff., discussing definition of law and policy at Community level (where there are no national rules) and total, optional, partial, minimum, and alternative harmonisation; Barnard, *The Substantive Law of the EU* (*supra* note 89) p. 626 ff. identifying exhaustive (full), optional, and minimum harmonisation.

110 The Geneva and Vienna Conventions on Road Traffic (*supra* note 92).

of the social security benefits mean that there is little or no political interest in harmonisation.[111]

In spite of examples in public international law, the use of harmonisation as a tool for cooperation is to a large extent associated with EU law. Since the foundation of the European Economic Community, harmonisation in its varieties has been an important tool for administrative integration and for the completion of the internal market. Harmonisation rules are mostly found in directives. Depending on the form of harmonisation used, EU law may thus give room for national particularities when introducing harmonisation in a certain field.[112]

In many instances the harmonised rules relate to substance, rather than administrative procedure. To a large extent, international administrative cooperation – both under EU law and public international law – is based on the idea that common (*i.e.* harmonised) rules are implemented by the participating states using their domestic administrative structures and rules. Under EU law, this is referred to as the principle of procedural autonomy.[113] Despite this, not least in EU law, there are many examples of procedural rules attached to the substantive rules found in conventions and EU secondary legislation.[114]

The use of the harmonisation tool implies an adaption of national administrative law to the interest of international exchange. For obvious reasons, this adaptation mostly relates to technical, detailed aspects of special fields of administrative law that might seem uncontroversial. However, it should be remembered that such technical rules might have significant consequences. The use of harmonisation on the international level has therefore been widely discussed in legal and political debate.[115]

### 3.4 Application of foreign administrative law

Theoretically speaking, instead of using harmonisation, a legislator could consider using the application of foreign administrative law as a cooperation tool. After all, the application of foreign private law is one of the fundaments of private international law. Why not, then, let administrative authorities apply the administrative law of another state in administrative matters related to that state?

Under a system based on the application of foreign administrative law in the same way as in private international law, an example from social security law could be the following. A Portuguese citizen who has moved to Sweden after many years of work in Portugal applies for social security benefits at the Swedish Social Insurance

111 In the EU context, *cf.* Pennings, *European Social Security Law* (*supra* note 79) p. 281 ff. concerning the harmonisation possibilities under Articles 151–161 and 352 TFEU.

112 Barnard, *The Substantive Law of the EU* (*supra* note 89) p. 624 ff.

113 On this principle, see Hofmann *et al.*, *Administrative Law and Policy of the European Union* (*supra* note 30) p. 10 ff.

114 For examples in the reference fields in EU law, see Article 8(3) of Regulation (EC) No 1073/2009, *supra* note 65 (concerning time-limits for taking a decision on an application for an authorisation); in an international convention Article 5 of the Nordic Convention on Social Assistance and Social Services, *supra* note 45 (on the use of languages of other Nordic states for contacts with national authorities).

115 See further Slaughter, *A New World Order* (*supra* note 5) p. 59.



Agency. The agency would then have to decide if it has jurisdiction to decide on the matter. If it concludes that it has jurisdiction, the agency would then have to find and apply the relevant rules in Portuguese social security law. Eventually, if the individual is entitled to a benefit under Portuguese law, the Swedish agency would have to pay it to the individual according to the benefit levels of Portuguese legislation.

In reality, however, there are very few, if any examples of arrangements on such rules. In the reference areas studied in this article, there are no clear examples of application of foreign public law. Under the traditional views linked to the territoriality principle, this kind of rule was thought to be theoretically impossible.[116] A traditional explanation for the non-application of foreign administrative law – and indeed foreign public law in general – is the idea of the close link between state, territory, and public law.[117]

The un-political character of private law might very well be disputed with today's view on the relationship between law and politics. However, it might be noted that the relationship between the parties to a dispute under administrative law differs from the one under private law. In the administrative setting, the state, formally or practically, often is a party to the conflict. In the social security law example above, the concept of a state applying foreign administrative law, but using its own resources for funding the benefits, is undoubtedly problematic.

Also besides the theoretical reasons for not applying foreign administrative law, there might be very good practical reasons as well. Administrative law differs from private law in the sheer amount of rules and fields covered. Owing to historical, political, and economical experiences there are also considerable differences as to the goals and levels of protection of administrative law. The application of foreign administrative law might therefore give rise to practical problems, not least since administrative rules in many cases are applied by sectoral experts without general legal training. Quite simply, it would be practically difficult for the public officials to find the relevant foreign legal material and to apply it properly. Furthermore, in comparison to private law, the traditions of comparative studies in administrative law have been rather weak.[118]

116 *Cf.* G. Biscottini, "L'efficacité des actes administratifs étrangers," 104 *Académie de droit international, Recueil des cours* (1961) pp. 638-697, 652.

117 See *supra* section 1; M. Akehurst, "Jurisdiction in International Law," 46 *British Yearbook of International Law* (1972–1973) pp. 145-257, 181 ff.; for the historical roots of this view, *cf.* F.C. von Savigny, *System des heutigen römischen Rechts. Band VIII* ([1849] facsimile, Darmstadt: Hermann Gentner, 1956) p. 32 ff. (§ 349).

118 However, for comparisons of general issues of administrative law, see Schwarze, *European Administrative Law* (*supra* note 7); R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (3rd ed., Cambridge: Intersentia, 2012); S. Rose-Ackerman & P.L. Lindseth (eds.), *Comparative Administrative Law* (Cheltenham: Edward Elgar, 2010).

## 4. Conclusions

The survey of different forms of administrative cooperation beyond the state has showed several functions of the legal tools discussed. Firstly, especially the mechanisms discussed in the network perspective have a clear function of helping national administrations carrying out their tasks in a better manner. Examples are found within the framework of international organisations with administrative tasks and particularly in the described enforcement and information networks and composite decision-making structures. In contrast, the tools discussed in the conflict of laws perspective bridge gaps between national legislations, thus serving as a counterpart to private international law.

However, the discussions above have also indicated that the network tools and the conflict of laws tools are interlinked and to a certain extent presuppose each other. International and EU rules on harmonisation are often the result of the work of cooperation within international organisations with administrative tasks and administrative networks. Also, recognition and coordination may presuppose harmonisation and network structures to work in practice. In reality, the states would probably be reluctant to accept foreign decisions if they were not somewhat similar to domestic ones. The grounds for this are of course to maintain protection levels in the own state and to prevent unfair competition by lower standards. The other way around, harmonisation may create a more level playing field and thus pave the way for recognition or coordination regimes. Further, concerning EU law, we find that the composite decision-making procedure is linked to rules on recognition of foreign decisions. This seems logical since the recognising states thus have the possibility of influence through the composite decision-making procedure.

The use of the tools, and the combination of several tools in special administrative fields, make possible a balancing of the conflicting interests of international cooperation and national self-determination. The possibilities of cooperation through the conflict of laws tools range from coordination, keeping the national structure more or less intact over recognition to harmonisation, with ensuing changes in substantial national legislation. In this way, these tools provide for different degrees of transfer of public power. As has been touched upon, the most far-reaching tool in this context, application of foreign administrative law, is very seldom used. The network structures in the reference fields discussed, with public officials meeting in EU committees and other international settings, may provide for a better mutual understanding and trust necessary for the tools to work in practice.

In the fields discussed above, it is difficult to see that administrative action entirely leaves the connection to the state. Rather, in the discussed examples, various structures of cooperation mean that national administrative bodies engage in international contacts as an important part of fulfilling their tasks in the national systems. In this way, problems well-known in national administrative law also arise in cross-border administrative cooperation. Safeguarding the rights of individuals affected by



international administrative cooperation structures – for example, concerning data protection, and ensuring transparency and accountability in the decision-making – is an important challenge to administrative law cooperation beyond the state.

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# Administrative law beyond the state

*– Nordic perspectives*



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