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Erzsébet Csatlós

CONTEMPORARY ISSUES OF PUBLIC ADMINISTRATION – GLOBALISATION

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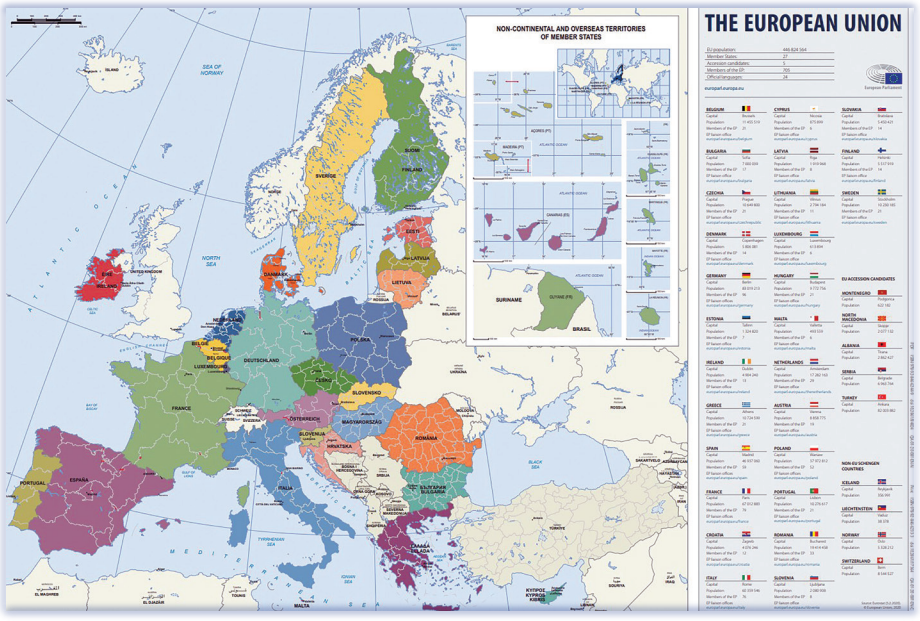

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Content

Foreword

The present e-material is a course book for those who wish to broaden their minds at the crossroad of public administration, international law and European Union law.

States have many tasks to do, and their public administration serves all these purposes in a way that conforms to the constitutional values and also the traditions of every State. However, several challenges are of transboundary nature that require the cooperation of the States, and all of these have a necessarily impact on the tasks of the states and their public administration. This course wishes to give an insight into these challenges from the point of view of public administration and public administrative law.

Each chapter is designed to help to acquire basic knowledge but also helps with background information and explanation with examples. Hyperlinks are also hidden in the text (marked with blue) to drive your attention to gain further information on several aspects and institutions of the topic. The literature collected at the end of each chapter tries to help with online available sources while the definitions, the exercises and the test of multiple choices aim to help the student to test their acquired knowledge. This publication does not replace the course lectures but complements it in a way that all of you, no matter what educational and legal or non-legal background you have, can catch up and find useful information on some contemporary issues of public administration in our globalised world.

Enjoy your reading, broaden your mind and focus on the basics to gain advanced profit!

Best regards,

The Author

I. Public administration of a State

1. What is public administration?

Public administration is as old as human civilization. Administer is an English word, which is originated from the Latin word '*ad*' and '*ministrare*'. It means to serve/ to manage; ***administration*** stands for an activity of different motion, choices, and organization of how they should be done to achieve a certain aim. ***Public administration*** is the same, just the aims to be achieved are common aims of the society decided by the commons and achieved by the commons with the leadership of a group elected by the commons.

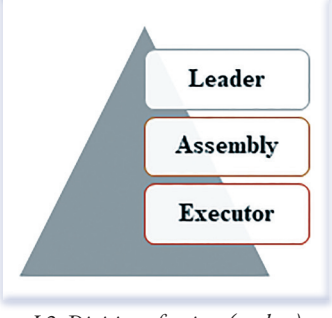
> *Administrative law and public administrative law are often used as synonyms although, in strictu sensu, they are not the same. The 'administration' is a word with Latin origins meaning 'to serve', or 'to manage affairs'. In this sense, administration means the management of the affairs of an organization. Public administration means governmental administration, it is the accomplishment of politically determined objectives, but public administrative law deals with the decision-making of the administrative units of government.*
> *Administration and management are often used as synonyms although they are not the same: administration refers to a process of effectively influencing an entire organization by formulation of plans, framing policies and setting objectives (decisive function) at the top level, while management states for a skill of getting the work done from others, thus put plans and policies into actions at the lower level (executive function). Administration, therefore, englobes management.*

In history, the common aims, the notion of 'common' and the leader who had the right to decide on the priorities/aims (*public goals*) and on how to achieve these common aims have been constantly changing, so as the *organisation* which was settled to realise the background of execution, the *staff* who performed the tasks towards the common and the *material* and *procedural rules* that prescribed how it shall be carried out.

I.1. Role of public administration (author)

2. A brief introduction to the history of public administration

Since people live in communities and get together to do something together to achieve an aim[1], public administration exists. In primitive communal society, ***in the time of cavemen***, this common aim that gets people together was connected to survival: to hunt together, defend their community, gather berries together, etc. Performing these common activities was a very basic form of public administration. A more developed form of organisation appeared when the people started to be divided (***the division of society***) according to their mission in the common activity:



I.2. Division of society (author)

- there were those, who were wise enough to draw up plans and alternatives (***assembly***);
- there were a few/only one (***leader***), who could decide upon common aims and could choose among the priorities and plans elaborated by the wider (and wiser) group of people and

[1] You can read more in this topic in: Peter KOBRAK: *The Logic of Caveman Management*. Public Administration Quarterly, 15(4 Winter) 1992. pp. 476-495.

- the largest number of the society were those who realised the common aims according to the wishes and executor (***executors***), who finally performed the activity to achieve the aim by following the orders of the leaders.

This separation of the classes of people was the result of a long development procedure and does not always mean a clear and impermeable line between the segments, but the ancient societies were built upon these levels.

> *For example, in Egypt: there was a leader (pharaoh) who was the ultimate source of decisions, and priorities, and there were a few people who helped him/her in this task (advisors, tax collectors, treasurers, army leaders of high rank), but most of the society was the executor, who in fact, did the job to achieve the aim. In a very simplified schedule: the pharaoh decided to build a pyramid, according to the highest advisors, he decided how and when to build it, his pages collected the money and organised the work according to the pharaoh's wishes and the workers put one stone on the other.*

In history, rules were supported not only by their loyal nobles but by ***professional advisors*** who were the master of certain issues (writing, financial knowledge) and often gained knowledge in other parts of the world and brought home the know-how (architecture medical issues, agricultural or military science, etc.). These positions around the rulers are the ancestors of the ministerial positions of today and the roots of professional administration and civil service.

> *Professionalism has always been important for civil service. In ancient China, an imperial exam based on merit was designed to select the best administrative officials for the state's bureaucracy. The Caroling Charles the Great sent his loyalist to learn abroad and erected a public servant school in Aachen. In the 17-18th century, the Habsburg Maria Theresia, and her son, II Joseph were famous for building up a professional State administration and investing in professional training. Besides, the clergy was always nearby and for centuries, clergymen were the ultimate sources of literacy, knowledge of sciences and education.*

Sometimes people revolted against the ultimate rulers and expresses their negative sentiments against the practice that they have no world in deciding upon the common aims, which usually brought them nothing but suffering (wars,

more taxes) and they are always just the ones who suffer from the decisions of the few rich ones at the top of society, and the executor of their wishes. The major common aims of these times were defending the territory, gaining new territories and everything the leader level of the society invented in the glory of the ruler (they lived in castles and ate fancy food, while most of the people were starving and lived poorly). In history, the strength of rulers always changed, and it depended on the supportive nobles and the relationship with the clergy. In the case of weak rules, the nobles had a great influence on decision-making, and vice versa: a strong rule could be independent of everyone (absolutism). The major change happened in the ***Enlightenment Age***. Great thinkers appeared and started to spread the idea that the source of power is the people and not the ruler. The people have the right to decide upon the decisions they execute, and they have the right to elect the one who leads them. The great famine emphasized people's rebellion and the ***Great French Revolution of 1789*** opened a brand new chapter in the **history of public administration** that leads to the birth of the real public administrative law.

3. The new chapter after the end of absolutism and the birth of public administrative law

Strong rulers were independent and could do whatever they wanted. Although in history, they often had to get support to be able to stay in their position and let others have a say in decision-making and ensure them a better place in society than before. (Do you remember the ***Magna Charta of 1215***? It was a document of such guarantees)

For a long time in history, there was one person who decided what the common aims and tasks are and how they would be organised, administration depended on the ruler and the law that governed it was also in the hands of the highest level of society.

With the abolishment of absolutism and the revolutions of Europe (***People's Spring or Spring of Nations***), people gained more power than ever: they are no more ridden lower part of society but active factors (***democracy***). The concept of ***separation of powers*** is linked to this change in society. People cannot practice their power directly, so they elect a group of people whom they feel to be competent and trustworthy to represent them and their interests (*assembly or*

parliament), and a leader (*government*) was either erected or the former monarch was prescribed but with restricted powers by the assembly. The government is then responsible for executing the decisions of the 'commons' represented by the assembly. To avoid the unfair practice of power, the *judicial branch* was settled to serve justice. Then, this decision-making body was responsible for the build-up of the organisation to serve the realisation of common aims. Therefore, the people could basically but indirectly decide upon their faith, common aims, and their realisation. The elected representatives could be changed in case of insufficiency as they shall perform their task according to predefined norms without the possibility of autocracy which was the previous regime's main feature. As for the functioning of public administration, it shall also be created according to predefined laws and regulations and shall perform its duties as it is prescribed by law. Law shall govern the society and not tyranny. (***rule of law***).

The traditional nature of public administration has been changing very rapidly in modern times. It is the consequence of the changing role of the economy, society, culture and the new requirements of public administration. At the beginning of the 21st century, the public administration is expected to be not only capable of providing former basic functions (law and order) but it is expected to play some new roles. The number of common goals has increased in different areas to serve the well-being of society. Public administration has grown to be the biggest system of society with many tasks from the classical state functions (internal-external defence, economic tasks) to welfare state functions (education, cultural, medical and social benefits etc.). Today, the way that a State serves these interests (choosing priorities) depends on its economic background and traditions.

> *There are states where education is a public task and free of charge from primary school to higher education, you pay for these from your taxes; there are states where you shall pay for higher education. Or there are states where medical care is paid by taxes and available for all who contribute while other states maintain only a basic level of service from taxes and people are entitled to decide which private assurance system they choose and be part of it to get complex medical care, etc. If they do not like the system, at the next elections, they can vote for that party that promises a better one and in case of winning, they can establish a new type of social benefits system as a leader who chooses the priorities.*

Public institutions (central, territorial and local organs) are also expected to play an initiative, regulative, and controlling role as well. In this way, the subsystem

will be able to help the competitiveness of the economy, the improvement of society and the well-being of citizens.

4. Public administration and public administrative law in a democratic society nowadays: the rule of law

There is no uniform and generally accepted definition for public administration; it depends on the examination's point of view.

Public administration is the realisation of common tasks (preparation of tasks and execution of tasks defined and regulated by the legislative) in a society by a specific organisation of authorities acting by public power (they have the right to enforce their decisions), unique civil service staff, and via special procedures governed by law. Public administration is the law in action; created and bound by an instrument of the law.

The **subordination of public administration to the law** is a requirement deriving from the rule of law.

> *The requirement of the subordination of the administrative activities to law means that public power possessing administrative bodies with public power, intervening in social relationships, may make their decisions within the organizational framework of law, governed by procedural law and within the framework set by substantive law regulated by law in a foreseeable manner.*

The **main task** of public administration, in general, is:

- *the preparation of legislation*: that is how the preferences of the government (leader) are ensured; alternatives are elaborated,
- *execution of legislation*: it ensures the realisation of the decisions taken by the legislator to formulate the society and the behaviours and by continuously verifying the success of their mission, they can prepare a new draft for legislation for better serving public aims in case of problems.

To perform these tasks, it is entitled to carry our **different types of activities**:

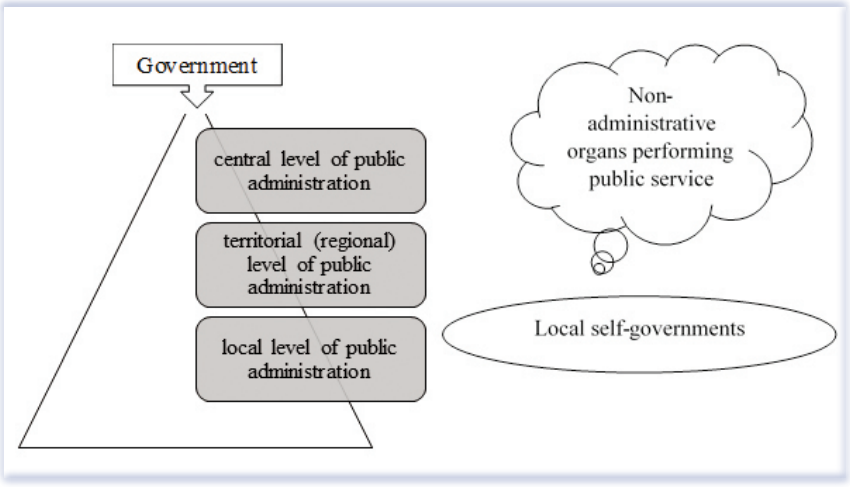
- it may establish *organs* and regulate their functioning to carry out tasks;
- it may produce *executive legal norms* (below legal acts of the parliament);
- it may act within *public power* (administrative authorities).

The first two are the prerogative of the highest level of administrative organs, while the latter features the territorial and local administrative levels which are closer to the ultimate subjects of law, the individuals.

The convenience of the activity and functioning of public administration is supervised and controlled by the *judiciary*. It means that the legislative activity of public administration is supervised by competent State organs (mostly by constitutional courts) and the functioning and decisions issued by administrative authorities are subject to judicial review to ensure conformity with legal norms (i.e. an individual has the right to submit a claim to court for a review of the individual decision of an administrative authority if the individual feels that the administration breached the law – material and/or procedural – while it formulated its decision pro or against the individual). In many states, there are alternative mechanisms, too, to fight against maladministration to disencumber courts in simpler cases and to help administrative power follow a proper practice (i.e. the role of ombudsman; different conciliatory or mediation mechanisms).

The **structure of public administration** depends on historical traditions and the current political choices of a State. State administration is hierarchical (thus via the direction of the upper level to down level organs, the government can ensure uniform application of law in every part of the country) and subdivided from central level (ministries, top-level organs of different tasks) to territorial (regional) and local level, these latter levels ensure task performance as deconcentrated units of a higher-level organ.

In most states, the local community has the right to handle their common tasks autonomously, without the interference of the government (*local self-government*). Their rights and level of autonomy also depend on the state 's tradition. There are also *non-administrative organs* that perform common tasks and contribute to them in different forms, however, they are not administrative organs (either not state-established organs, or they are established for different purposes and only a part of their activity is public service) It is also a choice of the State what is regulated under such category and what their status is. The relationship of such organs with the public administration and the government is also on legislation and the interference of government into the freedom of these organs usually depends on the level of state financial support.



I.3. Simplified structure of public administration (author)

Public administrative law in a broad sense covers all legal norms that are related to public administration; therefore, the norms for

- the organisation of organs and authorities of public administration (organisational or structural law)
- the civil service (civil service law)
- the details of common goals (material law)
- the procedure that leads to the realisation of common tasks including procedural rights and obligations of the parties (procedural law)

are different parts of public administrative law making it the biggest part of public law.

Public administration shall conform to the requirements rooted in the concept of *rule of law*. It means that public administrative law shall cover all mechanism, process, institution and practice that supports the equality of all citizens before the law, secures a non-arbitrary form of government, and more generally prevents the arbitrary use of power including the possibility of checking, repairing and sanctioning the non-compliance.

> *In general, the rule of law implies that the creation of laws, their enforcement, and the relationships among legal rules are themselves legally regulated so that no one – including the most highly placed official – is above the law. The legal constraint on rulers means that the government is subject to existing laws as much as its citizens are. The rule of law requires public administration to function in a way that respects legal certainty and predictability of administrative actions and decisions, which refers*

to the principle of legality as opposed to arbitrariness in public decision-making and the need for respect of legitimate expectations of the individuals. This latter is based on openness and transparency, aimed at ensuring the sound scrutiny of administrative processes and outcomes and its consistency with pre-established rules. On the other hand, accountability of public administration to other administrative, legislative or judicial authorities is the key to ensuring compliance with the rule of law and this leads further to other principles rooted in the rule of law principles, including the independence of the judiciary and the effectivity of judicial remedy. Last but not least, the efficiency in the use of public resources and effectiveness in accomplishing the policy is rather economical than the legal requirement, however, the responsible management of public funds and the control over them is also a bastion of democratic values.

Literature

Ewan Ferlie – Laurence E. Lynn Jr., – Christopher Pollitt (eds.): *The Oxford Handbook of Public Management*. Oxford University Press, Oxford, 2007.

Mary Liston: *Governments in Miniature: The Rule of Law in the Administrative State*. In: Colleen Flood – Lorne Sossin (eds.): Administrative Law in Context. Emond Montgomery Publishing, Toronto, 2008.

Significant definitions

Administration	a process of effectively influencing an entire organization by the formulation of plans, framing policies and setting objectives (decisive function) at the top level of the organisation
Management	the skill of getting the work done by others thus put plans and policies into action at a lower level of an organisation

Rule of law	the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government and more generally prevents the arbitrary use of power
Public administration	is the realisation of common tasks in a society by a specific organisation of authorities acting by public power, unique civil service staff, and via special procedures governed by the law
Public administrative law	legal norms that are related to public administration; therefore, organisational or structural law, civil service law, material law, and procedural law

Exercises to test your knowledge

1. Choose the statement to the terms!

Management	Administration

a) lower-level activity
b) decisive function
c) systematic way of managing people and things within the organization

What defines the management and administration related to a)-b)-c) statements?

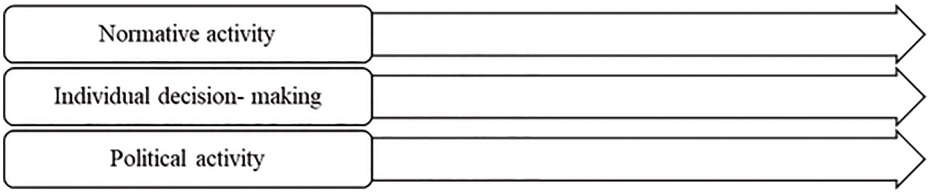
2. What influences the task of public administration and how?

Dynamical influencer	Static influencer

a) economy of a State
b) cultural traditions
c) internal security challenges

d) international relations
e) geographical conditions

3. What does public administration do to determine the behaviour of persons?



Find examples!

Which level of administration serves these activities?

Test of multiple choices/quiz

1. **……. is the formulation of plans, framing policies and setting objectives, while …… is putting plans and policies into action.**
   a) Administration; management
   b) Management; administration
   c) Public law; civil law

2. **The public administration of a State is influenced and determined by social challenges, internal and external influences, and the economic background of the State.**
   a) Yes, it is true as these circumstances have a strong influence on the tasks of public administration.
   b) No, public administration is stable and does not accommodate the needs of society.

3. **Finish it with a true statement! The history of public administration …**
   a) is old as human civilisation.
   b) is the achievement of the Enlightenment Age.
   c) is dated from the establishment of the rule of law principle.

4. **Finish it with a true statement! The rule of law is traditionally understood as the supremacy of the law in the regulatory legal acts system…**
   a) and it has no further implication on public administration.
   b) and it is a legal doctrine that forms the fundaments of constitutions but has not a direct impact on the administration.
   c) thus, it is a major value of a democratically functioning public administration and means the requirement of the subordination of the administrative activities to law.

5. **Finish it with a true statement! Law of public administration…**
   a) is the structural law of public administration.
   b) covers the structural and procedural law of public administration.
   c) covers the structural and procedural law of public administration and also includes the law of civil servants.

6. **International relations of the State are not determinant for the functioning of public administration.**
   a) True.
   b) False.

7. **Traditions and geographical features of a State are not static factors of public administration.**
   a) True.
   b) False.

8. **Material rules for the determination of social relations are beyond the notion of public administration.**
   a) True.
   a) False.

9. **Public administration shall be determined by the rule of law to avoid the abuse of power.**
   a) True.
   b) False.

10. **Public administration is built upon the same method in each country.**
    a) True.
    b) False.

II. Lifting public administration to supra-state level: internationalisation – globalisation – public administration

1. Trans-boundary challenges: common aims by the community of States

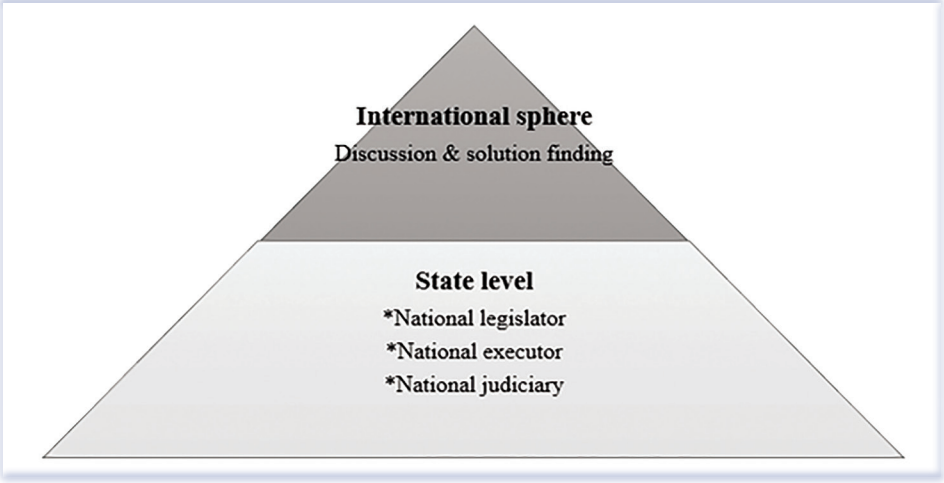
Some factors or happenings influence the State from outside State borders. Dealing with such challenges cannot be ensured by purely individual internal solutions; collaboration and discussion are needed to agree upon those factors which determine the common aim and the task of domestic public administration. Settling the common aim is often shifted to a level above States into an international sphere.

> *Some circumstances cannot be individually dealt with and suppose collaboration with: warlike crisis, environmental disasters, climate change, etc.*

Communication and establishment of a relationship between different people, and nations along interests was a constant feature of maturing civilizations, but the modern, institutionalised form of cooperation upon common interests is the product of the 20th century. *International organisation*s are structured forms of idea-exchange between more than two participants upon a formal agreement and often with formal common bodies (secretaries, assembly and/or smaller decision – making body) to establish together a commonly accepted sum of interests in the form of decision or a convention/agreement to which States can join by signature.

> *The institution of the consul was known to the Greeks and the Romans and its essential task was to watch over the commercial interests of the citizens in the territory of another polis. The representation of State interest in the form of ad hoc ambassadors and then in an institutionalised form of diplomacy was created after the State concept was established. By the 15th century, the exchange of representatives has started to dominate in the argumentation of common aims of different parties (States) and the formulation of political, commercial and military alliances along with the maintenance of friendly relations. As early birds, ad hoc conferences (like the 1815 Vienna Conference) were convoked for the solution of the political problems arising from international intercourse, but in the nineteenth century, an impassive development of associations or unions, international in character, between groups other than governments. This was followed by*

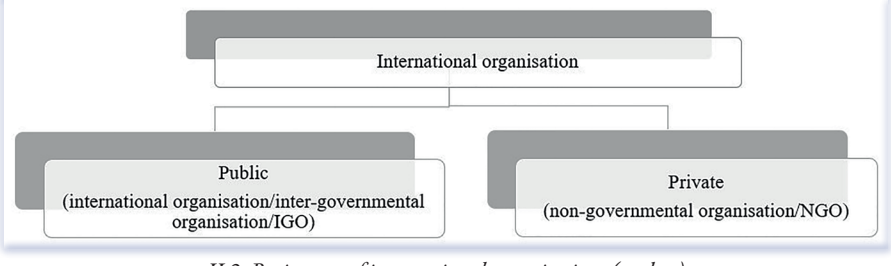
similar developments between governments themselves in the administrative rather than the political field. The roots of simple international organisations date back to but the ancestor of nowadays type in the 19th century. The most obvious area in which international cooperation gained place was that of transport and communication and they were called administrative unions. This term was used until the middle of the 20th century for special-purpose governmental associations set up in the second half of the 19th century. The purposes of these unions were the international regulation of postal services, railroad transportation, telegraph communications, and radio and the international protection of copyright in science, technology, literature, art, public health, and other fields. One of the first international administrative unions was the International Telegraph Union set up in 1865. All the international administrative unions shared several features. They were based on multilateral conventions, treaties, or agreements having the usual permanent character—that is, intended for a considerable length of operation—and they all had permanent bodies (bureaus or commissions). The functions of the bureaus were, as a rule, limited to purely informational tasks—to collect and publish appropriate materials, provide references, and also to serve as intermediaries between member states. The bureau of the International Union of Railroad Transport was an exception; it could, on the expressed wish of one of the parties, settle misunderstandings between international railroad administrations. In the 20th century, the number of international administrative unions increased greatly. When the League of Nations was set up, the imperialistic circles which held leading positions in the league attempted to use the international administrative unions to dominate international relations. But these attempts were strongly resisted by many participants in the international administrative unions because a great number of them were not members of the league. The majority of international administrative unions of that period remained independent organizations and merely exchanged information with the Secretariat of the League of Nations. The term "international administrative unions" went out of use in the middle of the 20th century. The present-day international organizations with similar roles (there are more than 200 of them) are called international organizations on special questions, and some of them are specialized institutions of the UN.



II.1. The scheme of international cooperation (author)

2. Types of international organisations and public administration

There are two basic types of international organisations and the role of public administration varies accordingly.



II.2. Basic types of international organisations (author)

Speaking about international organisations in general, the term covers ***inter-governmental international organisations (IGO)***. These are public establishments that may be formulated along with different principles as there is no universal rule for their creation thus have more or less the following characteristics:

- *establishment by* some kind of *international agreement* among states (under the classical rules of international law that governs the relationship among them);
- *establishment under international law* (that regulates international relations of States);

- possession of what may be called a *constitution* (also international law in nature);
- possession of *organs* which function relatively independently from its members (functioning according to the international law source that created them);
- generally, but not always an exclusive *membership of states or governments*, but at any rate predominant membership of states or governments (given the fact that only officials in charge of States are empowered to represent their government and participate in assuming obligation on behalf of it; the activity of private parties are beyond State power and the legal capacity of participating international organisations depends on the creating States, see later);
- *possible* possession of international *legal personality* (distinct from that of their member states – it depends on the creator States what competencies they vest in the organisation)

Typical IGOs are the *United Nations* (UN), *Organization for Security and Co-operation in Europe* (OSCE), *Council of Europe* (COE), *Organisation for Economic Co-operation and Development* (OECD), *North Atlantic Treaty Organisation* (NATO) or the Arctic Council which is also open for NSA participants.

Some international organizations now accept non-states as full members, while others ensure only observant or consultant roles for them.

> *The International Union for Conservation of Nature (IUCN) is a membership Union uniquely composed of both government and civil society organisations. It provides public, private and non-governmental organisations with the knowledge and tools that enable human progress, economic development and nature conservation to take place together.*

Non-governmental organisations (NGOs) or private international organisations are not established under international law, nor have exclusive or predominant state or governmental membership, they are usually associations of any other non-state actors (NSAs); for example *Greenpeace*, *World Wildlife Fund International*, *Amnesty International*, or *Médecins Sans Frontières*.

> *Being an NGO does not mean powerless l'art pour l'art work. It is often an NGO that draws attention to violations of international law (treaties, conventions) by States. More generally, NGOs participate in monitoring*

activities, either directly or indirectly, and may trigger mechanisms of compliance or enforcement. Their capacity to gather information, provide expertise and mobilize public opinion makes NGOs powerful actors in the implementation of international law, even in situations of armed conflict, but NGOs are more often relied on in environmental and human rights issues.

In history, the two types emerged, developed and co-existed parallelly.

On the necessity of river shipping, several river commissions were established to manage the Elbe (1821), the Douro (1835) the Po (1849) and, after the end of the Crimean War, the European Commission for the Danube in 1856. Regulation of other modes of transport and communication quickly followed: in 1865 the international Telegraphic Union was established, followed in 1874 by the universal postal Union and in 1890 by the International Union of Railway Freight Transportation. Today both unions fall under the umbrella of the United Nations system of organizations which is an international organisation of States.
In other areas, in 1903 the International Office of Public Health was created, and in the field of economics the establishment of the Metric Union (1875), the International Copyright Union (1886), the International Sugar Union (1902) and the International Institute for Agriculture (1905) may be mentioned as early forerunners of a present-day international organization. Meantime, organizations started to be established by private citizens, to deal with international issues. In 1840, the world Anti-Slavery Convention was established, and in 1863 a Swiss philanthropist, Henry Dunant, created the Red Cross in 1863, for example.

Based on the founders and parties, there are different international organisations. The founders determine the **legal status** and the competencies of the organisation.

(a) the simplest and most common way is when an international organisation arises from the agreement of ***States***.

The most commonly known example is the United Nations Organisation which expresses this nature by the name.

(b) there are organisations to which ***sub-State organs*** may also join to establish international bodies;

> *National bodies for the regulation of financial markets are associated with the International Organization of Securities (OICV - IOSCO); national insurance regulating bodies come together in the International Association of Insurance Supervisors (IAIS); the International Competition Network (ICN) brings together national competition authorities; the Financial Stability Board (FSB), promoted by the finance ministries and central banks of the G7 countries, brings together finance ministers and heads of the central banks.*

(c) some organisations are made up neither by States, nor by lower level, sub-state entities, but ***by other organizations***, acting alone or together;

> *For instance, the Commission on Phytosanitary Measures (1992) was established by the FAO; the International Centre for Settlement of Investment Disputes (1966) was established by the World Bank.*

(d) ***different organizations get together*** to establish another organization.

> *The Financial Stability Institute (FSI) was set up in 1999 by the Bank for International Settlements and the Basel Committee on Banking Supervision. The Codex Alimentarius Commission (1963) was established by the FAO and the World Health Organization (WHO – 1948). The World Trade Organization (WTO – 1994) and the United Nations Conference on Trade and Development (UNCTAD – 1964) together established the International Trade Committee.*

3. Public administration and international organisations

The law of international organizations can be described as special: it is always *lex specialis*, a law proper to each organization, as there are no general implications or universal international organisation law. Public administration in connection with international organisations shall be interpreted in two major directions:

3.1. Administration of the international organisation

Public administration of international organisations is supposed to mean the executive of the establishment which is not equivocal to the notion that exists in States' public administration. In the case of almost all international organisations, the executive power stays in the hands of the participating States and the public administration and public administrative law of an international organisation can be interpreted only in a narrow sense: the organisational and procedural aspects of the created bodies for maintenance of the work of the organisation and its staff. Neither international administrative law, under the terms of domestic one, exists, nor public administrative law of international organisations can be interpreted in the same way as in States.

> *States are recognized actors in international relations. According to its constitutional norms, each State has an internal, domestic order which describes the balance of power to serve the people. Therefore, in international relations, only those State organs (and officials) can represent the State and assume obligations on behalf of the State who are empowered to do so by basic domestic norms. Consequently, they are accountable for their acts. It follows, that when States establish the international organisation as a forum for common interest exchange, it is upon the will of States what competencies they give to the international organisation, how detailed regulation they ensure for its organisation and functioning and how they wish to ensure an independent administration for it.*

In most cases, in classical international organisations, the preparatory work and the executive functions stay in the hands of the State and its public administration. Thus, the public administration of an international organisation is served by the domestic administration of the participating States. These are normative rules on the formulation and representation of State interest and then, after the common interest is created, ensuring its execution. The incorporation of common achievements into domestic legal order is mainly the duty of the legislator, although once the international obligation is a part of domestic law, the task and duties of the public administration as executive power (organisation, normative tasks, decision-making) are the same.

II.3. State's administration and international organisation (author)

3.2. Influence of international organisation on the public administration of the State

International organizations are created in the interests of States, and the results of common work may be manifested in different forms with different legal effects: political declarations, decisions of its organs (under various names like opinion, recommendation,) and normative texts that are open for the signature of States (treaty, convention) so they can assume the commonly accepted solutions for a problem as an obligation. Being party to an inter-governmental organization may be a pressure to accept its achievements as an obligation; however, the rules of international law still ensure the freedom of choice. A State signs and ratifies it or not or chose to follow a recommendation or not. This is the classical ***Westphalian model*** of international relations.

Currently, the international legal order is based on the Westphalian model of sovereignty: States as a subject of international law, by their representatives, take part in the formulation of international agreements to fight common problems. States are entitled to assume obligations to delimit themselves and by doing so, they impose them on the territory and the people under their sovereignty in conformity with their public law framework, including constitutional and administrative law points.

Even if a convention establishes a supervisor organ to detect the implementation process and how State practice supports the success of its application of it, the judicial (and sanctioning) power that characterizes States' internal affairs is missing from the process unless the State made a declaration of subvention to an international court. However, enforcement of the judgment is also challenging and has no features of that within the State.

> *The Council of Europe has many conventions under its roof, however, many failed to be generally recognized even by its Member States. Check! The most famous and generally recognized is the Convention for the Protection*

of Human Rights and Fundamental Freedoms (1949). The breaches of its articles by a signatory State (its organs and authorities) can be submitted to the European Court of Human Rights (ECtHR) in Strasbourg, which is entitled to disapprove a legal application practice in individual cases and sentence a State, but beyond political pressure, it has no further tool for the enforcement of its decision or force the State to change its legislation.

In the case of NGOs, the State is missing behind the establishment procedure and the formulation and shaping of the commonly accepted results, thus the acceptance and incorporation of the NGO achievements are also less (or completely missing) effective than that of IGOs. Therefore, the main efficiency of NGOs does not stand directly in their normative contribution but in highlighting the needs and challenges and manifests in other efforts as a response to problems.

Just think about the work of Greenpeace with calling attention to global problems related to the environment and organising different programs and collecting donations to that end.

3.3. Supranational organizations

In general, all international organizations are supranational: they are establishments beyond state borders and above single states. In a legal sense, the key distinction between a *supranational organization* (SNO) and an ordinary international organization is the scope of autonomous regulatory power that the body may enjoy. The SNOs are inter-governmental organisations and are quite rare as their competencies and level of autonomy are based on the sovereignty transfer of their creating States which has several consequences: they can behave independently of their creators and establish (unwanted) obligations – without the possibility of choice originally offered by international law. Unlike IGOs or NGOs, SNO dominates over States.

SNO is similar to a federation as a form of government (like the USA): the self-governing status of the component states, as well as the division of power between them and the central government, is typically constitutionally entrenched and may not be altered by a unilateral decision of either party, the states or the federal political body.
The European Union (EU) is the leading exemplar of SNO. As a sui generis international organisation, it – via its institutions created by States in

funding treaties – can exercise a whole range of rulemaking, adjudication, and enforcement powers with a comparatively high degree of independence from the States that created it. The EU is not a federation mainly as in the case of the EU, the supranational entity is an international organisation and not a State, lacking the features of statehood.

4. Globalisation and public administration

Globalisation is often used as a word to describe nowadays in many aspects of life, and it shall not be disregarded in the world of public administration either. Traditionally, 'public policy' and 'public administration' have been directly linked to the sovereign powers of the nation-state but globalisation transforms this original thought.

Law has traditionally been the province of the nation-state with powers to regulate social relations and also enforce them. By contrast, international law has been comparatively weak with few effective enforcement powers. But globalization is changing the contours of law and creating new global legal institutions, norms and also new challenges to enforcement and adjudication.

4.1. Globalisation and its implication on common solution finding

Globalisation is a fancy term with plenty of meanings in the literature to describe happenings in the world beyond or above the States. In a broad sense, it has an interpretation (1) as internationalization, (2) as border openness, (3) as a process; (4) as ideology and (5) as a phenomenon, (6) and as both a transcending phenomenon and a continuing process of capital accumulation.

Globalisation is a term used to describe the changes in societies and the world economy that are the result of dramatically increased cross-border trade, investment, and cultural exchange along with, of course, the negative impacts of the positive changes (environmental challenges, for example). Globalization shares several characteristics with internationalization and is used interchangeably,

although some prefer to use globalization to emphasize the erosion of the nation-state or national boundaries. This is the direct impact of the *interdependency* in many ways and many areas of life; therefore, the extra-State factors have a direct influence on the inner-State conditions.

> *States are not isolated entities: they are a part of a community and related to each other in many ways: economically (export-import), politically (alliances and the friendly-hostile relationship has a direct impact on their economic situation, for example), environmentally (effect of industrial activities does not respect state borders, rivers, air and the same soil we live on connects a continent, and continents are connected by the oceans and the air above), etc., so the activity of one State necessary affect and influence the others.*

The world increasingly shares problems and challenges that do not obey nation-state borders, most notably pollution of the natural environment, poverty, and disease and to respond to them, the legal order shall also be adapted to it. Globalisation is dominated by the nation-state, national economies, and national cultural identities; however, it opens the sphere for other actors and that leads to changes in legal perceptions. Other actors also wish to take part in the formulation of the common aims and goals so as the tools to achieve them, therefore they wish to take part in the power that creates them. However, these changes simply do not fit into our well-established classical legal order and administrative law conception.

4.2. Global governance as a concept of a new world order

New forms of diplomacy have been formulating to meet changing needs, and this evolution of the diplomatic process needs to be examined. Global society is still primarily made up of nation-States, each with its own culture, a form of government, national priorities, and a fierce desire to act independently.

Globalisation does not mean the existence of a supranational global government. ***Global governance*** is the sum of individuals and institutions, public and private to manage their common affairs at the supra-State level. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal and

informal arrangements that people and institutions have agreed to or perceive to be in their interest. In this sphere, State is only one among the many other actors.

From the point of view of international organisations and a common set of aims and purposes, *global governance* is *governing, without sovereign authority, relationships that transcend national frontiers*. As Finkelstein says, *global governance is doing internationally what governments do at home*. In this sense, every international cooperation can be categorised as a sort of global governance.

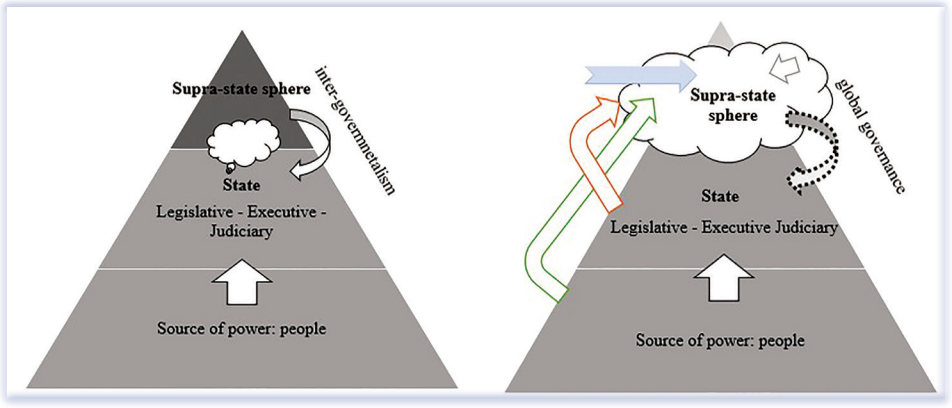
> *These organizations are normally given international functions to perform and, in carrying out their responsibilities, they engage in international relations and practice diplomacy as international actors. The organizations themselves use diplomacy in dealing with states and with other organizations in carrying out their mandates. Civil society mostly in the form of NGOs must also be considered as they play an increasing role in global affairs. Their political power is not comparable to what nation-States, or international (inter-governmental) organizations can do, but their significance in global politics is increasing, they maintain transnational networks, insist on being heard in diplomatic gatherings, mobilise public opinion, and affect the course of international events. Many NGOs are officially accredited by many international organizations. They even participate in the decision-making process of several institutions, such as the World Bank and the Joint United Nations Program on HIV/AIDS (UNAIDS). Besides, some non-sovereign territories are now occasionally invited to participate in international conferences. And some revolutionary movements are heard in international gatherings. Even when distrusted or seen as illegitimate, some of their representatives participate in the diplomatic process, as was the case with the Palestine Liberation Organization. International practices have become highly diversified; what was once unthinkable is now part of mainstream diplomacy.]*

The concept of global governance exceeds the classical scenario which is based on the Westphalian model as recognizes other actors than States at the international level which also take part in the formulation of the commonly accepted solution for a common problem. In many cases, State participation is completely missing, and the competent non-State forum establishes a best- ractice-based standard. In a legal sense, this solution is ***soft law***. Despite its orthodox birth compared to the classical international law acts, its significance and efficiency in practice have been justified.

The term soft law is used to denote agreements, principles, and declarations that are not legally binding mostly because it was not issued by actors that are empowered to create legal obligations. Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court. Hard law is created by the legislator and by those who are empowered to create regulations for example. They are sources of rights and obligations that can be enforced, and the disrespect of their content is subject to punishment. This is because their creator is empowered (usually in constitutional norms) to rule the social relationships. Soft law is, in contrast, a term to use for those legal instruments which may be useful as guidance for interpretation of hard law, but they are not able to create directly rights and obligations, therefore, their enforcement is not ensured, and they cannot be successfully invoked before courts. In domestic law, it is always the highest norm in force that declares what is hard law in a State (usually acts and regulations, decrees) and what is soft law (everything that is not hard law but issued to give a guidance legal application. In international law, the treaties and customary international law are generally accepted as hard law, while decisions of international organisations are usually soft law, their legal force depends on the competency of the international organisation in question and the willingness of the state parties.

Globalization and the rise of global governance are transforming the structure of international law as it does not fit easily into the structures of classical, inter-state, consent-based models of international law; too much of it operates outside the traditional ***binding forms of law***. All governmental functions are not shifted to the international sphere and neither legislative nor judiciary power shifts either, however, the result sometimes shows a controversial image due to their usefulness and/or interdependency pressure.

Compare the classical and the global governance international relations with the help of the following image!



II.4. Difference between classical international cooperation and global governance (author)

4.3. Global administration and global administrative law

With the expansion of global governance, many administrative and regulatory functions are now performed in a global rather than national context, yet through a great number of different forms, ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and domestic administrative action in the context of global regimes. Central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rulemaking are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt.

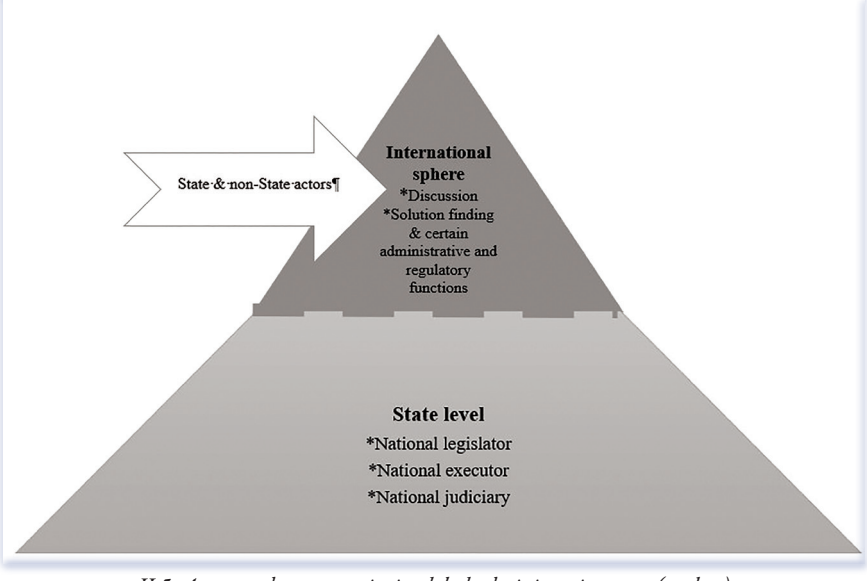
Global governance and **global administration** are not synonyms. Much global governance can be understood as administration, and such administration is often organized and shaped by principles of an administrative law character. Many administrative and regulatory functions are now performed in a global rather than national context through a great number of different forms, ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and domestic administrative action in the context of global regimes. The concept of global governance does not make a difference between authoritative acts and non-authoritative ones; however, this distinction is crucial for the constitutive and limiting functions of public law. Authoritative acts shall be constituted and limited by public law, and the limiting function of public law depends on identifiable actors on whom to impose limitations. As

Bogdandy, Dann and Goldmann concludes, the term *global governance*, therefore, is not enough to describe this kind of public law framework.

The title ***global administrative law*** is challenging to find legal expression for the phenomenon. The phenomenon it describes is not only global, not only administrative, and not only law. [Cassese (2015) p. 466]

- it is *not only global*, because it includes many supranational regional or local agreements and authorities;
- it is *not only administrative* because it includes many private and constitutional law elements (although the administrative component prevails, because constitutions and private regulation, involving "high politics" matters or societal interests, resist globalization)
- it is *not only law*, because it also includes many types of "soft law" and standards.

Global administrative law covers the normative background to the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that apply to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks; to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies.



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Significant Definitions

Diplomacy	a method of interaction between States or other international actors
Global administration	administration of global affairs in a multi-level structure of State and non-State actors

Global administrative law	normative background of global administration: refers to the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that apply to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks; to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies.
Global governance	the sum of the many ways how individuals and institutions, public and private, manage their common affairs
Globalisation	a term used to describe the changes in societies and the world economy that are the result of dramatically increased cross-border trade, investment, and cultural exchange along with, of course, the negative impacts of the positive changes
International organisation	structured forms of idea-exchange between more than two participants upon a formal agreement and often with formal common bodies to establish together a commonly accepted sum of interests in the form of a decision or a convention/agreement to which States can join by signature
Non-governmental international organisation (NGO)	the organisation of non-State actors
Soft law	agreements, principles, and declarations that are not legally binding mostly because it was not issued by actors that are empowered to create legal obligations.
Supranational (international) organisation	an organization with supra-State authority, i.e. lifting of certain State powers to a supranational sphere where the supra-State level can practice it without State-dependency.

Exercises to test your knowledge

1. Try to match the characteristic features and the type of international organisation!

Inter-governmental	Non-governmental	Supra-national

Characteristic features:

a) bodies and organs are created to help the common work
b) State participants
c) State and non-state participants
d) non-state participants
e) sub-state level actors may participate as members/observers/
f) can create soft law
g) can create only soft law
h) can create hard law and oblige States even if they voted against a decision
i) unanimous decision-making procedure
j) majority voting
k) governed by international law
l) based on sovereignty (power) transfer from States which enables the decision-making body to act independently from States
m) possibility of having a legal personality
n) Greenpeace
o) United Nations Organisation
p) European Union

2. Bring examples of how the preparation and execution take place in the case of an international organisation!

Test of multiple choices/quiz

1. Globalisation

a) brings transboundary solutions for transboundary problems within the existing legal order.
b) requires transboundary solutions for transboundary problems within a new legal order.
c) is the reason and the result of transboundary solutions for transboundary problems that challenge the existing world order.
d) is the reason and the result of transboundary solutions for transboundary problems that require a new legal order instead of the previous one.

2. Globalisation

a) is a legal phenomenon.
b) is a social phenomenon.
c) economic phenomenon.
d) is a complex and multifaceted phenomenon that has, inter alia, economic, social, cultural, economic, and legal implications and effects.

3. International organisations

a) are the creatures of the 20th century.
b) exists since Roman times.
c) ' history dates back to the 19th century.

4. International organisations

a) are synonyms of inter-governmental organisations.
b) covers all types of organisations in the international community.
c) are synonyms of non-governmental organisations.

5. Non-governmental international organisations
a) may establish an obligation on its Member States in the form of soft law.
b) lack the legitimate power to establish an obligation on States.
c) cannot establish an obligation on its members.

6. International organisations
a) are autonomous entities as legal persons.
b) can possess legal personality if they are empowered with this capacity.
c) are not legal persons.

7. Non-state actors are not entitled to appear on a global stage and participate as part of the international community.
a) True.
b) False.

8. International organisations are not able to be a member of other international organisations.
a) True.
b) False.

9. Administrative law
a) cannot be interpreted in an international context.
b) cannot be interpreted in an international context the same way and under the same conditions as in an internal context.
c) can be interpreted in an international context the same way and under the same conditions as in an internal context.

10. Global administrative law
a) covers the normative background of international organisations.
b) covers the normative background of external acts of administration.
c) covers the normative background of administrative issues in connection with globalised structures.

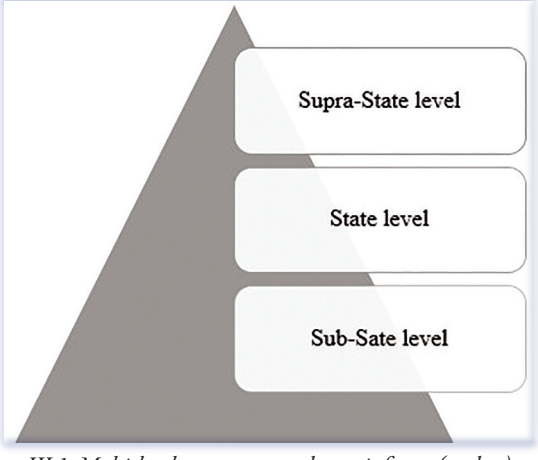
III. The law of global administrative cooperations

1. Multi-level governance and its main types

Interdependence and different kinds of international cooperation in all sorts of issues create a *multi-level governance* phenomenon.

Multi-level governance (MLG) is defined as the vertical (multiple levels) and horizontal (multiple actors) dispersion of central government functions and refers to both, political structures and decision-making processes because of the growing interdependence between governments and non-governmental actors at various territorial levels. Both supra-national and sub-national levels became more relevant. This is due to the (1) *decentralization within states* (see the autonomy of local self-governments for example) and (2) *increasing transnational cooperation* between them. Such impact tends to press apart from the State's public law framework.

> *Within MLG, State governance is heavily influenced by supra-State and sub-State actors and certain State functions may be enrolled at different levels. It does not deny the importance of nation states but also focuses attention and counts on the impact of actors other than the State.*



III.1. Multi-level governance - schematic figure (author)

1.1. The administrative law of the Westphalian model of international cooperation

According to the Westphalian concept, no superior authority is recognized above State and the elements of public power, legislation, execution and judiciary, belong

exclusively to the State. A state, which is built up and functions in conformity with the *rule of law*, enters international negotiations and assumes obligations in conformity with internal rules that determines its activity.

> *International organizations and their Member States constitute multilevel systems and a compound with a multilevel administration. In constitutional theory, it presupposes structures in which law is produced autonomously at each level and public authority is exercised through shared responsibility and the connection between the different levels is ensured by cooperation. Thus, international organisation constitutes different layers of authority combined with the international legal obligation of Member States to cooperate, however, there is no common legal background for that. The constitutional rules of each Member State determine the State actors' activity, but domestic law does not expand on the sphere of the act committed at a higher level, so an institutional administration is required that honours the rule of law and principles derived from it. Law done at the highest level of the system is considered international law and as such, it is supposed to be superior to domestic law but in fact, the legitimizing legal order is always at the national level. As regards judicial power, even if an international organisation disposes of a judicial organ, its jurisdiction is usually strictly limited to developing and interpreting common principles deriving from the common aims.*

Public administration is the performance of the State in action; in the international sphere, it is completed by governmental functions. Therefore, the bridge between national and supranational areas is also built on the requirements of rule of law by the acts of government in conformity with rule of law. In a state, the constitution is the source of how the power is separated and which organ is entitled to practice which tasks and lower-level legal norms are just precise and add the details. However, the basic of the organisation and state functions always lies in the constitutional norms, therefore, to assume the obligation to the state, all actors (state organs and officials) shall act empowered by constitutional norms and all of their activities shall be traced back to the constitutional provisions.

The legitimacy behind the activity and the way the results of negotiations are implemented in practice is thus ensured. By domestic legal norms which regulate the activity, it is guaranteed that the

(a) common, supra national decision-making processes are normatively correct (*empowered organs act within the limits of their power and according to the rules of procedure prescribed while they make the decision*);

(b) and the results of negotiations respond to public interests and values of the *rule of law (the commonly accepted achievement is legitimate in the view of democratic state requirements)*.

The consistency of rule of law principles and State activity in the international sphere then lies in the accountability of its representatives.

The economic and political interdependence of States has reshaped this mechanism while the values of the Westphalian regime remain. Legitimacy and rule of law are often seen as the guarantee in the democratic functioning of public administration which regulates the State in action.

Legitimacy has two aspects which stand in complex reciprocal relations.

- *Input legitimacy* refers to the importance of representation of all relevant interests and points of view when making authoritative decisions if these decisions are to be regarded as legitimate.
- *Output legitimacy* points to the quality of the decisions produced and to their effectiveness in solving the problems that they supposedly address.

At the State level, sub-national actors are often involved in decision-making to share experiences accordingly to public law that settles their status in the procedure and without the intention to take the place of the decision-maker. Therefore, benefits of sub-level involvement are used but input and output legitimacy remain in harmony and can stay in close interaction with each other.

III.2. Traces of legitimacy in international cooperation I. (author)

1.2. Globalised international cooperation and its legal background

In the supra-national sphere, different type of actors appears in various form of cooperation. Typically, international organisations are based on an inter-governmental regime. They have in common that they tend to practice a sort of legislative function, which is legitimate if the international organisation is

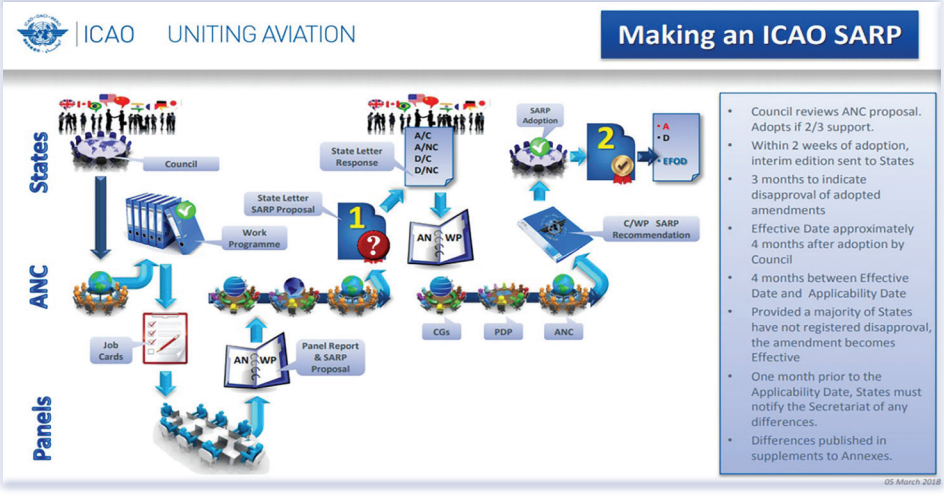
vested with such power (supranational organisation). Otherwise, the defined norm is *soft law*.

States ensure their implementation in domestic legal order. In these cases, the legitimacy of this sort of decision-making is ensured by the State that acts within its powers; follows the proper procedural law to that end, and provides equality of access to courts and other machinery for adjudication as a guarantee.

> *There are many useful achievements of different types of specialised international organisations that are used as orientation points or sources of ideas for domestic legislation or just practice. The World Health Organisation (WHO) guidelines are such instruments: health-related challenges do not respect State borders; therefore, they are supposed to be responded to globally, however, the opportunities and resources are not equally present for that purpose. They articulate and support the role of health authorities in sanitation policy and programming to help ensure that health risks are identified and managed effectively. The audience for the guidelines is national and local authorities responsible for the safety of sanitation systems and services, including policymakers, planners, implementers within and outside the health sector and those responsible for the development, implementation and monitoring of sanitation standards and regulations. The Governing Council is composed of one representative of each Participating State and is responsible for the organisation's maintenance. The Governing Council, after considering the recommendations of the Scientific Council (a) adopt the programme of permanent activities; (b) approve any special project, and (c) decides upon any supplementary programme. Professionalism is ensured by the Scientific Council, which is composed of highly qualified scientists, selected based on their technical competence in cancer research and allied fields. Engagement is a key aspect of WHO's role in global health governance and non-State actors play a critical role in supporting WHO's work to fulfil its constitutional mandate. Partnerships include various organizational structures, relationships and arrangements within and external to WHO to enhance collaboration to achieve better health outcomes. It means collaboration with, inter alia, institutions such as research institutes, parts of universities or academies, which are designated by the Director-General to carry out activities in support of the WHO's programmes; individuals and experts from whom the WHO may obtain technical guidance and support and UN Volunteers who*

make important contributions to UN action in the pursuit of sustainable development. See more by clicking here.
A similar example is seen in the case of the International Civil Aviation Organization (ICAO) which is also a specialized agency of the United Nations. It codifies the principles and techniques of international air navigation and fosters the planning and development of international air transport to ensure safe and orderly growth. The ICAO Council (the governing body which is elected by the Assembly for a three-year term, and is composed of 36 States) adopts standards and recommended practices concerning air navigation, its infrastructure, flight inspection, prevention of unlawful interference, and facilitation of border-crossing procedures for international civil aviation. ICAO defines the protocols for air accident investigation that are followed by transport safety authorities in countries signatory to the Chicago Convention on International Civil Aviation. As the governing body, the Council gives continuing direction to the work of ICAO. It is in the Council that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation. The Council is assisted by the Air Navigation Commission (technical matters), the Air Transport Committee (economic matters), the Committee on Joint Support of Air Navigation Services and the Finance Committee. At the international level, the International Civil Aviation Organization is responsible for setting minimum aviation safety standards (International Standards and Recommended Practices – SARPs), but these are not binding and so compliance is mainly dependent on the States parties' goodwill. As aviation is challenged by many circumstances, the ICAO works in close cooperation with other members of the United Nations family such as the World Meteorological Organization (WMO), the International Telecommunication Union (ITU), the Universal Postal Union (UPU), the World Health Organization (WHO), the World Tourism Organization (UNWTO) and the International Maritime Organization (IMO). Non-governmental organizations which also participate in ICAO's work include the Airports Council International (ACI), the Civil Air Navigation Services Organisation (CANSO), the International Air Transport Association (IATA), the International Business Aviation Council (IBAC), International Coordinating Council of Aerospace Industries Associations (ICCAIA), the International Council of Aircraft Owner and Pilot Associations (IAOPA), the International Federation of

Air Line Pilots' Associations (IFALPA) and the International Federation of Air Traffic Controllers' Associations (IFATCA).

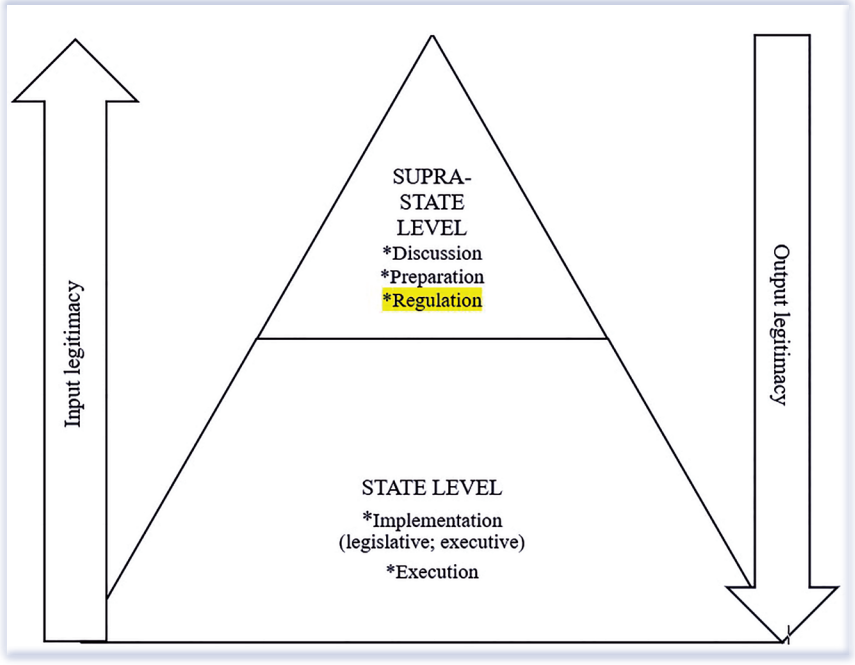


III.3. ICAO decision-making. Source: Making an ICAO SARP https://www.icao.int/about-icao/AirNavigationCommission/Documents/How%20to%20Build%20an%20ICAO%20SARP.pdf *(2022.08.31.)*

When the international soft law is created, there are often concerns about input and/or output legitimacy. In most cases, either one or both sides are missing.

The standard setting acts as a new form of cooperation resulting in soft law thus often failing to meet the rule of law requirements, however, as useful and effective tools, they often diffuse into legal practice and cause rule of law challenges. These standards are resulted from "*international institutions and transnational networks involving both governmental and non-governmental actors as well as administrative bodies that operate within international regimes or cause transboundary effects*" and without governmental powers and *de iure* empowerment, they contribute to the creation of *de facto* obligations.

The real legal challenge arrives when this type of regulatory power is practised by those actors that behave independently from states and international organisations.



III.4. Traces of legitimacy in international cooperation I. (author)

Goods and functions that escape State control are regulated at the supra-state/global level by organs of the State other than the legislator.

> *States are not able to control the fishing of migratory fish species, just as they are powerless to unilaterally limit the use of greenhouse effect-producing gases or to prevent the spread of financial crises. When their borders and functions overlap and conflict, States benefit by giving up their regulatory powers to other, global, public organisations that can effectively handle them. The emergence of several major cooperative initiatives among national regulators began engaging the attention of international law scholars in the 1990s when the first successes in the financial area were seen. However, it is not a new phenomenon. The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, for example, mandated the creation of new national agencies to coordinate international efforts at drug control and communications were to be carried out directly between these agencies rather than through normal diplomatic channels. The 1936 Convention thus attempted to create a network for drug control. A network of American antitrust regulators and their allies in foreign countries developed after*

> *World War II formed, collectively, a principled transnational network geared toward restructuring various national economies.*

The centrality of the State to the notion of public powers has become an optical illusion according to *Cassese*. States develop from and around a power centre. In contrast, global administrative organisations develop through mutual connections from peripheral points. Individual government agencies and actors have started to negotiate directly with their foreign counterparts and reach *informal understandings* relating to their areas of responsibility. Their expertise and insulation from domestic political pressures allow them to solve problems that traditional international organizations cannot adequately address. [Verdier (2009) p. 115]

1.3. Informal international law-making

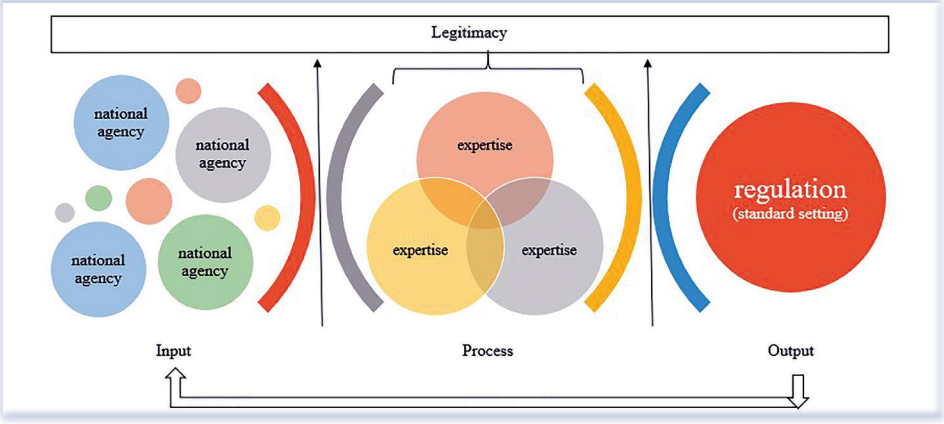
Informal international law-making (IN-LAW) is a broad phenomenon that is taking place in various forms and by different kinds of bodies that aims to produce a legal solution for global challenges. The informal character of this law-making process may be reflected at three levels:

(a) *input informality*: the actors are other than traditional diplomatic – State –actors.

> *In the international sphere, it is the executive of the State who is entitled to represent the State and has the right to assume an obligation.*

(b) *process informality*: it is a cross-border cooperation between public authorities, with or without the participation of private actors and/or international organisations in a forum other than a traditional international organization.

(c) *output informality*: the result of cooperation does not result in a formal treaty or traditional source of international law.



III.5. Legitimacy flow (author)

There are two basic types of informal international law-making in recent decades around the turning point between the 20th–21st century:

(a) ***International agencies/supranational authorities*** which are international bodies that are based on a decision by an international organisation, so their legitimacy and competencies are based on the empowerment of their creators.

(b) ***Harmonisation networks/trans-governmental networks/transnational networks/TRNs*** which informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.

2. Transregulatory networks

2.1. Definition of the phenomenon

There is neither one consistent title nor a global definition of TRNs in the literature. As these phenomena emerge upon necessity in practice, there is no uniform description that is valid for all of them. Usually, its major features are collected together.

TRNs effectively address global problems that individual governments cannot tackle alone. On the other hand, because TRNs are decentralized, dispersed, and involve domestically accountable participants, they do not pose the kinds of threats

to democracy, freedom, or national sovereignty that make world government undesirable.

2.2. Characteristics of the phenomenon: sui generis

TRNs:

- **members** are not States, but national regulatory agencies, that are tied to national rules related to their activity. This means a system of separate regimes, which are connected to a network. Their membership may also be selective;
- have no centre; it does not develop according to a plan, but **spontaneous**ly, therefore they can exist without the drawbacks of formal institutions or government procedures;
- gather the necessary expertise for a successful resolution;
- have **no international legal personality** or status beyond that conferred on their organization under the national law of their host country;
- tend to **operate** by consensus without formal voting procedures: it is progressive, cooperative and non-hierarchical;
- are not **transparent**. Despite recent efforts at greater transparency, many of their important meetings and negotiations are **kept secret** until the resulting document is released;
- issue **guidelines** and other documents that do not create international legal obligations (soft law) and do not require the same domestic ratification procedures as treaties;
- do not formally monitor the implementation of their decisions or provide dispute solution procedures;
- are widely regarded as **successful**: Unlike formal international institutions that are often paralyzed by politics, TRNs have the advantages of speed, flexibility, inclusiveness, and the capacity to dedicate sustained attention to complex regulatory problems.

2.3. Informalities of TRNs

(a) *input informality*: the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although their product acts as a normative act in a non-conform way defined by the classical

Westphalian regime. Authorities taking part in the network are formed and perform their powers within the limits of their domestic law and are accountable for their acts accordingly. However, the domestic legal and political mechanisms that normally hold national regulators accountable to their constituencies do not apply when regulators participate in TRNs.

> *BCBS members include organisations with direct banking supervisory authority and central banks. After consulting the Committee, the BCBS Chair may invite other organisations to become BCBS observers. BCBS membership and observer status will be reviewed periodically. In accepting new members, due regard will be given to the importance of their national banking sectors to international financial stability.*

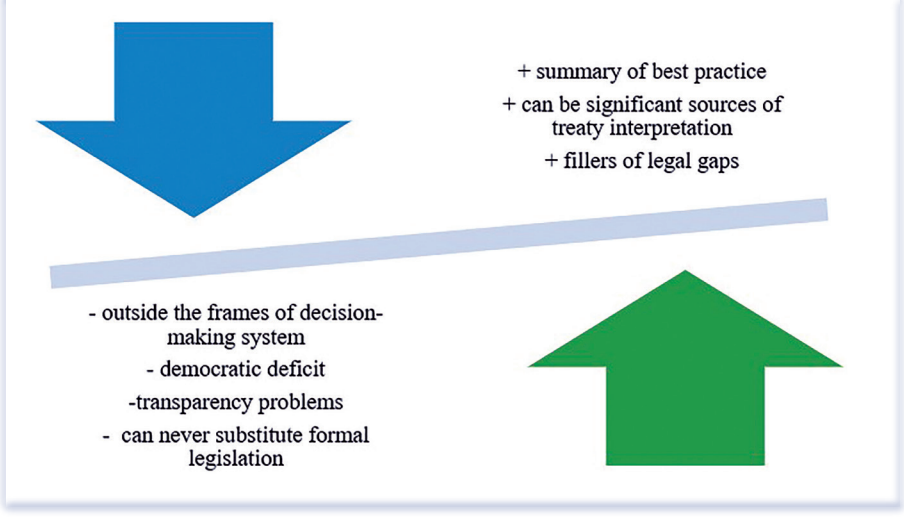
(b) *process informality*: different authorities of different jurisdictions work together in a supra-state sphere and at that level often without a detailed and previously settled scenario, accountability problems arise. understanding international regulatory cooperation in TRNs requires an examination of how domestic preferences shape the positions of national regulators on specific issues

Accountability has two sides; internal accountability refers to the decision-making processes within the organisation, including checks and balances and a clear division of roles and responsibilities. External accountability consists of the supervisors' obligation ability to explain to external stakeholders (including the government, parliament and the general public) that the impact of their activities is a generic concept that may be interpreted in different ways. Accountability encompasses at least six important elements: (i) who is liable; (ii) to whom; (iii) what are they liable for; (iv) through what processes is accountability assured; (v) by what standards; and (vi) what are the potential effects when standards have been breached? Due to the high level of informality of the functioning of TRNs (i.e. there are no pre-defined rules for every aspect of functioning, preparation for decision-making, voting etc.), most of the questions remain without answer.

> *The Committee is the ultimate decision-making body of the BCBS. Decisions by the Committee are taken by consensus among its members. Committee decisions of public interest shall be communicated through the BCBS website. The Committee shall issue when appropriate, press statements to communicate its decisions. A simple Charter with the purpose and role,*

membership, oversight organisation, BCBS standards, guidelines and sound practices, consultation with non-member authorities, relationship with other international financial bodies and public consultation process is available on the website of the BCBS but no further information is available on the functioning of the network.

(c) *output informality*: The members' (and often non-members') daily activities within their competencies are strongly influenced by the soft law standards. The influencing nature of the *soft law* creates roots in the economic or political interdependence of States while legitimacy and administrative control are missing from this system. So, domestic public administrative law, and, in fact, most elements of public law (constitutional elements the requirements of rule of law), seem to be put aside while foreign elements infiltrate into domestic public administration and their daily authority practice. Soft law has insufficiencies, however, several advantages, too, which may prove the success of TRNs. It shall be noted that legally binding force and legal effects are not the same. Even if there is no legally binding force, soft law can have legal effects in an unorthodox way (compared to the Westphalian model of international cooperation).



III.6. Pros and cons of TRNs (author)

The Basel Committee on Banking Supervision (BCBS) is the primary global standard-setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions

(90% of the world's banking assets). Additionally, the Committee has nine observers including central banks, supervisory groups, international organisations and other bodies (Bank for International Settlements and the Basel Consultative Group: European Banking Authority, European Commission and International Monetary Fund. The governance structure of the Basel Committee comprises a rotating chairmanship, standard-setting, and research-based groups, and the Secretariat, hosted by the BIS. The BCBS reports to the Group of Central Bank Governors and Heads of Supervision (GHOS) – its oversight body – and seeks its endorsement for major decisions.

The Basel Committee produces publications relating to capital adequacy (the best known of which is Basel III), accounting and auditing, banking problems, cross-border issues, core principles for effective banking supervision, credit risk and securitisation, market risk, the combating of money laundering and terrorist financing, operational risk, and transparency and disclosure. The BCBS sets standards for the prudential regulation and supervision of banks. The Basel Committee produces publications relating to capital adequacy (the best known of which is Basel III), accounting and auditing, banking problems, cross-border issues, core principles for effective banking supervision, credit risk and securitisation, market risk, the combating of money laundering and terrorist financing, operational risk, and transparency and disclosure.

The BCBS does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members' commitments. The BCBS expects full implementation of its standards by BCBS members and their internationally active banks. However, BCBS standards constitute minimum requirements and BCBS members may decide to go beyond them. The Committee expects standards to be incorporated into local legal frameworks through each jurisdiction's rule-making process within the pre-defined timeframe established by the Committee. If the deviation from literal transposition into local legal frameworks is unavoidable, members should seek the greatest possible equivalence of standards and their outcome. The Basel Committee established a comprehensive Regulatory Consistency Assessment Programme (RCAP) in 2012 to monitor and assess the adoption and implementation of its standards while encouraging a predictable and transparent regulatory environment for internationally active banks. Besides, there is no tool for enforcement.

The spreading practice of such trans-regulatory networks and their growing importance reveals the necessity of the articulation of a ***new legal order*** and re-thinking of the current one. TRNs can produce effective cooperation just because they do not fit in the existing legal order and the existing concepts that keep the legal order legitimate.

Beyond financial areas, there are significant transnational networks in the area of security and environmental protection.
In the global security area, the International Organization of Securities Commissions (IOSCO) is the primary forum for networking. It acts as a forum for securities cooperation and gives structure to the regulatory network. IOSCO comprises over 130 member commissions and meets regularly. IOSCO was founded in 1984 and has no state members. IOSCO provides an arena for discussion, policy coordination, and technical training for regulators in emerging markets. 85 per cent of the world's capital market is under IOSCO member supervision. Among IOSCO's main activities, the promulgation of core principles of securities regulation, the development of shared accounting standards, and the regulatory impact of the Internet can be emphasized. IOSCO members have negotiated over 500 non-legally binding Memoranda of Understandings (MOUs) amongst themselves.
In environmental issues, networks play a different role than in securities regulation. Because treaties remain the core approach to environmental rulemaking, the network of environmental regulators is primarily focused on enhancing the capacity of regulators to regulate. In other words, capacity building, rather than creating new agencies or embracing particular substantive rules, is the primary activity. The International Network for Environmental Compliance and Enforcement (INECE) for example was created in 1997 to signal the commitment to an ongoing network and set in place an ambitious two-year work program. While conferences are a central part of INECE, and permit regulators to meet, exchange ideas, and make connections, information technology is expanding its reach. It makes a connection with global environmental authorities, access training materials, helps guide the Network's focus and is recognized as a leader in environmental compliance and enforcement. INECE raises awareness of the importance of environmental compliance and enforcement as the foundation for the rule of law, good governance and, ultimately, sustainable development.

2.4. Administrative law of TRNs

In the case of a TRN, the preparatory and executive tasks are performed by state organs; bodies, each of them according to their domestic laws. Within the TRN, these different bodies act as regulatory bodies, contributing to the formulation of a commonly acceptable solution for a challenge that they seem to be able to fight against. Therefore, a significant part of the administrative law of a TRN is given by the domestic administrative law of the members. The rest is the feature of the collaboration phase of the members of the network but given the fact that it is an informal international law-making, no regularities can be shown. According to the current definitions and requirements, the administrative law (and the complete public law background) of such phenomenon can be described as illegal or in a smoother manner: it shows nonconformity with the classical rule of a law-based legal order.

Global administrative law is the closest notion to describe the TRN phenomenon.

- *Global*, as the expression, stands to describe the complexity of the actors and the different levels they represent. It is not advisable to use the word 'international' as the etymological meaning of the word suggests State actors while in such kind of regulatory regime, the supranational level of cooperation is marked by non-State participants lacking the main features of the classical intergovernmental networks. This is the reason why the notion of *international financial regulation* is not able to describe the phenomenon as a legal framework besides the content of regulation is too strict to overlap the process of formulation, implementation, and execution of the financial supervision regime in this multilevel structure.
- *Administrative*, as, strictly speaking, governmental functions are practised at the supranational level. It should not be called simply public law as it covers a wider scope than administrative law, it has constitutional law concerns but includes, inter alia, criminal law for example. The activity practised by trans-regulatory networks, in the view of the Westphalian model and the rule-of-law-based requirements of democratic functioning, shows evidence for the shifting of governmental functions to a global level. Comity work, standard-setting and creating soft law can be understood as preparatory work for legislators as the acceptance, implementation, and evaluation of the achievements (soft law) depend on different actors of a lower level. Its later success depends on legislative organs and executive authorities that finally apply them, and in lack of legislative

implementation, the system shows a movement from the continental to the common law practice. Within the EU, examples of features of both can be observed.

- And finally, it is *law*, as the law determines all social interactions, the arising phenomenon shall fit in the existing order and its basic requirements. The law defines and limits power. All the elements of the practice of power shall be done under a normative framework and shall correspond to the basic requirements concerning legitimate functioning. Regarding the multilevel phenomenon of financial supervision, this law in an infant status as it has not yet adapted to the existing legal order. Certain aspects of the multilevel public administrative system of composite procedures have legal gaps; the guarantees that protect individuals against authority powers are under construction. It shall be accepted that notions used in nation-States cannot be equivalent to the global phenomenon, but a corresponding interpretation may be applied.

3. Supranationalism

3.1. Supranationalism: the question of public power practice in the international sphere

There are supranational organisations, which are vested with certain State functions by the transfer of sovereignty, and there are those which assemble State and non-State actors, or simply, they function as a common forum of non-State actors. The most advanced forms include the shifting of power, mainly the legislative and/or judicial and ***rarely the executive***, in certain issues to an international level which might lead to the dispersion of authoritative decision-making across multiple territorial levels.

3.1.1. Supranational decision-making

Creating legislative bodies is usually the classical way of thinking about supranational regimes: a **common decision-making body** is vested with the power to adopt legislation (often with unanimity to ensure the unconditional

acceptance of this kind of regime) and oblige the Member States directly, without their domestic interpretative acts.

> *The European Union is the most well-known example of supranational decision-making. By the power transfer from the Member States, the legislative institutions are entitled to adopt binding sources of law that are to be applied directly by the Member States.*

3.1.2. Supranational judiciary

States may make subordination and accept the **superiority of an international judicial body** to judge cases in which the State (or to be corrected, its organ) fails to interpret the assumed international obligation.

> *The International Court of Justice (ICJ)is the principal judicial organ of the United Nations (UN); it is seated in the Hague. It is a general, permanent body of respected judges who may proceed to decide upon the breaches of international law and the judgments are accepted as final and binding. Its role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.*

3.1.3. Supranational executive: supranational public authority

It is rare that States to create **supranational administrative bodies** which ensure enforcement and daily execution of the adopted normative, legislative texts. Simply, because it is not realistic that a supranational organ may be capable to deal with everyday cases at the lowest level of administration i.e. in the case of individuals applying the created norm in individual cases and establishing such a system would not be cost-efficient. The question of a supranational public authority which issues binding decisions in individual cases is therefore very rare.

> *The European Union regulates competition in the internal market. Sometimes violations of competition rules happen within just one country, so a national competition authority would often handle the case. However,*

when the effects of illegal behaviour, like running a cartel, are often felt in many countries across the EU and beyond and in such cases, the Commission is often well placed to pursue these trans-EU cases and proceed with them and issue a decision with binding effect. In this case, the Commission is entitled to adopt individual acts of individual enterprises. The Commission has the power not only to investigate but also to take binding decisions and impose substantial fines. The Commission enforces the EU competition rules together with the national competition authorities of the EU countries. These authorities and the European Commission exchange information on implementing EU competition rules. See more: click here!

To sum up, the executive power collaborates to achieve solutions to solve global problems, therefore forming a global administrative space.

By shifting certain powers to create authoritative acts in the international area, the importance of legitimacy and having a public law framework is revealed. Normative background of the international authority, its supervision and jurisdictional questions arise.

3.1.4. Supranational power practice without empowered actors

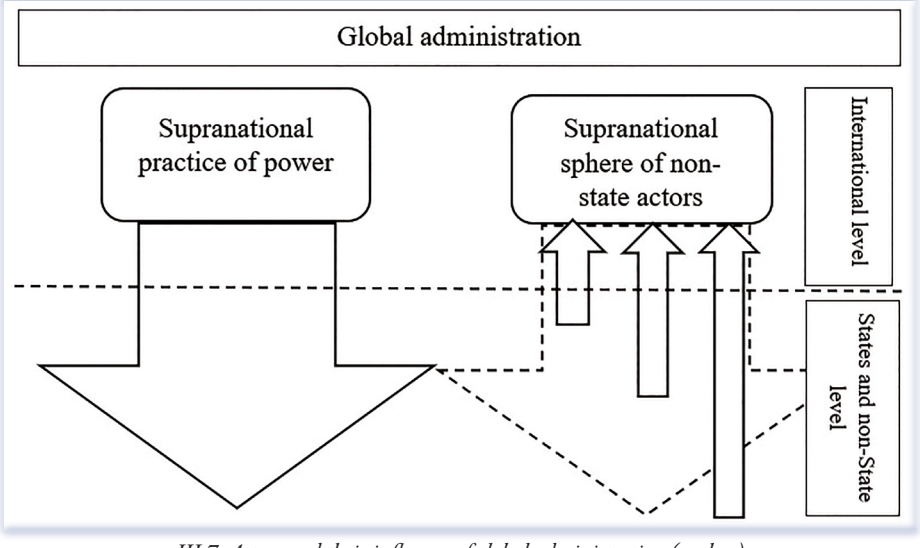
Recently it is often seen as competent national authorities cooperating to discuss challenges of law application. It seems that they take over the role of decision-maker as the result of their common think-thanking is manifested in commonly accepted guidance and other collection of best practices. Such exercise of public power often occurs through non-binding standards which are produced by a decision-making procedure which has nothing to do with the constitutional principles of legislation and the balance of interest made them worth following instead of legal commitments. Legal literature calls the phenomenon the exercise of international public power which reveals the question, in a wider scope, whether a global administrative space exists or there is a place for parallelly existing administrative spaces which overlap each other from time to time.

Trade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy and energy sources are all subjects of global regulation which involves many

> *other sectors as well, as the production of sugar, pepper, tea and olive oil. There is no human activity wholly untouched by supra-state or global rules. [Cassese p. 671.]*

Within a State, they cannot be such quasi legislators, as it would be a clear abuse of power and the spill-over of their competencies unless they are vested to act as such.

> *The French Conseil d'État is not only the highest level of public administration but its decisions are considered as case-law by the norms regulating its activity.*



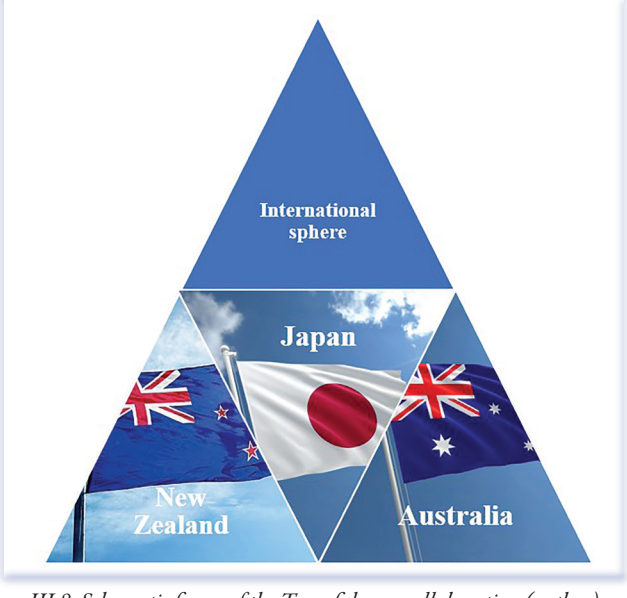
III.7. Actors and their influence of global administration (author)

Besides governmental functions and the contribution to legislative work, in States, a significant area of public administration deals with the direct execution of the law; public authorities interfere in social relationships to evaluate the public's interests and values over private purposes in individual cases by individual authority acts. Individual acts of public administration are strictly regulated by *public administrative law* which means *control* over *public power*, to keep the powers within their legal bounds and protect the citizen against their abuse and put under judicial control. As *von Bogdandy* describes, public law has a constitutive and limiting function to legitimise public authority. When formal and informal networks appear to exchange ideas, settle common standards for

common problems, and competent authorities collaborate to that end, the success of their mission depends on the evaluation of the soft law they establish as a solution to problems. Although within their States, they might be vested with authority power to enforce legal norms by individual acts in individual cases, they shall not apply the standard they created together until it is correctly implemented by the domestic legislator; no matter how competent the actor in a certain issue, being non-governmental actor, it cannot assume obligation on behalf of its State. This is a catch-22 even without complicating the issue with two *sui generis* organisations among the interacting actors at the supranational level.

International relations have grown to a ***global administrative space***: a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms. In practice, the increasing exercise of public power in these structures has given rise to serious concerns about legitimacy and accountability, prompting patterns of responses to those concerns in many areas of global governance. (Krisch–Kingsbury, 2006, p. 1.)

However, there are examples when the collaboration of States contributes to a supranational system which is settled above them and contains elements of all three parts of power: legislation-execution-judiciary. See the case of tuna fish case among three States and analyse how global administration works in such case.



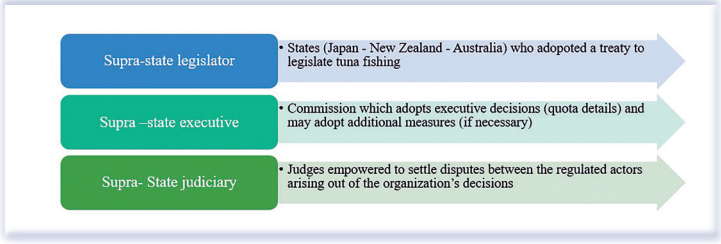
III.8. Schematic figure of the Tuna fish case collaboration (author)

According to the United Nation's Convention on the Law of the Sea (UNCLOS), "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations to ensure conservation and promote the objective of optimum utilization of such species (...)" Therefore, in 1993, Australia, Japan and New Zealand signed the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and in 1994, they established the Commission for the Conservation of Southern Bluefin Tuna Nature. It is a supranational authority that has a legal personality, a budget and rules governing accounting and employment relations, a Secretariat with its staff, and headquarters in Canberra. Within it, separate bodies carry out oversight and consultation tasks. In 2001, the Commission established an Extended Commission, made up not only of the Commission's Member States but also of other "entities or fishing entities" whose flagships fish tuna. Its main purpose was to adopt binding decisions establishing quotas of tuna that may be fished annually by each treaty adherent and if necessary, to adopt additional measures and control illegal fishing.

Meanwhile, Japan exceeded the quota, thus Australia and New Zealand opened an arbitration procedure before an arbitral tribunal (under UNCLOS) and required interim measures from ITLOS.

In 1999, the ITLOS declared that the 3 countries were not allowed to exceed the fishing limits decided upon by common agreement and in 2000, the arbitral tribunal stated its legitimacy that without Japan's consent to refer the controversy to the arbitral tribunal, "this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan it thus revoked the provisional measures ordered by the ITLOS, but added: "[h]owever, revocation of the Order prescribing provisional measures does not mean that the parties may disregard the effects of that order or their own decisions made in conformity with it".

To sum up the supra-State, a simple supra-national organisation with supranational authority and judiciary, see the chart:



III.9. Summary of the Tuna fish case collaboration (author)

To sum up, the *case of tuna fishing* shows ***the major features*** of ***global administration***:

- ✓ **lack of exclusivity** in international relations;
- ✓ a high degree of **self-regulation** as regulators and the regulated ones may be the same;
- ✓ **material law** may be of different sources;
- ✓ decisions are made by independent committees based on scientific criteria and negotiations concluded by agreements (**professionalism**)
- ✓ the line between public and private is hardly clear at the global level;
- ✓ there is **no** definitive **constitutional background**, so the legal framework and the supervision of the decision depend on further negotiations.

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Significant definitions

Best practice	is a method or technique that has been generally accepted solution by various actors that fight the same challenges within their competences
Formality of law-making	is an expression of a system that is settled by normative rules for the procedure of law-making based on the constitutional law of the State and the administrative law that rules the activity and procedure of the representative of the State that is empowered to assume legal obligations on behalf of the State.
Global administrative space	space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms

Harmonisation networks/trans-governmental networks/ transnational networks/TRNs	address global problems that individual governments cannot tackle alone by authorities of States which perform their activities in a special area to decide upon a best practice that can be followed with success to respond to transboundary challenges
Input informality of law-making	means the circle of actors and their incapacity to assume obligations for the legal system
Input legitimacy	refers to the importance of representation of all relevant interests and points of view when making authoritative decisions
Inter-governmental relations	interactions between governmental units i.e. responsible public organs at the highest level of State administration and policy that can act on behalf of the State they represent and can assume the obligation
Legal effect	power to influence the rights and obligations without *de iure* legal obligation; a sort of *de facto* obligation.
Legal force	power of binging rules for the conduct of individuals which can be enforced by the State organs; powers and limitations that arise from legislation and interpretation of laws, and which impel or restrain individual or organizational activities. *De iure* and *de facto* legal obligation.
Legal order	is a collection of norms: the law of nation-states, supranational entities or international law which are produced based on common characteristics (p.ex. Westphalian model of international cooperation)
Legitimacy	a value whereby the practice of power is recognized and accepted as proper
Multi-level governance (MLG)	is defined as the vertical (multiple levels) and horizontal (multiple actors) dispersion of central government functions and refers to both, political structures and decision-making processes because of the growing interdependence between governments and non-governmental actors at various territorial levels

Output informality of law-making	means the result of informal international law-making which does not create a legal obligation for States and has no legal force
Output legitimacy	expresses the quality of the decisions produced and their effectiveness in solving the problems that they supposedly address
Process informality of law-making	the non-existent normative background of the international cooperation phase among actors that are not empowered to assume obligation on behalf of the State
Public authority	the power to govern and regulate a part or aspect of public life with binding effect and with judicial enforceability;
Self-regulation	the power to determine the rules for own functioning
The informality of international law-making	is a broad phenomenon that is taking place in various forms and by different kinds of bodies that aims to produce a legal solution for global challenges

Exercises to practice

1. Select the characteristics for the right category!

Westphalian model of international cooperation	Globalised model of international cooperation

a) the actors are States
b) the actors are only States
c) the actors are often non-state players
d) intergovernmentalism

e) multiple actors from various levels in a multilevel governance system
f) multilevel governance
g) international law determines the relationship of the actors
h) administrative law has a determinant role in the functioning of the system
i) shifting of power
j) decision-making is based on governmental bodies and interpreted according to the constitutional framework of the participating States
k) solution finding for global problems
l) soft law is created
m) aimed to establish a convention to be signed by the participating States
n) supranational decision-making body
o) legitimacy behind the acts carried out at the supranational level has a domestic constitutional background
p) there is no constitutional background for the system
q) input legitimacy often lacks
r) professionalism dominates over the political point of view

2. Compare the formal and informal law-making according to the following features!

		Formal international law-making	Informal international law-making
Input	Actors		
	Nature of procedure		
Process	Actors		
	Nature of procedure		
Output	Result		
	Force		

3. Compare the trans-governmental regulatory networks to classical international cooperation!

	Classical international cooperation	Trans-governmental regulatory networks
Actors		
Institutionalisation of cooperation		
Political force v. expertise		
Legal personality		
Normative background of functioning		
Transparency of functioning		
Result of cooperation		
Success of cooperation		

Test of multiple choices/quiz

1. **Speaking of the Westphalian model of international cooperation, it means**
   a) that the cooperation is based on the interaction of state and non-state actors.
   b) that the cooperation supposes the dominance of State actors although non-State actors may also have equal rights in the procedure of adopting international obligations.
   c) that the cooperation is based on State actors.

2. **The Westphalian type of international cooperation**
   a) is the synonym of supranationalism.
   b) is the synonym of inter-governmental.
   c) is the synonym of globalism.

3. **Multi-level governance**
   a) supposes the horizontal collaboration of actors.
   b) supposes the horizontal and vertical collaboration of actors.
   c) supposes the vertical collaboration of actors.

4. **The reason for multi-level governance**
   a) is the interdependence of actors at different levels in the State.
   b) is the rising decentralisation of State functions.
   c) is only a feature of federal States.

5. **Input legitimacy**
   a) ensures that the actors which contribute to international cooperation are doing this according to the rule of law.
   b) ensures that the results of supranational decision-making conform with the requirements of rule of law.
   c) is to be ensured by the supranational bodies created by international cooperation.

6. **Legitimacy**
   a) is a requirement to be ensured when the results of the international cooperation are interpreted.
   b) is required to be ensured at all phases of international cooperation.
   c) is required to be ensured only at the domestic level of activities as in an international context it cannot be ensured.

7. Soft law

a) is not obligatory as it cannot produce legal effects as it cannot be enforced.
b) is not obligatory, although it may produce legal effects, it cannot be legally enforced.
c) is obligatory as it may produce legal effects and can be enforced.

8. Global administrative space

a) is the area of administration of supranational international organisations.
b) is the area of interplay between States and international organisations to perform executive power.
c) is the area where administrative functions are performed in often complex interplays between officials and institutions on different levels.

9. The role of public law in global administration

a) has a declarative and limiting function to legitimise the public authority
b) has a constitutive and limiting function to legitimise the public authority
c) has a constitutive and empowering function to avoid the practice of public authority.

10. If a supranational public authority is established

a) it is based on the establishing States' agreement.
b) it is depending on the competency rules it establishes for itself, that is what self-regulation means.
c) it means that NGOs are empowered to practice authority power.

11. Individual government agencies

a) are empowered to act at an international stage to assume obligation on behalf of their State.
b) are often empowered to participate in international cooperation but they are not vested with the power to assume obligation on the State.
c) are not empowered to act on the international stage but they can assume obligation on behalf of their State.

12. Actors of the global administrative sphere

a) can neglect domestic political pressure which allows them to solve problems that traditional international organizations cannot adequately address.
b) are governed by domestic political pressure which allows them to solve problems that traditional international organizations cannot adequately address.

c) are governed by domestic political pressure which prevents them from solving problems that traditional international organizations cannot adequately address.

13. Informal international law-making

a) lacks input, output and process formality.
a) lacks input, output and process informality.
a) is featured by input and output legitimacy.

14. The basic types of informal international law-making

a) are TRNs and supranational authorities.
b) are non-governmental organisations and governmental organisations.
c) are TRNs and the informal group of States.

15. Trans-governmental regulatory networks

a) regulate global challenges with the intention of legal effect on the legal system.
b) regulate global challenges with legally binding tools.
c) regulate global challenges by creating an obligation on the participants.

16. The guideline of an international organisation

a) is a soft law international law instrument.
b) is a hard law international law instrument.
c) is not law at all.

17. Trans-national regulatory networks

a) monitor the implementation of their decisions and provide dispute solution procedures.
b) do not formally monitor the implementation of their decisions or provide dispute solution procedures.
c) enforce the implementation of their decisions and provide dispute solution procedures.

18. TRNs are

a) formal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.
b) informal multilateral forums that bring together representatives from international organisations to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.

c) informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.

19. Input informality of TRNs means that

a) the standard setters are vested with legislative power and are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the classical Westphalian regime.
b) the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the classical Westphalian regime.
c) the standard setters are neither vested with legislative power, nor they are entitled to assume obligation for a State, although they issue acts as a normative act in a non-conform way defined by the global administrative regime.

20. The spreading practice of trans-regulatory networks and their growing importance

a) leads to a new world order which is called supranational legal order.
b) reveals the necessity of the re-thinking of the existing global administrative world order and requires the re-establishment of the Westphalian world order based on State dominance in international relations.
c) reveals the necessity of the articulation of a new legal order and re-thinking of the current one.

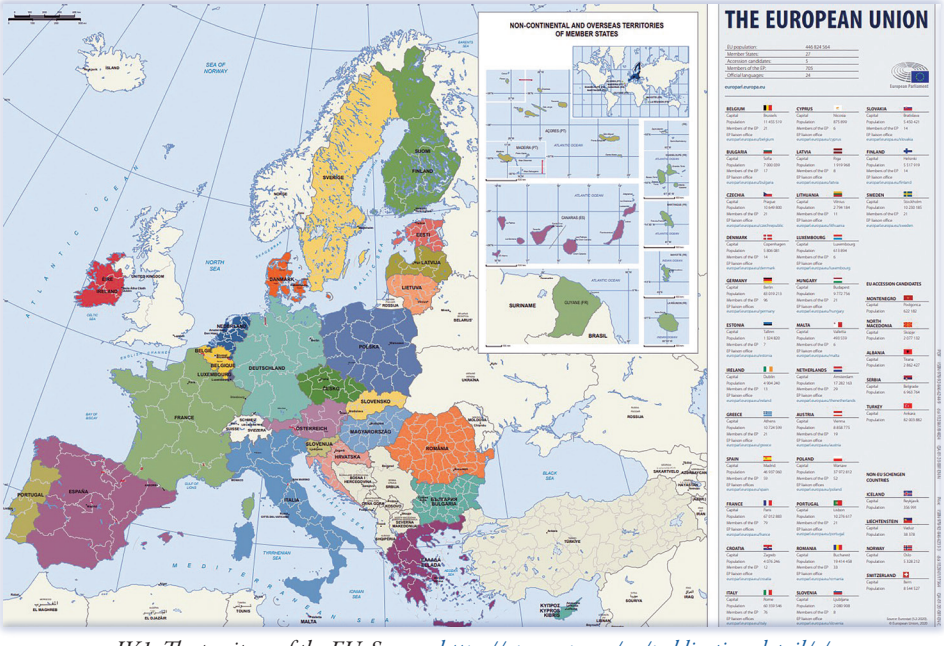
IV. European administration – a sui generis administrative space

1. The European Union as an international organisation: *sui generis* nature

The European Union is an international organization under the general definition:

- it is based on a formal instrument of agreement (founding treaties) between the governments of nation-states
- it includes three or more nation-states (27) as parties to the agreement;
- it possesses a permanent secretariat performing ongoing tasks: it has 7 institutions of permanent nature and many other bodies and agencies.

The *ever closer union among the peoples of Europe* has been the main objective of European integration since the Treaties of Rome in 1957, however, the organisation has always balanced between the intergovernmental and the community method of functioning; depending on the policy in question and the competence (transferred by the Member States) of the common legislator.



IV.1. The territory of the EU. Source: https://op.europa.eu/en/publication-detail/-/publication/ad1a6bb4-837a-11ea-bf12-01aa75ed71a1/language-en

Inter-governmental method	Community method
the Commission has a monopoly on the right of initiative	the Commission shares the right of initiative
Member States usually, decide by *unanimity*	qualified majority voting in the Council
the European Parliament is merely informed or consulted	the European Parliament as co-legislator
it is generally beyond the Court of Justice's competence	the Court of Justice ensures uniform interpretation of Community law

IV.2. The difference between the two approaches to international cooperation (author)

Since the entry into force of the last reform treaty (Lisbon Treaty), the EU has moved towards a **supranational character** by, inter alia:

- it got a *legal personality*, including:
  - EU can conclude international agreements with third countries or other international organizations,
  - has rights and can assume international obligations,
  - can issue claims and claim compensation in the light of international law rules,
  - can establish diplomatic relations
  - can have privileges and immunities concerning national jurisdictions.
- *political leader institution*: European Council moved from an informal to a formal institution with a president elected for 2,5 years
- formalization of the *rotating presidency*: the leader of the Council of the European Union (Council of Ministers) is one of the Member States according to a previously settled list for 6 months.
- the *ordinary legislative procedure* has become the leading method of adopting binding sources of law: it means that qualified majority voting and the collaboration of the European Parliament and the Council is the main decision-making procedure used for around 85 policy areas. Many of the adopted sources have a *direct effect*, which means that the EU is empowered to adopt obligatory legislation which can create rights and obligations straight to the individuals, without any implementing act of the Member States.

At present, **all type** of organisation characteristics **is present under the roof of the EU**.

> *The common foreign policy and common defence policy are classic examples of the traces of intergovernmental cooperation. It is such a unique area of EU policies that the Treaty on The European Union (TEU) contains its rules. Besides, the other policies of the EU do not fall under the ordinary legislative procedure. Special legislative procedures are used in certain sensitive policy areas. Unlike in the case of the ordinary legislative procedure, the Treaty on the Functioning of the EU (TFEU) does not give a precise description of special legislative procedures. The rules for these are therefore defined on a case-by-case basis by the treaty articles that lay down the conditions for their implementation. Under special legislative procedures, the Council is, in practice, the sole legislator. The Parliament is simply associated with the procedure. Its role is thus limited to consultation (such as under Article 89 TFEU concerning cross-border police operations) or consent (such as under Article 86 TFEU concerning the European Public Prosecutor's Office) depending on the case.*

2. The public administration of the EU

The EU constitutive treaties or any other official documents of the European Union do not directly and distinctively address administrative structures, administrative norms, principles of functioning, etc., of what can be called ***European public administration***. The best notion to describe the EU administration in the ***European Administrative Space is*** *a common set of standards for action within public administration, which is defined by national law and enforced through relevant procedures and accountability mechanisms*.

After almost six decades of successful functioning, the European Union **still lacks** a coherent and comprehensive set of codified rules of administrative procedures at all levels, although it is generally acknowledged that the key to the successful application of EU law lies in administration. The correlation of direct and indirect administration allows describing the EU as a ***multilevel administrative system*** in which there is an increasing number of policies that require intensive cooperation and direct co-working of the competent authorities at the national and supranational levels.

The EU is then a multi-level administrative space with two major levels.

2.1. Levels of European administration

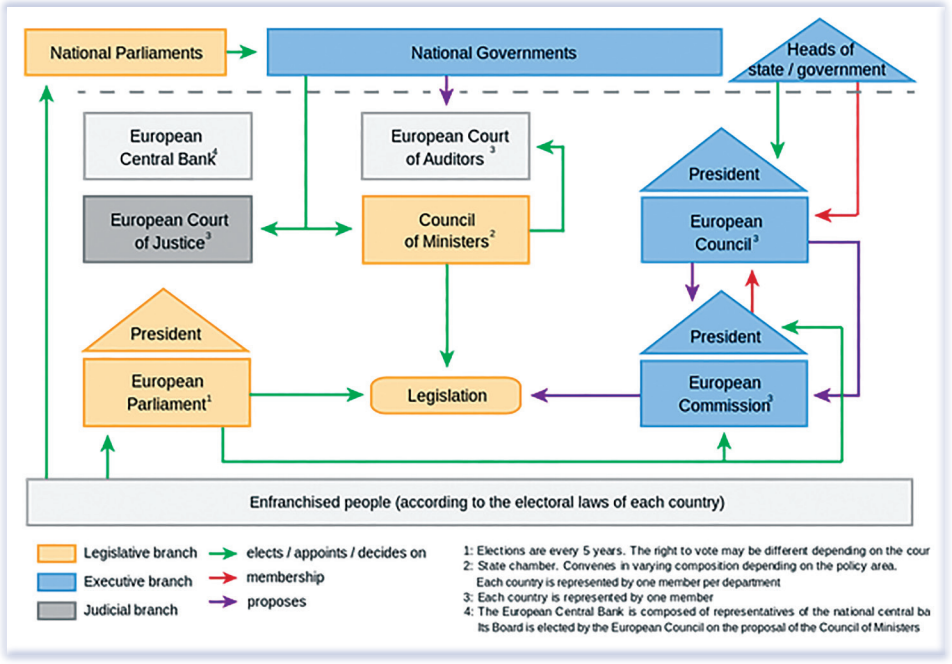
(a) ***direct level of administration***: the European Commission is the responsible institution to guard the implementation of EU acquis and is called the centre of execution, however, it has limited competencies and resources for steering the implementation. It rather monitors and intervenes when the primarily responsible Member States fail to ensure the proper execution of EU law. [*institutions of direct level administration are marked with blue* on the following chart]

As for governing function, it is primarily exercised by those institutions of the EU which consist of the heads of states/government leaders of the Member States, and not by one supra-state institution. Such tasks are dispersed.

It is very rare that a direct level institution possesses hierarchical tools (i.e. giving orders for the indirect level authorities) and/or practices authority power in concrete, individual cases. So, in the administrative law aspect, the EU is not a supra-national authority.

> *However, the Commission has certain rights to adopt normative rules on executive issues, but it is restricted and in individual cases, it can issue decisions only in certain competition law cases.*

(b) ***indirect level of administration***: the EU institutions cannot be substituted with national institutions, but they are obliged to cooperate. National administrations are responsible for the implementation and execution of EU law. National administrations have to be reliable, and transparent and have to function democratically.



IV.3. The basics of the EU institutional relationship. Source: https://www.pngfind.com/mpng/hbxJToi_the-basics-european-union-structure-hd-png-download/

2.2. European administrative networks

The European Union is constantly working on a sphere where national borders are invisible for the four freedoms (*a single market in which the free movement of goods, services, capital and persons is assured, and in which citizens are free to live, work, study and do business)* and the EU law can be enjoyed everywhere according to the same content and with the same guarantees.

To overcome the deficiencies of the EU which does not have its own administrative authorities' structure, European ***administrative networks*** (EANs) are established. They consist of institutional representatives of national executives – primarily departments and/or agencies – with tasks in the realm of national implementation or enforcement of EU policies. It includes horizontal and vertical cooperation among the competent organs and authorities and the nature and normative background of such co-work depends on the Europeanisation of the policy in question.

Due to the immediate connection with the competent authorities, their problem-solving abilities so fulfil an important role in facilitating the implementation and enforcement of EU policies. As the European Union's

legislative competencies are different, the EU acquis is also different in different legal areas, the implementation and executive task of Member State administration are different, so as the level of their networking. Due to the lack of EU legislative competencies to regulate administrative issues for decades, administrative cooperation has led to intensive and often seamless cooperation between national and supranational administrative actors and activities.

Therefore, networks under the scope of the EU and their tasks and capacities are also different, however, some features make some basic categorisation possible. There is no general normative background for the networks, therefore these categories are the product of legal literature. It also follows that the borders between the categories are not rigid; they are traversable, so one network may fill in more than one.

(a) **Information networks** are established to channel and coordinate the generation and editing of data relevant to an administrative activity. These are *constant channels for systematic cooperation* to share information and ensure data flow automatically, without the possibility of rejecting collaboration or retaining information.

> *The Visa Information System (VIS) allows the Schengen States to exchange visa data. It consists of a central IT system and of a communication infrastructure that links this central system to national systems. VIS connects consulates in non-EU countries and all external border crossing points of Schengen States. It processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area. The system can perform biometric matching, primarily of fingerprints, for identification and verification purposes. The Entry/Exit System (EES) is a new scheme that will be established soon (according to the European Commission, it will contribute to achieving full interoperability of EU information systems by 2020), by the European Union. The main purpose behind the founding of the EES is to register entry and exit data of non-EU nationals crossing the external borders of EU Member States to strengthen and protect the external borders of the Schengen Area and to safeguard and increase the security for its citizens. The EES will consist of the following: The EES will be composed of a **Central System**. Each of the member states will have its own **National Uniform Interface** (NUI) connected to the Central system through a secure and encrypted Communication Infrastructure. A **Secure Communication Channel** will connect the EES Central System and the VIS Central System. **Web Service** – through which third-country nationals*

travelling to the Schengen area will be able to check how many days long er they can remain in the Schengen territory.

(b) **Enforcement/executive networks** that establish a channel for cooperation to produce one single decision of one of them, so it is like a mixture of a systematic discussion forum and mutual assistance without the limits and restrictions of the latter. In composite administrative procedures when the case has an international element, the relevant authorities need to contact each other, share information, and handle documents or other evidence that the other authority in a different Member State needs to decide upon a case.

The Schengen Information System (SIS) is the most widely used and largest information sharing system for security and border management in Europe. SIS enables competent national authorities, such as the police and border guards, to enter and consult alerts on persons or objects. An SIS alert does not only contain information about a particular person or object but also instructions for the authorities on what to do when the person or object has been found. Specialised national SIRENE Bureaux located in each Member State serve as single points of contact for the exchange of supplementary information and coordination of activities related to SIS alerts. The Schengen Information System is an information network, but it also supports police and judicial cooperation by allowing competent authorities to create and consult alerts on missing persons and persons or objects related to criminal offences. therefore, in certain aspects, it is also the basis of law enforcement cooperation among authorities.
Another example is The Rapid Alert System for dangerous non-food products (RAPEX) allows the 31 participating countries (EU countries, Norway, Iceland and Liechtenstein) and the European Commission to exchange information on products posing a risk to the health and safety of consumers and on the measures taken by these countries to do away with that risk. The system also covers products posing risks to the health and safety of professional users and other public interests protected by relevant EU legislation (e.g. environment and security). It does not cover food, pharmaceuticals and medical devices, which are covered by other mechanisms. National authorities take measures to prevent or restrict the marketing or use of those dangerous products. Both measures were ordered by national authorities. Every Friday, based on this information provided by the national authorities, the Commission publishes a weekly

overview of the latest alerts. The published alerts include information on the product, identified risk and measures taken in the notifying country; a list of other countries where the notified product was found on their market and where measures were also taken; notifications on products posing serious risk and less than serious risk; notifications on professional products and those posing risk to other public interests. RAPEX was established by the General Product Safety Directive (GPSD) in 2004. Based on the decision the dangerous products can thus be withdrawn from the market and recalled from consumers everywhere in the European Economic Area thus the same level of EU law enforcement can be achieved without carrying out the same administrative procedure everywhere, so it also serves as an enforcement network. This mechanism contributes to the activity of the national consumer protection authority as an alert substitute for the whole procedure of official control and decision-making. Namely, rules concerning the safety of products under the scope of the General Product Safety Directive shall be the same everywhere in the EU (and in the European Economic Area) thus in the particular case when a national authority declares that a product is not in conformity with the EU law, this decision is therefore normative for all the national authorities in all the Member States in which that product is on the market. In Hungary, the Hungarian Authority for Consumer Protection is responsible to cooperate with the RAPEX system. Just for illustration: a toy pushchair named „Love Baby My Lovely" was withdrawn from the market because the product does not comply with the requirements of the Toy Safety Directive and the relevant European standards. The safety lock and the frame are not sufficiently resistant to load and can easily release and break respectively; causing the pushchair to collapse and thus may cause injuries to children. So, it was reported and then, based on an authority act issued in one Member State, all the countries had to withdraw the product from the market. Therefore, the act (decision) was not only a piece of information but a source of obligation, the same as it would have been issued by the authority of all the States who are members of the network.

(c) **Regulatory networks**: cover the systematic cooperation of competent authorities to identify the best practice and help the interpretation of EU law and the application of EU norms to achieve its purposes with normative content. Due to strict legislative competency rules, the network is not empowered to legislate, thus the norm established this way is *soft*

law. Even if practical concerns would support the self-regulation of a legal area while improving effectiveness and rule harmonization, EANs may seriously damage EU legitimacy.

The European Commission and the national competition authorities in all EU Member States cooperate through the European Competition Network (ECN). This creates an effective mechanism to counter companies that engage in cross-border practices restricting competition. As European competition rules are applied by all members of the ECN, the ECN provides means to ensure their effective and consistent application. Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices. The objective of the European Competition Network is to build an effective legal framework to enforce EC competition law against companies who engage in cross-border business practices which restrict competition and are therefore anti-consumer. Therefore, their soft law – as they are not vested with legislative powers – is supposed to be treated as obligatory.
It should not be mixed with comitology work. EU law sometimes authorises the European Commission to adopt implementing acts, which set conditions that ensure a given law is applied uniformly. Comitology refers to a set of procedures, including meetings of representative committees, that give EU countries a say in the implementing acts. During the procedure, the Member State work together, to form an opinion on the Commission's draft but the Member States' opinion has no coercive force on the Commission's further actions.

Regulatory networks are often seen in other legal areas of a less prominent networking structure. As the basic EU norms that call the competent authorities to cooperate do not go beyond this and contain no details for the normative background of the cooperation and until the Lisbon Treaty, there was no legislative competence for the EU to rule administrative cooperation, the cooperating authorities have started to regulate their work and while they are performing their task related to the proper implementation of an EU policy, they adopt *common guidelines, recommendations, guides, communications, work reports, statements,* etc. to help legal practice, therefore to produce a legal effect without the formal legal force of such documentation. From the point of view of proper application

of EU law, it is useful and seems efficient. Meanwhile, both sides of *legitimacy and accountability* are challenged.

European regulatory networks (ERNs) are an important expression of the institutionalization of a European Union (EU) multilevel regulatory administration.

Speaking about the normative background of the networks of European administration, three key factors shall be settled:

- ***the cooperation between network members:*** *for procedural aspects, the EU acquis often has taken the form of soft law due to the lack of legislative competence for a long;*
- ***the Commission's control of the network:*** *EU law according to the competence of the EU in a certain field of law but never as a superior administrative authority above the member state administration;* the Commission, in general, has no authority power, it has a certain level of supervision but no right to give orders/amend decisions and/or withdraw the power of the national authorities)
- ***and the autonomy of the network members vis-à-vis national governments:*** *it is based on domestic law.*

Concrete answers for these questions should be laid down in ***binding sources of EU law***, but it is often missing as the necessity called to live the networks, but the legal background has not yet reached the traces, so the majority of these issues are found in *soft law*. The European Union is based on the rule of law. This means that every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries and the regulatory power is not directly vested to authorities.

As for the cooperation of the authorities to effectively implement EU law, it was only the Lisbon Treaty that introduced a competence for regulation of ***administrative cooperation***.

TFEU Article 197

1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and civil servants as well as supporting training schemes. No Member State shall be obliged to avail

> *itself of such support. The European Parliament and the Council, acting using regulations by the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.*
> *3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.*

In case of administrative cooperation issues, the EU can only intervene to support, coordinate or complement the action of EU Member States with legally binding EU acts.

The relevance of a binding source of law to adopt is a key to not just the proper functioning of EU law in conformity with the rule of law, but also significant in the point of view of citizens whose legal cases are handled according to EU law in composite administrative procedure. The EU law, inter alia, ensures the *right to good administration* as a fundamental right. To enjoy the benefits of this right/to fulfil the obligation by the authority, the proper structural and procedural normative background for the complete procedure including the cooperation of the authorities of different jurisdictions is indispensable. Soft law cannot fill such a gap as it cannot create obligation with legal force, therefore, it cannot be invoked in legal disputes as argumentation.

3. The EU as an actor in global administration

The thickening density of international interdependence marked by cross-border information flows, trade liberalization, and global financial markets influence the EU and *vice versa*. Therefore, the EU also wishes to take part in the mainstream of international relations and take part as an actor, an active player to represent EU values and interests while contributing to the formulation of world politics and answering global challenges. During the development of the European integration, the European Union has not just grown in the number of its Member States but has expanded its regulatory (legislative) power to different fields and has developed many policies which lead to its status as a significant entity in global affairs.

It supposes the power to act as an international actor, although it was only the Lisbon Treaty that granted legal personality to the EU. Meanwhile, it shall be noted that the EU as an entity – and its institutions on behalf of it – can act only upon empowerment by ***treaty-based provisions*** or ***implied powers*** in external relations.

> *The concept of „implied powers" give the EU the possibility to regulate without explicit competence in the treaties. The concept of internal competence is used to give the EU the ability (competence) to negotiate international treaties in areas where the EU has the right to decide laws within the EU (internal competence to legislate). The Lisbon Treaty introduced „implied power" as a general rule by giving the European Union legal personality. Legal personality will allow the EU to represent the member states in negotiations with non-EU countries and international organisations in all questions where the EU can legislate internally.*

The EU's role in the international sphere heavily depends on the treaty-based provisions that empower the European Union to act. In European policy areas, it depends on its legislative competence: the powers of the EU outside its borders **adjust** the competencies that exist inside the EU.

> *If the EU has exclusive competencies it means that the EU alone can legislate and adopt binding acts. EU countries can do so themselves only if empowered by the EU to implement these acts. Therefore, in external relations, the EU is also a sole actor to assume obligations in the following areas: customs union; the establishing of competition rules necessary for the functioning of the internal market; monetary policy for euro area countries; conservation of marine biological resources under the common fisheries policy; and common commercial policy. In all the other policies in which the EU has any power, it shall always be carefully examined what are the limits of the empowerment, thus in international relations, it is also significant if the EU acts within its powers or goes beyond it (a.k.a. violates the sovereignty of its Member States).*

Security and defence policy, however, is a unique field and uniquely regulated by the EU Treaties. It is still basically an intergovernmental area of law as the Member States are strictly attached to their external independence. Meanwhile,

being a stronger global actor to strengthen the global role of Europe is a key priority of the Commission. The EU needs a strong common foreign policy to

- respond efficiently to global challenges, including the crises in its neighbourhood;
- project its values;
- reject protectionism and keep EU trade standards;
- contribute to peace and prosperity in the world.

3.1. EU as an actor in the global sphere

3.1.1. Actor of foreign security and defence policy

In the case of States, self-interest strategies to safeguard their national interests and achieve goals within their international relations are called ***external (foreign) policy*** and the main actor is the *government*, the leader of executive power. The EU's role as an international actor goes beyond merely the *Common Foreign and Security Policy* (CFSP) and the *Common Security and Defence Policy* (CSDP); it also includes policy areas, such as development, environment, and trade and often the policy areas cannot be sharply divided as they overlap each other. Furthermore, through these policies, the EU has built up an extensive network of relations across the globe, ranging from its immediate neighbourhood to Africa, Asia, Latin America, and North America.

The ***Union's action on the international scene shall be guided*** by the principles which have inspired its creation, development and enlargement, and which it seeks to advance in the wider world: ***democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity,*** and respect for the ***principles of the United Nations Charter and international law.***

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It ***shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.***

TEU Article 21

2. The Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations to...

- ✓ *safeguard its values, fundamental interests, security, independence and integrity;*
- ✓ *consolidate and support democracy, the rule of law, human rights and the principles of international law;*
- ✓ *preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, the principles of the Helsinki Final Act and the aims of the Charter of Paris, including those relating to external borders;*
- ✓ *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
- ✓ *encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;*
- ✓ *help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, to ensure sustainable development;*
- ✓ *assist populations, countries and regions confronting natural or man-made disasters; and*
- ✓ *promote an international system based on stronger multilateral cooperation and good global governance.*

EU's foreign policy field the *main* global actors who can speak on behalf of the EU are:

- President of the **European Council**

Represents the EU externally on foreign and security issues.

- President of the **European Commission**

Represents the EU at G7 and G20 summits and bilateral summits with third countries. The competent commissioner in certain foreign-related issues is also mandated to participate in international negotiations in their special field like international trade issues, neighbourhood and enlargement policy, humanitarian aid & crisis management, international cooperation

& development, or European civil protection and humanitarian aid operations.

- The **High Representative** of the Union for Foreign Affairs and Security Policy (and Vice-President of the European Commission; HR/VP)

The chief coordinator and representative of the Common Foreign and Security Policy (CFSP) can speak for the EU in that area. The HR/VP represents the EU for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences

The decision-making concerning the European point of view of a certain issue, however, shall respect the empowerment of the Member States, and ***stick closely to the treaty provisions*** to avoid *ultra vires* (beyond the powers) acts. All the statements on behalf of the EU and the votes done in the name of the EU shall be consistent with the EU policy and the EU norms legislated in a certain issue. Positions taken in the international sphere shall also be coordinated among those institutions and other organs whose competency is concerned. To ensure that, the acts in the international sphere, during negotiations etc. shall be done according to rules which ensure ***legitimacy (input and output), accountability and transparency***.

For example, in trade issues, the EU has exclusive competence, but there are many policies where the EU and the Member States' legislative competence is shared, therefore, if the EU steps into a global sphere, its representative shall also respect the limits of its competences and the same of true for the Member States when their foreign ministers are representing state interest: they shall also take not account their obligations deriving from EU membership.

3.1.2. Legitimacy of EU activity as a global actor: balancing between the EU and domestic (Member State) foreign policy activity

As previously mentioned, the EU's capacity to act as a global actor and perhaps assume obligation on behalf of the whole community of its Member States is

strictly based on its competencies; **the power transferred by its Member States** (provisions of the Treaties).

Chapter V of the *Treaty on the European Union* discusses the EU's external action as a ***member of international organizations*** which are open to non-State participants.

> *For example, the Commission takes part in the work of the Organisation for Economic Co-operation and Development (OECD) and its participation goes well beyond that of a mere observer. At the same time, the EU undertook to co-operate fully in achieving its fundamental goals. The European Union works closely with the numerous United Nations bodies to promote international peace, human rights and development, and the European Commission is also a significant UN partner, contributing over €1 billion in support of external assistance programmes and projects. Under the auspice of the World Bank, A strong and wide-ranging partnership has developed between the World Bank Group (WBG) and the EU institutions, including the European Commission, EU Council, European Parliament and European Investment Bank (EIB). The Council of Europe is the continent's leading human rights organisation which includes 47 member states, 28 of which are members of the European Union, and since the Lisbon Treaty, the EU.*

Besides competency issues related to the EU's legislative competencies, in this context, it is essential to focus on those situations when the Member State(s) and the EU are parties to the same international organization.

The Member States shall:

- ***support*** the EU's ***external and security policy actively*** and unreservedly in a spirit of ***loyalty and mutual solidarity*** and shall comply with the EU's action in this area.
- shall ***coordinate their action*** in international organisations and at international conferences;

> *The HR/VP shall organise this coordination. Even if the Member states are sovereign States and the EU has no exclusive competency on foreign policy, the Member States are required to always act according to EU values and in a way that promotes the interest of the common.*

- take part in the coordination of ***diplomatic and consular missions*** and the ***EU delegations*** in third countries and
  - coordinate their acts at international conferences,

- their representations to international organisations,
- cooperate in ensuring that decisions defining EU positions and actions,
- step-up cooperation by exchanging information and carrying out joint assessments,
- contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries (*they shall cooperate and support Member States' consular authorities to ensure consular protection to EU citizens in third states*)

States have external diplomatic and consular services in foreign countries to ensure their state interests and the availability of protection for their citizens abroad. These organs and authorities are placed in the territory of the foreign State but under the direction of the foreign ministers. Ius legationis, the right to send and receive ambassadors is generally accepted by international law. The EU as an international organisation also has a sort of diplomatic service: the European External Action Service (EEAS) and the EU delegations are placed in States beyond the EU and to international organisations.

- shall ***uphold the EU's positions*** in such forums;

The TFEU contains explicit provisions only in one specific case: the UN Security Council. The Security Council has primary responsibility for the maintenance of international peace and security. It has 15 Members, and each Member has one vote. Among the 15 members, 5 are permanent since 1945: they may use their veto to prevent a resolution from being adopted. Under the Charter of the United Nations, all Member States are obligated to comply with Council decisions. The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of the settlement. In some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security. Member States which are also members of the United Nations Security Council (among the 5 permanent members: France[2] and UK, and currently Poland until

[2] Thought-provoking reading in this context: One Voice, But Whose Voice? Should France Cede Its UN Security Council Seat to the EU? https://www.fpri.org/article/2019/03/one-voice-but-whose-voice-should-france-cede-its-un-security-council-seat-to-the-eu/

> *2019, Belgium and Germany until 2020) shall concert and keep the other Member States and the HR/VP fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter. When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the HR/VP be invited to present the Union's position.*

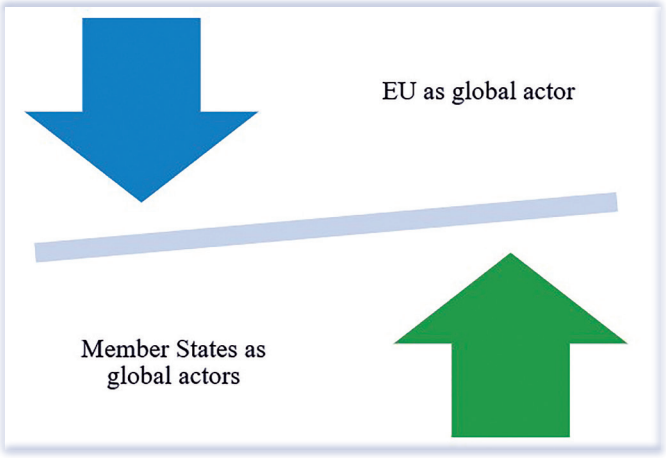
- Where not all the Member States participate, they shall ***keep the other Member States and the HR/VP informed*** of any matter of common interest.

Meanwhile, the treaty provisions covering the CFSP, CSDP including the creation of the office of HR/VP and the establishment of an external action service, **do not affect the responsibilities of the Member States**, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations. The Conference also recalls that the provisions governing the CSDP do not prejudice the specific character of the security and defence policy of the Member States.

In addition to the specific rules and procedures relevant to CFSP and CSDP, the Treaties will **not affect the existing legal basis, responsibilities, and powers of each Member State concerning**

- the formulation and conduct of its foreign policy,
- its national diplomatic service,
- relations with third countries
- and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.

Therefore, on one hand, the EU is a global actor within its policies, for the promotion of the European Union values and interests, on the other hand: Member States' sovereignty and competencies to formulate their policies concerning their foreign and defence policy are ensured.



IV.4. The dichotomy of acting as a global partner (author)

3.2. The EU as an actor of TRNs

Besides internal networking, the EU is an active player in global governance and participates in transnational regulatory networks *harmonisation networks/ trans-governmental networks/transnational networks/TRNs* informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants. Probably the collaboration is the most effective within the ***BCBS*** (cf. TFEU Protocol no. 4. Article 6; or the ***ICH***, (cf. TFEU Article 168. 3.) but despite the practical successes, the phenomenon has its legitimacy, transparency and accountability challenges as they lack usual legitimacy and accountability mechanisms.

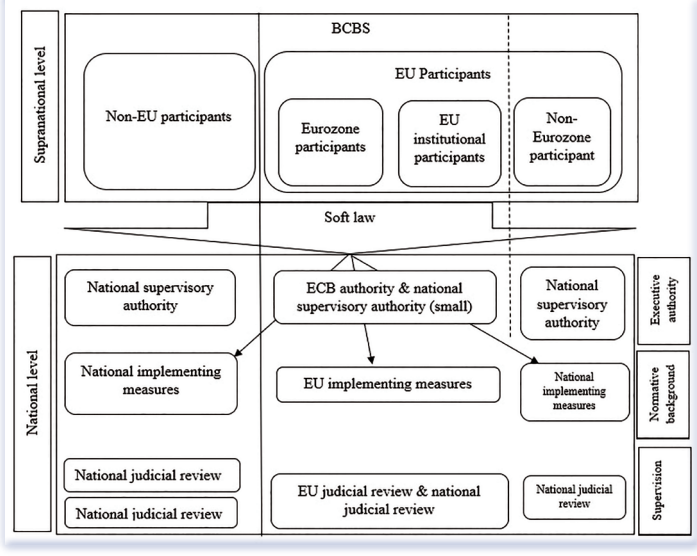
> *The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) aims to achieve harmonisation in the form of guidelines via a process of scientific consensus with regulatory and industry experts working side-by-side worldwide to ensure that safe, effective, and high-quality medicines are developed and registered. The key to the success of this process is the commitment of the ICH regulators to implement the final guidelines. The European Commission is a founding member and also the only supranational regulatory member which stands for the regulatory framework on pharmaceuticals is applicable across all the Member States of the EU and the European Economic Area. The European Medicines Agency the EU's relevant agency (established in 1995),*

underpins the centralised authorisation procedure and supports coordination between national competent authorities. It is a European medicines network comprising over 40 national regulatory authorities guaranteeing a constant exchange and flow of information regarding the scientific assessment of medicinal products in the EU and it is providing the Commission with its technical and scientific support and is coordinating the scientific expertise put at its disposal by the EU Member States, notably through EMA's main scientific committee, the Committee for Medicinal Products for Human Use (CHMP). See https://www.ich.org/about/members-observers/ec-europe.html. In the legitimacy of the ICH guidelines we have discovered deficiencies regarding all requirements of acceptability: stakeholder participation, transparency, accountability and control. (Dorbeck-Jung, 2008, p. 69; in details: pp. 65-66.)

The Basel Committee on Banking Supervision (BCBS) is a non-governmental international organisation englobing non-State actors to produce standards for banking supervision. One of its achievements is the Single Supervisory Mechanism (SSM). The EU has the competence to regulate banking supervision for eurozone Member States, so it contributed to the preparation of the SSM and then implemented it into its policy. Currently, 9 Member States of the EU are represented via their banking authorities in the BCBS (BE, FR, DE, IT, LU, NL, ES, SE, UK) alongside the ECB which represents the EU as an entity. The ECB holds two seats as it represents the EU in both its central banking and supervisory capacity (SSM). The European Commission (Commission) and the European Banking Authority (EBA) are invited as observers.

All euro area States participate automatically in the singly supervisory mechanism (SSM) and under this system, the ECB is enabled to take harmonised supervisory actions and corrective measures, therefore the ECB works as a public authority. in the BCBS, while the present composition of ECB (and SSM) delimits Member State participation in the formulation of the policy at the participatory phase for those who are members of the eurozone and voluntarily assume the SSM, however, the consequences will affect directly or indirectly everyone. On the other hand, it also put the accountability of the ECB and its actions within the BCBS in focus, as the documentation of meetings and discussions is not public although the EU emphasized this value and requirement in its functioning

If it is about Basel standards and the EU Member States, there are three categories of public law framework to describe the issue of financial supervision:
(a) States that are outside the scope of the Eurozone are, therefore also out of the scope of the ECB and its financial supervision rules. Such States are also bound by the aims and spirits of the EU, they are obliged not to endanger its aims, but are not explicitly;
(b) States that are participating in the eurozone and can take part in the decision-making procedure and international representation of the ECB;
(c) States that are not in the eurozone but voluntarily participate in the SSM and their close cooperation is established by a decision of the ECB, the Member State undertakes to ensure that its national competent authority and national designated authority will adhere to any instructions, guidelines, measures or requests issued by the European Central Bank in respect of supervised entities, but this Member State will not be given the right to take part in the ECB. The following figure summarises the multilevel system of banking supervision from an administrative system point of view. Even if different legal regimes seem to be applied to EU Member States' financial regulations, these regimes cannot be purely separated as first, the same aim and point of view are echoed in all the EU legislation concerning the banking union; second, the European administration of all the policies shall correspond to the same constitutional public law principles.



IV.5. Multi-level administration of banking supervision (author)

The nature of trans-regulatory networks allows the EU as an actor in its work, but the EU is **strictly connected to its competencies** laid down in the Treaties (TFEU, art.1; 2-6.).

TFEU Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competencies.

TITLE I

CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have the competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty of the European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:(a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

In European policy areas, it depends on its legislative competence: the powers of the EU outside its borders adjust the competencies that exist inside the EU (implied powers) except for the common foreign and security policy area. In the international sphere, the EU shall act according to serve **input and output legitimacy**. When it enters the global space, the distance between the source of power and the place of activity extends, and the detailed rules on the external action are crucial to maintaining democratism in the course of action. When institutions and bodies act on behalf of the EU, their **accountability and transparency** in the input and output phases of the procedure are evaluated. Even if on the EU's side the procedural details would be available to that end (which is often not the case), the transparency of the TRN's functioning is not ensured or due to economic-political reasons, are confidential.

Accountability has two sides:

(a) ***Internal accountability*** refers to the decision-making processes within the organisation, including checks and balances and a clear division of roles and responsibilities.

(b) ***External accountability*** consists of the supervisors' obligation ability to explain to external stakeholders the impact of their activities. Enabling stakeholders to seek and receive a response to grievances and alleged harm is a critical aspect of accountability. This is the mechanism through which stakeholders can hold an organisation to account by querying a decision, action or policy and receiving a proper review and act upon their claim. Effectivity of global institutions would also require that the standards they established are treated as an obligation, and there is a mechanism that monitors the compliance and enforce them necessary. Due to the non-

State actors and soft law nature of their rule-making result, the answers to the assumptions are available below a global level and depend on domestic acceptance.

In the case if the **EU appears as an actor**, the EU is bound by its internal requirements in the external dimension, therefore, EU legislation shall establish the legal background to fill out the gaps of democratic legitimacy. It means mainly procedural rules strengthening transparency and accountability of the external activity of the institution acting on behalf of the EU. On the other hand, it continues with the incorporation of the soft law into the decision-making procedure to make the legitimacy line unbroken and traceable.

The nature of trans-regulatory networks allows the EU as an actor in their work. On the other hand, the EU is strictly connected to its competencies laid down in the Treaties. Therefore, the EU shall act according to serve ***input and output legitimacy***. When institutions and bodies act on behalf of the EU, their ***accountability*** and ***transparency*** on the input and output phase of the procedure shall also conform with the rule of law principle. Even if on the EU's side the procedural rights would be available to that end (which is often not the case), the transparency of the TRN's functioning is not ensured or is confidential.

3.2.1. Input legitimacy

Both the determination of the Union negotiator or negotiating team, and that of the legal bases of international agreements have seen internal friction among EU institutions and the Member States. The trans-regulatory networks are standard setters who are neither vested with legislative power nor are entitled to assume obligation for a State, although their product acts as a normative act in a non-conform way defined by the classical Westphalian regime. The spreading practice of such trans-regulatory networks and their growing importance reveals the necessity of the articulation of a new legal order and re-thinking of the current one. The EU faces the same challenges while it is trying to improve the effectiveness of its policies and at the same time, it should improve the democratic deficit within its institutional structure. Both tasks are heavily connected to the question of administrative procedural improvement.

To respond to challenges in the global context, *Cassese* reveals, that the **key might be the change of conception** of the current legal order. It considers the **State as the locus of democracy.** If the State is taken out of the equation,

shifting decision-making from the national to the global level deprives citizens and corporations of these participatory rights. So, the top-down legitimacy could be, at least partially, compensated using reinforced guarantees for civil society. **Greater participation** in the formation of the national position ahead of global administrative negotiations, or actual participation in these negotiations, directly or through (similar global) non-governmental organizations are the key. The EU is keen on improving the participation, and the direct involvement of stakeholders in decision-making procedures, but not in those which are the preparatory phases of its participation in the global sphere as highlighted in the case of trans-regulatory networks' work.

> *To ensure the ECB fulfils its mandate properly, ECB policymakers need to be informed about developments in the global economic and financial environment. To that end, the ECB president takes part in the G30 meetings.*[3] *There was a European Ombudsman investigation about how to ensure the participation of members of decision-making bodies of the ECB in the G30 while avoiding any possible impact on its integrity, reputation, and independence, or a perception that there could be such an impact. The European Ombudsman's Decision is based on concerns that G30 membership could create a possible perception of a close relationship between supervisor and supervisee and undermine public confidence in the independence of the ECB. The Ombudsman revealed that participation does not generate the same potential difficulties as does membership although she highlighted that there is increased public awareness, expectation and demand that public institutions should comply with the highest possible standards of ethical conduct and transparency, legitimacy and accountability. These standards must apply irrespective of the forum or context within which such dialogue takes place. If the G30 is not yet ready to be more transparent, to meet these standards, together with the requirement of an "open, transparent and regular dialogue" with representative associations and civil society set out in Article 11(2) TEU, it is the ECB that should consider proactively informing the public about the content of meetings in which members of the ECB decision-making bodies participate. To that end, the Guiding Principles which refers to the procedural steps shall be clarified and add*

[3] The G30 gathers current and former central bank governors, ministers of finance, academics and private sector representatives, including bankers from the largest and most important economies which make it a relevant and useful forum in view of information- and intelligence-gathering.

more details and broaden the scope of the Guiding principles for external communication of application in the view of the subject and the object as a lack of transparency could create a public impression of secrecy, which would reflect negatively on the image and reputation of the EU's decision-making bodies, including the ECB. clarity and legal certainty and to contribute to the full and proper application of the rules of ethical conduct. Following the European Ombudsman's recommendation, the ECB has encouraged the G30's recent initiatives to increase transparency. In that spirit, when the ECB announces, on its website, that the participation of its decision-makers at G30 events will include a link to the G30's website. The ECB has also informed the G30 of the European Ombudsman's suggestion to publish the names of the members of the G30 Board of Trustees and now this information is available on the G30's website.

The principle of **sincere cooperation** is a reciprocal obligation to the EU institutions and the Member States and the institutions among each other. The ultimate duty of the EU to ensure participation is an obvious consequence of the obligation of the Member State to consult its position even in those international organisations to which the EU is not a party, but EU law expands the scope of action.

TEU Article 4

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The **duty of sincere cooperation** obliges the Member States to refrain from certain autonomous actions within international bodies or fora, both in areas of exclusive and shared Union competence. When the EU is exclusively competent, the Member States are under an obligation to result, meaning either following an established EU position or refraining from acting at all (*duty to remain silent*). Regarding shared competencies, the duty of cooperation implies an obligation

of conduct. However, sincere cooperation is **not** to be understood as a duty of **blind obedience** for the Member States. Procedural rules on participation shall make prior coordination available depending on the nature of the EU's competence at stake and there shall be available *options for judicial review* if the EU breaches its obligations.

> *The Member States and even individuals against the European Parliament, the European Council, the Council, the Commission or the European Central Bank or to bodies, offices, and agencies of the Union may invoke Article 265 TFEU and there could be a place for an action for annulment if an international legal norm is incorporated into EU legislation with the violation of the previous coordination obligation concerning the formulation of position for the Member States that are parties.*

Besides exclusive competencies, the **EU** also **can act at the international level as soon as there is a link with the realisation of the Treaty objectives in a particular policy area** and it can **adopt a position** even if it is not a party to the agreement. (CJEU C-399/12, para. 52.) In many IOs the EU will be left with no formal representation, even though it exercises significant competencies in the field. It does not mean that the achievement of such bodies is without influence on the EU. This shall be emphasised as Article 218 TFEU regulates the roles but once the EU participates in a TRN or just relies on/accepts its achievements and for such external activity, there are no explicit treaty provisions.

> *Article 218 TFEU governs the procedure for negotiating and concluding an agreement between the European Union and third countries or international organisations. It is the Council, as the institution representing the interests of the Member States, which is the primary decision-making body in that procedure. As such, it is to authorise the opening of negotiations while it is usually the Commission that conducts negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them. Article 218 TFEU also governs the degree of involvement of the European Parliament, whether in the form of consent in the cases listed exhaustively or in consultation. In the remaining cases, the Parliament is to be informed at all stages of the procedure. Throughout the procedure, the Council is to act by a qualified majority except where otherwise provided. (Opinion of Advocate General Szpunar, 2017, para. 54.)*

The requirements of sincere cooperation require the **possibility of opinion exchange**. It follows, that procedural rules should ensure the EU institutions **organise the procedure for the adoption of the EU's position** in such a way that the Member States have enough time to seek clarification on the competence questions. The EU institutions should work together in good faith, to clarify the situation which might lead to disagreement with the Member States in the international sphere and to overcome difficulties that arise internally. Accordingly, the procedure for the adoption of a legal instrument on common position shall ensure that "*a Member State that challenges the competence of the European Union may bring proceedings before the Court sufficiently early to permit clarification on the question of competence to be obtained*". (C-600/14, para 95.)

So, it seems that the EU tends to adapt to the reasonable advantages of global governance and profit from its achievements, but it has not implemented a legal background for input legitimacy.

3.2.2. Output legitimacy

The other problematic issue is the output legitimacy phase: the *soft law* created by the TRN. The EU has a strict decision-making procedure and the adaptation of a soft law shall also go through the same drafting and legislative procedure. International soft law shall not be directly applicable or rely on.

Meantime, according to the jurisprudence of the CJEU, ***even non-binding acts of international law may produce legal effects*** on the EU legal system. Even the fact that the EU as an organisation as a whole is not a party to another organisation, does not prevent it from formulating its position to be represented by those Member States who are parties to the organisation. It is accepted by the CJEU to incorporate useful achievements appearing in non-binding sources of such international organisations given their direct impact on the European Union's acquis in that area.

> *"Where an area of law falls within a competence of the European Union, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest." (CJEU C-45/07 Commission v Greece, ECR 2009 I-00701, para. 30 and*

31; see also, to that effect, Opinion 2/91) ECR 1993 I-01061, para. 5). CJEU C-399/12, Federal Republic of Germany v Council of the European Union. ECLI:EU:C:2014:2258, para. 50.)

So, it seems that the EU tends to adapt to the reasonable advantages of global governance and profit from its achievements, but it has not implemented a legal background for input legitimacy.

The **detailed provisions** on the formulation of this one voice and the accountability for acts in the supranational area in a proper, binding, clear and predictable legal norm of the EU would be the key to a proper public law framework.

The ECB shall function independently without any intervention from any other institutions or bodies of the EU and also, there is no feedback mechanism for the ECB or the SSM to report back to the Council of the European Parliament on the state of play of the BCBS discussions, it may seem that the BCBS can act independently without being accountable and thus responsible. Its independent act is ensured by the possibility of developing contacts and entering into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries, subject to appropriate coordination with EBA. Although on the other hand, without proper and detailed procedural rules, such guarantees of independence endanger accountability and thus, legitimacy. Accountability, meantime, is the link to the people and a guarantee of acting according to the general interest of the people, and at last, it is about the people's Europe.

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Significant definitions

Accountability	responsibility for the results of action
Agency	are distinct bodies from the EU institutions and separate legal entities set up to perform specific tasks under EU law
Comitology	procedure when the Commission has been granted implementing powers in the text of a law to adopt executive acts of the EU.
Enforcement/ executive networks	networks that complete and supports composite administrative procedures when the case has an international element, and the relevant authorities need to contact each other, share information, and handle documents or other evidence that the other authority in a different Member State needs to decide upon a case.
Four freedoms	the free movement of goods, services, capital and persons that allows interpreting the market of the EU Member States as a single one.
Implied powers	possibility to regulate without explicit competence in the Treaties which flows by explicit empowerment in a certain policy and that certain policy's success requires the extended interpretation of the empowerment
Information networks	are constant channels for systematic cooperation to share information and ensure data flow automatically, without the possibility of rejecting collaboration or retaining information
Regulatory networks	systematic cooperation of competent authorities to identify the best practice and help the interpretation of EU law and the application of EU norms to achieve its purposes with a normative content

Right to good administration	is a fundamental right of every person to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the EU (incl. Member State organs that execute EU law). This right includes: – the right of every person to be heard, before any individual measure which would affect him or her adversely, is taken; – the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; – the obligation of the administration to give reasons for its decisions. Every person has the right to have the EU make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.
Sincere cooperation	the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. The Member States shall take any appropriate measure, general or, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.
Sui generis international organisation	an international organisation that is so special that it is not similar to any other international organisations

The Treaties	the current basic international agreements in force are the fundamentals of the EU: the Treaty (TEU) on the European Union and the Treaty on the Functioning of the European Union (TFEU)
Transparency	clear and visible line of action among the source of power, the actor and the result of acting which enables check accountability

Exercises to practice

1. Support the argumentation with facts and examples:

The EU is	
a supranational international organisation	an intergovernmental organisation

2. How would you describe the EU's public administration? Can the following characteristics be mentioned about it? Explain why!

   a) multi-level:
   b) centralised:
   c) decentralised:
   d) de-concentrated:
   e) strictly regulated by EU law:
   f) cooperative:
   g) networking:
   h) policy dependent:

3. Analyse the following press release concerning the declaration of the HR/VP! What can you tell from this about the EU as a global actor?

2/8/2019 | PRESS RELEASE[4]

Declaration by the High Representative Federica Mogherini on behalf of the EU on the support to the UN-facilitated political process in Libya
The European Union and its Member States are united in demanding that all Libyan parties commit to a permanent ceasefire and return to an UN-facilitated political process. The European Union and its Member States welcome the proposal by Special Representative of the Secretary-General of the United Nations Ghassan Salame for a truce on the occasion of the Eid al-Adha is an important step in this regard. These measures could constitute the first step towards peace.

The European Union and its Member States recall that there is no military solution to the crisis in Libya. It is necessary to relaunch the UN-led mediation process, taking into account the full and equal representation and participation of both women and men, to promote an inclusive government, prepare for democratic parliamentary and presidential elections as soon as possible, and ensure a fair and transparent distribution of the national wealth and advance the reunification of all Libyan sovereign institutions, including the Central Bank and the national security forces under civilian oversight as agreed in Paris in May 2018, in Palermo in November 2018, and in Abu Dhabi in February 2019. In this vein, the European Union fully supports the Special Representative's proposal in three steps to relaunch the political negotiations and in particular to implement the truce.

The European Union and its Member States urge all parties to protect civilians, including migrants and refugees, by allowing and facilitating a safe, rapid and unimpeded delivery of humanitarian aid and services to all those affected, as stipulated under International Humanitarian Law and International Human Rights Law. The indiscriminate attacks on densely populated residential areas may amount to war crimes and those breaching International Humanitarian Law must be brought to justice and held to account. The European Union and its Member States demand all parties cease the targeting of humanitarian workers and medical staff as well as hospitals and ambulances and protect national infrastructure.

The European Union and its Member States call on all UN Member States to fully respect their obligations to contribute to Libya's peace and stability,

[4] https://www.consilium.europa.eu/en/press/

safeguard Libya's oil resources and protect its infrastructure in full compliance with the relevant UN Security Council resolutions. The European Union and its Member States also call all UN Member States to respect the arms embargo, in line with UN Security Council Resolution 2441. The ongoing conflict is destabilising Libya and the entire region has fuelled the intentional use of false news and disinformation and has increased the risk of terrorism and the tragic loss of human lives, also at sea. It urges all parties to dissociate themselves, both publicly and on the ground, from terrorist and criminal elements involved in the fighting, and from those suspected of war crimes, including individuals listed by the UN Se*curity Council.*

4. Analyse and interpret the decision of the CJEU! What kind of information does it give you from the EU as an international actor and its administration?

"Where an area of law falls within a competence of the European Union, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest." (CJEU, Case C-45/07 Commission v Greece, ECR 2009 I-00701, para. 30 and 31.)

Test of multiple choices/quiz

1. **The EU as a sui generis international organization**
   a) amounts features of supranational, intergovernmental and non-governmental organizations.
   b) amounts features of supranational and intergovernmental organizations.
   c) is a global international organization.

2. **The European Commission**
   a) is the ultimate administrative authority of the EU.
   b) is the ultimate administrative institution of the EU.
   c) is the major administrative institution of the EU along with other organs and bodies with an administrative function.

3. Unanimous decision-making
a) is a feature of the community method.
b) is a feature of the inter-governmental method.
c) is a feature of supranational organizations.

4. The European Administrative Space
a) is a common set of standards for action within public administration.
b) is defined by the founding treaties of the EU.
c) means the homogeneous administrative system of the EU.

5. The EU
a) relies only on the administration of the Member States.
b) relies on its administration and pushes execution on the Member States only when the principle of subsidiarity requires so.
c) relies on the administration of the Member States although it also has its administrative background as an organisation and establishes cooperation forms horizontally and vertically.

6. Transparency and procedural rules
a) determine the EU's external activity
b) should determine the EU's external activity's administration.
c) has no significance for the EU's external activity as it is a political activity falling beyond administration.

7. Which statement is correct?
a) The Member States and the EU shall coordinate their external activity due to the principle of sincere cooperation.
b) The Member States are always obliged to follow the EU's common position in external activity as the EU is superior to its Member States.

8. The EU as an entity – and its institutions on behalf of it – can act ..... in external relations.
a) upon the approval of Member States.
b) upon empowerment by treaty-based provisions or implied powers.
c) upon empowerment by treaty-based provisions.

9. The capacity of the EU as a global actor
a) depends on only its competencies laid down in the treaties.

b) depends on the ratification of Member States.
c) depends on the Commission representing the interest of the community and is empowered to act on behalf of the EU which has a legal personality.

10. Within TRNs, the output legitimacy phase is challenged…
a) by the non-State actors' professionalism.
b) by the soft law nature of the acquis achieved.
c) by the monitoring of the evaluation of the adopted resolutions.

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Sorozatszerkesztő: Szomora Zsolt

Csatlós Erzsébet: *Európai közigazgatás*. Szeged, 2021.
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Erzsébet Csatlós: *Contemporary Issues of Public Administration – Globalisation*. Szeged, 2022.

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