

# IS THERE AN EU INTERNATIONAL ADMINISTRATIVE LAW? A JURISTIC DELUSION REVISITED

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*International administrative law emerged in legal scholarship as a kind of parallel to international private law. While international private law constitutes an integral part of private law, international administrative law represents a special discipline of administrative law, providing norms for relations with foreign elements. These norms are referred to as "delimiting norms" in legal scholarship. Governing various aspects of legal relations, both international private law and international administrative law share a common characteristic: both have emerged and been traditionally perceived as national projects. Emergence of an 'union of composite administration' within the European union trigger the question of whether we can also identify similar processes regarding international administrative law. Reflecting the classical thesis that international administrative law represents a special branch of domestic administrative law, this article argues that the sources of EU administrative law provide for a comprehensive set of delimiting rules, which can be labelled as an 'EU international administrative law'.*

**Keywords:** international administrative law, delimiting norms, choice-of-law, isolationism, EU administrative law, EU international administrative law

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*What is presented as international administrative law,  
or something similar, is just a juristic delusion.<sup>1</sup>*

Karl Neumeyer (1869-1941)

## I. INTRODUCTION

The emergence of EU international private law as a special branch of EU law has been discussed over the last two decades by legal scholarship.<sup>2</sup> Traditionally, international private law had been understood as a part of national private law, providing for special conflict-of-law rules designed to deal with those private relations where certain 'foreign elements' are involved.<sup>3</sup> Despite a certain degree of internalisation by means of international agreements, international private law was characterised by a

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<sup>1</sup> Karl Neumeyer, 'Vom Recht der Auswärtigen Verwaltung und verwandten Rechtsbegriffen' (1913) 31 *Archiv des öffentlichen Rechts* 129.

<sup>2</sup> See Aude Fiorini, 'The Evolution of European Private International Law' (2008) 57 *International & Comparative Law Review* 969, Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 *Journal of Private International Law* 64, Geert van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016), Dominik Dusterhaus, 'Does the European Court of Justice constitutionalise EU Private International Law?' (2017) 6 *Cambridge International Law Journal* 159, Leonhard Huebner, 'Coherence in the International Private and Procedural Law of the European Union' (2018) 82 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 811, Jan von Hein, Eva-Maria Kieninger and Gisela Rühl (eds), *How European is European Private International Law? Sources, Court Practices, Academic Discourse* (Intersentia 2019) etc.

<sup>3</sup> In this respect, the English scholarship understood international private law as 'that part of the law of England, which deals with cases having a foreign element'. See Lawrence Collins (ed), *Dicey and Morris on Conflict of Laws, Vol. 1* (13th edn, Sweet & Maxwell 2000) 3.

considerable level of isolation, as each legal order provided for its own particular set of rules<sup>4</sup>.

Facing the gradual harmonisation of those areas that have traditionally been covered by conflict-of-law rules governing relations of private law, this article will investigate whether we can also identify similar processes in the field of administrative law. Thus, the article aims to address the question of whether we can speak of the recent emergence of a distinct 'EU international administrative law'. This research question will be addressed as follows.

Firstly, the article will argue that the scholarship of administrative law traditionally paid particular attention to those administrative relations where certain 'foreign elements'<sup>5</sup> were involved. This attention emerged into a special discipline of administrative law, which has been referred to as international administrative law.<sup>6</sup> The main aim of the conceptualisation of this special (sub)discipline of law was to identify overall principles and rules, as applicable in relation to those administrative relations, where a foreign element arose.<sup>7</sup> Even so, while international private law became a widely recognised academic discipline, its lesser famous *doppelgänger* – international administrative law – never gained such levels of attention. Therefore, section II presents a review of existing literature, dealing with this special discipline of administrative law.

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<sup>4</sup> Alberto H. Neidhardt, 'The Transformation of European Private International Law. A Genealogy of the Family Anomaly' (Ph.D. thesis, European University Institute 2018) 27-28.

<sup>5</sup> E.g. a foreign act (driving licence, passport, university diploma), a foreign administrative authority being active in "inland" (eg. a foreign border officer in a domestic train), domestic administrative authority being active beyond the territory of the state etc.

<sup>6</sup> Internationales Verwaltungsrecht, diritto amministrativo internazionale, droit administratif international, derecho administrativo internacional.

<sup>7</sup> See Klaus Vogel, 'Qualifikationsfragen in Internationalen Verwaltungsrecht' (1959) 84 *Archiv des öffentlichen Rechts* 54, Günther Beitzke, 'Extraterritoriale Wirkung von Hoheitsakten' in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (De Gruyter 1960) 505, Giuseppe Biscottini, 'L'efficacità des actes administratifs étrangers' (1961) 104 *Recueil des cours de l'Académie de Droit International* 638.

After exploring the existing literature on international administrative law, section III will be devoted to the identification of characteristic features of this particular discipline. Here, relations of international administrative law to two other branches of law – international private law and international public law respectively – will be analysed and major differences will be identified. Further, this part will also argue that international administrative law is created by a special set of norms, referred to as "delimiting norms" in legal scholarship, governing those administrative relations where certain foreign elements are involved. Such delimiting norms address these administrative relations by limiting applicability of domestic administrative law and allowing foreign administrative law to gain effect.<sup>8</sup> In this respect, international administrative law will be outlined as an integral part of domestic administrative law, which deals with those administrative relations where 'foreign elements' occur. Despite certain links to international public law,<sup>9</sup> the presented understanding of international administrative law implies a certain degree of isolation, as one can speak about German, French, Austrian and Italian international administrative law. Consequently, the viewpoint of this article is that of the domestic administrative law of a sovereign state.

Subsequent to outlining the existence of international administrative law as a special discipline, section IV will address the question of whether such delimiting norms may similarly be identified in the sources of EU administrative law. Also here, the viewpoint of this article will be that of the domestic administrative law of a Member State, which is part of the EU 'union of composite administration' on one hand, but executes the public administration by means of its own domestic administrative law at the same time. Reflecting the existence of international administrative law as an integral part of the domestic administrative law of each of the Member States, this article aims to address the question of whether the sources of EU administrative law also contain delimiting norms, governing administrative

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<sup>8</sup> For a very recent study on the nature of delimiting norms see Adrian Hemler, *Die Methodik der "Eingriffsnorm" im modernen Kollisionsrecht* (Mohr Siebeck 2019) 63.

<sup>9</sup> A delimiting norm can represent reception of an obligation, arising from an international agreement (e.g. a delimiting norm, provided by a statutory law of the domestic administrative law, can provide for mutual recognition of a foreign act, as required by an international agreement).

relations with certain 'foreign elements'. This research question has only rarely been addressed in legal scholarship.<sup>10</sup> However, it has important consequences, as the results of the existing scholarship on international administrative law can be applied also to delimiting norms existing under EU law.

Thus, section IV aims to give a final answer to the research question outlined in the title of this article. If the sources of EU administrative law do provide for a comprehensive set of delimiting norms, one may argue for the existence of a distinct 'EU international administrative law', which would represent a special (sub)discipline of the international administrative law of each of the Member States. At the same time, it would also represent a new (sub)discipline of EU administrative law. The existence of an 'EU international administrative law' will constitute a major change in the traditional perception of international administrative law as a purely national project. An such, an affirmative answer to the research question presented above would lead to the conclusion that a isolationistic perception of international administrative law is to be considered – at least to certain degree – as an anachronism.

## II. REVIEW OF LITERATURE

When dealing with administrative law, scholarship has traditionally and mainly paid attention to legal relations having an exclusively domestic character. Despite this, one can track academic interest in administrative relations, where certain foreign elements appear, to the very beginning of the 1900s.<sup>11</sup>

In 1901, Prospero Fedozzi outlined his hypothesis on the existence of an international administrative law as a separate (sub)discipline of

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<sup>10</sup> See eg. Christine E. Linke, *Europäisches Internationales Verwaltungsrecht* (Peter Lang 2001) and Jörg Terhechte and Christoph Möllers, 'Europäisches Verwaltungsrecht und Internationales Verwaltungsrecht' in Jörg Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos Verlag 2019) 1445.

<sup>11</sup> Klaus Vogel, 'Administrative Law: International Aspects' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, 9 – International Relations and Legal Cooperation in General* (North Holland 1986) 2-7.

administrative law.<sup>12</sup> In Fedozzi's understanding, international administrative law had emerged as a consequence of gradual internationalisation of administrative relations. In this respect, he understood the emergence of international administrative law as a parallel to the emergence of international maritime law, international private law, international criminal law and so on.<sup>13</sup> Fedozzi's hypothesis on the existence of international administrative law as a special branch of law was very soon reflected in the works of other scholars, in particular those of Umberto Borsi and Donato Donati.<sup>14</sup>

The concept of international administrative law was further developed by German scholars.<sup>15</sup> Beside Ernst Isay and Fritz Stier-Somlo, it is the academic work of Karl Neumeyer in particular that contributed to the further development of this field.<sup>16</sup> Neumeyer understood international administrative law as 'legal statutes that delineate the administration of one autonomous community *vis-à-vis* other autonomous communities and

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<sup>12</sup> Prospero Fedozzi, *Il diritto amministrativo internazionale (nozioni sistematiche)* (Unione tipografica cooperativa 1901) 12-13. In this respect, Fedozzi referred to Lorenz von Stein, who addressed the existence of international administrative law (*internationales Verwaltungsrecht*) in his *Die Verwaltungslehre* (Verlag der J. G. Cotta'schen Buchhandlung 1866). However, in strict contrast to Fedozzi, Stein limited his explanations to a statement about the existence of this branch of law, without analysing it further in detail.

<sup>13</sup> Fedozzi (n 12) 5-6.

<sup>14</sup> See Umberto Borsi, 'Carattere e oggetto del diritto amministrativo internazionale' (1912) *Rivista di diritto internazionale* 352 and Donato Donati, *I trattati internazionali nel diritto costituzionale* (Unione tipografico-editrice torinese 1906) 12-13. Recently, the contribution of Borsi was summarised by Bernardo G. Mattarella, 'Umberto Borsi e il diritto amministrativo internazionale' (2005) 15 *Rivista italiana di diritto pubblico comunitario* 933.

<sup>15</sup> See Ernst Isay, 'Internationales Verwaltungsrecht' in Fritz Stier-Somlo and Alexander Elster (eds), *Handwörterbuch der Rechtswissenschaft. Bd. 3* (De Gruyter Recht 1928) 344 and Fritz Stier-Somlo, 'Grundprobleme des internationalen Verwaltungsrechts' (1930/1931) 5 *Internationale Zeitschrift für Theorie des Rechts* 222.

<sup>16</sup> For an outstanding study on the contribution of Neumeyer to the legal scholarship see Henriette von Breitenbuch, *Karl Neumeyer – Leben und Werk (1869-1941)* (Peter Lang 2013).

provide for the promotion of foreign administration in its realm'.<sup>17</sup> Pursuant to his concept, this aim of international administrative law is realised by a body of special norms that Neumeyer referred to as delimiting norms.<sup>18</sup> These norms determine whether the administrative law of the concerned state is to be applied and, if so, to what extent and under what preconditions the application of the domestic administrative law is limited.

Thus, Neumeyer provided a far-reaching analysis of delimiting norms existing in the administrative law of the German Empire and in the subsequent Weimar Republic. He began by identifying these norms in provisions of acts governing passports and residence permits, university diplomas, titles and degrees.<sup>19</sup> Subsequently, Neumeyer analysed delimiting norms in the provisions of substantive law on natural resources, free professions, various types of insurance and various types of transport.<sup>20</sup> In the aftermath, Neumeyer published the final volume of his monumental series, dealing with general theoretical issues that arose from the concept of delimiting norms in international administrative law.<sup>21</sup>

In order to obtain permission to teach (*venia legendi*) at the University of Munich, Neumeyer addressed the scientific council of this institution through a lecture. The thesis of the lecture argued that 'international administrative law is a newly emerging branch of international private law'.<sup>22</sup> It is significant

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<sup>17</sup> Karl Neumeyer, 'Le droit administratif international' (1911) 18 *Revue générale de droit international public* 492.

<sup>18</sup> '*Grenznormen*' in the original German formulation.

<sup>19</sup> Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung I.* (J. Schweitzer Verlag 1910). For an English review of this volume see Paul S. Reinsch, 'Internationales Verwaltungsrecht' (1913) 7 *American Journal of International Law* 666.

<sup>20</sup> See Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung II.* (J. Schweitzer Verlag 1922) (this volume was reviewed in English by George C. Butte, 'Internationales Verwaltungsrecht' (1923) 17 *American Journal of International Law* 411) and Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung III.* (J. Schweitzer Verlag 1926).

<sup>21</sup> Karl Neumeyer, *Internationales Verwaltungsrecht, Allgemeiner Teil.* (Verlag für Recht und Gesellschaft 1936).

<sup>22</sup> Karl Neumeyer, 'Internationales Verwaltungsrecht' in Max Fleischmann and Karl Freiherr von Stengel (eds), *Wörterbuch des deutschen Staats- und Verwaltungsrechts* (2<sup>nd</sup> ed, J.C.B. Mohr 1913) 444.

that, more than three decades after the lecture took place, Neumeyer bitterly observed that his assertion had not attracted any major attention by the members of the scientific council.<sup>23</sup> This disinterest also continued over the following decades; contemporary scholarship was only occasionally dealing with the issue of administrative relations with foreign elements and the topic was only exceptionally addressed in the textbooks of administrative law.<sup>24</sup>

It was not until 1962 that Neumeyer's contribution on international administrative law (as written in 1913) was replaced in the *Handbook on International Public Law* by a more contemporary entry, authored by Ernst Steindorff.<sup>25</sup> Consequently, the actual existence of international administrative law became questioned by some scholars. For example, Klaus Vogel referred to a 'so called' international administrative law in the title of his splendid monograph on the territorial applicability of administrative law,<sup>26</sup> whereas Franz Matscher, some ten years later, asked whether there is such a thing as international administrative law at all.<sup>27</sup> The fact is that, in strict contrast to international private law, international administrative law has never achieved comparable status and recognition within legal academia.

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<sup>23</sup> Neumeyer (n 21) III.

<sup>24</sup> See Umberto Fragola, *Diritto amministrativo internazionale: Manuali di scienze giuridiche ed economiche* (Pallerano & Del Gaudio 1951), Hans J. Schlochauer, 'Internationales Verwaltungsrecht' in Franz Giese (ed) *Die Verwaltung* (Schriftenfolge zur staatswissenschaftliche Fortbildung der Beamten und Behördenangestellten 1956) 56, Prosper Weil, *Le droit administratif international: bilan et tendances* (Institut des hautes études internationales 1962), Giuseppe Biscottini, *Diritto amministrativo internazionale. La rilevanza degli atti amministrativi stranieri* (Antonio Milani 1964), Giuseppe Biscottini, *Diritto amministrativo internazionale, La circolazione degli uomini e delle cose* (Antonio Milani 1966), Günther Hoffmann, 'Internationales Verwaltungsrecht' in Ingo Münch (ed), *Besonderes Verwaltungsrecht* (De Gruyter 1985) 851.

<sup>25</sup> Ernst Steindorff 'Internationales Verwaltungsrecht' in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (De Gruyter 1962) 581

<sup>26</sup> Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm. Eine Untersuchung über die Grundfragen des sog. Internationalen Verwaltungs- und Steuerrechts* (Alfred Metzner 1965).

<sup>27</sup> Franz Matscher, 'Gibt es ein internationales Verwaltungsrecht?' in Otto Sandrock (ed), *Festschrift für Günther Beitzke* (De Gruyter 1979) 641.

In the last two decades, however, the problem of delimiting norms again became the subject of attention in legal scholarship.<sup>28</sup> Here in particular, the monographs of Christoph Oehler and Martin Kment deserve mention.<sup>29</sup> International administrative law also became the subject of attention by those scholars dealing with the phenomenon of EU administrative law.<sup>30</sup> Meanwhile, other authors criticized the concept of international administrative law as a parallel to international private law. For example, Eberhardt Schmidt-Aßmann argued that 'administrative law scholarship should abandon the inaccurate parallel and radically reorder the formation of terminology'.<sup>31</sup> Consequently, other authors relativized the existence of international administrative law, as constituted by Neumeyer, by arguing that it still represents a field of emerging research, rather than an established area of law.<sup>32</sup>

Despite some renewed interest in international administrative law in legal scholarship, the relations between international administrative law and the European integration processes have been much neglected in contemporary research. The dissertation of Christine E. Linke, published nearly twenty years ago, represents a salient exception.<sup>33</sup>

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<sup>28</sup> See Christine Breining-Kaufmann, 'Internationales Verwaltungsrecht' (2006) 125 *Zeitschrift für schweizerisches Recht* 7, Ming Son Nguyen, 'Droit administratif international' (2006) 125 *Zeitschrift für schweizerisches Recht* 75.

<sup>29</sup> See Christoph Oehler, *Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck 2005) and Martin Kment, *Grenzüberschreitendes Verwaltungshandeln* (Mohr Siebeck 2005).

<sup>30</sup> See Eberhardt Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, Springer Verlag, 2006) 383, Christoph Möllers, 'Internationales Verwaltungsrecht' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 1, Stephan Kadelbach, 'From Public International Law to International Public Law' in Armin von Bogdandy (ed), *The Exercise of Public Authority by International Institutions* (Springer Verlag 2010) 35.

<sup>31</sup> Eberhardt Schmidt-Aßmann, 'The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship' (2008) 9 *German Law Journal* 2077

<sup>32</sup> Terhechte and Möllers (n 10).

<sup>33</sup> Linke (n 10).

### III. INTERNATIONAL ADMINISTRATIVE LAW: AN ACADEMIC DISCIPLINE REINTRODUCED

Before addressing the research question of this article, the discipline of international administrative law must be reintroduced to the reader. When presenting this specific area of law, authors usually begin with reference to the feature of 'territoriality' of administrative law.<sup>34</sup> This feature is 'Janus-faced' and has two dimensions.

On the one hand, administrative law is, in principle, only applied in the territory of the concerned state, i.e. by its public administration, courts and other legal authorities. Simultaneously, the feature of territoriality implies that the administrative authorities exclusively apply domestic administrative law in the matters of public administration.<sup>35</sup> On the other hand, the existing scholarship has regularly pointed out the fact that administrative law (i.e. statutory laws) can – and regularly do – refer to certain facts arising from outside the territory of the state. This means, for example, that administrative law may oblige a domestic source of environmental pollution to use certain counter-measures, irrespective of whether the pollution occurs in the concerned state or abroad. It may also take periods of employment abroad into consideration for the purposes of social security payments and so

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<sup>34</sup> See Neumeyer (n 21) 94, Vogel (n 11) 5, Kment (n 29) 74, Hemler (n 8) 63, etc. Thus, while the traditional scholarship of administrative law has to a large extent marginalised the concept of territoriality, leaving it basically to the treaties of international public law, the scholarship of international administrative law has understood this concept a key issue and starting point. Concerning the concept of "territoriality" of administrative law and its exceptions, see also Thomas Merkli, Michael Eichberger and Andreas Batliner, 'Internationales Verwaltungsrecht: das Territorialitätsprinzip und seine Ausnahme' in *XIII. Treffen der obersten Verwaltungsgerichtshöfe Österreichs, Deutschlands, des Fürstentums Liechtensteins und der Schweiz* (Bundesgericht 2002) 82.

<sup>35</sup> See Carlos Esplugues, Jose Luis Iglesias and Guillermo Palao (eds), *Application of Foreign Law* (European Law Publishers 2011) 72. Here, the authors outline principal differences between the application of foreign law by the courts and the "non-judicial authorities" (public notaries, civil register officers, land registrars, immigration officers, guardianship authorities) and also point out major problems, arising by analysing the problem with regard to the field of public administration.

on. Such territorial extensions are frequently referred to as 'extraterritorial' applications of administrative law.<sup>36</sup>

A clear border is thus provided by the limit between the features of 'inland' and 'abroad' in administrative law, as imposed by international public law. This provides that any administrative activity of a state within the sovereign territory of another state will, in practice, be illegal. Having said this, it would be theoretically possible for a sovereign state to deny any effects of foreign administration in its own territory.<sup>37</sup> However, such an approach would certainly be impractical. Consequently, international administrative law represents a legal vehicle that 'allows domestic administrative law, which aims primarily at protecting public interests and also to find its consequent application to administrative relations with a foreign element'.<sup>38</sup>

Reflecting the review of existing literature outlined above, this section aims to sketch out the specific features of international administrative law as a special (sub)discipline of administrative law. Firstly, the subject will be defined with respect to other existing branches of law. Thus, the relation of international administrative law to two related, yet different areas of law – international private law and international public law – will be analysed and the main differences identified. Secondly, international administrative law as a 'delimiting law' – a special (sub)discipline of domestic administrative law – will be demarcated. This demarcation will represent a virtual bridge to

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<sup>36</sup> See Werner Meng, 'Extraterritorial effects of legislative, judicial and administrative acts of State' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland 1987) 155, William S. Dodge, 'Understanding the Presumption against Extraterritoriality' (1998) 16 *Berkley Journal of International Law* 85, Mathias Audit, 'La Compétence extraterritoriale en droit administrative' in *La compétence* (LexisNexis 2008) 69, Menno T. Kamminga, 'Extraterritoriality' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 125, Zachary D. Clopton, 'Extraterritoriality and Extranationality: A Comparative Study' (2013) 23 *Duke Journal of Comparative and International Law* 217, Joanne Scott, 'Extraterritoriality and Territorial Extension' (2014) 62 *American Journal of Comparative Law* 87.

<sup>37</sup> Under such approach, the state will neither recognise a foreign passport, nor a foreign driving licence, or a diploma, issued by a foreign university.

<sup>38</sup> Christoph Oehler, 'Internationales Verwaltungsrecht – ein Kollisionsrecht eigener Art?' in Stefan Leible and Matthias Ruffert (eds), *Völkerrecht und IPR* (Jaener Wissenschaftlicher Verlag 2006) 131.

answering the research question of this article, which will be addressed in section IV below.

### *1. International Administrative Law and International Private Law*

As mentioned above, Neumeyer understood international administrative law as a kind of parallel to international private law and, in the very early stages of his research, he even claimed international administrative law as being its particular subdiscipline.<sup>39</sup> Since Neumeyer, international administrative law has been understood as a kind of parallel of international private law in legal scholarship.<sup>40</sup> However, certain important differences were identified between these two branches of law, leading to the thesis on the 'emancipation of international administrative law from the realm of international private law'.<sup>41</sup>

Firstly, under international private law, the legal frameworks governing relations of private law in various states are understood as being normatively equal.<sup>42</sup> Consequently, states allow for the application of foreign private law in those cases where a foreign element is involved. On the contrary, under administrative law, such equality is not recognised.<sup>43</sup> Administrative law, as a matter of principle, exclusively recognises its own rules as applicable in administrative relations and these rules are to be decided upon by the competent administrative authorities of the concerned state. There is no

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<sup>39</sup> Neumeyer (n 21) III. In fact, the original thesis of Neumeyer on international administrative law being a subdiscipline of international private law gained reception in particular in Latin American scholarship— see e.g. Huberto M. Ennis, *Derecho internacional privado* (D. T. Lelong Editores 1953) 571.

<sup>40</sup> See Josef Weisbart, 'Internationales Privatrecht und öffentliches Recht' (1956) 6 *Juristenzeitung* 769, Paul H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts* (J. C. B. Mohr 1976) 5, Claus Dieter Classen, 'Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' in Christian Hillgruber (ed), *Die Leistungsfähigkeit der Wissenschaft des Öffentliches Rechts* (De Gruyter 2007) 392.

<sup>41</sup> Konrad Zweigert, 'Aussprache' in *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Hansischer Gildenverlag 1964) 141.

<sup>42</sup> Alex Mills, 'Connecting Public and Private International Law' in Veronica Ruiz Abou-Nigm, Kaey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 12.

<sup>43</sup> Vogel (n 11) 5.

place for any equality of domestic and foreign administrative law under this regime, a feature that has been referred to as the 'unilaterality of delimiting norms' in German scholarship.<sup>44</sup> Thus, in contrast to the conflict-of-law rules of international private law, the delimiting rules of international administrative law are not decisive in answering the question of applicable law between the domestic and the foreign one. They merely limit the application of domestic administrative law in those cases where a foreign element is involved in the relations of administrative law. Consequently, Neumeyer distinguished 'delimiting law' – international administrative law – from the conflict-of-law rules – international private law.<sup>45</sup> This strict distinction was not always consistently reflected by later scholarship of international administrative law. However, this article will follow Neumeyers' approach.<sup>46</sup>

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<sup>44</sup> Kurt Siehr wrote about 'introvert unilaterality of the international administrative law' in '*Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht*' (1988) 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 41. Regarding the feature of 'unilaterality' in international administrative law, see also Anton K. Schnyder, *Wirtschaftskollisionsrecht: Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter Berücksichtigung von Marktrecht* (Schulthess 1990) 45, Matthias Niedobitek, *Das Recht der grenzüberschreitenden Verträge* (Mohr Siebeck 2001) 366, Matthias M. Siems, 'Die Harmonisierung des Internationalen Deliktsrechts und die »Einheit der Rechtsordnung«' (2004) 9 *Recht der internationalen Wirtschaft* 662, Anatol Dutta, *Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr Siebeck 2006) 399. For an overview of existing theoretical consideration regarding the concept of 'unilaterality' see Hemler (n 8) 62, who also argues for a gradual erosion of this concept).

<sup>45</sup> Neumeyer (n 21) 105.

<sup>46</sup> See in particular Schlochauer (n 24) 3, Hoffmann (n 24) 855 and recently Oehler (n 38) 131. Here, the authors argued that certain conflict-of-law rules may be provided also in international administrative law. Such rules - which appear to be quite infrequent in administrative law – may provide for application of foreign administrative law by domestic administrative authorities. See also Jakub Handrlica, 'Foreign Law as Applied by Administrative Authorities' (2018) 68 *Zbornik Pravnog fakulteta u Zagrebu* 193. Other authors strictly denied such constructions, see eg. Hemler (n 8) 63, who explicitly opposes applicability of foreign administrative law by domestic administrative authorities. A third line of scholarship argues that the international administrative law exclusively provides

Secondly, there is an important formal difference between these two branches of law. In the area of international private law, the conflict-of-law rules have become the subject of frequent codification by national legislators. This is not the case for the delimiting rules of international administrative law, which are often embodied in the sources of substantive – as opposed to procedural – law, since this delimitation is a prerequisite for the application of substantive administrative law. The quotation on juristic delusion mentioned at the very beginning of this article reflected this special and very particular nature of the subject under discussion.<sup>47</sup> This difference between international private law and international administrative law has certainly caused difficulties for the coherent research of the latter subject and simultaneously given rise to prominence for the former.

Despite such differences between these two branches of law, certain similarities are also to be mentioned that are relevant to the scope of this article. The concept of international administrative law outlined above, understood as an integral part of domestic administrative law, has important consequences when analysing the subject from a comparative perspective. The subject of research, presented in the work of Neumeyer, was the international administrative law of the Weimar Republic. Two decades later, Giuseppe Biscottini provided a review of the *diritto amministrativo internazionale* and Prosper Weil presented an overview of *droit administratif international*. Both referred to their own domestic legal frameworks – Italian and French.<sup>48</sup>

Indeed, the very traditional understanding in the discussed field was based on a consideration that there are isolated structures of international administrative law in each sovereign state. Consequently, one can argue that

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for conflict-of-law rules – see e.g. Ulrike Wolf, *Deliktsstatut und internationale Umweltrecht* (Duncker & Humblot 1995) 99. These dogmatic divergencies also confirm the fact that today, more than one hundred years after Neumeyer published his works, international administrative law remains to represent to some extent a ‘juristic delusion’. Reflecting this situation, Jörg Terhechte and Christoph Möllers recently stated, international administrative law still represents an area of emerging research, rather than an established discipline. See Terhechte and Möllers (n 10) 1449.

<sup>47</sup> Wilhem Wengler, *Internationales Privatrecht* (De Gruyter 1981) 12.

<sup>48</sup> See Biscottini (n 24) and Weil (n 24).

under this very traditional understanding, international administrative law is a typical national project.<sup>49</sup> At this point, we find a shared characteristic feature with international private law, which also has – despite certain attempts at internationalisation – largely emerged as a national project. As Gerhard Kegel states,

when we speak about international private law, or international administrative law, we do not refer to statutory laws which are universal in their nature. These branches of law are termed so only, because they govern certain relations, which are of international nature. However, each State has its own international private law, international administrative law etc.<sup>50</sup>

Thus, a certain degree of isolation is characteristic of both international private law and international administrative law.

## 2. *International Administrative Law and International Public Law*

A delimitation between international administrative law and international private law may serve for further clarification of the nature of the subject discussed.<sup>51</sup> In this regard, it must be mentioned that international administrative law was not primarily designed to govern the administrative relations of a sovereign state *vis-à-vis* other states, or other subjects of international public law, such as international organisations.<sup>52</sup> The governing of these types of relations was left to international public law. As such, the

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<sup>49</sup> Stefan Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss* (Mohr Siebeck 1999) 3.

<sup>50</sup> Gerhard Kegel, *Probleme des internationalen Enteignungs- und Währungsrechts* (Westdeutscher Verlag 1956) 6.

<sup>51</sup> It has been in particular the German scholarship of international public law that paid traditionally attention for delimitation towards the area of international administrative law – see Alfred Verdross, *Völkerrecht* (Springer 1959) 377, Eberhard Menzel, *Völkerrecht* (C. H. Beck 1962) 5, Wolfgang Graf Witzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Wolfgang Graf Witzthum (ed), *Völkerrecht* (4<sup>th</sup> ed., De Gruyter 2007) 21. The issue of mutual relations between the two branches of law has been crucial also for the scholarship of international administrative law – see in particular Karl Neumeyer, 'Internationales Verwaltungsrecht: Völkerrechtliche Grundlage' in Karl Strupp (ed), *Wörterbuch des Völkerrechts und der Diplomatie* (Walter de Gruyter & Co. 1924) 577.

<sup>52</sup> Neumeyer (n 21) 68.

delimiting norms of international administrative law mainly aim at governing the relations between the subjects under the jurisdiction of the concerned state and its competent administrative authorities. At the same time, international administrative law is in essence following the principle of sovereign equality of states, as provided by international public law.<sup>53</sup> This concept supposes that it is up to each sovereign state to decide to which extent it will exclusively use its jurisdiction to apply and execute its own administrative law within its own territory. Under this concept, only the law of the concerned state is capable of providing any legal effects of foreign legal frameworks *vis-à-vis* domestic administrative law.

In addition to the dichotomy outlined above, there are several problems of mutual relationships that deserve to be clarified further. Firstly, a delimiting norm can reflect obligations of states that arise from international public law. In the legal frameworks, which follow the dualistic model of mutual relation between the international public law and the domestic law, the delimiting norms frequently react upon obligations arising from international agreements.<sup>54</sup> As outlined above, a delimiting norm can never cause any legal effect *vis-à-vis* a foreign legal framework.<sup>55</sup> Consequently, it is always the delimiting norm in the domestic administrative law that provides for such items as a foreign driving licence, a *laissez-passer* for a corpse, a pilot licence and so on, when the mutual recognition of all these acts are based on existing international agreements.<sup>56</sup> Further, the scholarship has recognised that a delimiting norm may also reflect a *custom* as a source of international public law.<sup>57</sup> Thus, the classical approach to international administrative law has

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<sup>53</sup> Ibid 169.

<sup>54</sup> For a rather rare analysis of the concept of international administrative law in a monistic system of relation between international public law and international administrative law, see Christian Tietje, *Die Internationalität des Verwaltungshandelns* (Duncker & Humblot 2001) 98.

<sup>55</sup> Klaus König, *Die Anerkennung der ausländischen Verwaltungsakten* (Verlag C. Heymann 1965) 45.

<sup>56</sup> See the Berlin Convention on the Transport of Corpses of 1937, The Geneva Convention on Road Traffic of 1949, the Vienna Convention on Road Traffic of 1968, the Chicago Convention on International Civil Aviation of 1944 and the Agreement of the Transport of Corpses of 1973 etc.

<sup>57</sup> Neumeyer (n 21) 45. Here, the author argued that granting of a citizenship by one State being recognised by other States, is based on the custom as a source of

always recognised that a source of international public law can represent the *origin* of a certain delimiting norm. However, reflecting the dualistic model of mutual relations between international public law and domestic administrative law, the scholarship has paid little attention to international agreements as sources of delimiting norms. This approach was supported by two additional facts: on the one hand, international agreements providing for delimiting norms were rare and, on the other, they did not follow any coherent approach to the issue of delimiting norms. Consequently, in strict contrast to the area of international private law, the scholarship of international administrative law has never developed any theory of reunification with the field of international public law.<sup>58</sup>

Secondly, an international agreement may also provide for competencies of certain international organisations *vis-à-vis* private persons and undertakings.<sup>59</sup> Powers of the International Atomic Energy Agency to send its inspectors in order to execute the controls related to its safeguard systems serves as a good example. Reflecting the dualistic model of mutual relation between international public law and domestic law, such competencies must also be provided by a corresponding norm of domestic administrative law.

Thirdly, certain parts of international public law cover issues that might well be *materially* linked to the area of administrative law. In principle, this concerns those international agreements providing for cooperation and assistance among the competent administrative authorities of the concerned states. Here, we are neither dealing with mutual relations among states in the traditional understanding, nor primarily with administrative relations

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international public law. Consequently, a delimiting norm, providing for legal effects of such foreign citizenship for domestic administrative law, rather reflects the customary law than a written international agreement.

<sup>58</sup> See Joel R. Paul, 'The Isolation of Private International Law' (1988) 7 *Wisconsin International Law Journal* 173 (arguing for "reunification of public and private international law") and more recently Alex Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1 (arguing that the thesis is a myth that public and private international law are discrete, distinct disciplines).

<sup>59</sup> See Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin von Bogdandy (ed), *The Exercise of Public Authority by International Institutions* (Springer Verlag 2010) 727.

between the citizen and the administrative authority, but with mutual relations among administrative authorities of different states. Such relations are usually of a technical nature, the relations created by the delivering of administrative decisions abroad representing a good example. The traditional approach to international administrative law, which reflects the dualistic dichotomy of *international public law vs. international administrative law*, paid only marginal attention to this area.<sup>60</sup> However, involving primary relations between the competent administrative authorities, these relations also provide certain effects towards residents of the concerned state(s) and, consequently, one can also argue for the presence of delimiting norms in these relations.<sup>61</sup>

So, international administrative law on the one hand and international public law on the other represent two different legal frameworks. While international administrative law governs relations between a citizen and the state, international public law governs mutual relations between states. However, as already outlined above, there is a strong link between the two branches of law.

### 3. *International Administrative Law and Administrative Law*

When dealing with international administrative law, virtually all contemporary authors refer to the monumental work of Neumeyer as the basic source.<sup>62</sup> This fact is sometimes described as a kind of *fascination* by

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<sup>60</sup> Schmidt-Aßmann (n 31) 18.

<sup>61</sup> Anne van Aaken, 'Transnationales Kooperationsrecht nationaler Aufsichtsbehörden als Antwort auf die Herausforderung globalisierter Finanzmärkte' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 219.

<sup>62</sup> See e.g. Benedict Kingsbury, 'The Administrative Law Frontier in Global Governance' (2005) 99 *American Society of International Law Proceedings* 145, Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 395, Dirk Ehlers and Hans U. Erichsen (eds), *Allgemeines Verwaltungsrecht* (14<sup>th</sup> edn, De Gruyter 2010) § 4, Jörg Menzel, *Internationales Öffentliches Recht* (Mohr Siebeck 2011) 16, Jakub Handrlica, 'Two faces of international administrative law' (2019) 9 *Tribuna Juridica – Juridical Tribune* 293, Hemler (n 8) 63 (and the extensive list of references in footnote 317).

these authors.<sup>63</sup> International administrative law, as constituted by Neumeyer, was understood as an integral part of administrative law, rather than international public law.<sup>64</sup> However, instead of constituting a coherent branch of substantive law, international administrative law is comprised of a set of delimiting norms, which are provided among the substantive law (such as tax law, social security law, university law, traffic law, police law, immigration law, natural resources law, confessional law etc.). In this regard, Neumeyer argued that a delimiting norm can provide for legal effects of foreign administrative measures by limiting the application of domestic administrative law in certain cases where a foreign element is present.<sup>65</sup> So, for example, statutory laws governing traffic may provide for legal consequences of a foreign driving licence, statutory laws governing university education can provide for legal consequences of a diploma issued by a foreign university and so on.

**Figure 1. Mutual relations between international administrative law and substantive parts of domestic administrative law**



<sup>63</sup> See e.g. Schmidt-Aßmann (n 31) 18.

<sup>64</sup> So explicitly Neumeyer (n 21) 19.

<sup>65</sup> Ibid 295. See also Fritz Reu, *Anwendung fremden Rechts: Eine Einführung* (Junker und Dünhaupt 1938) 102 (here, the author argued that international administrative law represents a special – from municipal administrative law separated – branch of law).

Thus, the denomination 'international' does not *primarily* refer to any link to international public law, but merely to the fact that norms of international administrative law govern those administrative relations where certain foreign (or international) elements occur. In this respect, some authors have opted for using the term 'administrative international law' in referring to the branch of administrative law that deals with relations with a foreign element.<sup>66</sup> Others argue for abandoning it and replacing it with another suitable designation.<sup>67</sup>

This article argues that rather than representing an area of administrative law governing certain coherent sections of public administration, delimiting norms are embodied in the respective provisions of other branches of substantive administrative law. They are also more closely connected to the structure and policies of the substantive law in question. In this respect, Klaus Vogel argued that 'it would be impossible to a large extent to treat these provisions separately from substantive law, since they fail to constitute a province of law of their own'.<sup>68</sup> Thus, in this context, the scholarship also frequently refers to special subdisciplines of administrative law, which aim at addressing relations with a foreign element.<sup>69</sup> This is the case of international tax law, international social security law and international environmental law.<sup>70</sup> This disintegrated and unharmonized nature of international

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<sup>66</sup> For an attempt to find a new umbrella term for the discussed area of law, see Eberhard Schmidt-Aßmann, 'Verfassungsprinzipien für den europäischen Verwaltungsverbund' in Wolfgang Hoffman-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, Band I* (C. H. Beck 2006) § 17. See also Franz C. Mayer, 'Internationalisierung des Verwaltungsrechts?' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 54.

<sup>67</sup> Oehler (n 29) 3.

<sup>68</sup> Vogel (n 11) 5.

<sup>69</sup> Giovanni Biaggini, 'Die Entwicklung eines internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' in Christian Hillgruber (ed), *Die Leistungsfähigkeit der Wissenschaft des Öffentliches Rechts* (De Gruyter 2007) 414 (with several other examples in footnote 8).

<sup>70</sup> See Ekkehart Reimer, 'Transnationales Steuerrecht' (for the area of international tax law), Markus Glaser, 'Internationales Sozialverwaltungsrecht' (for the area of international social security law) and Wolfgang Durner, 'Internationales Umweltverwaltungsrecht' (for the area of international environmental law) in

administrative law contributed to a certain marginalisation of the legal research in this area.<sup>71</sup>

However, despite failing to cover a coherent area of public administration, this article argues that the aim of delimiting norms – to govern administrative relations with a foreign element – represents a uniting element that leads to a classification of international administrative law as a separate (sub)discipline of administrative law. In the past decades, this line of argument was explicitly supported by several scholars.<sup>72</sup>

#### IV. IS THERE AN EU INTERNATIONAL ADMINISTRATIVE LAW?

In the previous sections, the existence of international administrative law as a special (sub)discipline of domestic administrative law was outlined. Despite certain links to international public law, this article understands international administrative law as a national project, so we can speak about German, French, Italian international administrative law and so on. This means that a certain degree of isolationism remains a characteristic feature of the discussed branch of law. In line with the existing scholarship, this article also argued that the body of international administrative law in each of these jurisdictions represents a separated set of delimiting norms, which govern relations of administrative law with 'foreign elements'. Thus, if approaching the issue from the perspective of the European Union, this section presumes that each of the Member States possesses its own set of rules, which constitute their own domestic international administrative law.

As outlined above, these delimiting norms in the sources of international administrative law may be the result of obligations, provided by existing

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Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 187, 73 and 121.

<sup>71</sup> Matscher (n 27) 645.

<sup>72</sup> See Thomas Fleiner-Gerster, *Grundzüge des Allgemeinen und schweizerischen Verwaltungsrecht* (2nd edn, Schulthess 1980) § 10 ('In fact, we can today refer about international administrative law as about an independent discipline'), Christine Breining-Kaufmann, 'Internationales Verwaltungsrecht' (2006) 125 *Zeitschrift für schweizerisches Recht* 72 ('international administrative law represents a legal discipline *sui generis*'), Jakub Handrlica, 'Revisiting international administrative law as a legal discipline' (2018) 39 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1237.

international agreements. This section aims to address the question of whether we can identify delimiting norms also in the sources of EU administrative law and if they represent a compact set of rules.<sup>73</sup>

This question will be analysed with regard to the model of *indirect* application of EU administrative law by the national administrative authorities under the scheme, which is referred to as the 'union of composite administration' in legal scholarship.<sup>74</sup> This scheme is recently understood as an administrative concept, which facilitates execution of EU administrative law within the European Union by the authorities of the Union and, at the same time, by the national administrative authorities.

The question will be analysed from the viewpoint of the international administrative law of the Member States. Here, two remarks must be made.

Firstly, the classical approach to international administrative law worked with the dichotomy *foreign authority – domestic authority*.<sup>75</sup> With certain reservation, this dichotomy is applicable also when analysing the relations between the administrative authorities of the Member States under the

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<sup>73</sup> In this context, it could be argued that certain developments towards harmonisation of delimiting rules can be identified also under the umbrella of the Council of Europe. However, while e.g. the Agreement on the Transfer of Corpses of 1973 and the European Convention on the Service Abroad of Documents Relating the Administrative Matters of 1977 do provide for certain degree of harmonisation in very specific areas of public administration, we can barely find a coherent approach towards establishing any kind of an 'European international administrative law' here.

<sup>74</sup> For more details on the concept of the 'union of composite administration', see Eberhardt Schmidt-Aßmann, 'Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrecht' in Eberhardt Schmidt-Aßmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund* (Mohr Siebeck 2005) 7. See also Matthias Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) and more recently Paul Craig, *EU Administrative Law* (3<sup>rd</sup> ed., Oxford University Press 2018) 28 (here, the author tries to reconcile various approaches towards definition of the administration, as executed by and within the EU).

<sup>75</sup> See Neumeyer (n 21) 80.

'union of composite administration'.<sup>76</sup> From the viewpoint of a Member State, the administrative authority of another Member State remains a *foreign* authority. Therefore, an act issued by such an authority, which takes on certain legal consequences under the legal framework of another Member State, is still to be regarded as a 'foreign element'. If any applicable norm deals with the legal consequences of such a foreign act, this norm is to be considered as a delimiting norm. To a certain extent, this approach is being blurred under the existing schemes of the 'union of composite administration', as the concerned authorities of the other Member States and of the EU here protect the interests of the other Member States as well.<sup>77</sup> However, it is a matter of fact that under the scheme of the 'union of composite administration', administrative authorities of various Member States are still to be considered as foreign authorities under the scheme of domestic administrative law.

*Secondly*, facing the myriad of forms of administrative measures, the following paragraphs will use the terms 'administrative act' and 'foreign act' as umbrella terms for all unilateral administrative measures, which produce legal effects *vis-à-vis* individual addressees. Such an approach is also currently followed by other scholars.<sup>78</sup>

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<sup>76</sup> See Stefan Burbaum, *Rechtsschutz gegen transnationales Verwaltungshandeln* (Nomos Verlag 2003) 23 and Timothée Paris, 'La reconnaissance des actes administratifs étrangers' (2014) 66 *Revue internationale de droit comparé* 631.

<sup>77</sup> For further details and many other examples see Gernot Sydow, 'Jeder für sich oder einer für alle? Verwaltungsmodelle für die Europäische Union' in Gabrielle Bauschke (ed), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen* (Boorberg 2003) 9 and Jakub Handrlica, 'International Administrative Law and Administrative Acts: Transterritorial Decision Making Revisited' (2016) 7 *Czech Yearbook of Public & Private International Law* 86.

<sup>78</sup> E.g. Angelos S. Gerontas, 'Deterritorialisation in Administrative Law: Exploring Transnational Administrative Decisions' (2013) 19 *Columbia Journal of European Law* 423.

### 1. *In Search for Delimiting Norms in the 'Union of Composite Administration'*

Under the 'union of composite administration', EU law may be executed according to two different models.<sup>79</sup> On the one hand, there is the model of *direct* administration, where EU law is being executed by the authorities of the EU. In parallel, the administrative authorities of the Member States may execute EU law under the scheme of *indirect* administration.<sup>80</sup> The latter model will be the subject of interest in this part.

From the viewpoint of administrative law of a Member State, the indirect administration can currently be realised under these four basic schemes:

- (i) isolated scheme,
- (ii) trans-territorial scheme,
- (iii) reference scheme,
- (iv) co-ordinated scheme.

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<sup>79</sup> For delimitation of direct and indirect administration within the 'union of composite administration', see Stephan Kadelbach, 'European Administrative Law and the Law of a Europeanised Administration' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167 and Jacques Ziller, 'Les concepts d'administration directe, d'administration indirecte et de co-administration et de fondements du droit administrative européen, in Jean-Bernard Auby and Dutheil de la Rechère (eds), *Traité de droit administrative européen* (2<sup>nd</sup> ed, Larcier 2014) 241. Recently, some authors point out certain erosion of these two classical models by introducing various consultation and co-operation schemes – see e.g. Herwig Hofman, 'Composite decision making procedures in EU administrative law' in Herwig Hofman and Alexander Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009) 136 and more recently Andreas Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre* (Mohr Siebeck 2013) 3

<sup>80</sup> For more details concerning the model of *indirect* application of EU law, see Jürgen Schwarze, *Europäisches Verwaltungsrecht* (2<sup>nd</sup> ed, C. H. Beck 2005) 25 and Edoardo Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications' in Herwig Hofman and Alexander Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009) 9.

While in the first scheme the national administrative authorities are applying EU law in an isolated way, in other words without any interaction between the competent administrative authorities of the Member States, the three other schemes are based on certain forms of transboundary effects of administrative measures, issued by the administrative authorities of one Member State (i.e. home state) in the administrative law of another Member States (i.e. host state).<sup>81</sup>

The effect of the trans-territorial scheme on domestic administrative law has attracted serious academic attention so far as, under this scheme, a classical concept of recognition of a foreign administrative act *ex lege* was reinvented and implanted into the numerous sources of EU law.<sup>82</sup> In the trans-territorial scheme, the legal effects of a foreign administrative act arise directly as a result of domestic administrative law and, consequently, no additional act of recognition is required. This concept was also known in the past from certain international agreements that provided for an obligation of mutual recognition of certain foreign acts (such as driving licences, *laissez-passer* for a corpse etc.).<sup>83</sup> Its multiplication under EU law enables its further appraisal from the viewpoint of international administrative law.

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<sup>81</sup> For a detailed review of the four schemes of indirect administration, see Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) 122.

<sup>82</sup> See Matthias Ruffert, 'Der transnationale Verwaltungsakt' (2001) 7 *Die Verwaltung* 453, Henrik Wenander, 'Recognition of Foreign Administrative Decisions' (2011) 71 *Heidelberg Journal of International Law* 755, Luca De Lucia, 'Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts' (2012) 6 *Review of European Administrative Law* 17, Herwig Hofmann, 'Dealing with Trans-Territorial Executive Rule Making' (2013) *Missouri Law Review* 423, Marie Gautier, 'Acte administratif transnational' in Jean-Bernard Auby and Dutheil de la Rechère (eds), *Traité de droit administrative européen* (2<sup>nd</sup> ed, Larcier 2014) 1303. For a recent evaluation of the trans-territorial scheme see Luca De Lucia, 'From Mutual Recognition to EU Authorisation: A Decline of Transnational Administrative Acts?' (2016) 8 *Italian Journal of Public Law* 90.

<sup>83</sup> E.g. the Convention with Respect to the International Circulation of Motor Vehicles of 1909, the International Convention Relating to Vehicular Traffic of 1926, International Convention on the Transport of Corpses of 1937, the Vienna Convention on Road Traffic of 1968, the Agreement on the Transfer of Corpses of 1973 etc.

It is a fact that while legal scholarship has already paid considerable attention to the newly emerged trans-territorial scheme, the relevance of this scheme for the area of international administrative law of the concerned Member States has so far not attracted much attention.<sup>84</sup> The trans-territorial scheme is being realised mostly by the directives providing that certain administrative acts, as issued by a competent administrative authority of the home state, must be *ex lege* recognised by other Member States (host states).<sup>85</sup> Currently, this is the case for authorisations relating to undertakings of collective investment in transferable securities as well as authorisations for pursuing investment services, insurance services, management of alternative investment funds, the activity of credit institutions and so on.<sup>86</sup> Driving licences and boat-masters' certificates for the carriage of goods and passengers by inland waterways also belong to this scheme.<sup>87</sup>

Here, the recognition of the act is being realised by a special norm of the corresponding domestic legislation of the host Member State. This norm

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<sup>84</sup> See overview of literature in fn 82.

<sup>85</sup> See Volker Neßler, *Europäisches Richtlinienrecht wandelt deutsches Verwaltungsrecht* (Verlag Köster 1994) 863 (here, the author argues that the trans-territorial scheme is in principle based on directives).

<sup>86</sup> See Directive 2009/65/EC, Art. 5.1. ('No UCITS (undertakings for collective investment in transferable securities) shall pursue activities as such unless it has been authorised in accordance with this Directive. Such authorisation shall be valid for all Member States'), Directive 2014/65/EU, Art. 6.3. ('The authorisation shall be valid for the entire Union and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Union, either through the right of establishment, including through a branch, or through the freedom to provide services'), Directive 2009/138/EC, Art. 15.1. ('An authorisation pursuant to Article 14 shall be valid for the entire Community. It shall permit insurance and reinsurance undertakings to pursue business there, that authorisation covering also the right of establishment and the freedom to provide services'), Directive 2011/61/EU, Art. 8.1. ('Authorisation shall be valid for all Member States'), Directive 2013/36/EU, Art. 17 ('Host Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States').

<sup>87</sup> See Directive 2006/126/EC, Art. 2.1. ('Driving licences issued by Member States shall be mutually recognised'), Directive 96/50/EC, Art. 1.4 ('The Group A or Group B certificate issued by Member States in conformity with this Directive shall be valid for all Group A or Group B waterways in the Community').

provides for legal effects of the foreign act in the sphere of the domestic administrative law. The norms of domestic administrative law of the home Member State are, in principle, unable to provide any legal effects in the legal sphere of the host Member State. Therefore, it is, in principle, the norm of the host Member State that provides for legal effects of the foreign acts and thus limits the application of its own domestic administrative law. Consequently, if analysing the trans-territorial scheme from the perspective of international administrative law of a Member State, one can see that it is in fact based on a robust body of delimiting norms. While in the past delimiting norms were frequently the product of reception of certain obligations arising from international agreements, the delimiting norms discussed in this section are the product of implementation of the respective directives.

The use of delimiting norms under the trans-territorial scheme goes far beyond the recognition of foreign administrative acts, as outlined above. The trans-territorial scheme triggers a need to guarantee administrative surveillance *vis-à-vis* the addressee of the foreign administrative act, who is conducting activities in the territory of the host state. In essence, two different approaches have emerged towards addressing this goal.<sup>88</sup> In the decentralised model, it is exclusively the host state that pursues competencies in its territory. In contrast, there is the competitive model in which these competencies are executed exclusively by the home state. This model reflects the fact that, even after the enlargement of its legal effects, the act concerned remains governed by the law of the home Member State. Consequently, it is the administrative authority of the home Member State that is in the best position to evaluate to what extent the addressee complies with its arising obligations.

While some directives have opted for introducing the competitive model, other provide for a mixture of both models.<sup>89</sup> In this regard, any case of execution of competencies of the authority of the home Member State in the

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<sup>88</sup> See Kenneth Armstrong, 'Mutual Recognition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2002) 225.

<sup>89</sup> See Directive 2009/65/EC, Art. 19.2. ('The competent authorities of the management company's home Member State shall be responsible for supervising compliance with paragraph 1'.)

legal sphere of the host Member State requires a corresponding delimiting norm being provided for in the domestic administrative law of the latter. Such norms limit the application of domestic administrative law (i.e. competence of the competent administrative authority of the host Member State) and enables the effects of a foreign administrative measure.

Furthermore, the trans-territorial scheme is also being realised in the form of regulations. At present, this is for example the case for authorisations of the export of dual-use items, including the export of cultural goods and decisions by customs authorities.<sup>90</sup> Here, the norms providing for enlargement of the effects of the foreign act into the sphere of the domestic administrative law are provided directly by the corresponding regulation, without it being necessary to implement them further.

While the two remaining schemes of indirect administration do not constitute any direct effects of foreign acts in the host states, they also provide that foreign acts do have certain consequences in other Member States. Also here, one may argue that such consequences are to be identified solely based on delimiting norms, which are provided by the international administrative law of the host states. Under the co-ordinated scheme, the administrative authorities of the concerned Member States are required to conduct administrative proceedings in mutual coordination. This means, for example, that an administrative proceeding in France must be coordinated with a parallel proceeding being conducted in Spain. Consequently, the competent French and Spanish authorities are under this scheme obliged to issue decisions based on mutual coordination. Such decisions have effect exclusively in the concerned Member State, although it is substantially linked to the corresponding decision of the other Member State. Coordinated decisions that are to be issued by competent regulatory authorities

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<sup>90</sup> See Regulation (EC) 428/2009, Art. 9.2. ('All the authorisations shall be valid throughout the Community'), Regulation (EC) 116/2009, Art. 2.3. ('The export licence shall be valid throughout the Community'), Regulation (EU) 952/2013, Art. 26 ('Except where the effect of a decision is limited to one or several Member States, decisions relating to the application of the customs legislation shall be valid throughout the customs territory of the Union').

concerning projects of common interest are a good example.<sup>91</sup> Also here, the link to the foreign act must be provided by a corresponding delimiting norm.

Lastly, the reference scheme is realised in a similar fashion, where a corresponding delimiting norm provides for an obligation on the part of the concerned host state to recognise a foreign act.<sup>92</sup> This is realised by the administrative act, issued by the competent authority of the host state, when specific requirements are met.

## 2. *An Attempt at Classification*

In the previous part, this article argued that the norms providing for effects of foreign acts under the various schemes of the 'union of composite administration' fell under the category of the 'delimiting norms', as understood in the classical scholarship of international administrative law. From the viewpoint of the EU Member States, these delimiting norms represent an integral part of their domestic administrative law and, importantly, they belong to the discipline of international administrative law. At the same time, the increasing number of cases in which the sources of EU law provide for legal effects of foreign acts opens the door for a more comprehensive academic classification of these delimiting norms.

The starting point of this endeavour will be the fact that German scholarship already paid serious attention to the nature of effects arising by various schemes of indirect administration. In this regard, Eberhardt Schmidt-Aßmann has argued for distinguishing those legal effects as either *genuine* or *mediated*, a classification later accepted by other scholars.<sup>93</sup> Building on the results presented by early German scholarship, this article will present an

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<sup>91</sup> See Regulation (EU) 347/2013, Art. 12.4 ('the national regulatory authorities shall, after consulting the project promoters concerned, take coordinated decisions on the allocation of investment costs').

<sup>92</sup> See Directive 2001/82/EC, Art. 22 (within 90 days of receipt of the assessment report, the host Member State shall either recognise the decision of the home Member State and the summary of the product characteristics as approved by it or, if it considers that there are grounds for supposing that the authorization of the veterinary medicinal product concerned may present a risk to human or animal health or the environment, it shall apply the procedures set out in Articles 33 to 38).

<sup>93</sup> See Schmidt-Aßmann (n 74) 270; for further reception of this classification see Sydow (n 81) 146 and Ruffert (n 74) 478.

attempt at classification of delimiting norms, which exist in the international administrative law of Member States as a result of the 'union of composite administration'. The classification stands as follows.

On the one hand, we can argue for the existence of *mediated* delimiting norms existing in the statutory laws as a result of the implementation of a directive.<sup>94</sup> The aim of these delimiting norms is to *limit* the application of the domestic administrative law in certain administrative relations and to *allow* the effects of a foreign administrative act in the host Member State. For example, Directive 2011/61/EU provides in its Article 8.1. that an authorisation for management of alternative investment funds, issued by a competent authority of one Member State, shall be valid for all other Member States. In order to implement this requirement for mutual recognition, the corresponding statutory law of the Member State must introduce a delimiting norm, providing for effects of those authorisations, issued abroad in other Member States. Being the result of implementation of a directive, this delimiting norm may be labelled as a *mediated* one.

**Table 1. Function of a mediated delimiting norm under the 'union of composite administration'**

Legal framework of Member State "a"			Legal framework of Member State "b"		
<i>Authorisation, issued by the competent authority of Member State "a"</i>	→	→	<i>mediated delimiting norm, provided by the statutory law of Member State "b"</i>	→	<i>effects of the authorisation in the legal framework of Member State "b"</i>
			<i>implementation into the statutory law of Member State "b"</i>		

<sup>94</sup> See Gerontas (n 78) 452.

		<i>delimiting norm in an EU directive, providing effects of the authorisation, issued by a competent authority of the Member State</i>		
		<i>implementation into the statutory law of Member State "a"</i>		
<i>effects of the authorisation in the legal framework of Member State "a"</i>	←	<i>mediated delimiting norm, provided by the statutory law of Member State "a"</i>	←	<i>Authorisation, issued by the competent authority of Member State "b"</i>
<b>Legal framework of the Member State "a"</b>			<b>Legal framework of the Member State "b"</b>	

When compared to the classical concept of delimiting norms, as understood by Neumeyer, these *mediated* delimiting norms demonstrate certain peculiarities. As outlined above, the classical understanding of delimiting norms was characterised by the feature of 'unilaterality'. In fact, this feature is being modified to a certain degree when analysing mediated delimiting norms resulting from directives. We can find a touch of unilaterality here, as the delimiting norm of the home state is *incapable* by itself of causing any consequences in the host state. The effects of the foreign act will be, in principle, exclusively the result of the delimiting norm, provided for in the statutory law of the host state.<sup>95</sup> At the same time, the feature of 'unilaterality' is blurred here by the fact that scholars have also acknowledged arising effects of foreign acts in those cases where a directive has been implemented *incorrectly* or not been *implemented* at all.<sup>96</sup> Such considerations would imply the argument that delimiting norms are contained directly in the directives, rather than in the implementing statutory laws.

<sup>95</sup> See Sydow (n 81) 150.

<sup>96</sup> See Neßler (n 85) 863.

In addition to such *mediated* delimiting norms, however, this article argues for the existence of *genuine* delimiting norms. These are provided by directly applicable regulations.<sup>97</sup> Such delimiting norms have the same purpose as the *mediated* ones: they limit the application of domestic administrative law and provide for legal effects of certain foreign administrative act. As a regulation is to be considered an integral part of the legal framework of each Member State, one may argue that the feature of unilaterality is also given here. With respect to the *genuine* delimiting norms, a dispute arose whether they can be provided indirectly, without any explicit reference to the provision of written law.<sup>98</sup> While several contemporary authors have argued against such a possibility, we must bear in mind that Neumeyer argued in favour of such *implicit* delimiting norms, if the *aim of the respective provision* is followed.<sup>99</sup> Consequently, this case triggers the point that theoretical concepts developed by the classical scholarship of international administrative law is also applicable to the current situation.

### 3. *EU International Administrative Law: a 'Delimiting Law' Reinvented*

In the past, delimiting norms were frequently the reflection of certain obligations, arising from international agreements. However, the existence of delimiting norms in a state's international administrative law is not necessarily the product of a new international agreement. In many cases, delimiting norms are provided by the national law-maker in order to reflect a frequent appearance of 'foreign elements' in certain administrative relations, without being based on reciprocity.

The multiplication of administrative relations that falls under various schemes of indirect administration under the umbrella of the 'union of

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<sup>97</sup> See Gerontas (n 78) 454.

<sup>98</sup> This was the case of the Regulation 258/97, which provided in its Art. 4.2. that 'following the procedure referred (...), the Member State referred to in paragraph 1 shall inform the applicant without delay that he may place the food or food ingredient on the market (...)'. In this concern, a question arose, whether such information had legal effects for the whole market (i.e. also territory of the other Member States), or was limited to the territorial jurisdiction of the concerned administrative authority.

<sup>99</sup> For arguments against, see Sydow (n 81) 145 and Gerontas (n 78) 454. For argumentation of Neumeyer, see Neumeyer (n 21) 19.

composite administration' has implied an increasing number of norms, enabling certain consequences of foreign acts in the administrative law of Member States. As outlined above, such norms represent an integral part of domestic administrative law and, reflecting their characteristic features, they belong to the family of delimiting norms.<sup>100</sup> Thus, this article argues that this group of norms represents a newly emerging part of the international administrative law of each of the Member States.

**Figure 2. Mutual relations between administrative law, international administrative law and the EU international administrative law**



From the viewpoint of the Member States, the delimiting norms arising from either directives or regulations represent an integral part of their domestic administrative law. This viewpoint, outlined in the figure above, does follow the very traditional approach to international administrative law as a national project of a sovereign state. Under this approach, we can barely speak about any regional, or universal international administrative law, but there are numerous frameworks existing in each of the different states.<sup>101</sup> While

<sup>100</sup> See also Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 395.

<sup>101</sup> See Jakub Handrlica, 'A Treatise for International Administrative Law' (2020) 10 *Lawyer Quarterly* 283.

certain international agreements do provide for some obligations, which have been reflected in the form in delimiting norms, such agreements basically fail to constitute any coherent structure, as they follow a myriad of forms and approaches.<sup>102</sup>

However, the existence of relatively coherent schemes under the 'union of composite administration' opens the door for approaching this issue also from the viewpoint of EU administrative law. Recently (and obviously inspired by the German model of the 'Special part of administrative law'<sup>103</sup>), attempts were made by several scholars to analyse various substantive areas of the EU administrative law.<sup>104</sup> The existence of a coherent set of delimiting norms, being provided for under the three schemes of indirect administration, enables one to argue that these norms represent a distinct EU international administrative law. The term *international* does not here refer to any source of international public law, but to the fact that the delimiting norms address the occurrence of 'foreign elements' in the relations of administrative law of the concerned Member States.<sup>105</sup>

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<sup>102</sup> See Wenander (n 82) 768.

<sup>103</sup> See e.g. Udo Steiner and Ralf Brinktrine (eds.), *Besonderes Verwaltungsrecht* (9<sup>th</sup> ed., C. F. Müller 2018), Friedrich Schoch, *Besonderes Verwaltungsrecht* (C. H. Beck 2018), Irmgard Rath-Kathrein and Karl Weber (eds.), *Besonderes Verwaltungsrecht* (11<sup>th</sup> ed., Studia Universitätsverlag 2018).

<sup>104</sup> Special part of administrative law (*Besonderes Verwaltungsrecht*) is dealing with various substantive parts. It regularly accompanies the general part (*Allgemeines Verwaltungsrecht*). For most recent attempt to address the issue of the Special part of the EU administrative law, see Herwig C. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Specialised Administrative Law of the European Union* (Oxford University Press 2018).

<sup>105</sup> See Jakub Handrlica, 'Qualification Problem in Administrative Law' (2020) 28 *Casopis pro pravni vedu a praxi* 457.

**Figure 3. Mutual relations between EU international administrative law and substantive parts of EU administrative law**



When approaching the issue of international administrative law from the viewpoint of EU administrative law, this article argues that EU international administrative law does not cover any comprehensive substantive part of EU administrative law. It rather contains a set of delimiting norms, governing the approach to the occurrence of 'foreign elements' in various areas of administration, for example in the EU traffic law, EU customs law, EU insurance law, EU banking law and so on.

The picture above serves for further clarification of this concept. From this viewpoint, the concept of EU international administrative law may also be considered as a kind of *juristic delusion*, as argued by Neumeyer in 1913. Thus, one may repeat the concerns of Franz Matscher regarding the existence of international administrative law and argue that EU international administrative law does not cover any coherent area of public administration and, consequently, can only barely represent a realm of its own.<sup>106</sup> However, the existence of a robust structure of *genuine* and *mediated* delimiting norms, aiming at limiting the application of domestic administrative law, can serve

<sup>106</sup> Matscher (n 27) 641.

as a persuasive argument in favour of existence of this particular (sub)discipline of EU administrative law.

Reflecting the existence of various schemes of indirect administration under the 'union of composite administration' and the consequent multiplication of delimiting norms, which facilitate the execution of this type of administration, this article argues that EU international administrative law represents an emerging branch of international administrative law. In contrast to international administrative law in traditional understanding, EU international administrative law is not an isolated product of one particular state, but represents a coherent regional framework. Yet at the same time, EU international administrative law does not at present provide for any uniform legal framework governing administrative relations with a foreign element within the EU. This is due to the fact that, in parallel to the delimiting norms provided by EU law, a number of other delimiting norms do exist in the various national regimes of international administrative law. These mutual relations are outlined in the figure below.

**Figure 4. Mutual relations between EU international administrative law and international administrative law of the Member States**



## V. CONCLUSIONS

Under the classical approach, international administrative law was understood as a special discipline of domestic administrative law, governing administrative relations with certain 'foreign elements'. This approach, developed by Neumeyer, reflected the dual concept of mutual relations between domestic law and international public law.

Consequently, while reflecting the fact that international administrative law can be influenced by international agreements, the classical understanding of the subject was that international administrative law is the *national project* of each individual state. At the same time, international administrative law *has never been understood* as a branch covering a coherent area of substantive administrative law. On the contrary, in similar fashion to international private law, international administrative law has represented *an auxiliary legal vehicle* enabling interfaces of the respective parts of substantive administrative law with foreign elements. This peculiar character of international administrative law and its disintegrated and unharmonized nature has contributed to a certain marginalisation of legal research in this area. Consequently, international administrative law never acquired the recognition and prominence of its more famous legal *doppelgänger* – *international private law*. The fact that even Neumeyer labelled the field of his life-long studies as a *juristic delusion* is quite symptomatic.

Facing a strengthening of horizontal administrative relations under the umbrella of 'the union of composite administration', this article has argued that the classical concept of international administrative law is undergoing a process of gradual transformation and that a new special branch of international administrative branch – EU international administrative law – is emerging. This process can be observed from two different viewpoints. On the one hand, it can be seen from the perspective of the Member States and their own administrative law. On this view, a new set of delimiting norms is appearing in the domestic legal framework as a result of the implementation of those directives, which facilitates the functioning of the 'the union of composite administration'. The delimiting norms of the EU international administrative law here represent an integral part of the domestic international administrative law of each Member State.

The issue can also be approached from a rather different perspective, which is fairly new, stemming from the traditional perception of international administrative law as a national project. Due to the emergence of a comprehensive set of delimiting rules, which are facilitating the indirect administration under 'the union of composite administration', one may argue that EU international administrative law also represents a particular (sub)discipline of EU administrative law. Consequently, this EU international administrative law has a regional character. In similar fashion to the classical understanding of international administrative law, the newly emerging EU international administrative also retains its *delusional* character. Rather than governing a coherent part of public administration, it has the character of a delimiting norm and serves an auxiliary function with respect to other substantive areas of EU administrative law.