

Edoardo Chiti

Bernardo Giorgio Mattarella *Editors*

Global Administrative Law and EU Administrative Law

Relationships, Legal Issues
and Comparison

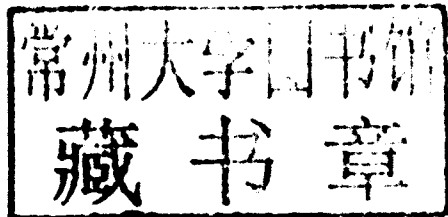


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Global Administrative Law and EU Administrative Law

List of Abbreviations

AD	US Department of Justice – Antitrust Division
ADB	Asian Development Bank
AGP	TT Agreement on Government Procurement
APA	American Administrative Procedure Act of 1946
ARC	Accounting Regulatory Committee
BCBS	Basel Committee on Banking Supervision
BIS	Bank of International Settlements
CAP	Compliance Advisory Panel
Cardozo Law Rev	Cardozo Law Review
CDM	Clean Development Mechanism
CEA	European Insurance Organisation
CEBS	Committee of European Banking Supervisors
CEN	Comité Européen de Normalisation
CENELEC	Comité Européen de Normalisation Electrotechnique
CERs	Certified Emission Reductions
CESR	Committee of European Securities Regulators
CGP	WTO Committee on Government Procurement
CHMP	Committee for Medicinal Products for Human Use
CINGO	Conference of International Non-Governmental Organizations
CMC	Common Market Council
CMDh	Coordination group for mutual recognition and decentralized procedure
CMG	Common Market Group
COE	Council of Europe
COP	Conference of the Parties
CPMP	Committee for Proprietary Medicinal Products
DCP	Decentralised Procedure
DG	Competition Directorate – General for Competition
DGIMS	Directorate General for Internal Market and Services

DIAC	Draft International Antitrust Code
DOE	Designated Operational Entity
DSB	WTO Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EAS	European Administrative Space
EB	Executive Board
EBA	European Banking Authority
EBF	European Banking Federation
EC	European Community
ECHA	European Chemicals Agency
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel Community Treaty
EEC	European Economic Community
EFAA	European Federation of Accountants and Auditor
EFAC	European Federation of Associations of Certification Bodies
EFRAG	European Financial Reporting Advisory Group
EFSA	European Food Safety Authority
EGAOB	European Group of Auditors' Oversight Bodies
EMA	European Medicines Agency
ESMA	European Securities and Markets Authority
ETSI	European Telecommunications Standards Institute
EU	European Union
Eur Competition Law Rev	European Competition Law Review
EWG	Expert Working Group
FAO	Food and Agriculture Organization
FASB	Financial Accounting Standards Board
FCAG	Financial Crisis Advisory Group
FEE	European Federation of Accountants
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSC	Forest Stewardship Council
FSF	Financial Stability Forum
FTC	US Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
George Mason Law Rev	George Mason Law Review
GHG	Greenhouse gas emissions
GPA	Government Procurement Agreement

GPP	Green Public Procurement
GRID	Global Reflexive Interactive Democracy
GRR	Global Regulatory Regime
Harv Int Law J	Harvard International Law Journal
IAASB	International Auditing and Assurance Standards Board
IAIS	International Association of Insurance Supervisors
IAS	International Accounting Standards
IASB	International Accounting Standard Board
IASC	International Accounting Standards Committee
IASCF	International Accounting Standards Committee Foundation
ICANN	Internet Corporation for Assigned Names and Numbers
ICH	International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use
ICN	International Competition Network
ICOMOS	International Council on Monuments and Sites
ICSC	International Civil Service Commission
IET	International Emissions Trading
IETA	International Emissions Trading Association
IFAC	International Federation of Accountants
IFRIC	International Financial Reporting Interpretation Committee
IFROs	International Financial Regulatory Organizations
IFRS	International Financial Reporting Standards
IIOC	Independent International Organization for Certification
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPC	International Personnel Certification Association
IQNet	International Certification Network
ISA	International Seabed Authority
ISA	International Standards for Auditing
ISBN	International Standard Book Number
ISO	International Organization for Standardization
IT	Information Technology
ITU	International Telecommunications Union
IUCN	International Union for Conservation of Nature
J Eur Public Policy	Journal of European Public Policy
JFSA	Financial Services Agency of Japan
JI	Joint Implementation
KP	Kyoto Protocol
LOLR	Lender of last resort
MAHT	Mercosur Ad Hoc Tribunal
MB	Monitoring Body
MB	Management Board

Mich J Int Law	Michigan Journal of International Law
MOP	Meeting of the Parties
MOP	Meeting of the Parties to the Kyoto Protocol
MRLs	Maximum residue levels
MRP	Mutual Recognition Procedure
N Engl Law Rev	New England Law Review
NAP	National Allocation Plans
NCA's	National Competition Authorities
NGO	Non-governmental Organization
NY Univ Law Rev	New York University Law Review
OECD	Organization for Economic Cooperation and Development
PDD	Project Design Document
PEFC	Programme for the Endorsement of Forest Certification schemes
PIOB	Public Interest Oversight Board
PPPP	Public Procurement Pilot Project
PTR	Permanent Tribunal of Review
QELRC	Quantified Emission Limitation and Reduction Commitments
REACH	Registration Evaluation, Authorization and Restriction of Chemicals
ROSCs	Reports on the Observance of Standards and Codes
SAC	Standards Advisory Council
SAI	Social Accountability International
SARG	Standards Advice Review Group
SEC	Securities and Exchange Commission
SIMAP	European Public Procurement (Système d'Information sur les Marchés Publics)
SMEs	Small and medium-sized enterprises
SPS	Agreement on Sanitary and Phytosanitary Agreement
SSP	Sustainable Public Procurement
STC	Decision of the Spanish Constitutional Court
TBR	Trade Barriers Regulation
TBT	Agreement on Technical Barriers to Trade
TEC	Treaty of the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Treaty Related Aspects of Intellectual Property Rights
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade And Development
UNECE	United Nations Economic Commission for Europe

UNESCO	United Nations Educational Scientific Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
Univ Chic Leg Forum	University of Chicago Legal Forum
US	United States of America
Va J Int Law	Virginia Journal of International Law
WB	World Bank
WGTCF	Group on the Interaction Between Trade and Competition Policy
WHC	World Heritage Convention
WHL	World heritage list
WHO	World Health Organization
WTO	World Trade Organization

Contents

1 Introduction: The Relationships Between Global Administrative Law and EU Administrative Law 1
Edoardo Chiti and Bernardo Giorgio Mattarella

A. Cross-Section Analysis

Part I Comparative Inquiries

2 EU and Global Administrative Organizations 13
Edoardo Chiti

3 EU and Global Judicial Systems 41
Barbara Marchetti

4 The Influence of European and Global Administrative Law on National Administrative Acts 61
Bernardo Giorgio Mattarella

Part II Exchanges of Legal Principles

5 The Genesis and Structure of General Principles of Global Public Law 89
Giacinto della Cananea

6 Administrative Law Beyond the State: Participation at the Intersection of Legal Systems 111
Joana Mendes

- 7 EU Law, Global Law and the Right to Good Administration** 133
Juli Ponce Solé

Part III Developing Linkages and Networks

- 8 “Interlocutory Coalitions” and Administrative Convergence** 149
Gianluca Sgueo
- 9 The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection** 173
Stefano Battini

B. Sectoral Analysis

Part IV Parallel Regimes

- 10 Public Procurement and Secondary Policies in EU and Global Administrative Law** 187
Simona Morettini
- 11 The Protection of Cultural Heritage Between the EU Legal Order and the Global Legal Space** 211
Carmen Vitale
- 12 The Relationships Between EU and Global Antitrust Regulation** .. 225
Elisabetta Lanza

Part V Converging Harmonizations

- 13 The Regulation of Pharmaceuticals Beyond the State: EU and Global Administrative Systems** 249
Alessandro Spina
- 14 EU and Global Private Regulatory Regimes: The Accounting and Auditing Sectors** 269
Maurizia De Bellis
- 15 The WTO and the EU: Exploring the Relationship Between Public Procurement Regulatory Systems** 293
Hilde Caroli Casavola

Part VI Cross Implementations

**16 Basel–Brussels One Way? The EU in the Legalization
Process of Basel Soft Law 323**
Enrico Leonardo Camilli

**17 The Review of Compliance with the Aarhus Convention
of the European Union 359**
Rui Lanceiro

**18 Private Implementation of Global and EU
Administrative Law: The Case of Certification
in the Climate Change Regime 383**
Georgios Dimitropoulos

Chapter 1

Introduction: The Relationships Between Global Administrative Law and EU Administrative Law

Edoardo Chiti and Bernardo Giorgio Mattarella

In the last two decades, European Union (EU) administrative law has gone through a process of extraordinary development and consolidation. It first developed as a body of principles and rules aimed at governing, on the one hand, the action of the EU public powers (such as the action of the Commission in the fields of State aids and competition), on the other hand, the action of the national administrations operating as decentralized EU agencies (e.g. the action of national public administrations in the field of public procurement). Subsequently, it has gradually developed in such a way to apply to the several phenomena of organizational and procedural interconnections among national and EU authorities. As a matter of fact, the EU legal order has elaborated a great variety of mechanisms of integration and composition of organizations and activities, establishing in different policy areas “European common systems”, made up of national, European and mixed authorities jointly responsible for the administrative implementation of an increasing number of EU rules and policies.

The emergence of a global administrative law represents a more recent phenomenon. It stems from the proliferation, as a functional response to the changing needs of the world community, of global regulatory systems by sector, sometimes provided with rulemaking powers and called to adopt individual measures, as well as of bodies responsible for the resolution of the controversies that may arise between the global regulators and the addressees of their action, or between the latter. Such development implies the establishment of a number of regulations by sector, centred around administrative law provisions (e.g. those concerning administrative proceedings and participation of private subjects) and established by a variety of legal sources, often differing from the traditional sources of international public law. In this context, the notion of “global administrative law” does not refer

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generically to a body of administrative law beyond the State. Rather, it refers to the administrative regulation of a global legal space differing from the traditional representation of the world community in several regards: (a) as for the subjects, because the classical construction of States as the only subjects of international law is substituted by a more complex understanding, based on the recognition that the subjects of global administrative regimes are, on the side of regulators, a rich variety of global public powers as well as private bodies, on the side of regulatees, not only States but also individuals, firms, market actors and NGOs; (b) as for legal principles, rules and practices, because the regulation of the action of the various global regulatory systems and the other subjects of the global legal space, contrary to the traditional assumptions of international law science, frequently makes recourse to instruments of administrative decision and management; (c) as for the sources, because global administrative law cannot be conflated in the classical sources of public international law, but it extensively relies on measures of different types, such as institutional practices, intra-institutional rules and private regulation. The notion of global administrative law thus describes a new legal reality of rules, institutions and practices that the classical understanding of international relations and international legal regimes fails to recognize or under-estimates.

The two mentioned components of administrative law beyond the State – EU administrative law and global administrative law – have been studied so far as two parallel bodies of law. Little attention has been paid to their “horizontal” relationships, while the analysis of “vertical” relationships between national administrative law and, respectively, EU and global administrative law has been privileged.

Yet, the relationships between EU administrative law and global administrative law that are established in an ever increasing number of policy areas raise several stimulating questions. First, which game of forces characterizes, in the sectors where such relationships take place, the interactions between EU administrative law and global administrative law? To which extent are EU administrations subject to EU law and to global law? And to which extent is global administrative law subject to the influence of EU administrative law? Is there opposition or communication among the two legal systems? And what principles govern the co-existence among EU and global administrative law? Second, what is the result of such game of forces? Does the interaction among EU administrative law and global administrative law give place to an architecture reproducing the traditional paradigm of statal administrative law, centred on the fundamental opposition between authority and freedom and on coercion and authoritative powers? Or does it respond to a different design, which cannot be fully traced back to the administrative experience of the States? In this case, in what ways do the usual forms of statal administrative law combine with the forms belonging to the tradition of international public law, where the rationale of negotiation prevails over command and control? And what are the consequences of the absence, in the global legal space, of a genuine constitutional architecture?

This book seeks to open the discussion on such uneasy issues. Its purpose is to contribute to the overall understanding of EU administrative law and global

administrative law through the analysis of their multiple legal relationships. Its authors are not interested in applying to a number of sectors a predefined set of EU and global administrative law categories. Rather, they seek to enrich and refine EU and global administrative analytical tools through the exam of the manifold relations between the two bodies of administrative law beyond the State. In this sense, the effort carried out in this book is essentially analytical: the aim is to begin to explore the complex reality of the interactions between EU administrative law and global administrative law, to provide a preliminary map of such legal and institutional reality, and to review it.

The book is the outcome of a two-year research, funded by the Italian Ministry of Education, by the Istituto di ricerche sulla pubblica amministrazione – Irpa, and by the Universities of Siena, Rome “Tor Vergata”, Naples, Viterbo, and Campobasso. The five working groups, each operating in one university, have been coordinated, respectively, by Professors Bernardo Giorgio Mattarella, Claudio Franchini, Giacinto della Cananea, Stefano Battini, and Hilde Caroli Casavola. Gianluca Sgueo has greatly helped to finalize the interactions among the various groups, as well as to manage the final stages of the project.

The researchers, selected with an international call for papers, have been asked to examine specific issues, while considering the general framework of global and European administrative legal principles and some cross-cutting issues, such as the competences of European institutions and global organizations and their possible overlap, the public–private dualism at the two levels, the issues of democracy and representation, the instruments of protection of private subjects towards public authorities.

The contributions to this book have been organized in six parts. The first part explores the potentialities of a comparison between EU administrative law and global administrative law. The second and the third part look at the linkages and interconnections between global administrative law and EU law. The last three parts then focus on specific sectors, by analyzing, respectively, cases of parallel regimes, converging harmonizations, and cross implementations.

The first part of the book discusses the relationships between EU and global administrative law by comparing some of their features. It does not provide an analysis of principles, rules and practices of EU and global administrative law. Rather, it focuses on certain structural elements of their legal systems, taken by themselves and in their interaction with national law. Somehow unsurprisingly, it highlights a combination of limited similarities and marked differences.

The comparative inquiry opens with Edoardo Chiti’s analysis of the EU and global administrative organizations. Three main aspects of such organizations are compared: the position of the EU and global administrative bodies in the institutional system; the organizational models prevalent in the EU and global administrations; and the recourse to private actors by the EU and global administrative law for performing specific activities. The analysis reveals a complex and peculiar pattern of similarities and differences in the administrative organizations of the EU and the global legal space. EU and global administrations are different in terms of the “constitutional” anchorage of their public administrations, which is

present in one case but not in the other. They tend to converge as far as their organizational models and the role assigned to private actors in the exercise of administrative functions are concerned. But this convergence takes place at a general level only, while the specific arrangements maintain important, distinguishing specificities. Such pattern of limited similarities and marked differences has several explanations: similarities reflect the common functional needs to which EU and global administrative systems are called to respond, while differences stem from the particular historical formation of the various systems beyond the State as well as from the particular place occupied by the European Commission in the EU legal order.

Barbara Marchetti's contribution compares the EU judicial system with the judicial mechanisms of four global regimes: the World Trade Organization, the UN Convention on the Law of the Sea, the Mercosur and the World Bank. It opens with a discussion of the multiple jurisdictions – international, constitutional and administrative – of EU courts. Then, the fundamental structure and functions of the dispute settlement system of the World Trade Organization, the International Tribunal for the Law of the Sea, the Mercosur system and the Inspection Panel of the World Bank are examined. In a global legal space characterized by both juridification and judicialization, several differences can be identified between judicial systems founded on voluntary jurisdiction, such as the UN Convention on the Law of the Sea and judicial systems based on exclusive and obligatory jurisdiction, such as the EU and the WTO. Furthermore, important divergences can also be found in comparing *prima facie* similar mechanisms for international compliance.

Bernardo Giorgio Mattarella's chapter deals with the influence of EU and global administrative law on national administrative decisions. Proceeding from the theory of administrative acts, typical of the legal scholarship of many European countries, the author examines first the way in which the law beyond the state affects the several steps of administrative decisions: the legal basis for administrative acts, their making, their contents, their legal effects, their execution and their review. This analysis displays more similarities than differences between EU and global law. The different techniques of influence are then investigated, distinguishing between the secure devices, which ensure the supremacy of European law over domestic one and the more diverse techniques used by global law. From this point of view, the differences are bigger, although an accurate exam reveals patterns of resemblance and convergence. Finally, the outcome of the described phenomena on crucial legal issues is considered, showing that the theory of administrative act seems able to adjust to the influence of the law beyond the state, and that even the impact of the latter on the rule of law and democracy is quite less stressful than one could expect.

The second and the third part of this book turn to the linkages and interconnections between global administrative law and EU law. Their purpose is to complement the comparative inquiry carried out in the first part by giving an impression of the multiple forms in which global administrative law and EU law come to contact and interact and by exploring the legal challenges inherent to such variety of interconnections.

The second part, in particular, is devoted to the dynamic of legal principles, which are easily traded between the European and the global legal regimes.

This part opens with Giacinto della Cananea's analysis of the genesis and features of principles of global public law. It is argued that a body of general legal principles common to national legal orders and regulatory systems beyond the State is in the process of emerging. Such principles regulate the ways in which powers are exercised by subordinating decisions to the execution of an established procedure. Their purpose is to remedy the marked sectionalism of the various legal regimes. These principles, which form a procedural (rather than substantive) due process of law, present common, recurring features, different from those characterizing other categories of legal principles. They are structurally and functionally different from both the principles of conventional international law and the principles traditionally recognized in national legal orders. The author investigates these features and the sources of such principles, both in EU law and in the global regulatory systems, and discusses whether the traditional dichotomy between municipal public law and international law has lost its significance, and whether the new principles have a universal or only relative value.

Joana Mendes's chapter then illuminates a specific aspect of the interplay between EU and global regulation, namely the problems arising from the reception of global rules on procedural participation by EU law in sectors, such as food-safety and environmental protection. The chapter investigates whether implementation of international law by EU law is capable of bypassing participation that would otherwise be granted by the EU institutions and bodies. Crucially, this may hinder the procedural protection of the persons affected or the standards of political or social legitimacy that have become accepted in EU governance. Several case-studies are considered to illustrate three different types of interaction between international regulatory regimes and the EU legal order: direct reception, reception filtered by EU procedures specifically created for this purpose, reception following existing EU procedures. These case-studies show how the incorporation of international law in EU law may actually jeopardize the effectiveness of the consolidated EU procedural standards.

Juli Ponce's contribution focuses on the procedural principles relating to the right to good administration, such as the duty of giving reasons and the citizens' participation, showing that such principles are increasingly recognized in different legal systems. Their spread is mainly an achievement of courts: global ones, such as the TWO Appellate Body, EU ones and national ones. The analysis, which takes into account also the case law of the European Court of Human Rights and of certain national courts, such as the US Supreme Court, shows that, in spite of the many differences between the mentioned legal systems, there is a certain degree of convergence in relation to problems and solutions. After accounting for this convergence, the author discusses in general terms the virtues and limits of judicial review of administrative decisions and the relations between judicial globalization and good administration.

Further models of connection and mutual influence are considered in the third part of the book.