

# Rule of Law and the European Administration of Consular Protection

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## Abstract

Application of European Union law and the decision-making in single cases is basically the area of indirect administrative system of the European administration, although number of policies which requires different sort of horizontal and/or vertical cooperation of organs and authorities is increasing. The consular protection policy of the EU is a typical example for this phenomenon and its recent developments are worth to be explored and analysed in this point of view especially with procedural administrative law aspects to see how it is in conformity with rule of law requirements and what challenges arise.

The right to get consular protection in the territory of third States from any consular authority of any Member State if the EU citizen's state of nationality is not represented there, is a fundamental one. Although the provision as a right inherent to EU citizenship has a history of more than two decades, it is still under construction due to the development wave caused by the Lisbon Treaty. The cooperation and coordination measures based on new competences were introduced by the Council Directive (EU) 2015/637 of 20 April 2015 (Directive 2015/637) which entered into force on 1<sup>st</sup> May 2018 and while putting the consular protection regime on new basis, it opened the gate for significant issues of administrative law: *structural law dimension* by incorporating the consular protection policy under the room of direct level of administration and also *procedural law aspects* of a service finally ensured by authorities of Member States without prejudice to Member States sovereignty over the domestic normative content of consular protection and their international relations with third States' procedural and structural law. Meanwhile, speaking about consular protection policy of the EU, different policies with different EU competences are present: fundamental rights protection, administrative cooperation and finally, it shall be noticed that it is a core issue of foreign policy, so, the humble intention of equal treatment of nationals and non-national EU citizen incorporates several challenges for legal application. On one hand, the major motif behind the policy and all its development is to better serve citizens while on the other, to catch up with the requirements of rule of law. During the past decades, the normative background was rather *soft law* (see its problems by Verdier, 2009. p. 167; Senden, 2005. p. 82), although the requirements vis-à-vis European administration is clear: it shall be based on the *rule of law*.

Horizontal and vertical cooperation of authorities envisaged by Directive 2015/637 challenges the elements of *rule of law*, basically in the view of citizenship rights. Member States are obliged to ensure the equal treatment of service, but the procedural rules and consular protection measures are regulated by domestic law, so they vary from State to State and the inter-state phase of the procedure is only framed without exact and detailed procedural rules. Meanwhile, the Council directive proposal, submitted on 31<sup>st</sup> May 2018, on the new emergency travel document is a further step towards a better administration of this specific consular protection measure. It involves developed provisions on the above-mentioned scenario including exact deadlines for procedural steps and preferring hard law instead of soft law measures (which is a common solution to administrative details in the form of guideline, for instance) to that end while the beneficiaries of such provisions and their procedural rights in this administrative procedure is still confusing. Its pioneer provisions are challenging for legal application but on the other hand, they envisage further harmonisation and in a wider scope, it strengthens the need for a comprehensible code for administrative procedures of EU administration especially for those phases of procedures which connect authorities of Member States and/or organs of direct administration of the EU.

The paper wishes to highlight the process of establishing European administration and call the attention to possible daily problems of legal application and establish theoretical- based solution to eliminate them.

## Key words:

European administration; consular protection, horizontal and vertical administrative cooperation; soft law

## 1. Introduction

In the history of European integration, the administrative background was not on the agenda for decades, simply because of the typical nature of international organisations: it used to be a domestic issue. (Ficzere, 2011. pp. 383-84; Chiti, 2011. p. 21) Later, when post-Soviet States were preparing for accession, it was realised that some standards shall be settled for the sake of effective and harmonised implementation of the *acquis*, and recently,

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policies have started to require collaboration of the competent authorities (horizontal cooperation), and also a certain level of cooperation with EU level institutions bodies and organs (vertical cooperation). The nature of cooperation varies from policy to policy depending on the legislative competences, however, it is a common feature that the sphere of interaction rather belongs to the practical side and the framework of legal norms does not expand on such details; the development of the common policy aims and the different networks (Corkin and Boeger, 2014. p. 223) still exceeds the regulation of the classical normative basics. Meanwhile, the protection of rights and their guarantee has also reinforced and been reevaluated, so when these areas overlap, it is time to check them in the view of the basic value of the EU, the *rule of law* principle. Getting in conformity with the rule of law keeps the system in a continuous developing mode and achieves a silent but necessary Europeanisation. The consular protection procedure is a typical example for that. The Maastricht Treaty declared among EU citizenship rights that “[e]very citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State (...)” (Maastricht Treaty, art. 8c al.1) First, being under the former second pillar, the decisions taken to facilitate the execution of the obligations were of that nature and besides enlisting the situations when the assistance should be ensured (95/553/EC Decision, art. 5.) according to the consular law of the requested consular authority’s domestic law (Poptcheva, 2014. p. 171-173), a common format for *emergency travel document* (96/409/CSFP) was also introduced. The harmonisation of consular law was not (and could not be) aimed, the obligation required only *equal treatment* and the establishment of „*the necessary rules among themselves and start the international negotiations required to secure this protection,*” (Maastricht Treaty, art. 8c al.2); details were settled in guidelines, that is *soft law* (cf. Ștefan, 2017. p. 203). Meanwhile, the Lisbon Treaty undoubtedly induced changes in the consular protection policy: it strengthened the right to get assistance as a fundamental one along with, *inter alia*, the right to good administration as a background and also introduced new competences. The manifestation of this latter is the Council Directive (EU) 2015/637 of 20 April 2015 (Directive 2015/637) on cooperation and coordination measures to facilitate consular protection which entered into force 1<sup>st</sup> May 2018, and the other one, the proposal on the *new emergency travel document* (EU ETD) is on its way, it was submitted on 31<sup>st</sup> May 2018 (EU ETD Proposal). Directive 2015/637 frames a cooperation scenario for competent authorities involved in consular protection of a non-represented EU citizen in normal times and in crisis while it takes account horizontal and vertical cooperation, too. It provides for the cooperation of different actors: other State’s consular authorities, the *European External Action Service* (EEAS) and the delegations of the EU. The Proposal goes beyond this, and wish to empower delegations, instead of individual Member States, to negotiate with third States on the acceptance of the EU ETD, and in addition to scenario for cooperation, it establishes concrete procedural rules with deadlines to make the issuance of emergency travel document more effective. Although this latter is not yet adopted, but it clearly marks a new chapter on the path of development, and which leads to a better conformity with the general principles of good administration, however, they also leave open questions and ambiguity in the point of view of citizens’ procedural rights. Consular protection in third States under the auspice of EU law is, in fact, a multi-level European administrative organisation (DezsőVincze, 2012. p. 490; Heidbreder, 2009. p. 5; Torma, 2011. pp. 197; Kárpáti, 2011. p. 234; Koprić, Musa, Lalić-Novak, 2011. pp. 15451546; Curtin Egeberg, 2013. pp. 3032; cf. Hofmann, 2009. p. 45) with *composite administrative procedures* (von Bogdandy and Dann, 2008. p. 215) whose normative is marked by rule of law challenges.

## 2. Research questions and methodology

The general features of European administration of consular protection, just like in the case of most other policies, are challenged by the normative background of administrative cooperation. The vertical and horizontal cooperation basically relies on non-binding instruments or simply decided upon ad hoc basis. Therefore, the aim to this paper is to reveal

- the role of rule of law in the European administration and its consequences;
- the evaluation of consular protection policy in this aspect;
- and the legal status and rights, including their enforcement, the beneficiaries of the policy, the EU citizens and their accompanying family members in the procedure.

To answer these questions, it is essential to explore and analyse the normative rules on consular protection in third States with special regards on the obligation that is imposed on Member States, the competency rules for the EU and one hand, to detect the requirements and on the other hand, the present reality of evaluation of the fundamental right to get consular assistance. In the point of view of citizens, the measures and the administrative procedural guarantees stand in the centre. For consular protection procedure, the consular law of the requested authority’s State is to be applied, although the previous phase is currently non-transparent, and only soft law guidance are available which seriously challenge the possibility to rely them as obligation or to invoke them (see, Trubek, Cottrell, and Nance, Mark, 2005, p. 2; cf. Ștefan, 2017. p. 203 and pp. 21626) although according to the rule of law requirements including the *right to good administration* (EU Charter, art. 41), the person shall

enjoy a set of procedural guarantees. Theoretical and dogmatic analyses are needed to conclude and establish this legal background and solve the question of law applicability with respect to the limits of competency marked by the features of fundamental rights, citizenship rights and common foreign and security policy. Therefore, the findings are basically determined by the overlapping area of domestic, EU and international law analysis and their relationship in this certain issue.

In fact, legal literature is also reticent on this issue as administration and administrative procedure of consular protection, although it is an administrative service, is still a basically domestic issue, but the success of the evaluation of EU law lies in administration applying common constitutional principles, (Lisbon Special European Council, 2000. paras. 9 and 17; Drechsler, 2009. pp. 7, 10) wishes to expand the scope to that end, although it does not answer significant jurisdictional and responsibility questions.

### 3. Findings

#### 3.1. *The role of rule of law as a compass in the European administration*

*“International organizations are unusual creations: generated by and for their member-states, at the same time they often have to compete with those very states that created them.”* (Klabbers, 2002. introduction) This statement is especially true for the EU as its functioning and organisation is always balancing at the axis of the *autonomy* of the EU and the *sovereignty* of Member States while these the layers and also the complex structure is based on the *rule of law*, (Les Verts, para 23.; TEU, art. 2) as the European integration has always been, by its nature a *community of law*. (Hallstein speech of 1962 cited by von Danwitz, 2014. p. 1312)

Accepting *von Bogdandy’s* concept, international institutions should be understood as concretizations of general principles of public law formulated in the tradition of liberal constitutionalism and adapted to the structures and requirements of multilevel systems. In the formulation of international principles for the exercise of public authority, there are three ways of interpretation. The (a) basic rule of law principles govern activities of international institutions which need to be implemented by domestic institutions to have legal effects with respect to the individual. Different principles occur for international institutions whose acts directly affect private subjects. These (b) principles force domestic administrations to consider extra-territorial interests as a response to global interdependence. The (c) third type consists of international legal principles for domestic administrative activity. (von Bogdandy, 2008. pp. 1921-1922) These are the principles regarding the cooperation of domestic administrations within composite administration. The EU, being a unique political system built on supranational and intergovernmental principles, includes all the three types and their application varies according to policies but the third version’s importance is dominantly growing.

Being one of the major values, it is an *„umbrella principle with formal and substantive components or sub-principles”* (Pech, 2009. p. 53.) originated from the traditional principles recognized throughout the national legal orders of its Member States: *legality, legal certainty, confidence in the stability of a legal situation, and proportionality*. (von Danwitz, 2014. p. 1314) The list is not exhaustive, and as there is not inclusive interpretation on the rule of law, theoretical analyses seeking for the administrative law standards support an exhaustive approach which also add *non-discrimination; the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of the public administration* to core elements of rule of law. Basically, the main administrative law principles subtracted and accepted as standard are reliability and predictability (legal certainty); openness and transparency; accountability; and efficiency and effectiveness. (SIGMA 27, 2009. p. 8; Bauer and Trondal, 2015. p. 10; see also different definitions in Møller and Skaaning, 2014. p. 1627) These are legal principles whose main function is the attribution of the binary qualification of legal/illegal in the light of overarching values and ignoring them leads to the loss of legitimacy; (von Bogdandy, 2008. p. 1912) no matter which level of European administration is on charge, they shall be respected, and they shall prevail. Direct and indirect administration form relatively separated organisational systems with their own institutional norms and are mainly connected via governance issues but the number of policies that requires daily and constant cooperation is growing, although the interaction sphere is out of the scope of legislation and comprehensible practice that may give rise to codification, as highlighted in the ReNEUAL Model Rules work. (ReNEUAL Model Rules Book VI. p. 265266) Meanwhile, the system formed by the two levels also assumes the principle of *administration through law*, which means that public administration ought to discharge its responsibilities according to law. (SIGMA 27, 1999. p. 9)

Therefore, when the implementation of the EU policies and application of EU law are viewed through the prism of rule of law, it shall be examined in a (a) *functional perspective* to see if rights and policy objectives can be pursued and balanced against each other; (b) an *organisational perspective* to check that institutions and bodies are equipped with means to pursue the tasks; (c) a *procedural perspective* to detect if the core values and rights are fulfilled and realised through procedural provisions and forms of act; and (d) an *accountability perspective* to verify if acts are reasoned and justified, and that there is proper review and control of activities. (cf. Hofmann,

2012. p. 4) Consequences seem logical and obvious, but it shall be noted that domestic administrative law does not expand beyond their territorial scope and the EU has restricted legislative competences which is different in diverse policies, although administrative cooperation measure in the form of regulation has gained legacy since the Lisbon Treaty but measures taken upon this provisions shall not result as prejudice on national administrative laws. (Lisbon Treaty, 76/D, TFEU 197) This latter condition is clear a limitation on the legislator. In addition, it shall be noted that even if there are relevant principles, they cannot create competence and cannot be substitute for missing empowerment provisions as measures taken at the EU level must also comply with the principle of subsidiarity. (McDonnell, 2014. p. 66) Principles fill the legal gaps and direct interpretation to achieve the common goal: evaluation of the EU goals, therefore, the rule of law is the encompass in European administration when the balance between the proper and effective execution of the *acquis* and Member State sovereignty is at stake, and rule of law is also the motor that keeps the legal development in action.

### ***3.2. The implications of rule of law on European administration of consular protection<sup>2</sup>***

Speaking about the European administration of consular protection under article 23 of TFEU/article 46 of EU Charter, the horizontal and vertical cooperation of the competent organs and authorities shall be examined as the consular policy of the EU is based on it. In a basic case, the unrepresented EU citizen has the right to turn to any available Member State's consular authority for assistance. The authority at site contacts the responsible authority of the alleged State of nationality to check identity and leaving space for the national authority to proceed; the foreign consular authority proceeds the case only if the Member State of nationality cannot or will not do it. The financial background of the procedure depends on the consular law of the jurisdiction, then it is the issue of the concerned Member States and the Member State of nationality and its own national. In case of crisis, that is natural or industrial catastrophes, terrorist attacks or any kind of situation when a mass of the EU citizens needs consular assistance on the territory of a third country, the supranational level of the European administration directly appears with the Commission as its vice-president, the HR/VP is responsible for foreign policy, including crisis management mechanism. (TEU, art. 26 (2); EEAS Decision, art. 4 (3) a). The identity check round may be put aside due to necessity and time loss, although other cooperation forms appear if there are other represented Member States at site, if there is an appointed *Lead State* among the represented Member States, (Lead State Guidelines, art. 2.1-2.4.) and the *delegations* of the EU displaced in the third State, which are hybrid administrative constructs that combine diplomatic and operational tasks, such as development cooperation and trade (Helly et al., 2014. p. 9; see also Reynaert, 2012. pp. 207226, 224) but have no competence to provide consular protection, appears, along with the competent units of the EEAS, which is a functionally autonomous body under the direction of the HR/VP (EEAS Decision art. 1.2; Lequesne, 2015. p. 36; Gatti, 2016. pp. 105190) to support consular authorities work. (Directive 2015/637, art. 10-11; 13.)

To describe the institutional relation of them, it shall be highlighted first, that none of the supranational organs are neither entitled to perform authority acts, nor to pursue consular protection. The cooperation of the competent institutions and organs is mainly based on coordination. Horizontal coordination is carried out at two main levels. The first one is at direct administrative level, where the coordination of all the foreign policy issues is the responsibility of the HR/VP (TEU, art. 26 (2)) assisted by the EEAS, which also has its own coordination system among its different divisions. (EEAS Decision, art. 4) The second level is the forum of site. *In situ* coordination has three main potential actors each of them having their own coordination mechanism. The first actor responsible for coordination is (a) the local *EU delegation* in a complementary role. (Austermann, 2014. p. 57) The second one is (b) the group of represented Member States who shall closely cooperate with each other and with the delegation and other potential bodies of the Commission. (Directive 2015/637, art. 10.1; 11) In case of more represented one, a Member States can take on the role of the *Lead State* on a voluntary basis under conditions laid down in a guideline, but without defining legal tools to that end. (Lead State Guidelines, Introduction (2); (5)) Close cooperation in this context means sharing of information to ensure efficient assistance for unrepresented citizens and coordinating contingency plans among themselves and with the EU delegation to ensure that unrepresented citizens are fully assisted in the event of a crisis. (Directive 2015/637, Preamble (2), art. 13.) Further details, like the assignment of one responsible actor to manage the process of an evacuation, for instance, and deal with the involvement of the EU capacities, is the subject of further intergovernmental negotiations of Member States. (Directive 2015/637, Preamble (19), art. 7 (2)-(3)) In addition, such negotiation does not create a right to give orders for the delegations or in reverse, nor does subordinate consular authorities to the EU organs in the system. Upon request by Member States' consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis. (EEAS Decision Art. 5(9); Helly et al., 2014. p. 810) They can also request to be supported by existing *intervention teams* at the EU level,

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<sup>2</sup> This part of the paper is discussed in a more detailed way in the following article of the Author: Csatlós, Erzsébet. 2018. A konzuli védelem európai közigazgatási szervezete. *Pro Futuro* 7, no. 1: 49–65.

including consular experts, in particular from unrepresented Member States, and by instruments such as the *crisis management structures of the EEAS* and the *Union Civil Protection Mechanism*. (Directive 2015/637, art. 13 (4); UCPM Decision, art. 16.17; Gestri, 2012. p. 118) The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground. The *Lead State*, if designated, should be in charge of coordinating of any support provided for unrepresented citizens. (Lead State Guidelines, 2)

To describe the relationship between the different levels and various actors of European administration of consular policy, the words ‘coordinate’ and ‘support’ are often used. Even if none of these words are defined by any normative texts, they must not *expressis verbis* suggest obligation. The aim is to synthesize efforts but without the coercive force of persuasion or direct order to make obligations, although accountability, predictability, and common understanding are presumed. (Lequesne, 2015. p. 46)

The system of European administration on consular protection lacks the classical hierarchical structure of state administration and vertical coordination is regulated by decision only in the case of the EEAS and its delegations. According to the relevant legal and non-legal acts of the EU *acquis*, none of the EU institutions or other bodies is entitled to direct consular authorities of Member States and practice such influence that would reduce their autonomy, or to receive their consular tasks. The consular authorities stay under the direction of their domestic superior authority, although the Member States’ authorities should closely cooperate and coordinate with one another and with the EU, in particular the Commission and the EEAS, in a spirit of *solidarity*. (TEU, art. 2; cf. TFEU 222 1 (b); Solidarity Decision, art. 4; 5; Chronowski, 2017. pp. 35, see also: Klamert, 2014. pp. 3541)

Under these general principles, in absence of harmonisation in material rules on foreign policy and consular protection, would vertical cooperation have an indirect impact making the EU organs a coercive power on external Member State organs? The principle of *loyal cooperation* might urge the effective execution and evaluation of a fundamental right of citizenship to overrule the shortage on organisational rules but, in the meantime, neither the implementation of foreign policy, nor the charter may extend the field of application of the EU law or establish any new power or task for it, or modify powers and tasks as defined in the TEU-TFEU. The rules for the EEAS and foreign policy may not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of the EU foreign policy, national diplomatic service, and relations with third countries. (14. Declaration to the Treaties, EU Charter art. 51 (2); TEU, art. 40 (1); EEAS Decision, article 4 (3)(a); cf. TFEU, art. 352. See, Dashwood, 2009. p. 43.) Meanwhile, many debates support the expansion of the delegations’ competency to take over some administrative functions for example to issue Schengen visa and to ensure some basic consular protection measure (Balfour and Raik, 2013. pp. 3738.) In the name of the subsidiary principle and the constitutional allocation of competences in the Treaties along with financial and institutional simplification prospects, the smaller States welcome the idea and would happily save some money with closing their consulates or being represented by the EU delegation where they were not before, but absolutely rejected by the dominant large States which are afraid of losing the rest of their external sovereignty and political interests by such step. (Lequesne, 2015. pp. 48-49; Whitman, 2015. p. 25) However, it shall be noted that all EU norms are *pacta tertiis* for third States, therefore consular protection can be practiced for non- nationals, that is on behalf on another State, upon appropriate notification to the receiving State, unless the receiving State objects (VCCR, art. 8), so for the sake of efficiency, according to Directive 2015/637, Member States are responsible to undertake the necessary measures in relation to third countries to ensure that consular protection can be provided on behalf of other Member States. In contrast, the EU ETD Directive Proposal empowers delegations to negotiate with third State the acceptance of the common EU format travel document and handle the specimens, so this consensual step at the drafting of the new rules for effectivity, in respect of proportionality and subsidiarity principles, is an approach towards the logical burden sharing.

Summing up, the lack of transparent and pre-defined rules of institutional relationship is seems to show inconsistency with the requirements of rule of law and the gaps of rules may lead to jurisdiction problems and procedural consequences in the view of responsibility of authorities and the evaluation of fundamental citizenship rights.

### ***3.3. The implications of rule of law on fundamental rights: the content of the service and its beneficiaries<sup>3</sup>***

In the view of the beneficiaries of the European consular protection policy, first, it shall be noted that an *equal treatment clause* is proclaimed (Poptcheva 2014, pp. 171173) but no harmonisation of consular law has been aimed, simply because of the lack of competences to do so. The relevant legal norms of second pillar were not

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<sup>3</sup> This part of the paper is discussed in detail in the following articles of the Author: Csatlós, Erzsébet. 2018. Consular Cooperation of EU Member States in a Fundamental Rights Approach. *Marmara Journal of European Studies* 26, 2.: 123; Csatlós, Erzsébet. 2019. EU ETD: Towards a New Chapter in EU Citizens’ Rights and a Better Administrative Cooperation. *International Law Review* (forthcoming in 2019).

recognized as part of the EU legal order as they were adopted on an inter-governmental ground. Meanwhile, as *acquis communautaire*, they were to be respected, although they could never overcome the diversity of national regulations and foreign policies. (CARE Final Report, 2010. pp. 2425) Later, the Lisbon Treaty brought major changes including new competences to facilitate consular protection in the form of directive with *cooperation and coordination measures*, but basically, the nature of assistance and the applied measure depends solely on the consular (domestic) law of the requested consular authority's Member State in each situation. Therefore, there is no uniform consular assistance service and no uniform procedural law either, although the general scenario in case of a request is now settled; *ie.* how the Member States' diplomatic and consular authorities shall closely cooperate and coordinate with one another and with the EU organs to ensure protection of unrepresented citizens (Directive 2015/637, art. 10). It is essential to highlight the fact that in case of distress, the obligation of the Member States is *to give assistance*, but not even a common emergency travel format cannot overrule consular law of Member States, if the authority is not empowered to issue such documents by their own domestic law.

The new regime introduced by Directive 2015/637 is based on *solidarity, non-discrimination and respect for human rights* and it refers to the EU citizenship as a fundamental status and the rights inherent as special ones (Directive 2015/637, preamble (1)-(3)). However, it aims no intervention in international relations, the task to make consular protection of non-nationals possible are addressed to Member States. Meanwhile, details are not discussed, although the requirement of a proper *administrative service* for EU citizens is resulted from basic values of the EU concerning administrative procedures which shall be also evaluated, *inter alia*, the right to good administration, in case of breach of law the right to legal remedy, and also the right to respect of family life and the right to protection of personal data, which are priorities of the EU ETD Directive Proposal. (EU ETD Proposal, preamble (22)). All are enlisted among the fundamental rights placed among primary sources of EU law (TEU art. 6 (3)) and although there are some concerns whether they are superior or not to other primary sources (Ziller, 2014. p. 347), it is undoubted that they are normative to all foreign services of the Member States that executes the EU's consular protection policy. (EU Charter, art. 51.1) In addition, compared to the regime of Decision 95/553/EC, in the view of citizenship rights, the consular protection shall be provided to those *family members* as a derivative right, "*who are not themselves citizens of the Union, accompanying unrepresented citizens in a third country, to the same extent and on the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the Union, in accordance with its national law or practice.*" (Directive 2015/637, art. 5)

One may ask if it is compatible with the rule of law that in the territory of a third State the same EU citizen and its accompanying family member may get different administrative service due to the different consular law of Member States. Consular authority of Member State 'A' may ensure a higher level of assistance, the 'B' would refuse to ensure the service for the family member, while 'C' could cost three times more than the other one, although formally, all of them are consistent with the core provisions of the consular protection policy of the EU. The possible diversity of the content and the personal scope of service are aggravated by differences in other aspects of the service like pre-conditions, for example there are states who insist on submitting a police report to prove the loss of passport while others do not require such document. The fee of the service is also a key factor in this context as the Directive 2015/637 impose provisions only on the scenario of reimbursement and mutual solidary between Member States (Directive 2015/637 (26)-(28), art. 14-15; annex I-II) and the *EU ETD Proposal* declares that States shall collect from the applicant such charges and fees as would normally be levied by them for issuing an emergency passport, although currently, it varies from 1,55 to 150 EUR. (ETD Presidency reflection paper, pp. 910) Such differences may be eliminated by practical arrangements, local agreements and workshare agreements which would have significance mainly among the represented Member States within the same third States although some sort of standardisation would definitely serve a balanced service and predictability and reduce the chance of *forum shopping*. In the point of view of Member States, they formally do not violate their obligation of equal treatment, however, the lack of proactive steps towards workload share may reveal questions concerning the effect of rights. (Rasmussen, 2017. p. 279)

In a particular third State, several Member States can be represented offering a variety of choice of forum for non-represented individuals as according to the directive in question, the individual has the right to turn to any of them.<sup>4</sup> This may create *forum shopping* and unequal burden on the chosen Member State. Here it is essential to reveal that *being unrepresented* means having no available representation in time and/or distance, so even if an EU citizen's nation State is represented in a particular third State, it does not automatically mean that he/she is represented; the consular authorities shall take into account the circumstances of each particular case. (Directive 2015/637, preamble (8)) The workload share arrangements shall be beneficial to citizens, since they allow for better preparedness to ensure effective protection. Member State consular authorities that receive requests for protection should assess (a) whether, in a specific case, it is necessary to provide consular protection or (b) whether the case can be transferred to the embassy or consulate which is designated as competent according to any arrangement already in place. According to the present regime, Member States should notify the

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<sup>4</sup> To see the available representations, visit: [https://ec.europa.eu/consularprotection/content/home\\_en](https://ec.europa.eu/consularprotection/content/home_en) (20.01.2019.)

Commission and the EEAS of any such arrangement, which should be publicised by the EU and Member States to ensure transparency for unrepresented citizens. (Directive 2015/637, preamble (10)) These arrangements are either non-existent or the transparency is missing as on the Commission's designated website, no such information seem to be available for EU citizens.<sup>5</sup> Even if in each and every third State there is an agreement of cooperation, the level of service stays colourful in different third States, although the harmonisation or standardisation of service is not aimed, while the clear, predictable and transparent administration of consular protection is not simply a desire but an obligation deriving from general administrative principles of EU law. As a general principle, the functioning of the EU is based on the rule of law, therefore good administration means that the institutions, bodies, offices, and agencies of the EU in carrying out their missions, shall have the support of an *open, efficient and independent European administration*. (TFEU, art. 298 al 1) Thus, good administration '*must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible*'. (CM/Rec(2007)7, pp. 3-4; TEU art. 2; Pech, 2009. pp. 53-57) Therefore, the scenario stating that the assisting Member State and the unrepresented citizen's Member State of nationality should be able to agree detailed arrangements for reimbursement of costs of consular protection within certain deadlines (Directive 2015/637, preamble (26)-(28); art. 7) shall also correspond to general provisions on citizenship procedural rights. The EU *ETD Proposal* does not bring an innovation in this field, it also emphasises that Member States that receive an EU ETD applications should assess it on a case by case basis, whether it is appropriate to issue the EU ETD or if the case should be transferred to the embassy or consulate which is designated as competent under the terms of any arrangement already in place. (EU ETD Proposal, preamble (7)). Crisis may justify flexibility and increase the level of *discretion* by the authority, although such power must also have clear legal boundaries and be subject to several constitutional and administrative law standards, such as objectivity and consistency in application. (SIGMA 27, pp. 8-14; Ponce, 2005. pp. 553554), too, just as it is provided by the current regime: in the view of administrative procedural requirements "[t]o fill the gap caused by the absence of an embassy or consulate of the citizen's own Member State, a clear and stable set of rules should be laid down. Existing measures also need to be clarified to ensure effective protection." (Directive 2015/637, preamble (7), emphasis added by Author)

Meanwhile, compared to Directive 2015/637, the *EU ETD Proposal* already recognized that along respecting competency limits, (EU ETD Proposal, preamble (9)) it is necessary to avoid fragmentation and resulting decreased acceptance of emergency travel documents issued by Member States to unrepresented citizens, be better achieved at EU level. Therefore, in addition to the Member State roles and responsibility centric Directive 2015/637, the *EU ETD Proposal* empowers the EU delegations in third States to notify the Third State authorities about the EU emergency travel document issuing practice and handle the specimens and negotiate to enhance its recognition (EU ETD Proposal, preamble (18); art. 12) To enhance safety measures to increase the international acceptance of the EU ETD, it also provides for *documentation management* in this cross-border administrative procedure, inter alia, within 60 days of the issue, all copies shall be destroyed: the one at the assisting authority, the one sent to the authority of the nationality and the original, that shall be given to the competent domestic authority after returning home. (EU ETD Proposal, art. 4.6-7) An internationally accepted form of travel document serves better its recipients and reduces the risk of rejection at border control while the recognition of the EU as a unity may also be achieved.

In the view of the *principle of good administration*, the EU ETD Proposal seems to give the chance for a transparent, reliable and predictable service without prejudice to the domestic laws of Member States. In contrast, with the pure scenario ie. listing the procedural steps in case of a submitted request for consular assistance of a non-represented citizen, the EU ETD Proposal contains exact deadlines for each phase of the procedure. (EU ETD Proposal, art. 4) Without any interference to domestic laws, the EU ETD is willing to overlap the inter-national procedural phase that used to be ignored due to competency issues and was a marginal subject of *soft law* guidance. As for procedural guarantees, the EU ETD Proposal also remains silent, although the general principles of EU law including the EU Charter provisions stand as background. Among the most related ones, the *right to good administration* shall be discussed.

Being an umbrella right as collection of procedural requirements, its elements are not unknown for democratic administrative procedure codes of Member States, however, domestic law does not extend to horizontal and vertical procedural stages, so the effective application of these rights may be questioned in these phases. Jurisdiction issues and legal remedy options would be crucial and not just for EU citizens, but also for family members. The substantial part of their consular protection rights is even more unpredictable, although the same procedural background could create a sort of unity. Under the right to good administration, the family member is also entitled to the same procedural guarantees given the fact that it enables *every person* and not just EU citizens. All in all, even in the lack of administrative procedural law code, the EU Charter provisions serve as general background for administrative procedures, although their application and enforcement may challenge the procedure in time and costs. The cooperation mechanism should be based on legally binding sources to make the

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<sup>5</sup> See, Consular Protection, [https://ec.europa.eu/consularprotection/content/home\\_en](https://ec.europa.eu/consularprotection/content/home_en) (20.01.2019.)

procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy. (EU Charter, art. 47; Model Rules, VI-3.; Varga Zs, 2014. p. 547) Currently, these requirements are fulfilled only partially.

It is necessary to establish a simplified procedure for cooperation and coordination between the assisting Member State and the unrepresented citizen's Member State of nationality but at the same time, it is crucial to maintain a *sufficient flexibility* in exceptional cases. In crisis situations, the assisting Member State should be able to issue EU ETDs without prior consultation of the Member State of nationality. In these situations, the assisting Member State should notify the Member State of nationality as soon as possible of the assistance granted on its behalf to ensure that the Member State of nationality is adequately informed. (EU ETD Proposal, preamble (5)) Again emphasized, in case of practicing discretionary power, the authorities are also engaged within the rule of law, therefore, the limitations and the modes of discretion shall also correspond to the same values and same procedural guarantees, including the availability of legal remedy. The EU Charter does not establish any new power or task for the EU, or modify powers and tasks defined by the Treaties (EU Charter, art. 51.2), but to establish the background for the evaluation of the content of the EU Charter as well as the content of any rights issuing from EU norms, is the duty of Member States. Therefore, the existing powers to create regulations of administrative cooperation (TFEU, art. 197) and further cooperation and coordination directives to facilitate consular protection (TFEU, art. 23 al 2) are also available to further common steps and in case of the latter, to establish in domestic legal order the necessary modifications to meet such requirements as the details of consular protection and its procedures are regulated in many ways; (CARE report, pp. 580-585) The effective implementation of the above-mentioned provisions (duty of consistent interpretation or 'indirect effect') requires positive action. (Chalmers and Tomkins, 2007. pp. 381-394; Klamert, 2014. pp. 125-138): "*in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy (...)*". (Case C-3/16, point 43)

All in all, it seems that upon the fundamental rights implications and their effective implementation to a better administrative service under the auspice of rule of law, the development of the policy seems to be dynamic and Member States shows willingness to accept measures in secondary legal source to that end, as it is shown by the existence of the EU ETD Proposal.

#### 4. Concluding remarks

The European administrative organisation is a multilevel structure with different networks of authorities in different policies (Terpan, 2013. pp. 33-34) and being the major value in the EU, the rule of law shall be motor of it. The EU is based on the transfer of power from Member States and the main cohesive force for all the policies among the levels of European administration structure is *coordination* at the supranational centre but basically the authority power lies in Member States' authorities. It is also true for the European consular protection structure. The policy itself is at the crossroad of common foreign and security policy, citizenship and fundamental rights protection and also concerns public administrative law and the cooperation of authorities at horizontal and vertical level. The challenging part is the vertical relationship of the actors. In fact, at the local level, only delegations are under the effective direction of the HR/VP and the president of the EEAS, who both represent the EU interests, but the consular tasks are performed by the consular authorities of Member States because they are empowered to do so, however, these latter category falls outside their scope. Sincere cooperation, loyalty and solidarity together with coordination are important functional principles of European administrative structure but principles cannot create a competence and cannot provide a direct legal basis for a measure at the EU level. Indeed, principles primarily indicate how a competence should be used, and therefore they guide those who fulfil obligations. Therefore, the insufficient provisions on inter-institutional relations can basically challenge the consistency with the rule of law and a proper functioning under its auspice. In another aspect, from the beneficiary side, creating a basis for a better administrative service with a more coherent, transparent and reliable legal framework than in the previous regime is essential not only in the effectivity of consular protection policy of the EU but in the development of normative rules of European administration: in an organisational as well as procedural aspect. The development of the normative rules of consular protection policy of the EU clearly shows certificate for this aspect. By involving the Commission and its related organs to perform external policy tasks justified by subsidiarity and proportionality principles, the organisational structure of a once purely domestic area of external administration, the consular protection, the European administration is growing. Meantime, its normative background is also developing as the intermediate phase, the connection of vertical and mainly the horizontal cooperation is currently purely regulated by predictable and transparent binding secondary sources. In consular protection issues it is also framed by soft law, therefore the entry into force of the directive envisaged by the *EU ETD Proposal* would mean a quality change and a step towards a better administrative service which is closer to the principles and requirements of an "*open, efficient and independent European administration*" (TFEU, art. 298.1) and to the legitimate expectation of every person who



shall enjoy all the guarantees evolved in the right to good administration and other benefits of the EU Charter. The drafting of this directive proposal calls the attention to the importance of effectivity which is essential for the proper functioning of the EU, while the insurance of benefits related to European Union citizenship urges Member States to increase Europeanisation in certain issues, while it is also recognized that the neglected phase of horizontal interaction of the competent authorities shall be regulated in binding secondary sources of EU law. The die is cast, the path is given, the first steps are taken.

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