

Csatlós, Erzsébet<sup>1</sup>

## The EU ETD Directive and the Development of EU Administrative Procedural Law Theoretical Remarks

European administration is increasingly featured by composite procedures whereas authorities and organs of direct and indirect administration are forming networks to finally decide upon a single case. The *consular protection policy of the EU* and its recent developments is worth to be explored and analysed in this point of view especially with procedural administrative law aspects to see how the citizenship rights are evaluated in material and procedural administrative law.

The new ruling of the *EU type of emergency travel document* [EU ETD] is on the path of cooperation and coordination but in a more matured and sophisticated way than the 2015 directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries. It not only refers to a network of the potential actors taking part in the composite procedure of consular protection, but it prescribes, inter alia, deadlines for each procedural step and empowers the delegations and the Commission to have an active role in execution to build European consular protection a European administrative structure and ensure the evaluation of citizenship rights along with fundamental right in a more comprehensible manner.

### *I. Introduction*

European citizenship rights for consular assistance have gone through a significant reform procedure during the last couple of years. Building the European administration of consular protection which is a fundamental right of EU citizens in third States means the transformation of the policy from intergovernmentalism to a Europeanised level of fundamental rights protection. Beside Directive (EU) 2015/637<sup>2</sup> which framed a general cooperation mechanism for helping EU citizens to get the necessary consular assistance in case if their nation State is not represented in the territory of a third State.<sup>3</sup> According to recent data of 2020, 76% of EU citizens are aware of this right.<sup>4</sup>

Remaining on the previous path, the focus of this study is the newly adopted Council directive on a special consular protection measure, the *EU type of emergency travel document*. As the loss of travel document has been recognized as a major reason for consular measures in third States,<sup>5</sup> under the inter-governmental regimes of the former second pillar, Decision

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<sup>1</sup> PhD, senior lecturer, University of Szeged, Faculty of Law and Political Sciences, Public Law Institute, csatlos.e@juris.u-szeged.hu.

<sup>2</sup> Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC. OJ L 106, 24.4.2015. p. 1-13. [hereinafter: Directive 2015/637]

<sup>3</sup> Directive 2015/637, Article 10.

<sup>4</sup> Flash Eurobarometer 485, European Union Citizenship and Democracy. Report. Fieldwork: February-March 2020, Publication: July 2020. Survey requested by the European Commission, Directorate-General for Justice and Consumers and co-ordinated by the Directorate-General for Communication. p. 35. <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/flash/surveyky/2260> (10.01.2021.)

<sup>5</sup> According to the 2017 EU Citizenship Report, the issuance of emergency travel documents is in practice the most frequent form of assistance given by the MSs to unrepresented EU citizens, it means more than 60 % of all cases. Report from the Commission to the European Parliament, the Council, the European Economic and Social

96/409/CSFP was intended to provide genuine help to the citizens of the Union in distress as a document that provides a clear demonstration of the practical benefits of being a citizen of the Union.<sup>6</sup> The single-journey document issued according to a common format allows the unrepresented EU citizen to return home, or, exceptionally, to another destination, if they do not have access to their regular travel documents, for example because they were stolen or lost.<sup>7</sup> However, the barely two decades of practice has proven the need for reform in this specific issue as well as in the case of consular protection in general.<sup>8</sup>

The new ruling in the form of a Council directive was adopted on 18 June 2019<sup>9</sup> and currently, this is the period of decision upon implementing measures and further executive acts, so the application of the new measure will be a matter of the future within a few years. However, it is notable to discuss the innovative aspects in the view of European administration and the paper wishes to focus on two of them: its procedural law achievements and its influence on the organisational building up of the policy completing the vertical cooperation with a horizontal side.

Directive 2019/997 is yet to be applicable in the future as after the adoption of the necessary technical specifications,<sup>10</sup> Member States have 2 years to transpose its provisions into national law. Therefore, the following analysis is theoretical and based on the adopted legal acts and their *travaux préparatoires*; the consular protection is a core domestic competence of Member States also falling under the foreign policy and it is the least documented area which makes it difficult to deduct comparative conclusion of empirical research in this area.<sup>11</sup> The paper aims to identify the possible elements in the composite procedure of issuing an emergency travel document and wishes to establish the normative

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Committee and the Committee of the Regions. Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017. Brussels, 24.1.2017. COM(2017) 30 final. [COM(2017)] p. 18. footnote 104. However, in absolute terms, the number of EU ETDs issued is relatively small. The annual numbers have been *estimated* at around 320 outside the EU and another 250 within the EU. It is estimated that another 400-500 unrepresented citizens annually are issued national ETDs rather than the EU ETD format. However, the figures for EU ETDs are fragmentary and probably underestimated, as currently not all Member States collect precise statistical data on EU ETDs (more information available in the evaluation accompanying this proposal). COM (2018) p. 1. footnote 4.

<sup>6</sup> 96/409/CSFP: Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document. Official Journal L 168. 06/07/1996. p. 0004 – 0011. [hereinafter: Decision 96/409/CSFP] preamble.

<sup>7</sup> Decision 96/409/CSFP, Annex I-III.

<sup>8</sup> Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. Brussels, 31.5.2018 COM(2018) 358 final. [COM(2018)] p. 1-2.

<sup>9</sup> Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. OJ L 163, 20.6.2019. p. 1–12. [Directive 2019/997] adopted on the legal basis of Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202, 7.6.2016, p. 1–388. [TFEU] Article 23. 2. on the proposal of the Commission and after consulting the European Parliament.

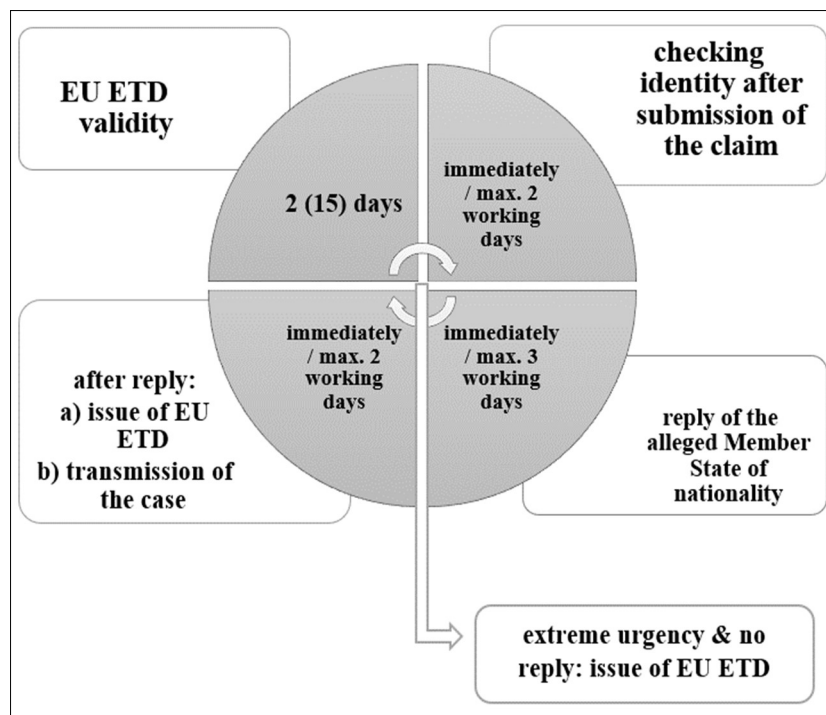
<sup>10</sup> At the time of the closure of the manuscript, no delegated act or implementing act was adopted on the basis of Directive 2019/997. See: Relationship between documents. [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELLAR:50b89e07-9325-11e9-9369-01aa75ed71a1#PPLinked\\_Contents\(10.2021.\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELLAR:50b89e07-9325-11e9-9369-01aa75ed71a1#PPLinked_Contents(10.2021.))

<sup>11</sup> At the beginning of the reform aspirations of the consular protection regime established after the Maastricht Treaty introduced EU citizenship, the survey of 2010 showed that the Member States of that time mostly had no systematic data collection on consular protection cases or if there was any, it was not available for the public. (CARE Final Report (2010) p. 597.) The situation has not changed much for 2018, it is proven by the explanation of the communication on the proposal for a Council directive establishing an EU emergency travel document and repealing Decision 96/409/CFSP. (COM (2018) p. 1. footnote 4.) cf. Schweighofer, Erich: The protection of Union citizens in third countries: aspects of European and International Law. In Faro, Sebastiano – Chiti, Mario P. – Schweighofer, Erich (eds.): European Citizenship and Consular Protection. New Trends in European Law and National Law. Editoriale Scientifica, Napoli, 2012. p. 76.; CARE Final Report. Consular and Diplomatic Protection. Legal Framework in the EU Member States. Citizens Consular Assistance Regulation in Europe. 2010. <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf> (last accessed: 20.08.2018; not available on website anymore) p. 597.

background for the solution.

## II. Procedural legislation for the horizontal administrative cooperation

The major achievement for the composite procedure of issuing emergency travel document for the unrepresented EU citizen in a Third State is the definition of the consecutive procedural steps and actors from the application to the ultimate refusal and the issue of the EU ETD. Upon choice, the unrepresented citizen may submit application for an EU ETD at any consular authority of any Member States which are available in the territory of a third State. This State contacts the competent authority of the State of nationality to check the identity of the person<sup>12</sup> and ask if the nation State wishes/or is a position to provide consular help itself. In case of a positive answer, the case is transmitted to the nation state and in case of a negative answer, it is the duty of authority where the claim was submitted to issue the travel document which is valid for a single journey back home that may last for two days but never no more than 15 days.<sup>13</sup> See the basic scheme of the course of procedure below on figure no. 1.



1. General course of the EU ETD procedure according to Directive 2019/997. (Author)

However, directives are classical tools of obliging Member States to achieve a certain result but leave to the national authorities the choice of form and methods<sup>14</sup> the Directive 2019/997 establishing an EU Emergency Travel Document is clearly formulated in a way that

<sup>12</sup> The assisting Member State shall provide the Member State of nationality with all relevant information, including: (a) the applicant's surname and given name(s), nationality, date of birth and sex; (b) a facial image of the applicant taken by the authorities of the assisting Member State at the time of application or, only where this is not feasible, a scanned or digital photograph of the applicant, based on the standards established by part 3 of International Civil Aviation Organization (ICAO) Document 9303 on Machine Readable Travel Documents (Seventh Edition, 2015) (c) a copy or scan of any available means of identification, such as an identity card or driving license, and, where available, the type and number of the document replaced and the national registration or social security number. (Directive 2019/997, Article 4. 2.)

<sup>13</sup> Directive 2019/997, Article 4.

<sup>14</sup> TFEU Article 288 al 3.

it may be applied with *direct effect*. The Council directive settles not only a scenario but exact *deadlines* for each procedural step to help the citizen with a predictable schedule. As soon as possible, and no later than three working days after receipt of inquiry about a potential national, the Member State of nationality shall confirm whether the applicant is its national, provide all the relevant information in the case concerned and shall also be responsible for any necessary contact with family members or other relevant persons or authorities.<sup>15</sup> If the Member State of nationality is unable to respond within three working days, it shall, within that period, inform the assisting Member State and shall provide an estimate of when the response is to be expected. The assisting Member State shall inform the applicant accordingly. Upon confirmation of the applicant's nationality, the assisting Member State shall provide the applicant with the EU ETD as soon as possible and no later than two working days after receipt of the confirmation.<sup>16</sup>

These procedural deadlines which can be overruled only under exceptional circumstances, and only in the favour of the citizen. In cases of extreme urgency, the assisting Member State may issue an EU ETD without prior consultation of the Member State of nationality. Before doing so, the assisting Member State shall have exhausted the available means of communication with the Member State of nationality. The assisting Member State shall notify the Member State of nationality, as soon as possible, of the fact that an EU ETD has been issued and of the identity of the person to whom the EU ETD was issued. That notification shall include all data which were included on the EU ETD.<sup>17</sup>

### *III. On the edge of glory? Balancing between procedural autonomy and procedural rights in the composite procedure*

Cooperation measures of this nature is a bright achievement as for most of the time, the administrative cooperation phase falls beyond any sort of secondary legislation of binding nature.

However, not every case is simple as a textbook example modelled by the Directive 2019/997; many troublesome elements may occur is the procedure which leads back to the unharmonized nature of consular tasks which make the procedural law issue of EU ETD the subject of further considerations.

#### *III.1. The content of the obligation arising from the two directives*

Not every foreign representation of Member States<sup>18</sup> is entitled to issue any sort of travel document either by the lack of empowerment or missing technical infrastructure. The Directive 2019/997 repurposes existing equipment used for visas, which is already available in EU Member States' consulates and which consular staff are trained to use.<sup>19</sup> However, the organisational scope of external representation is wider to give consular assistance but without authority power. The procedural phase marked by the cooperation of an honorary consul and a consular authority empowered to issue an ETD remains under either domestic

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<sup>15</sup> Directive 2015/637 Article 10(3).

<sup>16</sup> Directive 2019/997, Article 4. 3.

<sup>17</sup> Directive 2019/997, Article 4. 6.

<sup>18</sup> Directive 2015/637 Article 6.

<sup>19</sup> Commission staff working document executive summary of the impact assessment accompanying the document Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. Brussels, 1 June 2018. SWD(2018) 272 final. [SWD(2018) 272 final] p. 1.

law if they are both representatives of the same Member State or uncovered by obligatory norm.

The primary obligation of the Member State by the mother law, Directive 2015/637 as *lex generalis*, is, namely, to give forum to apply to, but not necessarily to adopt the claimed to consular measure, here, the issue the travels document. The primary obligation towards citizens lies in the hands of the Member State of nationality and the Directive 2019/997 seems to follow the same practice. The requested consular authority at site shall make it possible for the Member State of nationality to provide the necessary consular help and if the Member State of nationality does not provide it, then it may proceed according to its *own* consular law,<sup>20</sup> “*in accordance with its legal obligations and practice*”.<sup>21</sup> For such cases, the logical interpretation of the obligation to serve citizens and ensure the right to get consular protection and be incompatible with these obligations, is to transfer the case to the other member State authority at site or which is available to help nearby. However, this phase is not expanded by detailed provisions of the Directive. The *lex generalis* behind the EU ETD directive is the 2015 general Council Directive on the cooperation and coordination measure to facilitate consular protection gives just the guidance: its preamble envisages that Member States *conclude practical arrangements* for the purpose of sharing responsibilities for issuing EU ETDs to unrepresented citizens.<sup>22</sup>

The *workload share arrangements* envisaged by Directive 2015/637 would be beneficial to citizens, since they allow for better preparedness to ensure effective protection. Member States that receive requests for protection should assess whether, in a specific case, it is necessary to provide consular protection or whether the case can be transferred to the embassy or consulate which is designated as competent according to any arrangement already in place. Member States should notify the Commission and the *European External Action Service* (EEAS) of any such arrangement, which should be publicised by the Union and Member States to ensure transparency for unrepresented citizens. However, there is no sign of such arrangements is available for the public, and anyway, this way a part of the procedure remains under the same regime it was under the former one, second pillar: untransparent, unpredictable and based upon non-binding source unless such arrangement takes the form of a binding secondary source of the EU or a properly implemented international law treaty source. In addition, the current version of the consular protection website designed for EU citizens does not contain any information on the available representations in a certain third state, just states the fact if the state of nationality is not represented there.<sup>23</sup>

### III.2. *The relationship of procedural challenges and the applicable law*

The other neurotic point comes from the *equal treatment clause*<sup>24</sup> of the material law

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<sup>20</sup> Cf. Directive 2015/637, Article 2-3. and 10.

<sup>21</sup> Directive 2019/997, Article 4.4.

<sup>22</sup> Directive 2015/637, preamble (10)

<sup>23</sup> For EU citizens, currently there is no publicly available information on the existence on such arrangement. The Commission’s website designed for finding available representation (‘Find an embassy / consulate’ [https://ec.europa.eu/consularprotection/content/find-embassy-consulate\\_en](https://ec.europa.eu/consularprotection/content/find-embassy-consulate_en)) focuses on national representation and offers no non-national EU Member State representation at site: “In this Non-EU country, there is no result from the EU Member State(s) chosen.” The link to find one of another EU Member State ([https://ec.europa.eu/info/sites/info/files/live\\_work\\_travel\\_in\\_the\\_eu/consumers/documents/eujus15a-1818-i01\\_-\\_campaign\\_on\\_consular\\_protection\\_a4\\_accessibility\\_en\\_v04\\_1\\_0.pdf](https://ec.europa.eu/info/sites/info/files/live_work_travel_in_the_eu/consumers/documents/eujus15a-1818-i01_-_campaign_on_consular_protection_a4_accessibility_en_v04_1_0.pdf)) denies access: [https://ec.europa.eu/consularprotection/content/home\\_en](https://ec.europa.eu/consularprotection/content/home_en) (All accessed: 10.01.2021.)

<sup>24</sup> Poptcheva, Eva -Maria: Consular Protection Abroad: A Union Citizenship Fundamental Right? PIE Peter Lang, Brussels, 2014, pp. 171-173.

which ensures consular protection for not only unrepresented EU citizens but their *accompanying family members*. If a Member State ensures consular protection for non-national family members according to its own consular law and practice, that Member State shall ensure the same for the unrepresented EU citizens and his/her family member, too.<sup>25</sup> Despite the non-harmonisation of material law to that end, the provision itself may give rise to problems of choosing the *forum* for submitting the application as in *stricto sensu*, the consular authority *in situ* is not obliged to balance its own capacities and the other available Member States' representations' level of consular assistance service. It is not the duty of the Member State to choose the best available forum that ensures the most suitable type of consular help and service and transfer to there the claim for EU ETD. The importance of highlighting the content of obligation lies in the relevant provisions of the Directive 2019/997: issuing EU ETD for family members is an option among other expansion on the personal scope of application.<sup>26</sup> Therefore, implementation variations will continue to colour the palette of the available consular assistance in third States. As derivative right to consular assistance, the application of an accompanying family also reveals procedural rights concerns as the umbrella right of good administration including fair procedure<sup>27</sup> and the most efficient interpretation of the rights of citizens that overwhelms the necessary assistance for his/her accompanying non-EU citizen family members would require positive and proactive attitude especially as both directives are devoted to the respect of fundamental rights.<sup>28</sup>

The above-mentioned issues raise the necessity for further procedural standards to incorporate into binding secondary legislative act to better be in conformity with ruling of the administrative cooperation part of the composite procedure of issuing the EU ETD.<sup>29</sup> *Administration through law*, meaning that public administration ought to discharge its responsibilities according to law,<sup>30</sup> gets importance when a *negative decision* is born. From this point of view, the frameworks for issuing EU ETD seems deficient. If the Member State of nationality objects to an EU ETD being issued to one of its nationals, it shall inform the assisting Member State. In that case, the EU ETD shall not be issued, and the Member State of nationality shall assume responsibility for providing consular protection to its citizen in accordance with its legal obligations and practice. The assisting Member State, in close consultation with the Member State of nationality, shall inform the applicant accordingly.<sup>31</sup>

Material and procedural rules of consular measures are of domestic nature; however due to the very different level of regulation, it would be practical and desired to add a provision for the negative decisions. It is an obligation of the administration to give reasons for its decisions<sup>32</sup> and democratic public administrative procedural law provides for the general obligation to call the attention to the *available legal remedy*. In composite procedures it would be crucial remedies, the bodies before which they can be exercised, and the time-

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<sup>25</sup> Directive 2015/637, Article 5.

<sup>26</sup> Directive 2019/997, Article 7 (d).

<sup>27</sup> Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407. [EU Charter] Article 41.

<sup>28</sup> Directive 2015/637, preamble (33); Directive 2019/997, preamble (24).

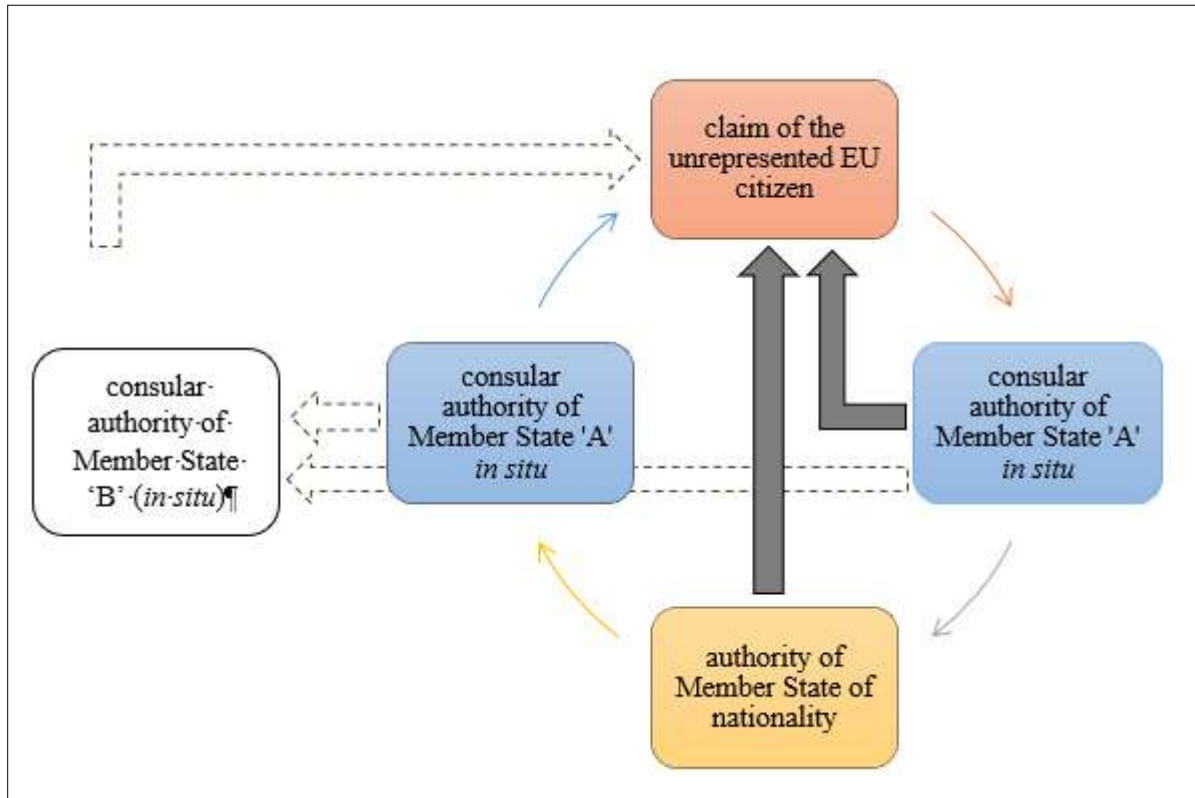
<sup>29</sup> Galetta, Diana-Urania – Hofmann, Herwig C. H. – Lottini, Micaela – Marsch, Nikolaus – Schneider, Jens-Peter – Tidghi, Morgane (eds): ReNEUAL Model Rules on EU Administrative Procedure. Book VI – Administrative Information Management. 2014, [http://www.reneual.eu/images/Home/BookVIinformation\\_management\\_online\\_publication\\_individualized\\_final\\_2014-09-03.pdf](http://www.reneual.eu/images/Home/BookVIinformation_management_online_publication_individualized_final_2014-09-03.pdf) (10.01.2021.) pp. 265-266.; Craig, Paul-Hofmann, Herwig C.H. – Schneider, Jens-Peter and Ziller, Jacques (eds): ReNEUAL Model Rules on EU Administrative Procedure. Oxford University Press, Oxford, 2017. p. 216. and pp. 232-234.

<sup>30</sup> European Principles for Public Administration, SIGMA Papers: No. 27, CCNM/SIGMA/PUMA(99)44/REV1. 1999. p. 9.

<sup>31</sup> Directive 2019/997, Article 4.4.

<sup>32</sup> EU Charter, Article 41.2. al. 3.

limits for exercising them, and decisions shall refer to the possibility of judicial proceedings and complaints to the Ombudsman.<sup>33</sup> Currently, there is no evidence on legal disagreements on consular protection measures however, it does not make it unnecessary to model a general scenario of legal steps for a potential appeal stage of the composite administrative procedure. As not every case is so simple that requires a general course of action, there may be some troublesome element is the procedure which goes back to the unharmonized nature of consular tasks. See the potential scheme of course of actions on figure no. 2.



2. Potential scheme of course of actions for the issue of EU ETD. (Author)

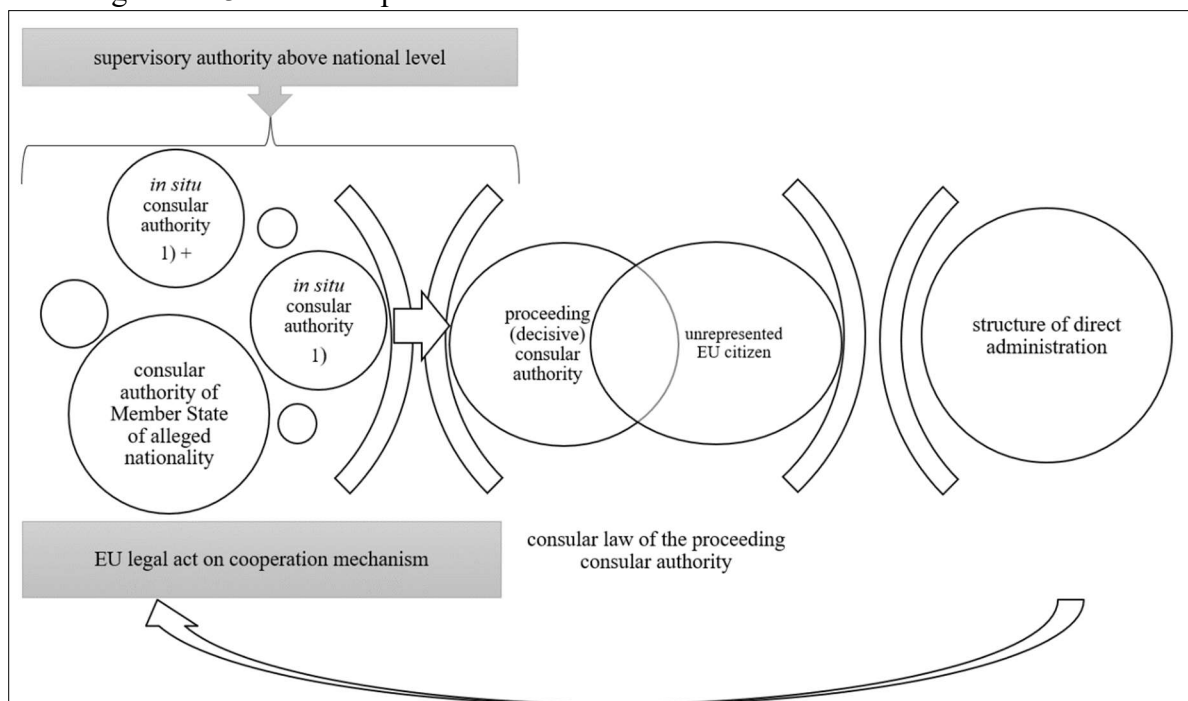
Not every foreign representation of Member States is entitled to issue any sort of travels documents either by the lack of empowerment or missing technical infrastructure. The obligation of the Member State by the EU ETD directive is to give forum to apply to, but not to issue the travels document. For such cases, the logical interpretation of the obligation to serve citizens and ensure the right to get consular protection and be incompatible with these obligations, is to transfer the case to the other member State authority at site or which is available to help nearby. However, this phase in not expanded by detailed provisions of the Directive. The mother law, the *lex generalis* behind the EU ETD directive is the 2015 general council directive on the cooperation and coordination measure to facilitate consular protection gives just the guidance: its preamble envisages that it is possible for Member States to conclude practical arrangements for the purpose of sharing responsibilities for issuing EU ETDs to unrepresented citizens. Member States that receive EU ETD applications (Member State 'A' *in situ*) should assess, 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 (Member State 'B' *in situ*). First, no sign of such arrangements is available for the public, and anyway a part of the

<sup>33</sup> European Ombudsman. The European Code of Good Administrative Behaviour. 2001. <https://europa.eu/!hj99fK> (10.01.2021.) Article 19.

procedure remains under the same regime it was under the former one, second pillar: untransparent, unpredictable and based upon non-binding source. In addition, the current version of the consular protection website designed for EU citizens does not contain any information on the available representations in a certain third state, just states the fact if the state of nationality is not represented there.

The other neurotic point comes from the equal treatment clause of the material law which ensures consular protection for not only unrepresented EU citizens but their accompanying family members. If a Member State ensures consular protection for non-national family members, that State shall ensure the same for the unrepresented EU citizens and his/her family member, too. The provision itself gives rise to problems of choosing the forum for submitting the application as *in stricto sensu*, the consular authority *in situ* is not obliged to choose the best available forum that ensures the most suitable type of consular help and service, and why it is important? Because the EU ETD directive handles the case of issuing EU ETD for family members as an option, implementing upon the choice of each Member State. So, the procedural phase beyond the visible and ruled part (marked with dashed arrows on figure no. 2) is crucial.

A part of the procedural law of the composite procedure is ruled. The basics for finding the proceeding authority by Directive 2019/997 and the decision-making phase is ruled by the domestic consular law of the proceeding forum. But by leaving completely unruled phases in the forum finding, not only the question of jurisdiction will be questionable but the guarantee system behind the procedure, too. See the scheme of the course of actions on the figure no. 3. from this point of view.



3. Schema of EU ETD procedure in the view of actors where '1)' stands for the chosen consular authority and '1)'+ represents all the other consular authorities of Member States *in situ*. (Author)

### III.3. Empowering the executive of direct level – solution prevailed?

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.<sup>34</sup> A part of the procedural law of the composite procedure is ruled. The basics for finding the proceeding authority by the directive and the decision-making phase is ruled by the domestic consular law of the proceeding forum. But by leaving completely unruled phases in the forum finding, not only the question of jurisdiction will be questionable but the guarantee system behind the procedure, too. So, can the other highlighted novelty – namely, the structural one – of EU ETD offer a solution for these questions?

### *III.3.1. Delegations taking over the diplomatic role of Member States*

Instead of relying on individual Member States, contrary to the general consular assistance measures to which it is referred as “*Member States, supported by local consular cooperation, should undertake the necessary measures in relation to third countries to ensure that consular protection can be provided on behalf of other Member States in any given case*”<sup>35</sup>, and they are while they may take into “*account the role of Union delegations in contributing to the implementation of that right*”<sup>36</sup>, in case of EU ETD, the *EU delegations* are empowered with the executive tasks of diplomatic nature.<sup>37</sup>

The specimens of the uniform *EU ETD form and sticker* shall be transmitted to the delegations in third States via the EEAS. They shall notify the relevant authorities of the third States of the usage of the EU ETD as well as its uniform format and main security features, including by providing specimens of the uniform EU ETD form and sticker for reference purposes. Ensuring this way, the recognition of the as official travel document is not only a guarantee feature but a giant step towards the international acceptance of the EU as global actor and it also a sort of harmonisation as all the other issues of consular protection including the acceptance of protection of non-national EU citizens fall under the competence of Member States.

### *III.3.2. The Commission is taking over the normative part of Member States executive role*

While the limits to the legislative executive are recognized in all national constitutional legal orders of democratic legal systems<sup>38</sup> and the “*Commission’s role in the sovereignty debate varies depending on the context*”,<sup>39</sup> the European administration the contrary is marked by the new EU ETD directive: the legislative frames are for detailed procedural scenario for the composite procedure of issuing the ETD and the executive is gaining powers to adopt implementing and delegating acts, disencumbering the Member States and filling the deficiencies of the intergovernmental regime.

Considering the limited number of EU ETDs issued by Member States, it is important to adopt a realistic approach to monitoring the implementation of the proposal and not to overburden national authorities. Member States are asked to provide the Commission with

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<sup>34</sup> Rasmussen, Steffen Bay: Constructing the European Demos through External Action? The Case of Consular Assistance to EU Citizens. In Heras, Beatriz Pérez de las (ed.): *Democratic Legitimacy in the European Union and Global Governance: Building a European Demos*. Palgrave Macmillan, Basingstoke, 2017. p. 279.

<sup>35</sup> Directive 2015/637, preamble Article (6).

<sup>36</sup> Directive 2015/637, Article 1.1.

<sup>37</sup> Directive 2019/997, Article 13.

<sup>38</sup> Tauschinsky, Eljalil – Weiß, Wolfgang: *The Legislative Choice Between Delegated and Implementing Acts in EU Law*. Edward Elgar Publishing, Cheltenham, 2018. p. 203.

<sup>39</sup> Brown, Stuart A.: *The European Commission and Europe’s Democratic Process Why the EU’s Executive Faces an Uncertain Future*. Palgrave, London, 2016, p. 35.

information on a limited number of key indicators on a yearly basis. If need be, it can be decided to collect additional information. After five years, the Commission will evaluate the implementation of the directive.<sup>40</sup>

It seems that serving the citizenship rights in an effective manner, to overcome the of fetters of the former inter-governmentalism and the competency limits of the Council, some executive power is now *delegated* to the Commission to achieve the objectives of the EU ETD. It refers primarily, in particular, to ensure the exercise of the right to consular protection on the basis of a modern and secure EU ETD format to ensure the security of the EU ETD and be in conformity with the international standards of the *International Civil Aviation Organization* [ICAO] as well as be secured against frauds and rejection.<sup>41</sup> Along delegated acts, the Commission is also *obliged* to practice the normative powers in the form of *implementing acts powers* to ensure uniform conditions for the implementation of the Directive regarding technical specifications and indicators,<sup>42</sup> and also to rule the standard form for application for EU ETD and, it may take a step forward discovering the gaps.

It is completely new in this policy field that the Directive 2019/997 now *obliges* Member States to regularly monitor the application of the provisions based on the same indicators and supply that information to the Commission on a yearly basis. Such provision requires data collection including statistics that makes the legal practice transparent and comparable as currently, no reliable picture is seen of the variety of State practice. Five years after the date of transposition of this Directive, the Commission shall carry out an evaluation on, among others, the impact on fundamental rights and the possible introduction of a *uniform fee* for EU ETDs in addition to the present possibility to issue implementing act establishing a *standard EU ETD application form* which shall contain information on the obligation to *return the EU ETD upon arrival*.<sup>43</sup> These latter are provided as possibilities for the Commission to invoke its implementing powers,<sup>44</sup> in fact the provision opens the door for further common executive norms at EU level instead of relying on Member States proactivity and procedural autonomy echoed from the Directive 2015/637 “*in order to find a balanced solution, will, as far as possible, act in such a way as to avoid going against any predominant position which might emerge within the appeal committee against the appropriateness of an implementing act.*”<sup>45</sup> However, implementing act are to set conditions that ensure that EU

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<sup>40</sup> Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. Brussels, 30.4.2019 SWD(2018) 273 final/2. p. 7.

<sup>41</sup> Directive 2019/997, Article 8.3 and 11.

<sup>42</sup> Directive 2019/997, Article 9.

1. The Commission *shall* adopt implementing acts containing additional technical specifications for EU ETDs relating to the following: (a) design, format and colours of the uniform EU ETD form and sticker; (b) requirements for the material and printing techniques of the uniform EU ETD form; (c) security features and requirements including enhanced anti-forgery, counterfeiting and falsification standards; (d) other rules to be observed for the filling in and issuing of the EU ETD. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 12(2).

2. It may be decided that the additional technical specifications referred to in paragraph 1 shall be secret and not be published. In that case, they shall be made available only to the bodies designated by the Member States as responsible for the production of EU ETDs and to persons duly authorised by a Member State or the Commission.

<sup>43</sup> Directive 2019/997, Article 4.8.

<sup>44</sup> Directive 2019/997, Article 4.9. The Commission *may* adopt implementing acts establishing a standard EU ETD application form which shall contain information on the obligation to return the EU ETD upon arrival. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 12(2).

<sup>45</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers. OJ L 55, 28.2.2011, p. 13–18. preamble (14).

laws are applied uniformly by Member States, they are not intended to impose procedural rights and obligations for the applicants. The Commission may adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (delegated acts)<sup>46</sup>, and the powers conferred on the Commission to adopt acts to ensure uniform conditions for implementing legally binding Union acts (implementing acts)<sup>47</sup> but while doing so, both are appropriate tools to enhance administrative cooperation measures. Even if implementing acts are primarily for harmonised State action along the respect of Member States basic obligation to adopt *all measures of national law* that are necessary to implement legally binding EU norms by themselves,<sup>48</sup> the delegated acts may add the necessary modifications to complete the directive.

To evaluate the gaps and deficiencies of the EU level ruling, the Member States shall provide the Commission with the information necessary, so from the least documented area of public administration, consular protection policy will similarly follow the classical authority decision-making. Envisaging further common rulings on procedural aspects like fees gives rise to hopes that further procedural guarantees seem to be found necessary to be established among the standard frames of the composite procedure scenario.

Meanwhile, the Commission concluded the success of the birth of the Directive in its report on the progress towards effective EU citizenship at the end of 2020. The Directive which yet to be applicable in the future as after the adoption of the necessary technical specifications,<sup>49</sup> Member States have 2 years to transpose the Directive into national law. In parallel, the Commission is declared *to continue* to include and negotiate consent clauses in bilateral agreements with non-EU countries to ensure that these countries agree that represented EU Member States give assistance to unrepresented EU citizens.<sup>50</sup>

#### *IV. Conclusion*

The European administration is increasingly featured by composite procedures whereas authorities and organs of direct and indirect administration are forming networks to finally decide upon a single case. The *consular protection policy of the EU* and its recent developments is explored and analysed in this point of view especially with procedural administrative law aspects to see how the citizenship rights are evaluated in material and procedural administrative law.

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 recently applicable Council Directive 2015/637 and recently, the issue of the emergency travel document has also been put under reform by Council Directive 2019/997. This latter not only refers to a network of the potential actors taking part in the composite procedure of consular protection, but it prescribes, inter alia,

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<sup>46</sup> TFEU Article 290.1.

<sup>47</sup> TFEU Article 291.2.

<sup>48</sup> TFEU Article 291.1.

<sup>49</sup> At the time of the closure of the manuscript, no delegated act or implementing act was adopted on the basis of Directive 2019/997. See: Relationship between documents. [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELLAR:50b89e07-9325-11e9-9369-01aa75ed71a1#PPLinked\\_Contents](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELLAR:50b89e07-9325-11e9-9369-01aa75ed71a1#PPLinked_Contents) (10.01.2021.)

<sup>50</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU. On progress towards effective EU citizenship 2016-2020. Brussels, 15.12.2020. COM(2020) 731 final. point 7.

deadlines for each procedural step and empowers the delegations and the Commission to have an active role in execution to build European consular protection a European administrative structure and ensure the evaluation of citizenship – fundamental – rights in a more comprehensible manner. Simplify the issuing of EU ETDs for citizens and improve cooperation between the Member States was expected to achieve<sup>51</sup> although it still shows gaps and deficiencies in the view of the evaluation of the right to effective legal remedy and procedural guarantees related to the composite nature and the administrative cooperation phase of the process. Meanwhile, contrary to the *lex generalis* of consular protection policy embodied by the Council Directive 2015/637, the Directive 2019/997 opens the executive norm making at direct level to ensure a coherent procedural and document management practice for operational practice at Member State level by their foreign representations. Complementing, the footpath for further development is paved by provisions on follow up and proper data collection obligations of Member States.

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<sup>51</sup> SWD(2018) 272 final, p. 1.