

ERZSÉBET CSATLÓS


Senior lecturer

Department of Public Administrative Law

University of Szeged, Faculty of Law and Political Sciences

CONSULAR PROTECTION POLICY OF THE EU IN THE VIEW OF GOOD ADMINISTRATION¹

EU citizens are entitled to a good administration. It is a fundamental right stipulated in Article 41 of the Charter of Fundamental Rights of the European Union (EU Charter) and it is guaranteed not only to EU citizens but *every person* in their cases proceeded by the institutions, bodies, offices, and agencies of the European Union (EU) and the national administrative authorities serving as the local hands of the EU as most of the EU policies are executed by them. In addition, there is an increasing number of EU policies which require not only a simple law application but the cooperation and collaboration of either the administrative organs at EU level with the authorities of Member States or the competent national authorities or in extreme cases, all of them are involved in one single case. All the phases of such procedures shall also correspond to the fundamental requirements, although, there is no complete and binding universal procedural legislation for them and neither domestic rules expand on the phase when direct and indirect level of European administration interact with each other,² nor the EU has definitive administrative procedural rules for them. Only the requirement of a good administration stand as a general background for such procedures³ and it is important to explore its outstanding relevance in

¹  „Supported by the ÚNKP-16-4-III. New National Excellence Program of the Ministry of Human Capacities”.

² SCHWARZE, JÜRGEN: *Judicial Review of European Administrative Procedure*. Law and Contemporary Problems, Vol. 68. 2004. 86. p. The European Parliament adopted a resolution with the aim of guaranteeing the right to good administration and ensuring an open, efficient, and independent EU civil service on 15 January 2013. It was based on a legislative initiative report prepared by the Legal Affairs Committee (*Berlinguer Report*) presenting detailed recommendations to the Commission on a *Law of Administrative Procedure of the EU*. On 4th October 2016, the Commission indicated that it remained unconvinced that the benefits of codifying administrative law would outweigh the costs. Instead, the Commission proposed that concrete problems should be analysed as they arise and met with specific actions. To highlight the necessity of comprehensive and cross-cutting administrative procedure, the European Parliament adopted a related resolution for an open, efficient and independent European Union administration in June 2016 (*Hautala Report*) and asked the Commission to examine a suggested proposal for a regulation and to present to Parliament a legislative proposal to be included in its work programme for the year 2017. See: European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration 2016/2610(RSP). Legislative Train Schedule Union on Democratic Change. Law of Administrative Procedure of the EU <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure> (20.04.2017.)

³ „European administrative law evolved from non-written general principles common to the constitutional (administrative) traditions of the Member States to core principles of the European administrative law which

the field of consular cooperation for consular protection; what it means and how it shapes and shadows the substantive and procedural aspects of this area despite the EU's intention of excluding any harmonisation of the administrative laws and regulations of the Member States⁴ although it acknowledges that the effective implementation of EU law is a common interest and the key for that lies in the administrative capacity of Member States.

I. Consular protection policy of the EU and its specificities as an administrative law area

Consular authorities are the external hands of public administration for their nationals on the territory of other States within this latter's consent. Therefore, consular service is based on bilateral consular treaties thus foreign policy of States determines and affects this legal field. For such services the EU does not have competence⁵ but to give a sense of being one big European nation where certain rights are available for every citizen of the Member States, it invented the concept of EU citizenship to create a relationship similar that exists between the State and its nationals.⁶ The rights include the availability of help and protection abroad, on the territory of third States.⁷ This concept exists since 1992 when it was introduced by the Treaty of Maastricht but being strictly attached to

include proportionality, legal certainty, protection of fundamental rights, non-discrimination, fair administrative procedure and efficient judicial review. All of them are standards of a modern administrative law common to those of the Member States." CĂRĂUȘAN, MIHAELA V.: *Towards an Administrative Procedure of the European Union: Issues and Prospects*. Acta Universitatis Danubius, 8(2) 2016. 80. p.; BAST, JÜRGEN: *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*. German Law Journal, 11(9) 1008-1010. p.

⁴ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012. p. 47–390. [TFEU] Article 197 al 3. TORMA, ANDRÁS: *The Public Administration of the European Union and the Member States*, in *Terms of the Lisbon Treaty*. Curentul Juridic, Vol. 46, 2011. 28. p.

⁵ WESSEL, RAMSES A. – VOOREN, BART VAN: *The EEAS' Diplomatic Dreams and the Reality of European and International Law*. Paper presented at the UACES Conference Exchanging Ideas on Europe 2012, Old Borders – New Frontiers, 3-5 September 2012, Passau, Germany. https://www.academia.edu/2993985/The_EEAS_Diplomatic_Dreams_and_the_Reality_of_European_and_International_Law (20.04.2017.) p. 10-13.

⁶ TFEU Article 20. 1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.* 2. *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. EU citizenship is destined to be the fundamental status of nationals of the Member States.* C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001, ECR I-6193, para. 31.

⁷ International law recognizes the practice of protecting other States' nationals along with own citizens. The consular protection policy of the EU is based on this thesis. Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261. [VCCR] Article 7-8. Cf. *Co-creating European Union Citizenship. Policy review*. Directorate-General for Research and Innovation, Socio-economic Sciences and Humanities 2013. 24. p.

the foreign policy area, basically, the EU's consular policy used to be under the scope of the intergovernmental regime of the former second pillar which was the widest area for national sovereignty and the least power for EU.

The EU's consular policy is limited to the competences conferred upon by its Member States.⁸ Therefore, it referred only to a certain equal treatment clause of in case of death, serious accident or serious illness, arrest, or detention, falling victim of violent crime, loss or theft of identity documents, and situations requiring repatriation or relief especially in armed conflicts, and in case of natural disasters.⁹

Besides, a decision calling the attention to provide consular protection to EU citizens in certain situations, the common form of emergency travel document was created, but as for details only soft law guidance was established and the field was left for further practical arrangements of the Member States which has never happened. The inter-governmental regime was therefore not effective.¹⁰ The major change arrived by the Treaty of Lisbon, when the right to consular protection in Third States was reaffirmed as a fundamental right by the EU Charter along with the right to good administration together with other procedural rights which are enforceable by citizens¹¹ but the new rules of consular protection in the form of directive adopted in 2015 and to enter into force in 2018 still do not go into details and although it lay down the cooperation and coordination measures for consular authorities and involves new players in the procedure of consular protection, leaves procedural questions and negotiations with the host Third States for Member States which sound reasonable as the directive itself declares that it neither affects consular relations between Member States and Third States, nor it Member States' competence to determine the scope of the protection to be provided to their own nationals. Under these circumstances, it needs to be

⁸ WOUTERS, JAN – DUQUET, SANDERIJN – MEUWISSEN, KATRIEN: *The European Union and Consular Law*. Leuven Centre for Global Governance Studies Working Paper No. 107. 2013. 3. p.; GEYER, FLORIAN: *The External Dimension of EU Citizenship. Arguing for Effective Protection of Citizens Abroad*. CEPS, No. 136. July 2007. 5. p.

⁹ Council Directive 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. [Consular Directive] Article 9. Article 23(1) TFEU appears to use the adjectives 'diplomatic' and 'consular' as synonyms, although diplomatic protection and consular protection are two completely different legal concepts. Given the fact that consular function can also be practiced by both diplomatic and consular agents, and considering the content of secondary sources it is obvious that Article 23 TFEU refers only to consular protection. SCHIFFNER, IMOLA: *A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái*. Acta Jur. et Pol., LXXII (18), 2009. 535-543. p.; VIGNI, PATRICIA: *The Protection of EU Citizens: The Perspective of International Law*, in: Larik, Joris – Moraru, Madalena (eds): *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*. EUI Working Papers, Law 2011/10, 100. p. BATTINI, STEFANO: *The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection*, in: Chiti, Edoardo – Mattarella, Bernardo Giorgio (eds.): *Global Administrative Law and EU Administrative Law*. Springer-Verlag, Berlin – Heidelberg, 2011. 177-178. p.; BECÁNIC, ADRIENN: *Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából*, in: Karlovitz, János Tibor (ed.): *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*. <http://www.irisro.org/tarstud2015aprilis/index.html> (18.04.2017.) 2014. 25-26. p. Diplomatic protection is still considered an exclusive prerogative of the State of nationality which does not have any duty to exercise such protection vis-à-vis its nationals. Cf. VIGNY 2010, 17.p. and C- 293/95 *Odigitria AAE v Council of the European Union and Commission of the European Communities*, ECJ, 28 November 1996, ECR II-02025. point 43-45.

¹⁰ Cf. BICKERTON, CHRISTOPHER J.: *European Union Foreign Policy. From Effectiveness to Functionality*. Palgrave Macmillan, London, 2011. 24. p.

¹¹ HOFFMANN, HERWIG C.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011. 203. p.

explored what is required by the EU under the term ‘good administration’ and then how the procedure of consular protection looks like and whether it conforms with the previously mentioned requirements.

II. Good administration

At first sight, *good administration* refers to a collection of fundamental procedural rights expressed in art. 41. of the EU Charter: impartial, fair handling of case in time, right to be heard, to access to documents, to get reason for decisions, right to compensation in case of maladministration, right to use of any official language of the EU. Although in a wider context it is a complex requirement system vis-à-vis administration. Accordingly, good administration in European administrative law refers to both a general principle (comprising legal and not-legal rules for a properly functioning democratic administration) and a fundamental right of EU citizens, a subjective right of fundamental nature in procedures of administrative authorities applying EU law.¹² As a general principle, it refers to the functioning of the EU is based on the rule of law,¹³ 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*. Thus, good administration ‘*must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible*’.¹⁴ In fact, the principle itself does not confer rights upon individuals except where it constitutes the expression of specific rights¹⁵ based on the caselaw and it must be noted that the rights in Article 41 of the EU Charter, are granted to ‘every’ person, which broadens the scope of protection to the non-citizens of the EU in comparison with those rights which are only guaranteed to citizens of the EU.¹⁶ Hereby it is necessary to call the attention to the fact that the right to consular protection in third states shall be ensured to non-citizen family members too, so they have substantive and procedural rights which might be a problem in case of disapproval of the Third State.¹⁷

As a substantive right, it encompasses more that is expressed by Article 41, it is expanded on other procedural rights of the EU Charter whose scope is not limited to administrative

¹² There is no exhaustive list of rights covered by the notion ‘good administration’. HOFMANN HERWIG – TÜRK, ALEXANDER: *Legal Challenges in EU administrative Law by the Move to an Integrated Administration*. in: Hofmann Herwig – Türk, Alexander (eds.): *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*. Edward Elgar, Northampton, 2009. 350-351. p.

¹³ Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, p. 13–390. [TEU] Article 2. The rule of law has no official definition; regarding its meaning see: PECH, LAURENT: *The Rule of Law as a Constitutional Principle of the European Union*. Jean Monnet Working Paper 04/09. 53-57. p.

¹⁴ Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Council of Europe, 20 June 2007 at the 999bis meeting of the Ministers’ Deputies, 3-4. p.

¹⁵ C-352/98 *P Bergaderm and Goupil v Commission*, 4 July 2000, ECR I-5291, para. 42.; T-196/99, *Area Cova and others v Commission*, 6 December 2001, ECR II - 3602 para. 43.; T-193/04, *Hans-Martin Tillack v Commission*, 4 October 2006, 2006 ECR II-03995. para 117.

¹⁶ KOPRIĆ, IVAN [et al.]: *Good Administration as a Ticket to the European Administrative Space*. Zbornik PFZ, 61 (5) 1529. p. MENDES, JOANA: *Good Administration in EU Law and the European Code of Good Behaviour*. EU Working Paper, Law, 2009/9. 3. p.

¹⁷ Consular Directive Article 5. cf. Article 1 (2).

procedures.¹⁸ However, the administrative authorities of Member States who already function according to democratic principles and the rule of law, as it was a pre-condition of accession, so, if Member States share the same democratic background,¹⁹ then the question is whether it has any relevance to Member State administration if the same principles and procedural rights are repeated with a scope of domestic authorities too?²⁰ The answer is affirmative because there is an increasing number of segments of administrative procedures which are not covered by definitive rules of neither EU law nor domestic law of Member States and it challenges the whole prestigious concept of good administration in such cases when the authorities shall cooperate and collaborate and the right to good administration is an enforceable right of constitutional status.²¹ Consular protection of EU citizens and their accompanying family members in Third States has become one of these procedures. The major question is therefore if an administrative procedure able to function in a proper way without detailed procedural rules if it is only based on principles²² and the influence of fundamental substantive and procedural rights.²³ Is that enough for an *open, efficient and transparent* European administration?

III. Procedural aspects of consular protection

The consular protection policy of the EU and so the consular directive put an emphasis on cooperation and coordination of consular authorities but without settling any procedural details and leaving it for the field of further negotiations of Member States as the treaties

¹⁸ See, SCHIFFNER IMOLA: *A gondos ügyintézés elvének érvényesülése az Európai Unió gyakorlatában*. In: Papp Tekla (ed.) *A jó állam aspektusai, perspektívái: Az önkormányzatok változó gazdasági, jogi környezete*. Szeged: Pólay Elemér Alapítvány, 2013. 5-7. p. In a wider sense, good administration as its aspects stems from the principle of rule of law, it incorporates several procedural rights which are normative for all types of procedures, not only administrative issues but no exhaustive list exists of those aspects. *Good Administration from the European Ombudsman's Perspective*. Speyer, Germany, 16 April 2008. <https://www.ombudsman.europa.eu/en/activities/speech.faces/de/5436/html.bookmark> (19.04.2017.); Good Administration through a Better System of Administrative Procedures. SIGMA, October 2012. http://www.sigmaweb.org/publications/Comments_LawAdminProceduresKosovo_JN_Oct2012_Eng%20%20.pdf (19.04.2017.) GALETTA, DIANA-URANIA [et. al]: *The General Principles of EU Administrative Procedural Law. In-depth Analysis for the JURI Committee*. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, PE 519.224. 2015. 7. p.

¹⁹ Cf. TEU Article 6 (3).

²⁰ Cf. EU Charter Article 51. al 1.

²¹ KRISTJÁNSDÓTTIR, MARGRÉT VALA: *Good Administration as a Fundamental Right*. Icelandic Review of Politics and Administration, 9(1) 242. p.; SIUCIŃSK, ROBERT: *Convergence of Law – Examples from European Administrative Procedure*. Conference Paper, 25–26 April 2013, Vilnius. http://www12007.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Siucinski.pdf (20.04.2017.) 305. p.

²² Principles are not supposed to be the legal basis for making a decisions to solve a case. See, VON BOGDANDY, ARMIN: *Founding Principles of EU Law. A Theoretical and Doctrinal Sketch*. Revus, 2012/12. 43. p.; Principles serves for gap filling and interpretation. LENAERTS, KOEN - GUTIÉRREZ-FONS, JOSÉ A.: *The Constitutional Allocation of Powers and General Principles of EU Law*. Common Market Law Review, Vol. 42, 2010. 1630. p.

²³ The EU provisions must be „sufficiently precise and unconditional’ to give rise to enforceable individual rights” C- 8/81 *Ursula Becker v Finanzamt Munster-Innenstadt*, 19 January 1982, ECR 53, para 25.; MOORHEAD, TIMOTHY: *European Union Law as International Law*. European Journal of Legal Studies, 5 (2012) 1. 136. p.

and the directive are *pacta tertiis* for the Third States.²⁴ But as EU expanded its legislation to a field which is so differently legislated by Member States: being a domestic issue, the substantive, and the procedural rules of providing consular protection varies from state to state and the obligation refers only to the equal treatment²⁵ of nationals and non-national EU citizens together with their accompanying family members in certain qualified situations²⁶ happened in Third States. Moreover, it created an obligation for authorities to cooperate but left for further negotiation of Member States to share the burden of tasks as actually, if there are more available consular authorities, the citizen can choose any of them to proceed. As the material rules of consular protection is not harmonised, the unrepresented citizen would probably choose the most convenient option. As for the definition of being 'unrepresented', it is to be noted that every citizen holding the nationality of a Member State which is not represented in a Third State. For the purposes of the Consular Directive, a Member State is not represented in a Third State if it has no embassy or consulate established there on a permanent basis, or if it has no embassy, consulate, or honorary consul there which is effectively able to provide consular protection in each case.²⁷ It makes the choice of vary more flexible for the EU citizen but also more complicated for legal application. Considering the non-EU citizen family members, their right to consular protection is derivate, only accompanying family members are entitled to the protection however, for them, the Consular Directive does not make a condition to be 'unrepresented' so the granting of material and procedural right for family members may also be a pitfall of legal challenges.

In addition, the primary obligation of a consular authority in a Third State if a non-national EU citizen ask for consular protection is to contact the competent authority of nationality to give it an opportunity to provide for the consular help itself.²⁸ The consular authority of the Member State in the Third State provides help only if the authority of nationality cannot or do not help. Without previously settled scenario, in crisis situations when the collaboration and cooperation of consular authorities of Member States are complemented by the EU missions and possibly governed by the *European External Action Service*,²⁹ the

²⁴ *Pacta tertiis nec nocent nec prosunt* is a general principle of international law, that is: a treaty binds the parties and only the parties; it does not create obligations for a Third State without its expressed consent. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331. Article 34.

²⁵ On generalising the principle of non-discrimination *ratione personae* and its limits see: WOLLENSCHLÄGER, FERDINAND: *The Europeanization of Citizenship. National and Union Citizenships as Complementary Affiliations in a Multi-Level Polity*. Paper presented at the EUSA Tenth Biennial International Conference Montreal, Canada, May 17-May 19, 2007. <http://aei.pitt.edu/8025/1/wollenschlager-f-03h.pdf> (20.04.2017.) 8-12. p.

²⁶ Consular Directive Article 7. The consular protection referred to in Article 2 may include assistance, inter alia, in the following situations: (a) arrest or detention; (b) being a victim of crime; (c) a serious accident or serious illness; (d) death; (e) relief and repatriation in case of an emergency; (f) a need for emergency travel documents as provided for in Decision 96/409/CFSP. cf. 95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28/12/1995 73 - 76, Article 5 (1).

²⁷ Consular Directive Article 4-6.

²⁸ Consular Directive, Article 3.

²⁹ Consular Directive, Article 13. As background, see: *The Role of The European External Action Service in Consular Protection And Services for EU Citizens*. Directorate-General for External Policies of the Union, Directorate B, Policy department. 2013. 12-15. p.; RAIK, KRIST: *Serving the Citizens? Consular Role of the*

coordination of consular protection is not ensured in a *transparent and predictable*³⁰ way. Most administrative acts for consular protection involve the exercise of discretionary powers by administrative authorities which is a legitimate feature of administrative law,³¹ but it must have clear legal boundaries and be subject to several constitutional and administrative law standards, such as objectivity and consistency in application.³² Where States that does not even regulate consular protection as a right with all the necessary legal guarantees of this legal institution shall do it without a delay, therefore substantive administrative law changes are required despite that it is a domestic competence.³³ Being an acknowledged fundamental right with direct effect, according to EU rules, the necessary guarantee system³⁴ shall also be established not only for simple cases before a consular authority but to those phases of the procedure when EU level organs are also involved to ensure its enforcement. *Ubi ius, ibi remedium* where there is a right there is a remedy.³⁵ This cooperative mechanism of consular authorities, due to the lack of delimitation of tasks and therefore responsibilities in the view of citizens is not transparent, clear, or predictable.³⁶ It is not always obvious to find the forum and the applicable procedural rules even in a simple case before a consular authority of nationality, for example the *Hungarian Act on consular protection* (HCPA) makes a difference between authority procedures of consular protection and the assistance which is also performed by the consular authority but is not qualified by official matters of an administrative nature as they are not administrative actions manifested in individual decisions.³⁷ For the former category, it makes a clear that it falls under the sphere of act

EEAS Grows in Small Steps. European Policy Centre, 30 April 2013. http://www.epc.eu/documents/uploads/pub_3488_consular_role_of_the_eedas.pdf (20.04.2017.) 2. p.

³⁰ ELIANTONIO, MARIOLINA: *Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?* Maastricht Journal, 23(3) 2016. 533. p. About legal certainty and legitimate expectations, especially clarity and precision, see: HOFMANN, HERWIG C. – ROWE, GERARD C. – TÜRK, ALEXANDER H.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011. 172-182. p.

³¹ JULI PONCE: *Good Administration and Administrative Procedures*. Indiana Journal of Global Legal Studies, 12(2) 2005. 553-554. p.

³² See in detail: *European Principles for Public Administration*. SIGMA Papers No. 27. 1999. 8-14. p.

³³ Cf. KOCHENOV, DIMITRY: *EU Citizenship and Federalism. The Role of Rights*. Cambridge University Press, Cambridge, 2017. 595. p.

³⁴ BAUBÖCK, RAINER – PASKALEV, VESCO: *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*. Georgetown Immigration Law Journal, Vol. 30, 2015. 92. p.

³⁵ "The principle that rights must have remedies is ancient and venerable." THOMAS, TRACY A.: *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*. San Diego Law Review, 64, 2004. 4-5. p.; Cf. CĂRĂUȘAN 2016, 87. p.; BUIZE, ANOESKA: *The Principle of Transparency in EU Law*. Uitgeverij BOXPress, Utrecht, 2013. 249-251. p.

³⁶ The cooperation mechanism should be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy. EU Charter, 2007, Article 47.; Model Rules. Welcome to ReNEUAL – the Research Network on EU Administrative Law. <http://www.reneual.eu/> (31.04.2017.) VI-3.; VARGA, ZS. ANDRÁS: *Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról*. Magyar Jog, 2014/10. 547. p., HOFMANN, HERWIG C.H. – MIHAESCU, BUCURA C.: *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*. European Constitutional Law Review, 2013/9. p. 73-101. MILECKA, KAMILA: *The Right to Good Administration in the Light of Article 41 of the Charter of Fundamental Rights of the European Union*. Contemporary Legal & Economic Issues, 2011/3. 43-60. p.

³⁷ Act XLVI of 2001 on consular protection [HCPA], Article 1 (1).

on *General Rules of Administrative Proceedings and Services*³⁸ and provides of the legal remedy forum,³⁹ but for the latter, the Act does not give any provision. It is more complicated if an honorary consul is in the procedure as for example according to Hungarian rules, it is not even an authority, and only analogy can help to define procedural rules for his/her activity and not definitive and transparent legal rules. Referring to the administrative nature of the legal relationship between the citizen and the consular authority, legal logic help to deduce the solution that it also falls under the scope of the act on general rules of administrative proceedings.⁴⁰ However, in case when further authorities appear as actors in the procedure of consular protection the delimitation of competences, therefore their responsibility for breaches of law vis-à-vis each other and mainly against the individuals protected by the several fundamental rights of the EU Charter.

IV. Consequences of good administration on consular protection

Summing up, the EU, by using its power to regulate cooperation of authorities and declaring consular protection in Third States as a fundamental right⁴¹ and settle the frames of it by a directive is not yet in conformity with neither the principle nor the fundamental right of good administration. In fact, the doctrine of procedural autonomy allows Member States to decide upon the implementation of EU law. Accordingly, Member States may lay down the rules governing their actions, therefore administrative procedural law is a domestic competence. However, this procedural autonomy has implicit limitations: first, when the implementation refers to a provision with direct effect, and when the application of a general principles of EU law require so. Article 51 al 2 of the EU Charter states that it does not establish any new power or task for the EU or modify powers and tasks defined by the Treaties and it has to be noted that the general obligation implementing the EU law in a good faith and in a consistent manner and also the roots of fundamental rights already existing in the constitutional traditions of Member States, the actions taken for the proper implementation and enforceability of rights expressed in the EU Charter cannot be considered as direct expansion of competences of the EU. Given the fact that the right to consular protection in Third States is a fundamental right with direct effect,⁴² so as the right to good administration and the principle of good administration is a general principle of EU law, the procedural autonomy no longer exists in this field and the effective implementation of the above-mentioned provisions (duty of consistent interpretation or ‘indirect effect’).⁴³

Since the reforms of the Lisbon Treaty, the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, is empowered to adopt

³⁸ Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

³⁹ HCPA, Article 19 (7).

⁴⁰ CSATLÓS ERZSÉBET: *Az általános konzuli hatósági együttműködések elméleti kérdései*. Eljárásjogi Szemle, 2017/1. 36-37. p.

⁴¹ KOCHENOV 2017, 596-597. p.

⁴² POPTCHEVA, EVA-MARIA ALEXANDROVA: *Consular Protection Abroad: A Union Citizenship Fundamental Right?* Doktorai Thesis, Universidad Autónoma de Barcelona, Barcelona. 2012. 157. p.

⁴³ See, CHALMERS, DAMIAN – TOMKINS, ADAM: *European Union Public Law. Text And Materials*. Cambridge University Press, Cambridge, 2007. 381-394. p.; KLAMERT, MARCUS: *The Principle of Loyalty in EU Law*. OUP, Oxford, 2014. 125-138.

directives establishing the coordination and cooperation measures necessary to facilitate consular protection⁴⁴ and it did so when it adopted the directive on consular protection but the EU should also consider using its supportive legislative power on administrative cooperation by means of regulations in accordance with the ordinary legislative procedure to improve administrative capacity to implement EU law and to facilitate the exchange of information.⁴⁵

Systematically, the EU expanded its ruling in that area where it has no further competences however, but the enforcement of fundamental rights and the conformation to the rule of law including principles of good administration would require a common executive regulation for which in fact the Commission has competence. Although in the past two decades, no real practice of this kind of consular protection has evolved, the need for consular protection is not a theoretical question as in recent years its importance has just been increasing.⁴⁶ However, the directive of 2015 will enter into force on 1 May 2018 thus Member States still have time to act but given the fact that since 1994 there have been no step forward further international negotiations to settle the problem of *pacta tertiis* or any kind of arrangements for the burden share, in the forthcoming year, no progress is predicted. It would not solve the problem of *pacta tertiis*, currently the EU seems to have no competency for that, but at least would make a proper, transparent, clear, and predictable procedural background for the interrelation of authorities when provide for ensuring citizen's rights.

References

95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28/12/1995 73 – 76. p.

Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

Act XLVI of 2001 on consular protection [HCPA]

BAST, JÜRGEN: *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*. German Law Journal, 11(9) 1006-1024.

BATTINI, STEFANO: *The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection*, in: Chiti, Edoardo –Mattarella, Bernardo Giorgio (eds.): *Global Administrative Law and EU Administrative Law*. Springer-Verlag, Berlin – Heidelberg, 2011. 173-184. p.

⁴⁴ TFEU Article 23 al. 2.

⁴⁵ TFEU Article 197. al. 2.

⁴⁶ In 2015, more than 160 cases were reported when a consular authority provided help for non-national EU citizens. See numbers and charts in: Consular Affairs Working Party Report of April 16 2016. Consular Cooperation Initiatives - Final report. Presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels; See also, SCHIFFNER, IMOLA: *Az uniós polgárok védelme harmadik államokban – a statisztikák fényében*. In: Katona Tamás (ed.): *Ünnepi e-könyv Herczeg. János professzor 70. születésnapjára*. Szegedi Tudományegyetem, Állam-és Jogtudományi Kar, Szeged, 2011. 509. p.

- BAUBÖCK, RAINER – PASKALEV, VESCO: *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*. Georgetown Immigration Law Journal, Vol. 30, 2015. 47-107. p.
- BECÁNICS ADRIENN: *Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából*, in: Karlovitz, János Tibor (ed.): *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*. <http://www.irisro.org/tarstud2015aprilis/index.html> (18.04.2017.) 2014. 25-30. p.
- BICKERTON, CHRISTOPHER J.: *European Union Foreign Policy. From Effectiveness to Functionality*. Palgrave Macmillan, London, 2011.
- BUIJZE, ANOESKA: *The Principle of Transparency in EU Law*. Uitgeverij BOXPress, Utrecht, 2013.
- C-293/95 *Odigitria AAE v Council of the European Union and Commission of the European Communities*, ECJ, 28 November 1996, ECR II-02025.
- C-8/81 *Ursula Becker v Finanzamt Munster-Innenstadt*, 19 January 1982, ECR 53.
- C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001, ECR I-6193.
- C-352/98 *P Bergaderm and Goupil v Commission*, 4 July 2000, ECR I-5291.
- CĂRĂUȘAN, MIHAELA V.: *Towards an Administrative Procedure of the European Union: Issues and Prospects*. Acta Universitatis Danubius, 8(2) 2016. 79-90. p.
- CHALMERS, DAMIAN – TOMKINS, ADAM: *European Union Public Law. Text and Materials*. Cambridge University Press, Cambridge, 2007.
- Co-creating European Union Citizenship. Policy review*. Directorate-General for Research and Innovation, Socio-economic Sciences and Humanities 2013.
- Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, p. 13-390. [TEU]
- Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390. [TFEU]
- Consular Affairs Working Party Report of April 16 2016. Consular Cooperation Initiatives – Final report. Presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels.
- Council Directive 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. [Consular Directive]
- CSATLÓS ERZSÉBET: *Az általános konzuli hatósági együttműködések elméleti kérdései*. Eljárásjogi Szemle, 2017/1. 33-42. p.
- ELIANTONIO, MARIOLINA: *Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?* Maastricht Journal, 23(3) 2016. 531 – 549. p.
- European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration 2016/2610(RSP). Legislative Train Schedule Union on Democratic Change. Law of Administrative Procedure of the EU <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure> (20.04.2017.)
- European Principles for Public Administration. SIGMA Papers No. 27. 1999.

- GALETTA, DIANA-URANIA [et al.]: *The General Principles of EU Administrative Procedural Law. In-depth Analysis for the JURI Committee*. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, PE 519.224. 2015.
- GEYER, FLORIAN: *The External Dimension of EU Citizenship. Arguing for Effective Protection of Citizens Abroad*. CEPS, No. 136. July 2007.
- Good Administration from the European Ombudsman's Perspective*. Speyer, Germany, 16 April 2008. <https://www.ombudsman.europa.eu/en/activities/speech.faces/de/5436/html.bookmark> (19.04.2017.)
- Good Administration through a Better System of Administrative Procedures. SIGMA, October 2012. http://www.sigmaweb.org/publications/Comments_LawAdminProceduresKosovo_JN_Oct2012_Eng%20%20.pdf (19.04.2017.)
- HOFFMANN, HERWIG C.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011.
- HOFMANN HERWIG – TÜRK, ALEXANDER: *Legal Challenges in EU Administrative Law by the Move to an Integrated Administration*. In: Hofmann Herwig – Türk, Alexander (eds.): *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*. Edward Elgar, Northampton, 2009. 355-380. p.
- HOFMANN, HERWIG C. – ROWE, GERARD C. – TÜRK, ALEXANDER H.: *Administrative Law and Policy of the European Union*. OUP, Oxford, 2011.
- HOFMANN, HERWIG C.H. – MIHAESCU, BUCURA C: *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*. *European Constitutional Law Review*, 2013/9. p. 73-101.
- JULI PONCE: *Good Administration and Administrative Procedures*. *Indiana Journal of Global Legal Studies*, 12(2) 2005. 551-588. p.
- KLAMERT, MARCUS: *The Principle of Loyalty in EU Law*. OUP, Oxford, 2014.
- KOCHENOV, DIMITRY: *EU Citizenship and Federalism. The Role of Rights*. Cambridge University Press, Cambridge, 2017.
- KOPRIĆ, IVAN [et al.]: *Good Administration as a Ticket to the European Administrative Space*. *Zbornik PFZ*, 61 (5) 1515-1560. p.
- KRISTJÁNSDÓTTIR, MARGRÉT VALA: *Good Administration as a Fundamental Right*. *Icelandic Review of Politics and Administration*, 9(1) 237-255. p.
- LENAERTS, KOEN - GUTIÉRREZ-FONS, JOSÉ A.: *The Constitutional Allocation of Powers and General Principles of EU Law*. *Common Market Law Review*, Vol. 42, 2010. 1629-1669. p.
- MENDES, JOANA: *Good Administration in EU Law and the European Code of Good Behaviour*. EUI Working Paper, Law, 2009/9.
- MILECKA, KAMILA: *The Right to Good Administration in the Light of Article 41 of the Charter of Fundamental Rights of the European Union*. *Contemporary Legal & Economic Issues*, 2011/3. 43-60. p.
- Model Rules. Welcome to ReNEUAL – the Research Network on EU Administrative Law. <http://www.reneual.eu/> (31.04.2017.)

- MOORHEAD, TIMOTHY: *European Union Law as International Law*. European Journal of Legal Studies, 5 (2012) 1. 126-143. p.
- PECH, LAURENT: *The Rule of Law as a Constitutional Principle of the European Union*. Jean Monnet Working Paper 04/09.
- POPTCHEVA, EVA-MARIA ALEXANDROVA: *Consular Protection Abroad: A Union Citizenship Fundamental Right?* Doktorai Thesis, Universidad Autónoma de Barcelona, Barcelona. 2012.
- RAIK, KRISTI: *Serving the Citizens? Consular Role of the EEAS Grows in Small Steps*. European Policy Centre, 30 April 2013. http://www.epc.eu/documents/uploads/pub_3488_consular_role_of_the_eeas.pdf (20.04.2017.)
- Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Council of Europe, 20 June 2007 at the 999bis meeting of the Ministers' Deputies.
- SCHIFFNER IMOLA: *A gondos ügyintézés elvének érvényesülése az Európai Unió gyakorlatában*. In: Papp Tekla (ed.) *A jó állam aspektusai, perspektívái: Az önkormányzatok változó gazdasági, jogi környezete*. Szeged: Pólay Elemér Alapítvány, 2013. 47-57. p.
- SCHIFFNER, IMOLA: *A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái*. Acta Jur. et Pol., LXXII (18), 2009. 523-544. p.
- SCHIFFNER, IMOLA: *Az uniós polgárok védelme harmadik államokban – a statisztikák fényében*. In: Katona Tamás (ed.): *Ünnepi e-könyv Herczeg. János professzor 70. születésnapjára*. Szegedi Tudományegyetem, Állam-és Jogtudományi Kar, Szeged, 2011. 506-532. p.
- SCHWARZE, JÜRGEN: *Judicial Review of European Administrative Procedure*. Law and Contemporary Problems, Vol. 68. 2004. 85-106. p.
- SIUCIŃSK, ROBERT: *Convergence of Law – Examples from European Administrative Procedure*. Conference Paper, 25–26 April 2013, Vilnius. http://www12007.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Siucinski.pdf (20. 04. 2017.)
- T-193/04, *Hans-Martin Tillack v Commission*, 4 October 2006, 2006 ECR II-03995.
- T-196/99, *Area Cova and others v Commission*, 6 December 2001, ECR II – 3602.
- The Role of The European External Action Service in Consular Protection and Services for EU Citizens*. Directorate-General for External Policies of the Union, Directorate B, Policy department. 2013.
- THOMAS, TRACY A.: *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*. San Diego Law Review, 64, 2004. 1633-1646. p.
- TORMA, ANDRÁS: *The Public Administration of the European Union and the Member States, in Terms of the Lisbon Treaty*. Curentul Juridic, Vol. 46, 2011. 23-37.p.
- VARGA, ZS. ANDRÁS: *Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról*. Magyar Jog, 2014/10. 545-555. p.
- Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261. [VCCR]
- Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331.

- VIGNI, PATRICIA: *The Protection of EU Citizens: The Perspective of International Law*, in: Larik, Joris – Moraru, Madalena (eds): *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*. EUI Working Papers, Law 2011/10. 91-106. p.
- VON BOGDANDY, ARMIN: *Founding Principles of EU Law. A Theoretical and Doctrinal Sketch*. *Revus*, 2012/12. 43. 95-111. p.
- WESSEL, RAMSES A. – BART VAN VOOREN: *The EEAS' Diplomatic Dreams and the Reality of European and International Law*. Paper presented at the UACES Conference Exchanging Ideas on Europe 2012, Old Borders – New Frontiers, 3-5 September 2012, Passau, Germany. https://www.academia.edu/2993985/The_EEAS_Diplomatic_Dreams_and_the_Reality_of_European_and_International_Law (20.04.2017.)
- WOLLENSCHLÄGER, FERDINAND: *The Europeanization of Citizenship. National and Union Citizenships as Complementary Affiliations in a Multi-Level Polity*. Paper presented at the EUSA Tenth Biennial International Conference Montreal, Canada, May 17-May 19, 2007. <http://aei.pitt.edu/8025/1/wollenschlager-f-03h.pdf> (20.04.2017.)
- WOUTERS, JAN – DUQUET, SANDERIJN – MEUWISSEN, KATRIEN: *The European Union and Consular Law*. Leuven Centre for Global Governance Studies Working Paper No. 107. 2013.