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## **EU LAW INFLUENCE ON NATIONAL ADMINISTRATIVE LAW TO PROTECT EU CITIZENS ABROAD - HARMONISATION VIA FUNDAMENTAL RIGHTS PROTECTION AND COOPERATION RULES**

### **ABSTRACT**

The legislative competence of the European Union has different sort of influence on national legal rules and this effect has been continuously expanding. Therefore, it has significant impacts on those legal areas which once was considered as pure domestic competences. The structure and functioning of national administration is a typical example, so as the consular protection procedure ensured for nationals abroad. The paper aims to give a brief exploration how these two classical domains of national legislation, tradition and foreign relations is explicitly - implicitly Europeanised and driven under norms of the European Union.

Keywords: *European administration, national administration, consular protection, administrative procedure*

### **INTRODUCTION**

It is undisputed that the European Union (EU) has significant effect on national legislation. Due to the different type of legislative competences,<sup>2</sup> there are legal areas where this influence is explicit and dominant, while in others the exclusive sovereignty of Member States still prevails, although implicit EU requirements exist.

### **RELATIONSHIP OF NATIONAL PUBLIC ADMINISTRATION, CONSULAR PROTECTION AND EU LAW**

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<sup>2</sup> TFEU Art. 3–6.

National public administration and the competence to regulate it has always been reserved for Member States.<sup>3</sup> Despite some sector specific normative rules of administrative nature, the execution of EU law has always been a *result-based obligation (obligation de résultat)*.<sup>4</sup> Since the 1990's, there have been many direct steps to lay down the principles governing the structure, the functioning and the procedures of public administration of Member States to serve better the execution of the *acquis*<sup>5</sup> and finally the Lisbon Treaty declared *everyone's* right to a *good administration*<sup>6</sup> as a legally binding fundamental right.<sup>7</sup>

The organs performing consular tasks are external units of State administration, therefore their existence and the scope of their activity depends on foreign policy and bilateral relations<sup>8</sup> Such State service for nationals is a manifestation of personal sovereignty of States and generally accepted by international law.<sup>9</sup> The EU is not a State, so it invented the idea of EU citizenship as a link to every citizens holding the nationality of any Member States with equal benefit of certain rights including consular protection on the territory of third States.<sup>10</sup> To regulate the core issue of this latter, being an area of foreign policy, EU competences are the weakest of all.<sup>11</sup> To promote the practice of such kind of administrative procedure, the Council, acting upon its special legislative competence given by the Lisbon Treaty,<sup>12</sup> adopted a directive in 2015 *on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries* [CPD]. It requires implementing measures until 1<sup>st</sup> May 2018,<sup>13</sup> and it has significant effects on areas of law which are considered as domestic. Notably, the EU has no competence to regulate neither consular protection, nor public administration, except for administrative cooperation since the Lisbon Treaty,<sup>14</sup> and foreign policy is also outside the scope of EU ordinary legislative competences.

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<sup>3</sup> Lisbon Special European Council (2000) point 9. and 17.; Drechsler (2009) 7. 10. p.

<sup>4</sup> SIGMA 27. 6. p.

<sup>5</sup> Panizza (2015) 2. p.; Galetta - Hofmann – Puigpelat – Ziller (2015) 6. p.

<sup>6</sup> EU Charter, Art. 41.

<sup>7</sup> Kristjánisdóttir (2015) 244. p.; Åkerberg para. 18. cf. Melloni para 60.

<sup>8</sup> See, VCCR Art. 5. Aust (2010) 42. p.; Sloane (2009) pp. 29–33.

<sup>9</sup> Lau (2015) 7. p.

<sup>10</sup> TEU Art. 9.; TFEU Art. 20; 23.

<sup>11</sup> Wouters– Duquet– Meuwissen (2013) 3. p.; Geyer (2007) 5. p.

<sup>12</sup> Lisbon Treaty 36). TFEU Art. 23. al. 2.

<sup>13</sup> CPD Art.17.

<sup>14</sup> Lisbon Treaty Art. 2 E g); 150) Art.176 D.; TFEU Art. 197.

The CPD provides for a cooperation framework.<sup>15</sup> The ultimate executive authorities to perform the task of consular protection are the consular authorities<sup>16</sup> of Member states as the EU has no competence, therefore no organ to act as such. In principle, the citizen whose State has no available foreign representation in a third State is enabled to turn to any consular authorities of any member States to get consular help and be treated as an own national.<sup>17</sup> This authority, after identification, shall contact the competent authority of nationality to give it the possibility to help its own citizen.<sup>18</sup> If the authority of nationality cannot or will not help, then the consular authority at site will do it under the same conditionals as to its own national. This reveals legal questions but in case of a big number of requests in crisis, the procedure is complicated with other actors, namely the organs of direct administration of European administration: *the delegation of the EU* at site<sup>19</sup> and the headquarter and different strategic units of the *European External Action Service*<sup>20</sup> under the direction of the High Representative of foreign policy (HR/VP) or the *Lead State* if designated any among the represented Member States.<sup>21</sup> In addition, consular protection englobes different areas where the EU has different competences, like the crisis management as consular protection in crisis falls under its sphere,<sup>22</sup> family policy as the directive expands the personal scope also to the accompanying family member,<sup>23</sup> but all of them have one matching point: the individual. Given the fact that his/her right to consular protection is a fundamental one<sup>24</sup> which is to be ensured via an administrative procedure which itself need to be in conformity with the guarantees inherent to another fundamental right, namely the *right of good administration*,<sup>25</sup> it leads to challenges to the administration of Member States: its structure, its procedure, and the material law it applies.

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<sup>15</sup> CPD chapter 2.

<sup>16</sup> Consular function can be practiced by both diplomatic and consular agents. VCCR Art. 3.; 70.

<sup>17</sup> CPD Art. 2.

<sup>18</sup> CPD Art. 3; 8.

<sup>19</sup> TFEU Art. 221; CPD Art. 11. Helly et al. (2014) 9. p.; Reynaert (2012) 224. p., Austermann (2014) 57. p.

<sup>20</sup> EEAS Decision Art. 1. 2.; Lequesne (2015) 36. p.

<sup>21</sup> Lead State Guidelines Art. 2.1-2.4

<sup>22</sup> CPD Art.13. cf. UCPM Art. 16. point 17.

<sup>23</sup> CPD Art. 5.

<sup>24</sup> EU Charter Art. 46.

<sup>25</sup> EU Charter Art. 41.

## IMPLICIT HARMONISATION BY EXPLICIT REQUIREMENTS: EUROPEANISATION OF TRADITIONAL DOMESTIC AREAS

The obligation refers to the *equal treatment* of foreign EU citizen in certain named situations<sup>26</sup> but EU law unify the tasks only in two areas: the financial help and its reimbursement<sup>27</sup> and the form of the *emergency travel document*.<sup>28</sup> The type of service is therefore divers and it creates obligation for material law changes: there are States which has no normative rules in this issue at all, the directive expanded the scope of protection to accompanying family members<sup>29</sup> and, by all means, EU law is *pacta tertiis* for third States<sup>30</sup> and the Member States are called to initiate the necessary changes in their bilateral treaties to avoid the possibility of conflicts.<sup>31</sup> The involvement of other actors cannot overrule these problems although they reveal others namely the organisational relationship among them. State administration is hierarchical and consular authorities ultimately are under the foreign ministries of their State while having other actors in the procedure with higher aims than individual State aims in foreign policy and their act directed by the HR/VP might create controversy. The principle of *solidarity* and *loyal cooperation*<sup>32</sup> urges consular authorities to interpret their tasks and obligations in an EU conform way although principles cannot create a competence and cannot provide a direct legal basis for measures. Indeed, principles primarily indicate how a competence should be used and therefore they orient those who fulfil obligations.<sup>33</sup> In a legal sense ad hoc acts, or soft law organisational norms shall not overrule domestic norms of competences which sets the limit for activity of the consular authorities and their mutual relationship.

The normativity of organisational background of consular protection is thus not in conformity with the *open, reliable, and transparent public administration, the principle of rule of law and the principles of good administration* that is envisioned by the EU. Administrative procedural rules of member states cannot make up for the cooperation rules among the actors of the procedure. All kinds of cooperation of

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<sup>26</sup> CPD Art. 9; CPDec. Article 5.; see also Wollenschläger (2007) pp. 8–12.

<sup>27</sup> CPD Art. 14-15. cf. CPDec. Article Article 7.

<sup>28</sup> ETDD Art. 1.

<sup>29</sup> CPD Art. 5.

<sup>30</sup> VCLT Art. 34-35.

<sup>31</sup> Maastricht Treaty Art. 8c, TFEU Art. 23, CPD Art. 12. cf. Art. 1.2. See a particular example: Piotrowicz (1990) pp. 569 – 570.

<sup>32</sup> Klamert (2014) 141. p. See also, Amerasinghe (2005) pp. 176 –187.

<sup>33</sup> McDonnell (2014) 66. p.

authorities shall be based on a general norm which, among others, delimitate the rights and responsibilities of the authorities, regulate their interaction also ensure the procedural rights of the individual including the right to effective legal remedy. In cases when immediately enforced measures are taken the fundamental rights guarantees including administrative procedural rights are even more important. “*The role of a well -regulated administrative procedure to secure liberty has been emphasized repeatedly.*”<sup>34</sup> This reasoning leads back to the domestic regulation of consular protection as consular protection cases are the least documented areas of public administrative law, and in addition, the relevant domestic norms are also diverse. According to data before the adoption of the directive of 2015, one third of the Member States regulate it in an independent legal act, and there are State where it is still an area of political decisions and do not even have regulation on the subject.<sup>35</sup> All these circumstances support the lack of transparency and reliability of the consular protection procedure. As the centre of cooperation is data - transfer and data sharing even in the simplest case it is a duty to make it available that the competent authority of the State of nationality and the State of site proceeds only if this latter cannot or will not help.<sup>36</sup> The basic rules to govern the network of authorities is crucial first to avoid forum shopping and parallel procedures, second, because of the legal remedy options.<sup>37</sup> Special features of measures taken as consular protection cannot justify the lack of procedural guarantees that are requirements for any other administrative procedures and the uncertainties of reveals the principle of *ubi ius, ibi remedium*: where is a right, there shall be legal remedy to cure maladministration. The supple nature of consular protection procedure, the lack of legal guarantees and normative background of the cooperation of actors involved in the procedure is consistent with the interest for a reliable and transparent administration. *Legal certainty* and *rule of law* would require clear cooperation rules among authorities, and the extensive autonomy, like in the former regime that left Member States to negotiate the details among themselves<sup>38</sup> and the voluntary cooperation in crisis management can be explained in the point of view of foreign policy and EU competences thereof but not in the view of public administration.

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<sup>34</sup> Schwarze (2004) 146. p.; Wakefield (2007) 21. p.

<sup>35</sup> CARE Final Report (2010) p. 582–586.

<sup>36</sup> CPD Art. 3.

<sup>37</sup> ReNEUAL Book VI. p. 245. VI-3.

<sup>38</sup> CPD (6); (19). There is no normative manifestation of such negotiation from the period before the adoption of CPD. Schweighofer (2012) 99. p.

## CONCLUDING REMARKS

The EU, by using its power to regulate cooperation of authorities and declaring consular protection in Third States as a fundamental right<sup>39</sup> 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, and neither the EU Charter, nor the interpretation of foreign policy can create new competences.<sup>40</sup> However, the right to consular protection in Third States is a fundamental right with direct effect,<sup>41</sup> the right to good administration and also the principle of good administration as a general principle of EU law requires the restriction of the procedural autonomy in this field and the effective implementation of the above-mentioned provisions requires positive action.<sup>42</sup> The CPD will replace the former regime on 1 May 2018 thus Member States still have time to implement the necessary measures although it will not substitute for a proper, transparent, clear, and predictable procedural background for the interrelation of authorities.

All these aspects show how national public administration is implicitly influenced by EU norms and how a legal area is Europeanised even if it is not the *expressis verbis* aim in the absence of competence to harmonise it.

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<sup>39</sup> Kochenov 2017, 596–597. p.

<sup>40</sup> EU Charter Art. 51 al. 2.

<sup>41</sup> Poptcheva (2014) 117–118. p.

<sup>42</sup> See, Chalmers – Tomkins (2007) pp. 381-394; Klamert (2014) pp. 125-138.

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