

EU LAW

EU ETD: Towards a New Chapter in EU Citizens' Rights and a Better Administrative Cooperation*

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1. Introduction

The concept of a 'People's Europe' first referred to benefits of traders and at the beginning of the economic integration the protection and rights under the same condition was already envisaged by the founders (EEC Treaty 1957, art 220). Later, step by step, the European integration has expanded its scope to different policies, and rights of the people was reevaluated along with the concept of *European identity*. (Declaration on European Identity 1973, I; Checkel and PJ Katzenstein 2009, pp. 11-14) The cosmopolitan conception was first manifested in the *European citizenship* officially created by the Maastricht Treaty to confer rights to citizens of the Member States of the EU and established legal basis to create the necessary normative background for them. Maastricht Treaty 1992, art. 8 1.; 8c) Among these rights, the most challenging one was the right that enabled European Union (EU) citizens to turn to any foreign representation of any Member States for help in third States in case if their State of nationality is not represented there. At first glance, it seems that the adjectives 'diplomatic' and 'consular' are used as synonyms in the referred treaty provisions, 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 (VCCR art. 70) and considering the content of secondary sources that aim to give a substance to them, it becomes obvious that the European citizenship policy currently rather ensures *consular protection and*

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assistance. (Schiffner 2009, pp. 535-543; Vigni 2011, p. 100; Battini 2011, pp. 177-178; Becánics 2015; pp. 25-26, cf. C- 293/95, point 43-45 and Vigni 2010, p. 17)

Almost 7 million EU citizens travel or live outside the EU in places where their own country does not have an embassy or consulate, as basically there are only four countries in the world where every Member State is represented: USA, Russia, China and India. (European Commission - Press release 2015; cf. Green paper 2006, p. 4; Balfour-Raik 2013, p. 12; Forni 2012, p. 157) Large Member States who have well-developed, extended international relations (Impact Assessment 2011, pp. 39-49) are in a better position to serve their nationals in need, while most of the Member States are in a less favourable situations thus their nationals are more likely to rely on these provisions to benefit from their rights as EU citizens. The EU citizenship policy aimed to eliminate these differences. Given to the consular protection's strong ties to foreign relations, first, it was placed under the unanimous decision-making capacity of the Council under the *common foreign and security policy* regime, but the Lisbon Treaty brought major changes for the success of citizenship policy not only for the consular protection policy of the EU (Shuibhne 2012, p. 141) but on the other hand, to the realisation of EU policies in general: *inter alia* it reinforced *the right to get consular assistance in third States* (EU Charter art. 46) as fundamental ones along with the *right to good administration* (EU Charter art. 41). The paper aims to examine the most wanted consular protection measure (COCON Report 2016), the issue of *emergency travel document* (ETD) in the view of recent developments embodied in a new directive (EU ETD Directive) and its evaluation through the prism of fundamental rights.

2. The emergency travel document in the EU legal order

A *passport* is an official document acknowledging and certifying the bearer as a citizen of the issuing State and has become increasingly a necessity in foreign travels. (Lee 1961, p. 175) Although there are international standards, the State decide upon the name, the type and the variation of travel documents it issues. (Lee 161, p. 176; Torpey 2000, pp. 161-162) The passport is, nevertheless, the expression of the State's sovereignty thus decisions concerning the modalities of issuance and acceptance depends on the State's discretionary power. (Hagedorn 2008, point 7)

The issuance of *emergency travel document* constitutes the most frequent type of assistance provided by Member States to unrepresented EU citizens in distress in third countries and are indispensable in helping these citizens return home. It does not substitute for an ordinary passport but aims to enable its holder for a one-way journey back home if his/her original travels document is *stolen, lost or destroyed* during his/her stay in a third State, that where the name of this kind of passport comes. (EU ETD Proposal, p. 1; preamble para 2; Directive 2019/997,

art. 3) Issuing a temporarily travel document is a typical a consular protection measure in the form of a quicker and simpler administrative procedure with then less security features and as that of issuing an ordinary passport therefore it shall not replace it but can substitute it temporarily. The EU has neither competency to issue it nor power to directly regulate its legal background.

When the EU announced EU citizenship and the consular protection rights inherent in the Maastricht Treaty, namely, that “[e]very citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State” (Maastricht Treaty 8c al 1), it also called the Member States to establish the necessary rules among themselves and start the international negotiations required to secure this protection before 31 December 1993. (Maastricht Treaty 8c al 2)

The Council then adopted a decision in which the Member States declared those situations which give rise to EU citizens to be entitled to the right to turn to any available representation of any MS for assistance.

“The protection (...) shall comprise: (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union. In addition, Member States' diplomatic representations or consular agents serving in a non-member State may, in so far as it is within their powers, also come to the assistance of any citizen of the Union who so requests in other circumstances.” (Decision 95/553/EC, art.5)

A year later, to facilitate consular assistance in case of lost, stolen or destroyed travel documents which is often required in cases under the above-mentioned circumstances, they also agreed upon a common format (Decision 96/409/CFSP) although, even now, the domestic practice of issuing such document is very colourful, it there is any practice at all. (ETD Presidency reflection paper 2015, p. 9) the Council decision of 96/409/CSFP wanted to provide a genuine help to the proceeding authorities by establishing a quick solution for the most commonly occurring problem of travellers: the issuing of a travel document to help the EU citizen to return home, while it does not replace or substitute the ordinary passport. The legislation in the frames of the second pillar *common foreign and security policy* (CFSP) was considered a simplified form of international agreement (CARE Final Report 2010, pp. 571-573; 579). According to its provisions, it is a piece of security paper, with a photo and important personal information on the holder including name, date of birth, place of birth, height, nationality and the signature of the holder (96/409/CSFP

Annex III).¹ It can be issued for a maximum period to return home. An ETD should be made valid for barely longer than the minimum period required for completion of the journey for returning home with the necessary overnight stops and for making travel connections. (96/409/CSFP Annex III) The recipient may only be a national of a Member State whose passport or travel documents are lost, stolen damaged or temporarily not available and has no accessible diplomatic or consular representation with the capacity to issue a travel

¹ ETDs shall be printed on security paper. It is 18x13 cm when it is open and 9 × 13 cm in folded format. The security paper is free of optical brighteners (approximately 90 g/m²), use a standard 'chain wires' watermark legally protected for the manufacturer of the document, with two invisible fibres (blue and yellow, SSI/05) fluorescent under ultraviolet light and reagents against chemical erasure. Each Member State shall provide the documents with a centralized numbering system, combined with the initials of the issuing Member State. The photograph of the bearer shall be laminated in accordance with national practice, it being understood that Member States shall take the necessary steps to ensure an appropriate level of security for the document. The bearer's personal details on the ETD form shall be consistently entered in either handwritten or typewritten form and shall be covered with a laminate. When an ETD is issued, the seal of the issuing authority shall be affixed partly on the document and partly on the bearer's photograph. ETDs shall have a guilloche protective background with indirect letterpress printing in four colours on the pages where data is to be entered with due consideration to iridescent printing. The decision also provides for the printing technology that shall be used. The inks used shall be copy-resistant and any attempt to make a colour copy shall result in clearly recognizable colour deviations. Moreover, at least one colour shall contain fluorescent agents. The inks shall also contain reagents against chemical erasure. The blank ETD forms shall be ensured a theft-proof storage. (96/409/CSFP Annex III) Cf. Directive 2019/997, Annex I. The uniform EU ETD form shall be in a trifold design: a single sheet printed on both sides and folded into thirds making it the EU ETD of 6 pages. When folded, the size of the form shall comply with the ISO/IEC 7810 ID-3 standard. The cover page of the uniform EU ETD form shall contain, in this order, the words 'EUROPEAN UNION' in all official languages of the Union and the words 'EMERGENCY TRAVEL DOCUMENT' and 'TITRE DE VOYAGE PROVISIOIRE'. It shall also feature twelve golden stars forming a circle. The uniform EU ETD sticker shall be securely affixed to the second page of the uniform EU ETD form in such a way as to prevent easy removal. The uniform EU ETD sticker shall be aligned with and affixed to the edge of the page. The machine-readable zone of the uniform EU ETD sticker shall be aligned with the outer edge of the page. The stamp of the issuing authorities shall be placed on the uniform EU ETD sticker in such a manner that it extends onto the page. The third and fourth page shall contain translations of 'Emergency Travel Document' as well as of the captions of the uniform EU ETD sticker in all official languages of the EU except for English and French. The following text shall also appear: *'This EU Emergency Travel Document is a travel document issued by a Member State of the European Union for a single journey to the holder's Member State of nationality or residence or, exceptionally, to another destination. Authorities of non-EU countries are hereby requested to allow the holder to pass freely without hindrance.'* Also, in French: *'Le présent titre de voyage provisoire de l'UE est un titre de voyage délivré par un État membre de l'Union européenne aux fins d'un trajet unique vers l'État membre de nationalité ou de résidence du détenteur, ou, à titre exceptionnel, vers une autre destination. Les autorités des pays tiers sont priées d'autoriser le détenteur du titre de voyage provisoire à circuler sans entraves.'* The fifth and sixth pages shall bear the heading 'VISA/VISA' and shall otherwise be left blank and these pages shall be reserved for visas and entry/exit stamps. In addition, a seven-digit number shall be pre-printed on the uniform EU ETD form.

document. In such cases, after being successfully identified as an EU citizen, or in case of extreme emergency without that, the consular authority of the Member State represented at site may issue the necessary document. Decision 96/409/CSFP also empowers Member State to extend the application of ETD rules to other persons in a consistent manner to their consular laws and practices. (Decision 96/409/CSFP, Annex II. 6)

The EU, with its consular protection policy, inserted an *equal treatment clause* (Poptcheva 2014, pp. 171-173) but no harmonisation of consular law has been aimed, simply because of the lack of competences to do so. The relevant legal norms of second pillar were not recognized as part of the EU legal order as they were adopted on an inter-governmental ground. Meanwhile, as *acquis communautaire*, they were to be respected, although they could never overcome the diversity of national regulations and foreign policies. (CARE Final Report 2010, pp. 24-25) Later, the Lisbon Treaty brought major changes including new competences to facilitate consular protection in the form of directive with *cooperation and coordination measures*, explicitly,

“[i]n Article 20, the words ‘establish the necessary rules among themselves and’ shall be replaced by ‘adopt the necessary provisions and’. The following new paragraph shall be added: ‘The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.’ ” (Treaty of Lisbon 2010, 36)

Consequently, the foundation stones of a new consular protection policy regime were established by Directive 2015/637 of 20 April 2015. Hereby, it is necessary to notice that the treaty lines concerning 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, are exactly the same as in the previous regime (cf. Maastricht Treaty, art. 8, 8c and TFEU, art. 20; 23) The provision is also identical with the provision under citizen’s rights in the EU Charter (EU Charter, art. 46) The list of consular protection situations is now completed with a last point referring to the issue of emergency travel document. According to its provisions, the consular protection “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*. (Directive 2015/637, art. 9; emphasis added by Author). It still does not mean that the *right to get emergency travel document* is established but it is a step on the path towards it. The obligation to ensure consular protection for non-represented non-national EU citizens is a general one which is still based on equal treatment without harmonisation

competency of the consular law of Member States: it requires Member States to ensure the same service and the same treatment of consular protection to non-national EU citizens according to the consular law of the requested Member State as they would ensure it for their own nationals. It reveals that there is no uniform consular assistance service and no uniform procedural law either, although the general scenario in case of a request is now settled; ie. how the Member States' diplomatic and consular authorities shall closely cooperate and coordinate with one another and with the EU organs to ensure protection of unrepresented citizens (Directive 2015/637, art. 10). The requirements of the new regime are based on *solidarity, non-discrimination and respect for human rights* and it refers to the EU citizenship as a fundamental status and the rights inherent as special ones (Directive 2015/637, preamble (1) – (3)), and aims no intervention in international relations, the provisions are addressed to Member States, allowing them to act accordingly while they ensure a proper *administrative service* for EU citizens but without giving direct reference to other basic values of the EU concerning administrative procedures which shall be also evaluated, inter alia, the right to good administration, in case of breach of law, the right to legal remedy, and also the right to respect of family life and the right to protection of personal data. (Directive 2019/997, preamble (24)). All are enlisted in among the fundamental rights placed among primary sources of EU law (TEU art 6 (3)) and although there are some concerns whether they are superior or not to other primary sources (Ziller 2014, 347), it is undoubted that they are normative to all foreign services of the Member States that executes the EU's consular protection policy. (EU Charter, art. 51.1.) To a better evaluation of the latter, the new regime expands the personal scope of equal treatment and orders Member States in the same manner as in the case of serving EU citizens: consular protection shall be provided to *family members*,

“who are not themselves citizens of the Union, accompanying unrepresented citizens in a third country, to the same extent and on the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the Union, in accordance with its national law or practice.” (Directive 2015/637, art. 5)

Directive 2015/637 entered into force 1 May 2018, and parallel to the reform procedure of the consular protection policy, the necessary reformation of Decision 96/409/CSFP has been prepared, so in consistently with the new challenges of the 21st century and to meet the requirements issuing from Directive 2015/637, a directive proposal was submitted on 31 May 2018. Adopted on 18 June 2019, the EU ETD Directive provide additional rules to be applied alongside those set out in Directive (EU) 2015/637 where necessary (Directive 2019/997, preamble (3)). The general aim is to improve the ETD's security features to enhance its acceptance by third States while it strengthens the identity

of the Union as perceived in third countries and their authorities while it meets the needs of recipients but without going beyond the competences arising from the new provisions inserted by the Lisbon Treaty (TFEU art 23 al 2). This latter is strongly connected to the better administration of the fundamental right. Before the administrative procedural measures are discussed, the emergency travel document reform shall be examined in the view of rights of its recipients.

3. Citizenship rights and the issuance of emergency travel document

Before World War I, document-free international travel was the general rule for individuals, and the restriction of the free movement by official documents was the product of the 20th century. (Bauman 2009, pp. 18-20) The right to leave any country, including one's own, and to return home (*right to leave and return*) is now recognized under international and European human rights law, (UDHR, art. 13(2); ICCPR, art. 12(2); (4); Protocol n°4 of the ECHR, art. 2(2); Liu 2007, pp. 29-32) although travel document is necessary for travel and the conditions of issue varies from State to State, and restrictions on the right to return is recognized only in special cases (ICCPR, art. 12.3; Guild 2013, p. 13), but as Liu says, the "right to return is accepted so widely that its existence as a rule of law is virtually beyond dispute" (Liu 2007, p. 84) and it is respected as a general principle (Lee 1961, p. 175). However, in order for the right to be effective, the State must provide the individual with a travel document, in particular a *passport*, which is a certificate of identification and an evidence that the bearer is the national of the issuing State (Lee 1961, p. 175) enjoys its protective power (Hargitai 1995, p. 715) and has an incontestable right to enter the territory controlled by its issuing State. (Liu 2007, p. 53; Torpey 2000, p. 163). It is an authentic document normally issued by the State of nationality of the individual as an inseparable aspect of citizenship policy, therefore it is a core element of State sovereignty (Hargitai 1995, p. 710; Zieck 2018, p. 106). The passport, as a summary name of travel documents which are the issued to reflect the above-mentioned status, is therefore an important element in border-crossing thus administration in case of the passport is lost, stolen or destroyed during one's staying abroad, is an important function of consular authorities (VCCR, art. 5 d)) and now also an entitled situation when Member States are obliged to ensure service under the consular protection policy of the EU.

However, it shall be emphasized that neither the TFEU, nor Directive 2015/637 establishes obligation for Member States to issue ETD or gives the right to any circle of recipients to get such document from any Member States consular authority in a third State. EU consular policy establishes obligation to assist but Member States' consular law gives the substance for the provisions and if a Member State's consular law does not provide for the possibility to issue travel

document, then that State's consular authority will be responsible to *ensure assistance* when there is a need for emergency travel document, (Directive 2015/637, art. 9 (f)) and the it should not affect more favourable national provisions either in so far as they are compatible with its provisions (Directive 2019/997, preamble (20)). In fact, "*the right to leave includes the positive obligation to issue travel documents, so that the right to leave can actually be exercised*" (Zieck 2018, p. 88), but its circumstances rests in domestic competence domain, that is why it is important to emphasize the EU norms' role in enhancing the task as *assistance* in the case of emergency travel document issue and not referring to it as a consular protection measure to be ensured for citizens.

The first and outmost obligation of the requested consular authority at site is, namely, to contact the Ministry of Foreign Affairs of the Member State of which the person claims to be a national or, where appropriate, the competent embassy or consulate of that Member State, and provide it with all the relevant information at its disposal, including regarding the identity of the person concerned, possible costs of consular protection, and regarding any family members to whom consular protection may also need to be provided (Directive 2015/637, art. 10). Except for extreme urgency, the checking of the identity of the person comes first, and then, the Member State of nationality has the chance to provide consular protection in accordance with its national law or practice and the requested Member State and its consular authority relinquish the case as soon as the Member State of nationality confirms that it is providing consular protection to the unrepresented citizen. (Directive 2015/637, art. 3) The right to issue a passport is still the prerogative of the nation State, to provide for its types and if they are willing to ensure short term, temporary travels document. The Member States' practice is colourful concerning temporary travel documents if there is any,² the establishment of a standard model by Decision 96/409/CSFP aimed to provide genuine help to the citizens of the Union in distress, as it might have been a clear demonstration of the practical benefits of being a citizen of the EU. (Decision 96/409/CSFP, preamble)

According to 2017 data, the issuance of emergency travel document is the most frequent form of assistance given to unrepresented EU citizens (*more than 60 % of all cases*) but 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, and another 400-500 unrepresented citizens

² Eight Member States issue more than one type of emergency travel document. Emergency travel document as a paper is used by 9 Member States, as a booklet by 3 Member States, laissez passer in paper format is used by 3 Member States, in booklet format by one; under the term provisional/temporary passport 7 Member States uses booklet form and as emergency passport 2 Member States use paper format and 6 Member States use booklet format. (ETD Presidency reflection paper, p. 9)

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. (EU ETD Proposal, p. 1. footnote 4; EU Citizenship Report 2017, p. 18) So, the picture is still colourful meanwhile there is no evidence of any distressed citizens that was left without travel document, so in that point of view, no right has been violated relating to consular protection policy of the EU. However, bearing in mind equal treatment, the pure application of the provisions may also lead to diversity in practice as States consular law is different and it also have effect on individuals and the evaluation of their substantial rights as the level of service is different even in the same third State.

While keeping the limits of its competence, Directive 2019/997 offers the possibility to expand the personal scope of recipients for a better evaluation of consular protection measures in general and opens floor for practical aspects of the usage of such standardised travel document. Under the current regime, Decision 96/409/CSFP entitles EU citizens as recipients and it is up to the discretion of Member States if they are willing to issue the EU format for other categories of persons (Decision 96/409/CSFP, Annex II 1.; 6.), although in the view of *right to the respect of family life* and the spirit of EU's family policy, the first and outmost interest of the EU citizens in crisis to be sure about the protection of their accompanying family members, including the possibility to get a travel document to the way back home. Currently, the Treaties ensures the right to get consular assistance for EU citizens and Directive 2015/637 obliges for equal treatment only those Member States whose consular law does itself offers consular protection for non-national family members of their own citizens. Directive 2019/997 offers a wide range of personal scope of application as optional issuance of EU ETDs to influence the widely spread application of the common format. It envisages its issuance to (a) own nationals of Member States, (b) to EU citizens who are not represented within the territory of the Member States, including the *overseas countries and territories*,³ and (c) to citizens of another Member State which is represented in the country where they seek to obtain the

³ Special arrangements are in force to apply to the following overseas territories of Member States enlisted by Annex II of TFEU: Greenland (DK), New Caledonia and Dependencies (FR), French Polynesia (FR), French Southern and Antarctic Territories (FR), Wallis and Futuna Islands (FR), Saint Pierre and Miquelon (FR), Saint-Barthélemy (FR), Aruba (NL), Netherlands Antilles: Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten (NL), Anguilla (GB), Cayman Islands (GB), Falkland Islands (GB), South Georgia and the South Sandwich Islands (GB), Montserrat (GB), Pitcairn (GB), Saint Helena and Dependencies (GB), British Antarctic Territory (GB), British Indian Ocean Territory (GB), Turks and Caicos Islands (GB), British Virgin Islands (GB), Bermuda (GB). The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list. (TFEU Article 355(2); Kochenov 2017, pp. 739-740.)

EU ETD and where arrangements between the relevant Member States exist to that effect. It opens the scope of application (d) to non-EU citizen family members accompanying Union citizens who are not represented in a third country or Union citizens referred to in points (a), (b) or (c), where those family members are legal residents in a Member State, without prejudice to any applicable visa requirements. Apart from these categories, the Member States may issue the EU ETD type of travel document (e) to other persons to whom that Member State or another Member State is obliged under international or national law to provide protection and who are legal residents in a Member State. (Directive 2019/997, art. 7.1. a)-e))

Although the widely spread application of a common emergency travel document format everywhere and in every situation would definitely serve the interest of the EU citizens, not just in third States: it is also a problem to board an airplane without valid ID card in the territory of the EU; but such administrative service is not aimed and supported by the consular protection policy right now, therefore Directive 2019/997 leaves this opportunity open for possibilities but not as an obligation. It shall be noted, that compared to the EU ETD Proposal which contained provisions for the *temporarily unavailable*, and *expired travel documents* if otherwise they cannot be obtained within a reasonable time (EU ETD Proposal, art. 7.1.), the adopted version does not make any *expressis verbis* reference to such circumstance. Directive 2019/997 provides in general for a temporary solution for a passport or travel document which is "*lost, stolen or destroyed or can otherwise not be obtained within a reasonable time.*" (Directive 2019/997, art. 3. 2. and art. 7.1. al 1.)

The possible diversity of the personal scope of service is aggravated by differences in other aspects of the service like pre-conditions, for example there are states who insist on submitting a police report to prove the loss of passport while others do not require such document. The fee of the service is also a key factor in this context as Directive 2019/997 declares that the assisting Member State shall charge the applicant such fees as it charges its own nationals for the issuance of national emergency documents but it may waive the charging of fees generally or in specific situations. In case where applicants are unable to pay any applicable fees to the assisting Member State when submitting their application, they shall undertake to repay their Member State of nationality such fees using the standard form set out in Annex I of Directive (EU) 2015/637. (Directive 2019/997, art. 5.). According to the previous studies, the issue of an emergency travel document varies from 1,55 to 150 EUR. (ETD Presidency reflection paper, p. 9-10) Such differences may be eliminated by practical arrangements, local agreements and workshare agreements which would have significance mainly among the represented Member States within the same third States although some sort of standardisation would definitely serve a balanced service and

predictability and reduce the chance of *forum shopping*. In the point of view of Member States, they formally do not violate their obligation of equal treatment, however, the lack of proactive steps towards workload share may reveal questions concerning the effect of rights (Rasmussen 2017, p. 279)

Diversity has another side: question of procedural aspects which area with concrete EU requirements and obligations although, in most of the time, in a less manifested form.

4. A better administrative cooperation for better evaluation of rights

The effective functioning of the EU including the ensuring the rights resulted by the EU citizenship and granted by fundamental law provisions requires a proper administrative background. Consular protection is a service of the administrative authorities beyond state borders, on the territory of third States. By establishing a standardised procedure of cooperation between the Member States for the issuance of emergency travel documents in a uniform format based on improved security features. This will allow citizens to exercise their right to consular protection effectively and in a more secure environment. (EU ETD Proposal, p. 3) To that end, two major questions shall be discussed: how a consular authority shall assist with an EU ETD a non-represented citizen and how the forum shall be chosen to assist.

4.1. The scenario for issuing the EU ETD

In case of the EU's consular protection policy under the new regime, there are coordination and cooperation measures to frame a scenario for the authorities involved in the same procedure which is incorporated in an obligation of the consular authority at site to contact the competent authority of the State of nationality first to check the identity and second to give the State the possibility to act in the case of its own citizen. In the case of issuing an EU ETD, Directive 2019/997 goes beyond and establish concrete procedural steps including *strict deadlines* for the inter-national communication phase of the authorities in the procedure. In case of receiving an application for an EU ETD, the consular authority shall, as soon as possible, and no later than two working days after receipt of the application, consult the Member State of nationality for the purpose of verifying the nationality and identity of the applicant. (Directive 2019/997, art. 4.1.) 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, art. 4.2.)

According to the *Impact Assessment* prepared for the *EU ETD Proposal*, the Member States will be obliged to exchange data through formal and secure channels for the purpose of confirming the identity of a citizen without other valid travel documents and is justified on those grounds. At all times, during data collection, storage and transmission, the Member States are obliged to follow the EU's *acquis* and fundamental rights, particularly in relation to data protection. (Impact Assessment 2018, p. 37-38)

As soon as possible, and no later than three working days after receipt of the information about the applicant, the Member State of nationality shall respond to the consultation and shall confirm whether the applicant is its national. 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, and 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. (Directive 2019/997, art. 4.3.) Each procedural step may take longer only in justified cases, (Directive 2019/997, art. 4.5.) while the cases of extreme urgency may justify the issuance of 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 and 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 including all data which were also included on the EU ETD. (Directive 2019/997, art. 4.6.)

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 about its concerns. 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. (Directive 2019/997, art. 4.4.)

The authority of the Member State issuing the EU ETD shall store a copy or scan of each EU ETD issued and shall send another copy or scan to the applicant's Member State of nationality. The recipient of an EU ETD shall be asked to return the EU ETD, regardless of whether it has expired, upon arrival at the final destination. (Directive 2019/997, art. 4. 7-8.)⁴ An EU ETD is valid only for the period required for completion of the journey for which it is issued. In calculating that period, allowance shall be made for necessary overnight stops and for making travel connections and the period of validity shall include an additional '*period of grace*' of two days but save in exceptional circumstances, the validity of an EU ETD shall not exceed 15 calendar days. (Directive 2019/997, art. 6.)

Ruling the supra-national cooperation in the form of a directive in the view of the development of European administrative procedural law is a giant step, as such provision in the form of an obligatory secondary source of EU law instead the usually applied soft law measures usually under the term *guidance* is a giant step. It also has direct consequences on the procedural rights of the individuals: even if domestic laws and regulations dominates the ultimate decision-making in the issue of the travel document, the previous phase of the procedure between the assisting consular authority and the competent authority from receiving the claim until the identification and the post procedural phase related to the documentation management, should be clear and transparent. Directives are obligatory sources of law, they are legally binding, so clear and unconditional provisions enabling citizens with rights even in case of implementation can give rise to procedural rights of the EU citizens. (C-9/70 point 10; Varner 2001, pp. 464-465; Craig and de Búrca 2007, p. 280) Directive 2019/997 and its provisions cover this way the inter-national phase of the administrative procedure, the communication of the competent authorities, unlike in the former practice, when the cooperation of authorities involved in one single case was a sphere of soft law. However, Directive 2015/637 establishes a scenario for cooperation and coordination in consular protection cases to inter-operate and then it is the consular law of jurisdiction that is applied but Directive 2019/997 goes beyond this with its provisions on the consecutive steps and deadlines.

4.2. Primus inter pares or forum shopping: finding the competent forum

Given the fact that consular law is different in Member States as its harmonisation is not aimed, Member States are entitled to conclude practical

⁴ 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. ((Directive 2019/997, art. 4. 9.)

arrangements to share the work and responsibility (Directive 2015/637, preamble (10)), and Directive 2019/997 also maintains such practice (Directive 2019/997, preamble (7)). In a particular third State, several Member States can be represented offering a variety of choice of forum for non-represented individuals as according to the directive in question, the individual has the right to turn to any of them.⁵ This may create *forum shopping* and unequal burden on those member States who serves the unrepresented individuals. Here it is essential to reveal that *being unrepresented* means having no available representation in time, distance or at all, so even if an EU citizen's nation State is represented in a particular third State, it does not automatically mean that he/she is represented, the consular authorities shall take into account the circumstances of each particular case. (Directive 2015/637, preamble (8)) The workload share arrangements shall be beneficial to citizens, since they allow for better preparedness to ensure effective protection. Member State consular authorities that receive requests for protection should assess (a) whether, in a specific case, it is necessary to provide consular protection or (b) whether the case can be transferred to the embassy or consulate which is designated as competent according to any arrangement already in place. According to the present regime, Member States should notify the 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. (Directive 2015/637, preamble (10))

In the view of a humble citizen, these arrangements are either non-existent or the transparency is missing as on the Commission's designated website, no such information seem to be available for EU citizens.⁶

Even if in each and every third State there is an agreement of cooperation, the level of service stays colourful in different third States, although the harmonisation or standardisation of service is not aimed, while the clear, predictable and transparent administration of consular protection is not simply a desire but an obligation deriving from general administrative principles of EU law. As a general principle, it refers to the functioning of the EU is based on the rule of law, therefore good administration means that the institutions, bodies, offices, and agencies of the EU in carrying out their missions, shall have the support of an *open, efficient and independent European administration*. (TFEU, art. 298 al 1) Thus, good administration '*must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible*'. (CM/Rec(2007)7, p. 3-4; TEU art. 2; Pech 2009, p. 53-57) Therefore, for

⁵ To see the available representation visit: https://ec.europa.eu/consularprotection/content/home_en

⁶ See, Consular Protection, https://ec.europa.eu/consularprotection/content/home_en

example, the scenario stating that the assisting Member State and the unrepresented citizen's Member State of nationality should be able to agree detailed arrangements for reimbursement of costs of consular protection within certain deadlines (Directive 2015/637, preamble (26)-(28); art. 7) shall also be done in a way that corresponds to general provisions on citizenship procedural rights. The EU ETD Directive does not bring an innovation in this field, it also emphasises, that Member States that receive EU ETD applications 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. ((Directive 2019/997, preamble (7)). Crisis situation may justify flexibility and increase the level of *discretion* by the authority, although such power must also have clear legal boundaries and be subject to several constitutional and administrative law standards, such as objectivity and consistency in application. (SIGMA 27, p. 8-14; Ponce 2005, pp. 553-554), too, just as it is provided by the current regime: in the view of administrative procedural requirements, “[t]o fill the gap caused by the absence of an embassy or consulate of the citizen's own Member State, a *clear and stable set of rules* should be laid down. Existing measures also need to be clarified to ensure effective protection.” (Directive 2015/637, preamble (7), emphasis added by Author)

It shall be noted that all EU norms are *pacta tertiis* for third States, therefore consular protection can be practiced for non- nationals, that is on behalf on another State, upon appropriate notification to the receiving State, unless the receiving State objects. (VCCR, art. 8), so for the sake of efficiency, according to Directive 2015/637, Member States are responsible to undertake the necessary measures in relation to third countries to ensure that consular protection can be provided on behalf of other Member States.

Meanwhile, Directive 2019/997 already recognized that along respecting competency limits, ((Directive 2019/997, preamble (9)) it is necessary to avoid fragmentation and resulting decreased acceptance of emergency travel documents issued by Member States to unrepresented citizens, be better achieved at EU level. Therefore, in addition to the Member State roles and responsibility centric Directive 2015/637, Directive 2019/997 empowers the EU delegations in third States to notify the local authorities about the EU emergency travel document issuing practice and handle the specimens and negotiate to enhance its recognition (Directive 2019/997, preamble (19); art. 13) An internationally accepted form of travel document definitely serve better its recipients and reduces the risk of rejection at border control while the recognition of the EU as a unity may also achieved.

5. Evaluation of the new chapter in EU citizens' rights and the better administrative cooperation

It is essential to highlight the fact that in case of emergency travel document issue, the obligation of the Member States is *to give assistance* in the need of official travel document instead of the ones that are not available anymore. Creating a common format upon international standards and ensuring board acceptance by increasing the powers of delegations over Member States to that end in an achievement to better serve EU citizen's interests and giving a normative background for the scenario is reformative. However, it should be recalled what Directive 2019/997 itself echoes in the last lines of its preamble: the values of the EU Charter shall be respected. In this point of view, it offers opportunity to get closer to the *principle of good administration with transparent, reliable and predictable* administration of this consular measure in every corner of the world where Member States are represented, although the Directive 2019/997 does not go beyond to this point. The other element would also require consistency with every aspects of the *right to good administration*.⁷

Such provisions are not unknown for democratic administrative procedure codes of Member States, however, in cases when the client is a non-national for sure and the domestic procedural rules do not extend to the intermediate section of the procedure, that is, mainly the horizontal administrative cooperation of the involved authorities, the effective application of these rights may be questioned and each missing part of normative content or soft law based procedural step get under magnifying glass. Jurisdiction issues and legal remedy options would be crucial and not just for EU citizens, but for family members. The substantial part of their consular protection rights is even more unpredictable, although in case of submitting request, under the right to good administration, the family member is also entitled to the same procedural guarantees given the fact that it enables *every person* and not just EU citizens. Probably, the current regime of requires more harmonisation efforts at least in the view of family members. All in all, even in the lack of administrative procedural law code, the EU Charter provisions serve general background for administrative procedures, although their application

⁷ 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; - the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. (EU Charter, art. 41)

and enforcement may challenge the procedure in time and costs. 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, art. 47; Model Rules, VI-3; Varga Zs 2014, p. 547) and currently, these requirements are fulfilled partially.

Although it is necessary to establish a simplified procedure for cooperation and coordination between the assisting Member State and the unrepresented citizen's Member State of nationality but at the same time, it is crucial to maintain a *sufficient flexibility* in exceptional cases. In crisis situations, the assisting Member State should be able to issue EU ETDs without prior consultation of the Member State of nationality. In these situations, the assisting Member State should notify the Member State of nationality as soon as possible of the assistance granted on its behalf to ensure that the Member State of nationality is adequately informed. (Directive 2019/997, preamble (5)) Again emphasized, in case of practicing discretionary power, the authorities are also engaged within the rule of law, therefore, the limitations and the modes of discretion shall also correspond to the same values and same procedural guarantees, including the possibility of getting legal remedy. The EU Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties, (EU Charter, 51.2.) but to establish the background for the evaluation of the content of the Charter as well as the content of any rights issuing from EU norms, is the duty of Member States. Therefore, the existing powers to create regulations of administrative cooperation (TFEU, art. 197) and further cooperation and coordination directives to facilitate consular protection (TFEU, art. 23 al 2) are also available to further common steps and in case of the latter, to establish in domestic legal order the necessary modifications to meet such requirements as the details of consular protection and its procedures are regulated in many ways; (CARE report, pp. 580-585) The effective implementation of the above-mentioned provisions (duty of consistent interpretation or 'indirect effect') requires positive action. (Chalmers and Tomkins 2007, pp. 381-394; Klamert 2014; pp. 125-138): "*in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy(...)*". (Case C-3/16, point 48)

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

6. Conclusion

Being a part of the European consular assistance policy, the reform of the *emergency travel document* in the form of a new directive opens a new chapter in the saga of EU citizens' rights and a better administrative cooperation, but also leaves the floor open for further ones. As it is a significant area of external issues, it may also contribute to "the creation of an EU demos through increased citizens' identification with and loyalty toward the EU" as Rasmussen envisaged (Rasmussen 2017, p. 278), Directive 2019/997 adds a further layer to build. The form of the emergency travel document aims to establish a more reliable and internationally accepted form of travel document which corresponds to generally respected safety standards to better serve EU citizens and as external policy field, it empowers delegations, instead of relying on Member State act, to enhance the EU ETD's acceptance by third States border authorities. It reinforces the EU 's role and place as a political entity with its people treated as a homogenous unit in the view of protection of certain rights. In an internal view, creating a basis for a better administrative service with a more coherent, transparent and reliable legal framework than in the previous regime is also a milestone not only in the effectivity of consular protection policy of the EU but in the development of normative rules of European administration: in an organisational as well as procedural aspect. By involving the Commission and its related organs to perform external policy tasks justified by subsidiarity and proportionality principles, the organisational structure of a once purely domestic area of external administration, the consular protection, the European administration is growing. Meantime, its normative background is also developing as the intermediate phase, the connection of vertical and mainly the horizontal cooperation is purely regulated by binding secondary sources. In consular protection issues it is also framed by soft law, therefore the entry into force of the directive envisaged by the Directive 2019/997 would mean a quality change and a step towards a better administrative service which is closer to the principles and requirements of an "open, efficient and independent European administration" (TFEU, art. 298.1) and to the legitimate expectation of every person who shall enjoy all the guarantees evolved in the right to good administration and other benefits of the EU Charter.

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