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VERTICAL COOPERATION OF AUTHORITIES AND CONSULAR PROTECTION PROCEDURE IN THIRD STATES¹

I. Introduction: the nature of consular protection policy of the EU

Mainly the domestic aspects of public administration are discussed, however, the execution of public policies also has external branches. Foreign representations ensure, among others, certain administrative services for their nationals on the territory of another State including consular protection.² It means various types of help, advice, and service for the citizen in trouble like contacting relatives and it can also include the performance of authority acts of consular agents, like the issue of emergency travel documents. Basically, this kind of State service is generally acknowledged by international law to national and as its theoretical concept is strictly linked to the personal sovereignty of States over its citizens, it is a prerogative of the State to decide upon its regulation. Correctly, it used to fall under absolute State discretion whether and how to ensure it to its citizens but since the EU declared consular protection of EU citizens in third States as a fundamental right and enabled the citizens to ask consular authorities from any available foreign representations of any Member State's in case of the lack of own State's representation. However, in principle, the relevant EU norms made no changes to the substantive rules of consular protection and instead of harmonisation, they introduced an *equal treatment* clause in specific situations³ when the consular authority of the Member State shall ensure the same protection to any EU citizens whose State has no available representation to help as it would ensure to its own nationals.⁴

In general, Member States do not need the involvement of the EU level organs as consular assistance and protection are after all exclusive national competencies and only the equal treatment is required whatever the laws and regulation of the Member State is on consular protection measures. Meanwhile, ensuring consular protection for a non-national EU citizen

¹  Supported by the UNKP-17-4 New National Excellence Program of the Ministry of Human Capacities.

² See, Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261. [VCCR] Article 5.

³ 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. [Consular Protection Decision] Article 5.1.; 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 Protection Directive] Article 9.

⁴ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 47–390. [TFEU] Article 23., Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012. 391–407. [EU Charter] Article 46.

requires the contacting with other Member States' competent authorities⁵ and crisis situations with numerous beneficiaries of the fundamental right to consular protection in Third States supposes the collaboration with EU organs and authorities for an effective assistance.⁶ The EU neither has competency to regulate consular protection, nor its institutions and organs are entitled to perform as consular authorities but the common foreign and security policy (CFSP) shall be defined and implemented by the European Council and the Council acting unanimously except where the TEU/TFEU provide otherwise, and shall be put into effect by the *High Representative of the Union for Foreign Affairs and Security Policy* (HR/VP) and by Member States.⁷

EU nationals make more than 180 million journeys outside the EU per year, that was the motif to strengthen cooperation and coordination on consular protection,⁸ as a matter of fact, according to data of 2016, all Member States are represented in only four countries in the world: the US, Russia, India and China. The Commission noted that in 2015 almost 7 million EU citizens travelled in or lived in a country where their national State has no representation and this number is expected to increase.⁹ So, the relevance of such basic right is getting reevaluated. Meanwhile, not only fundamental rights protection is getting increasing importance in the EU but the EU's foreign policy is continuously expanding and consular protection policy leads to the engagements of different kind of EU policies of different legislative competences. Notably, common foreign and security policy (CFSP) with crisis management and the involvement of foreign policy organs of the EU creates a unique system of collaboration of organs and authorities while the *de facto* performance of consular tasks remains in the hands of consular authorities of the Member States. However, in the procedure, other organs and authorities can take place which has relevance in a procedural law point of view and in an organisational aspect concerning the autonomy of classical state administration of foreign policy.

Therefore, the functioning of the system and the legal relationship between the components of this organisation shall be examined, notably, the administrative relationship between the direct level organs and the executors at indirect level.

II. The structure of the European administrative system

To describe the organisational background of a certain policy, the general features of European administration shall be clarified first.

⁵ Consular Protection Directive, Article 10.

⁶ See, Consular Protection Directive, Article 11–13.

⁷ TEU Article 24. (1).; 3. Article 26. (2)–(3). TFEU Article 2. (4).

⁸ In April 2006 the COCON Group estimated these trips at some 180 million per year. Green Paper Diplomatic and consular protection of Union citizens in third countries. Brussels, 28.11.2006. COM(2006)712 final. 4. footnote no. 6.

⁹ European Commission – Press release EU consular protection rules: better protection for European citizens abroad. Brussels, 20 April 2015. http://europa.eu/rapid/press-release_IP-15-4803_hu.htm (10.10.2017.) See also, KACZOROWSKA-IRELAND, Alina: *European Union Law*. Routledge, London, 2016. 704.

II.1. The nature and features of the European administrative system

*“International organizations are unusual creations: generated by and for their member-states, at the same time they often have to compete with those very states that created them.”*¹⁰

The powers transferred from Member States enable the EU institutions to legislate. In certain policies, the EU has exclusive competences,¹¹ while in others the competences are shared between the EU and the Member States and the latter can act only if the EU has chosen not to,¹² and the EU has the weakest powers when it has competence to support, coordinate or supplement the actions of the Member States.¹³ There is no general competence in the entire policy area but only with regard to matters specified by the TEU-TFEU provisions.¹⁴ However, the executive organisation is not regulated by the EU. Member States are required to have administrative systems and public administration institutions capable of transposing, implementing and enforcing the *acquis* according to the *principle of “obligatory results” (obligation de résultat)*.¹⁵

The EU’s own executive capacity (*direct administration*) is relatively small.¹⁶ The execution, the process of individual cases is, therefore, left to the administrative capacity of Member States’ (*indirect administration*).¹⁷ The correlation of the different levels allows to describe the EU as a *multilevel administrative system* known as *European administrative space (EAS)*¹⁸ which is held together by common constitutional principles rooted in

¹⁰ KLABBERS, Jan: *An Introduction to International Institutional Law*. CUP, Cambridge, 2002. Introduction.

¹¹ TFEU Article 3.

¹² TFEU Article 4.

¹³ TFEU Article 6.

¹⁴ See Treaty on the European Union – Treaty on the Functioning of the European Union. List of decision-making procedures by article (updated 17/12/2009) http://ec.europa.eu/codecision/docs/legal_bases_en.pdf (10.10.2017.)

¹⁵ SIGMA 27. 1999, 6.

¹⁶ As the guardian of the Treaties, the European Commission is responsible for the proper execution of EU law, in fact, each Commissioner is responsible for specific policy areas to defend the interests of the EU as a whole while they are in charge with drafting and monitoring proper execution by the Member States. The Commission is entitled to establish *agencies* for technical, scientific, or administrative function to help EU institutions in policy formation, law-making and execution. TFEU Art. 352. Sometimes they are called decentralized agencies as their seats are in different Member States although they are considered central supranational organs and not local ones placed on the territory of all the Member States. European Agencies – The Way forward. Brussels, Communication from the Commission to the European Parliament and the Council, 11.3.2008. COM(2008) 135 final. 4.; CHITI, Edoardo: *EU and Global Administrative Organizations*. Springer-Verlag, Berlin Heidelberg, 2011. 21.

¹⁷ Ficzer Lajos: *Európai közigazgatás – nemzeti közigazgatás*. In Gerencsér Balázs – Takács Péter (eds.) *Ratio legis, ratio iuris: ünnepi tanulmányok Tamás András tiszteletére 70. születésnapja alkalmából*. Szent István Társulat, Budapest, 2011. 383–84.

¹⁸ DEZSŐ Márta – VINCEZÉ Attila: *Magyar alkotmányosság az európai integrációban*. HvgOrac, Budapest, 2012. 490.; HEIDBREDER, Eva G.: *Structuring the European Administrative Space: Channels of EU Penetrations and Mechanisms of National Chance*. KFG Working Paper Series, No. 5. 2009. 5.; TORMA, András: *Az Európai Közigazgatási Térségről – magyar szemmel*. Miskolci Jogi Szemle, Vol. 6. spec. ed. 2011. 197.; KÁRPÁTI, Orsolya: *Az európai közigazgatási tér kialakulása (I. rész)*. Sectio Juridica et Politica, Miskolc, Tomus XXIX/1. 2011. 234.; KOPRIČ, Ivan – MUSA, Anamarija – NOVAK, Goranka Lalić: *Good Administration as a Ticket to the European Administrative Space*. Zbornik PFZ, Vol. 61. No. 5. 2011. 1545–1546.; CURTIN, Deirdre – EGBERG, Morten: *Towards a New Executive Order in Europe?* Routledge, London. 2013. 30–32.

democratic traditions. These are *legal principles* whose main function is the attribution of the binary qualification of legal/illegal in light of overarching values and ignoring them leads to the loss of legitimacy.¹⁹ All of them can be traced back to the principle of *rule of law* and they pervade the functioning of institutions and organs as well as the administrative procedures at all levels.²⁰ Direct and indirect administration form relatively separated organisational systems with their own institutional norms, they are mainly connected via governance issues. The system formed by the two levels also assumes the principle of *administration through law* which means that public administration ought to discharge its responsibilities according to law.²¹

The concept of EAS comes from the intergovernmental history of the integration when administration was a sphere for domestic affairs and only the uniform implementation was under the supervision of EU level institutions. The key for a successful execution of the *acquis* has always been a properly functioning public administration applying the common constitutional principles.²² Recently, the number of policies which requires intensive cooperation and an intermediate networking of the competent authorities at national and supranational level is increasing.²³ Direct and indirect administration is linked together, and the complexity of this relationship depends on the level of Europeanisation of a certain policy. The various forms of transnational interaction define the concept of *composite administration*. The administrative cooperation – first in the history of integration – got its legal framework in the Lisbon Treaty as a new competence.²⁴ The existence of such relationship between the executive apparatus requires the re-thinking of the concept on a simple *European administrative space* towards a *multilevel European administrative organisation*.²⁵

¹⁹ BOGDANDY, Armin von: *General Principles of International Public Authority: Sketching a Research Field*. German Law Journal, Vol. 9. No. 11. 2008. 1912.

²⁰ Particularly important principles set forth in the jurisprudence of the European Court of Justice, which all Member countries must in turn apply domestically when applying EU law, are, among others: the principle of administration through law; the principles of proportionality, legal certainty, protection of legitimate expectations, non-discrimination, the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of the public administration. Basically, main administrative law principles which are set as standard are the following: reliability and predictability (legal certainty); openness and transparency; accountability; and efficiency and effectiveness. SIGMA 27. 1999, 8. See also: BAUER, Michael W. – TRONDAL, Jarle: *The Administrative System of the European Union*. In: Bauer, Michael W. – Trondal, Jarle (eds.): *The Palgrave Handbook of the European Administrative System*. Palgrave Macmillan, Basingstoke, 2015. 10.

²¹ SIGMA 27, 1999. 9.

²² The Lisbon Special European Council (March 2000): *Towards a Europe of Innovation and Knowledge*. Presidency Conclusions Lisbon European Council 23 And 24 March 2000. point 9. and 17. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:c10241> (10.10.2017.) DRECHSLER, Wolfgang: *Towards a Neo-Weberian European Union? Lisbon Agenda and Public Administration*. Halduskultuur, Vol. 10. 2009. 7.; 10.

²³ JORDAN, Andrew – SCHOUT, Adriaan: *The Coordination of the European Union: Exploring the Capacities of Networked Governance*. OUP, Oxford, 2017. 3.

²⁴ CSATLÓS Erzsébet: *Perspectives of the Cooperation of National Administrative Authorities in the EU*. Jogelméleti Szemle, 2016/3. 45–55.; CSATLÓS Erzsébet: *Az európai közigazgatási eljárási jog kodifikációja és a hatóságok együttműködése*. Eljárásjogi Szemle, 2016/2. 14–23.

²⁵ HOFMANN, Herwig C.H.: *Which Limits? Control of Powers in an Integrated Legal System*. In: Barnard, Catherine – Odudu, Okeoghene (eds): *The Outer Limits of European Law*. Hart Publishing, Oxford, 2009. 45.

The key for the proper functioning of the EU lies in its execution and its organisation is a crucial element for that.²⁶ Organisation as such has certain objectives and goals to achieve and is structured on *certain principles* with a view to achieve these objectives. Therefore, the principles that determine the European administrative organisation shall be examined. Due to the nature of EU as a *sui generis* international organisation,²⁷ the principles are also unique to those which characterise the administrative organisation of a State. Due to the different competencies and powers in different policies transferred by its Member States, the EU's legislative competences and the influence on their execution are different in each branch. However, they meet at one point: the organisational concept of European administration shall also correspond to the *rule of law* as being one of the major values in the EU.

Despite the common values, the EU is *not an administrative union* in the sense of a centrally organised administrative system with deconcentrated bodies at sub-levels. The relationship between the actors who have administrative competences in a policy area is unique, and cannot be described by the classical principles of State administration. The mere fact that the institutions and organs of direct administration is above domestic administrative structure and are supranational in that sense does not make national authorities subordinate in hierarchy. It does not entitle EU institutions and organs to *act with authority power* or practice *direction* or other powers deriving from the *principle of hierarchy* within an organisation. Hierarchy “*should be understood as asymmetric interaction between principals and agents in a vertically differentiated structure, rather than as governing by command and control.*”²⁸

²⁶ Improving implementation of EU policies from the (a) *functional perspective* by ensuring that rights and policy objectives can be pursued and balanced against each other; (b) *organisational perspective* by ensuring that institutions and bodies are equipped with means to pursue the tasks; (c) *procedural perspective* by ensuring that the core values and rights are fulfilled and realised through procedural provisions and forms of act; and (d) *accountability perspective* by ensuring that acts are reasoned and justified, and that there is proper review and control of activities. HOFMANN, Herwig C.H.: *The future of Article 298 TFEU. Administrative procedures for EU institutions and bodies and integrated administration in the EU*. Presentation for the EU Ombudsman / ReNEUAL conference Towards an EU administrative procedure law? Brussels, March 15-16th 2012. http://www.reneual.eu/images/Events/ED_Conference_March2012/6.6.pdf (15.09.2017.) 4.

²⁷ Accepting *Bogdandy's* concept, international institutions should be understood as concretizations of general principles of public law formulated in the tradition of liberal constitutionalism and adapted to the structures and requirements of multilevel systems. In the formulation of international principles for the exercise of public authority, there are three ways to interpret. The (1) basic rule of law principles govern activities of international institutions which need to be implemented by domestic institutions to have legal effects with respect to the individual. Different principles occur for international institutions whose acts directly affect private subjects. These (2) principles force domestic administrations to consider extra-territorial interests as a response to global interdependence. The (3) third type consists of international legal principles for domestic administrative activity. These are the principles regarding the cooperation of domestic administrations within composite administration. The EU, being a unique political system built on supranational and intergovernmental principles, includes all the three types and their application varies according to policies but the third version's importance is growing. BOGDANDY, 2008. 1921–1922.

²⁸ BENZ, Arthur – ZIMMER, Christina: *The EU's competences: The 'vertical' perspective on the multilevel system*. Living Reviews in European Governance, Vol. 5, No. 1. 2010. 20.

II.2. The organisational law of the European administrative system

At local level, Member States' administrative authorities are engaged of the task of execution, the EU has no deconcentrated authorities in Member States to execute EU law. Due to the lack of constitutional basis in the funding treaties for the organisation of execution, *structural principles* are there to override the former concept of executive federalism towards a unified executive power. These are scholarly abstractions which define legal structures within the positive law in the sense of significant regularities,²⁹ and help to fix the margins of interpreting obligations to achieve an “*open, efficient and independent European administration*”³⁰ The key for such is the *solidarity* among all actors and *principle of loyal and sincere cooperation* and the *coordination* making it effective along with the obligation for all actors. Principles cannot create competence and, anyway, measures taken at the EU level must also comply with the *principle of subsidiarity*.³¹ Principles fill the legal gaps and directs interpretation to achieve the common goal: evaluation of EU goals.

There are many examples for policy areas with procedures in which decisions are taken on the basis of a procedure with composite elements. Cooperation is the process of entering into a relationship with another institution or organ to achieve a system derived goal. It means that in many cases, both Member State authorities as well as EU institutions and bodies contribute to a single procedure, irrespective of whether the final decision is taken on the national or the European level. The complexity of *composite procedures* and the competences of the indirect actors, so as their influence on the work of the national authority in charge to proceed in each case, depends on the policy area and the legislative competence of the EU to regulate it. Judicial review of composite decisions is thus often challenging.³² Therefore, the word ‘*cooperation*’ is used to describe in general the relationship between the actors as the content of it differs considerably from one policy area to another but basically, all of them have the *information sharing mechanism* at the heart.³³ Pure *vertical cooperation* takes place between the EU Member States' assigned central authorities with the EU institutions and organs in governance issues; while *horizontal cooperation* is an activity between the actors of the same level: direct level ones among each other and Member States' competent administrative authorities. The mixture of the two forms a network to a better realisation of EU aims and execution of EU law with a coordination

²⁹ BOGDANDY, 2008. 1911.

³⁰ TFEU Article 298.

³¹ MCDONNELL, ALISON: *Solidarity, Flexibility, and the Euro-Crisis: Where do Principles Fit in?* In: Rossi, Lucia Serena – Casolari, Federico (eds): *The EU after Lisbon Amending or Coping with the Existing Treaties?* Springer, Heidelberg, 2014. 66.

³² HOFMANN, 2009. 136. Composite procedures, makes the exercise of judicial review has become significantly more difficult. The reason is that the system of judicial review of administrative action in the EU is established in a traditional two-level approach: national courts or as courts of the CJEU. Judicial supervision of the actions of the integrated executives in the EU is generally undertaken by member-state courts. Without definitive structural and procedural rules for cooperation, the question of responsibility and finding adequate remedies for judicial review in procedures of composite nature is challenging. See, HOFMANN, Herwig C. H.: *The Court of Justice of the European Union and the European Administrative Space*. In: Bauer, Michael W.– Trondal, Jarle (eds.): *The Palgrave Handbook of the European Administrative System*. Palgrave Macmillan, Basingstoke, 2015. 301.

³³ HOFMANN, 2009. 138.; TRONDAL, Jarle – PETERS, B. Guy: *The Rise of European Administrative Space: Lessons Learned*. *Journal of European Public Policy*, Vol. 20. No. 2. 299–300.

centre at direct administration level; this is a common form of composite administrative procedure. Such procedure has existed for a long time in policy-specific rules but were not based on any coherent and comprehensive legal basis until the adoption of the Lisbon Treaty. It introduced supporting competence in administrative matters for the EU in the form of ordinary legislative procedure³⁴ without any substantive harmonisation of national laws or regulations and left the involvement of EU institutions remains limited to policies for which EU-level intervention is explicitly delegated.³⁵ Detailed procedural rules are missing in this area and the network -relation is detailed in a guidance concerning Lead State concept and is supposed to be under further negotiations of the Member States.³⁶

Due to the general obligation deriving from the fact effective implementation of EU law is a matter of common interest,³⁷ principle of *loyal* cooperation can be regarded to include, among others, a duty to consider, to cooperate, to comply and the duty to assist.³⁸ Loyalty, namely, is a general principle that has a function as an aid to interpretation in light of Union primary law and as a basis for gap filling.³⁹

Cooperation supposes the ordering of the different activities of different actors in the system to enable them to work together effectively. *Coordination* is managing interdependencies between activities;⁴⁰ the process of interaction that integrates a collective set of independent tasks.⁴¹ As cooperation, coordination also has a *vertical* and a *horizontal* dimension, depending on whether it takes place between the actor of different or the same level in the multilevel European administrative system. The modes of coordination can be distinguished as to whether they rule out exit options (coercive), aim for voluntary adjustment or agreement (cooperative), or establish normative frames of reference (persuasive), depending on the policy and the EU powers on it.⁴² Horizontal capacity pooling is regulated by EU law at direct level and means an institutionalized, compulsory, direct networking between competent authorities that is facilitated by supranational technical coordination tools. Under horizontal coordination, administrative capacities (and costs) remain national and are not conferred to the Commission or EU-level agencies.⁴³ Regulating vertical coordination is rare in the system and characterise mainly the relationship between

³⁴ TFEU Article 6 and 197.

³⁵ HEIDBREder, Eva G.: *Horizontal Capacity Pooling: Direct, Decentralized, Joint Policy Execution*. In: Bauer, Michael W. – Trondal, Jarle (eds.): *The Palgrave Handbook of the European Administrative System*. Palgrave Macmillan, Basingstoke, 2015. 370; 376.

³⁶ Consular Protection Directive, preamble (10), (19) – (20); (27); Article 7; 12.

³⁷ TFEU Article 197 (1).

³⁸ KLAMERT, Marcus: *The Principle of Loyalty in EU Law*. OUP, Oxford, 2014. 141. See also, AMERASINGHE, C. F.: *Principles of the Institutional Law of International Organizations*. CUP, Cambridge, 2005. 176–187.

³⁹ KLAMERT, 2005. 247.; 251.

⁴⁰ DEBAERE, Peter: *EU Coordination in International Institutions: Policy and Process in Gx Forums*. Palgrave Macmillan, Basingstoke, 2015. 24.

⁴¹ LEQUESNE, Christian: *At the Centre of Coordination: Staff, Resources and Procedures in the European External Action Service and in the Delegations*. In: Balfour, Rosa – Carta, Caterine – Raik, Kristi: *The European External Action Service and National Foreign Ministries. Convergence or Divergence?* Ashgate, Farnham, 2015. 46.

⁴² BENZ, Arthur: *European Public Administration as a Multilevel Administration: A Conceptual Framework*. In: Bauer, Michael W. – Trondal, Jarle (eds.): *The Palgrave Handbook of the European Administrative System*. Palgrave Macmillan, Basingstoke, 2015. 35.; 37; 38–40.

⁴³ HEIDBREder, 2015. 378–379.

EU institutions and their subordinated organs, however, “pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”⁴⁴ This means a general definition of the *principle of solidarity*⁴⁵ among all actors of European administration.

The common element of all the activity of composite administration shall correspond to the principles that are the basics of EU and whose respect is also required by Member State administration is *rule of law* and the *principle of good administration*.⁴⁶

III. Vertical relationship between the actors performing tasks related to consular protection in Third States

The procedure and function of a consular authority basically falls under its sending State’s material and procedure rules as representations are external organisational units of the State administration. Therefore, they are under the direction of a higher authority in a hierarchical system. In Hungary, consular authorities are divisions of the Ministry of Foreign Affairs and the consular officer is under the direction of the *minister of foreign affairs* (MFA).⁴⁷

III.1. Organs and authorities as actors in consular protection procedures in third States

EU legislative competences are the weakest in foreign policy as the main actor is the group of Member States in the European Council and the Council of the European Union (*Foreign Affairs Council formation*) with unanimous decision-making system.⁴⁸ It is essential to declare that none of the EU institutions or organs are entitled to perform authority acts including consular tasks. At direct level, mainly coordination of EU policies is ensured, and different infrastructural and operational mechanisms are insured as support, but *de facto* legal application is done by the authorities of Member States.

Close cooperation and efficient coordination between the directorates general and the departments involved are essential to ensure the quality and consistency of the work of the Commission. This coordination extends from the design of an initiative to its presentation to the Commission and during the interinstitutional phase. The executive power in case of common foreign and security policy is conducted by a special vice-president of the Commission, the *High Representative of the Union for Foreign Affairs and Security Policy* (HR/VP).⁴⁹ Being appointed by European Council, acting by a qualified majority, with the

⁴⁴ TEU Article 4(3). *cf.* Article 3.

⁴⁵ See the definitive provisions on solidarity in the Treaties: McDONNELL, 2014. 61–64.

⁴⁶ TEU Article 6.; EU Charter Preamble and Article 41.; BOGDANDY 2008. 1919.; See also WAKEFIELD, Jill: *The Right to Good Administration*. Kluwer Law International, Alphen aan den Rijn, 2007. 21–26.

⁴⁷ Act XLV of 2001 on Consular protection [CPA] 2 (1)–(2); CSATLÓS Erzsébet: *Az általános konzuli hatósági együttműködések elméleti kérdései*. Eljárásjogi Szemle, 2017/1. 34.

⁴⁸ TEU Article 22; 25–26.

⁴⁹ TFEU Article 18. 2; 4. At present Frederica Mogherini fills this position. High Representative (2014-2019) https://ec.europa.eu/commission/commissioners/2014-2019/mogherini_en (10.11.2017.)

agreement of the President of the Commission,⁵⁰ the HR/VP ensures the consistency of the Union's external action and responsible within the Commission for external relations and for coordinating other aspects of the Union's external action, including crisis management.⁵¹ Consular protection policy might touch other commissioners' tasks: the fundamental right to consular protection in third States as a part of citizenship policy falls under the competence of the Commissioner of *DG Migration, Home Affairs and Citizenship* or via crisis management the *DG Humanitarian Aid & Crisis Management*, but the *DG Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights* can also be mentioned. Being a Commissioner, the HR/VP is bound by Commission procedure rules to achieve coordination⁵² and basically, the Council and the HR/VP shall ensure the unity, consistency and effectiveness of action by the EU while the CFSP shall be put into effect by this latter and by the Member States, using national and EU resources.⁵³ The HR/VP chairs the Foreign Affairs Council and responsible proposals towards the preparation of the CFSP and shall ensure implementation of the decisions adopted by the European Council and the Council.⁵⁴

HR/VP in her function is supported by the *European External Action Service* (EEAS), a functionally autonomous body of the European Union separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.⁵⁵ It is a bureaucratic actor comprised of units and staff from the former European Commission Directorates General (DGs) for external relations and development, the external affairs parts of the European Council Secretariat and Member State secondments.⁵⁶ The EEAS is made up of a central administration and of the EU delegations to third countries and to international organisations. It is managed by an *Executive Secretary-General* under the authority of the High Representative. Consular protection issues fall under the competence of the *Consular crisis management centre* (INTCEN 4) which is a sub-division of *EU intelligence and situation centre* (INTCEN). This latter belongs to the *Deputy Secretary General for CSDP and crisis response* (DSG-CSDPCR) under the *Secretary General* who is superior to the person responsible for policy coordination. The Executive Secretary-General shall take all measures necessary to ensure the smooth functioning of the EEAS and the effective coordination between all departments in the central administration as well as with the *EU delegations*.

The *EU delegations* are hybrid administrative constructs that combine diplomatic tasks and operational tasks such as development cooperation and trade. They are not supposed to perform consular protection activity. They are under the direction of the head

⁵⁰ TEU Article 18.1.

⁵¹ TEU Article 18. 2. TEU Article 26 (2); Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) OJ L 201, 3.8.201. [EEAS Decision] Article 4. (3) a).

⁵² Rules of Procedure of the Commission [C (2000) 3614] OJ L 308 , 08.12.2000. 26–34.

⁵³ TEU Article 26. 2–3.

⁵⁴ TEU Article 27.1.

⁵⁵ EEAS Decision, Article 1. 2.; LEQUESNE, 2015. 36.; See autonomy of EEAS in detail: GATTI, Mauro: *European External Action Service: Promoting Coherence through Autonomy and Coordination*. BRILL, Leiden, 2016. 105–190.

⁵⁶ FURNESS Mark: *Who Controls the European External Action Service? Agent Autonomy in EU External Policy*. European Foreign Affairs Review, Vol. 18. No. 1. 2013. 103.

of delegations who are responsible for the HR/VP for the overall management of the work of the delegation and for ensuring the coordination of all actions of the Union. The *Head of Delegation* receives instructions from the High Representative and the EEAS, and shall be responsible for their execution. Delegations work in close cooperation and share information with the diplomatic services of the Member States but shall not substitute them in their work. EU Delegations are responsible for coordinating and chairing all EU working groups and meetings in third countries. The EEAS does the same at the level of the Council of the European Union, for external relations working groups.⁵⁷ There are more than 140 *delegations*⁵⁸ of the EU at local level which are hybrid administrative constructs that combine diplomatic and operational tasks such as development cooperation and trade⁵⁹ but have no competence to provide consular protection. The consular tasks – help and assistance – are performed by the *consular authorities of the Member States*, delegations have a complementary role.⁶⁰

Upon request by Member States consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.⁶¹ They can also request to be supported by existing *intervention teams* at Union level, including consular experts, in particular from unrepresented Member States and by instruments such as the *crisis management structures of the EEAS* and the *Union Civil Protection Mechanism*. The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground.⁶² The *Lead State*, if designated any, shall be in charge of coordinating any support provided for unrepresented citizens.⁶³ If more Member States are represented at site a *Lead State* might be entitled with a coordination role for a better sharing of work among representations as none of the supranational organs are neither entitled to perform authority acts nor to pursue consular protection procedure instead of Member State consular authorities. It is a domestic competence, although, EU institutions and organs have direct impact on the evaluation of EU policy in this field in case of crisis.

⁵⁷ HELLY, Damien – HERRERO, Alisa – KNOLL, Anna – GALEAZZI, Greta – SHERRIFF, Andrew: *A closer look into EU's external action frontline Framing the challenges ahead for EU Delegations*. ECDPN, Briefing Note, No. 62 – March 2014. 9.

⁵⁸ See the EU delegations in the world: https://eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en (10.10.2017.)

⁵⁹ Before the Lisbon Treaty entered into force, this role was fulfilled by the Member State holding the rotating EU Presidency. It might be seen the loss of power and visibility in comparison to the rotating presidency system. HELLY [et al.] 2014. 9.; see also: REYNAERT, Vicky: *The European Union's Foreign Policy since the Treaty of Lisbon: The Difficult Quest for More Consistency and Coherence*. The Hague Journal of Diplomacy, Vol. 7. 2012. 224.

⁶⁰ AUSTERMANN, Frauke: *European Union Delegations in EU Foreign Policy. A Diplomatic Service of Different Speeds*. Palgrave Macmillan, Basingstoke, 2014. 57.

⁶¹ EEAS Decision, Article 5. 10.

⁶² Decision No 1313/2013/EU of The European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 320, 6.11.2014. [CPM Decision] Article 16. point 17.

⁶³ Council European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) OJ C 317, 12.12.2008. [Lead State Guidelines] Article 2.1–2.4.

III.2. Vertical relationship between the element of the organisation

The cooperation of the competent institutions and organs is mainly based on coordination. Horizontal coordination is done at two main levels. (a) At direct administrative level, the coordination of all the foreign policy issues is the responsibility of the HR/VP⁶⁴ assisted by the EEAS which also has its own coordination system among its different divisions.⁶⁵ (b) *In situ* coordination has three main potential actors each of them having their own coordination mechanism: The first actor responsible for coordination is (b1) the local *EU delegation*. The second one is (b2) the group of represented Member States who shall closely cooperate with each other and with the delegation and other potential bodies of the Commission.⁶⁶ They can assign a (b3) *Lead State* among themselves for making the coordination with the other actors of the organisation easier. Hereby it need to be noticed Member States can take on the role of Lead State on a voluntary basis,⁶⁷ and apart from the Lead State concept which is defined in a guideline and not a binding legal norm, there is no reference to which of the represented Member State organ is responsible for coordination. According to the Consular Protection Directive elaborated in 2015, Member States represented in a third country shall closely cooperate with each other and share information to ensure efficient assistance for unrepresented citizens and coordinate contingency plans among themselves and with the EU delegation to ensure that unrepresented citizens are fully assisted in the event of a crisis.⁶⁸ Further details, like the assignment of one responsible actor to manage the process of an evacuation for instance and the deal with the involvement of the EU capacities, is the subject of further intergovernmental negotiations of Member States.⁶⁹ In addition, event such negotiation does not create a right to give orders for the delegations or in reverse, does not sub-ordinate consular authorities to EU organs in the system. Upon request by Member States' consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.⁷⁰ They can also request to be supported by existing *intervention teams* at Union level, including consular experts, in particular from unrepresented Member States and by instruments such as the *crisis management structures of the EEAS* and the *Union Civil Protection Mechanism*.⁷¹ The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground. The *Lead State*, if designated any, shall be

⁶⁴ TEU Article 26 (2).

⁶⁵ EEAS Decision, Article 4.

⁶⁶ Consular Protection Directive, Preamble (16)–(17), Article 10.1.; 11.

⁶⁷ Lead State Guidelines, introduction (2); (5).

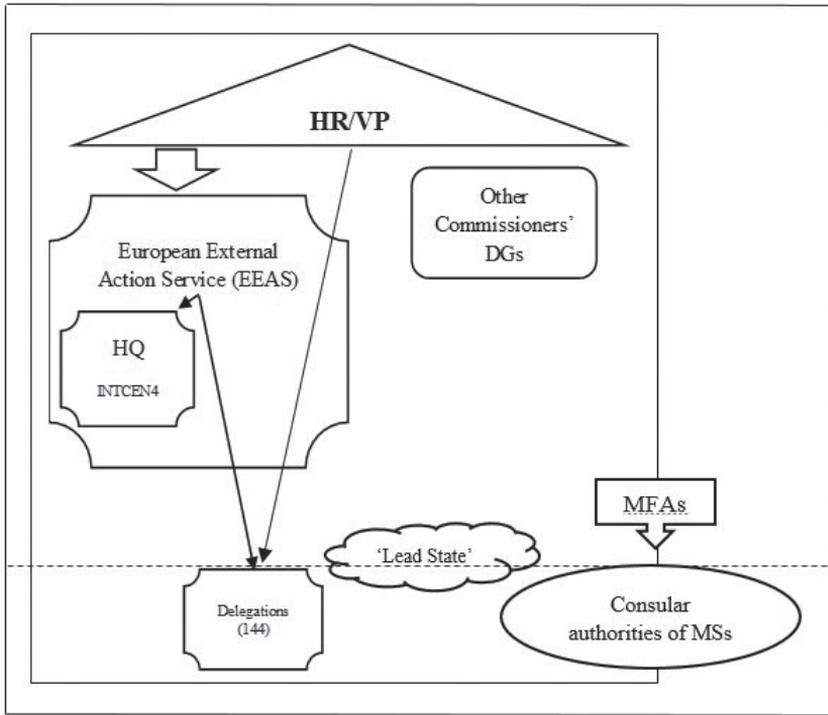
⁶⁸ Consular Protection Directive, Preamble (2); Article 13.

⁶⁹ Consular Protection Directive, Preamble (19); Article 7 (2)–(3).

⁷⁰ See EEAS Decision, Article 5(9). HELLY, 2014. 8–10.

⁷¹ Consular Protection Directive, Article 13 (4).; CPM Decision, Article 16. point 17. The civil protection mechanism is an operative instrument, which essentially aims at facilitating the mobilisation of immediate in-kind assistance for disasters both within and outside the EU. GESTRI, Marco: *EU Disaster Response Law: Principles and Instruments*. In: Guttry, Andrea de (ed.): *International Disaster Response Law*. Asser, The Hague, 2012. 118.

in charge of coordinating any support provided for unrepresented citizens.⁷² The following table shows the major actors.



1. Figure: Actors of consular protection policy. (Author)

To describe the relationship between the different levels and different actors of European administration of consular policy, the word '*coordinate*' and '*support*' is used often. Even if none of these words are defined by any normative texts, they shall not suggest obligation. It aims to synthesize efforts but does not involve the coercive force of persuasion or direct order to make obligations although it supposes accountability, predictability, and common understanding.⁷³

The system of European administration on consular protection lacks the classical hierarchical structure of state administration and vertical coordination is regulated in form of decision only in the case of the EEAS and its delegations. According to the relevant legal and non-legal acts of the EU acquis, none of the EU institutions or other bodies is entitled to direct consular authorities of Member States and practice such influence that reduces their autonomy, nor to receive their consular tasks. The consular authorities stay under the direction of their domestic superior authority although the Member States' authorities

⁷² Lead State Guidelines, 2.

⁷³ LEQUESNE, 2015. 46.

should closely cooperate and coordinate with one another and with the EU, in particular the Commission and the EEAS, in a spirit of *solidarity*.⁷⁴

Under these general principles, in absence of harmonisation on material rules on foreign policy and consular protection, would vertical cooperation have an indirect impact making the EU organs a coercive power on external Member State organs? The principle of *loyal cooperation* might urge the effective execution and evaluation of a fundamental right of citizenship to overrule the shortage on organisational rules but meantime, neither the implementation of foreign policy, nor the charter may extend the field of application of EU law or establish any new power or task for it, or modify powers and tasks as defined in the TEU-TFEU. The rules for EEAS and foreign policy shall not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of EU foreign policy, national diplomatic service, and relations with third countries.⁷⁵ In fact, such persuasion issuing from principles is similar in effect to that of soft law which has also been common in the former second pillar area. Consular authorities' activities concerning their visa issuing tasks,⁷⁶ is detailed by a guideline, and the networking in consular protection cases is also ruled by such norms.⁷⁷ In principle, soft law has no building effect, but in fact, they are significant sources of information and interpretation to hard law. Therefore, even if soft law cannot create obligation, it contributes to the proper implementation of hard law embodied in primary and secondary EU law sources.⁷⁸ In addition, as judicial practice clarified, the "*conferral of the power to adopt acts having no binding legal effect shows that voluntary compliance with the rules of the Treaty and non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty*".⁷⁹ Together with the principles that shall govern the activities of Member States to properly realize EU goals, they can fill the some legal gaps although such role is limited.

Many debates support the expansion of the delegations' competency to take over some administrative functions to issue of Schengen visa and performance of some basic consular

⁷⁴ Solidarity is a constitutional and European value. CHRONOWSKI Nóra: *Dignity and solidarity – lost in transition. The case of Hungary*. MTA Law Working Papers, 2017/15. 3–5. See also: TEU Article 2.; See in particular for CFSP: TFEU Article 222 1 (b).; Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU) OJ L 192, 1.7.2014. Article 4.; 5. On the meaning of solidarity see: KLAMERT, 2005. 35–41.

⁷⁵ 14. declaration to the Treaties, EU Charter Art. 51. (2); TEU Article 40 (1); EEAS Decision Article 4(3)(a); cf. TFEU Article 352. See, DASHWOOD, Alan: *Article 308 EC as the Outer Limit of Expressly Conferred Community Competence*. In: Barnard, Catherine – Odudu, Okeoghene (eds): *The Outer Limits of European Law*. Hart Publishing, Oxford, 2009. 43.

⁷⁶ Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts (2005/C 326/01). OJ C 326 22.12.2005.

⁷⁷ Guidelines on consular protection of EU citizens in third countries. Brussels, 5 November 2010, 15613/10. COCON 40 PESC 1371.; Common practices in consular assistance and crisis coordination. Brussels, 9 June 2010, 10698/10. COCON 28, PESC, 745; Guidelines for further implementing a number of provisions under Decision 95/553/EC. Brussels, 24 June 2008, 11113/08, PESC 833 COCON 10.

⁷⁸ ȘTEFAN, Oana: *Soft Law and the Enforcement of EU Law*. In: Jakab András – Kochenov, Dimitry (eds): *The Enforcement of EU Law and Values Ensuring Member States' Compliance*. OUP, Oxford, 2017. 200–202.

⁷⁹ ȘTEFAN, 2017. 205. See legal reasoning on the effect of non-binding sources: Case T-113/89 Nefarma and Others v. Commission [1990] ECR II-00797, para. 45; 79–82; Case T-116/89 Vereniging Prodifarma e.a. v Commission [1990] ECR II-00843, para. 46; 85.

protection activity.⁸⁰ In the name of subsidiary principle and the constitutional allocation of competences in the Treaties, along with financial and institutional simplification prospects, the smaller states welcome the idea and would happily save some money with closing their consulates or being represented by EU delegation where they were not before, but absolutely rejected by the dominant large States who are afraid of losing the rest of their external sovereignty and political interests by such step.⁸¹ It shall be noted that the principles and soft law cannot create new competences or expand existing ones, their role is restricted to interpretation of EU policies in good faith.

IV. Concluding remarks on the nature of vertical relationship of European administration of consular protection

European administrative organisation is a multilevel structure which is more than a European administrative space with different kind of networks of authorities in different policies. Its structure is based on the transfer of power from the Member States and it shall function on the basis of rule of law ensuring an open, efficient and reliable administration. However, the relationship between the different institutions, organs and authorities within the system has no uniform organisational rules; existing rules are sector specific, often soft law rules or just simply non-existent. Basically, the driving force of the functioning of the European administration of consular protection is *loyal cooperation* of competent authorities of both level with an intense horizontal *coordination* at a supranational centre. The strength of influence of the supranational level on the local executor is determined by the transferred competence in a certain policy.

Many questions and contradiction arise about the institutional and structural system of consular protection. As the EU *acquis* is continuously developing, the classical structural thoughts on European administration shall be re-considered. Given the fact that in the area which significantly affects foreign policy, external sovereignty, and international relations of a State to which the EU has strictly limited competences, the strongest coordination force is the basic principle of *loyal cooperation* and *solidarity*, but it does not make the structure effective, operational and conform to the rule of law. The challenging part is vertical relationship of the actors. In fact, at local level, only delegations are under the effective direction of the HR/VP and the president of the EEAS who both represent EU interest, but the consular tasks are done by the consular authorities of the member States because they are empowered to do so, however, these latter category falls outside the scope.

Principles cannot create a competence and cannot provide a direct legal basis for a measure at EU level. Indeed, principles primarily indicate how a competence should be used and therefore they orient those who fulfil obligations.⁸²

⁸⁰ BALFOUR, ROSA – RAIK, KRISTI: *Equipping the European Union for the 21st century*. National diplomacies, the European External Action Service and the making of EU foreign policy. FIIA Report 36. 2013. 37–38.

⁸¹ LEQUESNE, 2015. 48–49.; cf. WHITMAN, RICHARD: *Europe's Changing Place in the World and Challenges to European Diplomacy*. In: Balfour, Rosa – Carta, Catherine – Raik, Kristi: *The European External Action Service and National Foreign Ministries. Convergence or Divergence?* Ashgate, Farnham, 2015. 25.

⁸² McDONNELL, 2014. 66.

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