



EU-CITZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

Consular Protection of Unrepresented EU Citizens in Third Countries

Effectiveness and Future of the EU Citizenship Right to Consular Protection Outside the EU

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This EU-CITZEN Study analyses the text of the Consular Protection Directive and its interaction with other relevant EU legal competences and instruments in the field of consular protection. It identifies changes that could enhance the effectiveness of the response to consular protection in times of large-scale crisis, of COVID-19 magnitude and greater. It provides a set of general comments along with some suggestions for the European Commission to consider when critically examining the legal and policy options for the protection of unrepresented EU citizens in third countries.



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Abstract

The global health crisis triggered by the COVID-19 outbreak represents the biggest stress-test to date for national consular representations and the European External Action Service (EEAS). It saw an unprecedented number of EU citizens stranded in third countries and in need of urgent consular assistance services. In particular, they required repatriation and help with accessing health care in third countries. Pre-COVID estimates showed that, in 2020, close to 13 million EU citizens would not have a consulate or embassy of their Member State of nationality in third countries. They would thus be entitled to seek consular protection from the diplomatic and consular authorities of other Member States, in accordance with Article 20(2)(c) TFEU. As part of a large-scale repatriation exercise, more than 600 000 EU citizens were successfully repatriated in a coordinated consular exercise between the EEAS, the Commission and Member States.¹ However, the unprecedented scale of consular assistance required during the COVID-19 pandemic required trade-offs in decision-making that were not part of the common consular evacuation plans. Moreover, the Member States had less than two years' experience of implementing the key instrument governing consular protection for unrepresented EU citizens in third countries (Directive 2015/637/EU) when the COVID-19 related consular crisis took hold. Additional challenges appear to the post-COVID-19 pandemic, as the diplomatic footprint of many Member States is shrinking and the Member State with the largest external representation network and strongest diplomatic ties, the UK, has withdrawn from the EU.

All this begs the question of how we can best future-proof the EU's consular protection policies and inter-state cooperation, in anticipation of other crises similar in size and scope to COVID-19. This ad-hoc study will analyse the text of the Consular Protection Directive and identify changes capable of improving the effectiveness of the response to consular protection in times of large-scale crisis, of COVID-19 magnitude and greater. The study will first clarify what the EU citizenship right to equal protection in third countries confers on EU citizens, when compared to the international and national legal frameworks. It will then assess the implementation of the key notions and mechanisms introduced by the Consular Protection Directive, and address concrete

¹ According to EEAS https://eeas.europa.eu/headquarters/headquarters-homepage/76203/good-stories-consular-support-eu-citizens-stranded-abroad_en



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questions of practical relevance, such as: Who qualifies for consular assistance in third countries? What type of assistance are unrepresented EU citizens entitled to? How has the 'Lead State' concept been implemented to date? What role have EU delegations played in day-to-day and consular crisis situations so far? How have the Member States implemented the 'practical arrangements' option among themselves?

In conclusion, the study will examine whether the Consular Protection Directive is sufficient to respond effectively in times of large-scale crisis, i.e. of COVID-19 magnitude and greater. Or are additional measures, amendments to legislation or domestic implementation needed to enhance the effectiveness of the EU citizenship right to equal consular protection in third countries?



1. Background – lessons learned on the enforcement of the EU citizenship right to consular protection during the COVID-19 pandemic

The global health crisis triggered by the COVID-19 outbreak represents the biggest stress-test to date for national consular representations and the European External Action Service (EEAS). It saw an unprecedented number of EU citizens stranded in third countries and in need of urgent consular assistance services, in particular: repatriation and help with accessing health care in third countries.² Pre-COVID, estimates showed that in 2020, close to 13 million EU citizens did not have a consulate or embassy of their Member State of nationality that could have effectively provided them with consular assistance services in third countries.³ They would thus be entitled to seek consular protection from the diplomatic and consular authorities of other Member States, under the same conditions as the nationals of these countries.⁴ Notably, there are only four countries outside the EU where all Member States have a permanent representation – China, India, Russia and USA. Only five of the 27 Member States have representations in more than half of the countries.⁵ On average, the consular network of all the Member States is lower than the EU delegations network of the EEAS.⁶ Thus, in many third countries, only the EU is represented.⁷

In a large-scale repatriation exercise, coordinated between the Member States' external representations, the EEAS – with its delegation networks – and the Commission successfully repatriated more than 600 000 EU citizens.⁸ In addition, several of the Member States' repatriation flights were co-financed by the EU through the activation of the Union Civil Protection

² The COVID-19 pandemic is not only a health crisis of an unprecedented scale, but it has also triggered a global consular emergency due to the very severe transport restrictions, quarantine measures and border closures which created a need to urgently repatriate EU citizens (tourists and short-term travelers) stranded in third countries.

³ According to the European Commission's estimates, the number of EU citizens traveling to third countries where their Member State(s) of nationality is not present would reach 10 million in 2020 and 3.3 million for those EU citizens living in third countries where their Member State of nationality is not present. See Commission Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC(2011)1555, 13 ("2011 Impact Assessment").

⁴ On the basis of Article 20(2)(c)TFEU.

⁵ According to data available on the website of the European Commission, <ec.europa.eu/consular/protection/content/home_en>

⁶ For the presence of EU delegations world-wide, see https://eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en

⁷ See Annex IV to 2013 European Parliament Study on Franchise and electoral participation of third country citizens residing in EU and of EU citizens residing in third countries. An update of the map of external representations of the Member States compared to that of the EU is underway as part of the Consular Protection Directive review carried out by the European Commission.

⁸ European Commission, Inception impact assessment - Ares(2021)282291 of 13/01/2021.



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Mechanism (UCPM).⁹ The role of the UCPM and the EU delegations have been essential in securing the safe, effective and non-discriminatory repatriation of EU citizens. For example, Germany has repatriated a significant number of non-German nationals – with the support of the UCPM – due to the coordination role of the EU delegation in India, and Thailand.¹⁰ Meanwhile in Argentina, Guatemala and Nicaragua, France took the lead in repatriation operations, working in close cooperation with other European countries (notably Germany) and again with the support of the UCPM. This mechanism was also activated for the repatriation of European citizens on board the two cruise ships, the Diamond Princess in Yokohama, Japan and the Grand Princess in Oakland, California in the United States. In addition, European delegations were in continuous contact with the local authorities to ensure that air and sea links remained open as long as possible. This was the case for Morocco, where the European Delegation convinced the local authorities to allow departures from the port of Tangiers to Sète.¹¹

It can be argued that the repatriation of EU citizens from third countries during the COVID pandemic has been the largest to date, showing the concrete added value of the horizontal and vertical consular cooperation between the Member States, and between the latter and the EU. This has been made possible through the growing EU toolkit of consular protection instruments (see Figure 1).

2. Future challenges to the implementation of the EU citizenship right to consular protection

Securing prompt and effective consular protection for the unrepresented EU citizens in third countries in crisis situations will become increasingly difficult in the future. First, the COVID-19 pandemic has shown that common consular evacuation plans were not designed for the specific circumstances of a global health pandemic of that magnitude. Second, the number of unrepresented

⁹ EEAS ‘Good stories on consular support for EU citizens stranded abroad’ 7 June 2020: https://eeas.europa.eu/headquarters/headquarters-homepage/76203/good-stories-consular-support-eu-citizens-stranded-abroad_en

¹⁰ See more at https://eeas.europa.eu/headquarters/headquarters-homepage/76203/good-stories-consular-support-eu-citizens-stranded-abroad_en

¹¹ Ibid.



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EU citizens in third countries will most likely increase, due to the combined effect of a shrinking consular network among Member States, due to fiscal constraints, and the withdrawal of the United Kingdom from the EU.¹² There is also an increasing number of EU citizens travelling or residing abroad, the likely repeat or worsening of COVID-like crises due to the effects of climate change, population growth combined with increasing urbanisation, as well as other factors.¹³ Third, contacting nationals abroad is becoming a larger consular challenge than delivering actual assistance,¹⁴ due to the fragmented communication channels (travelling App, use of Twitter accounts, a dedicated Twitter account, 24/7 contact centres and other crowdsourcing techniques). While social media communication channels have the advantage of reaching unregistered citizens abroad, there are also dangers associated with algorithmic campaign practices, which can negatively impact on consular protection of EU citizens in the long run.¹⁵

Within this socio-political context of a pressing need on the EU and the Member States to deliver prompt and effective consular assistance to EU citizens located in third countries, questions are being raised about the appropriateness of the current EU legal framework to respond to large-scale consular emergencies. In particular, there are concerns over whether the current EU legal framework on consular protection of EU citizens is adequate to respond to a number of challenges. These include the potentially increasing numbers of requests for consular protection due to the growing numbers of unrepresented EU citizens, the worsening of consular crises triggered by large-scale natural and man-made disasters coupled with the shrinking Member States' networks of consulates and embassies in third countries. Furthermore, it poses questions over whether the EU legal framework is capable of accommodating the ad-hoc consular protection role played by the EU during the COVID-19 pandemic, or whether amendments are necessary to codify best practices.

¹² According to 2010 figures, the UK ranked third – after France and Germany – in terms of spread of diplomatic and consular representations in third countries, see: Impact Assessment accompanying the document Proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizens, SEC (2011) 1556 final, p. 51.

The UK has also played the role of Lead State in several third countries, such as Cambodia and Nepal, where it coordinated the consular assistance in crisis situations for all unrepresented Member States, see: Consular Cooperation Initiatives – Final Report from 29 April 2016 (8347/16).

¹³ See Commission Communication “Towards a stronger European disaster response: the role of civil protection and humanitarian assistance” COM(2010) 600 final.

¹⁴ Jan Melissen, ‘Consular diplomacy's first challenge: Communicating assistance to nationals abroad’, *Asia Pacific Policy Stud.* 2020; 7: 217– 228.

¹⁵ See Ian Manor, *The digitalization of public diplomacy* (Cham: Palgrave Macmillan 2019).



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These questions are highly significant, given that the European Commission is required to issue a review Report of the first three years of the Consular Protection Directive (2015/637/EU)¹⁶ implementation in May of 2021.¹⁷ This Directive is the primary instrument governing the implementation of the EU citizenship right to consular protection for unrepresented EU citizens in third countries. Building on previous research analysing the adoption of the Directive, this ad-hoc study will first review the most problematic areas, examining the text of the Directive and implementation data collected on the basis of desk research. The study first analyses the Consular Protection Directive within the various available EU mechanisms on consular assistance of unrepresented citizens outside the EU. It argues that there should be greater policy coordination among the various instruments and legal basis, which needs to be clearly communicated to EU citizens in order to increase awareness and efficiency of the EU citizenship right to consular protection abroad (Section 3). Section 4 then analysis the provisions of the Consular Protection Directive and their implementation in those key areas identified as problematic by the European Commission’s proposal for a Directive on consular protection. It poses a number of questions: Who qualifies for consular assistance in third countries (section 4.1)? What types of assistance are unrepresented EU citizens entitled to receive (section 4.2)? Are the bilateral or multilateral practical arrangements for designating responsible Member States for consular protection enhancing the efficiency of the EU citizens’ right to consular protection (section 4.3)? Has the Directive improved the functioning of the ‘Lead State’ institution in consular crisis situations, and are reforms needed to address Brexit and financial restraints (section 4.4.)? Does the Consular Protection Directive reflect the ad-hoc role developed by the EEAS/EU delegations in day-to-day and crisis consular circumstances?

Each of these sections will include an examination of the state-of-the-art along with policy recommendations.

¹⁶ Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries (OJ L 106, 24.4.2015, p.1–13) (‘Consular Protection Directive’).

¹⁷ See Article 19.



3. The available EU mechanisms on consular assistance of unrepresented EU citizens outside the EU (in third countries)

Publicly available information to date suggests that two main mechanisms have been mobilised to respond to requests for consular assistance from EU citizens stranded outside the EU during the COVID-19 crisis. Consular assistance, in the form of repatriation by non-nationality Member States and EU delegations, has been ensured on the basis of the Consular Protection Directive and the UCPM. In order to better understand whether these two legal frameworks were adequately implemented and sufficient to effectively respond to the needs of Member States and citizens, this section will analyse the respective objectives and provisions of the two instruments, as well as their operating conditions and potential linkages.

a. State-of-the-art

By virtue of their EU citizenship, every national of the 27 Member States has, in a third country in which their Member State of nationality is not represented, the right to protection from the diplomatic or consular authorities of any EU Member State which is represented in that third country. This protection should be provided under the same conditions as would be provided to nationals of that State. This means that an EU citizen who travels to (or lives in) a non-EU country, where their home Member State does not have an embassy or a consulate, can approach another Member State's embassy or consulate and ask for protection on the basis of Article 20(2)(c) TFEU. The Lisbon Treaty has made the EU citizenship right to equal consular and diplomatic protection a fundamental right of EU citizens (see Article 46 EU Charter of Fundamental Rights).

Following more than two decades since the conferral of an EU citizenship right to equal consular and diplomatic protection to unrepresented citizens, in 2015 the EU adopted the Consular Protection Directive. This is the key EU instrument for facilitating consular protection for unrepresented EU citizens in third countries. The adoption of this Directive was made possible following the introduction, by the Lisbon Treaty, of a new special legislative procedure. Notably, according to Article 23(2) TFEU, a Directive can be adopted by the Council with qualified majority



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voting, following a proposal¹⁸ advanced by the Commission, and following the opinion of the European Parliament.

The adoption of the Consular Protection Directive in 2015 was a historic moment for both the EU and international organisations more generally. In EU law, it unified the internal and external dimensions of EU citizenship into a coherent and uniform regulatory framework, conferring concrete benefits to EU citizens both within the EU borders and throughout the globe. In public international law, the increased role of the EEAS and EU delegations conferred by the Directive in providing consular protection to unrepresented EU citizens in third countries has the potential to re-shape the traditional institutions of public international law of consular and diplomatic protection. It will mean that, for the first time in the history of international law, an international organisation has concrete powers for providing consular protection to individuals beyond the traditional functional protection it can offer to its agents.¹⁹

In addition to the Consular Protection Directive, and under the same special legislative procedure provided by Article 23 TFEU, in 2019 the EU adopted the Emergency Travel Document Directive,²⁰ replacing Decision 96/409/CFSP²¹ on establishing an emergency travel document (ETD). The issue of emergency travel documents is the most-requested consular service by unrepresented EU citizens who have lost, destroyed or had their identification or travel documents stolen.²² The Directive provides for a modernised, harmonised and more secure EU ETD format, and ensures consistency with the 2015 Consular Protection Directive. The latter refers to the issuance of EU ETDs to unrepresented citizens as one of the six situations where the equal treatment of consular protection is required from the non-nationality Member States.

Although the Consular Protection and ETD Directives are the key instruments for consular assistance of EU citizens in third countries, the EU consular assistance toolbox includes a wider

¹⁸ Proposal for a COUNCIL DIRECTIVE on consular protection for citizens of the Union abroad/* COM/2011/0881 final - 2011/0432 (CNS) */

¹⁹ See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ GL No 4, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949.

²⁰ Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document (OJ L 163, 20.6.2019, p. 1–12) ('ETD Directive'). The transposition of this Directive will end in June 2021.

²¹ Decision 96/409/CSFP of the Representatives of the Governments of the Member States meeting within the Council of June 25 1996, on the establishment of an emergency travel document (OJ L 168, 6.7.1996, p. 4)

²² Around 60 percent of the consular services requests, Daily News 31/05/2018 https://ec.europa.eu/commission/presscorner/detail/en/MEX_18_4003



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range of instruments (see Figure 1). These have been adopted under different policies and Treaty legal bases, where the precise allocation of competences between the EU and the Member States has, until recently, been difficult to comprehend in practice.²³

The EU consular assistance toolbox is made up of:

1. A series of EU primary law provisions, pertaining to the following EU policies areas:

- EU citizenship: Articles 20(2)(c) and 23(2) TFEU;
- Civil protection: Article 196 TFEU;
- Humanitarian aid: Article 218 TFEU;
- The Common Security and Defence Policy (CSDP) missions, which can carry out humanitarian and rescue tasks: Article 43 TEU;²⁴
- The EU fundamental right to ‘diplomatic and consular protection’ under Article 46 of the EU Charter on Fundamental Rights;
- The residual competence of the EU (Article 352 TFEU), which can be exercised to ensure the fulfilment of the protection of EU citizens in the world, as enshrined in Article 3(5) TEU;
- Union delegations in third countries: Article 221 TFEU;
- The obligation of sincere cooperation between the Member States and the EEAS for the purpose of ensuring the Union’s objective of protecting the Union citizens in the world: Article 35 TEU.

2. A series of EU secondary law provisions pertaining to various EU policies, covering EU citizenship, civil protection and humanitarian aid and institutional organisation:

²³ See the 2017 EU Citizenship Report; Eurobarometer No. 430/2016 and Eurobarometer, Flash EB No 294/2010, European Union Citizenship; Eurobarometer (2010), Flash EB No 294, European Union Citizenship, 34.

²⁴ For example, the rescue and assistance of EU citizens provided by the CSDP police and military missions. Military assets can fill in critical capacity gaps in areas such as transportation, logistics support, engineering or medical support, such as during the earthquake and tsunamis in the Indian Ocean in December 2004 and the 2010 Pakistan floods. See more in Commission Communication ‘Towards a stronger European disaster response: the role of civil protection and humanitarian assistance’, COM/2010/0 600 final.



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- The Decision establishing the EEAS;²⁵
- Union Civil Protection Mechanism Decision (UCPM);²⁶
- The Consular Protection Directive;
- The ETD Directive.

b. Recommendations for addressing the challenge of policy coherence

As shown above, the EU's consular protection toolkit currently includes various EU instruments of different legal nature (Directives and Decision)²⁷, falling under different policies (EU citizenship,²⁸ civil protection,²⁹ external relations³⁰ and humanitarian assistance³¹). These should nevertheless serve to fulfil the same EU objective, namely that of protecting the EU citizens around the world.³² Given the increasing number of EU instruments on consular protection of EU citizens outside the EU, the links between the various instruments should be set out in a single policy document that clarifies how the various instruments complement each other, in particular since they rely on different types of EU competences; shared and supportive ones as well as the separate CSDP.³³

²⁵ The European External Action Service established by Art. 27(3) TEU and Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, O.J. 2010, L 201/30 (EEAS Decision).

²⁶ The European Union Civil Protection Mechanism was created in order to pool resources with the aim of improving the prevention, preparedness and response to disasters in the EU and abroad. All EU Member States, as well as Iceland, Norway, Serbia, North Macedonia, Montenegro, Turkey and the United Kingdom (during the transition period) participate in it. The Mechanism is one of the resources available to Member States when coordinating consular assistance in crisis situations. It has been used numerous times, including during the repatriation of EU citizens during the COVID-19 outbreak. Source: Council Decision No 1313/2013/EU on the Union Civil Protection Mechanism, as amended on 21 March 2019.

²⁷ See Figure 1.

²⁸ Article 23(2) TFEU for the Consular Protection and ETD Directives.

²⁹ Article 196 TFEU for the Union Civil Protection Mechanism Decision.

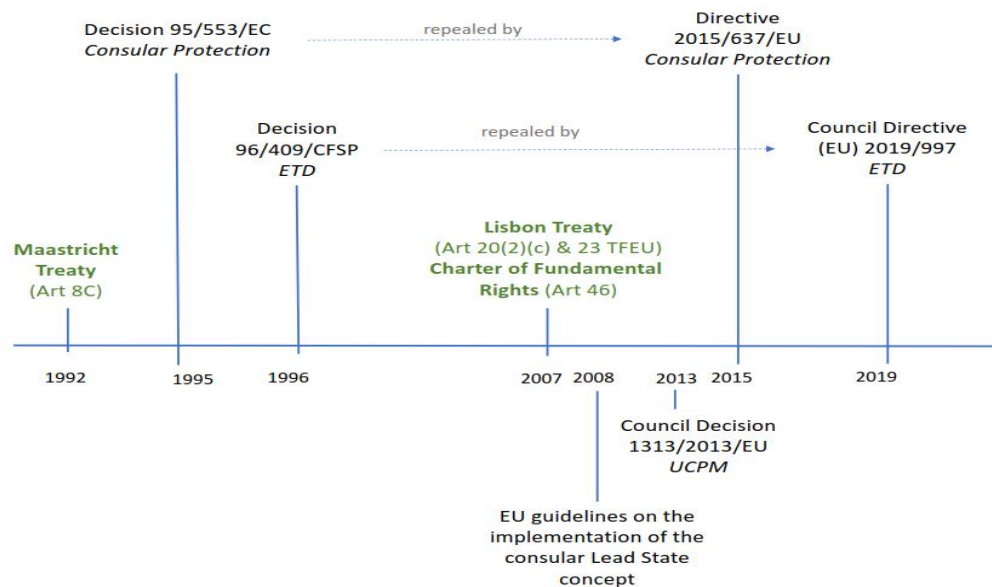
³⁰ Article 27(3) TEU and the EEAS Decision; Article 43 TEU, CSDP missions can exercise rescue operations of EU citizens stranded outside the EU.

³¹ Article 218 TFEU.

³² Article 3(5) TEU.

³³ According to the classification set out in Articles 4(2) and 6 TFEU and 24 TEU.

Figure 1: Scope of research: the EU legal framework on consular and diplomatic protection of unrepresented EU citizens in third countries





4. Consular protection of unrepresented EU citizens under the Consular Protection Directive (2015/637/EU)

Directive 2015/637/EU³⁴ replaced the ad-hoc, purely inter-governmental, approach of the 1995 Decision on consular protection³⁵ with clear, transparent rules aimed at enhancing the consular protection of unrepresented EU citizens. Specifically, the Directive implements the EU citizenship right enshrined in Article 20(2)(c) TFEU, whereby all EU Member States are required to provide the same level of consular protection to unrepresented nationals of other EU Member States, in non-EU countries, as they do for their own nationals.³⁶ This particular right is unique within the constellation of EU citizenship rights, since it extends the application of the EU foundational principle of non-discrimination based on nationality³⁷ to the territory of non-EU countries. Furthermore, it has an independent status, separate from the exercise of fundamental freedoms, the cross-border element or financial resources, on which the CJEU has made other EU citizenship rights dependent.³⁸ The only requirements that an individual has to fulfil to benefit from the EU citizenship right to equal protection abroad are: first, they must have EU citizenship; second, they have to be located outside the EU; and third, they must not have a representation of their Member State of nationality in the third country where they are located that they could ask for consular protection. Of these three requirements, the latter has posed the most problems in practice. This is due to the open-ended definition of the notion of ‘unrepresented’. In practice, this has created situations where – in the same third country – an individual may be considered as ‘represented’ by some Member States and simultaneously not by others.³⁹

³⁴ Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries (OJ L 106, 24.4.2015, p.1–13) (‘Consular Protection Directive’).

³⁵ See Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, O.J. 1995, L 314/73. For the shortcomings of this Decision and generally of the pre-Lisbon Treaty framework, see M. Moraru, ‘The Protection of EU citizens abroad: A legal assessment of the EU citizen’s right to consular and diplomatic protection’, (2011) *Perspectives on Federalism* Vol. 3 (2), online version.

³⁶ In addition, the Charter of Fundamental Rights enshrines the right to equal consular and diplomatic protection in Article 46, with a similar content as that of Article 20(2)(c) TFEU.

³⁷ Article 18 TFEU.

³⁸ C-333/13 *Dano* ECLI:EU:C:2014:2358.

³⁹ See Madalina Moraru, ‘An Analysis Of The Consular Protection Directive: Are EU Citizens Now Better Protected In The World?’ (2019) 56 *Common Market Law Review*, 417–461, at 431-434.



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The Directive has the general objective of further facilitating consular protection for unrepresented EU citizens through efficient coordination and cooperation measures, thus increasing legal certainty and EU solidarity. The Directive does not set out to harmonise the manner and extent of consular assistance provided across Member State representations; this is left to the individual Member States to determine. Rather, it aims to ensure equal treatment between nationals and unrepresented citizens of another EU Member State.

The transposition period for the implementation of this Directive expired on 1 May 2018. All Member States have now adopted some sort of transposition measures. In some Member States, the transposition increased legal certainty of domestic consular rules. For example, for the first time Member States have enacted consular laws to replace disparate administrative guidelines for the purpose of transposing the Directive.⁴⁰ However, not all Member States⁴¹ have adopted a binding provision of general application that meets the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness, something any transposition measure has to fulfil according to the CJEU.⁴²

4.1 Who qualifies for consular assistance in third countries?

a. State-of-the-art

The Directive defines the concept of an unrepresented citizen to include nationals of an EU Member State who find themselves in a third country where their Member State of nationality does not have a permanent embassy or consulate or who is effectively unable to obtain consular protection (Article 6 of the Consular Protection Directive).

The definition of ‘unrepresented’ EU citizens has undergone an important paradigm shift following the entry into force of the Consular Protection Directive. It has changed from an ambiguous definition, lacking clear objectives and safeguards, to a functional definition that

⁴⁰ See for example Greece, also Spain, according to the Fourth meeting of the Member State experts on the implementation of Art. 23 TFEU and Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries, Brussels, 27 October 2017.

⁴¹ On national transposition rules, see <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32015L0637>.

⁴² Case C-528/15 *Al Chodor* ECLI:EU:C:2017:213, paras. 43 and 46.



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prioritises the effective application of the principle of non-discrimination based on nationality. In particular, Article 6 covers now two types of EU citizens. The first are those EU citizens whose Member State of nationality has no embassy, consulate or honorary consul established on a permanent basis in the third country. The second are those EU citizens whose Member State of nationality has an embassy, consulate or honorary consul locally, but for any reason is unable to provide – in a given case – the protection that the person concerned would otherwise be entitled to receive according to national law or practice. Moreover, the European Commission clarified that “if there is any doubt about whether the citizen is represented or unrepresented, to ensure that his right to a consular protection is effective, this person should be able to seek protection from another Member State.”⁴³ This definition has the potential to unify the divergent practices of Member States when evaluating the ‘accessibility’ of external representations in large countries such as China, India or Brazil. However, the evacuations from several third countries during the COVID-19 pandemic have showed that the EU Member States follow different interpretations of the second type of ‘unrepresented’ EU citizens. For example, evacuations of foreign nationals from the city of Wuhan in China revealed that the question of responsibility posed significant challenges. While some of the evacuations were performed by several Member States in concert,⁴⁴ important human rights concerns emerged over whether dual nationals and EU citizens with a permanent residence in third countries should also be evacuated. Given that the Directive still allows for Honorary Consuls to be considered as an external representation of the Member State, there is still some uncertainty regarding the absence of ‘effective representation’ as the prerequisite for recognising the EU citizenship right to equal consular protection. Determining what constitutes ‘effective’ representation is viewed as a sensitive issue where a representation exists, but is not capable of providing consular protection. This may be the case where there is a lack of capacity or where the closure of a representation creates a temporary unavailability. In particular, Honorary Consuls may not be in a position to provide consular protection in certain circumstances.

The situation of tens of thousands of tourist EU citizens trapped on board of cruise ships (both tourists and crew) has raised complex new challenges and mixed responsibilities for consular

⁴³Minutes, Second meeting of the Member State experts on the implementation of Art. 23 TFEU and Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries (Experts Meeting Minutes), Brussels, 23 June 2016, p. 6.

⁴⁴ European External Action Service, ‘Good citizens stranded abroad’ 24 April 2020.



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authorities. They were faced with both the need to disembark passengers and crew in ports where they were not welcome, and the difficulty of repatriating them to their country of origin. The Consular Protection Directive does not expressly regulate the situation in international waters and how to establish whether a Member State is or is not represented. This requires a reassessment of the implementation of Article 6, which introduces a new definition for the ‘absence of representation’ that covers also these types of situations.

Third country nationals who are family members of unrepresented EU citizens have proved to be another contentious issue in practice,⁴⁵ and is one that the pre-Directive legal framework did not address.⁴⁶ The Directive remedied this normative gap by extending the category of beneficiaries of equal consular protection to third country nationals who are family members of unrepresented EU citizens.⁴⁷ It also grants equal treatment in consular protection matters to the third country family members of unrepresented Union citizens, who will enjoy consular protection under the same conditions as family members of the nationals of the assisting Member State. In practice, only a few Member States confer consular assistance to the aforementioned category of persons under the same conditions as for their nationals; this often happens only as a matter of policy and not on the basis of an individually conferred right.⁴⁸ However, in the specific case of emergency evacuations, most Member States have largely accepted – even before the adoption of the Directive – to evacuate the family members of EU citizens, even if they were third country nationals.⁴⁹ The low percentage of EU citizens estimated to have third country family members in 2011 may have contributed to the positive approaches of Member States in extending equal consular protection to third country family members.⁵⁰ However this low percentage may increase,

⁴⁵ From 2006, the European Commission suggested amending the personal scope of Decision 95/553/EC for the purpose of also extending equal consular protection treatment to the family members of Union citizens who are third country nationals. However, few Member States actually aligned their policies. For example, while Sweden aligned itself to this trend, Austria followed a more restrictive interpretation, justifying this mainly on the practical problems encountered in relation to visa controls. See the CARE Final Report, Ch. 3.

⁴⁶ Decision 95/553/EC did not consider the rights of the family members of EU citizens. Furthermore, Member States already had divergent practices on the inclusion of third country nationals who were family members of EU citizens within the personal ambit of the national consular protection regimes. See CARE Report, Ch. 3, section 4.1.1.

⁴⁷ See Art. 5 of the Directive.

⁴⁸ See, in particular, the cases of Cyprus, Ireland, UK and the other EU countries in approaching consular assistance as a matter of their internal policy in the CARE Final Report, Ch. 3.

⁴⁹ See Ch. 3 of CARE Final Report.

⁵⁰ 1.2 percent of EU citizens are estimated to have third country nationals as family members. See 2011 Impact Assessment, cited *supra* note 3, 28.



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thus putting the competing interests of Member States of ensuring the security of both their own nationals and those of EU citizens and citizens of third countries to the test.

A persistent shortcoming of Decision 95/553/EC also maintained by the Directive is the lack of an EU definition of ‘family member’. This definition is left to the national laws of the individual Member States.⁵¹ This absence of an EU-wide definition might lead to forum-shopping for the Member State with the widest domestic definition of ‘family member’, and also to Kafkaesque situations where members of the same family located in the same third country are considered ‘family members’ by one Member State but not by another. This type of situation is addressed in recital 9, where Member States are encouraged to provide protection to third-country family members of EU citizens “beyond what is required by the law of the assisting Member State or what is dictated by its practice” on the basis of an interpretation of Article 20(2)(c) TFEU in conformity with Article 7 EU Charter. The assisting Member State is invited to take into account “as much as possible requests from the unrepresented citizen's Member State of nationality, and in so far as what is agreed does not fall short of what is required by Union law”.⁵²

b. Recommendation for clarifying the personal scope of application of the Consular Protection Directive

Article 6 should be interpreted as also covering unrepresented EU citizens located in international waters. One particularly sensitive point – not fully clarified by the Directive – is the issue of whether or not stateless persons, asylum seekers and refugees who are family members of EU citizens are covered by the Directive. Although the Commission initially opened discussions with a view to including these categories within the scope of the Directive,⁵³ this interpretation was

⁵¹ E.g. while non-EU same sex partners might be recognised as family member in one Member State, they might not according to the practice of another Member State.

⁵² See recital 9.

⁵³ See CARE Final Report, p. 670.



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ultimately not included in the Commission's policy proposal.⁵⁴ It remains to be seen whether the strict interpretation of 'third country national' evolves to include these categories.⁵⁵

Establishing whether an EU citizen is represented or not should not be a theoretical assessment of whether their Member State of nationality has a consulate/embassy/Honorary Consul, particularly as the latter cannot exercise the same range of consular assistance services as consular or diplomatic staff. A case-by-case, practice-based assessment should be undertaken. However, problems may arise where information on existing representations is not up to date. Member States should therefore inform the European Commission regularly on the existing representation to be uploaded to the EC dedicated website (https://ec.europa.eu/consularprotection/home_en).

The lack of definition of 'family member' by the Consular Protection Directive has led, in practice, to a fragmented framework whereby each Member State can create its own definition, which can be more or less inclusive of third country nationals. For example, compare the opposition of Estonia – which seems to exclude third country family members from the scope of consular protection – to the situations of Latvia and Lithuania, which adopt a broad definition, going beyond the immediate family to cover the extended family (e.g. sister, brother, uncle, aunt, cousin). Furthermore, the family status may not be recognised in every Member State; same-sex marriages are officially recognised in only two-thirds of EU Member States. This may result in the exclusion of certain groups of individuals from the application of the transposed Directive from one Member State to another.⁵⁶

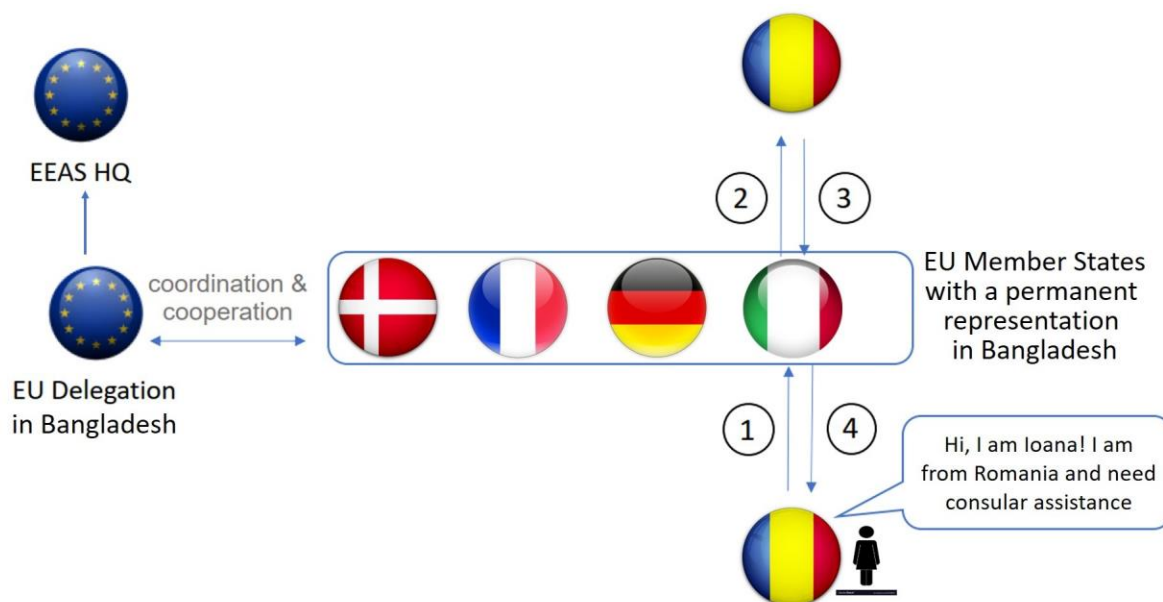
While maintaining a certain degree of flexibility in defining 'family member', Article 6 of the Consular Protection Directive should include further guidelines for its interpretation.

⁵⁴ See the 2011 Impact Assessment, cited *supra* note 3, Policy Option 3.

⁵⁵ This interpretation seems to be supported by the Commission, which - during the fourth meeting with the Member States experts on the implementation of Directive 2015/637 - argued that "third country family members should be assisted according to the Directive, regardless of their refugee status". See Minutes, Fourth meeting of the Member State experts on the implementation of Art. 23 TFEU and Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries, Brussels, 27 October 2017, p. 4.

⁵⁶ See the EC portal on the Consular Protection Directive – national transposition.

Figure 2. Example of the provision of consular assistance under the Consular Protection Directive



Ioana is from Romania, and was located in Bangladesh during the COVID-19 outbreak. She needed consular assistance, but Romania does not have a consulate or embassy in the country.

1. Ioana decides to seek assistance from the Italian Embassy.
2. In the absence of prior practical arrangements or bilateral agreements for permanent representation between Romania and another Member State represented in Bangladesh, the Italian Embassy takes up the case, contacts the Romanian Ministry of Foreign Affairs, requests any necessary information and informs it of the estimated costs of assistance.
3. Romania provides necessary information to the Italian Embassy.
4. Italian Embassy delivers the required assistance to Ioana.



4.2 What type of assistance are unrepresented EU citizens entitled to?

a. State-of-the-art

The Consular Protection Directive is not an instrument of harmonisation but one of “cooperation and coordination”,⁵⁷ which differentiates it from the majority of EU legal acts implementing the internal EU citizenship rights.⁵⁸ The formulation of Article 23(2) TFEU appears to limit the Council’s legislative competences in adopting common operational rules on the exercise of consular protection,⁵⁹ thus excluding harmonisation of domestic consular assistance services.⁶⁰ Article 9 specifies the circumstances under which unrepresented citizens may seek consular assistance, namely arrest or detention, being a victim of crime, a serious accident or serious illness, death and relief and repatriation in the event of an emergency. However, the Article allows the Member States to extend equal consular protection beyond these situations. It is important to understand what types of consular assistance Member States have provided to the unrepresented EU citizens during the consular crisis triggered by the COVID-19 pandemic and the differences that exist in the scope of consular protection provided by the Member States, given that Article 9 allows the Member States to provide for more favourable consular protection.

According to the Directive, equal consular protection treatment is provided only within the six scenarios; beyond these, Member States enjoy full discretionary powers.⁶¹ Some Member States are also committed to providing consular protection in other scenarios, but this is the exception rather than the norm.⁶² Although more favourable treatment could, in principle, be beneficial to EU citizens, in practice it led to confusion. This is because a precise list of the consular services provided by each of the Member States has never been centrally compiled and made

⁵⁷ See Art. 23(2) TFEU.

⁵⁸ Except Directive 93/109/EC, the EU Directives implementing the other internal EU citizenship rights are instruments of harmonisation.

⁵⁹ Art. 23(2) TFEU reads: “The Council ... may adopt Directives establishing the coordination and cooperation measures necessary to facilitate such protection.”

⁶⁰ The 2011 Impact Assessment, cited *supra* note 3, included only policy options with various degrees of coordination and cooperation measures.

⁶¹ Art. 5(2) of Decision 95/553/EC allowed the Member States to extend equal consular protection beyond the five circumstances mentioned in Art. 5(1).

⁶² See for example the Czech Republic, Estonia, Lithuania, Spain and Sweden. See more on these Member States’ legislation in the CARE Database of national legislation.



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public to the individuals. Instead, a case-by-case approach was adopted, with most EU citizens continuing to expect to receive the same kind of support, regardless of which Member State's embassy or consulate they called upon.⁶³

Possibly the most significant novelty introduced by the Directive are the provisions relating to rules on financial assistance. These replace the previous general – and costly – reimbursement regime with a model governed by the equal treatment requirement and clear standards for three different typical scenarios for financial assistance. First, the Directive eliminates the previous discretionary power of the Member State to impose additional consular fees on unrepresented citizens over and above the financial advance or help requested.⁶⁴ Article 14 of the Directive clarifies that unrepresented EU citizens are subject to the same rules that the assisting Member State applies to its own nationals as regards the provision and quantum of the financial assistance.⁶⁵ To take a concrete example, if the *in situ* represented Member State does not charge consular fees⁶⁶ to its citizens for the financial advance,⁶⁷ then the unrepresented EU citizen cannot be charged additional consular fees either, neither by the assisting Member State nor the Member State of nationality when claiming reimbursement.

Second, the Directive replaces the overly broad reimbursement procedure of Decision 95/553/EC with clear rules regarding the reimbursement of financial assistance in three main situations: a general (fall-back) scenario,⁶⁸ detained and arrested unrepresented EU citizens,⁶⁹ and a consular crisis scenarios.⁷⁰ These clusters of rules contribute to increasing legal certainty and provide an adequate functioning of the burden-sharing between Member States whilst preserving national consular customs on consular financial assistance.⁷¹

The general mechanism of reimbursement of financial assistance includes cases where the costs are normally borne by the citizens, who will have previously undertaken a written obligation

⁶³ Eurobarometer from March 2010. See the 2011 Communication, cited *supra* note 12, 4.

⁶⁴ See Art. 6(2) of the repealed Decision 95/553/EC.

⁶⁵ See also recital 25 of the Directive's preamble.

⁶⁶ For example the Netherlands.

⁶⁷ Which could take various forms, such as plane tickets, accommodation or help in cash.

⁶⁸ Art. 14.

⁶⁹ Art. 14(3).

⁷⁰ Art. 15.

⁷¹ See Rasmussen, "Constructing the European demos through external action? The case of consular assistance to EU citizens", in Pérez de las Heras (Ed.), *Democratic Legitimacy in the European Union and Global Governance* (Palgrave Macmillan, 2017), 263.



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to repay the costs to their Member State of nationality.⁷² In these cases, the reimbursement takes place directly between the assisting Member State and the Member State of nationality. The latter has the discretion to decide whether to ask for reimbursement from its own citizens. If the Member State of nationality decides to ask for reimbursement, then the citizen is obliged to pay within a “reasonable period of time”, but not exceeding 12 months.⁷³

The second reimbursement situation is an exception from the general obligation of equal treatment in the specific case of arrest or detention. Article 14(3) allows the assisting Member State to ask for costs relating to consular assistance of unrepresented EU citizens while under arrest or detention, even if this State does not normally ask for fees from its nationals in such circumstances. The exception applies only if the costs are “unusually high but essential and justified”, and reimbursement can be asked only for limited types of costs, related to travel, accommodation or translation.⁷⁴ The exception seems justified, particularly given that translation may often be required, as the unrepresented EU citizen and the consular or diplomatic authorities of the assisting Member State will plausibly speak different (native) languages.

The third mechanism of reimbursement concerns the costs borne in crisis situations, a scenario that was not dealt with by the repealed Decision 95/553 (with the exception of a minimal mention of “relief and repatriation of distressed citizens”).⁷⁵ The Directive introduces a *pro rata* reimbursement principle, which can facilitate financial assistance in crisis situations. Specifically, the Member States can ask for reimbursement on a *pro rata* basis, dividing the full value of the actual costs incurred by the number of citizens assisted. Furthermore, Article 15 eases the reimbursement procedure by eliminating the general requirement for the assisted unrepresented EU citizens having to sign an undertaking to repay.⁷⁶ Coordination with other relevant crisis-related EU instruments is ensured by stipulating that – should the costs be supported by the UCPM – the contribution by the Member State of nationality is determined after deduction of the Union’s contribution.⁷⁷

⁷² The provision of financial assistance requires the unrepresented EU citizen to sign an undertaking to repay the costs using a standard form set in Annex I, which had been translated into all EU languages.

⁷³ See Art. 14(2).

⁷⁴ See Art. 14(3).

⁷⁵ See Art. 5(1)(e) Decision 95/553/EC.

⁷⁶ See Art. 14(1).

⁷⁷ See Art. 15(3). On the Civil Protection Mechanism, see ec.europa.eu/echo/.



These clear standards and procedures have the potential to encourage conferring financial assistance by the Member States, given that there are greater safeguards for actual reimbursement of the incurred consular assistance costs. There is, however, a caveat, in that financial assistance is commonly offered “as a last resort and only in exceptional cases where citizens cannot obtain financial means in other ways, such as through transfers from family, friends or employers”.⁷⁸

The main shortcomings of the Directive’s provisions on financial assistance result from the lack of harmonisation of domestic consular practices. These range from not conferring financial assistance as a rule⁷⁹ or not charging any consular fee,⁸⁰ to setting a variety of fixed consular fees, ranging from 55,⁸¹ 60,⁸² to as high as 130 euro.⁸³

b. Recommendations for clarifying the fragmented substantive scope of equal consular protection

The Consular Protection Directive does not aim to harmonise the national consular protection legislation and practices. For the time being, there is no EU citizenship right to a uniform consular protection in third countries, only a right to *equal* consular protection. This EU citizenship right requires only equal treatment in consular protection between the unrepresented EU citizen and the nationals of the Member State represented in third countries. The Member States vary considerably in the precise consular services they confer in the six broad circumstances covered by the Directive.⁸⁴ Furthermore, there is no public list at EU level listing the precise consular services that each of the Member States provide under their domestic laws.

This lack of common consular protection services been one of the main stumbling blocks for the effective functioning of the EU citizenship right to equal protection abroad. Given the

⁷⁸ See recital 25 of the Directive’s preamble and CARE Final Report.

⁷⁹ See, as an example, Ireland.

⁸⁰ See, for example, Netherlands and Spain.

⁸¹ France.

⁸² Sweden.

⁸³ Denmark.

⁸⁴ For example, liaising with national authorities/courts in third countries on behalf of victims or in situations of arrest/detention, or accommodation in the embassy/consulate, exercise investigative powers in instances of death abroad are not provided to their nationals by all Member States. By consequences, they are not conferred either onto non-national EU citizens.



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Directive's stated "coordination and cooperation" approach, differences in consular customs between Member States are likely to persist, and indeed be exacerbated, in future crisis situations.

Concerning financial reimbursement, the lack of standardisation could have negative consequences for nationals and EU citizens in general. For example, Member States may decide to increase consular fees. This can be due to having to reimburse higher amounts to the assisting Member States in situations where they did not usually charge a fee themselves or only charged a lower amount in the past. Consular fees might also increase due to the risk of the Member State of nationality not being able to recover the fees from the assisted unrepresented national, particularly where there is a significant cost difference between the assisting and the nationality Member States.

In conclusion, a common core of the same consular assistance services should be secured to unrepresented EU citizens located in third countries, particularly during crisis situations. The Commission's dedicated consular protection website could provide the full list of consular services that each Member State provides within the scope of the Directive.

4.3 Horizontal consular cooperation between the Member States - 'practical arrangements'

a. State-of-the-art

One of the most contentious elements in the implementation of the EU citizenship right to equal consular protection was the right of Member States to "conclude practical arrangements on sharing responsibilities for providing consular protection for unrepresented citizens" (see Article 7). The Directive introduced rule-of-law safeguards for the controversial mechanism of 'practical arrangements'.⁸⁵ There was criticism of this mechanism, under Decision 95/553/EC, for its lack of safeguards against Member States circumventing their obligations to provide equal consular assistance to all unrepresented EU citizens who approached to them for help. For example,

⁸⁵ See Art. 7(2). For detailed critiques of Art. 4 of Decision 95/553/EC, see Saliceti, "The protection of EU citizens abroad: Accountability, rule of law, role of consular and diplomatic services", (2011) EPL 191; Madalina Moraru, 'An Analysis Of The Consular Protection Directive: Are EU Citizens Now Better Protected In The World?' (2019) 56 Common Market Law Review, 417–461.



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Member States were free to choose – as the assisting Member State – to grant minimal consular services to their own nationals in order to keep the spending on equal consular protection to a minimum.⁸⁶ In such cases, the rationale of the practical arrangements was the financial interests of the Member States, rather than the effective equal consular protection of unrepresented EU citizens. The Directive limits this freedom for arbitrary burden-sharing power of the Member State by subjecting the conclusion of practical arrangements to the express requirements of effectiveness of equal consular protection⁸⁷ and transparency of the practical arrangements. Article 7(2) of the Directive requires Member States to notify the Commission and the EEAS of the aforementioned burden-sharing arrangements, “which shall be publicised by the Union and the Member States to ensure transparency for unrepresented citizens”.⁸⁸ This safeguard has the potential for increasing awareness among EU citizens as to which Member State is responsible for providing consular protection in certain third countries.⁸⁹

While the EEAS has reported that local cooperation among EU Member States in third countries has increased since the adoption of the Directive,⁹⁰ the positive impact of the Directive on the operability of the EU citizenship right to consular and diplomatic protection will continue to be slow as long as the list of local arrangements is not made publicly available on the European Commission’s designated website.⁹¹

Importantly, the Directive enhances horizontal and vertical consular cooperation requirements. By establishing an obligation of result, rather than means, all Member States represented in third countries need to coordinate between themselves, and with the Union delegations, with a view to preparing contingency plans for consular protection during crisis

⁸⁶ This practice was believed to be due to practical arrangements concluded under Art. 4(2) of Decision 95/553/EC. Some Member States treat consular protection of their nationals as a State’s discretionary policy (Austria, Belgium, Cyprus, Ireland, Malta and UK), while others treat it as a constitutional or legal right of nationals (Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania). See the 2011 CARE Report.

⁸⁷ According to recital 10 of the Directive’s preamble, effective consular protection should be the primary objective for the Member States concluding practical arrangements.

⁸⁸ See Art. 7(2).

⁸⁹ According to the 2011 Impact Assessment, cited *supra* note 3, 15, the lack of publicity of the practical arrangements contributed to minimal awareness of the EU citizenship right to equal protection in third countries.

⁹⁰ Third meeting of the Member State experts on the implementation of Art. 23 TFEU and Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries, Brussels, 2 February 2017.

⁹¹ https://ec.europa.eu/consularprotection/content/find-embassy-consulate_en



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situations.⁹² This horizontal consular cooperation is further coordinated by requiring Member States to include precise topics on the agenda of local cooperation meetings, such as the regular exchange of information on matters relevant to unrepresented EU citizens, discussion on whether burden-sharing arrangements should be made as well as on chairing local meetings. Furthermore, Article 13 sets out precise coordination rules for crisis situations, which were previously dispersed over various soft law guidelines of the Council.⁹³

b. Recommendations for ensuring the effectiveness of the EU citizenship right to equal consular protection

Article 7(2) of the Directive requires the Member States to notify the Commission and the EEAS of the aforementioned burden-sharing arrangements, “which shall be publicised by the Union and the Member States to ensure transparency for unrepresented citizens”.⁹⁴ However, for the time being, the list with the local arrangements between the Member States and the precise modes of consular assistance that have been delegated has not yet been made publicly available. This undermines both the operability of the EU citizenship right to equal consular protection and the EU citizens’ awareness of their rights. The list should be made available on the Commission’s dedicated website on consular assistance.

⁹² See Recital 16 of the Directive preamble and Art. 13.

⁹³ Commonly adopted by the COCON Council Working Group, see *inter alia* Guidelines approved by the Interim PSC on 6 October 2000, Cooperation between Missions of Member States and Commission Delegations in Third Countries and to International Organizations, 12094/00; Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5.11 2010; Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON on 26 June 2006 – 10109/2/06 REV 2; "Lead State Concept in Consular Crises", Conclusions adopted by COCON, 10715/07, 12 July 2006; "Common Practices in Consular Assistance" and "Crisis Coordination" adopted by the COCON, 10698/10, 9 June 2010; Guidelines for further implementing a number of provisions under Decision 95/553/EC adopted by COCON, 11113/08, 24 June 2008. The initial work of the COCON was not disclosed to the public.

⁹⁴ See Art. 7(2).



4.4 How has the 'Lead State' concept been implemented to date?

a. State-of-the-art

A 'Lead State' is a Member State that voluntarily takes up the responsibility of preparing for and, if necessary, coordinating a crisis response covering unrepresented citizens.⁹⁵ It also serves as a focal point for Member States, providing relevant information concerning their unrepresented nationals. The Lead State can also have recourse to the crisis management structures of the EEAS and the UCPM. Given the important role played by a Lead State during consular crisis, it is useful to analyse how the good administration requirements introduced by the Consular Protection Directive⁹⁶ have been followed in practice, and whether additional shortcomings occurred during the COVID-19 related crisis.

The Lead State institution has existed since 2007, when it was designed by the Council and included in soft law documents.⁹⁷ The guidelines for implementing the concept of the Lead State being responsible for the coordination of the crisis response date back to 2008. It was first put into practice in early 2008 by France as the Lead State in Chad, when it evacuated more than 1 200 citizens from 12 Member States and from several other third countries (60 nationalities in all).⁹⁸ According to the Council Guidelines, the responsibility of the Lead State was, in this case, limited to transporting Union citizens to a place of safety. Once the evacuation of all Union citizens in need of assistance had been accomplished, the mission of the Lead State ended.⁹⁹ The Directive codifies this soft law practice and introduces important new safeguards for EU citizens, since all

⁹⁵ "European Union guidelines on the implementation of the consular Lead State concept" (2008/C 317/06).

⁹⁶ In particular, publicity of the EU list of Member States with Lead State role; clarity and transparency of rules to be followed; allocation of tasks and accountability.

⁹⁷ The "Lead State" concept was introduced by the Council Conclusions; see Council Conclusions, General Affairs and External Relations, 2808th Council meeting, 10654/07, Presse No. 137.

⁹⁸ Moraru, "Practical and legal consequences of absence of EU and Member States' external representations for the protection of EU citizens in third countries", in Arrighi, Bauböck, Collyer, Hutcheson, Moraru, Khadar and Shaw (Eds.), *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Citizens Residing in Third Countries*. Study of the European Parliament, Policy Department of Citizens' rights and Constitutional Affairs, 2013.

⁹⁹ Moraru, 'An Analysis Of The Consular Protection Directive: Are EU Citizens Now Better Protected In The World?' (2019) 56 *Common Market Law Review*, 147, 166.



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designated Lead States for particular third countries will have to be publicised.¹⁰⁰ Finally, EU citizens travelling to third countries will easily be able to determine which Member State is responsible for them during crisis situations.

During the COVID-19 crisis, this concept worked well in some countries, while in others it did not always function as expected. Nationally, there are differences of perception as to the range of activities and remote support unrepresented Member States should undertake for their own citizens. Given this, there seems to be a lack of clarity over what can be expected from a Lead State and an unrepresented Member State. The COVID-19 pandemic and the United Kingdom's departure from the EU require a reconsideration of a Lead State's responsibilities, given that it is a voluntary status.

b. Recommendations – Reconsidering the Lead State concept

In order to keep the Lead State concept operational while ensuring the effectiveness of EU citizens' right to equal consular protection, there needs to be a fairer burden sharing among Member States. The concept needs to be expanded to a wider pool of Member States than the current one made up of France, Germany, Italy, Spain and the Netherlands. The EU delegations should also be included as part of the coordination and cooperation, as the COVID-19 pandemic has highlighted their prominent role in ensuring that the Lead State manages to fulfil its functions. In addition, there needs to be greater clarity over what a specific Lead State is ready and can be expected to do in different typical crisis situations relevant in the local context. Here, it would also seem relevant to develop a set of 'best practices' of what unrepresented Member States could offer, either from a distance or, where necessary, via ad-hoc support teams brought in to help the Lead State perform its mission. Greater transparency in the list of Member States playing the role of Lead State, and their tasks, would be needed to ensure awareness of EU citizens of their rights.

¹⁰⁰ An initiative was already started by a core team of interested Member States under general supervision of COCON WG. Consular Coordination Initiative projects designating the crisis responsibility of a Member State were implemented in five countries so far: Cambodia, Dominican Republic, Nepal, Nigeria and Tunisia. See CCI Final Report, 29 April 2016.



4.5 The role of EEAS/EU delegation in day-to-day and consular crisis situations

The constitutional and institutional framework created by the Lisbon Treaty to increase the effectiveness and responsiveness of the Union's external action has encouraged the emergence of the vertical dimension of the EU citizenship right to consular protection, that is the possibility of invoking it also in relation to the Union. The Lisbon Treaty broke new legal ground for the institutional machinery for enforcing the EU citizenship right to equal protection abroad. It empowered its newly created European External Action Service (EEAS),¹⁰¹ with its more than 140 Union delegations,¹⁰² to contribute directly to the protection of EU citizens around the world.¹⁰³ Furthermore, a Consular Division was set up within the EEAS to support the coordination and cooperation between the EEAS and Member States, thus enhancing implementation of the right to equal consular protection in third countries.¹⁰⁴ The added value of this institutional makeover for unrepresented Union citizens around the world is significant, given that in several third countries, it is only the EU that is locally represented.¹⁰⁵ In other third countries, including in many key tourist destinations,¹⁰⁶ there are only three other Member States represented in addition to the EU delegation.¹⁰⁷

The Consular Protection Directive largely maintains the hierarchy of duty bearers established by Decision 95/553/EC. The Member State of nationality is the primary provider of consular protection for its nationals; the non-nationality Member States represented locally in third countries are secondary actors, bearing the duty of providing equal consular protection to that granted to their own nationals. The EU delegations are tertiary actors, whose limited intervention

¹⁰¹ The European External Action Service established by Art. 27(3) TEU and EEAS Decision.

¹⁰² According to public information available on the EEAS website on 18 August 2018. EU delegations are an integral part of the EEAS, see Art. 221 TFEU, Art. 5 of the EEAS Decision, cited *supra* note 47.

¹⁰³ See Art. 3(5) TEU. For an in-depth assessment of the Treaty of Lisbon changes impacting on the EU's external relations law, see Cremona, "Defining competence in EU external relations: Lessons from the Treaty reform process", in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge University Press, 2008).

¹⁰⁴ See the answer given by High Representative Mogherini on behalf of the Commission of 20 May 2015.

¹⁰⁵ For example, Somalia, Swaziland, Panama and Seychelles (according to information available on ec.europa.eu/consularprotection/content/about-consular_en on December 2018). The European Commission website has not been updated with the post-Brexit situation; therefore it is as yet unclear the extent to which the EU delegations are the sole presence in third countries.

¹⁰⁶ Such as Cape Verde, Fiji and Madagascar.

¹⁰⁷ See the European Commission, consular protection website, ec.europa.eu/consularprotection/content/about-consular_en.



is subject to the Member States' express requests. The innovative contribution of the Directive is twofold. First, in introducing express rule-of-law safeguards, in the form of legal certainty, transparency, effectiveness and good administration standards, it prevents Member States from circumventing their EU duties of providing equal consular protection to the unrepresented Union citizens in third countries. Second, the Directive empowered the Union delegations with consular assistance-related roles in two types of situations; day-to-day and crisis. For the first time in the history of international organisations, an international organisation has consular protection and assistance tasks above and beyond mere functional protection for its agents,¹⁰⁸ even if these roles are limited compared to those proposed for the EEAS by the European Parliament.¹⁰⁹ Taking advantage of the Lisbon Treaty's reform of the EU external action institutional framework, the Directive has further contributed to extending the duty of care beyond the Member States of nationality, directly onto the EU institutions. This has been essential in ensuring the effective repatriation and security of EU citizens stranded abroad during the COVID-19 pandemic.

In day-to-day situations, Article 11 refers to the duty of the Union delegations to inform unrepresented Union citizens of their consular assistance rights, in particular about the applicable inter-Member State burden-sharing arrangements.¹¹⁰ The role of the Union delegations seems somewhat limited in day-to-day consular services, with no explicit reference to consular assistance services being directly provided to unrepresented Union citizens. In crisis situations, the need for a broader role for the Union delegations is acknowledged.¹¹¹ This includes a non-exhaustive list of consular functions, including logistical support in the form of office accommodation and organisational facilities, exchange of information, involvement in drafting and carrying out contingency planning and coordination and other types of necessary assistance provided to the Member States' crisis teams.¹¹² Additional roles in consular protection management are envisaged

¹⁰⁸ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion, ICJ GL No 4, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, and Dugard, *op. cit. supra* note 23.

¹⁰⁹ For details see, Moraru 'An Analysis Of The Consular Protection Directive: Are EU Citizens Now Better Protected In The World?' (2019) 56 *Common Market Law Review*.

¹¹⁰ See Art. 11, last sentence.

¹¹¹ See Arts. 11 and 13.

¹¹² Compare Art. 11 with Art. 9. The Art. 11 wording is closer to recital 8. It is not clear what other types, if any, of consular functions can be included in the ambit of Art. 11.



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for various EU institutions (EEAS,¹¹³ European Commission, COCON¹¹⁴) by additional EU instruments such as the UCPM.¹¹⁵

In consular crisis situations, Article 13 of the Directive provides for a supporting role for the EU delegations, in particular providing logistical support upon request from the Member States in crisis situations. This mechanism is based on the role of leadership and coordination of consular assistance measures for unrepresented European citizens, exercised by a Member State represented in the third country, under the Lead State mechanism. A simplified procedure, adapted to crisis situations, allows the Lead State to obtain the reimbursement of costs incurred for the repatriation of citizens who are not its nationals. The Lead State will cooperate with the EU delegation in the third country and may request the support of third country and European intervention teams (which include consular experts, particularly from non-represented Member States). The Lead State may also seek support from European instruments, such as the crisis management structures of the EEAS and the UCPM. The operational core is the Emergency Response Coordination Centre, which is able to mobilise significant human and material resources. As part of the assistance provided by the UCPM, financial support may be requested by States providing consular protection, in order to ease any burden on them.

Following the UK's departure from the EU, it is important to examine the concrete role played by the EU and its potentially upgraded role, given that the EU's external representation is wider than the majority of the Member States.¹¹⁶ It could thus bridge gaps in local consular protection for many Member States and their unrepresented citizens.

Several other successful consular assistance practices developed by the Union delegations to date have not been codified by the Consular Protection Directive; these could perhaps be taken into consideration during the review of the Directive's performance. The overall practical involvement of the Union delegations in the consular protection of EU citizens abroad can be classified as follows: i) *facilitator* of communication and coordination between Member States, as well as communication between the Member States and EU citizens during consular crisis

¹¹³ Crisis Response Department of the EEAS has a Consular Crisis Response Division.

¹¹⁴ Consular Cooperation Initiatives – Final Report from 29 April 2016 (8347/16 ADD 1)

¹¹⁵ Council Decision No 1313/2013/EU on the Union Civil Protection Mechanism, as amended on 21 March 2019

¹¹⁶ According to M. Moraru, *Protecting (unrepresented) EU citizens in third countries–The intertwining roles of the EU and its Member States* PhD Thesis EUI 2015, see also https://ec.europa.eu/consularprotection/content/find-embassy-consulate_en.



situations;¹¹⁷ ii) *provider* of occasional direct consular protection services in crisis circumstances, making its premises available to EU citizens and to the Member States' consular and diplomatic officials; helping with transportation and evacuation of Union citizens in distress;¹¹⁸ use of a wide range of disaster response tools;¹¹⁹ iii) *sharer* of consular premises – EU delegations have been sharing their premises with the Member States' external representation on a permanent basis, in order to save costs and enhance security in unstable areas. The so-called “Houses of Europe”¹²⁰ were created experimentally in certain third countries: Nigeria (Abuja), Tanzania (Dar Es Salaam), and Kazakhstan (Astana and Almaty);¹²¹ iv) *occasional provider* of consular protection services in day-to-day situations directly to vulnerable EU citizens¹²² whose fundamental rights had been violated in third countries.¹²³ For example, this latter role has been exercised by the High Representative and the EU delegations, who conducted negotiations with local governments for the repatriation of EU citizens or for their liberation;¹²⁴ or when they helped EU citizens exit a

¹¹⁷ As happened, for example, in Japan, when the EU delegation spontaneously assumed the coordination of national capabilities responsibility during the 2011 nuclear disaster. See Wouters, Duquet and Meuwissen, “The European Union and consular law”, KU Leuven Working Paper 107/2013, 10.

¹¹⁸ During the 2009 Gaza crisis, for example, the EU Delegation evacuated 100 people in armoured buses. During the 2012 political upheaval in Syria, the EU delegation in Damascus helped evacuate 25 000 EU citizens. Similar successful operations were carried out during the 2011 Arab spring (see the 2011 Communication); see A. Miozzo's statement of May 2012, available at www.europeanvoice.com/article/imported/eu-embassy-stays-open-as-expulsions-escalate/74455.aspx, accessed May 2013. See the Report by the High Representative to the European Parliament, the Council and the Commission of 22 Dec. 2011.

¹¹⁹ For example SITCEN, EU Satellite Centre, EU Military Staff, MIC. See more concrete examples in Guest Editorial, “The EU's External Action: Moving to the Frontline”, (2014) EFA Rev, 329, 329–334; Casolari, “The external dimension of the EU disaster response”, in de Guttery, Gestri and Venturini (Eds.), *International Disaster Response Law* (Springer/T.M.C Asser Press, 2012), pp. 129-155; Cremona, “The EU and global emergencies: Competence and instruments”, in Antoniadis, Schütze and Spaventa (Eds.), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart Publishing, 2011), pp. 11-31.

¹²⁰ The term was used by Kerres and Wessel, “Apples and Oranges? Comparing the European Union Delegations to National Embassies”, CLEER Papers 2015/2, 14.

¹²¹ More co-location agreements are concluded among the Member States, see “Les colocalisations franco-allemandes,” available online www.france-allemande.fr/Lescolocalisations-franco,2811.html.

¹²² For example EU citizens detained in inhuman conditions, detained journalists or divorced mothers facing deprivation of their right to family life with their children.

¹²³ These have taken forms quite close to exercising diplomatic protection. See also the EU's request to Djibouti to comply with the Cotonou Agreement, which expressly subjected economic benefits to the respect of human rights within its territory. The EU's request came in response to the arbitrary arrest of an Italian citizen. See E-0829/08 of 16 April 2008.

¹²⁴ See, for example, the intervention on behalf of a group of Czech citizens illegally detained in Cuba; more details are available in the Written Question P-011180/11 submitted by Jan Březina (PPE) to the Commission (Vice-President/High Representative). Similarly, see the EU intervention on behalf of the Swedish journalist, Dawit Isaak, imprisoned in Eritrea for having exercised his freedom of expression, see Question for written answer E-008016/12 to the Commission (Vice-President/High Representative), submitted by MEP Olle Schmidt on 11 September 2012, O.J. 2013, C 308E.



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country and return to their Member State of nationality.¹²⁵ Such consular practices have proved to be beneficial to several EU citizens in distress.¹²⁶ Additional consular functions have been developed in practice by the EEAS. These include supervision of judicial proceedings in which EU citizens are involved¹²⁷ and safeguarding the interests of minors and other persons lacking full capacity, particularly when guardianship or trusteeship is required.¹²⁸

The Directive has not codified the various consular assistance functions that had been developed in practice by Union delegations, nor has it included additional ones that could have been of crucial importance to Union citizens who were unrepresented in third countries.¹²⁹ For example, faced with an unprecedented consular crisis, the EU Delegations reacted quickly, playing a critical role in most places. They not only supported consular cooperation among local Presidencies and EU Member State Embassies foreseen in the Consular Protection Directive 2015/637 but also – at the request of EU Member States locally – led the local consular coordination in many places, delivering diplomatic representations towards local authorities. The use of the UCPM for a consular response to COVID-19 has been unprecedented. It has been important in helping secure rapid repatriation. With airspaces closing down almost worldwide in mid-March 2020, commercial airlines winding down their operations and scattered groups of EU citizens in need of repatriation, Member States turned to the EU for assistance at an unprecedented level. The UCPM became an important tool, complementing the overall efforts in repatriating EU citizens home.

¹²⁵ Question for written answer to the Commission (Vice-President/High Representative) submitted by MEP Oreste Rossi, under Rule 117, O.J. 2013, C 308 E.

¹²⁶ However, this practice is not widespread nor entirely coherent, particularly due to the EU delegations' reluctance to act in the absence of an express legal basis. See Kerres and Wessel, *op. cit. supra* note 191, 35 et seq.

¹²⁷ See, for example, the practice of the EU delegation in India, which aimed to send representatives "to attend the court hearing in the case of Human Rights Defender and National Vice-President of the People's Union for Civil Liberties, Dr. Binayak Sen, as observers... This is in line with the EU's agreed policy on Human Rights Defenders. The EU has also expressed to the Indian authorities its concern about the conditions pertaining to the detention of Dr. Sen." Available at https://eeas.europa.eu/delegations/india/press_corner/all_news/news/2011/20110121_en.htm (accessed on May 2018).

¹²⁸ See the reply of the EEAS to the petition of an EU citizen whose child was abducted in Egypt, available at eeas.europa.eu/petitions/2012/20120820_rights_eucitizens_egypt_en.pdf (accessed May 2018).

¹²⁹ For example issuing ETDS for unrepresented EU citizens.



A codification of these practices would have responded to EU citizens' expectations, given that the EU citizens' perception of Union delegations as 'natural' contact points.¹³⁰ Furthermore, empowering EU delegations to provide direct consular assistance services to unrepresented Union citizens would simplify the consular assistance procedure. It would also reduce the risk of consular forum shopping and bring the EU closer to its citizens. As indicated by a European Parliament research study, a greater role for Union delegations in consular assistance and coordination would, *inter alia*, spare Member State budgets,¹³¹ eliminate duplication of identical services between Member States¹³² and increase the overall coherence of external relations.¹³³ For these reasons, the Parliament proposed that Union Delegations deal with the entire coordination of consular protection, including the contingency plans between Member States and evacuation in crisis situations, as well as some direct consular assistance functions for the benefit of unrepresented Union citizens. However, the Parliament's proposals did not obtain the support of the Commission and were met with strong opposition in the Council.

¹³⁰ See 2011 Impact Assessment, cited *supra* note 3, 28. A similar situation existed before the entry into force of the Lisbon Treaty. According to the declaration of F. Frattini, Director of the DG Justice in 2007, 17 percent of Union citizens interviewed believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels, 29 May 2007.

¹³¹ This is particularly useful in the aftermath of austerity measures adopted by the Member States. For example, the 33 percent reduction in the UK Foreign and Commonwealth Office in 2010, and the 54 percent budgetary cut in the Spanish Foreign Ministry in 2012. See Merheim-Eyre, "Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders". Similar scaling down of national diplomatic service budgets was reported in 2011 by the HR. See Report by the High Representative to the European Parliament, the Council and the Commission, on the EEAS, published 22 December 2011.

¹³² Emerson et al., "Upgrading the EU's role as global actor: institutions, law, and the restructuring of European diplomacy", CEPS (2011), 10.

¹³³ See the Research Project launched by the European Parliament on the role of the EEAS: European Parliament Committee on Foreign Affairs on the Strengthening the EU's external representation: the role of the EEAS in the Union's external representation.



a. Recommendations for ensuring that the helpful ad-hoc consular assistance role played by the EEAS/EU Delegations are reflected in the Consular Protection Directive

A codification of the above ad-hoc consular practices would have responded to EU citizens' expectations, given the EU citizens' perception of Union delegations as 'natural' contact points.¹³⁴ The Directive allows for some flexible development of the consular assistance practices by Union delegations. These could include the continuation of practices that have not been codified by the Directive, as well as 'on-the-ground' development of new consular assistance functions.¹³⁵ This study argues that any future development of the role of the EEAS in ensuring consular protection of EU citizens abroad should be driven by cost-efficiency principles that are compatible with the EU's objective of ensuring effective protection of (unrepresented) Union citizens abroad,¹³⁶ an objective that is binding on the Member States.

The Directive, on the other hand, strips the EU delegations of one of their constitutionally endowed consular coordination powers, namely the organisation and chairing of local cooperation between the Member States' diplomatic and consular missions in third countries.¹³⁷ Instead, this chairing role is now conferred on a Member State, which should closely cooperate with the Union delegation.¹³⁸ Given the Member States' asymmetric diplomatic footprint, it would be an opportune moment to reconsider whether the EU delegations should share the chairing role with the Member States for the local consular cooperation meetings.

¹³⁴ See 2011 Impact Assessment, cited *supra* note 3, 28. A similar situation existed before the entry into force of the Lisbon Treaty. According to the declaration of F. Frattini, Director of the DG Justice in 2007, 17 percent of Union citizens interviewed believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels, 29 May 2007.

¹³⁵ Arts. 12 and 13 often use the word "in particular". See also Rasmussen, "Constructing the European demos through external action? The case of consular assistance to EU citizens", in Pérez de las Heras (Ed.), *Democratic Legitimacy in the European Union and Global Governance* (Palgrave Macmillan, 2017), 259-284.

¹³⁶ See Art. 3(5) TEU, Arts. 20(2)(c) and 23 TFEU.

¹³⁷ Several Reports on the EEAS activities mention the gradual takeover of the external representation and internal coordination role from the rotating Council Presidency in third countries and various multilateral fora by the EU delegations. See e.g. EEAS, "EU diplomatic representation in third countries – second half of 2011", 11808/2/11 REV 2, Brussels, 25 Nov. 2011, and EEAS, "EU diplomatic representation in third countries – first half of 2012", 18975/11, Brussels, 22 Dec. 2011; Helwig, "The New EU Foreign Policy Architecture: Reviewing the first two years of the EEAS", CEPS February 2013, available at: www.ceps.be/ceps/dld/7711/pdf. See also M. Gatti, "The European External Action Service and the Implementation of the Union Method in European Foreign Policy", Bologna, Ph D Thesis, 2013, 39 et seq.

¹³⁸ See Art. 12.



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Additionally, the Directive includes consular functions whose exercise is mainly resource-neutral, maintaining the line of the EEAS Decision.¹³⁹ A greater consular assistance role would require allocating financial resources, a move that only had minimal support in the Council.¹⁴⁰ Nevertheless, the COVID-19 outbreak and the significant role played by the EEAS has shown that the EU delegations have become a natural contact point for unrepresented EU citizens in crisis situations. Coupled with the fact that the EEAS has the largest external representation network and multiple instruments at its disposal, these should be taken to demonstrate the EEAS, with its EU delegations network, is playing an enhanced role of consular assistance in crisis situations. Faced with a consular crisis of unprecedented length, the EU Delegations, acting under Article 11 and 13 of the Council Directive, played an important diplomatic and operational role. They often provided a robust facilitation of coordination of response action and exchange of information with local authorities. The future effective implementation of the Consular Protection Directive in crisis situations requires consideration of an increased budget for the EEAS to allow for the provision of direct consular assistance to unrepresented EU citizens in distress abroad.

4.6 Additional challenges in the provision of consular protection for unrepresented EU citizens: avoiding policy self-containment, underexplored digitalisation and ensuring express consent of third countries

a. State-of-the-art

The UCPM¹⁴¹ was created to pool resources with the aim of helping prevent, prepare for, and respond to disasters in the EU and abroad. All EU Member States, as well as Iceland, Norway, Serbia, North Macedonia, Montenegro, Turkey and the United Kingdom (during the transition period) participate in it. The Mechanism is one of the resources available to Member States when coordinating consular assistance in crisis situations. The UCPM was created in 2013 and replaced the Civil Protection Mechanism set up in 2001. It rests “on a Union structure consisting of an

¹³⁹ See Art. 5(1) of the EEAS Decision, which reads as follows: “The Union delegations shall ... 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.*” (emphasis added).

¹⁴⁰ Council Document 15677/13, 12 Nov. 2013.

¹⁴¹ Council Decision No 1313/2013/EU on the Union Civil Protection Mechanism, as amended on 21 March 2019.



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Emergency Response Coordination Centre (ERCC), a European Emergency Response Capacity (EERC) in the form of a voluntary pool of pre-committed capacities from the Member States, trained experts, a Common Emergency Communication and Information System (CECIS) managed by the Commission and contact points in the Member States”.¹⁴²

The mandate of the Mechanism is rather broad; it should “cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters, including environmental disasters, marine pollution and acute health emergencies, occurring inside or outside the Union”.¹⁴³ It should also “contribute to the implementation of Article 222 of the Treaty on the Functioning of the European Union”.¹⁴⁴

The Mechanism is based on Article 196 TFEU, which sets out the role of the Union in the area of civil protection. Where a disaster overwhelms the response capabilities of an individual Member State, that State may decide to appeal to the Union Mechanism to complement its own civil protection and other disaster response resources.”¹⁴⁵

The UCPM has proved a key instrument in ensuring effective repatriation of both represented and unrepresented EU citizens stranded abroad during the COVID-19 pandemic. To date, the EU’s Civil Protection Mechanism has often been activated to support Member States in ensuring consular assistance to EU citizens in major emergencies in third countries. The Mechanism has been activated for past crises such as Libya (2010),¹⁴⁶ Mumbai (2008),¹⁴⁷ and Libya again in early 2011.¹⁴⁸ During the Gaza crisis of January 2009, nearly 100 people were evacuated in armoured buses thanks to the EU Delegation’s support.

¹⁴² Ibid, recital 12.

¹⁴³ Ibid, recital 2.

¹⁴⁴ Ibid, recital 4.

¹⁴⁵ Decision 1313/2013, recital 24.

¹⁴⁶ In particular, two grants (with a value of €112 000) were awarded to two Member States that had evacuated around 150 EU citizens. See Commission Staff Working Paper, Impact Assessment, accompanying the document, *Proposal for a Directive of the Council on co-ordination and co-operation measures regarding consular protection for unrepresented EU citizens*, SEC (2011) 1556 final, Brussels, 14.12.2011, p. 18.

¹⁴⁷ In Mumbai, the Mechanism was triggered by the French Presidency and activated in order to assist severely wounded EU citizens after the Mumbai attacks. This operation complemented bilateral operations undertaken by Member States to evacuate more than 100 non-wounded EU citizens to Europe. The costs of the evacuation were 50 percent co-funded by the Civil Protection Financial Instrument. See Commission Staff Working Paper, Impact Assessment, *ibid.*, p. 18.

¹⁴⁸ See EU press release of 23.02.2011 available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/222&format=HTML&aged=0&language=EN&guiLanguage=en>



It has been used numerous times, including during the repatriation of EU citizens during the 2020 COVID-19 outbreak. There was broad consensus that the mechanism was vital in organising repatriation flights during the COVID-19 repatriation crisis. However, it depends on a Member State triggering it, which may be difficult in third countries with a low density of representations. Concerns were expressed that Member States relying on the mechanism might be faced with an undue administrative burden. At the same time, Member States with smaller numbers of citizens requiring assistance did not rely on the mechanism, due in part to the mere fact that they lacked first-hand experience in activating it.

In 2019, the EU Civil Protection Mechanism was further complemented by the creation of RescEU, a tool designed to “provide assistance in overwhelming situations where overall existing capacities at a national level and those pre-committed by Member States to the European Civil Protection Pool are not, in the circumstances, able to ensure an effective response to the various kinds of disasters.”¹⁴⁹

A second issue concerns the relationship between the UCPM and the Consular Protection Directive. This is not made clear in the Directive, although it appears from the preamble that the UCPM may be relied on as a subsidiary means at the discretion of Member States.¹⁵⁰

The EU institutional framework on consular protection consists of other department and divisions. For instance, the Crisis Response Department of the EEAS has a Consular Crisis Response Division. One of its main roles is to assist the Presidency and/or Lead States in coordinating action in times of crisis. The Commission supports the consular protection for unrepresented EU citizens by continuing to include and negotiate consent clauses in bilateral agreements with third countries, ensuring that these countries agree that represented EU Member States will give assistance to unrepresented EU citizens.

The Council also has a structure involved in coordinating consular protection, namely the Working Party on Consular Affairs (COCON). Among other responsibilities, the members of the Working Party engage in “the exchange of views on consular crises and related consular cooperation issues” and “discussing coordination and cooperation measures to facilitate consular

¹⁴⁹ Decision (EU) 2019/420 of 20 March 2019 of the European Parliament and of the Council of 13 March 2019 amending Decision 1313/2013/EU on a Union Civil Protection Mechanism, Art. 12 replaced

¹⁵⁰ Consular Protection Directive, recital 22.



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protection of EU citizens in third countries.”¹⁵¹ From January to December 2015, the COCON ran Consular Cooperation Initiatives (CCIs) in five countries: Cambodia, Dominican Republic, Nepal, Nigeria and Tunisia. The initiative was managed by a core team of interested Member States. The specific objective was to “further explore possibilities for developing the role of EU Delegations in facilitating and supporting coordination between Member States in their role of providing consular protection to citizens of the Union in third countries.”¹⁵² It resulted in a Final Report with recommendations and the development of a Joint EU Crisis Preparedness Framework.¹⁵³

During the COVID-19 pandemic, coordination between EEAS, DG ECHO and COCON WG played a significant role in ensuring effective repatriation. Under the Croatian Presidency, the decision was taken to temporarily merge the consular and civil protection communities and operational decision makers in Member States, as well as to support the consular efforts through the UCPM. This type of cooperation between the various EU institutional actors and instruments in the EU consular assistance toolbox should be deployed in similar future consular crises.

Additional hurdles, unrelated to the Directive, result from the extraterritorial exercise of the EU citizenship right to equal consular protection. Third countries may oppose the non-nationality Member States and EU exercise of consular protection if they have not previously expressly consented to this multilateral agreement concluded among EU countries. According to Article 8(3) of the Vienna Convention on Consular Protection, non-nationality States can exercise consular protection to the citizens of other States in third countries; however, the latter remain free to oppose this if consent was not obtained. Only a few Member States have formally informed particular third countries of the EU's special agreement to date.¹⁵⁴ It could be argued that third countries are bound – by a customary international rule – to continue to recognise the exercise of the EU citizenship right to equal consular protection, had no opposition been raised to this practice since its introduction in 1992. However, some third countries oppose this exercise, such as Russia for consular protection in the event of arrest or detention.

¹⁵¹ 20 <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-consular-affairs/>

¹⁵² Consular Cooperation Initiatives – Final Report from 29 April 2016 (8347/16).

¹⁵³ Consular Cooperation Initiatives – Final Report from 29 April 2016 (8347/16 ADD 1).

¹⁵⁴ According to the CARE Final Report, these countries were Belgium, France and Lithuania. France notified Chad of its will to be the State providing protection for the citizens of the other Member States “based on the EU Treaty provisions” (see Summary Report of Public Hearing on the Green Paper of 29 May 2007, p. 11).



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Recital 11 of the Consular Protection Directive clarifies that “the Directive should not prevent the Member State which is not represented in a third country from delivering consular protection to one of its nationals, for example by providing online consular services, where appropriate”. The option of remote assistance by way of online consular services has not yet been explored; however, in light of current emergence of digitalisation and abundance of information, its potential in ensuring external representation in uncovered third countries is unexplored and underdeveloped. However, the increased use of digital tools may also incentivise Member States to rely on remote consular protection and reduce their consular presence

b. Recommendations

The linkage between the Consular Protection Directive and the UCPM, as well as between the various institutional mechanisms with consular protection tasks, should be clarified. The application of the UCPM should also take into consideration the concerns raised by the Member States, which impact on the effectiveness of the EU citizenship right to consular protection. These include the heavy administrative burden / increasing bureaucracy, the lack of first-hand experience in activating the mechanism among some of the newer Member States, a lack of clarity of the precise support provided and the precise routes for seeking reimbursement for the repatriation flights.

There needs to be continuous efforts invested in clarifying the personal scope of the EU citizenship right to equal protection abroad and to obtaining the express consent of third countries to exercise the EU citizenship right to equal protection.

The use of digital tools by the Member States in providing consular assistance may address the financial costs of an *in situ* consular presence, while relying on remote consular protection would ensure the security of nationals abroad.



5. Conclusions and recommendations

One of the priorities of the EU's external action during the COVID-19 outbreak was to ensure protection of its citizens stranded outside European territory, particularly those citizens whose Member State of nationality had no embassy or consulate in a position to provide effective consular assistance. Repatriation of these citizens was made possible through the exercise of the right to equal consular protection attached to EU citizenship as well as because of the prominent role played by the EU delegations and the UCPM in emergency situations. There are some interesting lessons to be drawn from this experience, both of the extraterritorial dimension of EU citizenship and of the role of the EU as a duty bearer of consular protection of EU citizens abroad.

The application of the EU citizenship right to equal protection abroad has been fraught with inconsistencies in its implementation. In practice, this has led to limited awareness, understanding and exercise of the right by EU citizens. The substantive and personal scope of the right are not easily identifiable to the uninformed. The content of the EU citizenship right as a mere prohibition of discriminatory protection based on nationality, coupled with the divergent domestic legal frameworks of the 27 Member States on consular and diplomatic protection of citizens, have created a legal framework whereby the EU citizen enjoys different models of protection. These range from a constitutional right to protection abroad endowed with judicial guarantees, to no right whatsoever, except to legitimate expectations to receiving protection only in the limited six mandatory consular related situations. Or from enjoying protection only as an individual EU citizen as, or to see protection also extended to family members who are third country nationals. The list of differences between national legal frameworks and practices extend to various other aspects of the procedure of providing this type of protection of individuals.¹⁵⁵ Even the essence of the EU citizenship right to equal protection abroad – namely to choose which represented Member State to resort to for help – is in practice affected by the Member States. They have established burden-sharing agreements between themselves, allocating the responsibility to protect to one individual Member State, without ensuring widespread knowledge of the list of Member States responsible for the different third countries. The entire process of horizontal cooperation and

¹⁵⁵ See more in Chapter three of Madalina Moraru, *Protecting (unrepresented) EU citizens in third countries. The intertwining roles of the EU and its Member States*, PhD Thesis, European University Institute, 2015.



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coordination among the Member States is characterised by an *ad-hoc* approach that depends to a large extent on the persons involved.¹⁵⁶

Given this divergent framework, it is no surprise that, of the 300 000 cases of consular protection reported in 2009, only 16 percent had as the addressee an unrepresented Union citizen. However, 79 percent of the EU citizens responding declared that they were aware of their EU citizenship right to equal protection abroad.¹⁵⁷

A centralised EU list of concrete consular services provided by the Member States would tackle the lack of awareness among EU citizens and the heavily fragmented domestic frameworks on consular protection. The list should also include the Lead States and the practical arrangements concluded by the Member States. The geographical application of the EU right to equal consular protection to international waters and ships should be clarified. The EU delegations should also be included as part of the coordination and cooperation, as the COVID-19 pandemic has shown their prominent role in ensuring that the Lead State manages to fulfil its functions. In addition, there needs to be greater clarity over what a specific Lead State is ready to do and can be expected to do in different typical crisis situations relevant in the local context. Here, it would be valuable to develop a set of ‘best practices’ of what unrepresented Member States could provide, either from a distance or, if necessary, via ad-hoc support teams to help the Lead State perform its mission. Greater transparency over the list of Member States playing the role of the Lead State and their tasks is needed to ensure awareness among EU citizens of their rights.

In addition, not all of the Member States¹⁵⁸ have adopted a binding provision of general application that meets the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness, which – according to the CJEU – any transposition measure has to fulfil.¹⁵⁹

¹⁵⁶ See Commission staff working paper, Executive summary of the Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC (2011) 1555, 14.12.2011, 2.

¹⁵⁷ See Commission staff working paper, Executive summary of the Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC (2011) 1555, 14.12.2011, 2.

¹⁵⁸ On national transposition rules, see <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32015L0637>.

¹⁵⁹ Case C-528/15 *Al Chodor* ECLI:EU:C:2017:213, paras. 43 and 46.



Ad-hoc request: Consular Protection of Unrepresented EU Citizens in Third Countries

New EU actors have been endowed with the competence to contribute to the effective implementation of the EU citizenship right to equal protection abroad, specifically the EEAS and Union delegations. However, their role and allocation of tasks, particularly in cases of crises, have not been clarified. In practice, their potential has clearly not been fully realised.¹⁶⁰

In light of the increasing frequency and size of disasters¹⁶¹ and transboundary threats, as well as the budgetary pressures facing national foreign affairs ministries,¹⁶² the demands on the EU's disaster response capacity are likely to increase. An efficient use of resources will thus require that – in addition to the horizontal cooperation between the Member States – said Member States will also need to increase their vertical cooperation with the EU institutions and bodies.

A codification of the above ad-hoc consular practices would have responded to EU citizens' expectations, given their perception of Union delegations as 'natural' points of contact.¹⁶³

The COVID-19 pandemic has also demonstrated the importance of consular protection of unrepresented EU citizens in the EU, as not all the Member States are represented in each of the EU's countries. This could be an option for exploration under either Article 25 TFEU or Article 352 TFEU to ensure the objective of protecting EU citizens enshrined in Article 3(5) TEU.

¹⁶⁰ See the Draft Opinion for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council directive on consular protection for citizens of the Union abroad, PE 487.728v01-00, rapporteur: Tadeusz Zwiefka, 26 April 2012.

¹⁶¹ See the Report from the Commission to the European Parliament and the Council, 'Annual Report on the European Union's Humanitarian Aid and Civil Protection Policies and their Implementation in 2013', COM/2014/0537 final.

¹⁶² The recorded annual number of disasters worldwide has increased fivefold from 78 in 1975 to nearly 400 today. For more empirical evidence on the increasing numbers of disasters and threats, see the Communication from the European Commission to the European Parliament and the Council, *Towards a stronger European disaster response: The role of civil protection and humanitarian assistance*, COM(2010) 600 final, 26 October 2010.

¹⁶³ See 2011 Impact Assessment, cited *supra* note 3, 28. A similar situation also existed before the entry into force of the Lisbon Treaty. According to the declaration of F. Frattini, Director of the DG Justice in 2007, 17 percent of Union citizens interviewed believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels, 29 May 2007.



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