

19 PROTECTION OF EUROPEAN CITIZENS IN THIRD STATES UNDER ARTICLE 23 TFEU

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Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.

(Art. 23, Treaty on the Functioning of the European Union, ex Art. 20 EC Treaty)

19.1 INTRODUCTION

The European Union has been aspiring to further strengthen the protection of its citizens for a long time, which is one of the most important elements of the category of EU citizenship introduced by the Treaty of Maastricht.¹

The aim of European citizenship according to the settled case law of the European Court of Justice is

to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.²

Under the Treaty on the Functioning of the European Union, EU citizenship entails among others the following rights for the citizens of member states:

- The right to free movement and residence,
- The right to vote and stand for election in municipal elections and the elections of the European Parliament,

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1 In accordance with the category of EU citizenship, citizens of all member states can be considered European citizens as well.

2 Judgment of 20 September 2001 in Case 184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (Grzelczyk)* [2001] I-6242, para. 31.

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- The right to petition the European Parliament and the right to apply to the European Ombudsman,
- The right to protection by the diplomatic and consular authorities of any member state.

This latter right means that all EU citizens in the territory of third countries where the member state, whose nationality the citizen holds, does not have representation, are entitled to protection by any member state under the same conditions as a national of said state. Article 46 of the Charter of Fundamental Rights of the EU contains a similar provision as well. This Union right embodies the outer dimension of the category of EU citizenship, and because it can be found among the provisions related to the democratic principles in the Treaty on European Union, indeed, it is considered one of the key measures strengthening EU solidarity and identity.

According to the provisions, *the lack of* national protection entitles the citizen to protection afforded by another member state. Protection is *lacking* in case in a given country, the state of which the victim is a national, or a state that represents it permanently, does not have either an accessible permanent representation (embassy, consulate) or an accessible honorary consul who is competent in granting protection.³ According to the Proposal of the Commission of 2011,⁴ a European citizen is considered unrepresented if the embassy or consulate of his/her member state is not ‘accessible’. An embassy or consulate is not ‘accessible’ if the European citizen cannot reach it and return to his/her place of departure on the same day (by means of transport normally used in the third state).⁵

This protection shall be provided ‘under the same conditions’ as to the nationals of that given state. This is in accordance with the principle of equal treatment and the prohibition of discrimination on the grounds of nationality laid down in Article 18 of the Treaty on the Functioning of the European Union (hereinafter the ‘TFEU’). However, providing protection under the same conditions does not mean that the same protection shall be provided to European citizens, thus it does not mean the uniformity of protection either. Protection provided to own citizens means different regulations and practices in each member state,⁶ even though the Commission aimed at the creation of a unified form of protection.

However, for a long time it was not even clear what the nature of these rights and the content of this protection provided for European citizens under this provision exactly is. There were member states who saw the establishment of the right to diplomatic protection in it, while others limited the scope of the provision to consular protection. Nonetheless,

3 <<http://ec.europa.eu/consularprotection/index.action>> (last accessed 30 September 2011).

4 Final Proposal for a Council directive of 14 December 2011, COM/2011/0881 on consular protection for citizens of the Union abroad. (14.12.2011). 2011/0432 (CNS).

5 There is however no agreement about when an embassy or consulate is accessible.

6 Only a few member states recognize the possibility of legal remedy in the case of refusal to provide protection.

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even though the treaty provision itself does not specify this precisely, in light of the rules of enforcement developed in relation to the provision since, as well as the current Commission guidelines,⁷ it appears to be common ground that the provision contains the right to consular protection.

This seems to be the most suitable solution for the protection EU citizens, for if the legal status of European citizenship remains unchanged, under the present rules of international law and the rules of containment, providing protection to the citizens of other states is only possible within the framework of consular protection.⁸

This somewhat neglected and rather inefficient right, has become more and more prominent in the recent years and it is a definite plan of the Commission to give concrete flesh and ensure the enforceability of the provision. In light of this aim, the Commission prepares a report on the application of Article 23 of the TFEU every three years and documents the development and the needs of this field through other means as well.

The development of this area was added to the objectives of the Stockholm Programme, launched in 2010, supported among others by the European Council. The aim is to consider appropriate measures establishing coordination and cooperation necessary to facilitate consular protection in accordance with Article 23 TFEU.⁹

The natural disasters and crisis situations of the past years¹⁰ evidenced the need for consular protection regulated on the EU level.¹¹ At present, there are only three countries in which all of the member states have representation: the People's Republic of China, the Russian Federation and the United States of America, and out of 167 third countries, there are 107 countries where a maximum of 10 member states have representation.¹²

19.2 THE PROTECTION OF EUROPEAN CITIZENS PRIOR TO THE LISBON TREATY

Prior to the Lisbon Treaty, the documents that were adopted concerning the protection of European citizens were essentially not mandatory, their aim was mostly to facilitate

7 COM/2011/149, OJ C/2011/140/16, Communication from the Commission to the European Parliament and the Council: Consular protection for EU citizens in third countries: State of play and way forward. Brussels, 23.3.2011.

8 1963 Vienna Convention on Consular Relations, 596 UNTS 261, Art. 8.

9 European Council document, 17024/09, OJ 2010/C 115/01, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009.

10 More than 100,000 EU citizens were present at the location of the crises in this period.

11 In 2011 in Japan, Germany evacuated 18 non-German citizens from Sendai, from Libya, 8 EU consulates evacuated almost 5,000 EU citizens, Hungary for example evacuated 29 Romanian, 27 Hungarian, 20 Bulgarian, 8 German and 6 Czech citizens from Tripoli by airplane.

12 The Council document of 12 December 2005 on the representation of the EU presidency outside the EU, which has not been published. The document also shows that the member states have limited diplomatic and consular representation in Central America, the Caribbean, Central and East Africa.

coordination, beginning with the Decision of the Representatives of the Governments of the member states meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (95/553/EC).¹³ The wording of the decision of the Council is clear. It wishes to extend the right to protection by diplomatic and consular representations to all European citizens with reference to Article 20 of the EC Treaty (now Art. 23 of TFEU) in the case of European citizens who have no permanent representation or competent honorary consul of their nationality in the given third country.¹⁴ The decision of the Council first states the cases the protection laid down in the treaty applies to, such as:

- assistance in cases of arrest or detention;
- assistance in cases of serious accident or serious illness;
- assistance to victims of violent crime;
- assistance in cases of death;
- the relief for distressed EU citizens, or
- the repatriation of distressed citizens of the Union.¹⁵

Therefore, the 1995 decision definitely meant a step forward in determining the contents of the protection of European citizens, even though further specification of the latter was still dependent on subsequent legislation. However, the decision failed to set up a legal framework providing for a unified system of assistance and support to European citizens.

The subsequent 96/409/CSFP decision¹⁶ lays down the establishment of a temporary travel document issued in countries where a citizen's member state of origin does not have permanent diplomatic or consular representation. The aim of this decision is for the unified temporary travel document to provide genuine assistance to the citizens of the Union who are in distress, confident that the establishment of such a document will provide a clear demonstration of the practical benefits of being a citizen of the European Union.

For the enforcement of both decisions it was necessary that all member states incorporated the essential elements of these decisions into their own legal systems. This process however came to a halt mainly due to the different attitudes of the member states. In 1997, the European Parliament even noted critically that "the right to consular and diplomatic protection is still at a theoretical stage."¹⁷

13 Decision 95/553/EC of 28 December 1995, OJ L 314, of the Representatives of the Governments of the Member States meeting within the Council.

14 Decision 95/553/EC, OJ L 314, Art. 1.

15 Decision 95/553/EC, OJ L 314, Art. 5.

16 Decision 96/409/CSFP of 6 July 1996, OJ L 168, of the Representatives of the Governments of the Member States, meeting within the Council on the establishment of an emergency travel document, pp. 4-11.

17 EP Resolution of 20 July 1998, OJ 1998 C 226, on the Second Commission Report on Citizenship of the Union (COM(97) 0230 C4-0291/97), p. 61.

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However, since 2005, in light of the events that occurred at the time,¹⁸ these ‘sleeping’ provisions came to the forefront of attention. The decisions adopted previously were more than ten years old and did not reflect the changes and challenges that had appeared since. The number of member states had also increased significantly, therefore, there was a need to establish a more efficient system to guarantee the right laid down in Article 20 of the EC Treaty (presently Art. 23 of TFEU) to all EU citizens.¹⁹

In light of this, a working group dealing with consular cooperation (hereafter ‘COCON’) was set up under the Council of the European Union, with the aim of – among others – organizing the exchange of information about national best practices. The working group developed more documents to reinforce this aspect of EU citizenship.

This is how the guidelines entitled *Guidelines on consular protection of EU citizens in third countries*²⁰ and *Reinforcing the European Union’s emergency and crisis response capacities*²¹ were created. These non-binding guidelines put the emphasis on the exchange of information between member states with the goal of achieving a close cooperation including the delegations of the Commission.

The guidelines on consular protection concentrate primarily on areas concerning the cooperation of the consular representations of the member states. The guidelines thus make recommendations for the creation of a cooperation plan to be used in case of crisis situations, addressing the responsibilities shared during the course of cooperation and foreseeing the distribution of different tasks between the consular representations functioning in third countries. The creation of these recommendations, regular discussions and meetings serve the purpose of rendering the protection of European citizens more effective and well coordinated in third countries, eliminating the disadvantages stemming from the different practices of particular member states.²² The other,²³ also non-binding Council document deals with the technical side of the same goals with the need to strengthen crisis-management capabilities. This recommendation not only emphasizes the necessity of cooperation and information exchange between the member states as well as those developed by the institutions of the Community (now: European Union), but also pays special attention to the cooperation with other international organizations.²⁴

18 The 2005 tsunami in South-East Asia, 2006 Lebanon crisis. The recent crises affected a number of EU citizens, for example after the 2011 spring democratic uprisings in Libya, Egypt and Bahrein, or after the 2011 March earthquake in Japan.

19 Taking into account the new member states as well, all member states are represented in only three countries, in China, Russia and the United States.

20 Council document 10109/06 of 16 June 2006 revised by Council document 15613/10 of 5. November 2010 – not published.

21 Council document 10551/06 of 15 June 2006.

22 Council document 10109/06 of 16 June 2006.

23 Council document 10551/06 of 15 June 2006.

24 *Ibid.*

In May 2006, Michel Barnier, the former French Minister of Foreign Affairs and Commissioner published a report with the title *For a European Civil Protection Force: Europe Aid*, in which he defined the tasks of the European Union concerning the protection of EU citizens. The Barnier report, besides containing suggestions aimed primarily at the proper treatment of crisis situations, also touched upon the units that should be set up and the steps that must be taken in humanitarian and other crisis situations. In this regard it also clearly delimited the further tasks of Community legislation. Thus, it also explored the possibilities of consular assistance, emphasizing the necessity of further strengthening this institution on the Community level. According to Barnier's point of view, the European Union should develop its capabilities primarily in regions outside of the EU.²⁵

In the same year the Commission's Green Paper was published entitled the *Diplomatic and Consular Protection of Union Citizens in Third Countries*.²⁶

The Green Paper dealt separately with the protection of the diaspora of Union citizens in third countries,²⁷ in relation to which it mentioned the possibility of concluding treaties with third states. It suggests solving the problem of the protection of non-EU citizen family members of Union citizens through the extension of personal scope of consular protection to include them as well.²⁸

It also mentioned the necessary consent of third states as further problem to be solved, after both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention laid down the general principle of international law according to which the protection of a national by another state implies the consent of the third state.²⁹ Article 20 of the EC Treaty (now Art. 23 TFEU) already required the commencement of international negotiations for obtaining such consent, however, the Green Paper contains further alternatives. Therefore, consideration must be given to proposing so-called mixed agreements instead of classical bilateral agreements, since in this case both the Community and the member states could participate in settling the question of consent as signatories.³⁰ This would also carry the possibility of inserting a clause of approval with a permanent content into such treaties.³¹ With this clause, third states could consent to any member state providing protection to Union citizens.³²

25 M. Barnier, *For a European Civil Protection Force: Europe Aid*, 2006, p. 7.

26 European Commission Green Paper of 28 November 2006, COM(2006) 712 final – OJ C 30, on diplomatic and consular protection of Union citizens in third countries (hereinafter the 'Green Paper').

27 *Ibid.*, point 3.1.

28 *Ibid.*, point 3.2.

29 Art. 45 para. c), and Art. 46 of the 1961 Vienna Convention on Diplomatic Relations 500 UNTS 95, and Art. 8 of the 1963 Vienna Convention on Consular Relations, 596 UNTS 261.

30 Summary Report of Public Hearing of 29 May 2007 <www.careproject.eu/database/upload/EUpublichearing/EUpublichearing_en_Text.pdf>.

31 This solution is referred to as a 'consent clause' in the Green Paper on the subject.

32 Green Paper, point 5.

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The European Commission launched a broad debate³³ concerning the recommendations articulated in the Green Paper, since besides the issues already settled, some questions still remained open in following areas:

- The question of informing Union citizens about their right to diplomatic and consular protection,
- The content of the protection of Union citizens,
- Concepts about the possibilities of consular cooperation, the compatibility of the practice of member states,
- The consent of the authorities of third states.³⁴

All participants agreed that there is a need for more progress in the area of informing citizens, however, different views emerged concerning the extent of protection.³⁵ All states tried to make it clear that the content of protection should be clarified in order to include for example, that protection should be available on request from diplomatic and consular representations,³⁶ and that Honorary Consuls should also be able to properly represent EU citizens abroad.³⁷ Moreover, the representatives of states considered it important to discuss the question that in case the Union concept supports the extension of EU protection to family members as well, how can the scope of entitled family members be defined?

As a result of this dialogue, a so-called Action Plan 2007-2009 was drafted on 5 December 2007,³⁸ which summarized the positions of the member states and sought to outline the scope of necessary measures in connection with this issue.³⁹ It discussed further possibilities which could facilitate the application of the right, and it also stated that for the proper protection of Union citizens, the Community and national measures must be in conformity with each other, the realization of which had been so far hindered by the lack of national measures.

33 The European Commission held a hearing on 29 May 2007 concerning the Green Paper.

34 Summary Report of Public Hearing of 29 May 2007 <www.careproject.eu/database/upload/EUpUBLICHEARING/EUpUBLICHEARING_en_Text.pdf>.

35 The opinion of Germany has to be highlighted separately, who deems necessary the consideration of international legal norms, such as the Vienna Conventions on diplomatic and consular relations. In this question, the attitude of Great Britain can also be considered relevant, where the citizen is not even entitled to consular protection and in most cases it is only possible to make steps that were created through practice, in the absence of a satisfactory legal framework.

36 <http://ec.europa.eu/justice_home/news/consulting_public/consular_protection/contributions/contribution_ireland_en.pdf>.

37 Report on the Green Paper: Diplomatic and consular protection of Union citizens in third countries – European Parliament Report – 22/11/2007. *See also*, Danish reaction to Commission Green Paper on Consular Protection, Estonia's position.

38 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Effective consular protection in third countries: the contribution of the European Union – Action Plan 2007-2009, COM(2007) 767 final.

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Therefore, summarizing the legal and political steps prior to the Lisbon Treaty, it can be stated that the effectiveness of the measure was clearly reduced, since there were relatively incomplete and inaccurate measures in place concerning such protection, which made it impossible to define the clear contents of protection or to regard it a right which can actually be enforced. It was also problematic that in the legal field in question the measures and regulations of member states are quite different and so far was only the subject of intergovernmental cooperation. Nevertheless, the fact that the documents prior to the Lisbon Treaty did not have a binding effect did not mean that no guidance was not provided to the member states concerning the direction they should develop this area or the type of cooperation needed.

This is definitely necessary in certain fields since it jeopardizes legal certainty in case EU citizens *are not properly informed* about the contents of this right. The general information that can be found on the website of the Council, and the aspiration to put Article 23 TFEU in the passports of more and more EU citizens seems useful, however, it is not sufficient, especially since in this case we are talking about a fundamental right of Union citizens.

The *lack of common European norms* also causes problems since in the present situation the norms providing protection to EU citizens differ from member state to member state. In certain cases its *operation is intransparent*, since it is not clear to which state's consular representation one can turn in an emerging crisis situation in a third state. Finally, the settlement of the *financial implications* of the measures is also pending. EU citizens in third states most frequently ask for assistance in situations in which they lose their money, their documents and need full financial assistance.⁴⁰

19.3 THE NEW LEGAL SYSTEM

The Lisbon Treaty coming into force on 1 December 2009 brought changes in the field of the protection of EU citizens as well. It strengthened and clarified the efforts pertaining to the area. One of the most significant changes of the Lisbon Treaty is the rejection of the system of intergovernmental legislation and authorizing instead the Commission to propose legislation, as a result, the EU institution now has competence to propose directives in this field. In accordance with the provisions amended “the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.”⁴¹

39 This Action Plan is none other than the non-exhaustive schedule of the measures planned to be proposed by the Commission between 2007-2009.

40 Without defining the basis of financial solidarity, the consular representatives of member states hesitate to provide financial assistance.

41 Art. 23 para. 2 TFEU. Therefore after the entry into force of the Lisbon Treaty the right becomes relevant not only on the level of primary sources of law, but also on the level of secondary sources of law as well.

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The aim was to establish an individual right of legal relevance, which will no longer only exist as a declaration of political nature.

In order to determine the real content and enforceability of the right, our starting point is the locus of the provision in the treaty.

The Treaty on the Functioning of the European Union places it among the rights related to EU citizenship, supporting the interpretation of the provision as a *right* that all EU citizens are entitled to. This view is confirmed by Article 46 of the Charter of Fundamental Rights of the EU,⁴² which defines the protection of EU citizens as an individual fundamental right. Examining further the place of the provision we can also determine that the protection of EU citizens is a provision placed within the framework of the prohibition of discrimination. Providing protection to EU citizens can definitely be considered a situation coming under the prohibition of discrimination, thus it is a provision aimed at the elimination of discrimination based on citizenship. The wording of Article 23 confirms this, according to which a citizen is entitled to protection ‘under the same conditions’ as the nationals of the given member state.⁴³

Nevertheless, since the entry into force of the Lisbon Treaty the enforceable individual right nature of the provision was strengthened, since the second paragraph of Article 23 TFEU (as opposed to the previous provisions) authorizes the Council to adopt directives facilitating the provision of protection. This clearly entails the harmonization of protection, ensuring the possibility for EU citizens to not only receive some type of protection from the member states’ representations, but that this protection will be unified regardless of which member state or EU delegation they turn to.

Thus, in line with the current regulation, protection can be requested if the EU citizen is faced with difficulties in a non-EU state, his or her own member state does not have representation in said location. The citizen is then entitled to a type of protection similar to consular assistance, which is provided by the representation of another member state under the same conditions as it would be to its own citizens. We have to admit that this restricts the right to protection to a much tighter scope, rather than to determine that a member state, contrary to its interests and ignoring its opinion, has to provide this right to citizens. It is solely a complementary possibility in the case of the member state not represented in the offending third state, moreover, the right to be created in this form is not enforceable in case of violations occurring in one of the member states of the European Union. Therefore, the citizen cannot obtain an unrestricted right for protection against neither the EU, nor one of the member states. In addition, the provision merely ensures EU citizens to be

42 Any EU citizen is entitled to request the protection of a diplomatic or consular authority of any member state in the territory of a third state, where the member state of their nationality does not have representation, under the same conditions as the citizens of the member state in question.

43 It is questionable whether the requirement of equal treatment is realized if the content of the protection of an EU citizen depends on which member states he/she turns to?

granted assistance from foreign representations with the same conditions as their own nationals. Therefore, Article 23 does not state that it provides a right, only that it provides a right to the same protection that the foreign representation's own nationals have. As a result, the EU citizen does not become entitled to the protection that would be provided by his or her own state.

Basically, EU law does not create a new right in the practice of the member states, since we are talking about affording an already existing right to the nationals of other member states, which is more or less provided for the own nationals, therefore, existing practice can be modified. Moreover, a tendency can be discovered in the previous practice of the member states, according to which they provided protection to the nationals of other states under certain conditions,⁴⁴ and occasionally in crisis situations in which EU citizens were affected. However, some problems arise here, as international law imposes conditions for such a 'modification'. According to Article 8 of the 1963 Vienna Convention on Consular Relations, if a state wishes to provide consular protection to a non-national, the third state must first consent to this. Obtaining this consent may be essential for member states, since without it the proper protection of EU citizens in conformity with the treaty may not be guaranteed, and with reference to this, the member state may refuse to provide protection to the citizen of another member state.

On the other hand, the question arises: what happens if the member state does not even provide consular protection to its own nationals in a situation in which the EU citizen finds himself/herself, or consular assistance is not granted as a subjective right to its own citizens? Can it refuse to comply with Article 23 with reference to this? How can the category of EU citizenship be regarded a uniform concept at all, if the content of one of the related rights depends largely on the member state guaranteeing such right?

This is where we have to once more mention the second paragraph of Article 23, which makes it possible for the Council to adopt directives facilitating cooperation, definitely seeking to eliminate these problems by establishing a more unified practice. Its goal is to regulate in what cases and under what conditions an EU citizen is entitled to what type of assistance.⁴⁵ Not fulfilling these regulations already raises the question of the responsibility of the member state, and strengthens the possibility of enforcing the right. This is because the Commission may initiate an infringement procedure against the member state which does not implement the directives of the Council and does not adopt the provisions which afford protection to the citizens by the foreign representations.⁴⁶ On the other hand, the

44 I. Schiffner, 'Az uniós polgárok konzuli védelmének lehetőségei a tagállamok gyakorlatában' (The possibilities of consular protection of EU citizens in the practice of Member States), II *Forum* 1, 2012, pp. 174-179.

45 Document of the Council of 9 June 2010, Common Practices in Consular Assistance and Crisis Coordination. 10698/10.

46 The question arises: is the state obliged to provide the same assistance to its citizen that it is obliged to provide to EU citizens in the absence of a regulation?

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appropriate provisions of the member states are in vain if their authorities do not comply with the regulations and do not provide protection, in this case, according to the principle of sincere cooperation (formerly called principle of Community loyalty, Art. 4 para. 3 Treaty on the European Union, hereinafter 'TEU') the responsibility of the member state emerges again, since the member state and its authorities shall make every effort to ensure that EU law is enforced effectively. Moreover, Article 47 of the Charter of Fundamental Rights of the EU guarantees effective judicial protection,⁴⁷ thus, if the organs of the Union, for example the delegations of the EU would be obliged to provide protection to EU citizens in third states in the future, in the event of the breach of such obligation, they would be required to pay compensation on the basis of non-contractual liability.

Therefore, it can be concluded regarding the post-Lisbon Treaty regulation that even if it does not seek uniformity, it seeks to harmonize the field. The task of the member states remains to adopt the necessary rules, however, these are subject to judicial review. EU citizens can still freely decide which member state's protection they wish to request in lack of their own member state's protection. Perhaps this is why it is important: to avoid the so-called forum shopping, an EU citizen can choose, but still gets similar protection, wherever he or she turns.

19.4 POSSIBILITIES AND INSTRUMENTS OF COOPERATION FOR THE PROTECTION OF EU CITIZENS

The cooperation of member states in providing protection, which has already been mentioned in the Barnier report, could be a solution to the lack of unified national regulations. More forms of cooperation have incurred, besides the establishment of special crisis-management delegations, the unification of consular resources and the cooperation of national representations, the delegations of the Commission, and the Presidency of the Council.⁴⁸ The report has already considered the establishment of so-called European consulates in 2006.⁴⁹

Furthermore, there have been earlier attempts at consular cooperation between member states as well. For example, within the framework of the so-called 'Lead State' programme,⁵⁰ with the aim of strengthening consular cooperation and improving the protection of EU citizens in case of a crisis in those third states where only a few member states have representation.⁵¹

⁴⁷ Everyone, whose rights and freedoms provided by EU law are violated, has the right to effective remedy before a court under the conditions stated in this article.

⁴⁸ Barnier, 2006, p. 22.

⁴⁹ *Ibid.*, p. 23.

⁵⁰ According to the *European Union Guidelines on the implementation of the consular Lead State concept* the recommended concept would provide the protection of EU citizens in third states.

⁵¹ Action Plan point 2, p. 4.

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19.4.1 *Lead State Concept*⁵²

According to the conclusion of the meeting of 18 June 2007 of the General Affairs and External Relations Council

in the event of a major consular crisis and without prejudice to the primary responsibility of Member States to protect their nationals, the Lead State will endeavour to ensure that all European Union citizens are assisted and will coordinate between Member States on the ground.⁵³

In a certain third state, one or more member states are appointed as lead states to provide protection in the name of the other member states to those EU citizens who are unrepresented on the ground. In case of evacuation, the lead state would take responsibility concerning the European citizens who are unrepresented on the ground of the crisis, and besides coordinating the evacuation, in certain cases it would also provide consular assistance to the citizens in distress, even by undertaking to pay the necessary costs.⁵⁴

The member states would assume the tasks of being the lead state voluntarily, with the participation and active support of all member states. The other member states would in all cases continue to monitor the situation of their citizens on the ground, sharing with each other intelligence and situation assessments, providing reinforcement and additional resources if necessary.⁵⁵

The member state wishing to assume the task of lead state will notify this through COREU.⁵⁶ This should be brought to the attention of the diplomatic and consular representations in third states, in the framework of a local coordination meeting. If two member states wish to assume the task of lead state,⁵⁷ they should notify this jointly through the COREU. If there is more than one lead state, the states will divide their tasks as appropriate and clearly determine the rules of coordination. If another member state does not object through the COREU within a day deadline, and until the state does not resign through the COREU, the notifying member state shall be declared the lead state in

52 European Council Guidelines on the implementation of the consular Lead State concept 2008/C 317/06, OJ C317, 12 December 2008.

53 *Ibid.*, point 1.

54 During the 2006 Lebanon crisis.

55 European Council Guidelines on the implementation of the consular Lead State concept, 2008, point 2.

56 Correspondance Européenne, the inner mailing system of EU member states, which makes the fast cooperation of the Commission and the member states possible in matters of foreign policy. It is of particularly great significance when making decisions in crisis situations.

57 The General Secretariat of the Council updates the list of those third states, in which one member state assumes the position of lead state, as soon as they are informed of a statement of assuming lead state or resigning from the position. This list is published on the consular website stored on the server of SITCEN and sent regularly to the member states.

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the third state concerned.⁵⁸ In case of a significant consular crisis in a third state, where no member state has been appointed lead state, one or more member states can immediately assume this task, if they inform the other member states through the COREU or other appropriate means. It is the task of the state acting as lead state to take appropriate steps towards the protection of EU citizens, to organize their evacuation and to coordinate rescue operations by establishing certain crisis centres. In doing so it stays in contact with other member states informing them about the situation, the assistance needed and the circumstances of the affected EU citizens.⁵⁹ The recommendation of the Commission of 2011 also states that the lead state can request further assistance from the Community Civil Protection Mechanism of the EU and from the crisis-management structures of the European External Action Service.⁶⁰

The question of solving so-called *crisis situations* stands out from the types of cooperation among the member states. In this case, according to the Commission it is particularly important that the member states and the Union inform each other about the available evacuation capacity. During the evacuation operations, the member states often offer possibilities related to the evacuation – for example seats available on airplanes – for citizens who are unrepresented.⁶¹ The goal of the Commission is to increase coordination and to distribute the burden between member states, for example by setting up an EU group in crisis situations that consists of employees of national consulates, which, if necessary, cooperates with the European External Action Service and the Commission. Concerning the funding of these measures of possibly extraordinary cost, the Commission seeks to simplify the procedure and encourage member states to provide the necessary financial resources.

Since November 2007, the *Civil Protection Mechanism of the European Union* facilitates the consular protection of EU citizens.⁶² In crisis situations, as the operational centre of the mechanism, the Monitoring and Information Centre of the European Commission will make information available necessary for the mobilization of resources and tools and the exchange of information between the participating member states.⁶³

The idea of the establishment of *common offices* and the use of the Commission's delegations for the protection of Union citizens has already been mentioned in the Barrier

58 European Council Guidelines on the implementation of the consular Lead State concept 2008/C 317/06, OJ C317, 12 December 2008, point 5.1

59 Lead State Concept in Consular Crises, Conclusions adopted by COCON, 10715/07, 12.07.2006.

60 Final – Proposal for a Council directive on consular protection for citizens of the Union abroad. COM/2011/0881 2011/0432 (CNS) point 3.3.1.(4), p. 8.

61 COM(2011) 149 final, OJ C/2011/140/16, point 3.3.1.

62 Council Decision of 8 November 2007, OJ L 314, 2007/779/EC, Euratom, establishing a Community Civil Protection Mechanism, pp. 9-19, Art. 2(10).

63 This is what happened during the Libyan crisis as well to support the consular representations in evacuating the EU citizens as soon as possible. For example Hungary provided an airplane for the evacuation of EU citizens, which was financed jointly by the member states through the Mechanism. They also used the consular on-line system for the exchange of information between consular representations during the Libyan conflict.

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report. The plans/reports aiming at the creation of the protection of EU citizens deemed it possible to establish the so-called *European consulates* in the most affected regions, where a large number of EU citizens travel, yet there are less EU representations in the area.⁶⁴

Such common offices would not only mean a beneficial solution for smaller Member States without their own representations, but they would also provide a sort of cost-effective solution for the Member States.⁶⁵

In the system following the changes brought about by the Lisbon Treaty, we can monitor the realization of these ideas as well.

19.4.2 *Common Offices*

The Green Paper prepared by the Commission suggested the establishment of so-called *common offices*.⁶⁶ These common offices would provide the unity of functions in a cost-effective way so that at the embassy of a member state or at the same location as the Commission's delegations, the consular officials would continue to complete their consular tasks under the authority of their own member state.⁶⁷

Common offices, *i.e.* co-location arrangements, of member states and the EU delegation in a given third country could potentially save costs, enhance mutual cooperation of national consular staff and compensate for limited consular presence.⁶⁸

According to the recommendations of the Action Plan, the establishment of common offices and agencies would complete the so-called lead state system. These offices would operate on a permanent basis based on the concept of joint representation and distribute their expenses proportionately.⁶⁹ However, the possibility of the creation of common offices has not been sufficiently clarified yet, not even in light of the provisions and proposals of the Green Paper, since it is not clear on what basis in which cases would these offices provide consular assistance. Would all member states' citizens be provided assistance

64 The Caribbean, the Balkans, the area of the Indian Ocean, Western-Africa.

65 The cooperation of member states in this field is operational on a regional level already, the Joint Franco-German Consular Office, North East England and the possibility of joint representations has also attracted the interest of other member states: Bulgaria and Slovenia.

66 The only presently existing common office operates in the Republic of Moldova, as a joint visa application centre, which is open to all EU citizens.

67 Green Paper, point 4.1.

68 COM(2011) 149 final, OJ C/2011/140/16, point 2.3.2.

69 Action Plan point 5.3. p. 10.

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by these offices, or only the citizens of those member states that do not have representation in the particular third state?⁷⁰

However, the idea of the Action Plan, according to which the protection of EU citizens would be afforded by the delegations of the Commission, is particularly interesting.

Although the Member States have the primary responsibility for ensuring protection to their citizens, the delegations could, where authorised by the Council, exercise protection in matters falling under Community competence in line with the case-law of the Court of First Instance.⁷¹

As the Action Plan sets out, the protection of citizens is primarily the task and responsibility of states, the action for citizens on an international level is a fundamental right under the sovereignty of states.⁷² Nevertheless, the document entitled *Guidelines on consular protection*, which has already been published in 2006, considers the Commission delegation as a unit actively contributing to providing protection, which can contribute to the enforcement of Article 20 TEC (now Art. 23 TFEU) in cooperation with the consular and diplomatic representations of the member states. The establishment of the European External Action Service could mean a solution to this problem.

19.4.3 *The Delegations of the European Union*

The Commission delegations originally provided logistical support⁷³ in relation to consular assistance.⁷⁴

With the entry into force of the Lisbon Treaty, the external representations of the European Commission were incorporated into the European External Action Service (hereinafter 'EEAS') and became the diplomatic representations (Union delegations) of the European Union.⁷⁵ Union law provide a *sui generis* status to the EEAS. The EEAS is independent, at least regarding its administrative budget and its employees,⁷⁶ however, in order to fulfil its tasks it cooperates with the Commission, who has been performing foreign affairs tasks

70 This question is asked by the British position as well in connection with the Green Paper.

71 Since 1 December 2009 it is called the General Court. Action Plan point 5.5.

72 It is questionable if the member states would consent to this type of restriction of their own authority, and if this measure would be acceptable under the presently existing practice of international law in the case of basically an international organization.

73 Council of the European Union, *Guidelines on Consular Protection of EU Citizens in Third Countries*, 15505/10. 26 October 2010, point 4.

74 In January 2009 during the Gaza conflict the EU delegation was able to evacuate around 100 people from the area.

75 There are more than 130 EU delegations in more than 150 states.

76 The European Parliament has supervisory powers in this area.

as well, as well as the General Secretariat of the Council. The staff of the EEAS is made up of three sources: the General Secretariat of the Council, the relevant departments of the Commission, and the staff of the member states.⁷⁷

The representations however were put under the control of the High Representative for Foreign Affairs and Security Policy, and this can also mean that in the future these representations will complete the foreign relations related tasks that have been completed by the state holding the presidency of the European Union up to now.⁷⁸ This makes it possible for them to take over the local functions that have been fulfilled by the EU presidencies so far in the framework of the European Union's local level representation.

The delegations of the EU work under the leadership of the head of delegation, which has the authority to represent the EU in the particular state, exercising thereby the function of 'Ambassador' of the European Union. The head of delegation is accountable to the High Representative and can receive guidelines, instructions from the High Representative and from the EEAS.⁷⁹ In other respects the delegations of the Union can operate within the framework of immunities and privileges provided by the 1961 Vienna Conventions.

The delegations intend to operate in close cooperation with the diplomatic services of the member states.⁸⁰ During this, they have the authority⁸¹ to support the member states upon their request in the conduct of their diplomatic relations and the provision of consular protection to EU citizens in third states.⁸² According to the 2011 report of the High Representative for Foreign Affairs and Security Policy, however, this authority of the delegations is highly debated between the member states; according to Ashton "it is difficult to see how this objective could reasonably be achieved on a resource neutral basis." According to the High Representative, the capacities of the delegations are already limited in this area.⁸³ That is why Ashton finds that the delegations should concentrate on the coordination of the evacuation of EU citizens and on the dissemination of information.⁸⁴

77 Presidency report to the European Council on the European External Action Service, 14930/09, 23 October 2009, point 1.

78 Presidency report to the European Council on the European External Action Service, 14930/09, 23 October 2009, point 31.

79 Draft Council decision of 25 March 2010, establishing the organization and functioning of the European External Action Service, 8029/10, p. 4., Council Decision of 26 July 2010, 2010/427, OJ 2010, L 201/30, establishing the organization and functioning of the European External Action Service, Art. 5.

80 Draft Council decision 8029/10, p. 4, Council Decision of 26 July 2010, 2010/427, OJ 2010, L 201/30, Art. 3.

81 Art. 35 of the Treaty of the European Union states that the diplomatic and consular representations of the member states and the delegations of the European Union contribute to the enforcement of the right to consular protection of EU citizens mentioned in the TFEU.

82 One of the tasks of the delegations of the European Union is also to 'fulfil the needs' of other European institutions, thus to represent the European Council and the European Parliament in their relations with third states and other international organizations. – Council Decision 2010/427, OJ 2010, L 201/30, Art. 5.

83 Report by the High Representative to the European Parliament, the Council and the Commission of 22. December 2011, PROC HR(2011) 018. point 20.

84 *Ibid.*

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19.5 THE STRENGTHENING OF THE CONSULAR PROTECTION OF EU CITIZENS IN LIGHT OF THE NEW REGULATION

The majority of EU citizens are still unaware about their right to request consular protection from other member states in third states.⁸⁵ The European Commission launched a consultation in July 2010 where the participants believed that using the innovations of the Lisbon Treaty, the Commission finally has the possibility to strengthen the enforcement of Article 23 TFEU to make it more effective. Emphasis was primarily put on awareness-raising⁸⁶ and making the protection more effective.⁸⁷ The Commission undertook to examine the legislation and practice of member states concerning consular protection, and to evaluate the extent and nature of their differences.⁸⁸

Concerning the extent of protection, the aim of the Commission is to achieve the legitimation of the protection provided in the territory of third states concentrating on the practical aspects of consular protection, examining the possibilities of a 'clause' placed in international treaties regarding the necessary consent of third states. The Commission encourages the member states to include a consent clause in their future bilateral agreements with third states. Similarly, the Commission plans to include a consent clause in the future 'mixed' agreements between member states, the European Union and third states.⁸⁹

However, the biggest problem impeding the effective protection of EU citizens is certainly the differences in the content of protection granted by member states. The national regulations concerning consular assistance show a significant difference, even though they exhibit common features and best practices as well.

In the following points we summarize where the Commission finds it necessary to develop the current regulation and to unify the consular practices of member states.⁹⁰

1. The family members of EU citizens are usually excluded from the scope of consular protection. It should be clarified who can be considered a family member on an EU level, and the regulation should be unified in a way that family members would be

85 According to the available data only a few cases have occurred when an EU citizen asked for assistance from another member state, and the relevant statistics have not been gathered in all member states.

86 The Commission already suggested to the member states to indicate the related article of the Treaty about the protection of EU citizens in the national passports, which are issued after 1 July 2009. Austria, Belgium, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovenia, Sweden, Spain and the United Kingdom have already fulfilled this proposal.

87 In its Action Plan of 2007-2009 the Commission suggested further measures, including the organization of an information campaign, which would call attention to the available possibilities with the distribution of information materials. They planned the training of the consular representatives, and the enhancement of their possibility to gather information by organizing seminars where they can discuss the arising problems.

88 The communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Effective consular protection in third countries: the contribution of the European Union; Action Plan 2007-2009, point 5.2.1.

89 Action Plan point 5.5.

90 Commission Work Programme for 2011 (COM 2010 623).

entitled to protection in a crisis situation the same way as EU citizens. In the current situation refugees, stateless persons and non-EU family members are not included in the personal scope, nevertheless, the general approach is that in a crisis situation, member states do provide assistance to non-EU family members.

2. It needs to be clarified which member state has to help the EU citizen who is unrepresented, and how it will cooperate with the given citizen's own member state. Another issue is what exactly the EU citizen can expect in the absence of common EU norms.
3. The practice of states is different with respect to the financial implications of consular assistance as well. According to the current practice, the assisting state must first obtain authorization from the own state of the EU citizen, which state then has to reimburse the costs of the assisting state, even if by asking the citizen to reimburse the costs. The member states only shoulder smaller costs, and only as a last resort. According to the intentions of the Commission, the reimbursement of the expenses must be made within 12 months in a crisis situation.
4. The question of the consent of the third state regarding the consular protection of citizens of another state. The Commission encourages the member states to include a so-called clause of consent in their future bilateral agreements, which states that the third state agrees that the foreign representation of a member state can provide assistance to a citizen of another EU member state under the same conditions as it would to her own citizens.

In 2011, however, the Commission finished its first proposal, the Proposal for a Council Directive on consular protection for citizens of the Union abroad, which seeks to resolve the questions left open.

The Proposal would provide the third state family members of EU citizens with the same level of protection that the third state family members of the member state's own citizens are provided with.⁹¹ It further reinforces the view that EU citizens can turn to the embassies or consulates of 'any' other member state, by furnishing the member states with authority to conclude 'specific agreements' with each other. Furthermore, the proposal states what kind of assistance the member states can provide based on the common practice of consular protection of member states.⁹² Besides specifying in what type of cases an EU citizen can expect assistance, the directive proposed by the Commission,⁹³ would replace the 1995 decision which requires modification and amending, taking into account the legal framework established by the Lisbon Treaty.

91 Final – Proposal for a Council directive on consular protection for citizens of the Union abroad. COM/2011/0881 2011/0432 (CNS), point 3.3.1.(1), p. 7.

92 *Ibid.*, para. 6, p. 16.

93 The consular protection referred to in para. 1 shall include assistance in the following situations: arrest or detention; being victim of a crime; serious accident or serious illness; death; the assistance of people in distress and their repatriation; the need for temporary travel documents. *in*: Final – Proposal for a Council directive COM/2011/0881 2011/0432 (CNS), Art. 6.

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The Commission addresses the issue of financial burden-sharing as well,⁹⁴ determining that the member states should only provide financial assistance as a last resort.⁹⁵ A cost-reimbursement procedure will be introduced, which will be adjusted to crisis situations.⁹⁶

19.6 THE EVALUATION OF THE PRESENT SITUATION AND CONCLUSIONS

The European Union, due to the innovations brought about by the Lisbon Treaty, attempts to achieve the cooperation of member states in an area that used to belong entirely to the exclusive sovereignty of member states. However, not even the EU consular protection introduced by the Maastricht Treaty could change the fact that in this area, states would undertake the responsibility at most to negotiate with each other, and to create the necessary regulations.

As a result of this the Hungarian government – in accordance with the objectives of the Hungarian EU presidency – amended the Hungarian consular rules.⁹⁷ The amendments establish the legal framework for a closer cooperation between the consular services of member states in several ways. Within this framework, on the last page of the new passports with the label ‘Hungary’ the right defined in Article 23 TFEU is cited and a separate provision⁹⁸ ensures the right to issue the temporary travel document established in the decision of 1996,⁹⁹ *i.e.* the ETD (Emergency Travel Document) for a single journey to the state of origin of the applicant, to his/her country of permanent residence, or in exceptional cases to another destination. The amendment of the consular act tries to facilitate the management of crisis situations affecting European citizens as well by broadening the range of instruments that can be used for prior notification in case of a Hungarian national’s stay abroad.¹⁰⁰

But since the right to protection of EU citizens has become part of EU legislation, the member states should be prepared for the fact that the European Union could ‘force’ them to give up their previously unlimited sovereignty by harmonizing this area as well.

The recent crises in North Africa and Japan were once more proof of what kind of dangers EU citizens can be exposed to. Thus it is important that the member states admit that

94 Final – Proposal for a Council directive, COM/2011/0881 2011/0432 (CNS) paras 10, 17, p. 16.

95 Final – Proposal for a Council directive COM/2011/0881 2011/0432 (CNS) para. 17, p. 16.

96 This entails simplifying the procedural exchange involving consular authorities and citizens, adding standard formats for requests and introducing an easier system for tracking the reimbursement costs (on a pro-rata basis, fixed rates – in case costs cannot be calculated).

97 Act CLXIX of 2012 on Consular Protection.

98 Act XII of 1998 regulating travel abroad, para. 10.

99 Decision of 9 July 1996, 6/409/CSFP, OJ L 168 of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, pp. 4-11.

100 Act XLVI of 2001 on Consular Protection, para. 2/A.

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contrary to previous legal practice they should not, or not only determine the necessary regulations among each other, but make use the assistance of the Union that render the protection afforded more effective.

The Lisbon Treaty empowers the Commission to propose guidelines that establish the cooperation and coordination necessary to promote the consular protection of unrepresented citizens which is equal to the protection of EU citizens.

Meanwhile, the Commission has to bear in mind the objective of the report *Dismantling the obstacles to EU citizens' rights* during the cooperation and coordination with member states.

The Lisbon Treaty confirmed and clarified the right of EU citizens to consular protection. The right of EU citizens to consular protection appears clearly as an individual right in the Lisbon Treaty, which may be subject to judicial review. The Lisbon Treaty also brought a change by rejecting the intergovernmental model used previously in the area, and authorizing the Commission to propose directives concerning the issue, coordinating the area, cooperating with the representatives of the Council and the European Parliament.

Moreover, the newly established European External Action Service can act to frame the protection provided for EU citizens as effective as possible, making it easier for the foreign representations of member states to comply with the obligations, rendering the practice of consular assistance more coherent at the same time.¹⁰¹ Even though the previous experience shows that unified action does not cause a disruption in crisis situations, since the member states with different national regulations were able to coordinate their steps and act effectively,¹⁰² it is important that the form and content of the protection that EU citizens are entitled to is predictable, replacing the practice of the member states of deciding on a case-by-case basis, thus avoiding a possible differentiation between EU citizens. That is why the Commission suggests and aims at the adoption of rules of general scope in the future, which can be the basis of an EU level consular assistance.¹⁰³ The European Court of Justice can contribute to this aim through interpretation and legal development in the same way it did related to other EU citizenship rights.

However, making the protection of EU citizens in third states a truly enforceable right which works well in practice depends on the cooperation of member states. The tools for cooperation are already available, the task in the next period will enable the member states to act in order to protect the citizens of the European Union exactly by making use of these forms of cooperation.

101 The competences of the EEAS and the role of the delegations in consular cases will be reviewed in 2014.

102 During the recent crises (for example Libya, Egypt, Haiti, the Icelandic volcanic ash cloud) consular assistance was provided through telephone conferences and through the EU Joint Situation Centre. It was coordinated through a safe EU website ('on-line consulate') designed to distribute information between the consular authorities of the EU, which proved to be useful in mapping the on-site situation and the available capacities of the member states.

103 According to the judgment of the Council, the common tools and common procedural rules are missing. Council of the European Union, Guidelines on Consular Protection of EU Citizens in Third Countries 26 October 2010, 15505/10, p. 8.