

# Jogelméleti Szemle 2017/2. szám

## TARTALOM

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**Europeanisation of Consular Protection for EU Citizens in Third States\***

The harmonization of Member States' public administration is not the aim of the EU, although, in recent years, there have been several examples which prove that EU legislation in whatever policy inevitably and unavoidably results so.

In 2015, the EU replaced its former decision with a directive to enhance a better coordination of consular assistance in third States as every EU citizen has the right to enjoy the protection of the diplomatic or consular authorities of any Member State on the same conditions as the nationals of that State if in the territory of that third State his/her State of origin is not represented. This provision declared by Article 23 of TFEU not solely requires the cooperation of administrative authorities of Foreign Service but implicitly means a kind of harmonization of substantive law on consular protection which leads to organizational changes and affects administrative procedural rules of Member States.


*I. Consular protection*

People travelling, living or trading beyond the borders of their homeland have always benefitted from a kind of care from their State of origin as the specific link called nationality between the person and the State remains and reciprocally obliges both parties even beyond State borders.<sup>2</sup> This legal relationship is older than the birth of the concept of modern State. Foreign Service is the prolongation of a few administrative functions of the State on the territory of another State. It has two main directions: diplomacy primarily serves the interest of the sending State while promoting friendly relations and consular service is to help and serve the citizens there with the consent of the latter, receiving State. Consular protection is the help, the advice and the possibility to handle official matters of an administrative nature by the consular or diplomatic agents of a State to its citizens who are living or just staying abroad. It has always been a discretionary right of the State to decide upon the subject and the scope and extent of this kind of service.

Consular law consists of principles and norms (of domestic legislation as well as of international law) which regulate the activities of consuls. Every State defines the scope of the functions of its consular representatives in the frames permitted by the legislation of the host State and the bilateral consular treaty between them. As for the service given for nationals, it has two main areas. A part of consular service is a prolongation of domestic administration to ensure citizens abroad to handle a few official matters, for example it allows citizens to get travel documents, or to open procedures while they submit their requests via the consular authority which transmits documents to the competent domestic authority. Although, the status of consular authorities is based on a bilateral treaty, the domestic laws of the sending State regulate these procedures. The other part of consular tasks rather aims to help and protect citizens' interest on the territory of a foreign State, often during procedures of the authorities of the receiving State. In such cases, the scope of procedural rights and

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<sup>2</sup> Aust, Anthony: Handbook of International Law. Cambridge University Press, Cambridge, 2010. p. 42.; Sloane, Robert D.: Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality, pp. 29 - 33. In Harvard International Law Journal, Vol. 50, No. 1, 2009, pp. 1-60.

possibilities of the consul is basically up to the laws of the receiving State and the agreement of the States concerned. As both types of tasks depend on the bilateral agreements of the States involved, this legal area is strictly attached to foreign relations and foreign policy, which is still the core issue for EU Member State sovereignty.

Consular assistance and protection is an area of domestic competence,<sup>3</sup> so is the public administration of Member States. Therefore, it shall be strictly examined what is exactly required by EU law when it ensures the right to get consular protection from any competent authorities of Member States for EU citizens without any form of discrimination.

## *II. Legal aspects of the directive on the coordination and cooperation measures to facilitate consular protection*

### *2.1. Consular protection and EU legislative competences*

The concept of EU citizenship exists since the entry into force of the Maastricht Treaty in 1993.<sup>4</sup> It creates a specific relationship between the EU and the people living therein to strengthen European identity while guarantees, among others, the right to any EU citizen in a non-EU State where his/her own national State has no representation to ask for protection by the diplomatic or consular authorities of any other EU State. The concept is to strengthen the sense of togetherness and the feeling of being a part of one unified European nation on the base of solidarity and loyalty among EU 28 and in the light of non-discrimination and legal equality.<sup>5</sup> As a matter of fact, Member States are all present in only three States: the USA, Russia and China<sup>6</sup> but the need for consular help is increasing in our world of natural disasters and terrorist acts. So, the concept of providing for help for EU citizens where their State of nationality has no available representation has a growing relevance given the fact that there is a tendency of closing foreign services to cut expenses.

Following the Maastricht Treaty, the European Community's decision (95/553/EC) with its six meaningful articles of nine on details of diplomatic and consular protection entered into force in 2002 to ensure the assistance for EU citizens in case of death, serious accident or serious illness, arrest or detention; being victims of violent crime or need for repatriation of distressed citizens of the EU.<sup>7</sup> Enlisting the main field of help reveals that the EU policy solely refers to potential consular protection from consular and diplomatic agents of the Member States and diplomatic protection fall outside the scope of the requirements.<sup>8</sup>

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<sup>3</sup> Consular and Diplomatic Protection. Legal Framework in the EU Member States. CARE (Citizens Consular Assistance Regulation in Europe) 2010. (CARE Final Report)

<http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf> (20.03.2017.) p. 665.; Vermeer-Künzli, Annemarieke: Where the Law Becomes Irrelevant: Consular Assistance and the European Union, p. 971. In *International and Comparative Law Quarterly*, Vol. 60. 2011, pp. 965–995.

<sup>4</sup> Treaty on European Union (Treaty on Maastricht) 7.2.1992, OJ C 191, Art. 8c.; currently Article 23 ex Article 20 TEC, Treaty on the European Community) of Treaty on the Functioning of the European Union (TFEU) 26.10.2012 OJ C 326.

<sup>5</sup> Geyer, Florian: The External Dimension of EU Citizenship. Arguing for Effective Protection of Citizens Abroad. p. 2. In CEPS, No. 136. July 2007, pp. 1-11.

<sup>6</sup> Green Paper: Diplomatic and consular protection of Union citizens in third countries. Brussels, 28.11.2006, COM(2006)712 final. p. 4. point 1.5.; Balfour, Rosa – Raik, Kristi: Equipping the European Union for the 21st century. National diplomacies, the European External Action Service and the making of EU foreign policy. FIIA Report 36. 2013. p. 12.

<sup>7</sup> Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28/12/1995. p. 73. Article 5. 1.

<sup>8</sup> Schiffner, Imola: A diplomáciai védelem gyakorlásának eszközei. pp. 535- 543. In *Acta Universitatis Szegediensis de Attila József Nominatae Sectio Juridica Politica*, Tom. LXXII. Fasc. 18. 2009. pp. 523-544.; Becánics, Adrienn: Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából. pp. 25-26. In

Concerning common tools to make it effective, a decision on the establishment of an emergency travel document (96/409/CFSP) was adopted along with non-binding guidelines on consular protection and the concept of lead State of cooperation.<sup>9</sup> These documents were not recognized as part of the EU legal order, as they were adopted by Member States governments and not by the institutions. However, being *acquis communautaire*, they were to be respected.<sup>10</sup> At that time the field of consular and diplomatic cooperation was purely an inter-governmental area of Community legislation, it could not overcome the diversity of national regulations and foreign policies. Since the Maastricht Treaty, citizens were entitled to receive consular protection but it rather ensured non-discrimination than an individual right for citizens and an obligation for States under all circumstances. Consular protection is, in fact, just the possibility for States recognized by general international law and based on bilateral consular treaties, and not an obligation to fulfil in every circumstance, therefore its regulation varies from State to State, that is why the secondary pillar decision referred only to equal treatment with own citizens in certain situations when help might be needed.

Everything has changed when the Charter of Fundamental Rights of the EU (EU Charter) became a primary source by the Treaty of Lisbon therefore EU citizens' rights to diplomatic and consular protection echoed in Article 46 was reappraised as a fundamental right. Consular protection has become an integral part of the Union's policy on citizens' rights,<sup>11</sup> by the abolition of pillars it was placed under the scope of the EU institutions and the Court of Justice of the EU, and the Council also got the right to regulate related questions in the form of directives adopted in a specific legislative procedure. The concept has also changed: the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, got the power to adopt directives to establish the coordination and cooperation measures necessary to facilitate such protection.<sup>12</sup> Within the provisions of external actions of the EU, the Treaty of Lisbon also ordered the establishment of the *European External Action Service* (EEAS) and as diplomatic mission of the integration, the reinterpreted the *EU delegations* in third countries to act in close cooperation with Member States' diplomatic and consular services.<sup>13</sup>

The question is what is the obligation for Member States as a part of provisions concerning consular protection and cooperation belongs to citizenship policy and fundamental rights and whether there are institutional provisions that relate the topic to *common foreign and security policy* (CFSP) which is still under specific competency rules and decision-making system.<sup>14</sup> The implementation deadline for the new directive (2015/637 EU, hereinafter: Consular Directive) created in this atmosphere is 1<sup>st</sup> May 2018, however, it leaves some open questions which may not be answered by domestic legislations in a uniform manner.

Consular service is an extra territorial branch of State administration heavily related to foreign policy of the State and inter-state relations which is still a sensible area even after Lisbon and it has several impacts on consular assistance. As a matter of fact, EU's legislative competence is only to support, coordinate or supplement the actions of the Member States to improve their

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Karlovitz, János Tibor (ed.). *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*. International Research Institute s.r.o., Komárno, 2015. pp. 25-30.

<sup>9</sup> Krūma, Kristine: *EU Citizenship, Nationality and Migrant Status: an Ongoing Challenge*. Martinus Nijhoff Publishers, The Hague, 2013. p. 170.

<sup>10</sup> CARE Final Report, pp. 24-25.

<sup>11</sup> Proposal for a Council Directive on consular protection for citizens of the Union abroad. COM/2011/0881 final - 2011/0432 (CNS) p. 2. 1.2.

<sup>12</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (Treaty of Lisbon). OJ C 306, 17.12.2000. point 36.

<sup>13</sup> Treaty of Lisbon, point 30) on the new Article 13a; Article 188 Q on delegations.

<sup>14</sup> See Consolidated version of the Treaty on European Union (TEU). OJ C 326, 10.2012. Title V. especially Article 22 and Articles 29-31.

administrative capacity for a better implementation of EU law the legislative acts shall not result any harmonization of the national administrative laws, while for consular protection under the scope of Article 23 TFEU, its competences expand on the adoption of legal acts under special legislative procedure.<sup>15</sup> Meantime, EU law in fact does not aim to harmonise administrative laws of the Member States,<sup>16</sup> effective execution and implementation of EU policy is the responsibility of Member States, so the necessary harmonization in administration issues is a domestic competence. The question is to find the limit between the necessary modification to realize and achieve the common policy on consular protection as a fundamental right and the implicit expansion of EU competences, in that manner to impede the intervention to foreign policy of the State. Indeed, the preamble of the Consular Directive set the limitation of its scope: it does not aim to affect consular relations between Member States and third States and their rights and obligations arising from international customs and agreements.

## *2.2. Member State obligations arising from the directive on consular cooperation and coordination measures*

The Consular Directive obliges Member States and does not limit the scope of authorities: leaves the question open for all types of extra-territorial representations as it depends on the habits and regulations of States to decide upon which organ to authorize to provide consular assistance. Although the text mentions diplomatic and consular protection, the relevant provisions and legal literature is equable that the obligation refers to measures of consular assistance even if it is performed by diplomatic agents in the absence of consuls.<sup>17</sup> Citizens of the EU should be considered to be unrepresented in a third state if their Member State of nationality has no embassy, consulate<sup>18</sup> or honorary consul established there who is able to proceed. The citizen is also unrepresented in such case when his/her State's representation is unable to help for any reason, or it is just unavailable for the citizen for distance or any other reasons or circumstances.<sup>19</sup> The possibility to get consular protection from any available consular authority of Member States is now also equally open for the non-EU citizen family members<sup>20</sup>; however, some restrictions might indicate different treatment as emergency travel

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<sup>15</sup> TFEU Article 2.5.; 6 (g); and 197.

<sup>16</sup> Cf. TFEU Article 197.

<sup>17</sup> Consular functions can be exercised by diplomatic missions in accordance with the provisions of the general international rules of consular and diplomatic relations. Vienna Convention on Diplomatic Relations (VCDR), Vienna, 18 April 1961, 500 UNTS 95, Article 3.2.; Vienna Convention on Consular Relations (VCCR), Vienna, 24 April 1963, 596 UNTS 261. Article 3.; 70. Battini, Stefano: The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection. pp. 177-178. In Chiti, Edoardo – Mattarella, Bernardo Giorgio (eds.), *Global Administrative Law and EU Administrative Law*, Springer-Verlag Berlin Heidelberg 2011. pp. 173-184.

<sup>18</sup> The exercise of consular functions does not always mean that the consular service is established on the territory of the State in question. The sending State may, after notifying the States concerned, entrust a consular post established in a State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned (exercise of consular functions in a third State, VCCR, Article 7.). Another solution to the representation is the agreement with a State who already has a consular service in the State concerned to provide for consular protection for to citizens of both States. Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State (exercise of consular functions on behalf of a third State, VCCR, Article 8).

<sup>19</sup> Council Directive 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC. OJ L 106, 24.4.2015. (Consular Directive) preamble (8); Article 6.

<sup>20</sup> The right to respect for private and family life is acknowledged by Article 7 of the EU Charter and the family reunification principle also serves the private life of citizens. However, the EU family reunification principle has

documents (ETD) can only be issued for EU citizens, but not for non-EU citizen's family members.<sup>21</sup> As for the identification of the citizenship and family ties, the rules are relatively flexible if the persons are unable to produce valid passports or identity cards. Nationality may be proven by any other means, if necessary, including verification with the diplomatic or consular authorities of the Member State of which the applicant claims to be a national.<sup>22</sup> In fact, in case of non-national EU citizens, apart from extreme cases, consular authorities do not proceed *ex officio*, consular protection need to be claimed. However, when the consular authority is aware of the need of consular protection, especially in case of lost travel documents, the family reunification principle<sup>23</sup> may require some positive actions like helping the creation of contact between the family members and its Foreign Ministry, although, on the other hand, it might reveal some difficulties with the foreign relations with the third state.<sup>24</sup> Instead of declaring the right to consular protection and the 'non-discrimination clause' which characterized the previous regime, the Consular Directive shift the emphasis to the coordination and cooperation of consular authorities and does not require to proceed with the case. The intent of the Consular Directive is to guarantee help and protection in Third States by creating an obligation to consular authorities to coordinate their acts and cooperate with each other while fulfilling the required obligation and taking the necessary measures if the consular authority of nationality is not able to do so.<sup>25</sup> So, the Member States are not legally obliged to satisfy all the requests for assistance from EU citizens<sup>26</sup> but it does mean firstly, to help citizens to get the assistance by his/her own national consular authorities and if it is not possible or the authority of nationality is unable to react, secondly, to provide for the necessary consular protection. Indeed, when a Member State receives a request for consular protection from a person who claims to be an unrepresented EU citizen, or is informed of an individual emergency of an unrepresented citizen, it shall consult without delay the Ministry of Foreign Affairs of the Member State of which the person claims to be a national or, where appropriate, the competent embassy or consulate of that Member State, and provide it with all the relevant information at its disposal. This notification includes the information on the identity of the person concerned, on the possible costs of consular protection, and on the existence of any family members to whom consular protection may also need to be provided and helps and facilitates the exchange of information between the citizen concerned and the authorities of the citizen's Member State of nationality. As to prepare for a more comprehensive work, local cooperation meetings shall be held for a regular exchange of information on matters relevant to unrepresented citizens. It is chaired by one of the Member State representatives and it is in close cooperation with the delegation of the EU if there is any.<sup>27</sup> Except in cases of extreme urgency, this consultation shall take place before assistance

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a narrow scope of family members, see: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Directive on family reunification) OJ L 251, 3.10.2003, p. 12. Article 4. However, the more favourable treatment clause also to be applied for the meaning of family member. Consular Directive, Article 16.

<sup>21</sup> Consular Directive, (8); EDT Decision, Annex II. 2. (a).

<sup>22</sup> Consular Directive, Article 8.

<sup>23</sup> Member States are required to adopt measures for family reunification concerning residency cases of third State nationals in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law and in respect of the fundamental rights recognized in Article 8 of the EU Charter. Directive on family reunification, preamble (2).

<sup>24</sup> Cf. VCCR Article 8.

<sup>25</sup> Vermeer-Künzli: i.m. p. 969.

<sup>26</sup> The practice of Member States is various regarding their relationship with consular protection: if it is a duty of the State or a discretionary right to decide upon providing for it. Schiffner, Imola: Az uniós polgárok konzuli védelmének lehetőségei a tagállamok gyakorlatában. p. 180. In Forum: Acta Juridica et Politica, Vol. 2. No. 1. 2012. pp. 169-186.

<sup>27</sup> Consular Directive, Article 12.

is provided.<sup>28</sup> The obligation therefore primarily refers to being available for EU citizens without representation and the notification to their own State to make it possible that they get the requested protection and assistance by their State. This does not require the consul to proceed but rather to exchange information and cooperate during normal times and, above all, during major crises.

The need for an active consular cooperation is not just theory as an estimated 8.7% of EU citizens, or 7 million people, travel outside the EU to states where their Member State is not represented and a further 2 million EU citizens live in such countries.<sup>29</sup> A survey of 2015 states that 7 EU citizens from 10 are aware of the right to turn to the representative of any Member States if his/her State is not represented in a third state.<sup>30</sup>

As for the scope of help, the Consular Directive, in line with the former decision, does not create new functions for representatives of Member States; although it enlists some typical cases which might entail the necessity of consular protection in third states: death, serious accident or serious illness, arrest or detention, falling victim of violent crime, loss or theft of identity documents, and situations requiring repatriation or relief especially in armed conflicts, and in case of natural disasters.<sup>31</sup> The measure taken in such cases is up to the consular law of Member States, which are also free to ensure a wider range of protection but it shall be equally available for national and for non – national EU citizens.<sup>32</sup> With regard to the nature of the help, according to the latest Eurobarometer survey in the topic done in 2006, arrangement to immediately return to home was the most preferred form of assistance the Europeans would like to have in emergency. The Eurobarometer survey published in 2006 showed that one third (33%) of the overall – at that time EU25 – population mentioned this as their first preference.<sup>33</sup> In 2016, the statistics of the EEAS show that the number of non-represented EU citizens requesting consular assistance is limited and the cases are manageable; most requests dealt with the loss of travel documents.<sup>34</sup>

As for travel documents, only the national authorities can replace the damaged, lost or stolen ones, for non-national EU citizens the ETD can be issued upon request which is valid slightly longer than the minimum time needed to complete the journey for which it is issued.<sup>35</sup> It also requires the collaboration of the national authorities as the ETD can only be issued if clearance from the authorities of the person's Member State of origin has been obtained.

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<sup>28</sup> Consular Directive, Article 10.

<sup>29</sup> COM(2009) 263 final p. 5. III.1.2.

<sup>30</sup> Flash Eurobarometer #430. European Union Citizenship. Eurobarometer, 2015. [http://ec.europa.eu/justice/citizen/document/files/2016-flash-eurobarometer-430-citizenship\\_en.pdf](http://ec.europa.eu/justice/citizen/document/files/2016-flash-eurobarometer-430-citizenship_en.pdf) (20.13.2017.) pp. 29-30.; 33. By the way, 75 % of EU citizens were wrong believing that they are entitled to consular protection provided by any Member States' foreign service within the borders of the EU. Flash Eurobarometer #430. pp. 42-46. As for information on the available representations, citizens can use the following website which shall be kept up to date by the Member States. Consular protection for European Union citizens abroad. <http://ec.europa.eu/consularprotection/index.action> (20.13.2017.) or Your consulates and/or embassies. [http://europa.eu/youreurope/citizens/national-contact-points/embassies/index\\_en.htm](http://europa.eu/youreurope/citizens/national-contact-points/embassies/index_en.htm) (20.13.2017.) which directs citizens to the consular website of the chosen State to get information on the State's foreign service.

<sup>31</sup> Consular Directive, Article 9.

<sup>32</sup> Consular Directive, Article 2.

<sup>33</sup> Flash EB Series #188 Consular Protection. DG Justice, Freedom and Security Survey, Eurobarometer, 2006. [http://data.europa.eu/euodp/en/data/dataset/S572\\_188](http://data.europa.eu/euodp/en/data/dataset/S572_188) (20.13.2017.) p. 13. This is the latest survey on the topic.

<sup>34</sup> Consular Cooperation Initiatives - Final report. Presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels. p. 3.

<sup>35</sup> 96/409/CSFP: Decision 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. OJ L 168, 06.07.1996 (ETD) Annex II. 4.

Problems might occur with non-represented non-EU citizen family members. They are not entitled to get an ETD and this makes the return to home impossible for the family as it is obvious that they will not split up. Consular Directive does not directly create obligation for the consular authority proceeding in the case of the citizen to contact the national authorities of the non-citizen's Member State for that purpose. However, the general rules obliging Member State consular authorities to provide consular protection to the same extent and on the same conditions as to the EU citizen<sup>36</sup> can be interpreted that way to reach this conclusion. As for practical guidance to travel home, its form is up to the situation but concerning financial help, rules are clear: it is a final solution and national and non-national consular authority is also obliged to give financial help with the same conditions as to their nationals. Except for crisis, citizen shall sign an undertaking to repay to his or her Member State of nationality the costs incurred. Namely, the costs are directly repaid by the Member State of nationality and then the reimbursement will be the matter of the State and its national under the scope of domestic rules.<sup>37</sup>

### 2.3. Crisis preparedness and its implication on EU consular policy

The Consular Directive makes special references to crisis situations which involves EU organs in the cooperation of consular authorities: the *European External Action Service* and its local *delegations* established under the terms of agreements between the EU and the third State.<sup>38</sup>

EEAS was created to serve the High Representative to ensure more coherent and effective EU external action without any prejudice to the Member States foreign policy.<sup>39</sup> Being part of the EEAS Crisis Response Department, the *Consular Crisis Management Division* currently has two roles: it helps the Presidency to coordinate consular policies across the EU (e.g. travel advice, issuance of consular guidelines), and assists the EU Presidency and/or Lead States to coordinate action in times of crises. *Delegations* are placed under the authority of the High Representative of the EU for Foreign Affairs and Security Policy<sup>40</sup> and support the Member States in facilitating cooperation and in helping them to help unrepresented citizens while consular protection remains a national competence. Delegations do not provide direct assistance to EU citizens, so, the EEAS has contradictory mandates. It is expected to 'coordinate' (policies, institutions, Member States, embassies, ministers, collective action, financial resources), provide leadership, and to develop new ideas and policy entrepreneurship while it does not challenge national foreign policy.<sup>41</sup>

Consular Directive does not define crisis but it is relatively obvious that the notion covers natural and man-made disasters which prevent or make it impossible to apply the normal rules of consular protection while consular protection is needed more than ever.<sup>42</sup> In the event of a

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<sup>36</sup> Consular Directive, Article 5.

<sup>37</sup> Consular Directive, Article 14-15.

<sup>38</sup> Vooren, Bart Van – A. Wessel, Ramses: External representation and the European External Action Service: selected legal challenges. CLEER Working Papers 2012/5. p. 79.

<sup>39</sup> The establishment of an External Action Service “do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.” Treaty of Lisbon, 13. Declaration concerning the common foreign and security policy.

<sup>40</sup> These are situations like Bali bombing in 2002, Indian Ocean tsunami in 2004, and 2006 evacuations from Lebanon or just from the recent past, terrorist attacks in Brussels, when citizens' life and security was threatened. TEU Article 32 al 3., 35. See, Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service. OJ L 201, 3.8.2010 (EEAS Decision) Article 5.

<sup>41</sup> Balfour– Raik 2010: 13.

<sup>42</sup> Tindall, Karen: Governments' Ability to Assist Nationals in Disasters Abroad: What Do We Know about Consular Emergency Management? p. 102. In *Journal of Contingencies and Crisis Management*, Vol. 20 No. 2.



crisis, the EU (EEAS and delegations) and Member States (representation) shall closely cooperate to ensure efficient assistance for unrepresented citizens. Within the framework of local cooperation, they shall prepare contingency plans to follow in such situations. Upon their request, Member States may be supported by existing intervention teams at EU level, including consular experts, from unrepresented Member States. The protagonist of these situations is the (1) Lead State, that is the Member State(s) coordinating and leading the assistance of unrepresented citizens during crises in each third State with the support of (2) the other Member States concerned,<sup>43</sup> the (3) EU delegation and the (4) EEAS headquarters, and the (5) local authorities of the third State in which the crisis happened are also players. Member States shall provide the Lead State or the Member State(s) coordinating assistance with relevant information regarding their unrepresented citizens present in a crisis. Issues of citizenship, in fact, make it challenging to estimate the number of citizens that may need consular protection mainly in States with a strong history of immigration, like Canada, the USA or Australia for instance.<sup>44</sup>

However, the consular authority of the Lead State only joins forces and coordinates measures and may request reimbursement of expenses generated by this mission but not responsible to provide the consular services.<sup>45</sup> The EEAS and its delegations, in fact, cannot replace Member States' consular tasks. The EU has no power to do so as the protection of citizens is too much related to the notion of nationality which is a core competence of Member States. Practical reasons might occur to EEAS to practice consular protection in third States but at this stage of EU integration it is not yet possible and by the way, for acting within that competence, under the general rules of international law, the consent of the Third State would also be needed.<sup>46</sup> EU legislation in fact does oblige the Member States but as being *pacta tertiis* for third States,<sup>47</sup> further negotiations and arrangements are needed for an effective evaluation of Article 23 of TFEU and Article 46 of the EU Charter.

### 3. Challenges for the effective consular protection in third States

Consular services on the territory of a State can be performed only with the previous consent of the State of territory.<sup>48</sup> So, the margin for help of the State of nationality is limited even if it is willing to help its national in case of lack of representation in a Third State or in case it wishes to entrust another State to act on its behalf as this latter also requires the consent of the State of territory. The other side of the problem is cooperation and sharing of information which is the key for the process. As the transfer of demand or case of consular protection to the citizen's national authorities should not result that the unrepresented citizen is deprived of consular protection, the mechanism operates with a wide range of personal data whose protection is also a fundamental right acknowledged by the Charter. There are two types of cooperation form in this context. The (1) classical legal assistance when the consular authority

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2012. pp. 102–114. The executive directive to the Hungarian Act on consular protection (HCA) defines crisis as a situation created by extraordinary and unexceptional circumstances, which affects or may affect a significant number of citizens and requires immediate action of the consular service. Act XLVI of 2001 on consular protection. Hungarian Official Journal, 75/2001 (VII. 3.) (HCA), Article 1/A c.

<sup>43</sup> See, Consular Directive, (23). In details: Council European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) OJ C 317, 12.12.2008 (Lead State Guideline) pp. 6-8.

<sup>44</sup> Tindall: i.m. p. 105.

<sup>45</sup> Lead State Guideline, point 5.4.

<sup>46</sup> VCCR 2. 1. The establishment of consular relations between States takes place by mutual consent. 4. 1. A consular post may be established in the territory of the receiving State only with that State's consent.

<sup>47</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331. Article 34.; cf. VCCR Article 8.; Knapp, László: Az uniós polgárok diplomáciai és konzuli védelméről II. p. 108. In Jog-Állam Politika, 2010/1. pp. 95-120.; Vermeer – Kunzli: i.m. p. 990.

<sup>48</sup> VCCR Article 8.

needs the assistance of another authority i.e. the transmission of information to act within its own competence in a concrete procedure. The (2) cooperation mechanism is, in contrast, a continuous data sharing process without exact prior request as information management process is based on exact EU rules. It should be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy.<sup>49</sup> The Consular Directive does not serve as a general legal background for cooperating mechanism just outline the frames and remains silent on details and calls for further negotiation on the procedural aspects.

Consular authorities act as public authorities on behalf of their sending State and with their acts and decisions they affect the legal position and situation of the individuals. In case of need, the consular authority decides whether consular protection is exercised and which measure shall be taken. Being the fact that the right to consular protection in third States has become a basic right by Article 46 EU Charter, the Member State are also obliged to ensure the review of the decisions of the consular authority.<sup>50</sup> To protect a right created by EU law, judicial remedy shall be available. The European citizen who asks for consular assistance from the authorities of another Member State, and receives a refusal that he/she considers unfair or discriminatory shall have the possibility to appeal to a national judge capable of exercising judicial review of the contested administrative decision.<sup>51</sup> The Hungarian Consular Act (HCA) for example enlists those consular protection functions which requires authority act, and if a consular officer takes a decision of first instance, the Minister of Foreign Affairs is entitled to proceed on appeal, but as for denial of those kind of measure which not explicitly requires authority procedure, as not all the tasks and functions of consular protection are considered as authority procedure, no provision exists.<sup>52</sup>

Besides that, the Consular Directive does not give any guidance on double citizenship, for instance. The citizenship policy of the EU is flexible in favour of the citizens and definitely not following the 'effective citizenship' or 'genuine link theory'.<sup>53</sup> In case of both citizenships of EU States one would think that the forum decides upon the competent consular authority, but according to the case-law of the Court of Justice of the European Union (CJEU) the jurisdiction does not automatically rely on the forum.<sup>54</sup> In such cases which State shall be connected to provide for consular protection? Does the citizen have the right of forum shopping in favour of a more expanded consular assistance if he or she is aware of both States consular protection legislation? What is the obligation of the consular authority? Does the citizen with double nationality choose the competent national authority to alert, is the consular authority obliged to check if a citizen has double nationalities? Who decides upon the collision of competencies? General principles like acting in good faith does not select the road

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<sup>49</sup> ReNEUAL – the Research Network on EU Administrative Law. <http://www.reneual.eu/> (20.03.2017.) (Model Rules) VI-3., Varga, Zs. András: Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról. p. 547. In *Magyar Jog*, 2014/10, 2014, pp. 545–555.

<sup>50</sup> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." EU Charter, Article 47.

<sup>51</sup> Battini: i.m. p. 179.

<sup>52</sup> HCA, Article 19 (7).

<sup>53</sup> "[t]he mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member State, to rely on the prohibition of discrimination on grounds of nationality." Case C-122/96, Saldanha and MTS/Hiross, [1997] ECR, I-5325, paragraph 15.

<sup>54</sup> Gyenei, Laura: Kettős állampolgárság az Európai Unió erőterében, p. 160. In *Kettős állampolgárság az Európai Unió erőterében*. Iustum Aequum Salutare, IX. 2013. 2. pp. 157–168.

to walk and does not give enough rules for delimitation of responsibility of the authorities taking part in different phases of the cooperative mechanism.

The lack of detailed procedural rules is outstanding in case of crisis when the EEAS and its delegation appear as players in the procedure along with the Lead State. State administration is hierarchical; the chief of a consular authority is under the direction of its own State, in particular the Minister of Foreign Affairs. In a crisis when the cooperative mechanism starts its real operation, there are no exact legislative act provisions for handling those situations when the Lead State or the EEAS gives order to Member States consular authorities. In fact, the EEAS decision suggests that EEAS and delegations help Member States and are not superior to their consular agents, but as Member States are required to act in conformity with EU interests, even if foreign policy is still mainly a domestic field, general obligations mean a kind of determination to the margins of activity. What happens if EU organs representing EU interests confront with the Member State's foreign policy? Which is stronger: loyalty and solidarity towards the EU and other Member States or the domestic hierarchical order in the administrative structure and thus the foreign policy of the sending? The Consular Directive declares that it does not concern consular relations between Member States and third countries.<sup>55</sup> But it tacitly does when it obliges Member States to widen the scope of consular authorities' activity to protect any EU citizens and non-EU citizen family members. In fact, EU consular policy obliges only the Member States and not third States. Therefore, an effective protection requires at least a reflection and expansion on personal scope on existing bilateral consular agreements with third States but this is still awaited. It also calls the Member States' embassies or consulates to, wherever deemed necessary, conclude practical arrangements among themselves on sharing responsibilities for providing consular protection to unrepresented citizens. Insofar, since the existence of EU citizenship, no such arrangements have been made. They may conclude arrangements and not obliged to do so. So, again, why is it better than the former inter-governmental regime? Now, involving the EEAS and delegations, the common consular policy might get an extra impetus by implicitly giving a primacy of common interests, but can it be required under the present competency rules? All these problems reveal the necessity of a European regulation of administrative procedural law, mainly in the field of administrative cooperation mechanisms which is even more important in case of a crisis and highlights the fact that the EU is expanding on foreign policy issues where it still lacks the necessary power and competence to reach direct results.

#### *4. Closing remarks or opening for expansion of competences?*

From the viewpoint of rationality and efficiency, there are compelling reasons for transferring at least some of the functions of national diplomacies to the EU, rather than having a numerous representation of Member States in third States. It would make sense to have just one large EU delegation representing the whole Union, centralize the at least some consular services and limit national missions to a minimum where the EU also has delegation. Therefore, spending of unnecessary resources on coordination among authorities could be saved.<sup>56</sup> For that purpose, EEAS should be empowered to be at the centre of an EU system of diplomacy, shaping it and not just being shaped to create a new sense of unity. CFSP rules introduced by the Treaty of Lisbon and the creation of the EEAS are supposed to stimulate an internal logic towards more EU integration and burden-sharing in foreign policy,<sup>57</sup> but the

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<sup>55</sup> Consular Directive, Article 1.

<sup>56</sup> Balfour– Raik 2010: pp. 37-38.

<sup>57</sup> Balfour, Rosa – Raik, Kristi: Learning to dance to the same tune? The European External Action Service and National Diplomacies. European Policy Center, 17 January 2013. [http://epc.eu/documents/uploads/pub\\_3231\\_learning\\_to\\_dance\\_to\\_the\\_same\\_tune.pdf](http://epc.eu/documents/uploads/pub_3231_learning_to_dance_to_the_same_tune.pdf) (20.03.2017.) pp. 1-2.

Treaty of Lisbon also made it clear that the provisions covering the CFSP would not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service and relations with third States.<sup>58</sup> All in all, the expansion of EU competences and the temptation of Europeanisation of legal areas is a question of the future, now the actual challenges face detailed procedural rules of consular authorities' cooperation in order to make it conform to the requirements of good administration.

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<sup>58</sup> Treaty of Lisbon, 14. Declaration concerning the common foreign and security policy.