

RECENT CHANGES AND CHALLENGES OF CONSULAR PROTECTION FOR EUROPEAN UNION CITIZENS IN THIRD COUNTRIES****1. Introduction**

Consular authorities are the external hands of states' public administration. These state organs are established on the territory of another state and perform their duties with the consent of the host state. Consular relations of a state therefore depend on its foreign relations which is basically an expression of sovereignty and personal jurisdiction. The concept of consular assistance and service is in fact a compromise between the territoriality principle and the prerogatives of the states based on the nationality link.

The European Union, by expanding beyond its original economic nature, is developing a coherent area based on the interests of its people. However, the EU is not a state; it lacks that special legal tie which connects states to its nationals. Therefore, the idea of EU citizenship was invented as a unique link between the EU and the citizens holding the nationality of any Member State to reinforce the sense of togetherness along with the equal benefit of certain rights. It includes the availability of help and protection abroad, on the territory of third states if the state of nationality is not available. This concept exists since 1992 but its effectiveness has faced many obstacles which can be traced back to the fact that this aspect of citizenship policy is strongly based on foreign policy and external relations which is still the weakest link for EU and its legislative organs.

The paper aims to highlight the topic of consular protection in the view of its recent developments and challenges along with questions of

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legal application issue. All of them are influenced by legislative competency and fundamental rights impacts which cause procedural challenges with further question of, *inter alia*, non-represented EU citizens' family members' rights.

2. Engagement of consular service and EU citizenship

The concept of caring for citizens who live or travel outside national borders is ancient and generally recognized by international public law. For that purpose, states establish their representations on the territory of other states under the scope of bilateral agreements.¹ Such external state organs, the consular authorities, are maintained as the prolonged hands of state's administrative branch to ensure certain services for their citizens abroad: consular agents can issue travel documents, treat requests for assistance in case of sudden death, illness, or crime, or in extreme cases help to get back home if natural or man-made disasters disturb the staying abroad; consular functions may also refer to medical assistance, evacuation, or repatriation and help to safeguard of interest (Art. 5.d–f of the Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS 261, hereinafter: 'VCCR'). Nowadays, the need for such care is increasing but the capacity of states is running low: there is a tendency for closing foreign representations due to financial causes. As for solution, the international law recognizes the practice of protecting other states' nationals the same way as it is done to own fellows – if the host state agrees so (Art. 7–8 VCCR). The consular protection policy of the EU is based on this idea. Being an international organization, the EU cannot become a party to the Vienna Convention on Consular Relations as it is basically open for signature for states (Art. 74 VCCR). However, all the EU Member States are already parties to it, and it can be considered as a highly accepted treaty practice reflecting customary international law,² therefore not being a party to it does not preclude it as a legal basis for EU consular protection policy in third states. According to

¹ A. Aust, *Handbook of International Law*, Cambridge 2010, p. 42; R. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, HILJ 2009, no. 50, p. 29–33.

² E. Schweighofer, *The Protection of Union Citizens in Third Countries: aspects of international and European law* [in:] S. Faro, M.P. Chiti, E. Schweighofer (ed.), *European Citizenship and Consular Protection*, Napoli 2012, p. 79.

the rules in force, if the state of nationality has no available representation on the territory of a third state where an EU citizen would need service or protection, the citizen can request it from any other Member State's available representation (Art. 23 of the Treaty on the Functioning of the European Union, OJ C 326, 2012, hereinafter: "TFEU"). Article 23(1) TFEU seems to use diplomatic protection and consular protection as synonyms, although they are two completely different legal concepts.³ Considering the content of secondary sources (see below) it is obvious that Art. 23 TFEU refers to consular protection⁴ but it has to be noted that consular function can be practiced by both diplomatic and consular agents (Art. 3 VCCR). Diplomatic protection is still considered an exclusive prerogative of the state of nationality which does not have any duty to exercise such protection vis-à-vis its nationals.⁵

This concept of consular protection is inherent to EU citizenship which exists since the Maastricht Treaty to strengthen the feeling of being a one big European nation while creating "*an ever closer union among the peoples of Europe*" (preamble of the Treaty on European Union, OJ C 191, 1992, hereinafter: 'Maastricht Treaty') where the basics rights including the availability of consular assistance, are guaranteed to everyone. The Maastricht Treaty intended a radical change in strengthening the protection of rights and interests of the nationals of its Member States. Previously, citizenship concept had been reserved for nation states, and as the EU is not a state, it is a supranational entity, in comparison with citizenship of a state, citizenship of the Union is characterised by rights and duties and involvement in

³ P. Vigni, *The Protection of EU Citizens: The Perspective of International Law* [in:] J. Larik, M. Moraru (ed.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, Florence 2011, p. 100.

⁴ S. Battini, *The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection* [in:] E. Chiti, B. Mattarella (ed.), *Global Administrative Law and EU Administrative Law*, Berlin 2011, p. 177–178; I. Schiffner, *A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái*, AUS 2009, no. 72, p. 535–543; A. Becánics, *Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából* [in:] J.T. Karlovitz (ed.), *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*, <http://www.irisro.org/tarstud2015aprilis/index.html>, 18.06.2017, p. 25–26.

⁵ Vigni, 2010, p. 17. There are steps toward diplomatic protection exercised by the EU (*cf.* Vigni, 2010, p. 26; *Odigitria AAE v. Council of the European Union and Commission of the European Communities*, Judgment of 28 November 1996, Case 293/95, ECR II-02025, point 43–45.

political life to strengthen the ties between citizens and Europe by promoting the development of a European public opinion and European political identity (Art. B of the Maastricht Treaty). The difference between nationality and citizenship, attributing to the latter concept a sense of belonging to a community larger than that of the state, with a different political power and characterising the former as the legal status resulting from the connection between the individual and the state,⁶ EU citizenship supplements national citizenship without replacing it and leaves national citizenship intact; it rather guaranteed further rights to the citizen under the remit of the EU.

EU citizenship is a legal concept that depends on the existence of citizenship of a Member State and does not require any procedure for its recognition. EU citizenship is an *ipso iure* status of citizens of any Member States and derivative of the nationality of Member States. The issues of whether an individual is a national of any given Member State is decided exclusively by the national law of the state concerned (Art. 20 TFEU),⁷ so the jurisprudence of the CJEU, mainly in the *Rottmann* and *Zambrano* cases, is approaching to a sort of harmonisation to avoid the negative effects of the variety of these legislations.⁸ The competence to do so derives from the protection of the fundamental rights and rule of law which are general principles of EU law along with norms concerning non-discrimination and administrative procedural safeguards.⁹ Summing up, since the *Grzelczyk* case in 2001, the CJEU has repeatedly asserted that citizenship of the EU is destined to be a *fundamental status* of nationals of

⁶ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on joined cases *Rhiannon Morgan v. Bezirksregierung Köln* and *Iris Bucher v. Landrat des Kreises Düren* Judgment of 20 March 2007, Cases 11/06 and 12/06, ECR I-9183, footnote no. 53.

⁷ *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, Judgment of 7 July 1992, Case 369/90, ECR I-4239, point 10; *Belgian State v. Fatma Mesbah*, Judgment of 11 November 1999, Case 179/98, ECR I-7955, point 29; *Kunqian Catherine Zhu and Man Lanette Chen v. Secretary of State for the Home Department*, Judgment of 19 October 2004, Case 200/02, ECR I-9925, point 37; *Rottmann v. Bayern*, Judgment of 2 March 2010, Case 135/08, ECR I-146, point 39.

⁸ Cf. *Rottmann v. Bayern*, point 41; *Gerardo Ruiz Zambrano v. Office national de l'emploi*, Judgment of 8 March 2011, Case 34/09, ECR I-1177, point 42; L. Gyenci, *Unió polgárság: a piacorientált szemléletől való elszakadás göröngyös útja, A Rottmann-, a Zambrano-, a McCarthy- és a Dereci-Ügyek Analízise*, 2012, p. 142–144

⁹ R. Bauböck, V. Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, GILJ 2015, no. 30, p. 90–92.

Member States¹⁰ who are entitled to enjoy certain specific rights (Art. 21 TFEU) including the right, in the territory of a third country in which his/her country is not represented, to protection by the diplomatic or consular authorities of another Member State, on the same conditions as the nationals of the given state (Art. 21 TFEU). Due to the fundamental status of EU citizenship and its specific inherent rights, consular protection is now an integral part of the EU policy on citizen's rights that obliges Member States and their authorities while performing their tasks.

Meantime, consular protection and assistance has also been a service of domestic competence¹¹ as it is based on the special link between the state and its citizens called nationality. It breaks the classical principle of territorial notion of jurisdiction that each state exercise over the population residing within its own borders in favour of a narrow scope of personal jurisdiction that follows nationals beyond borders.¹² The possibility to maintain the states' services abroad to serve nationals, the establishment of consular authorities and the performance of consular service on the territory of another state depend on the consent, therefore the consular protection policy of states is based on its external relation. However, foreign policy of the EU is still a delicate issue and falls under specific legislative order, therefore the EU's consular policy is limited to the competences conferred upon by its Member States.¹³ On one hand, the foreign policy

¹⁰ *Grzelezyk v. CPAS*, Judgment of 20 September 2001, Case 184/99, ECR I-6193, point 31; *Baumbast and R v. Secretary of State for the Home Department*, Judgment of 17 September 2002, Case 413/99, ECR I-7091, point 82; *Rottmann v. Bayern*, point 43; J. Shaw, *The Treaty of Lisbon and Citizenship, European Policy Brief*, http://fedtrust.co.uk/wp-content/uploads/2014/12/PolicyBrief_Citizenship.pdf, 18.06.2017; I. Vörös, *Néhány gondolat az uniós polgárság intézményéről*, "Jogelméleti Szemle" 2012, no. 2, <http://jesz.ajk.elte.hu/voros50.pdf>, 18.06.2017, p. 283; A. Mohay, M. Davor, *Az uniós polgárság jogi természetét nemzetközi jogi és uniós jogi megközelítésben* [in:] T. Drinóczi (ed.), *Korszakunk jogi kihívásai: EU – Magyarország – Horvátország*, Pécs–Eszék 2012, p. 120.

¹¹ CARE Final Report (2010). Consular and Diplomatic Protection. Legal Framework in the EU Member States, <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>, 18.06.2017; A. Vermeer-Künzli, *Where the Law Becomes Irrelevant: Consular Assistance and the European Union*, ICLQ 2011, no. 60, p. 971.

¹² S. Battini, *International administrative law today: The case of consular assistance and diplomatic protection*, [in:] S. Faro, M.P. Chiti, E. Schweighofer (ed.), *European Citizenship and Consular Protection*, Napoli 2012, p. 57–58.

¹³ J. Wouters, S. Duquet, K. Meuwissen, *The European Union and Consular Law*, Working Paper 2013, no. 107, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/

competences challenge the effectivity of this area; and on the other, the administrative law harmonisation that it supposes. Consular authorities are, in fact, the external public administrative authorities of Member States and public administration and public administrative law is also a core issue of domestic competence (Art. 197 TFEU). Although by involving EU bodies and organs into their activity under the scope of the 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 (OJ L 106, 2015), hereinafter: Consular Directive, the legal field reserved for Member States is strictly influenced and challenged. In fact, Member States are all present in only three states to help their citizens abroad: the US, Russia, and China.¹⁴ So the task is not theoretical. Therefore, it shall be strictly examined what exactly is required and what can be required by EU law to create a common consular policy.

3. The development and the current regime of consular protection policy of the EU

After the creation of the EU citizenship concept, years have passed until its fundamental status was recognized and as for the right concerning consular protection, the biggest change happened when the Treaty of Lisbon entered into force in 2009. The modifications concern fundamental rights, competency implications along with institutional changes as well as administrative law influences.

3.1. Pre-Lisbon regime of consular protection in third states

Following the Maastricht Treaty, the European Community's decision with its six meaningful articles of nine entered into force in 2002 (Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995

wp107-wouters-duquet-meuwissen-sd.pdf, 18.06.2017; F. Geyer, *The External Dimension of EU Citizenship. Arguing for Effective Protection of Citizens Abroad*, CEPS 2007, no. 136, p. 5.

¹⁴ *Green Paper: Diplomatic and consular protection of Union citizens in third countries*, Brussels 2006, COM (2006)712 final, point 1.5; R. Balfour, K. Raik, *Introduction* [in:] R. Balfour, K. Raik (ed.) *The European External Action Service and National Diplomacies*, EPC Issue Paper 2013, no. 73, p. 12.

regarding protection for citizens of the European Union by diplomatic and consular representations, OJ L 314, 1995, hereinafter: ‘Decision of 1995’). Step by step, a decision on the establishment of an *emergency travel document* (hereinafter: ‘ETD’) was adopted (96/409/CFSP) along with a non-binding guideline on consular protection and another on the concept of *lead state* in case of cooperation in third states.¹⁵ Being adopted on an intergovernmental ground, these documents were not recognized as part of *EU legal order*, however as *acquis communautaire* they were to be respected. The regime rather ensured a *non-discrimination clause* than an individual right for citizens and an obligation for states under all circumstances. The decision of 1995 enlisted situations when the citizens must get protection (for instance in the case of arrest, repatriation or death – Art. 5 of the Decision of 1995). Under this legal regime Member States were to establish the necessary rules among themselves (like in a classical intergovernmental way of dealing with international issues). A set of *Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries* was adopted by the 241st Political Committee on 29 and 30 March 1993. However, the authorities of all third countries were informed of them by the Presidency in the form of *note verbale* (COM(93)702 final:7), the mere notification does not change the legal status of guidelines; for third states it is *pacta tertiis* (Art. 34–35 of the Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331). Further negotiations have never been realized,¹⁶ and the pre-Lisbon regime of consular protection in third states could never overcome the diversity of national regulations and foreign policies.¹⁷ Meantime, the concept of helping each other’s citizens abroad and sharing the burden meant nothing new: Nordic states or the Baltic ones have had this kind of cooperation since decades.¹⁸ It is also worth noting that the practice of consular functions in the name of other Member State already works when such function only has administrative and operative character as it

¹⁵ Krüma, 2013, p. 170.

¹⁶ Schweighofer, 2012, p. 99.

¹⁷ CARE Final Report, 2010, p. 24–25.

¹⁸ Wouters, Duquet, Meuwissen, 2013, p. 8; Schweighofer, 2012, p. 81–85.

is clearly seen in the common visa policy. In 2003 the Council amended the Schengen *Common Consular Instructions* and made it possible to delegate the power to issue the uniform visa in respect of third country citizens even when the representatives of the delegating state are present in the territory of that third country. Overall, states are not against the legal practice of acting on behalf of each other in administrative issues although the inter-state negotiations completing the consular policy were missing.¹⁹

Along years many challenges occurred: the eastern expansion almost doubled the number of Member States and the man-made and natural disasters together with financial crisis caused budget cutting on foreign representations. However, all these circumstances increased the importance of a common consular policy – perhaps with common organs.²⁰

3.2. Post-Lisbon situation of consular protection in third states and the Directive of 2015

First and foremost, by promulgating the *Charter of Fundamental Rights of the European Union* (EU Charter) as a primary source, the EU citizens' rights to consular protection was officially and clearly reinforced and recognized as a fundamental right (Art. 46 of the Charter of Fundamental Rights of the European Union, OJ C 326, 2012, hereinafter: 'EU Charter'). It has major implications on the procedure of consular protection which is explained in detail in chapter 4 of this paper.

Institutional changes also happened as the policy of consular protection in third states has been placed from pure inter-governmental regime under the scope of EU institutions. The Commission got the right to propose directives establishing the cooperation and coordination measures necessary to facilitate the right to equal consular protection for unrepresented EU citizens (Art. 17(2) of the Treaty on European Union, OJ C 326, 2012, hereinafter: 'TEU'; Art. 23(2) TFEU). The Council was empowered to adopt such kind of directives after consulting the European Parliament. Consequently, since the entry into force of the Lisbon Treaty,

¹⁹ P. Vigni, *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution?*, EUI Working Papers Law 2011, no. 11, p. 24.

²⁰ Balfour, Raik, 2013, p. 6–7.

EU institutions have the explicit competence to adopt common EU standards to protect Union citizens in third countries.²¹ As for administrative cooperation which is crucial for that end, the European Parliament and the Council, acting under supportive competence and by means of regulations in accordance with the ordinary legislative procedure, now can also establish the necessary measures – but without any harmonisation of the laws and regulations of the Member States (Art. 2(5), 6(g), 197 TFEU). Therefore, the effective execution and implementation of EU policy is the responsibility of Member States, mainly in the field of administration.

The Consular Directive was adopted to replace the Decision of 1995 on 1 May 2018 in the above-mentioned legal framework and circumstances. To correct the former regime's deficiencies, it puts an emphasis on a framework for cooperation of organs: national consular and diplomatic authorities and the organs of the EU. The mechanism looks simple: the unrepresented citizen can turn to the available consular authority of any Member State's which after identification contacts the responsible organs of the state of nationality, mainly the foreign ministry. If the state of nationality cannot or will not provide help and protection, it is the consular authority of the requested state that shall provide help under the same conditions as to nationals. So, the obligation rather concerns a sort of connection making efforts and in case of failure, equal treatment of EU citizens. In case of big number of requests, such as in crisis situations, the EEAS and the delegation are to help the consular authorities of the represented states to find the best practice and effective measures in a sudden situation and to collaborate with each other and with the local authorities. For a better sharing of work, a leader is advised to be assigned among the represented Member States whose consular authority will join forces and ensure one voice in necessary collaboration work, among others, with EU organs and the local authorities of the third state. It does not mean that this state shall bear all the responsibility and expenses as other Member States are also obliged to serve as background (Art. 12 of the Consular Directive; Council European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06),

²¹ Wouters, Duquet, Meuwissen, 2013, p. 6.

OJ C 317, 2008, p. 5.4; 6–8, hereinafter: ‘Lead State Guideline’). It shall be implemented until 1 May 2018; however, it leaves wide margin for domestic legislation and further negotiations are required. Such negotiations were also required by the former regime and had no success. It is not clear what change has been achieved in this respect.

It is crucial to find the balance between the necessary modification to realize common policies and the implicit expansion of EU competences. This mostly affects foreign policy powers thus the preamble of the Consular Directive itself set the limitation of its scope: it shall not affect consular relations between Member States and third countries, their rights and obligations arising from international customs and agreements (point 6 of the preamble of the Consular Directive). Meanwhile, the Treaty of Lisbon contributed for the institutionalization of foreign policy of the EU when called to life the *European External Action Service* (EEAS) and reorganized the *delegations* of EU in third states. The Council Decision establishing the EEAS specifies that the delegations are successors of the Commission delegations and thereby the external part of the EEAS, operate as diplomatic missions for the EU and shall support Member States in their role of providing consular protection to EU citizens in third countries (Art. 221(2) TFEU; Art. 35(1) TEU; Art. 5(10) and 10(5) of the Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201, 2010).²²

4. A fundamental right’s approach to consular protection in third states and its consequences

The Treaty of Lisbon and the Consular Directive unanimously point towards a qualitative change in the regime of consular protection of EU citizens in third states. From a special right for non-discrimination and equal treatment it has grown to be a definitive fundamental right of EU citizens which have a sort of impact on non-EU citizen family members.

²² S. Blockmans, *Beyond Conferral: The Role of the European External Action Service in Decision-Shaping* [in:] J. Larik, M. Moraru (ed.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Papers Law 2011, no. 10, p. 9–12.

4.1. Consular protection as a fundamental right of EU citizens

The protection of fundamental rights is a key for membership in the EU and serve as a general principle of EU law just as the norms on non-discrimination and the requirements for procedural safeguards.²³ Its evaluation may create additional constraints for the deprivation policies of Member States. However, the EU Charter does not establish any new power or task for EU, or modify powers and tasks defined by the Treaties (Art. 51(2) of the EU Charter). Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by their status as citizens of the EU (Art. 52(1) of the EU Charter).²⁴ As the CJEU declared in the *Rottman* case “[n]evertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter.”²⁵

Member States shall implement the Consular Directive into their legal systems and Member State authorities will be the executors of the provisions as they act on behalf of the EU as its executive branch, or as it is also called: indirect administration of EU.²⁶ It shall be noted that providing consular protection to nationals is a possibility, bilateral agreements make it possible, settle the limits of jurisdiction and in fact, domestic law of the state of nationality is responsible for the tasks of the consular authority. Rules for regulating consular tasks and competences in a certain case are therefore called *international administrative law*.²⁷

Approximately one third of the Member States have no legislation on consular protection and left the issue for political consideration. However, all of them had the Decision of 1995 implemented: some had

²³ R. Bauböck, V. Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, GILJ 2015, no. 30, p. 92.

²⁴ *Ruiž v. Office national de l'emploi*, point 45; *Rottmann v. Bayern*, point 42; I. Vörös, 2012, p. 240.

²⁵ *Rottmann v. Bayern*, point 41.

²⁶ E. Heidebreder, *Structuring the European Administrative Space: Policy Instruments of Multi-Level Administration*, JEPP 2011, no. 18, p. 719–720.

²⁷ Battini, 2012, p. 57–58.

national legislative provisions for this purpose while others declared the direct effect of it.²⁸ The Decision of 1995 was in fact an international agreement in a simplified form, with mainly principles and calls for consular protection of citizens in third states in some situations, therefore further negotiations and legislative steps were required. In general, consular protection procedure is a purely regulated area and even the documentation of the existing cases is penurious. First, because it is widely based on discretion, most decisions are taken on case-by-case basis; second, many functions are services without classical authority acts.²⁹ Now, consular protection in third states is obviously acknowledged as a fundamental right. Article 23 of TFEU aims to create rights for individuals and not just obligation for states; even in the lack of jurisprudence it is obvious that Member States need to undertake positive action for the benefit of individuals; consular protection is a positive claim of individuals vis-à-vis Member States.³⁰ As an administrative authority procedure it falls under general procedural requirements expressed by the *principle of good administration*.³¹ As consular assistance is mainly needed in urgent cases when other fundamental rights also emerge,³² the subjective reasons for measures taken or denied must be justified. Member States must ensure this, so this obligation demands transparent and reliable substantive law and clear procedural law background.

The substance of law is not regulated by EU law; the EU and its Member States do not offer common consular administrative and legal services abroad, only certain situations are enlisted when the citizens might need help abroad: arrest or detention; being a victim of crime; a serious accident or serious illness; death; relief and repatriation in case of an emergency and a need for emergency travel documents as provided for in the Decision 96/409/CFSP (Art. 9 of the Consular Directive; Art. 5 of the Council

²⁸ CARE Final Report, p. 571–573, 579.

²⁹ Schweighofer, 2012, p. 77.

³⁰ E.M. Poptcheva, *Consular Protection Abroad: A Union Citizenship Fundamental Right?*, Barcelona 2012, p. 101.

³¹ J. Wakefield, *The Right to Good Administration*, Alphen aan den Rijn 2007, p. 21–26.

³² Vigni, 2010, p. 27.

Decision). The level and quality of measures depend on the domestic regulations of Member States for consular help so the essence of consular protection varies from Member State to Member State. Besides, only two measures have common legal background in the EU: financial help to impede problems of reimbursement and the issue of emergency travel documents in case of lost or stolen travel documents. Concerning financial help, rules are clear: it is a final solution and non-national consular authority is obliged to give financial help with the same conditions as to their own nationals. Except for crisis, citizen shall sign an undertaking to repay to his or her Member State of nationality the costs incurred. The Member State of nationality is responsible to repay the costs to the Member State of the consular authority in charge and then the reimbursement will be the matter of the state and its national under the scope of domestic rules (Art. 6 of the Council Decision; more details: Art. 14–15 of the Consular Directive).

As for travel documents, only the national authorities can replace the damaged, lost or stolen ones. Non-national EU citizens can require only ETD from foreign consular authority. The ETD is given upon request and it is valid slightly longer than the minimum time needed to complete the journey for which it is issued (ETD, Annex II.4). 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.

The effective application of consular rules, just like all the other field of EU law, requires an appropriate legal background. It supposes clear, transparent, and foreseeable procedural rules and a legal remedy system in case of alleged breaches. In those states where consular protection is not even a right regulated in detail in legislative acts first, material, and procedural law changes are required during the implementation period.

4.2. Consular authorities of Member States and their procedure in the light of the right to consular protection

The primary obligation of Member States' external authorities is to stand as a forum to receive claims for consular protection and then contact the competent authority of the state of nationality to check the identity and to give the possibility to provide help for its own national. The

consular authority of the Member State at present only takes measures to protect the non-represented citizen if the state of origin cannot act. In case of crisis, immediate actions often substitute the intermediation but basically, the consular policy of the EU relies on cooperation of consular authorities. The core of this procedure is the exchange of information and sharing of data. Given the fact that personal data protection is also a fundamental right (Art. 46 of the EU Charter) the transparency and predictability of the administrative procedure including the information sharing mechanism, from the submission of the claim until the measure or decision taken by the competent consular authority, is also crucial.³³ The cooperation mechanism should be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy (Art. 47 of the EU Charter).³⁴ The Consular Directive does not serve as a general legal background for cooperating mechanism with such details, it just outlines the frames. In the lack of general EU legislation, how shall this new consular protection policy be more efficient than the previous inter-governmental regime?

Exact procedural rules are especially required when the procedure involves EU organs, the delegations and EEAS, or a lead state is designated to govern consular protection by the represented Member States' authorities in the territory of a third state. State administration is hierarchical; the chief a consular authority is under the direction of its own state, particularly the Minister of Foreign Affairs. In a crisis when the cooperative mechanism starts to operate, 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 States³⁵ and are not superior to

³³ M. Eliantonio, *Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?*, MJ 2016, p. 533.

³⁴ Model Rules, <http://www.reneual.eu>, 31.08.2016, VI–3; A. Varga, *Gyorsértékelés az európai közigazgatási eljárású modell-szabályokról*, "Magyar Jog" 2014, no. 10, p. 547.

³⁵ Cf. M. Gatti, *Coherence vs. Conferred Powers? The Case of the European External Action Service* [in:] L.S. Rossi, F. Casolari (ed.), *The EU after Lisbon Amending or Coping with the Existing Treaties?*, Heidelberg 2014, p. 258–259.

their consular authorities, but as Member States are required to act in conformity with EU interests, even if foreign policy is mostly still 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 administration and the foreign policy of the sending state in the third state? Answers to these questions basically influence the administrative procedure of consular protection.

Member State domestic procedural laws are different so as the legal remedy options. If an EU citizen submits claim for consular protection, the case might have many outcomes with multiple actors and as the mechanism is envisioned to operate on a permanent rather than temporary basis, procedural aspects and the cooperation and limitation of actors' playground should be better regulated for the transparency and reliability of the administrative procedure which is in conformity with the requirements of good administration (Art. 41 of the EU Charter).³⁶ In a mass of organs and authorities, a procedural norm could cause chaos in the system. For such act, since the Treaty of Lisbon, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, has competence to establish the necessary measures to facilitate the exchange of information and to promote administrative cooperation among them (Art. 197 TFEU).³⁷

Being the fact that the right to consular protection is a fundamental right by Art. 46 of the EU Charter, *ubi ius, ibi remedium*, the review of the decisions of consular authorities needs to be ensured. The principle that rights must have remedies is ancient and venerable.³⁸ The European citizen

³⁶ H.C.H. Hofmann, B.C. Mihaescu, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, ECLR 2013, p. 73–101; K. Milecka, *The Right to Good Administration in the Light of Article 41 of the Charter of Fundamental Rights of the European Union*, CLEI 2011, no. 3, p. 43–60.

³⁷ A. Torma, *The Public Administration of The European Union and the Member States, in Terms of the Lisbon Treaty*, "Curentul Juridic" 2011, no. 46, p. 28.

³⁸ T.A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*, SDLR 2004, no. 64, p. 4–5; A. Buijze, *The Principle of Transparency in EU Law*, Utrecht 2013, p. 249–251.

who claims 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.³⁹ The problem occurs in those Member States who does not regulate consular protection and recognize it only as a practice (Bulgaria, Denmark, Ireland, Sweden, Slovakia, Slovenia) or do not grant the right to consular protection, neither in a consular act nor in administrative practice (Austria, Czech Republic, United Kingdom, Netherlands, Belgium, Greece, Malta, Luxemburg, France, Spain, Cyprus).⁴⁰ Legal remedy also invokes organisational problems again: public administration is hierarchical. In case of a lead state who is the responsible organ to deal with an appeal in the public administrative system: the domestic superior authority of the lead state's consular authority or an EU organ? The lack of clarity concerning the competences of each party in consular protection procedure might also lead to dispute between authorities to which the dispute settlement mechanism is unforeseen.⁴¹ The number of consular authorities at site leads to another problem to solve: forum shopping. Who has the right to choose if no lead state is assigned? Multiple-citizenship also increase problems and the EU-s citizenship policy is rather flexible and does not follow the genuine link theory.⁴² A Hungarian citizen, for example, in Angola has ten Member States' authority to turn for help as Hungary has no representation there.⁴³ For the effective burden share, the concerned Member States shall designate a lead state and negotiate the details of cooperation but in such case: why is this system better than the former intergovernmental regime and then, how consular cooperation and the administrative procedure of consular protection be transparent and predictable if it may vary from state to state?

³⁹ Battini, 2011, p. 179.

⁴⁰ Schweighofer, 2012, p. 94–95.

⁴¹ Cf. L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, REAL 2012, no. 5, p. 45–47.

⁴² *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG*, Judgment of 2 October 1997, Case 122/96, ECR I–5325, point 15; L. Gyenei, *Kettős állampolgárság az Európai Unió erőterében*, "Iustum Aequum Salutare" 2013, no. 9, p. 160.

⁴³ Consular protection for European Union citizens abroad, Commission's website.

The Consular Directive declares that it does not concern consular relations between Member States and third countries (Art. 1 of the Consular Directive). But it tacitly does when it obliges Member States to widen the scope of consular agent's 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 a reflection on 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 are 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 highlight the fact that the EU is expanding on foreign policy issues where it still lacks the necessary power and competence to reach direct results.

4.3. Non-represented EU citizens' family members' and the right to consular protection

Consular protection shall be provided to family members who are not themselves citizens of the EU, accompanying unrepresented citizens in a third country. Such family members shall enjoy it to the same extent and on the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the EU, in accordance with its national law or practice (Art. 5 of the Consular Directive).

The *right to respect for family life* (Art. 7 of the EU Charter; point 2 of the preamble of the Communication from the Commission to the

European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, Brussels 2014, hereinafter: ‘Communication’) is interpreted in a positive manner to enjoy rights guaranteed by EU law.⁴⁴ In fact, the protection of the *family unity* has a strong motif on interpretation⁴⁵ and if EU law does not cover a situation, it should be analysed in the light of the same provisions of the European Convention on Human Rights which basically echoes the same requirements (Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Rome, 213 U.N.T.S. 222).⁴⁶ In respect of these rights, non-EU citizen family members enjoy several derived rights including consular protection in a third state under the same conditions as the EU citizen who is accompanied by them. However, the Consular Directive does not clarify who is a family member.

EU law guarantees rights for the family member who is entitled to enjoy them but unless otherwise agreed, it does not bind the third state. Therefore, further negotiations and practical arrangements are necessary not just among Member States but also with third states, too (Art. 7 and point 19 of the preamble of Consular Directive). The Consular Directive does not affect consular relations between Member States and third countries (point 6 of the preamble), but the guarantee of fundamental rights related to effective consular protection requires so.⁴⁷

The equal treatment clause obliges Member State consular authorities to perform positive actions but in certain cases it is the EU law which makes it impossible – for instance if the travel documents are lost or stolen. Travel documents can only be replaced by the competent national authorities but for non-national EU citizens the consular authorities of EU Member States in third states can issue an ETD which is valid slightly

⁴⁴ S. Pierluigi, *Nationality and Regional Integration: the Case of the European Union* [in:] S. Forlati, A. Annoni (ed.), *The Changing Role of Nationality in International Law*, London 2013, p. 182.

⁴⁵ Gyenci, 2012, p. 164.

⁴⁶ Pierluigi, 2013, p. 182.

⁴⁷ Cf. F. Ferraro, J. Carmona, *Fundamental Rights in the European Union. The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Service, EU, March 2015, p. 18–19.

longer than the minimum time needed to complete the journey for which it is issued (ETD, Annex II.4). The question of ETD is a core issue of effective consular protection. Considering statistics of consular protection in third states in 2015 (see table 1 below), most of the requests referred to this issue.

TABLE 1.

STATISTICS OF CONSULAR PROTECTION IN THIRD STATES IN 2015. SOURCE: CONSULAR AFFAIRS WORKING PARTY REPORT OF APRIL 16, 2016.

Third State	Cambodia	Nepal	Nigeria	Tunisia	Dominican Republic
Registered Cases	29	91	3	5	36
Type of measure	help arrest/detention death 'other'	help EDT medical help death	ETD arrest/detention	ETD repatriation	ETD
Protection by	UK	Denmark Germany Finland UK	Spain Romania Czech Republic	Czech Republic	no information available
Protection to	Dutch, Irish Lithuanian Cypriot, Latvian	wide variety of nationalities, but 52% is Swedish	2 Latvians 1 Slovak	Slovak	Italian Belgian Luxembourgish

The procedure requires the collaboration of the national authorities as the ETD can only be issued if clearance of the identity is done. However, non-EU citizen family members 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 the EU citizen (Art. 5 of the Consular Directive) can be interpreted to act 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 non-national consular authority is also obliged to give financial help with the same conditions as to their nationals. The sum of money could be calculated to cover the travel expenses of the accompanying family member, too. The costs, in fact, 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 (Art. 14–15 of the Consular Directive).

Further question arises from the point of view of the family members and the obligation of Member States towards them. Family members' right to consular protection is derived from the rights of the EU citizens. The Consular Directive expand the personal scope of consular protection in third states and compared to the EU citizens' right to consular protection, it does not have a fundamental status. Meantime, EU citizens do have fundamental rights related to the respect for private and family life and family, so the effectivity of the EU provisions is challenged again. It is to be noted that the right to consular protection in third states is strictly attached to EU citizens and their third-country national family members but ordinary third state nationals who hold a residence permit are not entitled to these rights. From the moment, they hold a residence permit valid for at least one year and has reasonable prospects of obtaining the right to permanent residence, they may also submit an application for family reunification (Art. 3–4 of the Communication), but it does not mean that their rights are the same as that of EU citizens. They have certain rights⁴⁸ but they are different from EU citizens' rights and despite some standardizing EU rules, Member States have broad discretion in regulating this field.⁴⁹ However, the 2010 *Guidelines on consular protection of EU citizens in third countries* expanded the protection of the EU on these third country

⁴⁸ Information Note on Family Reunification for Beneficiaries of International Protection in Europe, ECRE, June 2016, http://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf, 18.06.2017, p. 9–12.

⁴⁹ I. Schiffner, *Az uniós polgárság hatása a tagállami állampolgársági politikákra*, “De iurisprudentia et iure publico” 2015, no. 9, p. 14.

nationals if their nation state and one of the EU Member States have bilateral consular agreement, but only if evacuation is needed.⁵⁰ In addition, the guidelines are not legally binding documents and the 2015 consular directive does not contain a provision on such cases. It may require some positive action like facilitating the contact between the family member and its nation state's nearest consular authority or foreign ministry. 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 the EU citizen (Art. 5 of the Consular Directive) can be interpreted to 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 consular authorities are obliged to give financial help with the same conditions as to their nationals. Except for crisis, a citizen shall sign an undertaking to repay to his or her Member State of nationality the costs incurred. The repayment is an issue of inter-state action and then the reimbursement will be the matter of the state and its national under the scope of domestic rules (Art. 14–15 of the Consular Directive).

In strict sense, if EU law is the obstacle for equal treatment, then what else can be required under *non-discrimination and equal treatment clauses*? Are Member States and their consular authorities obliged to act to search for help for non-EU citizen family members? Even if the answer would be positive, it is to be noted again that fundamental rights related to private life and family requires equal treatment but they oblige the Member State not the third states (*pacta tertiis*) and acting in protection of a non-national can be denied or may lead to political conflicts. The question

⁵⁰ Guidelines on Consular Protection of EU Citizens in Third Countries, 15613/10 COCON 40 PESC 1371, Brussels 2010, p. 2; Poptcheva, 2012, p. 233–234.

leads back to the basic problem of CFSP: further negotiations are needed not just among Member States but also with third states as the EU is not entitled to act as a foreign policy actor in a single voice to conclude arrangements with third states in the question of consular protection as it is not an exclusive competence. In addition, in CFSP areas, the Council is the legislator and can adopt non-legislative acts but only unanimously (Art. 24 TEU). Thus, is it better and more efficient than the former regime especially in the view of fundamental rights protection? May the flexibility clause extend the competences to this foreign policy area to serve better the execution of an EU policy, the protection of EU citizens in third states? The expansion of EU influence on domestic competences to serve fundamental right is dynamic and now, EU citizen rights are also invoked in purely domestic affairs.⁵¹ The whole history of the European integration is, in fact, a series of expanding EU competences for implementation of common objectives. So, perhaps it is only a matter of time that ERTA doctrine will be allowed to help to eliminate certain deficiencies of consular protection: once the Union exercises its internal competences, its external competences become activated.⁵²

5. Path for the Future

EU citizenship has established a legal right which suggests common identity. 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 or her state is not represented in a third state. 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.⁵³ It clearly shows that even the substantive rules are not obvious for people and the lack of exact procedural norms may increase the threat to the evaluation of fundamental rights and may deprive citizens of effective consular protection.

⁵¹ Schiffner, 2015, p. 4.

⁵² R. Schütze, *The ERTA Doctrine and Cooperative Federalism* [in:] R. Schütze (ed.), *Foreign Affairs and the EU Constitution. Selected Essays*, Cambridge 2014, p. 287.

⁵³ Flash Eurobarometer #430, European Union Citizenship, http://ec.europa.eu/justice/citizen/document/files/2016-flash-eurobarometer-430-citizenship_en.pdf, 18.11.2016, p. 29–30, 33, 42–46.

The rights of EU citizens and obligation of Member States form a legal relationship between themselves, however, any activity on the territory of a third state can be performed within at least the tacit consent of this state (Art. 7–8 VCCR) and the EU law can impose obligations only on Member States. Consular protection of non-citizens has not been provided in numerous cases yet, such cases are still handled on case-by case basis and more or less the silent acceptance of the host state characterise these situations.⁵⁴ However, it might not be the case in difficult situation, therefore the legal background shall be settled and administrative procedures should be based on law instead of luck. So, acting to serve the interest of EU citizens and their non-EU citizen family members is conditional in international relations, therefore Member States' bilateral consular treaties need revision or further negotiations are still required as the idea of establishing dominant EU consulates on a permanent basis has not yet been achieved.⁵⁵ Many questions arise and one could ask including the centralisation of consular tasks for a common supranational organ and redistribute the execution to save costs and make the procedure more effective and uniform. The EU already has over 140 delegations in third states to represent its interests. Wouldn't it be logical to transfer some power to them? It is a question of Member State sovereignty and EU competences, and delegations are neither embassies, nor consular authorities, it is not the solution of today. Probably, one day they will be qualified as such by the consent of all Member States (*cf.* Art. 20–21 TEU) but first a proper basic norm at least for the settling of procedural aspects of consular protection would be a giant step and this solution is the most likely and probable to be achieved. The complete Europeanisation of consular protection as a non-exclusively EU legal area⁵⁶ is a question of a more distant future, now the actual challenge is the detailed procedural rules of consular authorities' cooperation to make it effective.

⁵⁴ Schweighofer, 2012, p. 98.

⁵⁵ Wouters, Duquet, Meuwissen, 2013, p. 11.

⁵⁶ *Cf.* J. Beck, *Cross-Border Cooperation and the European Administrative Space – Prospects from the Principle of Mutual Recognition*, IPAR 2015, no. 13, p. 10–11.

Summary

Consular authorities are the external hands of states' public administration. The concept of consular assistance and service is in fact a compromise between the territoriality principle and the prerogatives of the states based on the nationality link. The EU is not a state therefore it invented the idea of EU citizenship as a unique link between the EU and the citizens holding the nationality of any Member State to reinforce a sense of togetherness with equal benefit of certain rights including the consular protection on the territory of third states. The paper aims to highlight the topic of consular protection in the view of its recent developments and challenges along with questions of legal application issue. All of them are influenced by legislative competency and fundamental rights impacts which cause procedural challenges with further question of, inter alia, non-represented EU citizens' family members rights.

Keywords: consular cooperation, consular protection, EU citizenship, third countries, administrative procedure