CONSULAR COOPERATION OF EU MEMBER STATES IN A FUNDAMENTAL RIGHTS APPROACH

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Abstract

Consular authorities are the external hands of public administration of States established and worked with the consent of the host State. Consular relations of a State depend on its foreign relations which is basically an expression of sovereignty in the international relations of States. The European Union, by expanding beyond its original economic nature, is developing a coherent area based on the interests of its people. The EU is not a State; it lacks that special legal tie which connects States to its nationals, therefore the concept of EU citizenship was established as a tool for creating a special relationship to give a sense of togetherness and the feeling of being one big European nation, where the rights and possibilities are available for every citizen of the Member States. It includes the availability of help and protection abroad, on the territory of Third States. This concept exists since 1992, however, it is going through major changes as the integration is expanding and fundamental rights are gaining an increasing importance. 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 issues.

Keywords: *Consular authority, EEAS, cooperation, EU citizenship.*

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TEMEL HAKLAR YAKLAŞIMINDA AB ÜYE DEVLETLERİNİN KONSOLOSLUK İŞBİRLİĞİ

Öz

Konsolosluklar, devletlerin kamu idarelerinin, kabul eden devletin rızasıyla kurulan ve işleyen harici elleridir. Bir devletin konsolosluk ilişkileri, temelinde devletlerin uluslararası ilişkilerindeki egemenliklerinin bir ifadesi olan dış ilişkilerine dayanmaktadır. Avrupa Birliği, kökenindeki ekonomik tabiatın ötesine genişleyerek, halkının çıkarlarına dayalı uyumlu bir alan geliştirmektedir. AB bir devlet değildir; devletleri uyruklarına bağlayan o özel hukuki bağdan yoksundur. Bu nedenledir ki, AB vatandaşlığı kavramı, haklar ve imkânların Üye Devletlerin her vatandaşı için mevcut olduğu, birliktelik algısı ve bir büyük Avrupa milleti olma hissi veren özel bir ilişki yaratmak için bir araç olarak ortaya konmuştur. Bu, yurtdışında, üçüncü devletlerin ülkesinde yardım ve koruma imkânını da kapsamaktadır. Bu kavram 1992'den beri vardır, ancak, bütünleşme arttıkça ve temel haklar çoğalan bir önem kazandıkça büyük değişikliklere uğramaktadır. Bu çalışma, konsolosluk koruması başlığını, hukuki uygulanabilirlik konusundaki sorularla beraber, yeni gelişmeler ve zorluklar ışığında ele almak amacındadır.

Anahtar Kelimeler: *Konsolosluk yetkisi, AB Dış İlişkiler Servisi, işbirliği, AB vatandaşlığı.*

Consular Function as the External Public Administration of Member States

Many people travel and live abroad and there are certain situations when the person is far away from its State and need to arrange official matters or just get in trouble and there is no one to turn for help. For that purpose, based on the general law of international relations, States establish their representations on the territory of other States under the scope bilateral agreements. The concept of this kind of care of the nation State is older than the modern States. (Aust, 2010:42; Sloane, 2009: 29–33) Under the general law of international relations, States are entitled to perform their administrative authority over their citizens on the territory of other States in case of existing diplomatic and consular relations. Therefore, people abroad give rise to requests to consular agents concerning the drawing up of official documents that allow them to travel, requests for assistance can be submitted in case of sudden death, illness, or crime, or in extreme cases caused by natural or man-made disasters, the exercise of consular functions refers for medical assistance, evacuation, or repatriation and for helping to safeguard of interest. (VCCR, 1963, Art. 5 d-f) Nowadays, the need for such care is increasing but the capacity of States is

running low: there is a tendency of closing foreign representations due to financial causes. As for solution, based on the agreement of the concerned States and with the consent of the host State, international law recognizes the practice of protecting other States' nationals along with own citizens. (VCCR, 1963, Art. 7-8) The consular protection policy of the EU is based on this thesis, however, being an international organization, the EU cannot become a party to the *Vienna Convention on Consular Relations* (VCCR) and as consular protection and assistance is deeply rooted in national competences, the EU's consular policy is limited to the competences conferred upon by its Member States. (Wouters, Duquet and Meuwissen, 2013:3; Geyer, 2007:5) 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 of his/her State of nationality, the citizen can request it from any other Member State's available representation as the EU law guarantees this right inherent to EU citizenship.

> Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection. (TFEU, 2007, Art. 23)

Article 23(1) TFEU appears to use the adjectives 'diplomatic' and 'consular' as synonyms, although diplomatic protection and consular protection are two completely different legal concepts. (Larik and Moraru, 2011:100) Given the fact that consular function can also be practiced by both diplomatic and consular agents, and considering the content of secondary sources (see below) it is obvious that Article 23 TFEU refers only to consular protection (Battini, 2011:177-178; Schiffner 2009:535-543; Becánics, 2014:25-26). 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." (Vigny, 2010:17. *cf*. Vigny, 2010:26. and Odigitria AAE v Council of the European Union and Commission of the European Communities, 1996: point 43-45.)

Nevertheless, consular assistance and protection has always been a service of domestic competence (CARE Report, 2010:665; Vermeer-Künzli, 2011:971) as its emergence is based on the special relationship between the State and its citizens. Moreover, the service is performed by the external public administrative authorities of Member States. Public administration is also a core issue of domestic competence whose harmonisation is not intended (TFEU, 2007, Art. 197), although by involving EU bodies and organs into their activity under the scope of the new directive on consular cooperation, *Council Directive 2015/637 of 20 April 2015* (Consular Directive) the legal fields reserved for

Member States are strictly influenced and challenged. Therefore, it shall be strictly examined what is exactly required by EU law under a sort of common consular policy.

The Role of EU Citizenship and its Relationship with Consular Policy

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" (Maastricht Treaty, 1992, preamble) where the basics rights are guaranteed to everyone and, as a matter of fact, Member States are all present in only three States to help their citizens abroad: the US, Russia and China (Green Paper, 2006:4, point 1.5.; Balfour R. and Raik, K. 2013:12).

The Maastricht Treaty of 1992 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 political life to strengthen the ties between citizens and Europe by promoting the development of a European public opinion and European political identity. (Maastricht Treaty, 1992, Art. B.) 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". (Opinion of Advocate General Ruiz-Jarabo Colomer, 2007:9183) Citizenship of the EU 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. It is an *ipso iure* status of citizens being the citizen of any Member States, and the citizenship policy is a sovereign competence of the States, although considering that EU citizenship status is a "derivative of the nationality of Member States, the issues of whether an individual is a national of any given Member State shall be decided exclusively by reference to the national law of the State concerned." (TFEU, 2007, Art. 20. Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, 1992: point 10.; Belgian State v. Fatna Mesbah, 1999: point 29.; Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, 2004: point 37.; Rottmann v. Bayern, 2010: point 39.) The jurisprudence of the CJEU in mainly the *Rottmann* and *Zambrano* cases is approaching to a sort of harmonisation to avoid the negative effects of the variety of legislation. (Cf. Rottmann v. Bayern,

2010: point 41; 48.; Gerardo Ruiz Zambrano v. Office national de l'emploi, 2011: point 42; Gyenei, 2012:142-144) The competence to do so derives from the protection of the fundamental rights and rule of law which are being general principles of EU law and conditions for EU membership along with norms concerning non-discrimination and administrative procedural safeguards. (Bauböck and Paskalev, 2015:90-92) Summing up, since the *Grzelczyk* case in 2001, the CJEU has repeatedly asserted that citizenship of the Union is destined to be the fundamental status of nationals of the Member States (Grzelczyk v. CPAS, 2001: point 31.; Baumbast and R v. Secretary of State for the Home Department, 2002: point 82.; Rottmann v. Bayern, 2010: point 43.; Shaw, 2008:3; Vörös 2012:238; Mohay – Muhic, 2012:120) that entitles EU citizens to enjoy certain specific rights (TFEU, 2009, Art. 21.) 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 requested State (TFEU, 2007, Art. 21; 23). Due to the fundamental status of EU citizenship and the specific rights inherent, 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.

Consular Protection as a Fundamental Right

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 major change happened when the Treaty of Lisbon entered into force in 2009.

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 (95/553/EC) on details of diplomatic protection and 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.(Krüma, 2013:170) These documents were not recognized as part of the EU legal order, being adopted on an intergovernmental ground, however as *acquis communautaire* they were to be respected, although it could never overcome the diversity of national regulations and foreign policies. (CARE Final Report, 2010:24-25) The Maastricht Treaty and its citizen concept with the consular protection entitlement rather reflected to a non-discrimination clause than an individual right for citizens and an obligation for States under all circumstances. Decision of 1995 enlisted situations when the citizens must get protection like in the case of arrest, repatriation or death (Decision of 1995, Art. 5). 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. Such kind of negotiations have never been realized, although the concept of helping each others' citizens abroad and sharing the burden means nothing new under the Sun: Nordic States with the Baltic ones or the Commonwealth States have this kind of cooperation since decades (Wouters, Duquet and Meuwissen, 2013:8). 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 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. All in all, 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. (Vigny, 2010:24)

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 increased the importance of a common consular policy – perhaps with common organs (Balfour and Raik, 2013:6-7).

Post-Lisbon situation of consular protection in Third States and the Directive of 2015

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 consular assistance consists of its action, often by performed by authority measures, therefore consular policy has relatively strong influence on administration. However, many provisions of the Treaty of Lisbon has brought major changes in the consular policy of the EU: the modifications have fundamental rights aspects, competency implications along with institutional changes.

First and outmost the Charter of Fundamental Rights of the European Union (EU Charter) has became a primarily source therefore the EU citizens' rights to consular protection in Third States was reinforced and recognized as a fundamental right (EU Charter, 2007, Art. 46)

In the present regime introduced by the Treaty of Lisbon, the concept of consular protection in Third States is placed 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. (TEU, 2007, Art. 17(2); TFEU, 2007, 23, para. 2). 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, the EU institutions have "the explicit competence to adopt common EU standards to protect Union citizens in third countries." (Wouters, Duquet and Meuwissen, 2013:6)

The Treaty of Lisbon also put the administrative cooperation of Member States under the supportive competence of the EU. No such aspect of public administration of Member States and execution of EU law were regulated in the treaties before. As a matter of fact, since the EU's legislative competence is only to support, coordinate or supplement the actions of the Member States to improve their administrative capacity for a better implementation of EU law, the legislative acts shall not result any harmonization of the national administrative laws. (TFEU, 2007, Article 2.5.; 6 (g); and 197) It does not mean that EU law has no influence on administrations but effective execution and implementation of EU policy is the responsibility of Member States, mainly in the field of administration, so the necessary harmonization in administration issues is a domestic competence. The question of finding the limit between the necessary modification to realize and achieve common policies and the implicit expansion of EU competences is crucial. Even the preamble of the Consular Directive set the limitation of its scope: it does not affect consular relations between Member States and third countries, their rights and obligations arising from international customs and agreements.

The Treaty of Lisbon also contributed for the institutionalization of foreign policy of the EU when regulated the European External Action Service (EEAS) as the basic organ for common foreign and security policy and reorganized the delegations of EU in Third States which are supposed to be the diplomatic missions of the EU. Council Decision establishing the EEAS specifies that the delegations are successors of the Commission delegations and thereby the external part of the EEAS that 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. The diplomatic and consular missions of the Member States and the EU Delegation are supposed to cooperate. (TFEU, 2007, Art. 221(2); TEU, 2007, Art. 35, para. 1; 2010 EEAS Decision, Art. 5(10), 10(5); Blockmans, 2011:9-12)

Under the above-mentioned conditions, a Council Directive (Consular Directive, 2015/637) was adopted to replace the former decision of 1995 on consular protection on 1 May 2018. 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 States, which, after identification,

contact the responsible organs of the State of nationality, mainly the foreign ministry. If the State of nationality cannot or will not provide for help and protection, it is the consular authority of the requested State that shall provide for help under the same conditions as it would do for its own nationals. So, obligation rather concerns a sort of connection making efforts and in case of failure, EU law requires the equal treatment of the EU citizen with the requested State's own nationals. In case of big number of requests, such as in crisis situations, the EEAS and the delegation at site 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. (Consular Directive, 2015, Art. 12.; Lead State Guideline, 5.4.; 6-8.); The Consular Directive had to be implemented until 1 May 2018; it leaves too wide margin for domestic legislation and further negotiations which are required - just in the former regime. Mainly because this time, the validation of an EU guaranteed fundamental right deeply concerns foreign policy and external sovereignty of Member States, still a delicate issue even after Lisbon; and public administration of Member States, which has always been a domestic issue and still a marginal area for EU legislation.

EU Citizen and its Fundamental Right to Consular Protection in Third States

The regime of consular protection of EU citizens in Third States along the new directive of 2015 (Consular Directive) faces challenges; most them are related to the fundamental status of EU citizenship and fundamental rights related to it.

The protection of fundamental rights is a precondition for application for EU membership and serve as a general principle of EU just as the norms on non-discrimination and the requirements for procedural safeguards are especially pertinent. (Bauböck and Paskalev, 2015:92) 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 the EU, or modify powers and tasks defined by the. (EU Charter, 2007, 51 para. 2) 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 Union. (EU Charter, 2007, Art. 52 para 1; Gerardo Ruiz Zambrano v. Office national de l'emploi, 2011: point 45; Rottmann v. Bayern,

2010: point 42.; Vörös 2012:240). 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." (Rottmann v. Bayern, 2010: point 41.)

Consular right provision of the TFEU and EU Charter is detailed in the decision of 1995, which is still in force, and to be substituted by the Consular Directive in May 2018. Member States had to implement the Consular Directive into their legal orders and Member State authorities are 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. (Heidbreder, 2011:719-720) It shall be noted that in international relations, providing consular protection to nationals is a possibility and beside bilateral agreements it is the domestic law that fills the frames. Studies done in 2010 justifies that approximately one third of the 27 Member States that time did not regulate consular protection in legislative acts and left the issue for political consideration although all of them declared the 1995 decision implemented; but some had expressly enacted national legislative provisions for the principles of the decision, while others declared the direct effect of it. (CARE Report, 2010: 571-573; 579) 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.

Now consular protection is obviously acknowledged as a fundament right. EU citizens' rights are fundamental rights of individuals: they shall be ensured and guaranteed and can be hindered for objective reasons. As consular assistance is mainly needed in urgent cases, when other fundamental rights can also emerge (Vigny, 2010:27), 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 procedural law background.

Article 23 of the 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 to benefit the individuals; consular protection is a positive claim of individuals vis-à-vis Member States. (Poptcheva, 2012:101)

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 Decision 96/409/CFSP (Consular Directive, 2015, Art. 9.; Council Decision of 1995, Art. 5.) The level and quality of measures depend on the domestic regulation 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 repay and the issue of emergency travel documents (ETD) in case of lost or stolen travel documents. Both measures are to facilitate the return to home. 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 it would do to its own nationals. Except for crisis, citizen shall sign an undertaking to repay to his or her Member State of nationality the costs incurred, as the cost 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. (Council Decision of 1995, Art. 6; more details: Consular Directive, 2015, Art. 14-15.)

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. (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 EU law requires an appropriate legal background which supposes a legal remedy system in case of alleged breaches; in those states where consular protection is not even a right regulated in details in legislative acts first, material and procedural law changes are required during the implementation period.

Fundamental Rights and the Obligation of Consular Authorities

The provision rather reflects a non-discrimination clause then an individual right for citizens and an obligation for States under all circumstances since consular protection is a fundamental right. The primary obligation of Member States is to stand as a forum to where the citizen can turn for help and then, the Member State’s consular authority at present 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 site only takes measures to protect the non-represented citizen if the State of origin cannot or refuses to 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 that has information, and data sharing that involves the exchange of personal data. Given the fact that personal data

protection is also a fundamental right, (EU Charter, 2007, Art. 46) 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. (Eliantonio, 2016:533) 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. (EU Charter, 2007, Art. 47.; Model Rules, VI-3.; Varga Zs., 2014:547) The Consular Directive does not serve as a general legal background for cooperating mechanism with such details just outline the frames and remains silent on details and calls for further negotiation on the procedural aspects. In 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 of a consular authority is under the direction of its own State, in particularly the Minister of Foreign Affairs in general. 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 (cf. Gatti, 2014:258-259) and are not superior to their consular agents. However, as Member States are required to act in conformity with EU interests, even if foreign policy is still a domestic field in majority, general obligations mean a kind of determination to the margins of activity. What happens if the 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? The Consular Directive declares that it does not concern consular relations between Member States and third countries. (Consular Directive, 2015, Art. 1.) 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, yet 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.

Procedural Law and the Guarantee of Consular Protection

The domestic procedural laws of the Member States are different, so as the legal remedy options. If an EU citizen submit 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 conform with the requirements of good administration (EU Charter, 2007, Art. 41; Hofmann and Mihaescu, 2013:73–101; Milecka, 2011: 43-60) In a mass of organs and authorities, a procedural norm could convert a system to chaos. Since the Treaty of Lisbon, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to facilitate the exchange of information and to promote administrative cooperation among them. (TFEU, 2007, Art. 197; Torma, 2011:28)

Bearing in mind the fact that the right to consular protection is a fundamental right by virtue of Article 46 of the EU Charter, the review of the decisions of consular authorities need to be ensured. 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. (Battini, 2011:179) Legal remedy also invokes organisational problems again: public administration is hierarchical. In case of a Lead State, who is the responsible organ to appeal in the public administrative system: the domestic superior authority of the Lead State's consular authority or an EU organ? The unproperly settling of competences of each player in consular protection might also lead to dispute between authorities to which the dispute settlement mechanism is unforeseen. (cf. De Lucia, 2012:45-47) 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, even though the EU's

citizenship policy is rather flexible and does not follow the genuine link theory. (Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG, 1997: point 15.; Gyenei, 2013:160) A Hungarian citizen, for example, in Angola has ten Member States' authority to turn for help as Hungary has no representation there. (Consular protection for European Union citizens abroad) For the 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 inter-governmental regime and then, how consular cooperation and the administrative procedure of consular protection be transparent and predictable if it may vary from Third State to Third State?

Non-represented EU Citizens' Family Members and Rights to Consular Protection

> Consular protection shall be provided to family members, who are not themselves citizens of the Union, accompanying unrepresented citizens in a third country, 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 Union, in accordance with its national law or practice. (Consular Directive, Art. 5.)

The right to respect for family life (EU Charter, 2007, Art. 7; Directive on family reunification, preamble (2)) is interpreted in a positive manner to enjoy rights guaranteed by EU law itself. (Pierluigi, 2013:182) In fact, the protection of the family unity has a strong motif on EU law interpretation, (Gyeney, 2012:164) and even if a situation is not covered by EU law, it should be analysed in the light of the same provisions of the European Convention on Human Rights (ECHR, 1950, Art. 8.). (Pierluigi, 2013:182) 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 who has derived rights.

In addition to problems that might occur in case of the EU citizen, there are some additional challenges to legal practice. It is the EU law that 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 negations and practical arrangements which is referred to in the Consular Directive is necessary not just among Member States, but with the Third States too. (Consular Directive, 2015, preamble (19); Art. 7.), The Consular Directive does not affect consular relations between Member States and third countries (Consular Directive, 2015, preamble (6)), but the guarantee of fundamental rights related to effective consular protection requires so. (cf. Ferraro and Carmona, 2015:18-19.)

The question of ETD is the core issue of effective consular protection. Considering statistics of consular protection in Third States in 2015 (table 1. below), the majority of the requests referred to the issue of ETD.

Table 1. Statistics of Consular Protection in Third States in 2015

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/detentio n	ETD repatriation	ETD
PROTECTION BY	UK	Denmark Germany Finland UK	Spain Romania Czech Republic	Czech Republic	no available information
PROTECTION TO	Dutch Irish Lithuanian Cypriot Latvian	wide variety of nationalities, but 52% Swedish	2 Latvians 1 Slovak	Slovak	Italian Belgian Luxembourgish

Source: Consular Affairs Working Party Report of April 16 2016.

So, 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. It is established by the Consular Directive and not mentioned in the EU Charter, thus 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.

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, while ordinary Third State nationals who hold a residence permit are not entitled to these rights. From the moment, he/she holds a residence permit valid for at least one year and has reasonable prospects of obtaining the right to permanent residence, he/she may also submit an application for family reunification. (COM(2014) 210 final: 3-4) Yet, it does not mean that his/her rights are the same as those of EU citizens. They have certain rights, (see, ECRE Note, 2016:9-12) but different from EU citizens' rights and despite some standardizing EU rules, Member States have broad discretion in regulating this field. (Schiffner, 2015:14) However, the 2010 Guidelines on consular protection of EU citizens in Third countries expanded the protection of the EU on these Third country nationals if their nation State and one of the EU Member States have bilateral consular agreement, but only if evacuation is needed. (Guidelines, 2010:2; Poptcheva, 2012:233-234) In addition, the guidelines are

not legally binding documents and the 2015 Consular Directive does not contain any such provisions.

The equal treatment clause obliges Member States' consular authorities to perform positive actions, but in certain cases it is the EU law which makes it impossible like 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 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. 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, (Consular Directive, 2015, Art. 5) can be interpreted in a 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 and the sum of money can be calculated to cover the travel expenses of the accompanying family member. In such cases, it is the EU citizen who is the subject of this legal relationship and, except for crisis, sign the undertaking to repay to his or her Member State of nationality the costs incurred, as 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. (Consular Directive, 2015, Art. 14-15.)

In strict sense, if EU law is the obstacle for equal treatment, then what else should be needed; what else can be required under non-discrimination and equal treatment? 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 that fundament rights related to private life and family requires equal treatment but they oblige the Member State not the Third States and acting in protection of a non-national can be denied or may lead political conflicts. The question leads us to the classical problem of common foreign and security policy (CFSP): further negotiations are needed not just among Member States but with the Third Sates as the EU is not entitled to act as a foreign policy actor in a single voice to conclude arrangements with

Third States. In addition, in CFSP areas, the Council is the legislator and can adopt non-legislative acts but only unanimously (TEU, 2007, Art. 24.). So, 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, in fact, 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. (Schiffner, 2015:4) The whole history of the European integration is, in fact, a series of expanding EU competences for better implementation of common objectives. So, perhaps it is only the question 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 parallel external competences become exclusive. (Schütze, 2014:287)

Path for the Future

Rights enlisted in Article 20 TFEU is not exhaustive. First, because additional rights guaranteed by EU law also applies for them and second, and the list can be expanded under Article 25 TFEU stating that the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the EP, may adopt provisions to strengthen or add to those rights. (Pierluigi, 2013:172) Besides, it is important to notice that right of EU citizens and obligation of Member States form a legal relationship between themselves. Any activity on the territory of a Third State can be performed within at least the tacit consent of this State (VCCR, 1963, Art. 7-8) and the EU law obliges only Member States and not this Third States. So, acting to serve the interest of EU citizens, and their non-EU citizen family members -a non-citizen- is conditional in international relations therefore Member States' bilateral consular treaties need revision. The delegation of consular functions to another State, has met with resistance, and the idea of establishing dominant consulates on a permanent basis has not yet been implemented (Wouters, Duquet and Meuwissen, 2013:11) Whilst EU citizenship has established a legal right, the problem with labelling it as 'citizenship' is that this suggests the aspect of a 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. (Flash Eurobarometer #430. 29-30; 33, 42-46)

So, many questions arise, not to mention organisational those caused by the involvement of CFSP organs into the cooperation of Member State authorities. These are just a few, and one could ask: shouldn't it be more effective and time

and cost consuming to centralise the basic consular protection measures and ensure the consular protection by EU organs uniformly? The EU has delegation in Third States; over 140 delegations exist to represent the interests of the EU. Wouldn't it be logical to transfer some power to them? It would be, but as it is a question of Member State sovereignty and EU competences, and delegations are not embassies, it is not the solution of today. Not yet. Probably, one day they will be qualified as such by the consent of all Member States (Cf. TEU, 2007, Art. 20-21) but first a proper basic norm for at least for the settling of procedural aspects of consular protection would be a giant step and this solution is the most likely to be achieved.

Institutional challenges and big variety of substantive law along with procedural ambiguities impede an effective and coherent implementation of the individual right to consular protection of Union citizens. European administrative procedural law exists in principles shared by Member States and detailed procedural aspect involving EU organs and national authorities and its codification is on its way. As for the other questions, they are for further negotiation; otherwise the Europeanisation of non-EU legal areas (cf. Beck, 2015:10-11) 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.

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