THE EUROPEAN UNION AND CONSULAR LAW

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ABSTRACT
Since the early 1990s, the European Union has been working to establish a common framework ensuring consular protection for Union citizens in third countries. In the meantime, the practical need for consular assistance of unrepresented Union citizens in third countries has only increased, resulting in the progressive elaboration of the Union’s legal and institutional framework necessary to deliver such assistance. This paper discusses the law, policies and practices that are in place and those to come, taking account of the 2011 Commission proposal for a Directive and the real-life alterations in consular protection the proposal may effectuate. In spite of favourable conditions for further development of common consular protection, various legal, institutional and political hurdles continue to impede an effective and coherent implementation of the individual right to consular protection of Union citizens.

KEY WORDS
Consular Protection; Union Citizenship; Vienna Convention on Consular Relations; Consular Assistance in Crisis Situations; Urgent Local Consular Assistance; Visa Issuance; Proposal for a Council Directive on Consular Protection for Citizens of the Union Abroad.

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1. INTRODUCTION

Since the early 1990s, the European Union (‘EU’ or ‘Union’) has been set to establish a common framework ensuring consular protection for Union citizens in third countries. Ever since, the practical need for consular assistance of unrepresented Union citizens in third countries has only increased, resulting in the progressive elaboration of the Union’s legal and institutional framework necessary to deliver such assistance. This paper discusses the law, policies and practices that are in place and those to come, taking account of the 2011 Commission’s proposal for a Directive and the alterations in consular protection the proposal may effectuate. The paper first gives a broad sketch of the evolution of EU law on these issues from the 1992 Maastricht Treaty to the 2008 Lisbon Treaty (section 2). This overview makes clear that, broadly speaking, two main policy options can be followed for a common consular service (section 3). The following sections discuss European consular practices in crisis situations (section 4) and in the provision of day-to-day administrative and legal consular functions (section 5). In this analysis, the Commission’s proposed directive is taken into account. The concluding remarks (section 6) indicate how, in spite of favourable conditions for further development of common consular protection, various legal, institutional and political hurdles continue to impede an effective and coherent implementation of the individual right to consular protection of Union citizens.

2. EU CONSULAR PROTECTION FROM MAASTRICHT TO LISBON

Twenty years ago, the EU initiated attempts to elaborate a common framework ensuring consular protection for Union citizens in third countries.1 Over the years, the Union has experienced particular legal obstacles to the full realisation of its potential in consular affairs. Being an international organization, the EU cannot become a party to the Vienna Convention on Consular Relations (VCCR).2 In addition, the development of consular protection and assistance at the level of the EU remains a challenge in a policy field which interferes with deeply rooted national competences. The Union’s powers are limited to the competences conferred upon its Member States.3 Both in the international and European legal contexts, the EU Member States remain dominant sovereign consular actors. The development of legal provisions on consular affairs is closely connected to the concept of Union citizenship.4 The 1992 Treaty of Maastricht introduced the latter concept and

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1 Note that the European Treaties (and article 23 of the Treaty on the Functioning of the European Union specifically) use the expression ‘protection by the diplomatic or consular authorities’. In this paper, we focus on consular protection, which may be provided by both diplomatic and consular authorities. See Treaty on the Functioning of the European Union, OJ 2010, C 83/47, 30 March 2010 (TFEU) and Treaty on the European Union, OJ 2010, C 83/13, 30 March 2010 (TEU).
3 Art. 5(1-2); art. 4(1) TEU.
developed a number of rights for Union citizens. One of these rights is laid down in Article 23 TFEU⁵:

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.

Whereas the Maastricht Treaty prescribed consular protection on a non-discriminatory basis for all Union citizens, the further development of this entitlement remained a clearly intergovernmental affair resting in the hands of the EU Member States. Although reference is made to ‘protection by diplomatic and consular authorities’, presumably, the Treaty drafters’ intention was solely to refer to consular protection, which can be delivered by both diplomatic and consular authorities.⁶

Following the necessary negotiations among Member States, two Decisions ‘of the Representatives of the Governments of the Member States in the Council’ were adopted: Decision 95/553/EC and Decision 96/409/CFSP. These Decisions clarify the rules on the exercise of consular protection and the way in which such assistance is to be offered.⁷ Moreover, the Decisions provide further insight into the rationale behind the concept of European consular protection. According to Decision

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⁵ Art. 23, first para., TEU; originally Art. 8(c) TEC (1992 Maastricht Treaty), subsequently Art. 20 TEC (1997 Amsterdam Treaty), and taken up in Art. 46 of the 2000/2007 Charter on Fundamental Rights of the European Union. The original Art. 8(c) TEC read as follows: ‘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. Before 31 December 1993, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.’ [emphasis added]. Member States failed to respect the Treaty deadline. Accordingly, the subsequent provision on consular protection in Art. 20 TEC did no longer set a deadline for the Member States to establish the necessary rules among themselves and start international negotiations. Article 46 of the Charter does not include the final sentence of ex-Art. 20 TEC/ ex-Art. 8(c) TEC. The inclusion in the Charter transformed consular protection of Union citizens in a fundamental right whereas Art. 23 TEU, finally, also introduced an express competence for the Union to act in the field of consular protection: see infra.


⁷ Article 1 of Decision 95/553/EC clarifies, for example, the notion of ‘non-representation’ as follows: ‘[…] if, in the place in which he is located his own Member State or another State representing it on a permanent basis has no accessible permanent representation, or accessible Honorary Consul competent for such matters.’ Article 5 of Decision 95/553/EC specifies that consular protection comprises: (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union.’ See also: S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, at pp. 80-83. Ruffert observes that Decision 95/553/EC takes a more restricted view on consular protection than what was provided for in the EC Treaty. He refers to the limiting of the granting of protection in Art. 5 (1) to serious emergencies and the requirement for the Member States not to provide protection in other cases: ‘Diplomaticher und konsularischer Schutz zwischen Völker- und Europarecht’, at 467. Besides, Decision 95/553/EC concerns consular assistance without referring to diplomatic protection; see S. Battini, ‘The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection’, in E. Chiti and B. G. Mattarella (eds.), Global Administrative Law and EU Administrative Law, Springer, 2011, at 178.
95/553/EC, the provision of common protection arrangements for non-represented Union citizens in third countries would (i) strengthen the identity of the Union as perceived in third countries and (ii) strengthen the idea of European solidarity as perceived by Union citizens.\(^8\) Despite the ambitious goals put forward in Decision 95/553/EC, the Member States appeared poorly motivated to quickly implement the Decision; it took them over seven years to notify the entry into force of all the necessary measures, a necessity for the Decision to become effective.\(^9\) In the meantime, the Commission distributed a brochure on ‘Consular protection for the citizens of the European Union’ among national embassies and consulates to informally coordinate practices.\(^10\) The European consular initiative was reinvigorated at the dawn of the 21\(^{st}\) century. First and foremost, renewed political dynamics were triggered by various emergency situations in third countries.\(^11\) Large scale disasters underlined the importance of more effective overseas consular cooperation in order to assist Union citizens in need, especially in cases when consular presence of Member States in the affected States was lacking.\(^12\) Furthermore, the Charter of Fundamental Rights of the European Union (2000) included consular protection in the list of fundamental rights,\(^13\) while the EU’s enlargement to 25 and subsequently 27 Member States entailed a multiplication of the number of Union citizens that potentially would require consular protection in third countries.\(^14\)

From 2000 to 2007, Member States acting in the Council adopted various non-binding guidelines in order to facilitate consular cooperation amongst each other.\(^15\) In this context, EU institutions also undertook their first policy initiatives in the area of consular protection and assistance.\(^16\) Accordingly, the further development of an effective system of consular protection for non-represented Union citizens in third countries became a European priority. Once again, it was stressed that considerable potential exists both for the internal and external policies of the Union. Within the EU, consular protection can provide the notion of ‘Union citizenship’ with a concrete and tangible meaning for Union citizens. Externally, common consular assistance on its turn can strengthen the reputation of the EU as a coherent international actor.\(^17\)

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\(^8\) Preamble of Decision 95/553/EC.

\(^9\) Article 8 of Decision 95/553/EC stipulated that the Decision would only enter into force when ‘all the Member States would have notified the General secretariat of the Council that the procedures required by their legal systems for the Decision to apply have been completed’.


\(^12\) In the case of the 2004 tsunami, for example, an important number of EU Member States did not have a representation in the countries affected by the disaster: 17 Member States had a representation in Thailand, while only six had a representation in Sri Lanka. European Commission, ‘Green Paper on Diplomatic and Consular Protection’, 28 November 2006 (COM(2006)712 final) [further: ‘Green Paper’].

\(^13\) Article 46 EU Charter on Fundamental Rights (OJ 2000/C 364/01; OJ 2010/C 83/02). Note that article 46 of the Charter does not repeat the last part of art. 8 (c) Maastricht Treaty on the provisions to be adopted and negotiated by Member States.

\(^14\) The EU enlargement entailed that on the one hand the number of Member States represented in all third countries has decreased (this is only the case in three countries: China, Russia and the USA), while the number of Union citizens who may be entitled to protection has increased considerably during that period: Commission, ‘Green Paper’, p. 4.


However, the proposals made by Member States on the one hand, and EU institutions on the other, reflect different views on European consular assistance: Member States (in particular the larger ones) aimed for an intergovernmentally steered cooperation, while in particular the Commission foresaw an important role for the large network of (former) Commission delegations.

As is known, the Lisbon Treaty aspires to a strengthened foreign policy of the Union. New actors have been established: the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy. Catherine Ashton holds the latter function and, as the Lisbon Treaty stipulates, she is assisted by the European External Action Service (EEAS). The Union Delegations, i.e. the successors of the Commission delegations and thereby the external part of the EEAS, operate as diplomatic missions for the Union as a whole. The European Treaties oblige the diplomatic and consular missions of Member States and Union Delegations to cooperate. Specifically with regard to consular protection of non-represented Union citizens abroad, the Lisbon Treaty has strengthened the legal framework and the role of EU bodies and institutions through a variety of provisions, in particular Articles 35 TEU, 20(2)(c) and 23 TFEU and 46 of the EU Charter of Fundamental Rights.

First of all, Article 35, para. 3, TEU stipulates that, in addition to the diplomatic and consular missions of the Member States, Union Delegations will ‘contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries (…) and of the measures adopted’ at national, EU and international level for this purpose. In the same vein, the Council Decision establishing the EEAS specifies that the Union Delegations ‘shall (…), upon request by Member States, support Member States (…) in their role of providing consular protection to citizens of the Union in third countries’. Secondly, Article 23, para. 2, TFEU enables (‘may’) the Council to ‘adopt directives establishing the coordination and cooperation measures necessary to facilitate [consular] protection’. The Commission has the exclusive right to table a draft directive while the European Parliament must be consulted before the Council can adopt such a directive. Consequently, since the entry into force of the Lisbon Treaty, EU institutions have the explicit competence to adopt common EU standards to protect Union citizens in third countries. Moreover, with Lisbon, the EU Charter of Fundamental Rights has become a legally binding instrument with the same legal value as the EU Treaties, making the right to consular protection (article 46 Charter) a true fundamental right for Union citizens at


26 Art. 221 TFEU.
27 Art. 221(2) TFEU; Art. 35, para. 1 TUE; art. 10(5) 2010 EEAS Decision.
28 Surprisingly, during the negotiations of the Lisbon Treaty, the topic of consular protection per se was never discussed. See: Tichy-Fisslberger, ‘Der Schutz der EU-Bürger durch die diplomatischen und konsularischen Vertretungsbehörden’, at 217.
29 Art. 35, para. 3, TUE.
30 Commission, Green Paper, §§ 1.4, 2.2, 3.1, 4.1.
31 Art. 15(6), 18 and 27 (2) TEU.
32 Art. 27(3) TEU.
34 Art. 221 TFEU.
35 Art. 221(2) TFEU; Art. 35, para. 1 TUE; art. 10(5) 2010 EEAS Decision.
36 Surprisingly, during the negotiations of the Lisbon Treaty, the topic of consular protection per se was never discussed. See: Tichy-Fisslberger, ‘Der Schutz der EU-Bürger durch die diplomatischen und konsularischen Vertretungsbehörden’, at 217.
37 Art. 35, para. 3, TUE.
38 Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201/30 of 3 August 2010, Art. 5(10) [further: EEAS Decision], which adds that this must take place ‘on a resource-neutral basis’.
39 Art. 23, para. 2 TFEU.
40 Art. 17(2) TUE and 23, para. 2, TFEU, which refers to ‘a special legislative procedure’.
41 See Art. 6(1) TEU.
constitutional level, with possibly an important future role for the European Court of Justice in terms of interpretation and enforcement.

The aforementioned redefined European constitutional framework, as well as international crises, have entailed novel opportunities to further develop the right to consular protection of non-represented citizens in third countries. Since 2009, the Council, the Parliament and the Commission have underlined in various policy documents the need for more effective EU consular protection. The Commission informs Union citizens by providing practical details on the possible consular assistance offered by Union Delegations and Member States on a website dedicated to this purpose. Moreover, the Commission has drafted a proposal for a Council Directive on consular protection for citizens of the Union abroad. In the proposal, various cooperation and coordination measures are laid down to facilitate consular protection for unrepresented Union citizens. As the Commission observes in the explanatory notes to its proposal, national consular laws and practices continue to diverge, as do views about the underlying concepts of consular protection for unrepresented citizens. There is no clear European consensus on the content of Article 23 TFEU nor on the responsibilities which this right entails. The proposed directive aims to (i) clarify the content and operability of the right of unrepresented Union citizens to consular protection under equal conditions; and (ii) simplify cooperation and coordination between consular authorities. If adopted, the Directive would replace the old Decision 95/533/EC on consular protection which currently regulates consular protection for non-represented Union citizens.

3. POLICY OPTIONS FOR A COMMON CONSULAR SERVICE

The historical overview in the above section reflects that, notwithstanding increasing political interest in the topic, several obstacles continue to hinder the practical and effective realisation of an individual right to consular protection. A distinction between two potential policy routes is in order.

A first option, the formation of a highly integrated European consular partnership with a leading role for the EEAS, currently receiving little support. The possibility of establishing so-called ‘European Consulates’ or ‘Euroconsulates’ that execute a

33 See also Battini, ‘The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection’, at 179, who argues that any requests for assistance from European citizens are reviewable by national courts and that national diplomatic and consular authorities are not allowed to exercise any margin of discretion to satisfy such requests.
34 The Proposed Directive refers to the crises in the context of the Arab Spring and the earthquake in Japan of March 2011. at p. 2.
38 See: http://ec.europa.eu/consularprotection/index.action. Inter alia, the website offers an overview of all diplomatic/consular representations of EU Member States and Union Delegations worldwide.
39 Based on the Stockholm Programme, §2.7.
40 See the Proposed Directive, supra note 16.
41 Proposed Directive, p. 3. For a detailed analysis of consular laws and practice of EU Member States, see: Care Project Final Report, especially Chapter 2.
limited number of consular tasks has been examined by the Commission in 2006.43 The number of complications was found to be significantly high. Consular laws, practices, and the enthusiasm to invest in the quality improvement of the consular services provided differ to a great extent among Member States.44 Furthermore, the latter are concerned about their international reputation: maintaining a high profile abroad is, amongst others, made possible by the presence and the well-functioning of consular posts. Consular staff, finally, serves the important goal to collect firsthand facts and figures for national ministries while performing their respective tasks; a direct line which States do not wish to see disappear.45

A second option, optimizing intergovernmental cooperation between EU Member States in the performance of consular functions, has gained wider acceptance. The Member States favour this policy model, which allows them to maintain control over the provision of consular services.46 Presently, States are experimenting on an ad hoc basis with co-location projects in which several national consular services share premises and administrative staff.47 This is particularly interesting for those Member States that, for geographic, historic, or cultural reasons build on a tradition of working closely together. Prime examples are the Benelux countries, the Baltics, and Nordic States.48 However, it is not excluded for Member States to set up co-location projects with non-EU States as well.49 A third variation of location sharing includes Member States and the Union Delegation. The recent memoranda of understanding providing for co-housing of the Union Delegation with the Luxembourg delegation to Ethiopia viz. with the Spanish diplomatic and consular post in Yemen, offers example. It is expected that the number of Member States asking the EEAS for such arrangements will increase in the future.50

The Commission’s proposed Council Directive on consular protection for Union citizens builds on this second option, leading on to a closer cooperation between national consulates. It embraces the idea that consular functions essentially remain an intergovernmental matter suggesting a fairly limited role for Union Delegations in consular affairs. Yet, it does not entirely do away with EU solutions. The Commission’s proposal enables the EU to take up a supporting role in the realisation of the protection of unrepresented Union citizens in third countries. The Commission’s proposal does so, by operationalizing the legal principles contained in Article 23 TFEU. An accessibility criterion is introduced to delineate the concept of ‘unrepresented citizens’. Furthermore, the proposal clarifies that a Union citizen will be considered as unrepresented in case it is impossible for him/her to reach the embassy or consulate of his nationality and return to his place of departure via means of transport commonly used in the third country at least the same day.51

Another aspect of further specification of the personal scope of the common consular

44 Battini, discussing the Europeanisation of national laws, argues that EU law can also be understood to ‘harmonize, at least to some degree, the substance of the national laws regarding consular assistance, thus minimizing the differences between the respective “international administrative laws” of the various Member States’.”The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection”, at 179.
47 Art. 27 (1) VCCR enables this, as well as it allows for the entrenchment of the custody of consular premises, together with the properly contained therein and the consular archives, to a third State.
48 Belgium’s Minister of Foreign Affairs Reynders recently stated the country’s intention to co-locate with Dutch and Luxembourg consular posts abroad. See ‘Consulaten onder één dak’ [Consulates under one roof], De Standaard, 9 January 2013.
51 Art. 3 (2) Proposed Directive. An exception is foreseen for urgent cases.
protection concerns the non-discrimination measures proposed. It is explicitly accepted in the proposed Directive that third country family members of Union citizens can receive European consular protection.\textsuperscript{52} Non-discriminatory treatment also includes the principle, as stipulated in Art. 23 TFEU, that consular officers have to ensure the protection of nationals of another Member State on the same conditions as the nationals of their own State.\textsuperscript{53}

4. CONSULAR PROTECTION AND ASSISTANCE IN CRISIS SITUATIONS

The individual right to consular protection of Union citizens embodied in the Treaty and Charter provisions is put to the test when crisis situations occur in third countries. Revolutionary uprisings, earth- or seakuakes, hurricanes, or terrorist attacks can all give rise to the exercise of consular functions. In such a case, States attempt, as quickly as possible, to locate their nationals in the affected area. In addition, they have to manage the variety of Union citizens' requests for medical assistance, evacuation, or repatriation caused by the natural or man-made disaster.\textsuperscript{54} In this context, reference can be made to another tool developed in the European context that serves similar goals: the Community Mechanism for Civil Protection.\textsuperscript{55} Set up in 2001, this mechanism pools the civil protection capabilities of the Member States and other participating countries. The Council Decision establishing the Mechanism defines that the latter can be used for supporting consular assistance to Union citizens in major emergencies in third countries for civil protection purposes and if requested by the consular authorities of the Member States.\textsuperscript{56}

Member States have collaborated within and together with the EU institutions to establish a legal framework specifically designed to improve crisis cooperation between national consular services and Union Delegations. It is thus assumed that both Member States and Union Delegations can simultaneously take up independent roles.

In many third countries a specific Member State can be designated that, for geographical, diplomatic, historical, or linguistic reasons, has a more intense alliance with the given country than fellow Member States.\textsuperscript{57} Quasi-automatically, this inter-State connection will create a leading role for that Member State in handling an unforeseen crisis. Reasons are plentiful: the Member State will not only have an excellent knowledge of the area and the political regime, but its citizens will very

\textsuperscript{52} Art. 2 (3) Proposed Directive. It is consistently held by European Court of Justice (ECJ) that the principal benefits of Union citizens’ rights are also extended to their family members, see in this respect, for example, ECJ, 11 July 2002, C-60/00 Carpenter, Jur. 2002, I-06279. ECJ, 25 July 2008, C-127/08 Metock et al., Jur. 2008, I-06241.

\textsuperscript{53} A ‘national treatment’-clause of a general nature can be found in Article 1 Proposed Directive: ‘This Directive lays down the cooperation and coordination measures necessary to facilitate the exercise of the right of citizens of the Union, in the territory of a third country in which the Member State of which they are nationals is not represented, to protection by the diplomatic or consular authorities of another Member State on the same conditions as the nationals of that Member State’ (see in similar terms Art. 7 Proposed Directive). Article 2 (1) Proposed Directive reaffirms national treatment with regard to the beneficiaries of consular protection, by providing that ‘(e)very citizen holding the nationality of a Member State of the Union which is not represented by a diplomatic or consular authority in a third country, hereafter ‘unrepresented citizen’, shall be entitled to protection by the diplomatic or consular authorities of another Member State under the same conditions as its nationals’. The ‘national treatment’ principle, furthermore, extends to family members of unrepresented EU citizens (Art. 2 (3) Proposed Directive). Finally, Art. 15 explicitly states that consular protection must be offered to unrepresented citizens under the same conditions as nationals in crisis situations.


\textsuperscript{56} Ibid, Art. 2 (10).

\textsuperscript{57} Examples are plentiful: Portugal in Brazil, Spain in Honduras, the United Kingdom in India, France in Morocco, etc.
likely also constitute the largest group of European nationals residing permanently or temporarily in the given third State. The concept of the ‘lead State’, although not legally binding, is recognized in the EU. 58 Currently, practical arrangements are installed regarding lead States in 29 third countries out of 146 where at least one Member State is represented. 59

The Commission’s proposal for a Directive elaborates on the precise role of the lead State in consular affairs. 60 Article 15 of the proposal, dealing with crisis cooperation, provides that Member States represented in a third country shall coordinate the contingency plans among themselves and with the Union Delegation. In the event of a crisis, the lead State is in charge of coordinating and leading the assistance. On the same grounds, it is suggested to also assign the evacuation task to the lead State, where appropriate. If needed, responsibilities will be shared with other Member States represented in the region and in consultation with the Union Delegation. In addition, the lead State will also provide a point of contact for unrepresented Member States, through which they can receive information about their citizens (Art. 16 (1) and (4)).

Interestingly, the European Parliament envisions a role for the lead State that differs from the role proposed by the Commission. The Parliament recommended a number of amendments to the proposal. 61 A more prominent role for the Union Delegations was suggested, as well as closer cooperation between Member States’ consulates and the Union Delegation. In order not to put an unbearably heavy burden on the lead State, or any Member State present in the area, Union citizens should be given the choice to contact the consulate or the Union Delegation to claim protection. 62 The Parliament furthermore suggests that Union Delegations should deal with coordination and cooperation activities, including the communication of contingency plans, evacuation, and the timely exchange of information. 63 The coordination function is one function to which the Union Delegations are already accustomed. The Union Delegation in Japan, for example, spontaneously assumed it when a nuclear disaster caused the official proclamation of an emergency situation in 2011. Finally, the Parliament added in Article 1 that ‘where relevant, Union delegations

58 Art. 6 Council Decision 95/553/EC, Guidelines on consular protection of EU citizens in third countries (Council document 10109/06 of 16 June 2006 revised by Council document 15613/10 of 5 November 2010 – not published) and European Council Guidelines on the implementation of the consular Lead State concept, OJ C-317/6, 12 December 2008. See also S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, at p. 81. The ‘lead State’ principle originates from NATO practices on consular cooperation between Member States in the event of a crisis: Tichy-Fissberger, ‘Der Schutz der EU-Bürger durch die diplomatischen und konsularischen Vertretungsbehörden’, at 223. See also the Council’s reply on 27 September 2007 to written question E-2865/07 by S. Kaulmann, OJ 2008 C 43/138, 16 February 2008, which indicates that ‘the role of the Lead State is voluntary and requires the active support and participation of all Member States. The criteria for determining which Member State will take the lead in any third country will be established by the Member States on a case-by-case basis, depending, inter alia, on local conditions. Member States will ensure that an appropriate share of the burden is allotted to each mission present in that third country’. See also Forni, ‘The Consular Protection of EU Citizens during Emergencies in Third Countries’, at 170, who notes that the principle was applied for the first time in February 2008, in Chad. See also Council of the European Union, Stocktaking report: Measures to increase the effectiveness, coherence, and visibility of EU external policies, Doc. 10612/08, Brussels, 13 June 2008, at 10.

60 See explanatory notes to the Proposed Directive, p. 5.

61 Art. 16 (2) determines how a Member State is designated as Lead State in a given third country: ‘if it notified its intention through the existing secure communication network; unless another Member State objects within 30 days or the proposed Lead State renounces the task through the secure communication network. If more than one Member State wish to assume jointly the task of Lead State they shall jointly notify their intention through the secure communication network. In the event of crisis one or more Member States may assume this task immediately and shall undertake notification within 24 hours. Member States may decline the offer, but their nationals and other potential beneficiaries remain, in accordance with Article 6(1), eligible to assistance from the Lead State. If there is no Lead State, Member States represented on the ground shall agree on which Member State will coordinate assistance for unrepresented citizens’.


63 European Parliament, Amendment 47 and 48 concerning Art. 15 (1) and (2) Proposed Directive. The Commission had put it this way: ‘Member States represented in a third country shall coordinate the contingency plans among themselves and with the Union delegation’. The Parliament amended Article 16 on the ‘lead State’ accordingly.
may also be entrusted with consular tasks for unrepresented citizens’. This modification may be regarded as controversial because it implies the acceptance of the exercise of tasks by an international organization, the EU, which traditionally are the prerogative of sovereign nation States. It is doubtful whether the Council will accept this. Legislative deliberations on the adoption of the Proposal have been placed on the provisional agenda of the Foreign Affairs Council in Luxembourg, to take place on 24 June 2013.  

5. DAY-TO-DAY CONSULAR FUNCTIONS

5.1. INTRODUCTORY REMARKS

Some of the most important needs of citizens abroad give rise to requests to consular agents concerning the drawing up of documents that allow them to travel, to get married or to adopt children and requests for assistance in case of sudden death, illness, or crime. A feature of the aforementioned consular tasks is that they are of a continuous nature and demand permanent monitoring. Performing the day-to-day consular function effectively and efficiently is as indispensable as the management of exceptional crises.

Intergovernmental European cooperation as well as support by the EEAS and Union Delegations in these everyday situations is more limited than in times of crisis. In the past, to remedy this, it has been suggested to designate a ‘dominant’ consulate in third countries. The latter concept clearly shares similarities with the concept of the lead State employed in crisis situations. A key distinction, however, would be that it is envisioned to operate on a permanent rather than temporary basis. Especially in relation to this last feature, the ongoing delegation of consular functions to another State, has met with resistance. As it would entail the transfer of related decision-making powers, the idea of establishing ‘dominant consulates’ was never implemented.

The Commission’s proposal for a Directive includes a rather unambitious provision on day-to-day cooperation. Article 14 deals with the coordination of consular affairs at the local level and the modalities of local meetings between representatives of all Member States’ consular posts and the Union Delegation. Results of such meetings and communications can be shared with unrepresented States. At the coordination gatherings, information will be exchanged on issues such as the safety of citizens, local prison conditions, and unrepresented citizens’ access to consular services. The chairperson will be a representative of a Member State or the Union Delegation, to be decided locally unless otherwise agreed by the Ministries of Foreign Affairs centrally.

Apart from this, the EEAS assists the cooperation between consular posts in a technical manner. A specific website (Consular On Line) is maintained by the Service to share contact details of relevant contact persons in the Member States.

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64 See General Secretariat of the Council, ‘Provisional agendas for Council meetings, during the first semester of 2013 (Irish Presidency)’, Brussels, 21 December 2012. The announced deliberations are ‘public deliberations’ in accordance with Article 16(8) of the TEU, organized when the Council deliberates and votes on a draft legislative act, and as such, a crucial step in the legislative process.


66 Ibid.

67 See also European Parliament, Opinion of the Committee On Foreign Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council directive, op. cit., p. 38, where it is stated: ‘The Committee nevertheless expresses the view that the Commission proposal could have been much more ambitious and that it does not make use of all the possibilities offered by the Lisbon Treaty and especially the role of the EU delegations highlighted in Art. 35 TEU’.


69 Art. 7 Proposed Directive.
Although useful, these collaboration efforts between Member States are essentially limited to exchanges of information, a rather unambitious specimen of intergovernmental cooperation.

5.2. **Urgent Local Consular Assistance**

An unexpected personal disaster may occur in a foreign country, and if it does so, the consular post of the State of nationality serves as the point of first contact for the Union citizen. In the event of inaccessibility of the consulate, as defined in the proposal for Directive, the aforementioned principle of protection by the consular authorities of any Member State, possibly supported by the Union delegation, is applicable.\(^\text{70}\)

In its current state, EU law fails to sufficiently specify the role which an Union Delegation can assume in such situations. Consular practice shows that there are three types of actions that Delegations undertake to support unrepresented citizens in urgent need for assistance: they may (1) function as an intermediate actor to communicate between Union citizens and local authorities, (2) bring citizens into contact with the authorities of their own State, and (3) help citizens leave the country, for example by pre-financing the transport to the home State.

5.3. **Administrative and Legal Assistance: Towards a Common Consular Visa Policy?**

The EU and its Member States do not offer common consular administrative and legal services abroad. Notarial and regulatory practices of States are insufficiently integrated and standardised to realise such an undertaking. However, this objection does not hold with regard to consular functions concerning the issuing of travel documents.\(^\text{71}\) The EU, considered as one entity without internal borders, has established a common policy on border checks, asylum and immigration.\(^\text{72}\) The latter policy domain also covers external aspects related to shared peripheral borders. A number of regulatory initiatives have been taken that allow for extended consular cooperation in this policy field. As early as 1996, the Council established a standard model for a European ‘Emergency Travel Document’ (ETD).\(^\text{73}\) The ETD can be issued to a Union citizen in the territory of a country where his or her Member State of origin has no accessible diplomatic or consular representation with the capacity to issue a travel document or where that State is not otherwise represented. In 2009, a Community Code on Visas was promulgated to define common procedures and conditions for the issuance of visas for transit through, or intended stays in the territory of the Member States not exceeding three months in any six-month period.\(^\text{74}\) The Visa Code creates a legal framework for the delivery of uniform visas by Member States’ consulates to third country nationals wishing to travel to the EU.

Even though the foregoing examples of joint consular practices open up possibilities to realize a more integrated consular service, two preliminary remarks are in order. First, although the common visa policy has constitutional status through its inclusion

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\(^{70}\) Art. 23 TFEU j. Art. 10 (5) EEAS Decision.  
\(^{72}\) See Title V, The Area of Freedom, Security And Justice, Chapter 2, Policies on Border Checks, Asylum and Immigration, TFEU.  
\(^{73}\) Decision 96/409/CSFP of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, as modified by 2006/881/CFSP Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 30 November 2006 adapting Decision 96/409/CSFP on the establishment of an emergency travel document, in order to take account of the accession of Bulgaria and Romania to the European Union, OJ L 363/422, 20 December 2006.  
in the EU Treaties, it builds on the Schengen acquis in which the United Kingdom and Ireland do not participate. Second, European policies on the access to a national territory remain a sensitive matter, even for Schengen States. States preferably maintain a certain level of control on the influx of migrants into their respective countries.

Since 2006, ‘Common Application Centres’ (CACs) can be set up in partner States included in the European Neighbourhood Policy (ENP). The objectives of this type of pooling of resources are twofold: the introduction of biometrics in passports and visas is facilitated and the scope of European representation extended. Citizens of the neighboring countries can thus apply for a visa in such Centre that would enable them to travel freely within the Schengen zone. Essentially, this constitutes a specific variation of co-location in which a State may participate at its own discretion. Practice has seen small groups of Member States teaming up to establish CACs. The Commission, sympathetic to such collaborations, specified in 2009 that it envisions the Centres in the long term to become all-round common offices that perform consular functions, such as issuing visas or legalizing documents. Political realities may have altered those plans, though, since further integration in performing consular functions related to visa policy was a subject-matter not included in the Commission’s 2011 proposal for a Directive.

Another suggestion concerned the addition of the issuance of Schengen visas to the existing responsibilities of Union Delegations. The European Parliament’s Committee on Foreign Affairs in its opinion on the Commission’s proposal brought

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75 See the Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131/43 of 1 June 2000 and Council Decision 2002/192/EG of 28 February 2002 concerning the request of Ireland to take part in some of the provisions of the Schengen acquis, OJ L 64/20 of 7 March 2002.
77 One can, for example, recall that at the outbreak of the Arab uprisings beginning of 2011, Member States had lively discussions on how to control the ‘human tsunami’ (dixit Berlusconi) within the Schengen zone: D. Perrin, ‘Arab Revolts and Migration: Behind the Mediterranean Wall, the Unity of Europe’, in Mediterranean Yearbook 2011 (Barcelona: IEMed 2011), at pp. 283-286.
78 The ENP is composed of 16 of the EU’s closest Eastern and Southern neighbours and has the objective ‘to avoid new dividing lines between the enlarged EU and its neighbours and to strengthen the prosperity, stability and security in the region’. See: European Commission, Strategy Paper on the European Neighbourhood Policy (ENP), Brussels, 12 May 2004, COM(2004) 373 final. In its 2009 Green Paper, the Commission suggests to set up common offices in the Caribbean, the Balkans, the Indian Ocean and West Africa. See: Commission, Green Paper, p. 11.
79 Commission, Green Paper, p. 11.
80 Where Common Application Centres are established, staff of the diplomatic missions or consular posts of two or more Member States shall be pooled in one building in order to receive the applications (including biometric identifiers) addressed to them. Applicants shall be directed to the Member State responsible for the processing of the application. Member States shall agree on the duration of and conditions for the termination of this cooperation as well as the cost-sharing among the participating Member States. One Member State shall be responsible for contracts in relation to logistics and diplomatic relations with the host country. Consideration 14, Regulation (EC) No 390/2009 of the European Parliament and of the Council of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, OJ L 131/1 of 28 May 2009.
Three objections can be made to such construction, making its realization for the time being highly unlikely. First, it is doubtful whether the EEAS, and by extension the Union Delegations, have the necessary legal competence to issue visas. As indicated above, the EEAS Council Decision stipulates that Union Delegations can, “upon request by Member States, support the Member States […] in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis”. The issuing of visas seems to surpass what can be understood as a ‘supporting’ role. In addition to this, in all probability, ‘consular protection’ should be read in its narrow meaning, in light of Article 23 TFEU, to not include ‘consular assistance per se’. Second, from the viewpoint of the EEAS the issuance of visas - a typical consular, administrative, task - does not confer much added value to the current functions of Union Delegations, which are mainly of a diplomatic nature. Finally, no additional funding is foreseen for the EEAS in respect of consular training for staff or for the further practical implementation of the issuance of visas.

6. CONCLUDING OBSERVATIONS: HURDLES ON THE ROAD TO AN EFFECTIVE CONSULAR PROTECTION OF UNION CITIZENS

The past two decades have been marked by both a continuous increase of the practical need for consular assistance of unrepresented Union citizens in third countries and the elaboration of the legal and institutional framework necessary to deliver such assistance. Despite the favourable context for the further consolidation of consular protection for Union citizens, it appears that various hurdles still preclude an effective and coherent implementation of this individual right of Union citizens. EU Member States and Union Delegations still grant consular protection on a case-by-case basis. Especially, legal clarity is lacking with regard to the content of the concept of consular protection, its operationalization, and the means and methods of cooperation and coordination between consular authorities. At each of these levels, moreover, tensions exist among Member States (preventing a more effective intergovernmental cooperation), as well as between EU institutions and Member States (with some institutions supporting a more prominent role for EU actors and most Member States favoring Member State-driven consular protection).

Consular affairs are sensitive at national political level and connect strongly with public opinion of citizens. While diplomatic relations are of prominent interest from a political perspective, the provision of consular assistance is of great importance for the relationship (and the reputational image) of a State vis-à-vis its citizens. The willingness to further develop consular cooperation at EU level very much depends on the political sensitivity of the issues at hand. Accordingly, it was found that Member States’ will to cooperate is considerably higher in case of crisis situations

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84 Admittedly, such textual reading is tricky, as the difference between consular protection and assistance is often not upheld in policy documents. See e.g. the Commission’s 2009 Green Paper on ‘diplomatic and consular protection of Union citizens in third countries’ [Emphasis added] that dedicates a section on the issuing of visas. The most recent Proposed Directive (2011) bearing the same, demarcated, title does not longer touch upon this topic.

85 High Representative Ashton referred explicitly to the lack of resources on the occasion of the 2013 EEAS review as obstructing the further engagement of the EEAS in consular affairs: ‘Resources are also the key to any discussion on potential new areas of activity, including consular activities or more military experts in delegations – areas where the EEAS at present has limited expertise or competence. These changes will not happen overnight’. Statement by EU High Representative Catherine Ashton on EEAS Review, Strasbourg, 12 June 2013, A 314/13, at 5.

86 See for example: Care Project Final Report, p. 680.

87 For example: G. Porzio, ‘Consular Assistance and Protection: An EU Perspective’, p. 95: ‘A Dane may be very happy at being assisted by an Austrian during a crisis in Africa, but upon return to Denmark the question will inevitably be: if an Austrian was there, why was Denmark not present?’ During the tsunami, a German aircraft evacuated some British citizens. A UK tabloid was only too happy to publish the news with the quaint title ‘Luftwaffe Flies Brits Back Home’!.
than it is in sensitive policy areas such as the deliverance of visas. As noted, the specific content of the ‘right to consular protection’ is unclear and results in a diverging and ad hoc implementation of this Union citizens’ right by Member States. This situation entails legal uncertainty for Union citizens and makes it difficult to adequately inform the latter about their rights.\textsuperscript{88} Moreover, the diverse approach of Member States also generates ‘consular shopping’, with unrepresented Union citizens ‘shopping’ around consular posts in order to find the best service.\textsuperscript{89} This might lead to disproportionate burdens on those consulates that are offering the most favourable services. Along the same line, it can be observed that (small) Member States with limited representations throughout the world will benefit from the large network of representation of other Member States. Unlike in many other international legal arrangements, reciprocity in consular assistance is unequal: those States having more representations need less often assistance for their nationals by other States.\textsuperscript{90} This finding points to the importance to elaborate clear arrangements regarding the practicalities of reimbursement of costs incurred when delivering consular assistance. The European Commission’s proposal for a Directive foresees formal arrangements aiming to better guarantee that the State protecting citizens of another State will be reimbursed by the State of nationality, which in turn must be reimbursed by its citizens who received consular protection.\textsuperscript{91}

To conclude, an important issue to be considered is the relationship between consular protection and assistance as provided for by EU law on the one hand, and the international legal framework on consular relations on the other. Remarkably, while the right to consular protection is being further developed within the EU legal framework, its relation with relevant international law has only received scant attention thus far. This is particularly problematic since consular protection for Union citizens abroad is essentially carried out on the sovereign territory of third States. Article 8 VCCR allows for the exercise of consular functions by third States, but makes explicit that the receiving State can object to this.\textsuperscript{92} Accordingly, Article 23 TFEU provides that ‘Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection’. These negotiations can either result in (i) a bilateral agreement between an EU Member State and a third State for the protection of non-nationals, (ii) a multilateral agreement between a number or all EU Member States and a number of third States, or (iii) a mixed agreement between (a number of) third States, the EU\textsuperscript{93} and its Member States. In these agreements, the third State would accept protection and assistance by an EU Member State on behalf of nationals of another EU Member State. Currently, however, few agreements exist with third States that implement Article 23 TFEU.\textsuperscript{94} The legal implications of this omission can be significant, as without its prior agreement, a third State has the discretion to refuse an EU Member State to provide consular assistance to a non-represented EU-citizen that is not its national.\textsuperscript{95}

\textsuperscript{88} For an extensive analysis, see the Care Project Final Report, especially p. 680.
\textsuperscript{89} Care Project Final Report, p. 552: ‘The United Kingdom is aware of the ‘risk’ that large numbers of EU citizens from smaller Member States that have lower levels of consular representation could place a disproportionate burden on its finances and resources.’
\textsuperscript{90} As A. M. Vermeer-Künzili notices, ‘Where the Law Becomes Irrelevant’, p. 975.
\textsuperscript{91} Compare Art. 12 Proposed Directive with art. 6 Decision 95/553/EC. Note that the European Parliament proposes Member States to establish a ‘trust fund’ for consular protection from which the consulate (or embassy) of the assisting Member State could advance its expenses for assisting an unrepresented citizen and into which the Member States of the assisted unrepresented citizen should reimburse the financial advance.: Amendment 18(a).
\textsuperscript{92} Article 8 VCCR provides for the ‘Exercise of consular functions on behalf of a third State’, specifying that: ‘Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.’ Consequently, according to international law the consent of a third State can be implicit, and unopposed notification is sufficient (for diplomatic protection explicit consent is required: art. 46 VCDR).
\textsuperscript{93} On the basis of art. 197(2) TFEU and art. 6 (g) TFEU. See: Care Project Final Report, p. 678.
\textsuperscript{95} An additional argument why third States need to agree on consular protection of EU Member States to non-represented EU citizens is the fact that EU-citizenship does not fall together with ‘being a national of a State’. Since
Admittedly, practice shows that third States do not actively oppose the provision of consular assistance by EU Member States to non-represented Union citizens. It is also uncertain whether bilateral agreements concluded between Member States and third States can be generalised in the sense that other EU Member States will be able to benefit from them too. For consular protection, the principle of non-discrimination ensures that non-represented Union citizens are entitled to protection of consular authorities on the same conditions as the nationals of that State (art. 23, para. 1, TFEU). Vermeer-Künzli illustrates this problématique as follows: in the case of a consular agreement between Portugal and Brazil, a consular officer of Brazil in a third country can be requested to assist a Union citizen who is not Portuguese, whose own State of nationality is not represented in the relevant third country and who invokes the bilateral agreement between Portugal and Brazil based on the non-discrimination principle. While Brazil may argue that it is not bound by any agreement between Portugal and other EU Member States, this argument does not apply to Portugal, as the latter is obliged under EU law to offer consular assistance to non-represented Union citizens on the same conditions as its own nationals. The present EU legal and policy framework fails to consider this problem.

Finally, the legal implications of the new European initiatives which result from changes brought about by the Lisbon Treaty are uncertain. It is for example not clear in what relationship bilateral agreements concluded between EU Member States would stand to EU legislation and initiatives. The EU competence with regard to consular protection and assistance is limited through the principles of subsidiarity and proportionality (art 5 TEU), and the provision of consular services is not expressly attributed to EU institutions in the TEU or TFEU. At the same time, the competence of Member States to protect their nationals is continuously highlighted and EU institutions are merely allowed to play a supporting role of the Member States’ assistance. Member States will most probably continue to conclude consular agreements among each other, but they have to exercise these powers in conformity with the EU Treaties and any applicable EU legislation.

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article 23 TFEU accords a right to Union citizens and not to ‘nationals of the sending State’ (as is provided for in the VCCR, eg. art. 5 VCCR), the consent of third countries with the implementation of article 23 TFEU is necessary. See: Vermeer-Künzli, ‘Where the Law Becomes Irrelevant’, p. 985.


102 Ibidem.

103 See for example the reaction of the UK on the potential establishment of European Consular Posts, as taken up in the Care Project Final Report, p. 544. ‘The United Kingdom has not rejected outright the development of a European External Action Service but it does believe that the boundary of subsidiarity must be observed. In concurrence with its French counterpart, the United Kingdom does not believe that the European Commission has been able to demonstrate that the establishment of ‘European’ Consular Posts would be more efficient than the existing system of consular assistance that is delivered by Member States.’.

104 See for example: Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ I. 201:30 of 3 August 2010, Art. 5(10): ‘The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.’.


106 As is indicated in the Care Project Final Report, p. 561. ‘On the basis of Arts. 23 TFEU and 46 of the EU Charter […] Provision of a wider consular protection to the citizens of the Contracting Union country but not to other Union citizens from other unrepresented Union countries would amount to overt discrimination among the Union citizens’.
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