Chapter 5

Protection of European Union Citizens Abroad: Legal Framework and New Challenges

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Abstract

One practical benefit of being a European Union (EU) citizen is the right to be protected by diplomatic and consular authorities of any Member State in a third country where the citizen's own Member State is not represented. The primary aim of this study is to examine the contemporary framework of EU law regarding the protection of European citizens abroad and to answer the question of how this law affects the internal law and practice of EU Member States. By analysing normative rules, it seeks to review the evolution and scope of this protection. It presents the transposition of relevant EU law by the EU Member States on the example of Poland (with some references to other Central European States). The research also covers the effectiveness of the European External Action Service, including its EU Delegations, in relation to European consular protection, as well as the practical aspects of the application of Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the EU in third countries. As many problems and ambiguities in the application of these regulations have been revealed, particularly during the large-scale crises that have occurred in recent years (COVID-19 pandemic, military conflicts in various parts of the world, etc.), in December 2023, the European Commission proposed to amend Directive 2015/637 in order to strengthen EU citizens' right to consular protection. The proposal is also subject to analysis in this paper in order to assess the possibility of producing its intended outcomes, including enhanced legal clarity, streamlined cooperation, greater effectiveness of consular service, higher standards of consular support, and response to crises.

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1. Introduction

Citizens of a particular State are under its protection while abroad. Under international law, such protection of citizens has two forms: diplomatic protection and consular protection (or rather, consular assistance).[1] The creation of the concept of European Union (EU) citizenship and its incorporation into the Maastricht Treaty resulted in establishing a new level of protection for citizens of EU Member States when they are travelling or living in a third (non-EU) country, which is based on what was previously reserved for them under national constitutional systems[2] and respected under international law. The external dimension of EU citizenship has been expressed in the provision that EU citizens would be entitled to protection by diplomatic and consular authorities of any Member State in a third country where the citizen's own Member State is not represented by an embassy or a consulate. This right is set out in Arts. 20(2)(c) and 23 of the Treaty on the Functioning of the European Union (TFEU)[3] and in Art. 46 of the Charter of Fundamental Rights of the European Union (CFR).[4] To give effect to this right, the acts of secondary EU law are established; currently the relevant rules are contained in Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the EU in third countries adopted on 20 April 2015.[5] The Member States had to transpose the Directive into their national legislation, which means bringing into force the laws, regulations, and administrative provisions necessary to comply with this Directive.

The primary aim of this study is to examine the contemporary framework of EU law regarding the protection of EU citizens abroad and to answer the question of how this law affects the internal law and practice of EU Member States. First, it requires determining the scope of the right of EU citizens to be protected abroad.

1 Künzli, 2006, p. 321.
2 Kozłowski, 2020, p. 150.
3 Treaty on the Functioning of the European Union, consolidated version, Official Journal C 326/47, 26 October 2012.
4 Charter of Fundamental Rights of the European Union, Official Journal C 326/391, 26 October 2012.
5 Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, Official Journal L106/1, 24 April 2015.

As it is commonly called 'right to diplomatic and consular protection', the study, first, clarifies the scope of these two concepts: consular protection and diplomatic protection, which are strictly established under international law and State practice. Further considerations focus on detailed legal analysis of primary and secondary EU law concerning the protection of EU citizens abroad. The main part of the study is devoted to examining the implementation and practical application of the rules contained in Directive 2015/637, including its transposition into the national legislation of Member States, as demonstrated by the example of the Republic of Poland. The subsequent sections of the study address the role of the European External Action Service (EEAS) and its Delegations in the protection of EU citizens abroad and indicate the 'weak points' of the present regulations revealed in practice in recent years, particularly during large-scale crises strongly involving the consular protection of unrepresented EU citizens in third countries. Significant gaps in the existing consular protection framework – in particular, deficiencies in the current coordination and cooperation mechanisms among Member States' consular services – reinforced demands for improving the system. On 6 December 2023, the European Commission brought forward a proposal for a Council directive to amend Directive 2015/637 in order to achieve greater clarity and the overall effectiveness of consular protection for EU citizens in third countries, the analysis of this proposition is included in the last section.

2. Consular Protection and Diplomatic Protection – Clarification of the Scope of Concepts

In international law, diplomatic protection and consular protection/assistance are two completely different legal concepts.[6] As is noted in the doctrine, despite these differences, semantic confusion occurs in their application: 'diplomatic protection' in common language means, in most cases, a consular protection action.[7]

Consulates are an ancient institution with a varied history.[8] Protection of nationals has always been important and is now the most basic function of the consul.[9] The terms 'consular protection' and 'consular assistance' are not directly used in the Vienna Convention on Consular Relations 1963, although in Art. 5 of this Convention, which is devoted to consular functions, such activities are listed as follows: (a) protecting in the receiving State the interests of the sending State and of its

6 Vigni, 2017, p. 587.
7 Farias de, 2021, p. 209.
8 Much more than permanent diplomatic missions, but, as will be explained, diplomatic protection is not strictly connected with diplomatic missions. About the historical development of consulates and their functions, see e.g. Zourek, 1957, pp. 72 et seq.
9 Lee and Quigley, 2008, p. 116.

nationals, both individuals and bodies corporate, within the limits permitted by international law and (b) helping and assisting nationals, both individuals and bodies corporate, of the sending State.[10]

In international law doctrine, both the terms 'consular protection' and 'consular assistance' are used. It is, therefore, useful to consider the conceptual difference between them and whether they can be used interchangeably. According to Patrizia Vigni, both international norms and practice confirm that the distinction between consular assistance and protection is unnecessary. However, the definition of 'consular assistance' is most frequently adopted and 'includes all the forms of protection that individuals have the right to enjoy when they happen to face problems on the territory of a third country'.[11]

In fact, 'consular assistance' seems to be a better term to describe consular activities conducted for citizens staying abroad, broader than only 'consular protection'. It combines two elements: helping and protecting (of both individuals and legal persons). For instance, this term is used by the British Foreign, Commonwealth & Development Office (FCDO):

> Consular assistance describes the support and help the FCDO can provide to British nationals if they get into difficulty whilst living or travelling abroad (…). This includes, for example, supporting those who have lost their passport, been a victim of crime or who have been hospitalised or arrested.[12]

It is also used by the International Organization for Migration: 'Consular assistance is the aid provided by the consular (…) agents of a State to its nationals abroad', and 'Consular assistance is the assistance rendered by States to their nationals, and in some cases to non-nationals (based on bilateral or multilateral agreements), including those who find themselves in difficulties in a foreign State'.[13]

10 Vienna Convention on consular relations, done at Vienna on 24 April 1963 (entered into force on 19 March 1967), UN Treaty Series, vol. 596, p. 261.
11 Vigni, 2017, p. 587.
12 Foreign, Commonwealth and Development Office, 2022.
13 IOM UN Migration, 2021, pp. 3–4.

The term 'consular assistance' may also be derived from internal law, such as Polish Consular Law 2015.[14] According to Art. 20(1) of this regulation, a consul 'provides assistance' to a Polish citizen, in particular, in the event of:

a) a serious accident or serious illness;
b) an arrest or detention of that citizen;
c) an act of violence of which a Polish citizen has fallen victim;
d) the death of a Polish citizen;
e) a need for a sudden return of a Polish citizen deprived of financial resources to the Republic of Poland or to the country of residence.

Unlike the terms 'consular protection' and 'consular assistance', which remain undefined in international legal documents, such a definition can be found in relation to diplomatic protection. In 2006, the International Law Commission completed its work on codifying the topic of diplomatic protection by adopting the Draft Articles on Diplomatic Protection (DADP).[15] Articles start with a definition of diplomatic protection. According to Draft Article 1, it:

> (…) consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Therefore, diplomatic protection is primarily related to the international responsibility of States, and 'diplomatic action' is one possibility to exercise this protection – but not the only one. ILC further explains that this article 'views diplomatic protection through the prism of States responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act'.[16]

The development of human rights has raised the question of whether diplomatic protection is a human right. In other words, it is a question of whether a State has an obligation to provide such protection in a given situation or whether it remains the sole decision of that State. Traditionally, under 'classic' international law, diplomatic protection has been considered an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is considered an injury to the State. That was because 'in the early years' of international law, an individual had no rights in the international legal order, and this fiction was the only means to protect him at the international level.[17] Today, the situation is sig-

14 Ustawa z dnia 25 czerwca 2015 r. Prawo konsularne, Dz.U. z 2023 r. poz. 1329 [Act of 25 June 2015 Consular Law, uniform text published in Official Journal 2023 item 1329].
15 United Nations, 2006.
16 DADP, point 5, p. 27.
17 DADP, point 3–4, p. 27.

nificantly different because of the development of human rights and the mechanism of their protection. According to Jan Sandorski, the right of a citizen to diplomatic protection by his State arises from the rights and privileges that States guarantee to their citizens in their constitutions. He points out that very often in these constitutions there appear provisions clearly creating a citizen's right to diplomatic and consular protection. This is evidence of State practice, which is increasingly accompanied by the conviction that the rules created in this way are international customary law norms or at least customary law norms *in statu nascendi*.[18] He stresses that the traditional understanding of diplomatic protection as a State right only, and not a human right, is very unfortunate: the citizen is then 'objectified', 'doomed to the mercy and disgrace' of the State. J. Sandorski also states that in truly democratic States, the citizen should not be treated as a subject dependent on the good or bad will of the State, but as an important 'subjectified' element of the State, who is entitled to protection when his or her basic rights have been violated.[19]

However, as ILC stressed, Draft Article 1 of the DADP containing the contemporary definition of diplomatic protection 'is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both'.[20] Moreover, in the commentary on Draft Article 2 of the DADP,[21] it is underlined that a State has the right to exercise diplomatic protection on behalf of its national, but it is under no duty or obligation to do so. What may oblige a State to extend diplomatic protection to a national is its internal law, but international law imposes no such obligation.[22] It is an approach known from the famous *Barcelona Traction* case, in which the International Court of Justice stated, *inter alia*, that 'The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease'.[23] Despite the development of human rights, this approach is still dominant in contemporary international law, and an attempt to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad is, unfortunately, still 'wishful thinking'.[24]

In the abovementioned text, the expression 'diplomatic protection' is used in its formal sense, as defined by the ILC. However, the same expression is also used informally to indicate the assistance provided by diplomatic missions to their nationals[25] for the following two reasons. First, the Vienna Convention on Diplomatic

18 Sandorski, 2006, p. 20–21.
19 Ibid., p. 133.
20 DADP, point 5, p. 27.
21 Art. 2 of the DADP concerns the right to exercise diplomatic protection.
22 DADP, point 2, p. 28.
23 Barcelona Traction, Light and Power Company, Limited (*Belgium v. Spain*), Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, point 79, p. 45.
24 Salazar Albornoz, 2006, p. 407. Differently: Sandorski, 2006, p. 20.
25 Denza, 2018, p. 466.

Relations 1961[26] lists among the basic functions of diplomatic missions 'protecting in the receiving State the interests of the sending State and of its nationals' (Art. 3(1) b). Second, it is a 'shortcut': the diplomatic missions may also perform consular functions by their consular section (Art. 3(2)).

As follows from the presented definition of diplomatic protection, a State may exercise it, *inter alia*, through diplomatic action. This action covers, according to the ILC, 'all the lawful procedures employed by a State to inform another State of its views and concerns including protest and request for inquiry or negotiations, aimed at the settlement of disputes'.[27] Such activities may be performed by diplomatic agents (but also by other State organs). However, 'diplomatic protection does not include *démarches* or other diplomatic action that do not involve the invocation of the legal responsibility of another State such as informal requests for corrective action'.[28] Therefore, not all actions taken by diplomats to protect nationals will meet the requirements for diplomatic protection – only those that concern international responsibility.

It should also be stressed that diplomatic protection is an instrument of 'last resort'. States are much more cautious in using it mainly because of political reasons; they are not eager to spoil relations with the other country, even if the latter has violated international law. Consequently, diplomatic protection is rarely used by States than diplomatic actions not involving international responsibility and incomparably less frequently than everyday consular assistance. The violation must be exceptionally serious for the State to agree to turn it into an action of international responsibility.[29]

Summarising this part of the considerations, diplomatic protection in the formal sense must be connected with the responsibility of States for an internationally wrongful act. Some forms of diplomatic protection in the formal sense may be exercised by a State through the actions of its diplomatic agents, but the aim of the action must be to invoke the legal responsibility of the other, in practice, the receiving State. Other activities of diplomatic agents that involve the protection (only) of the interests of their nationals in the receiving State can be called 'diplomatic protection' only in its informal meaning. In most cases, the term 'diplomatic protection' is used simply as a shortcut to the performance of consular functions by the consular sections of diplomatic missions.

26 Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961 (entered into force on 24 April 1964), UN Treaty Series, vol. 500, p. 95.
27 DADP, point 8, p. 27.
28 DADP, point 8, p. 28.
29 Farias de, 2021, p. 210.

3. Protection of EU Citizens Abroad Under EU Treaties

The Treaty of the European Union established a unique institution: EU citizenship, which is different in its nature from, and not a substitute for, national citizenship.[30] It is an *ipso jure* status of citizens of any EU Member States, and whether an individual is a national of any given Member State is decided exclusively by the national law of the State concerned.[31]

From the very beginning, among the rights arising out of EU citizenship was the right to enjoy, on the territory of a third country in which the Member State is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.[32] This novel right[33] was established to give more practical substance to the new concept of citizenship and to strengthen the international identity of the EU in third countries.[34] Art. 23 of the TFEU, specifically dedicated to this issue, also provides for an obligation for EU Member States to adopt the necessary provisions and start the international negotiations required to secure this protection. The abovementioned right of EU citizens guaranteed in the TFEU is additionally reinforced by the wording of Art. 46 of the CFR,[35] which is similar to the main content of Art. 23 of the TFEU.

When analysing the protection of EU citizens abroad, the first issue that needs to be clarified is the scope of protection they are entitled to. The following question arises: does European citizenship include the right to diplomatic protection? This is particularly important in the context of the common use of the term 'diplomatic and consular protection' to describe this entitlement, both in the doctrine[36] and in European Commission official documents[37] and on the official website[38] that may cause confusion. The main reason for this appears to be the title of Art. 46 of the CFR, that is, 'diplomatic and consular protection'. However, a careful analysis of the wording of Art. 23 of the TFEU shows that this article only concerns a form of protection that requires assistance from the diplomatic or consular authorities of (other) Member

30 According to Art. 9 of the TEU (Treaty on European Union), '(…) Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. Treaty on European Union, consolidated version, Official Journal C 326/13, 26 October 2012.

31 Csatlós, 2016, p. 264.

32 Currently Art. 20(2)c TFEU (ex-Art. 17 of the TEC – Treaty on European Community).

33 Kostakopoulou, 2020, p. 75.

34 Denza, 2014, p. 1183.

35 Art. 46 of the CFR Diplomatic and consular protection: Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she 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 Member State.

36 E.g. Wrońska, 2009, pp. 198–210. Some authors even use only the term 'diplomatic protection' in relation to the right enshrined in Arts. 20 and 23 of the TFEU, see: Schrauwen, 2008, pp. 61–62.

37 E.g. Green Paper, Diplomatic and consular protection of Union citizens in third countries, COM (2006) 712 final, Brussels, 28 November 2006.

38 European Commission, n.d.

States – which is not the same as the combination of 'diplomatic protection' and 'consular protection'. It should be stressed that in the content of Art. 23 of the TFEU (as well as in the sole content of Art. 46 of the CFR), the terms 'diplomatic protection' and 'consular protection' are not used.[39]

The second cause of misunderstanding may be the very use of the word 'diplomatic' in the content of Art. 23 of the TFEU. As Patrizia Vigni notes, 'in fact, the word seems to associate diplomatic protection with the functions of diplomatic agents, while neither diplomatic nor consular organs usually exercise diplomatic protection in international practice'.[40] The drafters of Art. 23 of the TFEU, thereby, bring together two functions and activities that are distinct and subject to different rules under international law.[41] However, there is a reason for such a formulation of Art. 23 of the TFEU: the simultaneous use of the adjectives 'consular' and 'diplomatic' is to create the possibility for EU citizens to choose between the authorities to which they will refer, justified by the fact that not only consular posts but also consular departments in diplomatic missions are entitled to perform consular functions.

Nevertheless, the answer to the question of whether EU citizenship results in the right to diplomatic protection by the other Member States is negative primarily because of the very essence of what diplomatic protection is. One key element of the definition of diplomatic protection is that a State invokes the responsibility of another State for an injury caused by an internationally wrongful act of that State to a person that is a national of the former State. European citizenship itself does not provide a sufficient link to fulfil the requirement of nationality that is obligatory when a State wants to exercise diplomatic protection in favour of the person concerned. Whether a Member State is entitled to provide diplomatic protection for EU citizens who are not its nationals cannot be resolved unilaterally by the EU since EU law binds only the Member States – and not third States. Therefore, it has been argued that actions taken by a Member State on behalf of the nationals of another Member State should be recognised by third countries on the same premise as recognition of State assistance under international law.[42] Of course, there may be arguments that consular protection can also be provided to citizens of another State only with the consent of the host country. Nevertheless, under international law, such a situation has already been foreseen. According to Art. 8 of the Vienna Convention on Consular Relations 1963, upon appropriate notification to the receiving State, a

39 Although, for example, the German version of Art. 23 of the TFEU refers to 'diplomatic and consular protection' – 'diplomatischer und konsularischer Schutz', for more about this, see: Bogdandy von and Arndt, 2011 point 16. Such language seems to include diplomatic protection – but this would be (or more precisely: this is in fact) inconsistent with the content of Art. 20 of the TFEU in German version, which speaks about protection by the diplomatic and consular authorities (Recht auf Schutz durch die diplomatischen und konsularischen Behörden eines jeden Mitgliedstaats). Therefore, it is difficult to assume that this is an evidence of the inclusion in Art. 23 of the TFEU, the right to diplomatic protection.

40 Vigni, 2017, p. 588.

41 Ibid., p. 587.

42 Shuibhne, 2023, p. 221 (in reference No. 193).

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. The practice of consular services by one State on behalf of another is, for example, common among countries of the Commonwealth: The UK, Canada, and Australia, with extensive overseas consular representation, have for many years performed consular functions on behalf of smaller Commonwealth States.[43] However, unlike consular protection, there is neither legal basis nor a practice of exercising diplomatic protection by a State in relation to persons who are not its nationals.[44] As Annemarieke Vermeer-Künzli stressed, 'diplomatic protection on behalf of a non-national is extremely unlikely to be accepted under current international law'.[45]

Taking into account the abovementioned arguments, it should, therefore, be concluded that the right of European citizens 'to protection by the diplomatic or consular authorities' means the right (only) to consular protection (assistance), which should be conducted by embassies or consular posts, and not the entitlement to both consular protection and diplomatic protection. In other words, existing EU norms do not allow diplomatic protection within the meaning of the phrase 'protection by the diplomatic or consular authorities' of another Member State contained in Art. 23 of the TFEU.[46] It is confirmed by the subsequent legislative instruments concerning the protection of EU citizens on the territory of third States that are focused on cases in which prompt and effective consular assistance is needed by EU citizens.

4. Protection of EU Citizens Abroad under EU Secondary Law – Council Directive 2015/637 and Other EU Legal Acts

Before the entry into force of the Lisbon Treaty, the EU citizenship's right to equal protection in third countries was, according to Madalina Moraru, 'the 'odd one out' right in the toolkit of EU citizenship rights, due to its being subject to different institutional and policy instruments, and decision-making rules compared with internal EU citizenship rights'.[47] The implementation regime of this external dimension of EU citizenship was based on the intergovernmental model – two decisions that were

43 Denza and Wickremasinghe, 2023, p. 277.

44 With the reservation that this applies to diplomatic protection in the formal sense – the invocation of international responsibility of States (presented in point 1 of this article) and not to the undertaking of temporary protection of the interests of one State and its nationals on the territory of the other State, which is permitted according to Art. 46 of the Convention on Diplomatic Relations 1961: 'A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals'.

45 Vermeer-Künzli, 2011, p. 968.

46 Vigni, 2017, p. 591.

47 Moraru, 2019, p. 424.

intergovernmental agreements: Decision 95/553/EC of 19 December 1995 regarding protection for citizens of the EU by diplomatic and consular representations[48] and Decision 96/409/CSFP of 25 June 1996 on the establishment of an emergency travel document.[49] Both the abovementioned documents were criticised for establishing only minimal general guidelines that Member States had to respect when ensuring equal consular protection abroad for unrepresented EU citizens, which could not provide effective protection. Decision 95/553/EC entered into force only after 7 years (on 3 May 2002), after a long process of ratification by the 15 contemporaneous Member States, demonstrating the inconsistent attitude of States and obstacles in the debate on increased EU cooperation in regards consular assistance.[50] In the doctrine, it was assessed that the ambiguous, open-ended formulations and wide discretionary powers awarded to the Member States, without safeguards for the EU citizens' rights, confused rather than clarified the practical implementation of the EU citizenship right to equal protection abroad.[51]

The key changes have occurred because of the entry into force of the Lisbon Treaty, which has empowered the Commission to propose directives for implementing the EU citizenship right to equal protection in third countries.[52] As Erzsébet Csatlós notes, it 'has completely redefined, directly and indirectly, the EU's consular protection policy by seeking to overcome the limits of intergovernmental cooperation'.[53] Two years later, in 2011, the Commission put forward its proposal for a directive that relies primarily on the cooperation of Member States.[54]

Council Directive 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries was adopted after prolonged negotiations.[55] It is based on some crucial European values and affirms consular protection[56] of unrepresented EU citizens under the same conditions as nationals as a fundamental right and an expression of European solidarity, which provides an external dimension to the

48 Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, 1995.

49 Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, 1996.

50 Okano-Heijmans, 2010, p. 18.

51 Moraru, 2019, p. 423.

52 According to (current) Art. 23(2) of the TFEU.

53 Csatlós, 2022, p. 119.

54 Commission Proposal for a Council Directive on Consular protection for citizens of the European Union abroad, COM(2011)881 final, Explanatory Memorandum.

55 Kostakopoulou, 2020, p. 88. About the long and difficult road to the Directive's adoption, see: Moraru, 2019, pp. 420–429.

56 In the context of the previous considerations on the scope of the right to protection of EU citizens abroad, it is worth noting that the Directive's preamble refers only to consular protection – and not to diplomatic and consular protection – despite the direct reference to Art. 46 of the CFR (Diplomatic and consular protection).

concept of EU citizenship and strengthens the identity of the EU in third countries.[57] The primary goal of the Directive is to establish the mechanisms for coordination and cooperation needed to give practical effect to Art. 23 of the TFEU. In the doctrine, it is stressed that the key challenge was 'achieving an appropriate balance between effectiveness and legal certainty for citizens, on the one hand, and respect for (and sensitivities around) national prerogatives in the provision of consular assistance, on the other'.[58]

The obligation of Member States' embassies or consulates to provide consular protection to unrepresented citizens under the same conditions as to their own nationals is the core provision of the Directive (Art. 2). Unrepresented EU citizen refers to every citizen who holds the nationality of a Member State not represented in a third country (Art. 4). Protection is also guaranteed to their family members (Art. 5). Even though the latter are not EU citizens themselves, they are entitled to protection to the same extent and under the same conditions as non-EU family members of citizens of the assisting Member State.

To apply the Directive, it is crucial to determine what constitutes an unrepresented Member State. Pursuant to Art. 6, it is not only an obvious situation when a Member State has no permanent embassy or consulate established in a third country but also when it has no embassy, consulate, or honorary consul there, which is effectively in a position to provide consular protection in a given case. The Directive also confirms that unrepresented EU citizens can choose the Member State embassy or consulate from which they seek protection (Art. 7(1)).

The Directive outlines the types of consular protection granted: it may include, *inter alia*, the following situations: (a) arrest or detention, (b) being a victim of crime, (c) a serious accident or serious illness, (d) death, (e) relief and repatriation in case of an emergency, and (f) a need for emergency travel documents (Art. 9). The above list shows that the drafters acknowledged and sought to address 'the very different circumstances that can necessitate assistance for Union citizens in third countries, ranging from 'day-to-day situations, such as in case of serious illness or when being victim of a crime' to large-scale crises and emergencies'.[59] It should also be stressed that the situations are enumerated in a non-exhaustive manner, which means that unrepresented EU citizens are also entitled, in a non-discriminatory manner, to other types of consular assistance that Member States provide to their own nationals.

In the subsequent provisions of the Directive, the principles and measures involved in organising assistance at different levels are established: cooperation and coordination between Member States' diplomatic and consular authorities, between Member States' authorities at the central level, and with the EU, more specifically, the Commission and the EEAS. In particular, the Directive codifies the 'Lead State' concept that was previously adopted by the Council as conclusions in June 2007 and

57 Preamble of the Directive, Recital 3.
58 Shuibhne, 2023, p. 223.
59 Ibid., p. 223.

specified in the Guidelines in 2008.[60] According to Recital 23 of the Directive, the term 'Lead State' refers to 'one or more Member State(s) represented in a given third country, and in charge of coordinating and leading the assistance of unrepresented citizens during crises'.

The Directive regulates also the reimbursement of cost, with the general rules that the assisting Member State may ask for the reimbursement of costs from the unrepresented citizen's Member State of nationality (not from the unrepresented citizen directly) and that unrepresented citizens shall undertake to repay to their Member State of nationality the cost of consular protection, on the same conditions as the nationals of the assisting Member State. The unrepresented EU citizen assisted repays his or her Member State of nationality for the cost of consular protection if so requested (Art. 14(1) and (2)). There is also a facilitated procedure provided for crisis situations (Art. 15).

EU Member States were given three years to transpose the Directive, that is, to bring into force the laws, regulations, and administrative provisions necessary to comply with it. The date of 1 May 2018 – the date of the final transposition – is considered a milestone reached in the development of EU citizenship policy because the Directive is the very first EU secondary instrument implementing one of the core EU citizenship rights – the right to equal protection outside the EU.[61]

One of the most common situations when European consular assistance is provided, also mentioned in Directive 2015/637, is the loss of a passport or travel documents, which can cause significant distress to unrepresented citizens in third countries. From 2002,[62] on the basis of Decision 96/409/CFSP, embassies and consulates of EU Member States may issue Emergency Travel Documents (ETD) to unrepresented EU citizens. During non-crisis situations, the need for an emergency travel document is even the main case of assistance provided by Member States to citizens of other Member States.[63] ETD is a single-journey document, allowing the bearer to return home, or, in cases of exceptions, to another destination, in the event that they do not have access to their regular travel documents because, for example, they were stolen or lost. Another destination could be, for example, a neighbouring or similarly close country where the unrepresented citizen's Member State of nationality has an embassy or consulate. Despite the existing possibility of issuing these documents, there was a need to establish, in the form of a directive, simplified procedure for

60 EU guidelines on the implementation of the consular Lead State concept, Official Journal C 317/6, 12 December 2008.

61 Moraru, 2019, p. 417.

62 Decision 96/409/CFSP came into force on 28 November 2002, Decision 96/409/CFSP of 25/6/96 on the establishment of an emergency travel document. [Online]. Available at: https://www.consilium.europa.eu/pl/documents-publications/treaties-agreements/agreement/?id=1996128 (Accessed: 10 January 2025).

63 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 13.

cooperation and coordination between the assisting Member State and the unrepresented citizen's Member State of nationality in this regard. On 18 June 2019, the Council adopted a Directive establishing an EU ETD.[64] The Directive introduced a new, more secure EU ETD format and simplified the formalities for unrepresented EU citizens in non-EU countries whose passport or travel document has been lost, stolen, or destroyed. After the adoption of the necessary technical specifications in December 2022,[65] Member States are currently transposing the Directive into national law and will apply it as of December 2025.[66]

5. Transposition of Directive 2015/637 by EU Member States: the Example of Poland

The adoption of Directive 2015/637 coincided with the parliamentary work on the largest amendment to consular law in Poland that has taken place in the last 40 years. The new Consular Law was adopted on 25 June 2015 and repealed the Act on the Functions of Consuls of the Republic of Poland of 13 February 1984.[67] The need to adapt the consular regulations in Poland to the obligation to provide assistance to unrepresented EU citizens in the third States as established in Arts. 20 (2) c and 23 of the TFEU was one of the main arguments mentioned in the formal justification for the new act.[68] Before the new law was adopted, European consular assistance, including assistance in emergency situations, was not specifically regulated in Polish legislation.[69] Poland recognised Decision 95/553/EC as an international agreement concluded in a simplified form (without approval or ratification) and the norm embodied in the Decision as self-executing.[70] The exercise of consular protection by

64 Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU ETD and repealing Decision 96/409/CFSP, Official Journal L 163/5, 20 June 2019.

65 Commission Implementing Decision (EU) 2022/2452 of 8 December 2022 laying down additional technical specifications for the EU ETD established by Council Directive (EU) 2019/997, Official Journal L 320/47, 14 December 2022.

66 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Art. 25 TFEU on progress towards effective EU citizenship 2020–2023, 2023, p. 36.

67 Ustawa z dnia 13 lutego 1984 r. o funkcjach konsulów Rzeczypospolitej Polskiej, Dz. U. z 2015 r. poz. 389 i 539 [Act on the Functions of Consuls of the Republic of Poland of 13 February 1984, uniform text published in Official Journal 2015 items 389 and 539].

68 Republic of Poland Parliament (Sejm), 7th term, No. 3290, justification, p. 3 [Druk Sejmowy Nr 3290 Sejmu Rzeczypospolitej Polskiej VII kadencji, uzasadnienie, s. 3].

69 A broad and detailed information on Polish law and practice concerning consular assistance (including protection of EU citizens abroad) before the new PCL was adopted is presented in: Consular and Diplomatic Protection Legal Framework in the EU Member States, CARE (Citizens Consular Assistance Regulation in Europe) Project, 2010, pp. 347–370.

70 Ibid., p. 350.

the Polish consular posts for the citizens of another EU State in a third country took place mostly based on bilateral agreement on mutual representation, such as three agreements on representation concluded with Lithuania concerning the representation in the Maghreb States (Algeria, Morocco, Tunisia).[71] Poland also took actions regarding consular assistance in cases of military conflict. After the Russian attack on Georgia in 2008, Polish Ministry of Foreign Affairs organised evacuation flights for Polish citizens, which also extended to nationals from other EU countries.[72] There were also situations in which Polish citizens were assisted within the framework of European consular protection.[73]

Legislative work on the new consular law at the governmental level began in 2014, and the project was submitted to the Polish Sejm on 27 March 2015; therefore, the first version of the new act included provisions that were in line with Decision 95/553/EC, which governed the protection of contemporaneous EU citizens abroad. EU Directive 2015/637 was adopted on 20 April 2015, while parliamentary work was still in progress; thus, it was possible to introduce amendments to the draft new Polish Consular Law taking into account the new EU regulations. During the debate on these amendments in the Sejm subcommittee, it was pointed out that because of this, Poland could become the first country to implement the provisions of Directive 2015/637.[74] The information that this act implements the Directive is placed in a reference to the title of the act in its officially published text.[75]

The final version of the new Polish Consular Law (PCL) contains several provisions that directly concern providing consular assistance to EU citizens by Polish consuls.[76] Art. 21(1) PCL asserts the following:

> To the same extent as a Polish citizen, the consul shall provide consular assistance to a citizen of a European Union Member State that does not have a diplomatic representation or consular office on the territory of the receiving State that is not a European Union' Member State, or if it is unable to provide consular assistance to this citizen in a given case.

Thus, the primary obligation of Poland as an EU Member State provided in Art. 23 of the TFEU was implemented. Art. 21(1) of the PCL is also consistent with Art.

71 Ibid., pp. 353–354.

72 A total of 365 people were evacuated, including 275 Poles as well as, for example, 45 Czechs, 7 Estonians, 5 Britons, and 5 Slovaks, ibid., p. 358.

73 After the earthquake in Haiti in January 2010, Polish citizens were evacuated by other EU Member States: 3 by France, 1 by Germany, and 1 by Spain, ibid., p. 357.

74 The broadcast of the subcommittee meeting is available at: https://www.sejm.gov.pl/Sejm7.nsf/transmisja.xsp?documentId=65B703152A1E3ECAC1257E60002D117E&symbol=TRANSMISJA_ARCH&info=T.

75 Supra note 14.

76 The Consular Law entered into force on 1 November 2015, but it was determined that the provisions concerning the protection of EU citizens by Polish consuls would apply from 1 May 2018 (the date by which the Directive 2015/637 was to be implemented).

6 (in conjunction with Art. 4) of the Directive, provided that the Polish act does not directly mention an honorary consul, who is effectively in a position to provide consular protection in a given case.[77] It should be stressed that Art. 2(2) of the Directive leaves it to each Member State to decide whether it applies the Directive to Honorary Consuls, and Poland is one of nine Member States with national laws not explicitly specifying whether they apply the Directive to Honorary Consuls (from Central European States, Estonia and Slovenia are also in the same position).[78]

The PCL also includes provisions about the following:

a) the possibility of the Polish consul forwarding the request for consular assistance of a EU citizen to a consular post or diplomatic mission of another EU Member State, if it is competent to provide such assistance and if such action does not violate the rights and interests of that citizen (Art. 21(2) PCL);
b) cooperation and coordination of activities of Polish consuls with the EU Member States and the EU (Art. 21(3) PCL);
c) rules for providing financial assistance by the Polish consul to EU citizens and the reimbursement of costs from the unrepresented EU citizen's Member State of nationality (Art. 41 PCL);
d) procedure of reimbursing costs when the EU Member State has provided consular assistance, including financial assistance, to a Polish citizen (Art. 42 PCL).

The PCL provisions are supplemented and clarified by the regulation of the Minister of Foreign Affairs of 17 April 2018 on financial assistance provided by the consul of the Republic of Poland to citizens of EU Member States.[79]

Regarding financial reimbursement for assistance provided to unrepresented citizens, Member States may establish different procedures. Poland is one of (only) six countries (also including Estonia in Central Europe) that seek reimbursement from the Member State of nationality, while the other countries apply mostly the principle

77 According to Art. 6 of Directive, 'a Member State is not represented in a third country if it has no embassy or consulate established there on a permanent basis, or if it has no embassy, consulate or honorary consul there which is effectively in a position to provide consular protection in a given case'.

78 European Commission, 2021, p. 42.

79 Rozporządzenie Ministra Spraw Zagranicznych z dnia 17 kwietnia 2018 r. w sprawie pomocy finansowej udzielanej przez konsula Rzeczypospolitej Polskiej obywatelom państw członkowskich Unii Europejskiej [Regulation of the Minister of Foreign Affairs of 17 April 2018 on financial assistance provided by the consul of the Republic of Poland to citizens of European Union Member States], 2018.

of requesting direct reimbursement from an assisted unrepresented EU citizen (i.e. Bulgaria, Czech Republic, Romania, Slovenia, Slovakia).[80]

An issue worth paying special attention to is the lack of a provision in the PCL under which the Polish consul could provide consular assistance to family members, who are not themselves EU citizens, accompanying unrepresented EU citizens in a third country. However, this does not mean that Poland did not implement Art. 5 of the Directive regarding EU citizens family members. According to the wording of this article, consular protection shall be provided to those persons, but only

> (…) to the same extent and under 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.

The PCL has no provisions on providing consular protection to family members of Polish citizens who are foreigners (do not have themselves Polish citizenship); thus, it may be assessed that Poland has the same policy regarding family members of its own citizens as family members of EU citizens. Poland is one of three EU Members that do not provide consular assistance to the family members who are not themselves EU citizens, accompanying unrepresented EU citizens in a third country – the other two countries are Bulgaria and Estonia.[81]

However, the transposition of Directive 2015/637 into the Polish legal system also contains certain gaps and inconsistencies indicated in the Polish literature on the subject.[82] First, the inconsistencies of the scope of consular assistance were pointed out, resulting from differences between the list of situations entitling to consular assistance contained in Art. 20(1) of the PCL and the list of types of consular assistance contained in Art. 9 of the Directive. This refers to two of the six types of assistance mentioned *expressis verbis* in the Directive:

- assistance in the case of 'being a victim of crime' (Art. 9(b) of the Directive), which corresponds to assistance in the case of 'an act of violence' of which a [Polish] citizen was the victim under the PCL;
- 'relief and repatriation in case of an emergency' (Art. 9(e) of the Directive), which corresponds to assistance 'in the event of a need for a sudden return of a citizen deprived of financial means' under the PCL.

In both cases, the scope of protection is narrower in the PCL than in the Directive. 'An act of violence' is a narrower concept than that of 'a crime' mentioned in the Directive, as there are many types of crimes that do not involve violence. In the

80 Annexes to Study to support the preparation of an impact assessment on a potential EU policy initiative on the coordination & cooperation measures to facilitate the exercise of the EU citizens' right to consular protection, Framework Contract JUST/2020/PR/03/0001 for Evaluation, Impact Assessment and Related Policy Support Services in the Justice and Consumers Policy Areas (Lot 1), European Commission, 2021, p. 60.

81 Ibid., p. 39.

82 See Filipek, 2015, pp. 144–160.

second situation, a citizen must be 'deprived of financial means' to get assistance in the event of a need for a sudden return, while there is no such requirement in the 'emergency' case in the Directive. These two cases were regulated in this way in the PCL because the content of its Art. 21 was drafted before Directive 2015/637 was adopted and aligned with Decision 95/553/EC;[83] this content has not been amended to be consistent with that of the newly adopted regulations. As the list of situations contained in Art. 21 of the PCL entitling to consular assistance is not closed, both a Polish citizen and a citizen of another EU country who is to receive consular assistance under the same conditions should be able to get the assistance of a Polish consul also in cases other than those listed *expressis verbis*. However, a much clearer and favourable situation for the citizens would be if the PCL were appropriately amended so that no such differences existed between the scopes of Art. 21 of the PCL and Art. 9 of the Directive.[84]

6. The Role of the EEAS and its Delegations in the Protection of EU Citizens Abroad

The EEAS was created on the basis of the Treaty of Lisbon and formally launched on 1 January 2011,[85] more than a year after this Treaty entered into force.[86] It is designed as a functionally autonomous body under the authority of the High Representative of the Union for Foreign and Security Policy.[87] Further regulations concerning the EEAS were specified in the Council Decision of 26 July 2010 establishing its organisation and functioning.[88] The EEAS comprises a central administration and EU Delegations to third countries and to international organisations (Art. 1(4) of Decision). Currently, the network of EU Delegations and Offices comprises 144 missions that represent EU worldwide.[89]

This EU institution does not challenge national diplomacy in a material sense but rather at a symbolic level.[90] As Erzsébet Csatlós stresses, EU law does not place delegations and Member States' diplomatic missions and consular posts in a hierarchical

83 Druk Sejmowy Nr 3290 Sejmu Rzeczypospolitej Polskiej VII kadencji, uzasadnienie [Republic of Poland Parliament (Sejm), 7th term, No. 3290, justification], 2015, pp. 14–15.
84 Cf. Filipek, 2015, pp. 154–157, 160.
85 European Union External Action, 2021.
86 More about the creation of EEAS see e.g. Erkelens and Blockmans, 2012, pp. 246–279.
87 Kerres and Wessel, 2015, p. 9.
88 Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU), Official Journal L 201/30, 3 August 2010.
89 European Commission, no date b.
90 Adler-Nissen, 2014, p. 657. On a comparison of EEAS and diplomatic missions of Member States see Kerres and Wessel, 2015, pp. 1–39.

relationship, and their role is complementary.[91] However, as regards the 'institutional machinery for the enforcement of the EU citizenship right to equal protection abroad', according to Madalina Moraru, the Lisbon Treaty 'broke new legal ground' by empowering the EEAS to directly contribute to the protection of EU citizens worldwide.[92] Art. 5(10) of Decision 2010/427 provides that EU Delegations are to support 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'. This is because consular (and diplomatic) protection and assistance still fall within the States' competence and are provided by the EU Member States. The EU itself, as an international organisation, has no competence in this area; therefore, the EU Delegations may provide support to those countries in ensuring protection for EU citizens in third countries at the request of individual Member States.[93] Nevertheless, this support is crucial for an effective crisis response and the practical implementation of the right to consular protection. For supporting coordination and cooperation between the EEAS and Member States in providing consular protection of unrepresented EU citizens in third countries, a Consular Division was set up in the EEAS.[94]

Facilitation and coordination of EU efforts on consular crisis preparedness and response are, in fact, the primary task of the EEAS, both locally in third countries and between EU capitals.[95] The EU Delegations had to pass a real test of effectiveness in 2020, when the COVID-19 pandemic began. The global health crisis had created an urgent need for consular assistance services, mainly the repatriation of EU citizens who were stranded outside the EU (owing to commercial flight restrictions). Of course, individual Member States played the main role in those actions, but the EEAS supported them with their consular assistance to EU citizens through its network of local consular correspondents in the 143 (at that time) EU Delegations, *inter alia*, by providing practical information to EU citizens on their options.[96] As the EEAS informed in June 2020, since the beginning of the COVID-19 outbreak, more than 590.000 people have been flown back to Europe thanks to flights organised by the Member States: this was done at the beginning via commercial flights, but when this option was no longer possible, the European Response Coordination Centre (ERCC) of the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO), together with the EEAS and EU Member States, stepped in to assess difficult situations worldwide demanding special assets (flights, ships, etc.). This made it possible to activate the EU Civil Protection Mechanism (UCPM), which coordinated and co-financed up to 75% of the special transport assets mobilised for the repatriation of approximately 60,000 EU citizens to Europe from

91 Csatlós, 2022, p. 120.
92 Moraru, 2019, p. 426.
93 Sutor, 2019, p. 482.
94 Moraru, 2019, p. 426.
95 European Union External Action, 2025.
96 European Union External Action, 2020.

countries worldwide through more than 270 flights.[97] The examples of EU Delegation involvement in the repatriation actions included, *inter alia*, negotiations with local authorities to authorise departures/repatriation flights (Morocco, India, Vietnam, Maldives – by the EU Delegation in Colombo), coordination of repatriation actions of Member States (Kuwait, Saudi Arabia, Montenegro), organisation of the repatriation (Kenia, Uganda, Rwanda), support/facilitation of repatriation actions (Sierra Leone and Liberia, Mauritius), or contribution to maintaining and increasing the number of available seats on commercial flights to Europe (Australia).[98] During the COVID-19 pandemic, almost all EU Delegations were particularly active in the overall coordination of Member States' actions.[99]

In addition to the COVID-19 pandemic, in the last few years, other events have also presented challenges in the field of consular assistance for EU citizens in third States involving EU Delegations and the EEAS, including, in particular, the crisis in Afghanistan, Russia's war of aggression against Ukraine, the crisis in Somalia, and the conflicts in Sudan and in Israel and the Gaza Strip. Their role is of particular significance in those countries where the EU Member States do not have their own missions, such as Eswatini. During the unrest in the summer of 2021 in this country, Member States contacted the EU Delegation, the only EU diplomatic presence in the field, to share information about the presence of their most vulnerable citizens and enquire about the security situation and possible evacuation options.[100]

According to data available from 2022, there were 25 third countries where no Member State had an in-country embassy or consular post; in five such countries, the EU Delegation was the only EU diplomatic presence (Afghanistan, Barbados, Eswatini, Guyana, and Lesotho). In many more third countries, the consular or diplomatic presence by Member States is very low and, thus, at high risk of being overwhelmed if a larger-scale crisis occurs (e.g. in more than half of third countries, a maximum of seven Member States are represented, often with limited resources).[101] In addition, the number of EU Member States' diplomatic missions and consular posts has recently decreased due to *Brexit*. Some EU Member States, similar to the other States, have decided not to maintain their missions, mostly for economic reasons.[102]

97 Ibid.

98 Ibid.

99 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 15.

100 Ibid., p. 16.

101 Ibid., p. 5.

102 E.g. Polish Ministry of Foreign Affairs finally decided to close Polish Embassy in Khartoum (Sudan), while also intending to accredit a Polish ambassador to Sudan based in Cairo (Egypt). Decision No. 35 of Minister of Foreign Affairs of 26 June 2024 regarding the liquidation of the Embassy of the Republic of Poland in the Republic of Sudan [Decyzja Nr 35 Ministra Spraw Zagranicznych z dnia 26 czerwca 2024 r. w sprawie likwidacji Ambasady Rzeczypospolitej Polskiej w Republice Sudanu, Dz.Urz. MSZ z 2024 r. poz. 33].

Sometimes, they are also forced to close the missions by the receiving State; for example, Russia in the last view months decided to withdraw its consent to maintain by the Republic of Poland two consular posts: the Consulate General in Sankt Petersburg (closed on 8 January 2025)[103] and the consular agency in Smolensk (closed on 31 August 2023).[104] However, regarding third countries, all the Member States have a permanent representation in only five such countries – China, India, Russia, the USA, and the UK – whereas only five of the twenty-seven Member States have representations in more than half of the countries (according to the data from 2021).[105] The Member States that have the largest consular network and are, therefore, represented in the most third countries are France (present in 136 third countries), Germany (127), Spain (103), Italy (101), Sweden (95), and the Netherlands (88). The Member States that have the smallest consular network and are, therefore, represented in the least third countries are Estonia (present in 19 third countries), Luxembourg (19), Malta (19), Cyprus (22), Latvia (22), Lithuania (24), and Slovenia (24).[106] On average, the consular network of all the Member States is lower than the EU Delegations network of the EEAS.[107] It shows how often an EU citizen may not be represented in a third country and, simultaneously, how important a role the EU Delegations may play in providing them consular assistance.

7. How Does it Work? Commission's Assessment of the Implementation and Application of Directive 2015/637

According to the 2023 Eurobarometer on Citizenship and Democracy, 69% of the EU citizens are aware of the right to be protected by diplomatic and consular authorities of any other Member State under the same conditions as those of that State's nationals when they are in a non-EU country in which their Member State of origin does not have representation. A large majority of the respondents (93%) agree

103 Ceremonial ending of the activities of the Consulate General of the Republic of Poland in Saint Petersburg. See Uroczyste zakończenie działalności Konsulatu Generalnego RP w Sankt Petersburgu z udziałem Ambasadora RP w Federacji Rosyjskiej Krzysztofa Krajewskiego i Konsula Generalnego RP Grzegorza Ślubowskiego [Ceremonial ending of the activities of the Consulate General of the Republic of Poland in Saint Petersburg], 2025.

104 Oświadczenie MSZ ws. zamknięcia Agencji Konsularnej RP w Smoleńsku [Statement of the Ministry of Foreign Affairs regarding the closure of the Consular Agency of the Republic of Poland in Smolensk], 2023.

105 Commission Staff Working Document Impact Assessment, accompanying the document Proposal for a Council Directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU Emergency Travel Document, 2023.

106 Ibid., pp. 113–114.

107 Moraru, 2021, p. 2.

that EU Member States should cooperate closely to help EU citizens who need consular protection outside the EU. A similar proportion (91%) agreed that if they were in a non-EU country where their national government had no consulate or embassy and they needed help, they would seek support from an EU Delegation instead.[108] This result shows how strong among the EU citizens the need is to provide effective consular protection for them in third States.

The challenges presented above have reinforced the need to ensure that 'the infrastructure is in place to give effect to EU citizens' rights related to consular protection in practice',[109] particularly by improving the EU legal framework of consular protection concerning preparedness for crises. The European Commission in its Report concerning implementation and application of Council Directive (EU) 2015/637 notes that consular protection is as follows:

> (…) prone to become more relevant in the future as the frequency, severity and duration of crises could increase, notably the crises related to global warming, causing unavoidable multiple climate hazards and presenting multiple risks to ecosystems and humans'.[110] At the same time, it pointed out that recent crises have provided 'a context to identify gaps and reflect on how to strengthen EU citizens' rights related to consular protection and to further facilitate its exercise.[111]

A thorough analysis of the practice of applying the Directive revealed its several 'weak points' requiring changes, most often by clarifying and improving the rules. In regard to the first chapter of the Directive, the following problems (and possible ways to solve them) were pointed out (*inter alia*):

a) problems concerning honorary consuls: although in most Member States, honorary consuls are rarely or never involved in the provision of consular protection to unrepresented EU citizens because of their generally limited powers (also vis-à-vis their own nationals), their role may be essential in crisis situations; in this regard, the way in which Member States inform each other and EU citizens about the existence of honorary consuls and the extent to which they can provide consular protection to unrepresented EU citizens could be improved;
b) problems in determining whether an individual should be considered 'unrepresented', particularly difficulties in determining whether an existing em-

108 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Art. 25 TFEU on progress towards effective EU citizenship 2020–2023, 2023, p. 36.
109 Report from the Commission to the European Parliament and the Council on the implementation and application of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, 2022, p. 2.
110 Ibid., p. 2.
111 Ibid., p. 21.

bassy, consulate, or honorary consul is 'effectively in a position to provide consular protection' (e.g. to what extent, a lack of proximity could cause a lack of representation); it was suggested to further clarify the concept;

c) a lack of clarity and understanding regarding the procedure for redirecting applications from unrepresented EU citizens, particularly when an embassy or consulate from which such a citizen seeks consular protection does not recognise itself competent according to the practical arrangement on sharing responsibilities for providing consular protection concluded between Member States; it is stressed that although the Directive allows for bilateral agreements to be put in place between Member States, there seems to be a need to further clarify that this is not a precondition for providing consular assistance to unrepresented EU citizens;

d) cases of unrepresented EU citizens that had been denied consular protection by a Member State when the assistance requested was not one of the listed types in Art. 9 of the Directive, even though this Member State legislation required it to provide such assistance to its own nationals; it is stressed that the types of assistance mentioned in Art. 9 are not exhaustive, meaning that unrepresented EU citizens are also entitled, in a non-discriminatory manner, to other types of consular protection assistance that Member States provide to their own nationals.[112]

Although the Commission evaluated the cooperation between Member States as 'overall effective', it noticed the lack of digital tools, capacity issues notably in times of crisis, and the lack of an explicit legal basis for processing of personal data of EU citizens (including data transfers) leading to delays or even omissions in unrepresented citizens receiving assistance. The Commission also called for strengthening the overall role of EU Delegations, to review the 'Lead State' concept in light of the shortcomings observed during crisis situations, and for more clarity as regards the financial reimbursement procedures in the Directive.[113]

The Commission's conclusions generally coincide with the opinions on the weak points and shortcomings of the Directive, which have been pointed out in the doctrine from the very beginning (already at the preparatory work stage).[114] For example, Paweł Czubik drew attention to the vagueness of the criterion for recognising a person as an 'unrepresented citizen' (although the solution introduced was definitely better than the one in force under the 1995 Decision),[115] and Madalina Moraru pointed out the practical problems of its application.[116] M. Moraru also argued for empowering EU Delegations to provide direct consular assistance services to

112 Ibid., pp. 8–13.
113 Ibid., pp. 14–21.
114 See Czubik, 2013, pp. 37–62.
115 Ibid., p. 48.
116 Moraru, 2021, p. 3.

unrepresented EU citizens.[117] P. Czubik sees it slightly differently and rightly puts forward the idea of separating the matters covered by the Directive and creating a separate regulation for the matters of typically consular activity and the issue of evacuating people in emergency situations, with the latter activity being able to be performed directly by the EU Delegations.[118] However, both authors primarily stressed the lack of instruments in the Directive that would ensure its compliance with Art. 8 of the VCCR, which states that a consular post of the sending State may exercise consular functions in the receiving State on behalf of a third State 'upon appropriate notification to the receiving State' and 'unless the receiving State objects'.[119] In the same context, Erzsébet Csatlós points out the following:

> Consular Directive declares that it does not concern consular relations between Member States and third countries. 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. Therefore, an effective protection requires a reflection on bilateral consular agreements with Third States but this is still awaited.[120]

However, the lack of formal consent of third countries to the EU's model of consular protection of unrepresented EU citizens 'seems at first sight to be a theoretical quibble rather than a real impediment to its concrete exercise' because 'third countries have never opposed the exercise of consular protection of EU citizens by non-nationality Member States or the Union'.[121]

8. Need for Changes – the Commission's Proposal to Amend Directive 2015/637

On 6 December 2023, the Commission brought forward a proposal for a Council directive to amend Directive 2015/637.[122] The main goal of the new regulations is to address the previously highlighted deficiencies by enhancing legal certainty, streamlining cooperation, and increasing the overall effectiveness of consular protection for EU citizens in third countries.[123]

117 Moraru, 2019, p. 450.
118 Czubik, 2013, pp. 38–40.
119 Ibid., pp. 41–42, Moraru, 2019, pp. 454–455.
120 Csatlós, 2017, p. 80.
121 Moraru, 2019, p. 455.
122 Proposal for a Council Directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU emergency travel document, 2023.
123 Pittoors, 2024, p. 2.

The proposal clarifies when a Member State is to be considered as unrepresented in a third country because it has no embassy or consulate effectively in a position to provide consular protection. In Art. 6 of the Directive, a new para. 2 has been added, outlining the criteria of effectiveness. These criteria should be applied taking into account local circumstances. They are as follows:

a) the difficulty for the citizen concerned to safely reach or be reached by the embassy or consulate within a reasonable period, taking into account the nature and urgency of the assistance requested and the means available to the citizen;
b) possible closure of the embassy or consulate, including when it cannot be confirmed as operational and accessible within a reasonable period;
c) whether, by redirecting the citizen to the embassy or consulate of his or her Member State of nationality, consular protection would likely be compromised, particularly if the urgency of the matter requires immediate action by the requested embassy or consulate.

Regarding honorary consuls, the proposition clarifies that the presence of an honorary consul of the citizen's Member State of nationality may only be taken into account if the assistance requested by the citizen is covered by the competences of the honorary consul (new Art. 6(1)). This is to avoid citizens being denied assistance with reference to an honorary consul who is not competent to assist them.[124]

The proposition adds a new term 'evacuation' in Art. 9, point e (regarding the scope of consular assistance) to comprehensively cover situations where EU citizens are rescued and moved from areas affected by an emergency to a safe location, which must not necessarily be the territory of a Member State, as well as situations where they are repatriated to EU territory. This extension is certainly needed and is an example of lessons learned from the crises of recent years.

A new wording of Art. 7 is also to be introduced, in which the key principle of an unrepresented citizen's freedom to choose the embassy or consulate she/he asks for protection has been preserved and, in addition:

a) it is clarified that in cases, when an embassy or consulate from which the unrepresented citizen seeks consular protection is not designated as competent according to the specific arrangement concluded between Member States, it is incumbent on this embassy or consulate of Member State approached, not the citizen concerned, to transfer the application to the relevant embassy or consulate;
b) a new paragraph is added concerning crisis situations resulting in numerous applications for consular protection, which allows represented Member States, supported by the EU Delegation, to transfer requests for assistance based on available capacity in crisis situations.

124 Ibid., p. 6.

Most of the lessons learned from the crisis situations of recent years have been reflected in proposals for amendments to Chapter 2 of the Directive, devoted to 'co-operation and coordination'. Member States have been entitled to involve, in their coordination and cooperation measures, their security and military personnel, honorary consuls, and international organisations or diplomatic and consular authorities of third countries (new para. 5 added to Art. 10). The role of EU Delegations has been clarified by establishing a non-exhaustive list of cooperation and coordination tasks with Member States' embassies and consulates in order to contribute to local consular cooperation, crisis preparedness, and response. The new tasks include, *inter alia*, chairing local consular cooperation meetings and coordinating the setting up and agreement of joint consular contingency plans (new Art. 11(1) e and f). The current Art. 13 would be split into two, with Art. 13 focussing on crisis preparedness and the newly added Art. 13a focussing on crisis response. Crisis preparedness would be focused on joint consular contingency plans, which should be established and agreed by the Member States and the EEAS for each third country and then tested within annual consular exercises. To improve the information available on the estimated number and location of EU citizens present in a third country for crisis preparedness and crisis response, the new obligation is provided for Member States to offer their citizens the possibility to register with or inform competent national authorities of their travels to or residence in third countries. It would also make it easier to contact citizens affected by a crisis situation. Regarding crisis response, current 'intervention teams at Union level' would be replaced by 'joint consular teams' composed of experts from Member States, the EEAS, and the Commission services. They shall be available for rapid deployment to third countries affected by a consular crisis (new Art. 13a (2)).

The proposition also introduces an entirely new Chapter 2a 'Provision on information', which is in line with Parliament's earlier request to keep EU citizens better informed. Art. 13b consolidates the various notification requirements already present in Directive 2015/637 and mandates that Member States provide limited statistical data to improve the monitoring of the directive. Art. 13c provides that Member States should take measures to inform citizens of their right to consular protection, listing examples of possible measures that could be taken in this context, such as including information on the right to consular protection in travel advisories.[125]

The rule concerning cost reimbursement would also be changed in order to simplify reimbursements. In particular, it would be possible for unrepresented citizens to directly reimburse costs, under the same conditions as nationals of the assisting Member State, for the service provided by that Member State. Only if this does not occur should the assisting Member State approach the Member State of nationality for reimbursement (new wording of Art. 14).

As consular tasks cover, *inter alia*, sensitive situations such as arrest, incarceration, injury, or being a victim of a crime, it is necessary to ensure that competent

125 Ibid., p. 6.

authorities of the Member States and relevant EU institutions and bodies have access to and can exchange all the necessary information, including personal data, that is required to provide consular protection to EU citizens (Recital 40 of the proposition). Generally, consular assistance operates with a wide range of personal data, the protection of which is also a fundamental right acknowledged by Art. 8 of the CFR.[126] Thus, the new Art. 16a concerning protection of personal data that would be inserted into the Directive is a very needed solution.

The last amendment proposed by the Commission is of crucial importance: it is a new Art. 16b stating that 'Member States shall ensure that unrepresented citizens have an effective remedy under national law in the event of a breach of their rights under this Directive'. According to Recital 44 of the proposition, the goal of this new regulation is to implement a fundamental right to effective remedy for those whose rights guaranteed by EU law are violated, contained in Art. 47 of the CFR,[127] in the context of consular protection. The need to introduce such a possibility has already been indicated in the doctrine. Erzsébet Csatlós noted as follows:

> [t]o protect a right created by European law, judicial remedy shall be available. European citizen who asks for consular assistance from the authorities of another Member State, and receives a refusal which 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.[128]

Thus, effective implementation of the right to consular protection (similar to any other right) requires the existence of an effective remedy in the event of its violation. Nevertheless, it remains an open question what this would look like in practice under the national law of particular Member States, particularly because the Directive does not harmonise the internal law of the Member States regarding the provision of consular assistance. For example, in PCL (similar to Hungarian Consular Act),[129] there are legal procedures established for those consular protection functions, which require the authority to act. When a consular officer takes a decision in the first instance, the appeal is submitted to the Minister of Foreign Affairs.[130] However, not all the tasks and functions of consular protection are considered authority procedures, and no provision exists for denying those kinds of measure that do not explicitly require authority procedures.

126 The lack of such regulations was indicated even before the Directive was to be implemented, *inter alia*, by Erzsébet Csatlós, see Csatlós, 2017, p. 78.

127 According to Art. 47 of the CFR, 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article (…)'.

128 Csatlós, 2017, p. 79.

129 Ibid., p.79.

130 Art. 88 (1) PCL.

The European Parliament on 24 April 2024 adopted by 521 votes to 89, with 17 abstentions, following a special legislative procedure, a legislative resolution on the proposal for a Council directive amending Directive (EU). The Parliament approved the Commission proposal subject to many amendments regarding, *inter alia*, the extension of the protection to recognised refugees and stateless persons and providing special protection for children. The Council would adopt the act after consulting the European Parliament but without being obliged to follow its opinion. The proposal awaits the final decision of the Council.[131]

9. Conclusions

A careful analysis of the provisions of the EU Treaties concerning the protection of EU citizens abroad, particularly the wording of Art. 23 of the TFEU, in the broader context of international law, clearly shows that this 'external face' of EU citizenship,[132] commonly called the right to diplomatic and consular protection, does not include the right to diplomatic protection in its formal sense. Diplomatic protection, according to its international law definition and State practice, must be connected with the responsibility of States for an internationally wrongful act. European citizenship itself does not provide a sufficient link to fulfil the requirement of nationality that is obligatory when a State wants to exercise diplomatic protection in favour of the person concerned. The right of EU citizens 'to protection by the diplomatic or consular authorities' means the right (only) to consular protection (assistance), which should be performed by embassies or consular posts, and not the entitlement to both consular protection and diplomatic protection. It is confirmed by the subsequent acts of secondary EU law concerning the protection of EU citizens on the territory of third States that are focused only on consular assistance.

The very essence of the European consular protection is that EU citizens are entitled to be protected by any EU Member State under the same conditions as the nationals of that State when they are unrepresented in the territory of the third country. In other words, it is a right to equal protection in third countries. Directive 2015/637 does not aim to harmonise national consular protection legislation and practices. Consequently, it does not change the scope of Member States' consular protection of their own citizens. This results from the subsidiary nature of European

131 European Parliament legislative resolution of 24 April 2024 on the proposal for a Council directive amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU Emergency Travel Document (COM(2023)0930 – C9-0015/2024 – 2023/0441(CNS)); available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0336_EN.html (Accessed: 20 January 2025).

132 Kostakopoulou, 2020, p. 75.

citizenship in relation to the citizenship of one's own country. Therefore, when transposing the Directive, Member States do not have to change their own consular law regarding protection for their own citizens – and, for example, their family members – but only extend the scope of assistance to citizens of other EU countries. This can be seen in the example of Poland's transposition of the Directive.

The practice of applying Directive 2015/637 revealed its many 'weak points' that require changes, most often by clarifying and improving the rules, for example, with regard to such crucial issues as determining whether an individual should be considered 'unrepresented'. Moreover, recent large-scale crises have highlighted deficiencies in the current coordination and cooperation mechanisms among Member States' consular services and also between them and EU Delegations, simultaneously showing the strong need to improve the legal framework in order to better use the EU Delegations network for effective crisis response and the practical implementation of the right to consular protection; this is particularly because, on average, the consular network of all the Member States is lower than the EU Delegations network of the EEAS.

The lessons learned from the crisis situations of recent years have been reflected in the proposal of the European Commission to amend Directive 2015/637. The proposal has a wide scope and covers the vast majority of the Directive's provisions. It contains several much-needed solutions that explain and simplify issues identified as causing problems and fill in some existing significant gaps, for example, by adding new provisions regarding data protection. Particularly needed are the new regulations concerning the preparedness and coordination and cooperation of the EU and Member States in times of crises, which would involve strengthening the EU's supporting role and making best use of its unique network of EU Delegations. The proposition also includes a mechanism that may be challenging for Member States: the right to effective remedy, which would be the real test of the effectiveness of the consular protection of EU citizens. However, introducing proposed amendments should result in enhanced legal clarity, streamlined cooperation, greater consular service effectiveness, and heightened standards of consular support and crises response – the effects that are strongly desired and expected in the area of European consular protection, especially in view of foresight studies suggesting that large disruptions to travel and other human activities are likely to increase further, resulting from either man-made events (e.g. wars, conflicts, or social unrest), phenomena linked to global warming (e.g. fires or flooding), or large-scale health crises and epidemics.[133]

133 Pittoors, 2024, p. 28.

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