

Effective consular protection of unrepresented EU citizens in third countries during the COVID-19 pandemic: law and policy

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The global health crisis triggered by the COVID-19 outbreak represents the biggest stress-test to date for national consular representations and the European External Action Service (EEAS). An unprecedented number of EU citizens were stranded in third countries, and in need of urgent consular assistance services, in particular: repatriation and help with accessing health care in third countries. Pre-COVID estimates show that close to 13 million EU citizens did not have a consulate or embassy of their Member State of nationality to ask for consular assistance in third countries,¹ and were thereby entitled to consular protection from the diplomatic and consular authorities of other Member States in the same conditions as the nationals of these countries (Article 20(2)(c) TFEU). On average, the consular network of all the Member States is lower than the EU delegations network of the EEAS.² Notably, all the Member States have a permanent representation in only four countries – China, India, Russia and USA – whereas only five of the 27 Member States have representations in more than half of the countries.³ Thus, in many third countries, only the EU is represented.⁴

In a large-scale repatriation exercise, coordinated between the Member States' external representations, the EEAS with its delegation networks, and the Commission, more than 500,000 EU citizens were successfully repatriated.⁵ In addition, several Member States' repatriation flights were co-financed by the EU through the activation of the Union Civil Protection Mechanism (UCPM).⁶ This has been the largest European repatriation exercise to date, and the consular coordination between the EU and the Member States and the growing EU consular protection toolkit (see Figure 1) has shown its added value. However, securing prompt and effective consular protection to the unrepresented EU citizens in third countries in crisis situations will become ever more difficult. First, the COVID-19 pandemic showed that common consular evacuation plans were not adapted to the specific circumstances of a global health pandemic of the COVID-19 magnitude. Second, the number of unrepresented EU citizens in third countries will most likely increase due to the combining effect of : shrinking consular network of the Member States abroad due to the fiscal constraints and withdrawal of

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¹ According to the European Commission's estimates, the number of EU citizens traveling to third countries where their Member State(s) of nationality is not present would reach 10 million in 2020 and 3.3 million for those EU citizens living in third countries where their Member State of nationality is not present.

² For the presence of EU delegations world-wide, see https://eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en

³ According to data available on the website of the European Commission, ec.europa.eu/consularprotection/content/home_en

⁴ See Annex IV to 2013 European Parliament Study on Franchise and electoral participation of third country citizens residing in EU and of EU citizens residing in third countries.

⁵ EEAS, 'Coronavirus: EU citizens stranded abroad, an unprecedented repatriation effort' 20.04.2020: https://eeas.europa.eu/headquarters/headquarters-homepage/77768/coronavirus-eu-citizens-stranded-abroad-unprecedented-repatriation-effort_en

⁶ EEAS 'Good stories on consular support for EU citizens stranded abroad' 7.06.2020: https://eeas.europa.eu/headquarters/headquarters-homepage/76203/good-stories-consular-support-eu-citizens-stranded-abroad_enb

the United Kingdom from the EU;⁷ the increasing number of EU citizens travelling or residing abroad; the COVID-like crises will most likely increase due to the effect of climate change, population growth combined with increasing urbanization and other factors.⁸

Within this socio-political context, the need for more solidarity and coordination among Member States and the EEAS clearly emerges as a first necessity. However, it is unclear what form the pooling of consular responses should take; and whether this can be achieved within the existent EU legal framework or requires amendments of legislation. This requires an evaluation of the performance of the key instrument governing consular protection for unrepresented EU citizens in third countries (Directive 2015/637/EU) during the COVID-19 related consular crisis, in order to understand how we can best future-proof the EU's consular protection policies and inter-state cooperation, in anticipation of other COVID-19- like crises.

Legal and policy context governing the provision of consular assistance to unrepresented EU citizens in third countries

The provision of consular protection to unrepresented EU citizens in countries located outside the EU is governed by a legally complex EU legal framework of interlinked and varied policies, where the precise allocation of competences between the EU and the Member States has until recently been difficult to grasp in practice.⁹ The provision of consular protection to EU nationals remains an exclusive national competence. Notwithstanding, the Lisbon Treaty affirmed the competence of the EU to legislate in the area of consular protection. Directive 2015/637/EU¹⁰ replaced the ad-hoc, purely inter-governmental approach of the 1995 Decision on consular protection¹¹ with clear, transparent rules aiming to enhance consular protection of unrepresented EU citizens. Specifically, the Directive implements the EU citizenship right enshrined in Article 20(2)(c) TFEU, whereby all EU Member States are required to provide the same level of consular protection to unrepresented nationals of other EU Member States as to their own nationals, in non-EU countries.¹² This particular EU citizenship right is unique within the constellation of EU citizenship rights since it extends the application of the EU foundational principle of non-discrimination based on nationality¹³ to the territory of non-EU countries.

⁷ According to 2010 figures, the UK ranked third – after France and Germany – in terms of spread of diplomatic and consular representations in third countries, see: Impact Assessment accompanying the document Proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizens, SEC (2011) 1556 final, p. 51.

The UK has also played the role of Lead State in several third countries, that is coordinating the consular assistance in crisis situations for all the unrepresented Member States, see: Consular Cooperation Initiatives – Final Report from 29 April 2016 (8347/16).

⁸ See Commission Communication “Towards a stronger European disaster response: the role of civil protection and humanitarian assistance” COM(2010) 600 final.

⁹ See the 2017 EU Citizenship Report.; Eurobarometer No. 430/2016 and Eurobarometer, Flash EB No 294/2010, European Union Citizenship; Eurobarometer (2010), Flash EB No 294, European Union Citizenship, 34.

¹⁰ 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 (OJ L 106, 24.4.2015, p.1–13) (‘Consular Protection Directive’).

¹¹ See Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, O.J. 1995, L 314/73. For the shortcomings of this Decision and generally of the pre-Lisbon Treaty framework, see M. Moraru, ‘The Protection of EU citizens abroad: A legal assessment of the EU citizen’s right to consular and diplomatic protection’, (2011) *Perspectives on Federalism* Vol. 3 (2), online version.

¹² In addition, the Charter of Fundamental Rights enshrines the right to equal consular and diplomatic protection in Article 46, with a similar content as that of Article 20(2)(c) TFEU.

¹³ Article 18 TFEU.

Furthermore, it has an independent status, dissociated from the exercise of fundamental freedoms, the cross-border element or financial resources which the CJEU has made the EU citizenship rights dependent upon.¹⁴ The only requirements an individual has to fulfil in order to benefit of the EU citizenship right to equal protection abroad is : first, (s)he has to have EU citizenship; second, (s)he has to be located outside the EU; and third, the EU citizen must not have a representation of the Member State of nationality in the third country where (s)he is located to ask for consular protection. Of these three requirements, the latter has posed most problems in practice due to the open-ended definition of the notion of “unrepresented”, which has created in practice situations where in the same third country the same individual would be considered as represented by some Member States, and not represented by others.¹⁵

The adoption of the Consular Protection Directive in 2015 represented a historical moment for both the EU and more generally, international organisations. As regards EU law, it unified the internal and external dimensions of EU citizenship into a coherent and uniform regulatory framework that confers concrete benefits to EU citizens not just within the EU borders, but also across the globe. As regards public international law, the increased role conferred by the Directive to the EEAS and EU delegations in the provision of consular protection to unrepresented EU citizens in third countries has the potential to re-shape the traditional institutions of public international law of consular and diplomatic protection, since, for the first time an international organisation has concrete powers in the provision of consular protection of individuals beyond the traditional functional protection for its agents.¹⁶

The EU’s consular protection toolkit currently includes various EU legal instruments of different legal nature (Directives and Decision), under different policies (EU citizenship,¹⁷ civil protection,¹⁸ external relations,¹⁹ humanitarian assistance²⁰), which should nevertheless serve to fulfil the same EU objective, that of protecting the EU citizens in the world.²¹ However, policy coherence is difficult to achieve when the arsenal of EU policies engages different types of EU competences: shared, supportive, and the separate CFSP,²² and when the Consular Protection Directive does not aim to harmonise the national consular protection legislation and practices. For the moment, there is no uniform EU citizenship right to consular protection in third countries, but an EU citizenship to equal consular protection, which means that all 27 different national rights to consular protection are equally in force. The EU citizenship right requires only an equal treatment to consular protection between the unrepresented EU citizen and the nationals of the Member State represented in third countries.

¹⁴ C-333/13 *Dano* ECLI:EU:C:2014:2358.

¹⁵ See M. Moraru, ‘An Analysis Of The Consular Protection Directive: Are EU Citizens Now Better Protected In The World?’ (2019) 56 *Common Market Law Review*, 417–461, at 431–434.

¹⁶ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ GL No 4, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949.

¹⁷ Article 23(2) TFEU for the Consular Protection and ETD Directives.

¹⁸ Article 196 TFEU for the Union Civil Protection Mechanism Decision.

¹⁹ Art. 27(3) TEU and the EEAS Decision.

²⁰ Article 218 TFEU; the CSDP missions can also carry out humanitarian and rescue tasks (Art. 43 TEU).

²¹ Article 3(5) TEU.

²² According to the classification set out in Articles 4(2) and 6 TFEU and 24 TEU.