

THE RIGHT TO DIPLOMATIC AND CONSULAR PROTECTION - DEVELOPMENT PROSPECTS

1. The European Citizenship

The European Citizenship, established in 1993 by the European Union Treaty, is one of the most progressive and controversial instruments of the integration. First design mainly implied deepening of bonds between the Union and its citizens and fortification of its democratic legitimization, but later it became one of the most important determinants of the entity role in the EU².

The citizenship's general definition indicates that a citizenship is a relatively permanent bond between an entity (physical person) and a state connected by certain legal rights and duties.³ Established in the EU so-called European Citizenship refers in its definition to a state citizenship. According to Article 17 of the EC Treaty "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship".⁴ Based on this definition it can be stated that the EU Citizenship is a personal, mutual, supplementary, dependent and apparent legal bond between a physical person and the EU⁵.

1 Iwona Wrońska, dr, Katedra Prawa Międzynarodowego Wydziału Prawa Uniwersytetu w Białymstoku.

2 A. Cieleń, *Prawa polityczne obywateli Unii Europejskiej*, Warszawa 2008, p. 9.

3 *Ibidem*, p. 9.

4 The Amsterdam Treaty on the change of the Treaty of the EU, the treaties establishing the European Community, and also a few connected legal acts, signed in Amsterdam on 2nd Oct 1997, OJEU 1997 C 340.

5 On particular issues of EU citizenship see: J. Galster, C. Mik, *Podstawy europejskiego prawa wspólnotowego. Zarys wykładu*, Toruń 1998, p. 193-19 and C. Mik, *Obywatelstwo europejskie w świetle prawa wspólnotowego i międzynarodowego*, Toruński Rocznik Praw Człowieka i Pokoju 1993, Z. 2, Toruń 1994, p. 67-68.

Since the 1992 Maastricht Treaty one of the EU goals has been the strengthening of the Member States citizens legal rights and interests through the introduction of the EU Citizenship. The European citizenship is enshrined in the Treaty establishing the European Community (Articles 17-22). The establishment of the European citizenship in the 1992 Maastricht Treaty was the mile stone in the deepening process of the European integration. The Treaty's Preamble refers to a rule of law principle, freedom, democracy, respect for human rights and fundamental liberties. The EU Citizenship does not mean a Union nationality - it refers to rights and privileges acquired by the way of EU membership. Thus, EU Citizenship complements the national citizenship without replacing it. The EU civil rights are supplementary though and they are of importance in one's home country as well as in another Member State or in a so-called third country.

2. The right to consular and diplomatic protection in the Community law

The Maastricht Treaty with its entry of the European citizenship has granted rights to the Member States citizens in relation to the states of which they are not citizens. One of the basic rights granted to the EU citizens by the EC Treaty is the right to consular and diplomatic protection.⁶ The source of this right is Article 20TEC, according to which "Every citizen of the Union shall, on the territory of a third country in which the Member State of which he is a national is not represented⁷, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State⁸. Member States shall establish the necessary rules among them-

6 Spanish government was the initiator of establishing the diplomatic and consular protection within the EU countries, and in their memorandum of 21st Feb 1991 on European citizenship presented an official proposal to oblige the EU to give diplomatic protection to EU citizens. That initiative did not meet a strong support. More: A. Łazowski, *Obywatelstwo Unii Europejskiej - uwagi teoretyczne i praktyczne w dziesięć lat po wejściu w życie Traktatu z Maastricht (in:) Szkice z prawa Unii Europejskiej*, red. E. Piontek, A. Zawadzka, Kraków 2003, p. 162.

7 The lack of a diplomatic post means not only that there is no a delegacy of a given state but also there is no a diplomatic post of other countries which would be able to represent it on regular basis, or there isn't a consular agent who could support a EU citizen.

8 On the same conditions (...) means to give protection to a European citizen whose country has no an established diplomatic post according to the same rules which apply to nationals of that country. Thus, this particular diplomatic agency is supposed to treat a citizen of another country in the same way as it would treat their own nationals in a comparable situation.

selves and start the international negotiations required to secure this protection”.

Entitled to the right to diplomatic and consular protection according to the rules determined in the Article 20 TEC are exclusively EU citizens (i.e. citizens of the Member States, but not their family members without EU citizenship). In practice, the range of this protection results not only from Community law provisions but also (or maybe before all) from bilateral and multilateral agreements entered by Member States⁹. Article 20 TEC does not constitute a transfer of Member States' competency to the Community, nor to the Union, the formula expressed in this article does not create a “European” diplomatic or consular protection, which would replace the protection of the Member States. There is an overlapping of international public law regulations with a widely interpreted EU law and a state law¹⁰. Thus, Article 20 TEC opened a new dimension in individual rights enjoyed by EU citizens; it created for the Member States a common responsibility for the lives of citizens of other Member States in third countries.

3. The legal status concerning diplomatic and consular protection in the EU

The EU achievements in category of diplomatic and consular protection are very limited. Except Decision 96/409/CFSP on the establishment of an emergency travel document, it consists of the mentioned Treaty of Maastricht, legislature regarding diplomatic and consular protection created by two decisions, which in their preambles invoke Article 20 TEC. First is the Decision 96/409/CFSP of 6th June 1996 on the establishment of an emergency travel document¹¹, The EU achievements in category of diplomatic and consular protection are very limited. Except Decision 96/409/CFSP on the establishment of an emergency travel document, it consists of the mentioned Treaty of Maastricht, legislature regarding diplomatic and consular protection created by two decisions, which in their preambles invoke Article 20 TEC.

9 A. Cieleń, A. Szymański, *Obywatelstwo Unii Europejskiej*, Warszawa 2004, p. 74.

10 A. Łazowski, *Obywatelstwo Unii Europejskiej - uwagi teoretyczne i praktyczne w dziesięć lat po wejściu w życie Traktatu z Maastricht* (in: *Szkice z prawa Unii Europejskiej*, red. E. Piontek, A. Zawidzka, Kraków 2003, sp. 162.

11 An emergency travel document is supposed to enable a return journey of a citizen to their state or, in emergency, another Member State of 06.07.1996, OJEU L 168.

First is the Decision 96/409/CFSP of 6th June 1996 on the establishment of an emergency travel document the Decision 95/553 regarding protection for citizens of the EU by diplomatic and consular¹² representations which only came into force in May 2002 due to the cumbersome legislative. The EU achievements in category of diplomatic and consular protection are very limited. Except the Decision 96/409/CFSP on the establishment of an emergency travel document, it consists of the mentioned Treaty of Maastricht, legislature regarding diplomatic and consular protection created by two decisions, which in their preambles invoke Article 20 TEC. First is Decision 96/409/CFSP of 6th June 1996 on the establishment of an emergency travel document¹³.

Besides, in 2006 a special structure has been formed - COCON, a working group at the EU Council, responsible for consular co-operation and organizing information exchange regarding model state practices.

4. Current situation of diplomatic and consular protection in the EU

Not all of the Member States have a permanent and accessible representation in each third country at their disposal. It should be noted, that only 3 countries in the world (China, Russia and the USA) have diplomatic and consular representations of all EU Member States and in 107 third countries there are only representations of not more than 10 Member States, in some frequented places like for instance the Maldives with no such representation whatsoever.

As a result of past crisis situations (the Asian tsunami, the Lebanon crisis, etc.) the Commission noticed significant problems that make support in crisis situation in the third countries difficult. Taking the question of insufficiencies under consideration, that characterise the network of diplomatic and consular representations of the Member States, it should be mentioned that the present Community legal achievements in this regard are rather modest.

12 OJEU L 314 of 28.12.1995.

13 More: N. Reich, *Bürgerrechte In der Europäische Union*, Nomos, Baden Baden 1993.

The COCON group produced, in June 2006, directives about consular protection of European citizens in third countries¹⁴. The directives are not binding; they underline the importance of information exchange between Member States to ensure close co-operation, in which the Commission's delegacies take part. The directives suggested that every Member State works out plans in case of crisis situation, which should be known by other Member States. The Member States should be encouraged to exchange information about changes in travelling directives.

The diplomatic and consular protection - is based on the principle of no discrimination and contains according to the text diplomatic as well as consular protection. It gives, as A. Łazowski says, "an external dimension to the principle of non-discrimination because of citizenship", resulting from Article 12 TEC¹⁵.

The existing legal framework has been interpreted more restrictively until now: as to diplomatic protection, as well as to consular protection the lawyers of the Member States always claimed, that this area belongs to intergovernmental co-operation, such being currently regulated by the 1963 Vienna Convention and not by the Article 20 TEC. The Commission's stand is of broad interpretation of Article 20, stressing that it is not about intergovernmental co-operation but more about application of the existing law.

With all certainty the harmonization of the diplomatic and consular protection should be pursued - it is an essential phase of efficient not illusory execution and application of European citizens rights. If, by lawyers' opinion, the spectrum of application of Article 20 TEC and the 1995 Decision is now limited to the consular protection, the European Parliament and the Commission should create conditions to enable a review of the 1995 Decision in order to widen its range and unequivocally enclose the "diplomatic protection" in it. The importance of establishing an European diplomatic and consular protection is fundamental: it must gradually consolidate itself as an existing, real law, serving all EU citizens in the same way, so all inconsistencies and in-

14 Doc. 10109/06 of the Council of EU of 2nd June 2006.

15 A. Łazowski, *Obywatelstwo Unii Europejskiej - uwagi teoretyczne i praktyczne w dziesięć lat po wejściu w życie Traktatu z Maastricht* (in:) *Szkice z prawa Unii Europejskiej*, red. E. Piontek, A. Zawadzka, Kraków 2003, p. 163.

equalities regarding treatment and protection, due to discretionary powers of the consulates, can be eliminated.

5. The Green Paper of the diplomatic and consular protection of Union citizens in third countries

The fact is, that currently a real usage of the diplomatic and consular protection of other countries remains only a theory, which makes it the least sufficient right that EU citizens are entitled to. Considering that there is also a limited representation of the Member States in third countries and recent crises (namely the Asian tsunami and the Lebanon crisis) illustrated that there is a common experience resulting from it and therefore a possibility of improvement of co-operation between consular and diplomatic authorities, the Commission accepted on 28th Nov 2006 the Green Paper of diplomatic and consular protection of Union citizens in third countries¹⁶. Assuming as a starting point the above mentioned practical aspects, the Commission formulated its proposals in regards to the enlargement of diplomatic and consular protection of EU citizens based on Article 20 TEC.

In the Green Paper the Commission tried to expand beyond current frames and present a proposition containing fundamentals of real harmonization of the right to diplomatic and consular protection, that EU citizens are entitled to. According to the text of the Green Paper the main reasons that caused the Commission to deliberate these matters were of various nature:

First: Article 46 of the Charter of Fundamental Rights, which states that the right to diplomatic and consular protection is one of the fundamental rights that EU citizens are entitled to;

Second: the planned review, after 5 years, of Decision 95//553/WE, which went into effect in May 2002;

Third: the perspective of introduction of the fifth report of the Union citizenship prepared by the Commission, which gave an opportunity to present initiatives regarding right to diplomatic and consular protection;

16 OJEU C 030, 10/02/2007 P. 0008-0013.

Forth: a necessity of determination of connection between diplomatic and consular protection and other disciplines (civil defense, crisis situation interventions, humanitarian aid).

The Commission presented doubleway proposals aiming at a better guarantee for compliance with the right to diplomatic and consular protection. The first aspect refers to the question of information of EU citizens, who often do not know their own rights in this regard. The second aspect presented in the Green Paper is an array of reflections on the protection range, which should be ensured to the citizens and on structures and resources needed by the Union for that, as well as on relationships that ought to be developed with authorities of the third countries. The goal being an establishment of an ambitious long-term strategy, where information and communication should play the key role¹⁷.

And so, in compliance with the Green Paper information decisions the citizens must be better informed about consular protection questions. It is stipulated that institutions and the Member States inform periodically the citizens (about consular service) and the transportation professionals, like travel offices. Further, in the Commission's opinion, the directives about application of Article 20 TEC should be published in the Official Journal of the EU.

In case that a Member State does not have an embassy or a consulate in third country, to which its citizen travels, this person has to have access to information about embassies or consulates of other Member States in a given country.

A proposal was presented that all passports should contain the text of Article 20 TEC¹⁸. The Commission opinion is that it would give an adequate reminder to the citizens [of their rights]. This postulate

17 It is worth noticing that in 1996 one of the first initiatives was submitted regarding the right to diplomatic and consular protection. A special leaflet on that subject was issued which was agreed by all EU states and which was intended to be distributed and available in the Council's agencies abroad. In practice, the results were not satisfactory. See: European Commission, Second report on citizenship of the Union, p. 11.

18 The proposal to include the content of Art. 20 TEC in passports in order to inform citizens on their rights submitted in report of 9th May 2006, titled 'For a European civil protection force: Europe aid.' On 15th June the Presidency addressed the Member States to consider the possibility to reproduce the text of Art. 20 TCE in passports to make sure that the citizens will be properly informed on their rights. See: Council's documents no 10551/09 of 15th June 2006, „Zwiększenie zdolności Unii Europejskiej do reagowania w sytuacjach nadzwyczajnych i kryzysowych”.

was met with broad support of Member States, representatives of the Community, citizens and other European institutions¹⁹. It was detailed in the Commission's recommendation of 5th December 2007 regarding placement of the Article 20 TEC text in passports²⁰. In this document the July 2006 Eurobarometer poll was cited, which indicated that the majority of EU citizens does not know Article 20 TEC, nor its consequences, which confirms the necessity of implementation of the proposed solution. According to the Commission's recommendation, the text of Article 20 should be written in the official language(s) of the issuing Member State. It would be sufficient just to cite the first sentence of Article 20²¹, because the second sentence refers to Member States' duty to undertake international negotiations in order to ensure diplomatic and consular protection and there is no direct importance to citizens in it.

The next, important aspect discussed in the Green Paper is a complex problem of specification and character of the diplomatic and consular protection that applies to EU citizens. The Commission clearly states, that range and character of the protection is not identical, because there are as many different protection systems in existence as many Member States there are. The result is that many differences exist - in range of diplomatic and consular protection and in legal powers as well²². The Commission proposed in long-term perspective to conduct a broad analysis of the existing differences in order to determine what possibilities there are of giving to all citizens similar protection, independently from their nationality. The Commission indicates in the Green Paper that two activity areas need to be taken into consideration:

19 See: Report of European Parliament A6-0454/2007 and Report of the European Economic and Social Committee SOC/262 (CESE 425/2007).

20 OJEU L 118/30 z 6.5.2008, notified as the document no C(2007)5841.

21 The Commission in its recommendation suggested that in order to diminish the administrative load for the Member States it would be recommended to reproduce the text of Article 20 TEC in new passports issued after 1st July 2009 with the reference to the EU website <http://ec.europa.eu/-consularprotection>. To make this information available to the citizens holding the passports without the notice on Article 20 TEC, the stickers with the text would be placed on the outer part of the back cover of their passports.

22 For example, only some Member States recognize the right to make an appeal against the decision to refuse protection.

Firstly, protection of EU citizens working and residing in third countries. In this aspect the proposed measure embraces an inclusion of protective regulations into bilateral agreements between Member States and third countries, that apply to EU citizens working and residing in third countries, which ensures a full observance of Decision 88/384/EEC²³.

Secondly, protection of family members of Union citizens, who do not have a Member State's citizenship. The Commission postulated to take action to expand the consular protection to family members of EU citizen, who are citizens of third country by usage of appropriate means (change of Decision 95/553/EEC or Commission's Petition based on Article 22 TEC)²⁴.

The Green Paper of diplomatic and consular protection has also discussed in more detailed manner all issues connected with operations of consular authorities. The Commission issued an opinion to the problem of identification and repatriation of the deceased. The proposed actions are: so-called short-term measures, which contains the change of Decision 95/553/EEC resulting in enclosure of identification and repatriation regulations; and a recommendation addressed to Member States, which are not yet a parties of the Council of Europe's convention on the transportation of the deceased²⁵ signed in Strasbourg on 26th Oct 1973 to join it. As a long term action in this matter, the Council has included simplification of procedures of the deceased repatriation (where establishing of the European system of compensation could be an additional action); assistance for the research and work on

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- 23 In their decision 88/384/EEC establishing a prior procedure of communication and consultation in the issues of migration policy in reference to non-member countries, the Commission introduced the procedure of mutual consultations between the Member States in order to support incorporating into bilateral agreements more common regulations and ensure better protection of citizens of the Member States living and working in the third countries. www.eur-lex.europa.eu
- 24 According to the Commission, the need to provide a better care and protection to citizens and their families was revealed during the conflict in Lebanon in July 2006 when Cyprus carried out the evacuation and repatriation family members of those citizens whose countries had no diplomatic posts in Lebanon. In the Commission's opinion, the obstacles which are encountered by citizens and their families in such situations need to be removed and in order to implement it the rules have to be established which will enable the EU countries to provide common diplomatic and consular protection to their nationals in a difficult situation and to their family members not holding the EU citizenship.
- 25 Convention no 80 from the series of European treaties (ratified by 15 Member States; Poland has not signed this agreement yet). <http://conventions.coe.int>

effective tools of DNA analysis as well as specialising a few European laboratories in victim identification.

Another issue, important from the point of view of an effective consular protection, is simplification of procedures of granting financial aid. Decision 95/553/EEC presented an elaborated procedure of refund and financial aid which support citizens in difficult situations²⁶. Thus, a centralized system of examining applications in a common bureau in a third country could be a solution to this problem, as it would simplify administrative procedures detailed in the Decision 95/553/EEC.

One of the final matters of the Green Paper is the perspective of establishing so-called common bureaux which could guarantee certain appropriate standard of consular protection. The Commission believes that the basic issue is setting a fair share of the tasks between the Member States in case of numerous applications for aid or repatriation from those citizens whose country is not represented in a given state. A solution to such situation could be establishing common bureaux proposed in Barnier's report and supported in the above mentioned 28th June 2006 Announcement on realisation of the Haque programme²⁷. The European Parliament expressed its support for such proposals²⁸. Creating common bureaux would provide a proper share of roles and functions and take steps to economize in the field of fixed costs connected with the structure of diplomatic and consular networks of the Member States.

Depending on a state and the number of agencies of Member States, the bureaux could be placed in different diplomatic posts or national embassies or in one of those institutions or the premises of the Commission delegacy. In each case, consular officials would perform their duties authorized by their Member State in common bureaux. The tasks carried out within the framework of common bureaux could be based on the system of deputizing and exchange between the Member States. The actions proposed by the Commission include: a) initially,

26 An European citizen applying for financial aid has to obtain a consent from his state and makes a commitment to repay; in case when the country which provided the aid submits a motion for repayment to that citizen's state, it covers the expenses and the citizen is obliged to refund all costs to the country he/she is from. As a guarantee, the country providing the aid can detain passports of some state's citizens.

27 Implementing the Haque Programme: the way forward of 28th June 2006, COM (2006).

28 Resolution of 5th Sep 2000 on common diplomacy of EU.

establishing 'common bureaux' on the Caribbean, the Balkans, and the area of the Indian Ocean and in West Africa²⁹; b) publication of rules and regulations of the system of deputizing and exchange of the states in the third countries³⁰; c) information campaigns encouraging citizens to register in common bureaux; d) in long term perspective, performing tasks by common bureaux such as authenticating documents and issuing visas.

The last issue discussed in the Green Paper is the problem of the consent of the authorities of the third countries in the aspect of a citizen protection abroad. Implementing the resolutions of Article 20 TEC requires the consent of the third countries. A general rule of a international law states that the protection of a citizen of one state by another state requires a consent of a third country. The Article 20 TEC assumes an obligation to take up international negotiations by the Member States to provide such protection. Thus, each Member State is expected to commence bilateral negotiations with the third countries.

Although, a standard clause on common consular and diplomatic protection can be included into agreements concluded by the states within the European Union. By virtue of such clause the third countries would accept that EU citizens could get protection from any Member State which has its delegacy on their territory. In a long term perspective, the Commission proposed scrutinizing the possibility to acquire the third countries' consent to satisfy the requirement of protection by the EU delegacies in cases within the range of European rights.

In the Green Paper the Commission presents proposals which aim at the reinforcement of EU right to diplomatic and consular protection. Considering further prospects of the development of protection of fundamental rights of the European citizens, it needs to be emphasised that current diplomatic and consular protection included in the Maastricht

29 The Commission proposed four experimental areas: The Caribbeans, The Balkans, The Indian Ocean and West Africa. They were submitted due to a large number of European tourists visiting them, a limited number of diplomatic posts and the presence of the Commission's delegacies which could provide a suitable aid. The programme of employees' (diplomatic services of the Member States, the Commission and the Commission's Secretariat) exchange could serve that purpose according to the Commission's communication of 8th June 2006 in respect of Europe in the world. See: *Europe in the World - Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM (2006) 278 final version.

30 In order to enable carrying out the duties, the Member States, with their citizens on mind, could define and publish the regulations of substitution system and duty share which would be in force in all common bureaux in the third countries.

Treaty is not sufficiently legally effective. This opinion is shared by the Commission and other EU institutions. Similar attitude belongs to the Committee of the Regions in the Opinion of 19th Dec 2008 'Citizens' rights: spreading fundamental rights and laws resulting from European citizenship' which defined EU legislation on diplomatic and consular protection as unsatisfactory, simultaneously indicating the support for any initiatives of the development of legal output in this field and undertaking necessary actions on the international level³¹.

The opinion of the European Parliament is also worth mentioning. It is noticed in the Resolution of 2nd April 2009 on problems and perspectives of an European citizen³² that the European Union has not managed to establish a complete system of assistance for European citizens and lessen their suffering in critical situations. It demands that, according to the Commission's Green Paper, all planned actions will be accomplished, especially the postulate of a wider interpretation the Article 20 TEC in reference to the consular and diplomatic protection actually given to EU citizens³³ will be maintained.

It is also significant for the assessment of the right to diplomatic and consular protection that its implementation depends mainly on the will of the third countries which are not obliged to respect the Union law and give their consent to expand the range of performance of the existing on their territory consular posts of the EU countries. Special problems may be encountered by persons with a double allegiance³⁴.

Certainly, the protection of fundamental rights will invariably constitute the main part of EU activity, which is emphasised in the Announcement of 18th Feb 2009 to the European Parliament, the Commission, the European Economic and Social Committee and the Committee of the Regions that has become a year's strategy for 2010³⁵. However, without proper legal instruments the diplomatic and consular

31 OJEU C 325/76 of 19.12.2008.

32 <http://www.europarl.europa.eu>

33 On the other hand, Article 20 TCE undoubtedly could help to limit the number of diplomatic posts of some EU countries and enable the remaining states to overtake the performance of tasks. Reducing the number of delegacies depends on how serious are the countries about the second sentence of Article 20 TCE which obliges them to be internationally active in order to provide a proper level of diplomatic protection. See: A. Cieleń, A. Szymański, Obywatelstwo Unii Europejskiej, Wydawnictwo Sejmowe, Warszawa 2004, p. 75.

34 D.Ehlers (Hrsg), Europäische Grundrechte Und Grundfreiheiten, De Gryuer Recht, Berlin 2003, p. 493.

35 KOM(2009) 73, <http://eur-lex.europa.eu>

protection will not be entirely effective. Having considered the aspects of limitations to the access to the diplomatic and consular protection, it has to be stated that Armin von Bodgandy was right in his assesment: 'Article 20 TEC promises more than it can provide'³⁶

36 A. von Bodgandy (Hrsg), *Europäische Verfassungsrecht. Theoretische und dogmatische Grundzüge*, Springer, Berlin 2003, p. 562.