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Pending the Implementation of Article 23 TFEU and Article 35 TEU – Still Incomplete Right of EU Citizens to Diplomatic and Consular Protection

W oczekiwaniu na wykonanie art. 23 TFUE i art. 35 TUE – wciąż niepełne prawo obywateli Unii Europejskiej do opieki dyplomatycznej i konsularnej

SUMMARY

In 1992, with the adoption of the Maastricht Treaty, a new institution, namely EU citizenship, was created. The treaty introduced a qualitative change in the sphere of political and legal position of citizens of the Member States, who gained in these spheres a number of new powers. One of them is the right to diplomatic and consular protection. The analysis of these two rights leads to a conclusion about the great discrepancy that exists between treaty guarantees and the effective exercise of this right. The Member States did not agree with third countries on this subject, which is a requirement of international law. Secondary law also allows only a partial exercise of the treaty's right to care in the territory of third countries. It has been reduced only to consular assistance and is still narrowly understood. The treaty law of EU citizens remains therefore at a very early stage of development.

Keywords: EU citizenship; diplomatic and consular protection; consular assistance

INTRODUCTION

In the history of European integration, the entry into force of the Maastricht Treaty was a landmark event. It set a completely new horizon of cooperation between the Member States, not only in the subjective and organizational aspect of the functioning of the Union, but also gave the citizens of the Member States a new special attribute, which is EU citizenship. On the basis of the treaty, it has been associated with a whole range of rights and freedoms, which in an even deeper

dimension empower individuals under EU law. A new measurement of their legal functioning has been created, which is based on guaranteeing them a number of rights. This, however, is based on what was previously reserved for them under national constitutional systems. Among them was the right to diplomatic and consular protection. An important novelty of this institution was an attempt to challenge a permanent rule of international law. According to this principle, the right of representation of a person in the territory of a third country can only be exercised by the country with which he or she was connected by citizenship. The treaty has transferred this principle to the EU level. This was, however, accompanied by incomplete consideration of the realities of international law. The attitude of Member States, usually reluctant to share some attributes of their sovereignty with the EU, was also important. The constitutional – and probably political – problem then had to be focused in the course of legislative action. They were related to the exercise of the right to diplomatic and consular protection on the territory of a third country. To this day, due to established regulations of international law, as well as – which is also important – political conditions, this institution is at a quite early stage of development. It also seems that its evolution will not be progressing fast enough.

Dogmatic analysis of the regulations and observation of the practice of applying the treaties seems to lead to the conclusion that the provisions of EU law are not fully implemented. As a consequence, the right to diplomatic and consular protection is still binding in half – this is also the hypothesis of this study. The analysis includes relevant EU primary and secondary legislation. It was made from the perspective of individual entities obliged to provide protection in a third country and the category of obligations assigned to them. They set out the potential limits of the scope of protection that an EU citizen can expect outside its territory. The final considerations include conclusions and provide an assessment of the prospects for the further development of one of the most important aspects of EU citizenship, which is the right to care outside EU borders.

BASIC REGULATIONS OF PRIMARY EU LAW AND THE RIGHT OF EU CITIZENS TO DIPLOMATIC AND CONSULAR PROTECTION

The right to diplomatic and consular protection for EU citizens is very closely linked to the structure of EU citizenship itself[1]. What is more, although it has the character of a new political system, it is very strongly modeled (and established)

[1] K. Lechowicz, *Opieka dyplomatyczna i konsularna jako europejskie prawo obywatelskie*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza" 2013, no. 13, pp. 210–211.

on the traditional bond that exists between the country of origin and its citizen[2], and even constitutes its substitution[3]. In this context, it makes the individual independent not only under EU law, but also in relation to the national legal order[4]. The exercise of the right to diplomatic and consular protection, guaranteed under the Treaty, is not an institution that stands alone, but is directly linked to the fact that an individual has EU citizenship[5]. In this way, it was, for the first time, regulated in the 1992 Maastricht Treaty[6]. The motives of this international agreement state that it was concluded, *inter alia*, to "establish citizenship common to the citizens of their countries". However, this was not just about declaring the existence of a "hollow" and only declarative institution of citizenship, but about giving it specific and legally explicit attribution. They allowed the entity to provide its own autonomous subjectivity under EU law and enabled the exercise of the rights that were granted to it within the framework of the subjectivity obtained in this way[7]. By definition, this should be done independently of national law, which also applies to entitlement to care abroad[8]. Thereby, the institutional and legal level of the traditionally functioning national citizenship has been transferred to the EU level. As a consequence, it created a new category of public law, affecting on the principles of *sui generis*, which has become EU citizenship as it is understood today. The category in question is multidimensional and EU citizenship itself can be considered in its individual, horizontal and vertical aspects[9]. In implementing the idea and construction of EU citizenship, Article 8c was added to the Treaty regulations in force at the time, which stated that "every citizen of the Union benefits in the territory of a third country, where the Member State of which he is a citizen does not have his

[2] More about this feature, see D. Harasimiuk, *Obywatelstwo UE – element tożsamości narodowej, europejskiej, czy jedynie dodatkowy status obywateli państw członkowskich*, „Ius Novum" 2017, no. 3, pp. 123–127.

[3] D. Bach-Golecka, *Civis europeus sum: uwagi na temat europejskiej opieki konsularnej*, [in:] *Wybrane zagadnienia współczesnego prawa konsularnego (z perspektywy prawa i praktyki międzynarodowej oraz polskiej)*, eds. P. Czubik, W. Burek, Kraków 2014, pp. 224–225.

[4] K. Kozłowski, *European citizenship. Does it grant a new quality in the European Union law system? Background, functions and thoughts*, [in:] *International Scientific Conference on Law and Law Studies – Pravni Rozpravy Law Changeovers 2013 Reviewed Proceedings, Magnanimitas under auspicious Ministry of Justice of the Czech Republic*, Hradec Karlove 2013, pp. 43–51.

[5] P. Czubik, *Granice opieki konsularnej w prawie wspólnotowym (wybrane problemy dotyczące interpretacji i możliwości zastosowania decyzji 95/553)*, „Kwartalnik Prawa Publicznego" 2003, no. 3–4, p. 95.

[6] Maastricht Treaty on European Union, original version (OJ EU C 191, 29.07.1992, pp. 1–112), hereinafter: MT.

[7] K. Kozłowski, *Gwarancja prawa do opieki dyplomatycznej i konsularnej jako element instytucji obywatelstwa Unii Europejskiej*, [in:] *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Preisnerowi*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, pp. 269–270.

[8] P. Czubik, *Granice opieki konsularnej…*, p. 98.

[9] D. Bach-Golecka, *op. cit.*, p. 218.

representation, of each diplomatic and consular protection other Member States under the same conditions as nationals of that State" (Article 8c sentence 1 MT). Furthermore, Member States agreed that before 31 December 1993, "they would establish the necessary rules among themselves and undertake the international negotiations required to secure this protection" (Article 8c sentence 2 MT). However, the latter provision was not implemented within this period, which is the result of serious difficulties, primarily of a political nature, which were encountered in the process of implementing the institutions of EU citizenship, both at the level of the Member States and in relations with third countries[10]. This sphere, "to a large extent, touches upon political issues and may have negative consequences in inter-state relations"[11]. Nevertheless, the core of the regulation, as provided for by MT, has been preserved, and with the exception of the reference to the time-limit, in the same form is reflected in the current wording of the Treaty on the Functioning of the European Union[12]. As a result, the applicable regulation, in the first sentence, provides that "every citizen of the Union shall enjoy in the territory of a third country where the Member State of which he or she is a citizen has no representation, from the diplomatic and consular protection of each of the other Member States under the same conditions like the citizens of this country. Member States shall adopt the necessary provisions and enter into the international negotiations required to secure this protection" (Article 23 sentence 1 TFEU).

An important step in the sphere of regulation of the right to diplomatic and consular protection at the EU level was the adoption of the Treaty of Lisbon. It introduced a significant substantive change in the provisions of the Treaty on European Union[13]. This modification confirmed the obligation to care for EU citizens in third countries by the diplomatic and consular missions of the Member States, but also imposed an obligation on the EU delegations established in third countries (Article 35 sentence 1 TEU). As a result, any EU citizen who resides outside the EU can exercise the right to represent his interests on the territory of a third country, provided not only by his home diplomatic service, but also in its absence, by the diplomatic and consular authorities of one of the other EU Member States and also – which represents the strong empowerment of the EU itself on the international stage – by its diplomatic missions.

[10] With an indication of "political reasons". See I. Skomerska-Muchowska, A. Wyrozumska, *Obywatel Unii*, Warszawa 2010, pp. 146–147, 149, 152–154.

[11] M. de Bazelaire de Ruppierre, K. Frączak, *Ochrona konsularna niereprezentowanych obywateli Unii Europejskiej w państwach trzecich (art. 23 TFUE)*, „Przegląd Legislacyjny" 2016, no. 2, p. 31.

[12] Treaty on the Functioning of the European Union, consolidated version (OJ EU C 326, 26.10.2012), hereinafter: TFEU.

[13] Treaty on European Union, consolidated version (OJ EU C 326, 26.10.2012), hereinafter: TEU.

Treaties are not the only level of regulation of the analyzed issue under primary law. The need to provide diplomatic and consular protection has been specified in Article 46 EU Charter of Fundamental Rights[14]. It places them in Chapter V, which is devoted to civil rights, and the editors of this provision repeat the treaty provisions. It is important that we are dealing with a right assigned to the institution of citizenship, as well as similar with other mechanisms of a political nature, e.g. the right to stand for election to the EP (Article 39 ChFR) or the right of petition (Article 44 ChFR). This accent also resounds in the sphere of non-discriminatory exercise of this right. Although the level of protection abroad will vary from one Member State to another, they are obliged to treat other EU citizens on an equal footing with their own nationals when exercising them[15]. The possibility of requesting care in a third country has become, on the basis of EU law, a subjective right, that is "the right of the individual", instead of the current model arising from international law, where it was only "the right of the state"[16]. All this signals a broad interpretative context situating the relevant law in the public sphere, including on the level of political rights, i.e. those that have so far resulted from the institutions of national citizenship, and now – due to deepening integration processes – are gaining their autonomous field regulations at the level of EU law.

PROBLEMS OF INCOMPLETE IMPLEMENTATION OF ARTICLE 23 TFEU AND ARTICLE 35 TEU

Reading the full range of EU citizens' right to consular and diplomatic protection is a complex task. The first difficulty appears already on the basis of indicating the category of entities obliged to implement it. The reconstruction of the addressees of the obligation requires referring to the provisions contained in both treaties, i.e. in Article 23 TFEU and Article 35 TEU. They contain, in principle, identical content, but Article 35 TEU requires that the exercise of this subjective right should also be assisted in third countries by EU diplomatic missions. Therefore, it goes beyond the previously accepted jurisdiction of EU countries. This was based on the action of the home state for a person in need of assistance, or – in a subsidiary dimension – of another EU Member State.

There is a broader issue related to the treaty addressees of the obligation. It concerns the extent of this care that an EU citizen who is outside the EU can expect. Such differentiation applies to the categories of authorities that are obliged under

[14] Charter of Fundamental Rights of the European Union, original version (OJ EU C 191, 29.07.1992), hereinafter: ChFR.

[15] P. Czubik, *Granice opieki konsularnej…*, p. 103.

[16] D. Bach-Golecka, *op. cit.*, p. 225.

national and EU law to guarantee diplomatic protection, as well as – which is an additional difficulty – is determined by the incomplete implementation, so far, of both delegations contained in Article 23 TFEU. In the interests of clarity of these considerations, it is therefore necessary to examine the content of the treaty right to diplomatic and consular protection in this area. According to the treaties, it should be performed successively by the EU citizen's country of origin, another Member State and permanent representation of the Union abroad.

1. Right to diplomatic and consular protection by the citizen's country of origin

The right to diplomatic and consular protection abroad is most closely related to the institution of national citizenship. Individual countries, on the basis of recognized rules of international law, have the right to represent the interests of their citizens towards third countries[17]. This directly results from the institution of citizenship, which includes the entitlement for the country of origin to care for its citizen. Such a possibility results from this special public relation of assigning a person to a given state (citizenship as an exclusive state-citizen relationship)[18]. It should not be surprising, therefore, that the law in question, which belongs to an EU citizen, has been specified in the Treaties as a mechanism that works only in a subsidiary way[19] and not as an autonomous civil law in relation to the national legal order[20]. In the first place, therefore, an EU citizen will benefit from the care guaranteed by the home diplomatic or consular mission. It is also within the sphere of national law, limited by the regulations of international law, that will determine the scope and form of implementation of the discussed law[21]. In this respect, the legal position of individual EU citizens in third countries will probably never be universalized and will depend on what is guaranteed to them under the national legal order and which at the same time results from international law[22]. It is also important in this sphere that the right to diplomatic and consular protection provided by the EU regulations was designed as an institution that acts in a subsidiary way in relation to the basic duty that concerns the citizen's country of origin. Also for this reason, the provisions of the Treaty, reading in their literal wording, cannot be understood

[17] P. Czubik, *Propozycja zmian w zakresie europejskiej opieki konsularnej*, „Europejski Przegląd Sądowy" 2008, no. 1, pp. 55–56.

[18] M. de Bazelaire de Ruppierre, K. Frączak, *op. cit.*, pp. 29–30.

[19] P. Czubik, *Granice opieki konsularnej…*, p. 95.

[20] M. de Bazelaire de Ruppierre, K. Frączak, *op. cit.*, pp. 35-37.

[21] In a broader perspective: K. Kozłowski, *Prawo do opieki dyplomatycznej i konsularnej – przyczynek do rozważań w świetle standardu międzynarodowego*, „Polski Rocznik Praw Człowieka i Prawa Humanitarnego" 2018, vol. 9, DOI: https://doi.org/10.31648/prpc.3763, p. 153.

[22] I. Skomerska-Muchowska, A. Wyrozumska, *op. cit.*, pp. 147–148.

as introducing a uniform standard of protection in the territory of a third country when, in accordance with national and international law, the entity is protected by foreign authorities of the country of its origin[23]. The strictly linguistic approach to the interpretation of the content of the Treaties does not require the harmonization of the protection standard to be guaranteed by the permanent representations of EU Member States to their citizens, but only provides for the possibility of using the representation of another EU country in a subsidiary way if the country of origin does not have its foreign service in a third country[24]. Therefore, the jurisdiction of the diplomatic body of another EU country or EU representative office will only be updated if the EU citizen's country of origin does not have its duly authorized representative in that country.

At this opportunity, attention should be paid to the possibility of a dynamic method of interpretation of the treaty provisions. The right to diplomatic and consular protection is a special category, most often associated with ensuring protection of the most sensitive subjective rights. The necessity of intervention on the part of foreign services most often refers to the situation of deprivation of liberty, including compliance with the prohibition of inhuman or degrading treatment or punishment. It may also relate to broadly understood private (personal) matters, for example, abduction or the issue of parenthood. Diplomatic and consular assistance should therefore be given "in an emergency of an extraordinary and special nature (*denial of justice*)"[25]. The issue of sensitivity and, at the same time, the necessity to protect these most basic rights, while recognizing the universalization of the human rights protection system, requires that they should be protected in an effective manner. From the point of view of Article 2 TEU, it should therefore be assumed that the subsidiarity of the mechanism provided for in Article 23 TFEU is limited by the criterion of effectiveness of protection of fundamental rights. As is also indicated in the literature, "as part of diplomatic protection, the state protects its citizens, and in the case of human rights, all ties between the state and the individual have been abandoned"[26]. Therefore, it seems that in a situation where the country of origin of an EU citizen physically has a permanent representation on the territory of a third country, but for some reason cannot exercise effective care over its citizen, then in such circumstances the jurisdiction of the diplomatic or consular services of another EU country should be activated. This can happen even contrary to the literal wording of the Treaty. To describe such circumstances, literature uses the category of "unavailability" of the permanent foreign representation of a citizen's

[23] P. Czubik, *Granice opieki konsularnej…*, pp. 104–105.

[24] K. Kozłowski, *Gwarancja prawa do opieki dyplomatycznej…*, p. 274.

[25] Idem, *Prawo do opieki dyplomatycznej i konsularnej…*, p. 154.

[26] M. Muszyński, *Opieka dyplomatyczna i konsularna w prawie wspólnotowym*, „Kwartalnik Prawa Publicznego" 2002, no. 2–3, p. 147.

country of origin in a third country, without further analyzing this problem or its scope[27]. In turn, when discussing the draft directive implementing the Treaty norm, the concept of "real protection" was used, without indicating what kind of situations this category covers[28].

Leaving aside the related terminological problems, it would be difficult to accept the circumstances in which an EU citizen would be deprived with the protection of fundamental rights, guaranteed him or her by the Treaties (Article 2 TEU), only because its country of origin has its own authorized representative in a third country and for some reasons – regardless of their nature – cannot offer its citizen an adequate level of compliance. In such cases, on the margins of considerations, the relationship between the exercise of diplomatic or consular protection by the state and the preservation of the doctrine of the so-called clean hands[29]. Absolutely, however, a citizen should not be put on the "grace" of its country of origin[30]. This issue can, of course, be extremely sensitive from the point of view of intra-EU relations, as it raises a *de facto* dispute over the actual scope of jurisdiction of each Member State over its citizens. On the other hand, however, formal controversy regarding the manner of exercising the right of representation should not, also on the basis of Article 2 TEU, lower the protection standards enjoyed by EU citizens in the narrow scope related to guaranteeing fundamental rights and freedoms. It seems that this difficult interpretation problem, negating the literal wording of the Treaties, should be *de lege ferenda* taken into account during their subsequent revision, while being aware of the highly conflicting, and thus politically controversial, nature of the issue.

2. Right to diplomatic and consular protection from another EU Member State

An analysis of the application of Article 23 TFEU and Article 35 TEU cannot disregard the legal nature of the Treaties. From the point of view of international law, including the Vienna Convention on the Law of Treaties[31], they are ordinary international agreements. Their rights and obligations may be addressed only to individual Member States and participants of legal transactions located on their territory. Third countries, which are not parties to the Treaties, are not – obvious-

[27] K. Lechowicz, *op. cit.*, p. 211.

[28] D. Bach-Golecka, *op. cit.*, p. 220.

[29] I. Gawłowicz, *Międzynarodowe prawo dyplomatyczne – wybrane zagadnienia*, Warszawa 2011, pp. 218–225.

[30] P. Czubik, *Granice opieki konsularnej…*, pp. 104–105.

[31] Vienna Convention on the Law of Treaties, drawn up in Vienna on May 23, 1969 (Journal of Laws 1990, no. 74, item 439), hereinafter: VCLT.

ly – bound by their provisions (Article 34 VCLT)[32]. As a consequence, the fact that the Treaties reserve for EU citizens a subsidiary right to representation on the territory of third countries may be a source of claim, also for damages. However, it is implemented within the EU itself and in relation to one of the EU countries[33]. However, it no longer has external effect, i.e. located outside the EU, where no claim for failure to fulfill the treaty obligation can be effectively pursued[34]. Member States have the competence (*ius contrahendi*) to establish (substitute) forms of diplomatic service. Such an agreement, primarily under international law, does not have the effect that a third country will be obliged to recognize such (subsidiary) representation formula[35]. The achievements of both Vienna Conventions[36] in this sphere are unambiguous and grant the right to implement diplomatic and consular protection only to the state of "effective exercise of citizenship"[37]. In a third country, diplomatic protection therefore will be provided by the country of origin only on the basis of that original jurisdiction that arises from citizenship. The latter is a sufficient basis for granting international protection[38]. A separate issue is when another Member State should take care of an EU citizen who is not his national citizen. The question arises whether the state will be interested in it, as well as whether for certain political and social reasons, it will not only mark the aid[39]. Also, the scope of possible diplomatic and consular activities depends not only on the regulation of national law, which in itself raises significant disparities in determining the scope of protection of individual EU citizens[40], but will be more widely determined by international law and – last but not least – the will to cooperate with host country parties[41].

Ensuring the admissibility of EU citizen representation by a Member State of which he is not a (national) citizen depends, under international law, on the conclusion of a relevant international agreement or individually conferred competence, which usually takes place *ad casum*. There must therefore be explicit legal recognition by a third country of the legitimacy of another EU Member State to represent

[32] K. Kozłowski, *Prawo do opieki dyplomatycznej i konsularnej*..., pp. 157–158.

[33] K. Lechowicz, *op. cit.*, p. 212; M. Muszyński, *op. cit.*, pp. 156–158.

[34] I. Skomerska-Muchowska, A. Wyrozumska, *op. cit.*, p. 149.

[35] P. Czubik, *Propozycja zmian*..., p. 55.

[36] In addition to the VCLT, we are also talking about the Vienna Convention on consular relations done in Vienna on April 24, 1963 (Journal of Laws 1982, no. 13, item 98).

[37] I. Gawłowicz, *op. cit.*, pp. 226–231.

[38] K. Lechowicz, *op. cit.*, p. 210.

[39] K. Kozłowski, *Gwarancja prawa do opieki dyplomatycznej*..., p. 273.

[40] P. Czubik, *Propozycja zmian*..., p. 57.

[41] A. Wyrozumska, *Jednostka w Unii Europejskiej*, [in:] *Prawo Unii Europejskiej*, ed. J. Barcz, Warszawa 2002, p. 384.

a foreign citizen, and thus to complete the representation of non-nationals[42]. The EU legislator, when constructing the provisions of the Treaties, was aware of the conditions cited and imposed in this sphere, on all Member States, the obligation to take two categories of action, namely: the conclusion of relevant international agreements with third countries, as well as – through the EU bodies – the adoption of the relevant directive coordination. A certain treaty ambition was, however, combined with conditions – above all – of a political and social nature[43]. The right to represent their citizens by the country of origin is very strongly conditioned by issues of sovereignty and state identity, as well as is associated with the ongoing implementation of international policy by individual countries. These circumstances seem to have meant that the rights of EU citizens as set out in Article 23 TFEU and Article 35 TEU are still *in statu nascendi*. In legal terms, this is dictated only by partial implementation, both by individual Member States and EU bodies themselves, of the obligations imposed in the Treaties on both categories of entities.

First of all, the Treaties impose a specific scope of responsibility on individual Member States. Pursuant to Article 23 sentence 2 of the TFEU, they were required to "adopt the necessary provisions and enter into the international negotiations required to ensure this protection". The aforementioned provision requires EU countries to conduct appropriate negotiations with third countries. The goal of these negotiations should be the conclusion of international agreements that will allow the implementation of the EU right to diplomatic and consular protection[44]. This is of course an extremely ambitious task and due to the fact that it has a multi-faceted character, it will be possible to carry out only in the further time horizon. The EU legislature was aware of this dependence. Therefore, as some substitute tools, two Council Decisions functioned in legal circulation, one concerning the protection of citizens by EU diplomatic missions[45], and the other related to the temporary travel document[46]. These acts reduced the relevant treaty entitlement only to selected activities in the field of consular jurisdiction, and – only to a limited extent – set out the rules for cooperation between Member States in this field[47]. Their adoption could not replace the negotiation effort on the part of individual EU countries. The

[42] In a consistent manner: P. Czubik, *Propozycja zmian…*, p. 55; idem, *Granice opieki konsularnej…*, p. 107; M. Muszyński, *op. cit.*, p. 150.

[43] P. Czubik, *Propozycja zmian…*, p. 58.

[44] M. de Bazelaire de Ruppierre, K. Frączak, *op. cit.*, p. 41.

[45] Now repealed Decision of the representatives of the governments of the Member States meeting within the Council (95/553/EC) of 19 December 1995 on the protection of citizens of the European Union by diplomatic and consular representations.

[46] Still applicable Decision of the representatives of the governments of the Member States gathered within the Council (96/409/CFSP) of 25 June 1996 on the establishment of a temporary travel document.

[47] P. Czubik, *Propozycja zmian…*, p. 53.

effectiveness of the law in question is closely linked to the possibly uniform operation of all Member States, as well as the will of most third countries, the subject of which will be approval for the introduction of a new model of diplomatic and consular representation. Any coordination effort within the EU itself, including the legislative one, will not have the proper effect if Member States fail to fulfill this commitment[48]. International law allows for protection on the territory of a third country by a state other than the country of origin. However, this may be the case provided that the third country does not oppose this form of protection, and thus acting on an *in favorem tertii* basis[49]. The solution to the problem would therefore be to ensure in third countries, by individual Member States, assurance of no opposition to the representation of EU citizens. Apart from the practical difficulties that may arise from third countries operating in such circumstances *pro futuro*, it should be noted that there would still be a situation of significant legal uncertainty. It may refer, in a particular case, to a situation where non-objection may be withdrawn or limited to some extent. An international agreement seems to eliminate or mitigate this risk, at least in legal terms[50]. Ordering activities, as will be discussed in the next paragraph, will have any sense as long as the implementation of Article 23 TFEU and Article 35 TEU, in accordance with the rigors of international law, is sanctioned on the basis of bilateral and legally regulated relations between Member States and third countries.

The Lisbon Treaty empowered the Council, acting in consultation with the European Parliament, to adopt a "directive establishing the coordination and cooperation measures necessary to facilitate […] protection" (Article 23 sentence 3 TFEU). A specialized Council Directive was adopted in the implementation of this instruction[51]. It represents a step forward in enabling EU citizens to exercise their right to diplomatic and consular protection, but these special regulations are not convincing about the full implementation of the treaty order. It is not the point of this study to discuss the Directive itself, but it can be pointed out that its narrow scope is already determined by its title. It refers only to "coordination and cooperation to facilitate consular protection", but not to diplomatic activities, which, due to the structure of the treaty, should be specified in secondary EU law[52]. This causes that matters related to diplomatic protection are excluded from its scope,

[48] K. Kozłowski, *Gwarancja prawa do opieki dyplomatycznej…*, p. 272.

[49] P. Czubik, *Granice opieki konsularnej…*, pp. 108–109; idem, *Propozycja zmian…*, pp. 59–60.

[50] In a consistent manner: idem, *Propozycja zmian…*, pp. 59–60; idem, *Granice opieki konsularnej…*, pp. 108–109; D. Bach-Golecka, *op. cit.*, p. 218.

[51] Council Directive (EU) 2015/637 of 20 April 2015 on coordination and cooperation measures to facilitate consular protection for unrepresented Union citizens in third countries and repealing Decision 95/553/EC (OJ L 106, 24.04.2015), hereinafter: the Directive.

[52] In a consistent manner: D. Bach-Golecka, *op. cit.*, pp. 218–219; I. Skomerska-Muchowska, A. Wyrozumska, *op. cit.*, pp. 149–150.

which, however, violates the standard of protection arising from the Treaties[53]. The content of the regulation also confirms this observation. The Directive defines the concept of "consular protection on the part of a Member State of citizenship" (Article 3 of the Directive), guarantees "access to consular protection" (Article 7 of the Directive), and lists examples of types of assistance, providing them with an indication that they are "consular protection" (Article 9 of the Directive). The adoption by the Council of this measure of coordination between the Member States deserves approval. Nevertheless, from the point of view of full implementation of Article 23 TFEU, this activity is far from sufficient. First of all, due to the narrow scope of the Directive indicated, which applies only to consular protection. This, however, does not yet exhaust the treaty disposition, which also recalls the issues of diplomatic protection[54]. It is also important that the intra-EU and coordinating nature of the Directive itself does not replace the fulfillment by Member States of the obligation imposed by Article 23 sentence 2 TFEU. The possibility of implementing EU civil law, as provided for by this provision, still depends on the solidarity of all nation-states in this duty, and in a wide range of possible (Recital 6 and Article 1 para. 2 of the Directive)[55].

3. Right to diplomatic and consular protection from EU permanent delegations established in third countries

The necessity provided for by the Treaties to ensure the protection of the rights of EU citizens in the territory of third countries, after the entry into force of the Treaty of Lisbon, has been further strengthened. Currently, EU foreign delegations are also to "contribute […] to implementing the right of Union citizens to protection on the territory of third countries" (Article 35 TEU). Cooperation and care provided by such agencies were also defined as subsidiary activities to the universal right of representation of the EU citizen's country of origin. Furthermore, the Treaties do not relate to a conflict of laws. It is not known what law to keep when in a given third country there is a diplomatic representation of a given EU country and at the same time an EU diplomatic representation. The question then arises as to which of these diplomatic agencies has the right to represent the citizen. This issue is also not regulated by secondary law. It is also not entirely clear whether the treaty's obligation to "contribute" to protecting EU citizens is equivalent to a commitment to fully protect their interests[56]. It should also be noted that the possibility of undertaking activities related to the exercise of the right of representation by

[53] P. Czubik, *Granice opieki konsularnej…*, pp. 97–98.
[54] K. Lechowicz, *op. cit.*, p. 211.
[55] P. Czubik, *Propozycja zmian…*, pp. 55–56.
[56] M. de Bazelaire de Ruppierre, K. Frączak, *op. cit.*, pp. 33–34.

EU bodies will depend on the existence of an agreement concluded between the EU and the host third country or the recognition by that country of the guaranteed right *ad casum* or *ad personam*. Also in this case, the general rules of international law apply, which places the burden of seeking legitimacy to exercise the right to diplomatic protection on the EU authorities or Member States[57]. Thus, national citizenship remains an institution conditioning the possibility of providing care outside the country of origin[58].

The EU diplomatic missions in third countries are, in addition to the central administration, a component of the European External Action Service. The rules of its operation are set out in the relevant Council Decision[59]. This service is an autonomous EU administrative entity, separate from other major EU bodies, capable of performing tasks in the field of "ensuring the coherence of various areas of the Union's external action and the coherence of these fields with other Union policies" (Article 3 para. 1 EEAS). It is worth pointing out that the statutory provisions regarding its functioning, admittedly provide for a specific category of tasks for permanent EU representations, nevertheless they do so in a very narrow dimension. At the same time, they set up these agencies as mere auxiliaries of the diplomatic representations of the Member States. Regulations indicate that actions may be taken by an EU foreign delegation to the territory of a third country at the request of individual Member States. This is done only on the basis of "supporting", but not "replacing" these countries in "their diplomatic relations and fulfilling this task", and such activity cannot "engage any additional resources" on the EU side (Article 5 para. 10 EEAS). This construction is, of course, the result of adapting EU law to the requirements of international law, also in the field of – so far – the exclusive right of countries of origin to represent their citizens. Not without reason, therefore, the EEAS decision provides only for auxiliary and coordination functions for EU institutions, in relation to the appropriate actions taken by the permanent representations of the Member States. Such "soft actions" do not in any way determine the powers of EU delegations, which was further specified in the aforementioned Directive. It refers to the category of "cooperation and coordination" and models the jurisdiction of EU delegations to provide "logistical support" and entities facilitating "exchange of information" (Article 11 of the Directive). Only this brief description demonstrates that the right of EU citizens to diplomatic and consular protection provided by EU foreign posts – as defined in Article 35 TEU – is at a fairly early stage of development.

[57] *Ibidem*, p. 34.

[58] D. Bach-Golecka, *op. cit.*, p. 224.

[59] Council Decision (2010/427/EU) of 26 July 2010 determining the organization and functioning of the European External Action Service (OJ EU L 201, 3.08.2010), hereinafter: EEAS.

CONCLUSION

The right to diplomatic and consular protection under the Treaties is one of the elements of EU citizenship. It has legal but also political overtones. Until now, the right to represent citizens in a third country has been reserved exclusively to their country of origin. It was also a well-established principle of international law. The Treaties deeply interfered not only with the rule applicable so far between individual states, but also – *de facto* and *de iure* – raised the European Union itself to the level never seen before. They gave it an attribute so far reserved for any sovereign state that could exercise the right of representation for its citizens. This way, an identical competence was formed, but exercised on the basis of the Treaties, and by other Member States or foreign representations of the EU itself. This not only shaped the EU's public entitlement as a supranational organization, but also gave EU citizens new rights.

The right to protection in a third country, in the light of the Treaties, is a subsidiary right. This should not come as a surprise, given the clear rules of international law. The rule is that the country of origin takes care of its citizen, which results from the specificity and, at the same time, the essence of the institution of citizenship. The Treaties could not have penetrated this node so deeply that they could bring *ius representationis* to the EU level in general. It therefore only updates where the citizen's home Member State has no foreign representation. An important issue, however, is whether the Union can represent the interests of an EU citizen, if the country of origin has its establishment in a third country, but for some reasons, it cannot or does not even want to give him or her protection in the most sensitive (basic) rights. From the point of view of the universalization of human rights protection, which is part of the EU acquis, there can be only one answer. However, this will be a response that goes far beyond the literal content of the Treaties.

The discussed law is a good example of a certain incoherence of EU law with international law, largely determined by the sovereign aspirations of nation-states. On the one hand, the Treaties reserve – admittedly – for other Member States the competence to represent EU citizens, and on the other – this legal pursuit – is clashing with well-established rules of international law. Therefore, as long as no relevant international agreements are concluded on this matter, treaty entitlement becomes only a certain declaration. After all, it will not be legally effective to invoke the provisions of EU treaties on the territory of a third country, since that country, pointing to the rules of international law, will not recognize the claim for the possibility of providing care by another EU country. The Treaties require urgent implementation in this respect, which, however, due to political considerations, is not a prospect for the near future.

Finally, the right to "diplomatic" and "consular" declared in the Treaty becomes, under secondary law, only the right to consular protection, which is still

very narrowly understood. The adopted coordination directive does not seem to leave any doubts in this sphere. The lengthy process of issuing it shows the scale of the challenge of the legislative charter. Above all, however, it clearly indicates the reluctance of Member States towards the integration process in terms of building EU citizenship and giving it such attributes as it is characterized by national law. This was also one of the reasons why the Treaty granting the right to care for EU citizens to foreign institutions of the Union itself, on the basis of secondary law, boils down to performing coordination and ancillary activities, and not to a real and effective right to provide protection over these entities.

Undoubtedly, all these observations do not diminish the obvious fact that globalization processes facilitate and at the same time intensify the movement of EU citizens to the territories of third countries. Following this, the number of interactions of EU citizens with the legal orders of non-EU countries will increase, and as a consequence the demand for consular and diplomatic services will increase. Only the time may answer the question of whether, even for functional or financial reasons, Member States will continue to guard the traditionally recognized attributes of citizenship or whether – by implementing the already stated treaty provisions – they will decide to effectively raise them to the EU level. In this context, EU citizenship has a chance to get its new quality or at least to the extent provided for in the Treaties.

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STRESZCZENIE

W 1992 r., wraz z przyjęciem Traktatu z Maastricht, powstała nowa instytucja, jaką jest obywatelstwo Unii Europejskiej. Traktat wprowadził jakościową zmianę w sferze pozycji politycznej i prawnej obywateli państw członkowskich, którzy zyskali w tych sferach szereg nowych uprawnień. Jednym z nich jest prawo do opieki dyplomatycznej i konsularnej. Jego analiza prowadzi do wniosku o dużym rozdźwięku, jaki istnieje pomiędzy gwarancjami traktatowymi a efektywnym wykonywaniem tego prawa. Państwa członkowskie nie porozumiały się bowiem z państwami trzecimi w tym przedmiocie, co jest wymogiem prawa międzynarodowego. Także prawo wtórne umożliwia jedynie częściowe wykonywanie traktatowego prawa do opieki na terytorium państw trzecich, ponieważ zostało ono sprowadzone tylko do pomocy konsularnej, i to jeszcze wąsko ujętej. Prawo obywateli Unii Europejskiej znajduje się zatem jeszcze na bardzo wczesnym etapie swojego rozwoju.

Słowa kluczowe: obywatelstwo Unii Europejskiej; opieka dyplomatyczna i konsularna; opieka konsularna