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REGULATORY SCRUTINY BOARD OPINION

Review of the Directive on consular protection in third countries

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EUROPEAN COMMISSION
REGULATORY SCRUTINY BOARD

Brussels,
RSB

Opinion

Title: Impact assessment / Review of the Directive on consular protection in third countries

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

Under Article 23 TFEU, EU citizens in third countries where the Member State of their nationality is not represented, have the right to seek help from the diplomatic or consular authorities of any Member State on equal terms with citizens of that Member State. Council Directive 2015/637 contains the necessary provisions to implement this right.

The Directive, as well as the Union Civil Protection Mechanism (UCPM), have recently been tested during the unprecedented COVID-19 crisis and the evacuation of EU citizens from Kabul. In parallel, the EU's consular network has shrunk as a result of Brexit. This initiative aims to address any gaps in the implementation and coverage of the Directive.

(B) Summary of findings

The Board notes the additional information included in the report in response to the previous opinion.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

(1) The report does not provide sufficient evidence of the scale of the problems and why they will not be tackled under the dynamic baseline and instead require a legislative initiative. Given this, the proportionality of what is proposed is not demonstrated.

(2) The report does not bring out clearly the available policy choices.

(3) The identification and assessment of impacts are incomplete. The comparison of the options and their scoring is not evidence based.

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(C) What to improve

(1) The scope of the initiative remains unclear, in particular in what specific circumstances the proposed legal changes on the definition of unrepresented nationals would give rise to a justiciable consular right for unrepresented EU citizens worldwide, or whether this would be limited to specific third countries where no Member States is present with consular service. This should be clarified as it could have a direct bearing on the resource implications for EU Delegations and Member States. The report should demonstrate compliance with Article 10 (cost-neutrality) of the EEAS Decision.

(2) The scale of the problemis is not apparent raising doubts as to the proportionality of, or justification for, legally binding EU action. The report should present how big the problems are bringing in all available evidence. If the problems are small, this should be clearly stated upfront and the scale and nature of the measures proposed should be commensurate with this.

(3) The baseline is underdeveloped, insufficiently presented in the main report and not dynamic. The report is not clear on why certain non-regulatory measures presented for each problem could not already be done under the baseline scenario. This should be dynamic and go beyond a narrative on the expected continuation of the current regime. It should integrate the expected evolution of the problems covering the envisaged changes in consular network and the number of unrepresented EU travellers, the effects of the UK leaving the EU and the expected increase of crises.

(4) The report should explain that not all the options are alternatives and thus comparable, as they address different problems under the same specific objective. The report should clarify whether other combinations of options have been considered, for instance a combination of exclusively non-regulatory measures only, and if not, explain why. It should make a critical assessment of the limitations of the baseline as a reliable basis for comparison of the options.

(5) The impact analysis should be further developed. The report should include an explicit and distinct section with the assessment of the impacts of each policy option. The report needs to distinguish clearly between the categories of impacts assessed and the criteria on which the comparison of options is based. All mandatory categories of impacts should be examined, and it should be clearly noted if they are deemed not relevant or not significant. The assessment of the costs should be further developed as they appear to be understated (see point 1), particularly if the amendments give rise to a universal justiciable right, and should be fully worked through and set out. Broad statements that the costs will be "very limited" should be sufficiently substantiated by the analysis to allow policy makers to take an informed assessment. The analysis of the benefits should be further developed to assess all relevant types of benefits.

(6) The assessment of the options against the comparison criteria should be based on evidence. The report should elaborate on the assessment of proportionality for all options rather than merely stating 'this policy option is considered fully proportionate to achieve the objective'. The scoring of the options is arbitrary and should instead be supported by and consistent with the preceding analysis. The report should explain why the scoring of options with different characteristics is often the same, or options with similar characteristics score differently.

(7) The report does not sufficiently reflect and take account of the views of different stakeholder groups. It should include a clear explanation why the "evaluate first" principle was not respected and how feedback from stakeholders was taken into account to

compensate for the lack of evaluative evidence, particularly in the problem definition.

(8) The monitoring and evaluation provisions should be further developed. The report should be more specific on the targets set for the indicators beyond an expected increase. It should re-assess the statement that there is currently no existing data for any of the proposed indicators. It should also assess how realistic are the proposed sources of information. Evaluation provisions and their timing should be added.

The Board notes the estimated costs and benefits of the preferred option in this initiative, as summarised in the attached quantification tables.

(D) Conclusion

The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.

Full title	Impact assessment accompanying the Proposal for a Council Directive amending 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.
Reference number	PLAN/2020/8637
Submitted to RSB on	8 June 2023
Date of RSB meeting	Written procedure

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

I. Overview of Benefits (total for all provisions) – Preferred Option		
Description	***Amount***	***Comments***
	Direct benefits	
Increased legal certainty	- Better protection arising from more frequent and systematic EU Delegations' support to Member States both in crisis and non-crisis situations - Legal certainty for actions of EU delegations and Member States improves overall effectiveness on the provision of consular assistance to unrepresented EU citizens - Better protection from further development, effectiveness and innovation in local coordination in particular in crisis situations - More effective, consistent and streamlined communication with EU citizens - Reduced scope for litigation due to clearer and more adequate rules	Applies to unrepresented EU citizens in third countries, Member States and EU delegations The current legal uncertainty and administrative burden may cause emotional distress and does hinder the provision of consular assistance to EU citizens when travelling to or residing in a third country, and especially in a crisis situation. The amendments stand to tackle the existing problems by providing a more complete, clearer and sounder legal framework, thereby improving the exercise by EU citizens of their right to consular protection
Increased protection of the fundamental rights	- Strengthened and more effective right to consular protection - Higher level of compliance with the right to personal data protection - Effective access to the right to an effective remedy and to a fair trial	Applies to unrepresented EU citizens in third countries
Time and burden savings	- Less time and effort needed to be recognised as unrepresented. - Improved EU citizens' access to information on who can be assisted - Smoother and quicker financial payments - Easier registrations before travelling or when residing abroad - Better and more efficient provision of EU citizens location information during crisis situations	Applies to unrepresented EU citizens in third countries
Efficiencies for administrations	- Better service provided to unrepresented EU citizens in assessing their situation and in deciding if the person should be assisted or not. - Better distribution of the burden of assistance among Member States and between Member States and EU delegations - Smoother and more effective coordination and	Member States' administrations and EU delegations

	cooperation procedures - Improved registration procedures will result in efficiencies for administrations when contacting citizens in case of crisis situations - Easier recovery of costs incurred for assisting Member States - More coordinated and consistent travel advice	

II. Overview of costs – Preferred option							
		Citizens		**EU institutions/EU delegations**		**National Administrations**	
		One-off	**Recurrent**	**One-off**	**Recurrent**	**One-off**	**Recurrent**
Option 1b) Legal amendments to clarify the definition of what it means for an EU citizen to be unrepresented and in particular the types of situations in which a Member State representation should not be considered "effectively in a position to	Direct adjustment costs					For Member States administration to learn and apply the new definition.	Some costs related to regular training of consular staff
	Direct administrative costs				Time dedicated to the additional requests for support by Member States for the assistance of a potential increase of unrepresented EU citizens.		Some costs for the increased requests by unrepresented EU citizens. It is assumed that Member States with larger consular networks will be impacted more by these requests.
	Direct regulatory fees and charges						
	Direct enforcement						

provide consular protection".	costs						
	Indirect costs						
Local coordination meetings are chaired by the EU Delegations	Direct adjustment costs			Some additional costs for EU delegations to organise coordination of LCCs and their standardisation.			
	Direct administrative costs				Very limited costs for EU delegations linked to chairing those meetings and coordinate. As they already participate to those meeting on a regular basis, the additional costs should be limited.		
	Direct regulatory fees and charges						
	Direct enforcement costs						

	Indirect costs						
Review of the concept of Lead State and definition ofdivision of tasks under JFW, formalization of JFWs and JCTs	Direct adjustment costs			Some costs for EU delegations for the reorganisation of tasks in relation to preparation and update of JFWs, involvement of unrepresented Member States, circulation of agendas and minutes.		Some costs related to the application of these revised concepts and procedures	
	Direct administrative costs				Some additional costs for the EEAS Consular Affairs Division from the mandatory annual update of all JFWs		Limited costs for some Member States due to the assignment of new tasks under JFWs
	Direct regulatory fees and charges						
	Direct enforcement costs						

	Indirect costs						
Strengthen the supporting role of EU Delegations and align it with the EEAS Decision	Direct adjustment costs						
	Direct administrative costs				5 cost-free Seconded National Experts for an average estimation of costs of 145.000 euros for all 5 SNEs per year for operating expenditure and 80.000 for mission and security		For some Member States salary costs of a Seconded National Expert (SNE's) to work in EU Delegations (5 in total) 1 cost-free SNE salary could range from 980 EUR net per month, for a civil servant in the first grade in Bulgaria to 8.177,83 EUR gross monthly salary for a high-raking diplomat in Finland.
	Direct regulatory fees and charges						
	Direct enforcement costs						
	Indirect costs						

a requirement for Member States to provide the Commission and the EEAS with information in a certain timeframe and in machine readable format on honorary consuls functions and on bilateral and practical arrangements in place	Direct adjustment costs					Marginal costs for adjusting the information into the machine-readable format	
	Direct administrative costs			We estimate that updating the Europa website would require one FTE person for three months at the beginning, Assuming a grade AD7 Commission official would carry out the updates (average cost of the EU official, 171.000 EUR per year), the cost for the first year would be EUR 42,750 Due to the stable staffing principle, this post will be found through internal redeployment	one month per year following the first year for updating the Europa website. Assuming a grade AD7 Commission official would carry out the updates (average cost of the EU official, which is 171.000 EUR per year), it would cost EUR 14.250 per year thereafter.		
	Direct regulatory fees and charges						
	Direct enforcement costs						
	Indirect costs						
Member States required to promote measures to inform consular authorities and/or	Direct adjustment costs						
	Direct administrative costs						Additional costs to improve the effectiveness of their registration systems by rising their citizens'

record citizens' presence abroad							awareness of the importance to register their travels/residence abroad by means of information campaigns at airports or by cooperating with insurance/travel/telecom companies.
	Direct regulatory fees and charges						
	Direct enforcement costs						
	Indirect costs						
legal amendments adding the option for unrepresented citizens to pay the assisting Member State or the EU Delegation. Establish a timeframe for reimbursement procedures and clarify application to represented citizens	Direct adjustment costs					Some initial costs for Member States to adjust their procedures. 2 Member States indicated that they have to change their legislation in order to allow request of reimbursement from citizens directly and might therefore incur in more adjustment costs.	
	Direct administrative costs						
	Direct regulatory fees and charges						
	Direct enforcement						

	costs						
	Indirect costs						
Updated personal data protection rules	Direct adjustment costs			Some initial costs for EU delegations to adjust their procedures.		Some initial costs for Member States to adjust their procedures. Some Member States might have to adjust their legislation	
	Direct administrative costs						
	Direct regulatory fees and charges						
	Direct enforcement costs						
	Indirect costs						
Legal redress	Direct adjustment costs					Some initial costs for Member States to adjust their procedures. Some Member States might have to adjust their legislation	
	Direct administrative costs						
	Direct regulatory fees and charges						
	Direct enforcement costs						
	Indirect costs						

EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Review of the Directive on Consular protection in third countries

Overall opinion: NEGATIVE

(A) Policy context

Under Article 23 TFEU, EU citizens in third countries where the Member State of their nationality is not represented, have the right to seek help from the diplomatic or consular authorities of any Member State on equal terms with citizens of that Member State. Council Directive 2015/637 contains the necessary provisions to implement this right.

The Directive, as well as the Union Civil Protection Mechanism (UCPM), have recently been tested during the unprecedented COVID-19 crisis and the evacuation of EU citizens from Kabul. In parallel, the EU's consular network has shrunk as a result of Brexit. This initiative aims to address any gaps in the implementation and coverage of the Directive.

(B) Summary of findings

The Board acknowledges the additional information provided in advance of the meeting and commitments to make changes to the report.

However, the Board gives a negative opinion, because the report contains the following significant shortcomings:

(1) The report is not clear on the problem definition. It does not provide evidence of the existence and scale of the problems and the hierarchy between them. It does not provide credible evidence that the theoretical legal gaps have led to real and general problems on the ground.

(2) The proposed legal basis, which includes the use of the *passerelle clause* to effect a Treaty change, is not proportionate, given the lack of evidence of a general problem, whose relevance goes beyond exceptional cases, and the proposed ad hoc approach to exercising the new competence. The report fails to take account of the international legal framework governing consular relations and disregards the potential for working arrangements between Member States and with third countries to address the ad hoc problems identified.

(3) The report does not clearly explain the policy choices. The presentation of the policy options as packages is not comprehensive and omits some relevant combinations of policy measures.

(4) The report does not present a complete impact analysis. Effectiveness is not

sufficiently elaborated. It does not explain how a new, universal, legal role for EU Delegations can be reconciled with a piecemeal, ad hoc implementation. The benefits and costs are not credibly estimated. The justification of the qualitative and quantitative assessments is not sufficiently evidence-based. The report is not clear whether it intends to respect the cost-neutrality requirement of the EEAS Decision.

(5) The report does not sufficiently reflect and take account of the views of different stakeholder groups.

(C) What to improve

(1) The report lacks the solid analytical basis that an evaluation of the Directive would have provided. It should clearly explain why no evaluation has been undertaken. In its absence, the problem description should complement the lack of evaluative evidence. It should avoid drawing conclusions along the lines of evaluation criteria from the implementation report, as its findings cannot be considered as reliable evidence of a problem.

(2) The report should be clear about the existence and nature of the problem. Theoretical problems that may occur are not substantiated with the evidence of relevant recurring cases needing further regulatory coverage. For example, there is no evidence in the report of citizens being deprived of assistance in a context of crisis; there is no evidence of citizens being deprived from receiving consular protection as a result of the practice of deferring requests either. The report should differentiate between endemic problems requiring changes to the legal framework and ad hoc, occasional problems relating to the unpredictable nature of crises. It should narrow down its scope to focus only on real general problems for which there is reliable and consistent evidence.

(3) The report should indicate the scale of the problem. It should estimate the amount of support from UK consulates that EU citizens in distress received in countries with no other EU representation. It should provide information about bilateral agreements Member States or the EU have with third countries (e.g. Switzerland, Canada or possibly in the future also with the UK) and to what extent these mitigate the problems. It should clearly set out the relationship between the Directive and the Union Civil Protection Mechanism in crisis situations. It should substantiate with evidence, the premise that there is a growing number of crises worldwide requiring consular assistance and that existing arrangements are insufficient to address these. Finally, it should clearly demonstrate that all Member States favour the EU taking on the coordinating role in crises.

(4) The report should better justify the proportionality of the proposed legal basis, which, for the preferred option, includes a Treaty change via the use of the Article 25 TFEU *passerelle clause*. This does not seem justified by either the nature or scale of the identified problems. The report should also demonstrate that this approach would not go beyond the cited Council conclusions that advocate a potential revision of the Directive, rather than of the Treaty. It should also clearly specify upfront that recourse to this Treaty Article requires unanimity at the Council since this is relevant to both the justification of the preferred option and to the political feasibility.

(5) The report should explain the role of the Vienna Convention on Consular Relations as the basis for international consular cooperation between states and how EU Delegations would fit into this framework.

(6) The report should be more explicit about the rationale behind the policy options and the

proposed packages. The options design should focus on real policy options, leaving technical choices in an annex. The baseline cannot – by definition – be a policy option and should not be discarded. The report should explain the difference between the dynamic baseline and the measures proposed in the non-legislative option. It should clearly set out the extent to which the identified and substantiated problems could be addressed by the combination of the dynamic baseline and this option. It should also clearly highlight the differences and similarities between option 2B and option 3, given that both require Treaty change. It should clarify if option 3 is actually different to option 2B only because it extends beyond crisis situations. It is not clear how option 2B could work only in crisis situations given their unpredictability and the corresponding need therefore for a universal standing consular capability in all EU Delegations worldwide. The proposal that the capabilities under option 2B could only be triggered ad hoc in a crisis situation by unanimity in the Council calls into question both the need for this standing capability as well as the need to revise the Treaty to provide it. The idea of rapid reaction consular crisis response teams is not covered or analysed in the impact assessment and cannot therefore be assessed.

(7) The political acceptability by Member States of the options should be taken into account and could be used as a criterion to discard some options. It is not clear how the political feasibility of option 2B differs from that of option 3 given they both require recourse to the *passerelle clause* and therefore unanimity. It is not therefore clear on this basis why only option 3 is not considered proportionate. The report should make a clear distinction between a normal and a crisis situation as this has an impact on proportionality, i.e. if the capabilities proposed in option 2B are to be triggered only on an ad-hoc basis, it is not clear why options 1 or 2A would not suffice.

(8) The impact analysis should be comprehensive and clearly show the benefits and costs. The report should clarify the effectiveness assessment of the options, in particular regarding the personal and geographical scopes, accessibility and communication. It should add the cost assessment for each option issue by issue. It should indicate clearly the precise costs the initiative will entail, their amount and their timeframe. It should explain how this could be covered by redeployment and identify exactly when and where the savings would come from. If new financial resources would be required, it should set out precise costings and explain how these would fit with the budgetary ceilings of the 2021-2027 Multiannual Financial Framework. It should also address the need to revise the cost-neutrality requirement of Article 5(10) of the EEAS Decision for the preferred option, given the additional human and financial resources that would be required.

(9) The report should provide the justification for the quantitative and qualitative cost assessment conclusions. The cost assessments for the preferred option lack credibility. It is not clear what the justification for low quantitative estimates and 'limited' or cost 'neutral' qualitative conclusions is and what evidence they are based on. A Treaty change to give EU Delegations competence for consular assistance would give rise to a justiciable legitimate expectation on the part of EU citizens that they would be able to enjoy this right universally. That cannot by definition, and given the wide range of consular work, be achieved on a resource-neutral basis. The report should also clarify how the gradual approach would work given the universal, justiciable right the initiative would create. Such an ad hoc approach would seem to be more compatible with a non-legislative option.

(10) The absence of a dedicated public consultation is problematic in terms of the evidence basis. By way of mitigation, the views of stakeholders – including dissenting ones – expressed in the public consultation for the 2020 EU Citizenship Report, the Flash Eurobarometer 485 on EU Citizenship and Democracy and in targeted consultations with Member States and EU Delegations should be presented throughout the report, not only in

the problem analysis. The views of Member States are not sufficiently reflected in the report. The initiative by eight Member States favouring a review of the Directive is given disproportionate weight. The views of the remaining 19 Member States on the proposals in the initiative – including dissenting views – should be clearly set out.

(D) Conclusion **The DG must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion.**	
Full title	Review of the Directive on Consular protection in third countries
Reference number	PLAN/2020/8637
Submitted to RSB on	22 December 2021
Date of RSB meeting	2 February 2022

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