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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a Council Directive

amending Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and Directive (EU) 2019/997 establishing an EU Emergency Travel Document

{COM(2023) 930 final} - {SEC(2023) 930 final} - {SWD(2023) 941 final} -
{SWD(2023) 942 final}

Subsidiarity Grid

1. Can the EU act? What is the legal basis and competence of the EU's intended action?
1.1 Which article of the Treaty is used to support the legislative proposal?
The legal basis for the proposal is the second paragraph of Article 23 of the Treaty on the Functioning of the European Union (TFEU). It provides that the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate the protection of EU citizens in the territory of a third country in which the Member State of which he is a national is not represented by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.
1.2 Is the EU competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of consular protection, the EU's competence is shared. <i>Subsidiarity does not apply for policy areas where the EU has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the EU and the Member States. Article 6 TFEU³ sets out the areas for which the EU has competence only to support the actions of the Member States.</i>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴:
- Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at EU level?
The proposal is based on various consultations that demonstrate that the action is best achieved at EU level. The evidence base is drawn in particular from the following: • the Commission Report on the implementation and application of Directive 2015/637/EU (COM(2022) 437 final); • discussions at the Council working party on consular affairs ('COCON') on further facilitating the exercise of EU citizens' right related to consular protection in third countries in the context of a possible up-date of the Directive, between September and November 2022; • the inception impact assessment and the responses received in response to it; • the Flash Eurobarometer 485 on EU Citizenship and Democracy; • an anonymised sample of citizen's complaints received by DG JUST; • the 2020 EU citizenship report, including its open public consultation survey with consular questions; • Member States' replies to the questionnaire developed by the Expert Group Meeting on Consular Protection of 8 December 2020. Additionally, Member States were also asked to

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

provide qualitative feedback, through interviews, on the application of the Directive and the problem definition; on the proposed policy options; and on the COVID-19 pandemic lessons learnt;

- an online survey sent to EU delegations;
- a short survey collecting anecdotal information from a sample of unrepresented citizens;
- interviews with stakeholders (citizens, industry, selected EU bodies);
- Data on consular activities provided by the EEAS Consular Affairs Division;
- a dedicated study from a contractor that gathered and analysed the evidence mentioned above.

Consultations and their results are presented in Annex II of the impact assessment⁵. The explanatory memorandum of the proposal⁶ and the impact assessment contain a section on the principle of subsidiarity as well as on the indicators to be used to assess the impacts of the proposal.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Yes. Consular protection for unrepresented citizens entails, by definition, a cross-border dimension, given its nature as a EU citizenship right enjoyed vis-à-vis the authorities of Member States other than those of one's nationality.

The objectives of this proposal, namely to improve the exercise of the right set out in point (c) of Article 20(2) TFEU by unrepresented citizens, cannot effectively be achieved by the Member States independently, given that doing so requires amendments to certain provisions of Council Directive (EU) 2015/637⁷. Action at EU level is thus necessary.

In this context, the impact assessment contains the following: *"Providing for common EU standards, safeguards and clear procedures for cooperation and coordination regarding unrepresented EU citizens is better achieved at EU level. A general subsidiarity check of whether the EU is best placed to act in the field of coordination and cooperation of consular protection to unrepresented citizens was already carried out at the time of the adoption of the Directive⁸, and remains valid. EU citizens' right to consular protection are still, obviously, a cross-border issue and an integral part of EU citizenship, requiring better cooperation and coordination at EU level.*

Since the expiry of its transposition deadline in 2018, the Commission has closely monitored the implementation of the Directive, as demonstrated by the recent publication of the Commission Report. Combined with further consultations, the report showed that further action at EU level is needed. Without timely and effective EU action, the problems identified in the report and their causes would continue to hinder the exercise by unrepresented EU citizens of their right to consular protection."

Absence to act at EU level would result in the rules of Directive (EU) 2015/637 not being adapted to address the shortcomings identified in their application. In addition, the rules would not take into account the experiences gained during recent consular crises. As a result, EU citizen would not be able to enjoy their right of consular protection to a degree that would be possible by EU level action.

⁵ SWD(2023) 941 final.

⁶ COM(2023) 930 final.

⁷ 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 (OJ L 106, 24.4.2015, p. 1, ELI: <http://data.europa.eu/eli/dir/2015/637/oj>).

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011SC1556>.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?
The impact assessment contains the following: <i>“The legal framework for the exercise of EU citizens’ right to consular protection involves the interaction of EU and (inter)national rules. Indeed, the obligation of Member States to provide consular protection to (unrepresented) nationals of other Member States has by definition a cross-border dimension. This means that it cannot effectively be addressed by Member States acting individually.”</i>
(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?
Yes, the obligation of Member States to provide consular protection to (unrepresented) nationals of other Member States has by definition a cross-border dimension.
(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty ⁹ or significantly damage the interests of other Member States?
Yes, as national action to address the shortcomings identified in the application of Directive (EU) 2015/637 may result in Member State breaching their obligation to correctly apply the national measures transposing that Directive.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
The proposed amendments would not affect Member States’ competences to determine the level of consular protection they offer. At the same time, they cannot put in place measures that conflict with Directive (EU) 2015/637.
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
The identified problems concern consular protection of EU citizens in third countries. They are cross-border in nature and do not vary across national, regional and local levels across the EU.
(e) Is the problem widespread across the EU or limited to a few Member States?
The majority of Member States consulted for the impact assessment saw an added value in the proposed amendments. According to the impact assessment, of the 125 million trips that EU citizens made to third countries in 2019, 14.2 million trips were to countries where the EU citizens were not represented by their Member State of nationality. There are currently only five third countries – the United States of America, China, India, Russia and the United Kingdom – where all 27 Member States are represented.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
Absence to act at EU level would result in the rules of Directive (EU) 2015/637 not being adapted to address the shortcomings identified in their application.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

The majority of Member States consulted for the impact assessment saw an added value in the proposed amendments. Consultations undertaken for the preparation of this legislative proposal have shown that the views and preferred courses of action are mostly similar across the EU.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at EU level by reason of scale or effects of that action (EU added value)?

Yes. The proposal aims to tackle difficulties experienced by unrepresented citizens. Improving consular protection of EU citizens abroad by reinforcing EU solidarity and cooperation in this field ensures that EU citizens continue to benefit from this right according to the highest standards.

These objectives would be best achieved through targeted amendments to Directive (EU) 2015/637. The adoption and uniform application of these rules throughout the EU cannot be achieved by Member States acting individually but can be achieved by EU legislation. The mere application of soft measures does not go far enough to tackle the problems identified and thus does not meet the objectives fully.

For reasons of scope and effects, the objectives of the proposal would thus be best achieved at EU level in accordance with the principle of subsidiarity.

(a) Are there clear benefits from EU level action?

Yes. The adoption of improved rules on the consular protection of EU citizens can be best achieved by EU legislation.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The current problems in the application of the rules on consular protection of unrepresented EU citizens may have an adverse impact on the fundamental rights and other rights of those persons in crisis situations. In view of this, the quantitative size of the problem in terms of the absolute number of citizens affected by the problems should not be considered as the primary or only indicator of the seriousness of the problem, or as the basis to assess the need for the EU to take action to address the problem.

Each failure to provide effective consular protection to EU citizens in distress not only has concrete negative consequences for the citizens and their families concerned, but it also poses a reputational risk for the Member States and the EU. Consular protection is prone to becoming more relevant in the future as the frequency, severity and duration of crises are likely to increase, including due to global warming.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

The right to consular protection is a cross-border issue and an integral part of EU citizenship, requiring cooperation and coordination at EU level. The introduction of improved rules at EU level on consular protection would avoid the current problems faced by unrepresented citizens and consular authorities. This would provide greater legal certainty and remove gaps and inconsistencies in the application of the rules on consular protection. This would be in line with the values, rights and objectives of the Treaties.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?
Under this proposal, Member States retain their regulatory autonomy with regards to the level of consular protection they provide. Already existing rules at EU level would be amended. Therefore, the proposed new rules would – if at all – only result in a minimal loss of competence for Member States and their competent authorities. The benefits of proposed amendments outweigh any potential loss of competence.
(e) Will there be improved legal clarity for those having to implement the legislation?
The proposal aims to ensure legal certainty for unrepresented citizens and consular authorities. Legal uncertainty for the actors involved, in particular in crisis situations, undermines their capacity to respond effectively to the situation, therefore hindering EU citizens' access to their fundamental right to consular protection.
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?
The explanatory memorandum contains the following text on the proportionality of the legislative proposal: <i>"The objectives of this proposal can be achieved by way of amendments to certain provisions of Directive (EU) 2015/637.</i> <i>In doing so, the proposal does not go beyond what is necessary to achieve this objective, as it does not fundamentally alter the existing rules and procedures of Directive (EU) 2015/637. In particular, it does not propose the introduction of additional procedures, but rather strives to streamline existing ones to lower the administrative burden on Member States and facilitate the provision of consular protection. For example, the proposal would allow assisting Member States to collect costs, in a non-discriminatory manner, directly from unrepresented citizen, rather than having to seek reimbursement from the citizen's Member State of nationality."</i> Additional explanations as to the proportionality of the different policy options – including the policy options not retained – can be found in the impact assessment accompanying the proposal.
3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?
The legislative proposal addresses the identified issues in the most appropriate and proportionate way to achieve the intended objectives.
(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the EU can do better?
Yes. The proposal only contains common rules to the extent necessary to achieve the policy objectives and is limited to those aspects that Member States cannot achieve satisfactorily on their

own. In particular, the proposal does not interfere with national substantive law in the field of the consular protection.
(b) Is the form of EU action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?
In line with its legal basis, Article 23(2) TFEU, the proposed instrument is a directive. As it seeks to amend the rules contained in Directive (EU) 2015/637, no other form is possible.
(c) Does the EU action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
The proposal strikes a balance between the regulatory autonomy of Member States and the need to tackle the identified issues in providing consular protection to unrepresented EU citizens. As it seeks to amend the rules contained in Directive (EU) 2015/637, limiting the proposal to a less stringent policy instrument is not possible.
(d) Does the initiative create financial or administrative cost for the EU, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
It is assessed that the proposal will result in financial and administrative benefits to stakeholders compared to the status quo: - Less time and effort needed from citizen to be identified as unrepresented. - Better distribution of the burden of assistance among Member States. - Smoother and more effective coordination and cooperation procedures. - Improved access by EU citizens to information on who can be assisted. - Improved registration procedures, resulting result in efficiency gains for administrations when seeking to contact citizens in case of crisis situations. - Smoother and quicker financial reimbursements. The costs of the initiative would be commensurate with the objectives to be achieved. A detailed estimation of the costs can be found in the impact assessment accompanying the proposal.
(e) While respecting the EU law, have special circumstances applying in individual Member States been taken into account?
No special national circumstances requiring a specific treatment for individual Member States in the legislative proposal have been identified during the performance of the supporting study or during the consultations undertaken to prepare this legislative proposal. The proposed provisions aim to respect national legal traditions in the field of consular protection.