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## Apples and Oranges? Comparing the European Union Delegations to National Embassies

Pia Kerres and Ramses A. Wessel



**CLEER**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**APPLES AND ORANGES? COMPARING THE EUROPEAN  
UNION DELEGATIONS TO NATIONAL EMBASSIES**

**PIA KERRES AND RAMSES A. WESSEL**

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## **ABSTRACT**

The present article aims to assess the tasks of EU Delegations and national missions, as laid down in their respective constitutive texts, namely the Council Decision establishing the organisation and functioning of the European External Action Service (hereinafter called EEAS Decision) and the Vienna Convention on Consular Relations (VCCR) and the Vienna Convention on Diplomatic Relations (VCDR) (together referred to as Vienna Conventions). The findings of this first part will be combined with those retrieved from a survey conducted among selected EU Delegations. In this part, the paper takes a legal-political approach to the question concerning the extent to which EU Delegations can be compared to national Embassies. The second section of this paper will take a look at the creation of the Delegations, their functions and involvement in different settings, while the third section will address possible similarities between the different legal and policy texts. This part will be followed by an analysis of the behaviour of Delegations in practice (section 4). Some conclusions will be presented in section 5.

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## 1. INTRODUCTION

The 2009 Lisbon Treaty not only introduced the European External Action Service (EEAS) as the European Union's new vehicle for foreign policy, but also equipped this new body with a network of – by now – 139 so called 'Union Delegations'. When Mrs. Ashton took up her post in December 2009, she said that the EU Delegations 'should be a network that is the pride of Europe and the envy of the rest of the world' and 'a trusted and reliable ally on European issues'.<sup>1</sup> Later she underlined this continued ambition, and added that the EEAS should be a 'single platform to protect European values and interests around the world', and 'a one stop shop for our partners'.<sup>2</sup> Implementing this ambition has meant that the former 'Commission Delegations' have been turned into 'Union Delegations'<sup>3</sup> and that for all practical diplomatic purposes they are seen as EU 'embassies'.<sup>4</sup> Six years later, the question is to which extent the Delegations have developed into the 'trusted and reliable ally', also for EU citizens around the world.

Indeed, much has been written on the EEAS and the Union Delegations. In general, the view seems to be that the new arrangements did impact the way in which EU Member States engage in diplomatic activity with third states: 'European diplomatic representation post-Lisbon is transforming into a multi-dimensional system, based on regular and intense coordination mechanisms between various European national actors and EU actors'.<sup>5</sup> While some studies include the question to which extent the Delegations are equipped to fulfil their diplomatic tasks,<sup>6</sup> so far, studies actually comparing the tasks of Union Delegations and national Embassies seem to be lacking.<sup>7</sup> The present article

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<sup>1</sup> Catherine Ashton, 'Quiet diplomacy will get our voice heard', *The Times* (17 December 2009).

<sup>2</sup> Catherine Ashton, 'Statement by High Representative Catherine Ashton on Europe Day' (Brussels, 7 May 2011), A 177/11.

<sup>3</sup> European External Action Service, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, 16 and see also F. Bergmüller, 'The EEAS: A Loss for the European Commission's External Relations Capacities?', in P. Quinn (ed.), 'Making European Diplomacy Work: Can the EEAS Deliver?', *EU Diplomacy Papers* 8/2011 (Bruges: College of Europe 2011), 14-18.

<sup>4</sup> See also the view of the European Parliament: 'The institutional aspects of setting up the European External Action Service', European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI), Art. 6(e), OJ C-265 E/9, 30.9.2010; and J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', *Hague Journal of Diplomacy*, 2012, 31-49.

<sup>5</sup> H. Maurer, 'An Upgraded EU Delegation in a Reinforced System of European Diplomatic Coordination: Insights from Washington', in J. Bátora and D. Spence (eds.), *The European External Action Service: European Diplomacy Post-Westphalia* (Basingstoke: Palgrave MacMillan 2015), 274-287, at 275.

<sup>6</sup> See most recently, Bátora and Spence, *supra* note 5. For an empirical analysis of what has been written on the EEAS (and from which perspective) see in this book the chapter by R. Adler-Nissen, 'Theorizing the EU's diplomatic service: Rational player or social body?'

<sup>7</sup> Although recently a comparison was clearly – but perhaps more implicitly – made in J. Wouters and S. Duquet, '*Unus inter plures?* The EEAS, the Vienna Convention and International

aims to make a modest start in doing exactly that: it assesses the tasks of EU Delegations and national missions, as laid down in the respective texts, namely the Council Decision establishing the organisation and functioning of the European External Action Service (hereinafter called EEAS Decision)<sup>8</sup> and the Vienna Convention on Consular Relations (VCCR) and the Vienna Convention on Diplomatic Relations (VCDR) (together referred to as Vienna Conventions).<sup>9</sup> The findings will be combined with those retrieved from a survey among selected Delegations. The paper thus takes a legal-political approach to the question to which extent EU Delegations can be compared to national Embassies. The second section of this paper will take a look at the creation of the Delegations, their functions and involvement in different settings. The third section will address possible similarities between the different legal and policy texts, followed by an analysis of the behaviour of Delegations in practice (section 4). A conclusion will be presented in section 5.

## 2. INTRODUCING THE UNION DELEGATIONS

### 2.1. From Pre-Lisbon Delegations to the new Delegations under the EEAS

The international identity of the European Union (EU) has frequently been discussed,<sup>10</sup> but it is clear that it is not a state.<sup>11</sup> The EU is supported in its external actions by the European External Action Service (EEAS). In addition to the headquarters in Brussels, the EEAS has so-called EU Delegations in third countries. The EEAS was created by the Lisbon Treaty in 2009<sup>12</sup> and

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Diplomatic Practice' published in J. Batora and D. Spence (eds.), *The European External Action Service: European Diplomacy Post-Westphalia* (Basingstoke: Palgrave MacMillan 2015). Cf. also H. Merket, *The European Union and the Security-Development Nexus: Bridging the Legal Divide*, PhD thesis, University of Ghent, September 2015, who in Chapter 4 addresses the question: 'EU Delegations as quasi-embassies: are they up to the task?'

<sup>8</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* [2010] L 201/30 3.8.2010.

<sup>9</sup> Respectively Vienna Convention on Diplomatic Relations, Done at Vienna on 18 April 1961; Entered into force on 24 April 1964; United Nations, Treaty Series, vol. 500, p. 95, available at <[http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf)> and Vienna Convention on Consular Relations, Done at Vienna on 24 April 1963. Entered into force on 19 March 1967; United Nations, Treaty Series, vol. 596, p. 261, available at <[http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf)>.

<sup>10</sup> See for instance and for further references C. Eckes and R.A. Wessel, 'The European Union: An International Perspective', in T. Tridimas and R. Schütze (eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford: Oxford University Press 2016) (forthcoming).

<sup>11</sup> This was for the first time confirmed by the Court of Justice of the European Union in ECJ, Opinion 2/13, not yet published, para. 156-157.

<sup>12</sup> Art. 27(3) TEU: 'In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. [...]'

became operational in January 2011. One of the purposes of the Lisbon Treaty was to create a more coherent, effective and visible EU foreign policy,<sup>13</sup> the foundations of which were laid with the inclusion of the Common Foreign and Security Policy (CFSP) in the 1992 Maastricht Treaty. These developments had to be furthered due to an altering nature of national and European interests caused by European integration and globalization. Cross-border mobility, worldwide communication, and international business replaced the functions of traditional diplomacy. Furthermore, globalization challenges nation-state sovereignty, leading states to face similar problems which can only be solved effectively by common, multilateral action.<sup>14</sup> Another idea, or rather a hope, was that a common European diplomatic service will eventually lead to greater convergence among the positions of the Member States.<sup>15</sup> This objective of convergence and consistency is reflected in Art. 3(1) EEAS Decision:

'The EEAS shall support, and work in cooperation with, the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies.'

The EEAS is designed as a functionally autonomous body under the authority of the High Representative of the Union for Foreign and Security Policy.<sup>16</sup> The first High Representative in this new setting was Baroness Catherine Ashton, who was in November 2014 succeeded by the former Italian foreign minister, Federica Mogherini. The interconnectedness of the EU is also displayed within the EEAS. The High Representative is not only the head of the service, but also the vice-president of the Commission, the chair of the Foreign Affairs Council and furthermore accountable to the European Parliament.<sup>17</sup>

The Delegations under the EEAS trace back to the Commission Delegations from the early 1950s, with the very first being established in Washington D.C. in 1954. In the 1960s and 70s many more followed, primarily in Africa.<sup>18</sup> These

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<sup>13</sup> R. Balfour and H. Ojanen, 'Does the European External Action Service represent a model for the challenges of global diplomacy?', *IAI Working Papers*, 2011; S. Blockmans, 'The European External Action Service one year on: First signs of strengths and weaknesses', *CLEER Working Papers*, 2012.

<sup>14</sup> M. Emerson; R. Balfour, T. Corthaut, J. Wouters, P.M. Kaczynski and R.L. Thomas, 'Upgrading the EU's role global actor: Institutions, law and the restructuring of European diplomacy' (Brussels: Center of European Policy Studies 2011); A. M. Fernández Pasarín, *supra* note 14.

<sup>15</sup> M. Comelli and R. Matarazzo, 'Rehashed Commission Delegations or Real Embassies?', *EU Delegations post-Lisbon*, *IAI Working Papers* 2011.

<sup>16</sup> Art. 1(1) of the Council Decision establishing the organisation and functioning of the European External Action Service, *supra* note 8. See also G. De Baere and R.A. Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences', in Batora and Spence, *supra* note 5. For further elaboration please see D. Helly, A. Herrero, A. Knoll, G. Galeazzi and A. Sherriff, 'A closer look into EU's external action frontline', *European Center for Development Policy Management* 2014; as well as B. van Vooren, 'A legal-institutional perspective on the European External Action Service', *48(2) Common Market Law Review* 2011, 475-502.

<sup>17</sup> The High Representative's tasks can be found in Article 18 and 35 TEU. For literature on this, see S. Blockmans, *supra* note 13.

<sup>18</sup> See more extensively F. Austermann, 'Towards Embassies for Europe? EU Delegations in the Union's diplomatic system', *Policy paper* 8 (2012), available at <[http://dseu.lboro.ac.uk/Documents/Policy\\_Papers/DSEU\\_Policy\\_Paper08.pdf](http://dseu.lboro.ac.uk/Documents/Policy_Papers/DSEU_Policy_Paper08.pdf)>.

Commission Delegations were established to represent the European Commission only. The work in the early days was mostly about low politics and developmental issues. From the 1980s on the Delegations became key institutions in enlargement negotiations, and took over certain traditional diplomatic tasks and competences. These included for example being the base for all visiting high-level EU officials in the third state, as well as the Heads of Delegation gaining diplomatic immunities. Delegation work was to a great extent about managing technical and financial cooperation programmes, and implementing trade and cooperation agreements.<sup>19</sup> Later, the involvement in economic diplomacy increased, together with the Delegation's political role. With the inclusion of CFSP in the Maastricht Treaty in 1992, Delegations were given the task to draft political reports together with the Member State embassies.<sup>20</sup> The cooperative work and coordination meetings with the representatives from national embassies were held and chaired by the embassy of the rotating Council presidency nation.

## 2.2 Functions of the EU Delegations

Post-Lisbon, the core functions of the EU Delegations are the reporting of developments on the ground and the analysis and information preparation for the EU institutions and Member States<sup>21</sup>. This shall strengthen the EU's capacity to speak with one voice and ensure consistency in European external actions.<sup>22</sup> The Delegations, now official called 'Union Delegations', no longer only represent the European Commission, but the entire European Union.<sup>23</sup> They represent the EU's foreign policy abroad, defend European values and interests, have responsibility over multi-annual development cooperation programmes and provide logistical support, information and assistance to the EU institutions.<sup>24</sup>

Delegations organise and hold monthly coordination meetings in their premises, where they discuss with the Member State representatives, and represent the common position towards the third state, as soon as it is reached. The fluctuation which was created with the pre-Lisbon system of having the embassy of the rotating presidency represent the EU position was stopped and

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<sup>19</sup> F. Austermann, 'The European External Action Service and its Delegations: a diplomatic service of different speeds', 1(1) *Global Affairs* 2015, 51-57.

<sup>20</sup> *Ibid.*

<sup>21</sup> See Art. 5(9) Council Decision establishing the organisation and functioning of the European External Action Service. For literature see D. Helly, A. Herrero, A. Knoll, G. Galeazzi and A. Sherriff, 'A closer look into EU's external action frontline', *European Center for Development Policy Management* 2014, as well as P. Koutrakos (ed.), 'The European Union's external relations a year after Lisbon', 3 *CLEER Working Papers* 2011.

<sup>22</sup> Art. 3(1) Council Decision establishing the organisation and functioning of the European External Action Service.

<sup>23</sup> Art. 221 TFEU. On the meaning of these new Delegations see M. Comelli and R. Matarazzo, *supra* note 15.

<sup>24</sup> D. Helly, A. Herrero, A. Knoll, G. Galeazzi and A. Sherriff, 'A closer look into EU's external action frontline', *European Center for Development Policy Management* 2014.

the diplomatic face of the EU is now constant.<sup>25</sup> This important task will strengthen the reporting skills of the Delegation officials, which is one of the most traditional diplomatic tasks.

The constant representation is also advantageous for host officials, as the EU Delegations are better resourced than most national embassies, greater institutional memory is achieved, and both EU and host officials have more incentives to invest in a long term relationship. On the other hand, a permanent presidency also implies less dynamism and enthusiasm than one that lasts for only six months.<sup>26</sup>

### 2.3 Delegations to International Organisations

In addition to the Delegations to third countries, the EU sends Delegations to the most important international organisations, such as the UN, NATO, or the WTO.<sup>27</sup> Delegations to international organisations have a hard stand, as there are significant discrepancies between the mechanisms of EU external representation and the working methods in international organisations, mostly due to the fact that international organisations are created for states and not for regional integration organisations such as the EU.<sup>28</sup> Although these situations may be accommodated by the international organisation, the position of the EU (Delegation) will remain different than that of state parties. This is largely due to the division of competences within the EU itself and to the fact that membership of the EU to another organisation does not always match the necessary competences - resulting in situations where the EU has competences but is not a member (such as in the ILO), or where the Member States have virtually lost all of their competences, but have remained a member (such as in the WTO). Whenever the working field of the accredited international organisation is within the exclusive competences of the EU, the EU serves as the main actor and Delegations have a pre-eminent position. Whenever shared competences are at stake, the EU acts as an observer with participatory rights but no voting rights.<sup>29</sup> Thus, each statement made in an international organisation requires tracing of who is competent for which area, to ensure that the internal division is reflected externally. So-called 'declarations of competence' (laying down the division of competences) are only partly helpful as a competence division may change over the course of years. For matters under exclusive competence, Member States may complement a statement, but may not divert from the common EU position. This repetition of statements only serves

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<sup>25</sup> See F. Austermann, *supra* note 19.

<sup>26</sup> F. Austermann, *supra* note 18.

<sup>27</sup> As laid down in Art. 35 TEU.

<sup>28</sup> G. Grevi, 'From Lisbon to New York: The EU at the UN General Assembly', 81 *FRIDGE Policy Brief* 2011; K.V. Laatikainen, 'The EU Delegation in New York: A Debut of High Political Drama', in D. Spence and J. Batora, *supra* note 5, 195-218; R. A. Wessel, 'Can the EU replace its Member States in international affairs? An international law perspective', published in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds.), *The European Union in the world: Essays in Honour of Marc Maresceau* (Leiden/Boston: Martinus Nijhoff Publishers 2013) 129-147.

<sup>29</sup> M. Cornelli and R. Matarazzo, *supra* note 15.

the visibility of the national foreign minister.<sup>30</sup> Overall, it is noticeable that Member States are reluctant to recognize the stronger role by EU Delegations in international organisations.<sup>31</sup>

## 2.4 Staff in the Delegations

The Union Delegations nowadays are affected by their past – they are hybrid administrative constructs that combine diplomatic tasks, coming from the EEAS, and operational tasks, a role inherited from the Commission Delegations.<sup>32</sup> Generally, Delegation staff consists of Commission staff (mostly former DG RELEX personnel), Council Secretariat staff and seconded national diplomats.<sup>33</sup> It has been observed that, while national diplomats are good with foreign and security matters and negotiations, EU officials are good with managing large cooperation programmes. This results in political staff mostly coming from the Council or the Member States as seconded national diplomats, whereas operational staff is often former Commission staff. The Delegations are highly valued in Brussels and the Member State capitals for their insights and knowledge, but the exchange of information is far from being a two-way street, with Delegations suffering from the lack of coordination coming from Brussels.<sup>34</sup>

The Head of Delegation receives instructions from the High Representative and the EEAS and is responsible for their execution. Yet, in line with Art. 5(3) EEAS Decision, the Commission may also issue instructions, in areas where it has competence. To prevent the above mentioned lack of coordination and possibly contradicting instructions, the Commission shall, when giving instructions to a Delegation, also send a copy to the Head of Delegation and the EEAS headquarters.<sup>35</sup>

## 2.5 Delegations in Crisis Situations

In the event of a crisis, special procedures apply, which include an extended role for EU Delegations. An *ad-hoc* crisis platform brings together all relevant EEAS, Commission and Council services to share information and create coherence in EU external crisis action.<sup>36</sup> The Delegations handle matters on the ground. They usually undertake three types of action to support citizens for whom a national representation is not available: they function as an intermedi-

<sup>30</sup> R.A. Wessel and B. Van Vooren, 'The EEAS's diplomatic dreams and the reality of European and international law', 20(9) *Journal of European Public Policy* 2013, 1350-1367.

<sup>31</sup> M. Cornelli and R. Matarazzo, *supra* note 15.

<sup>32</sup> Helly et al., *supra* note 24.

<sup>33</sup> Staff issues are discussed in Art. 5(2) Council Decision establishing the organisation and functioning of the European External Action Service. For literature see S. Hemra, T. Raines and R.G. Whitman, *A diplomatic entrepreneur: making the most of the European External Action Service* (London: Royal Institute of International Affairs 2011).

<sup>34</sup> Helly et al., *supra* note 24.

<sup>35</sup> G. De Baere and R.A. Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences', in Bátorá and Spence, *supra* note 5.

<sup>36</sup> S. Blockmans, *supra* note 13.

ate actor to communicate between citizens and local authorities, they bring citizens into contact with the authorities of their own State, and help citizens leave the country, for example by pre-financing transport.<sup>37</sup>

*a. The Lead State concept*

An additional source of coordination comes from the 'Lead State' in the country, if the concept is in place. The Lead State, which is a Member State, will voluntarily take the lead in consular affairs in the third country in times of crisis and is in charge of coordinating and leading the assistance, possibly also the evacuation. States that volunteer often have either historical ties stemming from colonial times, or geographical, diplomatic or linguistic reasons. Further significant factors can be the resulting excellent knowledge of the area and the political regime and the likelihood that the citizens of that Member State form the largest group of Europeans living or travelling there. The benefits of the concept include saving costs, providing clarity to the receiving state and making operations more transparent. Beneficiaries include nationals of all EU Member States present in the territory of the third state at that time.<sup>38</sup>

In 2011 the Lead State concept was established in 29 third countries out of the 146 countries worldwide, where at least one Member State is represented.<sup>39</sup> One Member State that is very vocal in the discussion about the Lead State concept is France, who wants a greater crisis coordination role for the Delegations and the EEAS. It carries a relatively heavy burden, as it is often operating as Lead State. Furthermore France promotes a compensation mechanism to regulate financial reimbursements by the other Member States.<sup>40</sup> The Lead State concept was for instance implemented under the command of France in Chad. French authorities evacuated more than 1.200 citizens from 12 Member States and several third countries, adding up to citizens from 60 nationalities in total.

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<sup>37</sup> J. Wouters, S. Duquet and K. Meuwissen, 'The European Union and Consular Law', Working Paper No. 107 (Leuven Centre for Global Governance Studies 2013), available at <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp107-wouters-duquet-meuwissen-sd.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp107-wouters-duquet-meuwissen-sd.pdf)>.

<sup>38</sup> See the European Union guidelines on the implementation of the consular Lead State concept, published in the Official Journal of the European Union OJ [2008]C 317/06, 12.12.2008. For literature on the Lead state concept, see A. Vermeer-Künzli, 'Where the law becomes irrelevant: consular assistance and the European Union', 60(4) *International and Comparative Law Quarterly*, 2011, 965-995; J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>39</sup> Figures taken from the Report by the High Representative to the European Parliament, the Council and the Commission published in the Official Journal of the European Union in 2011.

<sup>40</sup> K. Raik, 'Serving the citizens? Consular role of the EEAS grows in small steps', European Policy Centre, 2013, available at <[http://www.epc.eu/documents/uploads/pub\\_3488\\_consular\\_role\\_of\\_the\\_eeas.pdf](http://www.epc.eu/documents/uploads/pub_3488_consular_role_of_the_eeas.pdf)>.

### *b. Examples of Delegations helping in crisis situations*

As stated before, EU Delegations can also be of great help during crisis situations, as illustrated by the following instances. One example where the EU Delegation was largely involved was in 2012, when most Member States closed their embassies in Syria, but the Delegation in Damascus stayed open, hosting national diplomats from four Member States (thus fulfilling diplomatic asylum tasks), assisting with evacuations of around 25.000 EU citizens and maintaining a crucial local presence.<sup>41</sup> During the Arab spring rebellions in the Northern part of Africa, EU Delegations carried out similar operations in Libya, Egypt and Tunisia.

A second example is the Union Delegation in Japan, which spontaneously assumed a coordination function after the nuclear disaster caused the official proclamation of an emergency situation in 2011.<sup>42</sup>

In a third instance, during the Gaza crisis in January 2009, nearly 100 people were evacuated in armoured buses thanks to (by then Commission) Delegation's support.<sup>43</sup>

## **2.6 Sharing Facilities with National Representations**

As stated in a report by the High Representative, Delegations can play an important role in the future. As 'national diplomatic services are scaling back their resources to concentrate on national priorities, the value added of the delegations is ensuring the EU is properly represented throughout the world. This is not about replacing national diplomatic services, but in making a more effective and cost efficient use of resources'.<sup>44</sup> An opportunity of such efficient use of resource can be found in the economic section of each national embassy. Generally this section has three tasks: reporting on economic trends, reporting on aspects of trade policy, and assisting in support of national commercial interests. It has been argued that the first two tasks can be dealt with in the Delegations, as there is no added value in doing it 28+1 times.<sup>45</sup> In addition, the premises of the Delegations could be used to create so-called *Houses of Europe*. National services could work in co-location in the premises of the Union Delegations and profit from common security and other infrastructural elements, as suggested in the Green Paper by the Commission.<sup>46</sup>

As we have seen, while Member States were willing to cooperate and 'to coordinate civil protection and assistance operations within a European framework, they were not, however, fully inclined to change the intergovernmental

<sup>41</sup> Ibid.

<sup>42</sup> See J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>43</sup> A. M. Fernández Pasarín, *supra* note 14.

<sup>44</sup> Report by the High Representative to the European Parliament, the Council and the Commission published in the Official Journal of the European Union in 2011.

<sup>45</sup> Emerson et al., *supra* note 14.

<sup>46</sup> Ibid. These thoughts were also brought up in a Commission document from 2006, under the name of 'Diplomatic and consular protection of Union citizens in third countries', Green Paper of 28 November 2006 (COM(2006) 712 final)

and voluntary nature' of the Lead State concept.<sup>47</sup> Notwithstanding the increased Delegation competences during crisis situations, large Member States still defend the state-to-state scheme. If Member States were to change their approach to cooperation, much room for the Delegations to help would be created.

Many more areas could be handled more efficiently by including the EU Delegations as additional support. Some of these areas (for example the issuance of visa, or consular assistance), will be dealt with in section 4 below.

### 3. COMPARING THE TASKS OF DELEGATIONS AND EMBASSIES

This section will compare the tasks of EU Delegations to those of national embassies. As the situations differ there are no truly comparable texts. While tasks of national embassies and consulates are to a large extent laid down in the Vienna Conventions, the tasks of the Union Delegations are to be found in the EEAS Decision. We will therefore use these documents for our analysis. Before doing so, we will note a number of more general preliminary observations related to the fact that the EU is not a state.

#### 3.1 Preliminary Observations Related to the Role of the EU as a Global Actor

The main international legal texts on all privileges, requirements, and tasks connected to national representations are the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. As mentioned in Art. 48 VCDR only states can become a party.<sup>48</sup> The EU as an international organisation, though having significant state-like features, cannot become a party to the Vienna Conventions.<sup>49</sup> Yet, in almost all aspects of the legal dimension of the Union Delegations, the Vienna Conventions have been taken as a starting point.<sup>50</sup> The question to which extent the EU is bound by the (customary law content of the) Vienna Conventions falls outside the scope of the present paper, but has partly been addressed elsewhere.<sup>51</sup>

Before any diplomatic relations can be established, it has to be noted that it is the exclusive competence of states to recognise other states.<sup>52</sup> This preliminary condition for any further negotiations is retained by the Member States. Thus, as long as not all 28 Member States have recognised a third state, the EU cannot act. When opening or closing a national mission in a third state, the

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<sup>47</sup> Citation from A. M. Fernández Pasarín, *supra* note 14, at 363.

<sup>48</sup> Vienna Convention on Diplomatic Relations of 1961.

<sup>49</sup> See Arts. 50 of the VCDR and Art. 76 of the VCCR: "The present Convention shall remain open for accession by any State".

<sup>50</sup> See also J. Wouters and S. Duquet, *supra* note 7: 'The Vienna Convention governs every aspect of diplomatic life, and Union Delegations adhere to it in the same way as state missions in local diplomatic corps all over the world'.

<sup>51</sup> *Ibid*; as well as J. Wouters and S. Duquet, *supra* note 4.

<sup>52</sup> *Ibid*.

decision is taken by the Head of State or Government. In the case of the EU, following Art. 5(6) EEAS Decision,

'The High Representative shall enter into the necessary arrangements with the host country, the international organisation, or the third country concerned. In particular, the High Representative shall take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.'

These arrangements are codified in the Establishment Agreement or Headquarters Agreement between the host State and the EU.<sup>53</sup> The close connection between the texts becomes visible, through the reference in the Article to the VCDR. 'Other provisions of the Vienna Convention of 1961 on Diplomatic Relations shall be applicable *mutatis mutandis*',<sup>54</sup> aiming at making 'the entire Vienna Convention govern the EU's diplomatic practice. In essence, it allows the Union to 'contract-in' to the multilateral regime of the VCDR using a standard clause in a consistent set of bilateral agreements'.<sup>55</sup>

An important notion in Art. 2 VCDR is the condition that the other state must replicate privileges and immunities. This reciprocity is necessary to guarantee protection to the own diplomats. But how can the EU as a non-state actor grant diplomatic status with privileges and immunities to foreign diplomats accredited to the EU? A solution was found in having the Member State in whose territory the EU has its seat, thus Belgium, accord to the customary diplomatic immunities and privileges to missions of third states accredited to the Union.<sup>56</sup>

Diplomats, when appointed by the Head of State, are named to the government of the receiving state in a Letter of Credence. The heads of a mission are acknowledged as such, when they have presented their credentials or notified the receiving states' foreign ministry of their arrival and presented a true copy of their credentials. In the context of the EU, these Letters of Credence of Heads of Delegations are co-signed by the Presidents of the European Council and the European Commission. Receiving states are asked to give credit to the Heads of Delegation, as they are tasked with the same authority as national heads of mission. Yet, the Heads of Delegation only hold a courtesy title of Ambassador, which they shall not use in reality. This unique standing is mirrored in the *corps diplomatique*, the list of Ambassadors present in a capital. The Head of Delegation is listed in the first section after all national Ambassadors.

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<sup>53</sup> As laid down in the Council Decision establishing the organisation and functioning of the European External Action Service, 2010, *supra* note 8.

<sup>54</sup> Found in Art. 3(2) of the Agreement between the Commission of the European Communities and the Government of New Zealand on the Establishment and the Privileges and Immunities of the Delegation of the Commission of the European Communities in New Zealand, from 2004, B2004/01, available at <<http://www.treaties.mfat.govt.nz/search/details/t/3392/120>>.

<sup>55</sup> See J. Wouters and S. Duquet, 2015, *supra* note 7.

<sup>56</sup> As laid down for example in Art. 3(3) of Agreement between the Commission of the European Communities and the Government of the Kingdom of Norway on the Establishment and the Privileges and Immunities of the Delegation of the Commission of the European Communities in the Kingdom of Norway, from 1987.

sadors and not in the second section with the representatives of international organisations. Usually, the position on the list climbs with seniority, but this rule does not apply for Heads of Delegation.<sup>57</sup>

When establishing diplomatic relations with a third state, the EU follows the procedures described in the Vienna Conventions very closely, and directly refers to the text, thus behaving like a state: 'although the EU is not a party to the Vienna Convention, the Convention is being applied to the widest extent possible in the EU's bilateral diplomatic relations via multiple agreements'.<sup>58</sup> It is therefore sensible to argue that the Vienna Conventions are suitable texts to compare the EEAS Decision to, as it is the main reference point used by the drafters themselves.

Yet, there are some instances where the EU has to deviate from the 'regular procedure' due to its nature as an international organisation. The EU cannot issue the Delegation officials a diplomatic passport. An alternative was found in the *laissez-passer* document. All Establishment Agreements include a provision with which the receiving state recognises the document as a valid travel document.<sup>59</sup> Unfortunately, it remains unclear if other authorities recognise it, such as the authorities of a country which is a stop-over destination during the travels of a Delegation official.<sup>60</sup>

Finally, there is the issue of granting diplomatic asylum. On the one hand, EU Delegations are bound to the article on non-interference in the internal affairs of the receiving state on the basis of the concluded mission agreements, while, on the other hand, they must uphold European values and humanitarian rules. In practice, they could grant a fugitive asylum, as their premises are inviolable on the basis of the same mission agreements.<sup>61</sup>

### 3.2 Formal Tasks of National Embassies and EU Delegations

The Vienna Conventions reveal that national representations have an extensive number of tasks, divided into consular and diplomatic tasks. Under Article 3 VDCR one can find five relevant provisions for diplomatic tasks, completed by another 18 provisions under Article 5 VCCR, describing all consular tasks. Provisions are on (1) general and rather basic issues, such as the fact that the mission represents the sending State in the receiving State (2) traditionally

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<sup>57</sup> R.L. Bosilca, 'The European Union - A 'Sui generis' International Diplomatic Actor: Challenges posed to the International Diplomatic Law', 14(1) *Romanian Journal of European Affairs* 2014.

<sup>58</sup> Citation taken from p. 3 of J. Wouters and S. Duquet, *supra* note 4. See also R.L. Bosilca, *supra* note 51; as well as R.A. Wessel, 'Can the EU replace its Member States in international affairs? An international law perspective', in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds.), *supra* note 28, 129-147; and J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>59</sup> As an example see the Agreement between the Commission of the European Communities and the Government of the Republic of Albania on the Establishment and the Privileges and Immunities of the Delegation of the Commission of the European Communities in the Republic of Albania, from 1993.

<sup>60</sup> J. Wouters and S. Duquet, *supra* note 4.

<sup>61</sup> R.L. Bosilca, *supra* note 57.

consular issues, such as the issuance of passports or travel documents, and (3) on specific issues, such as the safeguarding of interests of minors or persons lacking full capacity. A total of 23 provisions can be found on the tasks of national representations.

The question is to which extent these tasks are also formally allocated to Union Delegations. As said, the EEAS Decision forms the basis for the tasks of the Union Delegations. Looking at the Decision, the following provisions on the formal legal rights and proposed activities can be found:

1. Art. 5(8): The Head of Delegation shall have the power to represent the Union in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings.
2. Art. 5(9): The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.
3. Art. 5(10): The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.

When one merely compares the number of provisions, one can see that Union Delegations operate on nearly one eighth of the number of provisions of the national missions. There is thus a large discrepancy in the number of tasks formally allocated with each type of representation. In a formal sense the Delegations (1) represent the EU in the receiving state (2) the Head of Delegation may negotiate on behalf of the EU (3) they shall support the national embassies by the Member States with information and (4) if necessary with consular protection for their respective national citizens or other Union citizens.

When comparing the list of tasks of the Delegations with the tasks of national representations according to the Vienna Conventions, several overlapping provisions can be found. Both texts include as tasks of the mission (1) being an information provider for the sending State/the EU and its Member States (2) representing the sending State/the EU in the receiving State, and (3) having the capacity to negotiate with the government of the receiving State.

At the same time, the EEAS Decision does not mention various traditional consular and diplomatic tasks. The question therefore is whether EU Delegations have a function in relation to the following list of tasks:

1. Provide EU citizens with travel documents (see Art. 5 d VCCR),
2. Issue visas to non-EU citizens (see Art. 5 d VCCR),<sup>62</sup>
3. Provide consular assistance (see Art. 5 a, e, f, m VCCR),<sup>63</sup>

<sup>62</sup> The two provisions in Art. 5d VCCR will be split for the rest of the paper, as the discussions surrounding the topics are very different. Thus one point is on the issuance of short-term visa for non-EU citizens, while the other point is on the issuance of travel documents for EU citizens.

<sup>63</sup> It has to be noted from the start here, that this point is to be understood as consular assistance to EU citizens by initiative of the EU Delegation. Currently, EU Delegations may according

4. Provide diplomatic protection (see Art. 3.1. (b) VCDR),
5. Represent EU citizens before court (see Art. 5 i, j VCCR),
6. Safeguard interests in case of succession *mortis causa* (see Art. 5 g VCCR),
7. Assist minors and other persons lacking full capacity (see Art. 5 h VCCR),
8. Assist during investigation of vessels,
9. Promote bilateral relations (see Art. 5 b VCCR, Art. 3.1. (e) VCDR).

These nine points are most relevant for the upcoming analysis. Therefore, the following sub-section will be used to zoom in on all nine tasks with a view to assess a possible role for the Union Delegations in these areas.

### 3.3 Zooming in on Key Diplomatic Functions

It can probably be accepted that 'representation' is the key function of both embassies and Union Delegations. As far as the latter are concerned, representation entails that the Delegation can legally and politically be seen as the representative of the European Union. It will thus be able to represent the Union formally in the host state and at the respective international organisations. In that capacity it also serves as the contact point for the host state and the international organisation. Representation is most prominently visualised by means of flying the European flag. This area is one example where the EEAS and its Delegations generally face little complications. Abroad, the Union Delegations are limited (as any other state represented in that state) by the regulations of the host State. As has been observed, this also means that

'the Union flag has to be flown and the anthem has to be played in the same way as locally represented states. [...] Since all missions may simultaneously fly their own flag, it is unlikely that one of them should protest against similar usage by Union delegations. As a counterpart, states are guaranteed, on a reciprocal basis, the right to fly a flag in Brussels on the premises of their mission to the EU'.<sup>64</sup>

In this area, the Delegations are thus treated like any other national representation in the respective third state.

Yet, as we have seen, embassies have other diplomatic tasks than flying a flag. On the basis of our textual comparison between the main legal texts defining the tasks of national embassies and the Union Delegations, the following tasks will now be analysed with a view to finding a possible role for the Union Delegations in these areas.

#### *a. Provide EU citizens with travel documents*

Decision 96/409/CFSP establishes the possibility for any national representation of a Member State in a third country to issue an emergency travel document

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to the EEAS Decision only engage in consular assistance if the support is requested by a Member State mission (Art. 5 (10) EEAS Decision).

<sup>64</sup> J. Wouters and S. Duquet, 2015, *supra* note 7.

(ETD) to a citizen of the EU, whose Member State of origin has no permanent diplomatic or consular representation in the territory of the third country. These ETDs may be issued when the passport is lost, stolen, destroyed or temporarily unavailable. They are only valid for the duration of a single journey to the country of origin.<sup>65</sup>

For the issuance of an ETD the EU Delegations are currently not included as a possible point of help. With increasing numbers of EU citizens travelling abroad, and reducing numbers of Member State representations around the globe, one could argue in favour of including the EU Delegations as additional support. There are worldwide approximately 30 countries where a Union Delegation and only up to three national embassies exist (e.g. Fiji, Cape Verde, and Madagascar).<sup>66</sup> In countries like these, EU Delegations could play a crucial role for EU citizens, as they could function as an extra service point for citizens in distress. A positive side effect could be the increased visibility of the EU and its Delegations among the public.

#### *b. Issue visas to non-EU citizens*

Since 2009 the EU Member States follow the Community Code on Visas, defining the procedures for application and the conditions for admission. With the Visa Code a common legal framework for the delivery of uniform visas to third country nationals was created.<sup>67</sup> Persons travelling to the EU receive a visa to travel to the Schengen area, as the Code is based on the Schengen acquis. When checking the regulation for the role of the EU Delegations (at the time of writing the Visa Code, they were still Commission Delegations), they are merely to be informed of any representation agreements among the Member States, and the termination of such.<sup>68</sup>

When applying for a visa, applicants must follow the guidelines. When the travel includes solely one country of destination, the Member State whose territory constitutes the sole destination is competent. When the visit includes more than one country, the Member State whose territory constitutes the main destination in terms of length of stay is competent. In case no main destination can be determined, the Member State through which the visitor seeks to enter the Schengen area is competent.<sup>69</sup> If a Schengen country does not have a representation in the country of origin of the visitor, or if the present embassy or consulate is not issuing visas, a Schengen visa application may be submit-

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<sup>65</sup> Decision of the representatives of the governments of the Member States, meeting within the Council on 25 June 1993 on the establishment of an emergency travel document.

<sup>66</sup> See Report by the High Representative to the European Parliament, the Council and the Commission published in the Official Journal of the European Union in 2011.

<sup>67</sup> J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>68</sup> Art. 8 (8) Regulation (EC) No 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas, OJ [2009] L 243/1, 15.9.2009.

<sup>69</sup> Rules found on <<http://www.schengenvisainfo.com/how-to-apply-schengen-visa/>>.

ted to the Member State which represents this country for visa matters as laid down in bilateral representation agreements.<sup>70</sup>

Currently there are local Schengen cooperation meetings in third states among the Member State missions in place, whose purpose 'is to deal specifically with operational issues in relation to the application of the common visa policy'.<sup>71</sup> For this purpose, it is established that the 'meetings shall be convened within the jurisdiction by the EU Delegation, unless otherwise agreed at the Commission's request'.<sup>72</sup>

Due to the open border nature of the Schengen area, a common interest is produced on which visa decisions are made. It could therefore be argued towards placing a common interest under a common administrative procedure, which could be handled by the EU Delegations.<sup>73</sup> Arguments against an involvement of the Delegations may include that it is still 'a sensitive matter as Member States like to keep a certain level of control over the influx of migrants into their country'.<sup>74</sup> A further issue is the fact that the Schengen area excludes the United Kingdom and Ireland as members. Furthermore, Wouters et al. argue that the issuance of visa by EU Delegations exceeds what can be understood as a supporting role, as stipulated in the EEAS Decision, and that from the standpoint of the EEAS this extra task would not add much value.<sup>75</sup>

### c. *Provide consular assistance*

An important part in the work of a national representation is the consular assistance to citizens. There are several provisions in the EU Treaties dealing with this issue. Most importantly, Art. 23 TFEU states that:

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.'

This right is linked to an accessibility criterion: if it is impossible to reach one's own embassy or consulate and return – within the same day - to the place of departure via means of transport commonly used in the third country, the Union citizen may go to any Member State representation closer to him or her. This protection primarily applies in cases such as death, serious accident or illness, arrest or detention, loss or theft of identity documents, and does not include tasks such as the authentication of documents, which would be a purely ad-

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<sup>70</sup> CARE, *Consular and Diplomatic Protection, Firenze: CARE – Citizens Consular Assistance Regulation in Europe*, 2010.

<sup>71</sup> Commission Decision of 11.6.2010 establishing the Handbook for the organisation of visa sections and local Schengen cooperation, C(2010)3667 final.

<sup>72</sup> Ibid.

<sup>73</sup> Emerson et al., *supra* note 14.

<sup>74</sup> See J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>75</sup> Ibid.

ministrative consular assistance task.<sup>76</sup> These day-to-day consular assistance functions are handled differently to consular protection actions during times of crises. As stated by Wouters et al. 'intergovernmental European cooperation as well as support by the EEAS and Union Delegations in these everyday situations is more limited.'<sup>77</sup>

The European Charter of Fundamental Rights includes consular protection in its list of fundamental rights, and with its codification in the Lisbon Treaty, the right to consular protection became a legally binding fundamental right for every Union citizen.<sup>78</sup> Yet, the exercise of this right may be problematic in the light of international law. While Member States should give priority to EU law over international law (*Gemeinschaftstreue*), EU law is not binding on third states.<sup>79</sup> The EU thus cannot establish Article 23 TFEU unilaterally, as there is no concept of European citizenship (established in Art. 20 TFEU) outside the legal framework of the EU treaties. The important link between intervening state and protected citizen is missing in the eyes of third states. This calls for bilateral agreements, but so far only a limited number of treaties were concluded by a Member State with a third state which provides for an extension of their exercise of consular protection to other Union citizens. The only countries that have included such clauses in agreements are Italy and Portugal.<sup>80</sup> As emphasised by a 2010 study on consular and diplomatic protection:

'The fact that the Member States have not started negotiations for conclusion of international agreement with third countries for recognition of the exercise of consular protection by EU countries for unrepresented nationals of other EU countries is not in itself capable of denying this right to the Union nationals, however it is likely to impede its effectiveness'.<sup>81</sup>

The VCCR includes in Article 8 the option of taking-over the exercise of consular function on behalf of a third state.<sup>82</sup> It can therefore be argued that this provision supports the right established under Art. 23 TFEU.

Member States have experienced little or no objection by the receiving states to the exercise of consular services on behalf of a third state,<sup>83</sup> as currently an unopposed notification suffices.<sup>84</sup> Thus, the consular assistance methods of the Member State consulates are working, but they are (nearly) not at all reflected in the legal arrangements. Preferably, a clause would be included into international agreements, securing the right to provide consular assistance to any EU citizen.

<sup>76</sup> European Parliamentary Research Service, 'Consular protection for EU citizens abroad', available at <<http://epthinktank.eu/2012/10/24/consular-protection-for-eu-citizens-abroad/>>.

<sup>77</sup> See J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>78</sup> See Article 46 of the Charter.

<sup>79</sup> R. A. Wessel, *supra* note 58.

<sup>80</sup> CARE, *supra* note 70, pp. 13 and 277.

<sup>81</sup> *Ibid.*, p. 22.

<sup>82</sup> Vienna Convention on Consular Relations, 1963.

<sup>83</sup> CARE, *supra* note 70, at 35.

<sup>84</sup> A. Vermeer-Künzli, *supra* note 38.

Internally, some Member States oppose to Article 23 TFEU because reciprocity is unequal. Those states having more representations also need assistance for their nationals by others less often, so there will be no 'returning the favor'.<sup>85</sup>

Yet another step would be to allow the EU Delegations to provide consular assistance to Union citizens. Delegations so far have the obligation to support consulates in this task, if required so by the Member State.<sup>86</sup> While the EEAS Decision in Art. 5(3) foresees the option of consular assistance by the Delegations themselves, Article 8 VCCR does not cover this case of exercise of consular function by an international organisation. Thus, if EU Delegations were to increase their scope, agreements with third States should cover this option. For any involvement that is not covered by an article in an agreement, the specific consent by the receiving state will be necessary, as the nationality claim does not cover European citizenship.<sup>87</sup> Because consular matters are still under the competence of the Member States, the only option for the EU to conclude agreements including an increased role for the EU Delegations, would be through a 'mixed' agreement.<sup>88</sup> In such mixed agreements, the Member States are necessarily included as parties. This method is the preferred option, as elaborated in the Green Paper.<sup>89</sup>

When looking at the discussion surrounding the idea of upgrading the role of the EU Delegations for the provision of consular assistance there are diverse opinions. The European Parliament and several small and medium-sized Member States (most actively the Netherlands) spoke themselves out for a greater role of the Delegations in consular affairs. The European Parliament for example proposed amendments to the Commission proposal for a Directive on consular protection of unrepresented Union citizens, which pushes for an increased role for EU Delegations in the field of consular services. Arguments for an extended role include that this would help to increase burden-sharing, save national public budgets, provide sufficient support for the increasing number of Union citizens living/travelling abroad, bring the EU closer to its citizens, help smaller Member States through co-location, and generally have more coordination and greater institutional memory.<sup>90</sup> This extra service point could help the approximately 40.000 unrepresented citizens per year.<sup>91</sup>

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<sup>85</sup> J. Wouters, S. Duquet and K. Meuwissen, *supra* note 37.

<sup>86</sup> Art. 5(10) Council Decision establishing the organisation and functioning of the European External Action Service, *supra* note 8.

<sup>87</sup> R.A. Wessel and B. van Vooren, *supra* note 30.

<sup>88</sup> See more extensively B. van Vooren and R.A. Wessel, *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press 2014), Chapter 2.

<sup>89</sup> Commission document from 2006, under the name of 'Diplomatic and consular protection of Union citizens in third countries', *supra* note 46.

<sup>90</sup> Many authors support this claim, amongst others: F. Austermann, 2012, *supra* note 19; R. Balfour and H. Ojanen, 'Does the European External Action Service represent a model for the challenges of global diplomacy?', *IAI Working Papers 2011*; CARE, *supra* note 70; M. Emerson; R. Balfour, T. Corthaut, J. Wouters, P.M. Kaczynski and R.L. Thomas, 'Upgrading the EU's role global actor: Institutions, law and the restructuring of European diplomacy' (Brussels: Center of European Policy Studies 2011); and lastly Helly et al., *supra* note 17.

<sup>91</sup> See <<http://www.schengenvisainfo.com/how-to-apply-schengen-visa/>>.

*Contra* this development are large Member States, especially the UK. They argue that consular affairs are national affairs, consular assistance by EU Delegations is not practical on a resource-neutral basis as required by the EEAS Decision in Art. 5(10), EU Delegations have very limited expertise, and it would lead to a loss of national visibility.<sup>92</sup>

Nevertheless, as illustrated above, EU Delegations can play an important role in the coordination of evacuations of EU citizens and pragmatic solutions can be found on the ground. Due to these reasons and the increasing awareness of the added value of joint strategies that include the EU Delegations, several Member States have demanded to strengthen EEAS capabilities which shall provide operational support in large-scale threat situations.<sup>93</sup>

*d. Provide diplomatic protection*

Diplomatic protection can only be relied on after all local remedies have been exhausted and injuries have occurred from an internationally wrongful act. Diplomatic protection is strongly linked to the requirement of nationality as established in the *Panevezys-Saldutiskis Railway* case.<sup>94</sup> Diplomatic protection is distinct from consular assistance insofar as it represents the interests of a state rather than a national, and is more of a remedial nature.<sup>95</sup>

Article 20(2c) TFEU provides that citizens of the Union shall have

‘the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that state.’

The article provides for both consular assistance and diplomatic protection, which was arguably not intended by the drafters.<sup>96</sup> Künzli argues that EU citizenship is ‘not sufficient to fulfil the requirement of nationality of claims for the purpose of diplomatic protection’ and that ‘EU member states cannot be forced to exercise diplomatic protection.’<sup>97</sup> In line with this understanding it could be argued that Art. 23 TFEU forms a deviation from general international law.<sup>98</sup> In line with Art. 20, this Article provides:

‘Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions

<sup>92</sup> For this argumentation see: F. Austermann, 2012, *supra* note 18; Raik, *supra* note 40; and R.A. Wessel and B. van Vooren, *supra* note 30.

<sup>93</sup> A.M. Fernández Pasarín, *supra* note 14.

<sup>94</sup> *Panevezys-Saldutiskis Railway* case, Permanent Court of International Justice, *Estonia v. Lithuania*, PCIJ Series A/B, No. 76 (1937).

<sup>95</sup> A. Künzli, ‘Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance’, 66 *Heidelberg Journal of International Law*, 2006.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, at 346.

<sup>98</sup> R.A. Wessel, *supra* note 58.

as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.’

The CARE report opposes this understanding and argues that ‘the Union clearly provides a right to diplomatic protection for the Union citizens which must be exercised by another Member State than the State of nationality of the Union citizen is not represented on the spot by his/her own Member State’.<sup>99</sup> In their understanding, Art. 20 TFEU establishes

‘a right of the citizens, not a right of the State, and for the exercise of diplomatic protection by the Member States to non-nationals, the Union has developed its own concept of diplomatic protection, which does not go against the rules of public international law’.<sup>100</sup>

Decision 95/553/EC picks up on Art. 20 TFEU and states that every Union citizen is entitled to consular protection of any Member State’s diplomatic or consular representation, if the state of origin has no representation, or the representation is not accessible. Among the actions included in such protection are assistance in cases of death and assistance in cases of arrest or detention. Drafters clearly intended to mean consular assistance, but assistance in cases of arrest or detention can likely give rise to diplomatic protection.<sup>101</sup>

While it remains unsure to what extent other Member States may help in consular matters (see above), it is even more unlikely that other Member States can take over in diplomatic protection matters. ‘The consular or diplomatic agent (of the other Member State) will not be entitled to take action with the local authorities in a way that would amount to diplomatic protection due to the requirement of nationality of claims’.<sup>102</sup> Thus, the issue is strongly connected to the status of EU citizenship. As long as EU citizenship does not equate nationality in the eyes of third states, the EU Member States will face difficulties providing diplomatic protection on behalf of an EU citizen coming from another Member State. For any involvement by the Delegations, the specific consent by the receiving state will be necessary, due to the same reasons as elaborated above.

There have been arguments that the EU should be able to provide diplomatic protection in cases concerning a breach of an agreement between it and a third state for the benefit of individuals, as occurred in the *Odigitria* case.<sup>103</sup> While such instances are limited and only concern cases in which the EU is the holder of the right violated and not the individual Member State, they do happen.<sup>104</sup>

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<sup>99</sup> See CARE, *supra* note 70, at 27.

<sup>100</sup> *Ibid.*

<sup>101</sup> A. Künzli, *supra* note 95.

<sup>102</sup> *Ibid.*, at 348.

<sup>103</sup> Court of First Instance (First Chamber), *Odigitria AAE v Council of the European Union and Commission of the European Communities*, Case T-572/93, 6 July 1995.

<sup>104</sup> See A. Vermeer-Künzli, *supra* note 38.

*e. Represent EU citizens before court*

As stated earlier, this kind of representation belongs to diplomatic protection which has even stricter requirements than consular assistance, making it highly unlikely for EU Delegations to be able to act. One could merely imagine a situation in which the EU Delegations act as a form of consulate and 'have a particular role in assisting national in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime'.<sup>105</sup> The Delegation staff would not have the power to intervene in a judicial process to prevent a denial of justice, they could only have a representative character in cases where the individual is unable to attend a trial him/herself.<sup>106</sup>

If the Head of Delegation or any Ambassador were to get involved in the judicial process, he or she would represent the EU or his/her state of origin, and thus the actions would no longer count as (consular) assistance but as diplomatic protection. Yet, in the case of a Head of Delegation, the Ambassador title is only a courtesy title, therefore, the actual power in the judicial process is questionable. Furthermore, a scenario where the Head of Delegation would go to such lengths is unlikely. Most probably, the Delegations would contact the responsible embassy as soon as possible and thereby support the EU citizen in distress.

*f. Safeguard interests in case of succession mortis causa*

Currently, Regulation 650/2012, which recently became effective after a period of transition on August 17, 2015, deals with all matters related to succession with cross-border elements. It establishes that

'a given succession is treated coherently, under a single law and by one single authority; citizens are able to choose whether the law applicable to their succession should be that of their habitual residence or that of their nationality; parallel proceedings and conflicting judicial decisions are avoided; and mutual recognition of decisions relating to succession in the EU is ensured'.<sup>107</sup>

The new regulation fosters faster, easier and cheaper procedures by establishing a common European framework. Problematic is the fact that Denmark, Ireland and the UK are not part to the framework, but the latter two reserved for them the right to adopt the Regulation later.<sup>108</sup> Taking into account that there is already an EU regulation in place, the Delegations can help to enforce the Regulation and cooperate with citizens and Member States.

<sup>105</sup> M.N. Shaw, *International Law* (Cambridge: Cambridge University Press 2014), Chapter 11.

<sup>106</sup> See A. Künzli, *supra* note 95, at. 332.

<sup>107</sup> European Commission, 'Successions and wills' available at <[http://ec.europa.eu/justice/civil/family-matters/successions/index\\_en.htm](http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm)>.

<sup>108</sup> *Ibid.*

*g. Assist minors and persons lacking full capacity*

There is very limited literature and information on any discussion regarding the assistance of minors or persons lacking full capacity. Solely in response to a petition by an EU citizen whose son was abducted in Egypt, the EEAS released the following statement:

‘Defending the rights of their citizens in a third country is primarily the task of the concerned EU Member States and, regrettably, the EU has neither the capacity nor the competence to follow each individual case. Nevertheless, the European Union is working on the multilateral track in order to improve the international legal framework that would apply to all EU countries’.<sup>109</sup>

An imaginable position for the EU Delegations could be that of a service point, enabling EU citizens to get into contact with authorities from their country of origin to organize amongst other issues the transport back home.

*h. Assist during investigation of vessels and aircrafts*

The instances described in these provisions, which could necessitate the EU Delegations to act, are seldom. The only scenario applicable is when ships with a Member State flag (sailing under an EU flag only is not possible) are stopped and investigated, whilst carrying out actions falling under the exclusive competences of the EU. Examples are fishing agreements concluded by the EU and certain third states. In the agreement between the EEC and the Republic of Côte d’Ivoire on fishing off the coast of the Republic, the following two provisions are included: (1) In case of seizure of fishing vessels flying the flag of a Member State, this shall be notified to the Delegation and simultaneously to the consular agent of the Member State of the flag and (2) before any judicial procedure is started an attempt shall be made to resolve the presumed infringement through an administrative procedure.<sup>110</sup>

By informing the Delegation and actively involving it in the process, the Delegation could support and coordinate the administrative procedure through its connections to all Member States and Brussels, and provide information whenever needed. The benefit of such involvement could be a faster resolution of the case.

*i. Promoting bilateral relations*

While the promotion of relations is not specifically mentioned in the EEAS Decision, it is commonly referred to in the Establishment/Headquarters Agreements and on the Delegation websites as an important part of their mission.

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<sup>109</sup> Letter by Head of Division, Division Middle East I - Egypt, Jordan, Lebanon, Syria of the EEAS called ‘Response to petition regarding rights of EU citizens in Egypt’ from 2012.

<sup>110</sup> I. Govaere and S. Poli, *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill: Martinus Nijhoff Publishers 2014).

According to the mandates listed on the respective Delegation websites, Delegations may for instance be 'responsible for the conduct of official relations'<sup>111</sup> and 'enhance bilateral relations in the political, economic, commercial, environment, social and cultural fields, including new opportunities for cooperation'.<sup>112</sup> According to a selection of Establishment Agreements, the EU and the third state establish the Delegations 'desirous of further strengthening and developing the friendly relations and cooperation'.<sup>113</sup> Relations almost always date back to before Delegations even existed and therefore just need to be continued and fostered.

Further important issues mentioned (yet not further defined) are the defence of European values, such as democracy and rule of law, and the maintenance and increase of awareness, visibility and understanding of the EU among the public in the receiving state.<sup>114</sup>

The promotion of bilateral relations is most effective when the Head of Delegation and the team of diplomats are familiar with the local customs and ideally speak the host country's official language fluently.<sup>115</sup>

## 4. EU DELEGATIONS IN PRACTICE

### 4.1 The Selection of Delegations

Legal texts only partly provide the answers. To investigate how Delegations *behave* regarding the identified points and perceive their tasks, a questionnaire was developed covering all nine tasks mentioned in the previous section. The questionnaire includes both questions on the tasks and room for the Delegation official to present a personal opinion on where the Delegations should move to. The questionnaire can be found in the appendix; the answers are on file with the authors.

Selecting the Delegations was done with regard to the following criteria. The sample population is limited to the number of Delegations under the EEAS. Currently, according to the EEAS website,<sup>116</sup> there are 139 Delegations and offices around the world, including also Delegations to international organisations. The latter were excluded from the possible cases, leaving a sample of 131 Delegations. Another criterion is the number of national embassies by

<sup>111</sup> The EU Delegation to China 'The Role of the EU Delegation', available at <[http://eeas.europa.eu/delegations/china/about\\_us/delegation\\_role/index\\_en.htm](http://eeas.europa.eu/delegations/china/about_us/delegation_role/index_en.htm)>.

<sup>112</sup> The EU Delegation to Australia 'The Role of the EU Delegation', available at <[http://eeas.europa.eu/delegations/australia/about\\_us/delegation\\_role/index\\_en.htm](http://eeas.europa.eu/delegations/australia/about_us/delegation_role/index_en.htm)>.

<sup>113</sup> Agreement between the Commission of the European Communities and the Government of the Kingdom of Norway on the Establishment and the Privileges and Immunities of the Delegation of the Commission of the European Communities in the Kingdom of Norway, from 1987, *supra* note 56.

<sup>114</sup> The EU Delegation to Kazakhstan 'The Role of the EU Delegation', available at <[http://eeas.europa.eu/delegations/kazakhstan/about\\_us/delegation\\_role/index\\_en.htm](http://eeas.europa.eu/delegations/kazakhstan/about_us/delegation_role/index_en.htm)>.

<sup>115</sup> See Helly at al., *supra* note 17.

<sup>116</sup> European External Action Service, 'EU Delegation's websites', available at <[http://eeas.europa.eu/delegations/index\\_en.htm](http://eeas.europa.eu/delegations/index_en.htm)>.

Member States in the specific country. In the final selection, there are three Delegations in countries with many representations and another three in countries with few. There are only three countries in which all 28 Member States have a mission: the US, China and Russia. Then there is a high number of receiving states where only around three Member States have a mission,<sup>117</sup> in addition to the EU Delegation. The underlying consideration for this criterion is the increased need for help by the Delegations in case the own Member State is not represented.

Apart from the questionnaire, the websites of the Delegations have been consulted for information, excluding Delegations with a website in any other language than English. Most states in South America and Africa have websites in French, Spanish or Portuguese only and were excluded for that reason, although we have been able to include countries from those regions.

On the basis of these selection criteria, six cases were chosen.

#### *a. Delegation to the United States*

The Delegation is located in Washington, DC since 1954 and is thereby the first overseas representation of the EU. It is also one of the largest Delegations with approximately 100 people in staff, whereof 30 are EU diplomats and the remaining personnel are seconded national diplomats or locally engaged staff.<sup>118</sup> The Delegation works in close cooperation with the missions of the 28 EU Member States and 'presents and explains EU policy to the U.S. Administration and to Congress, and analyses and reports on the political, social, and economic situation in the U.S. to its headquarters in Brussels'.<sup>119</sup> Apart from the EU representations, nearly every country in the world has a diplomatic mission here. The only city to have more diplomatic missions than Washington is Brussels.

The Lead State concept is not in place, as all EU Member States are represented in the United States. The United States is one of three countries worldwide where all 28 Member States have a mission.

#### *b. Delegation to Canada*

The Delegation to Canada was established 1976 and currently employs around 25 Delegation officials, divided in Political and Public affairs, Economics and Trade, and Administration. The Delegation differs to others with regard to the lacking assistance section. This can be explained by the fact that Canada was always on a similar industrial development process as the EU, which also indicates the safety level of Canada. Due to this stability, the EU Delegation was

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<sup>117</sup> See K. Raik, *supra* note 40.

<sup>118</sup> The EU Delegation to the United States, 'Meet our staff', available at <<http://www.euintheus.org/who-we-are/meet-our-staff/>>.

<sup>119</sup> The EU Delegation to the United States, 'The European Union: A guide for Americans', 2015.

never required to get involved in a crisis situation and the Lead State concept is not in place.

Apart from the Delegation, 25 Member State missions are present. While the embassies of Slovenia and Lithuania have the same address as the Delegation, the three representations do not work in co-location.

#### *c. Delegation to Peru*

The Delegation to Peru is located in Lima since 1991 and moderately big with around 40 people working in the Delegation. Next to the EU Delegation 14 Member State missions are present in Peru. 'The Delegation in Peru has a diplomatic status similar to that of those countries with established diplomatic relations in the country and as such enjoys a regime of privileges and immunities, contained in a Headquarters/Agreement signed with the Peruvian Government in 1990'.<sup>120</sup> The Delegation works in close cooperation with the EU Member States in all areas, and Delegation officials have an 'excellent relationship with colleagues in EU MS Embassies'.<sup>121</sup>

#### *d. Delegation to Belarus*

The Delegation to Belarus in Minsk opened in 2008 and is thereby the youngest case, and rather medium-sized with around 30 people in staff. Of the 28 EU Member States, 16 Member States have missions present. Belarus is part of the European Neighbourhood Policy (ENP), and therefore benefits from EU-funded assistance and cooperation programmes. ENP was initiated in 2004 with the goal of 'avoiding the emergence of new dividing lines between the enlarged EU and our neighbours and instead strengthening the prosperity, stability and security of all. It is based on the values of democracy, rule of law and respect of human rights'.<sup>122</sup> Belarus differs from all other cases with respect to the Lead State concept. In Belarus the concept is in place and under the leadership of Poland.

#### *e. Delegation to New Zealand*

The Delegation was established in 2004, and is therefore the second youngest Delegation compared to the other cases. The Delegation is also extremely small, with a total staff number of 8. Apart from the Delegation, 8 Member State missions are present in New Zealand, and another 15 missions are based in Canberra, Australia, which are also accredited to New Zealand.

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<sup>120</sup> The EU Delegation to Peru, 'The role of the EU Delegation', available at <[http://www.eeas.europa.eu/delegations/peru/about\\_us/delegation\\_role/index\\_en.htm](http://www.eeas.europa.eu/delegations/peru/about_us/delegation_role/index_en.htm)>.

<sup>121</sup> European Diplomat at the EU Delegation to Peru; all answers are from 2015.

<sup>122</sup> See also Art. 8 TEU. For more information on ENP please visit <[http://eeas.europa.eu/enp/about-us/index\\_en.htm](http://eeas.europa.eu/enp/about-us/index_en.htm)>.

'The Delegation acts as a provider of information to New Zealanders about the European Union, its policies and activities; and as a conduit for regular exchanges with the New Zealand government'.<sup>123</sup>

#### *f. Delegation to Zambia*

This Delegation was opened in 1975 following Zambia's signing of the first Lomé Convention. Under the Lomé Convention, development cooperation activities were initiated, which were implemented by the Delegation in close cooperation with the Government of Zambia.<sup>124</sup> Due to its membership to the African, Caribbean, Pacific countries (ACP), Zambia and the EU share special relations. In recent times, the role of the Delegation has changed from coordinating cooperation programmes to playing 'an essential role in providing information on the policies and institutions of the EU. In doing so, the Delegation works closely with' the 7 Member States' missions in Zambia.<sup>125</sup> The Delegation is medium-sized with 55 member of staff.

### **4.2 Analysis of the Findings**

In order to provide a better overview, the nine tasks will be grouped together as follows. Under the notion of consular assistance, assistance to minors, succession in case of death, issuance of travel documents and visa, and inspection of vessels are included. Under the notion of diplomatic protection, is the representation before courts included. A third category concerns the promotion of bilateral relations.

#### *a. Consular assistance*

Regarding the issuance of travel documents to EU citizens, all six Delegations responded that they do not and never have issued travel documents to EU citizens in distress. They are willing to find out the responsible representation, but no more. We can conclude that this task is neither mentioned in the EEAS Decision nor applied in reality.

When looking at the task of issuing visa to non-EU citizens, the Delegations also responded that they do not issue any visa. They will provide information on which Member State embassy or consulate is responsible, following the visa application rules explained above. We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

Third is the issue of consular assistance. Delegations stated that they will provide guidance with the tools they have, and provide the citizen with informa-

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<sup>123</sup> EU Delegation to New Zealand, 'Welcome', available at <[http://eeas.europa.eu/delegations/new\\_zealand/about\\_us/welcome/index\\_en.htm](http://eeas.europa.eu/delegations/new_zealand/about_us/welcome/index_en.htm)>.

<sup>124</sup> The EU Delegation to Zambia 'The role of the EU Delegation', available at <[http://eeas.europa.eu/delegations/zambia/about\\_us/delegation\\_role/index\\_en.htm](http://eeas.europa.eu/delegations/zambia/about_us/delegation_role/index_en.htm)>.

<sup>125</sup> *Ibid.*

tion and contact to the responsible mission.<sup>126</sup> The Delegation official from Peru reports going beyond the call of duty by helping a non-represented citizen through personal contacts. He spoke 'with a Colleague of that particular Member State working in the EU Delegation in Mexico', to 'find out the responsible Embassy (Brasilia) and establish the contact. Then it is up to the person to get in touch'.<sup>127</sup> Apart from their role as an information provider, the Delegations organise the monthly consular meetings with the representatives from the national embassies and consulates, which are chaired by the Member State holding the rotating presidency. The Delegation participates in these meetings, and is therefore well informed on all issues connected to the 'Schengen agreement and bilateral visa waiver agreements between host country and the Member States'.<sup>128</sup> We can conclude that the task is not mentioned in the EEAS Decision, and Delegations cannot formally act, but they are involved as an information provider for citizens and as a meeting point for a Member State embassy and consulate officials.

Now looking at the assistance regarding safeguarding the interests in case of succession *mortis causa*, all Delegations reported that they do not get involved in such instances but rather 'expect EU Member States Embassies / Consulates to handle these situations'.<sup>129</sup> We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

The same goes for the assistance of minors and persons lacking full capacity. Delegations claim to have 'no administrative responsibility'<sup>130</sup> and therefore just provide basic support until the Member State representations take over. We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

Regarding the involvement of the Delegations during the investigation of vessels, most Delegations do not seem to be aware of this issue,<sup>131</sup> and were therefore never involved in a situation where the Delegation took up such tasks. We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

As shown in the explanations of the different tasks above, the EU Delegations at this moment have no responsibility in each of the points under the category of consular assistance. Yet, there is room for development towards a greater role of the Delegations, as for example in the issuance of travel visa. While the increase of competence in the latter example depends highly on the Member States and their (change of) opinion on the utility of the Delegations, other areas such as the provision of consular assistance face certain complex legal issues.

Consular protection is a universal right to all EU citizens which has to be fulfilled by the Member States. According to public international law, consular

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<sup>126</sup> European Diplomat at the EU Delegation to Belarus. All answers are from 2015.

<sup>127</sup> EU Delegation to Peru, *supra* note 120.

<sup>128</sup> European Diplomat at the EU Delegation to New Zealand. All answers are from 2015.

<sup>129</sup> The EU Delegation to Peru, *supra* note 120.

<sup>130</sup> European Diplomat at the EU Delegation to Canada. All answers are from 2015.

<sup>131</sup> European Diplomat at the EU Delegation to the United States. All answers are from 2015.

protection is linked to nationality. For any State to provide consular protection to a citizen, this nationality claim must exist. The right to consular protection by the EU would need to be included in agreements with third states. Due to this lack of formal legal agreements, Member States and the EU have to rely on the consent by the receiving state for their execution of this protection. The EU Delegations are currently (merely) assisting the Member State missions after a request for help, provide EU citizens with information, and organise and hold the monthly consular and Schengen meetings with the representatives from the Member State missions present in that country.

There is a broad discussion on the added support by the Delegations with arguments ranging from: consular assistance being at the core of sovereignty, and Delegations being unable to provide assistance on a resource-neutral basis, to saving national budget, bringing the EU closer to its citizens and reacting to the increasing number of EU citizens travelling/living abroad. We can argue that while the points are not mentioned in the EEAS Decision, they are also not applied in reality. Delegations stay close to their role as an information provider, just this time more directly in contact with the EU citizens and less so with the EU institutions in Brussels. Also, with regard to the differences between the six selected Delegations, we can conclude that the number of national representations by the EU Member States does not seem to have an influence on the behaviour of the Delegations regarding these tasks.

Even more interestingly may be the responses by the Delegations on the discussion of an extension of competences. While the opinions among the scholars and the Member States are widespread, there is a clear trend among the Delegations. They seem to have a generally positive attitude that in the medium to long turn Delegations will be given the competence to act in consular matters. They are aware that for this to happen, the Member States need to want a change,<sup>132</sup> need to harmonize their views,<sup>133</sup> and need to strengthen the capacity/human resources of the EU Delegations.<sup>134</sup> When these steps are taken, which according to a Delegation official could be in the next four to six years,<sup>135</sup> Delegations are able to help in cases involving unrepresented citizens.

When asking the Delegations where they see the Member States in the possible process of acquiring more consular competences, the position of the Delegations can be summarized by saying that 'Member States would have to decide if such development is desirable; it would be for the Member States to decide if they continue to play their role as at present, or transfer some tasks to the EU'.<sup>136</sup> A supporting argument for an enhanced role of EU Delegations is the fact that 'EU Member States close more of their Embassies'.<sup>137</sup> 'If they have withdrawn their missions from third country X, then they would expect greater assistance from an EU Delegation'.<sup>138</sup>

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<sup>132</sup> The EU Delegation to Peru, *supra* note 120.

<sup>133</sup> *Ibid.*

<sup>134</sup> The EU Delegation to Zambia, *supra* note 124.

<sup>135</sup> The EU Delegation to Peru, *supra* note 120.

<sup>136</sup> The EU Delegation to Zambia, *supra* note 124.

<sup>137</sup> The EU Delegation to Peru, *supra* note 120.

<sup>138</sup> *Ibid.*

*b. Diplomatic protection*

Regarding diplomatic protection, all Delegations stated that they cannot provide this sort of protection to an EU citizen, and never have been able to do so. The sole instance in which the Delegation would become active is if one of the Delegation officials had problems with his diplomatic visa.<sup>139</sup> We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

Next is the issue of representation of EU citizens before court. Delegations stated that if no responsible Member State is represented in the third country, they would provide support with the basic tools they have, and as soon as possible contact the responsible Member State to take over. Furthermore, the Delegation official from the US stated that his Delegation is not involved in 'such services in the United States because all 28 EU MS are represented in the United States'.<sup>140</sup> We can conclude that the task is neither mentioned in the EEAS Decision nor applied in reality.

As predicted in the literature, Delegations currently do not act regarding these two tasks. They fulfil a supporting role, but are limited in further action by legal difficulties. Diplomatic protection goes beyond consular matters as it represents the interests of a state in a conflict between states. While the EU provides its citizens in Art. 20/23 TFEU with the right to diplomatic protection by the embassy of any Member State on the same conditions, as a national of that Member State, this right is troublesome in the light of international law. Diplomatic protection is strongly linked to nationality, wherefore the specific consent by the receiving state for any sort of diplomatic protection by a state which is not the state of origin is necessary. It may already be difficult for third states to accept the provision under Art. 23 and even more unlikely that they accept a formal role of EU Delegations in these actions. Delegations can merely take on a 'consular'/supporting role by representing the EU citizen in case he cannot attend the court proceedings and enabling the contact to the responsible national embassy. But, it could be argued that it makes sense to give Delegations a larger role in cases related to exclusive EU competences.

While academics largely point to the problems related to an extension of the Delegation's mandate in these matters, the Delegations themselves are moderately positive by stating that it could happen in the future (but not in the short-term),<sup>141</sup> provided that the Member States wish so,<sup>142</sup> Member State embassies increase their cooperation with Delegations<sup>143</sup> and the human resources of the Delegations are stocked up.<sup>144</sup> A supporting factor could be the instance when no Member State is present in a third country.<sup>145</sup>

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<sup>139</sup> The EU Delegation to Peru, *supra* note 120.

<sup>140</sup> European Diplomat at the EU Delegation to Canada. All answers are from 2015.

<sup>141</sup> The EU Delegation to Peru, *supra* note 120.

<sup>142</sup> European Diplomat at the EU Delegation to Zambia. All answers are from 2015.

<sup>143</sup> The EU Delegation to Peru, *supra* note 120.

<sup>144</sup> EU Delegation to Zambia, *supra* note 124.

<sup>145</sup> *Ibid.*

*c. Bilateral relations*

All six Delegations answered clearly that an important part of the Delegation's work is the promotion of friendly relations, according to one official even 'the primary work of the Delegation's sections' (European Diplomat United States, 2015). Delegations aim to stimulate relations through activities, which may include conferences, presentations and discussions (European Diplomat Canada, 2015). Five out of six Delegations reported that relations were already good before the Delegation was established, with the exception of Belarus which stated that 'relations were at times strained' (European Diplomat Belarus, 2015).

Academic literature remains largely silent on the issue, whereas the mandates published on the websites and the Establishment Agreements do mention the topic. Relations can be of a political or economic nature, may include trade, transport or scientific cooperation, can be with the goal to further education or external assistance, and can also involve the defending of European values.

To conclude, the information from the websites and Establishment Agreements coincides with the insights from the questionnaire. While the EEAS Decision does not specifically mention the maintenance of bilateral relations as a task of the Delegations, Delegations do engage in this task. This point is therefore the only point in which the Delegations act, even though the task is not specifically mentioned under Art. 5 or at another point in the EEAS Decision.

## 5. CONCLUSION

The aim of the present paper was to compare the tasks of EU Delegations and national embassies, both on the basis of a comparison between the key legal texts and by asking selected Delegations about their perception of their mandates. The Vienna Conventions functioned as an orientation point for the EEAS Decision drafters. Yet, because the EU as an international organisation cannot become a party, the Conventions are applied to the widest extent possible in the EEAS Decision as well as in the Headquarters Agreements concluded with third states.<sup>146</sup>

It became clear that the tasks of national representations are far more extensively described than the tasks of EU Delegations. While both texts include as tasks of the mission (1) being an information provider for the sending State/the EU and its Member States (2) representing the sending State/the EU in the receiving State and (3) having the capacity to negotiate with the government of the receiving State, the EEAS Decision lacks nine other traditional tasks. We can therefore argue that while the texts are closely related in several aspects (for example taking up diplomatic relations), with regard to the tasks of repre-

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<sup>146</sup> See Art. 5(6) Council Decision establishing the organisation and functioning of the European External Action Service, *supra* note 8; as well as the examples given earlier with the Headquarters Agreements

sentations they are different in respect to the missing nine points in the EEAS Decision.

The nine identified tasks were dealt with in detail. The main points of discussion in relation to consular assistance were the right to consular protection by any Member State mission in the territory of a third state for an unrepresented Union citizen (Art. 23 TFEU), the lacking inclusion of this right in the agreements by the Member States (only Italy and Portugal have fulfilled their duty to include the provision), and the (rarely contested) acceptance by third states for the execution of this right. Important for the discussion is also the lacking nationality claim, due to the fact that EU citizenship does not equate nationality according to international law. If the EU Delegations were to receive increased competences by the Member States, bilateral agreements with the third states would still be necessary to make the right legally binding. As long as neither of the two sorts of agreements exist, it is up to the discretion of the receiving state whether a Member State mission or a Delegation may perform the duty they were tasked with under EU law.

The same goes for diplomatic protection. This protection only arises after an internationally wrongful act has occurred, necessitating the respective state to act. This is thus no longer about representing the citizen, but rather the state. While consular assistance can be relied on after an uncontested notification to the third state, diplomatic protection needs the specific consent by the third state. Yet again, EU citizenship is not sufficient in international spheres, as it does not equate nationality.

To find out how Delegations behave regarding these nine points, a questionnaire was created and sent to six selected Delegations. From the responses several conclusions can be drawn. Firstly, Delegations do not issue travel documents and visas, provide consular assistance, provide diplomatic protection to EU citizens, represent EU citizens before court, safeguard interests in case of succession *mortis causa*, assist minors or persons lacking full capacity, or assist during investigation of vessels. Most of this can, of course, be explained by the fact that Delegations (or the EU as such for that matter) do not have the competences in these areas and that any might not only result in violations of EU law, but even in some cases of international diplomatic rules. Secondly, Delegations stated that they would in all instances provide support with the basic tools they have and facilitate the contact to the responsible Member State mission. Through their participation in monthly consular and Schengen meetings they are well informed. Thirdly, the promotion of bilateral relations stood out. While the EEAS Decision does not formally mention it, Delegations agree that it is part of the Delegation's work.

We can therefore conclude that Delegations behave rather conservatively in the instances not formally mentioned in the EEAS Decision. They do not actively engage in eight out of the nine points, but stay close to their role as an information provider. Only regarding one point do the Delegations deliberately behave differently, as they make it one of the most important parts in their daily work: the maintenance of friendly relations.

So, how 'embassy-like' are the EU Delegations in practice? We are bound to conclude that for EU citizens in third countries not so much has changed. In a formal legal sense the tasks of EU Delegations are limited compared to national embassies and also in practice the Delegations are hesitant to stretch their powers. Yet, the perception by staff members differs and often reveals similarities with national embassies. While perhaps anecdotal, some answers to the surveys questions were interesting in this respect. Thus, one Delegation official summarized that

'in many ways, this Delegation does function like an embassy. The sections of the Delegation reflect the scope of its work, much of which mirrors that of an embassy. From a public diplomacy perspective, we do the same sort of work as Member State embassies, promoting the European Union and its policies. What makes the European Union unique is that it is based on its 28 Member States and we frequently engage in work to enhance their collective and individual visibility. But of course in several key respects, the Delegation is not an embassy. We do not engage in consular activity'.<sup>147</sup>

Another official stated more directly that 'The EU Delegation is an Embassy and acts as such in all circumstances'.<sup>148</sup> Thus, despite their formal conservatism, Delegations seem to perceive themselves as very much 'embassy-like'.<sup>149</sup>

When compared to the actual tasks, this positive perception on the role of EU Delegations may also bring about additional complexity, and additional coordination is necessary. This has also been concluded by other studies:

'The new EU Delegation role of coordinating with member states is clearly perceived as positive. More fine-tuning may be needed in the effort to define the areas where the EU Delegation should get involved and where not. [...] The question is thus not whether the EU Delegation [...] is able to take over from member states, but rather how member-state efforts, EU Delegation activities and the close coordination of both is likely to enhance representation of the EU and its member states in the most useful manner [...].'<sup>150</sup>

Yet, regarding a possible future for the Delegations in consular matters or other areas, one might argue – keeping in mind functionalist spill-over theories – that the current situation is not final. Given the extensive focus on coordination and cooperation in many areas, this may eventually spill over onto other areas. It seems that the consulted Delegations would at least support such a development.

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<sup>147</sup> European Diplomat at the EU Delegation to Canada. All answers are from 2015.

<sup>148</sup> The EU Delegation to Peru, *supra* note 120.

<sup>149</sup> This is supported by the analysis of J. Wouters and S. Duquet, *supra* note 7: 'Delegations may fly the European flag, play the anthem, and enter heads of EU Delegation on the diplomatic list. This role, carried out by the EEAS Protocol Unit, is analogous to that of a protocol service in a state's Ministry of Foreign Affairs. Similarly, the EEAS ensures that all Delegations benefit from full application of the Vienna Convention. [...] This approach evidences the primary concern of the EEAS, i.e. recognition on the basis that is 'one of the others' – with all the others being states.'

<sup>150</sup> Maurer, *supra* note 5, at 285-286.

## APPENDIX: QUESTIONNAIRE

*General information*

1. What is your job in the Delegation?
2. How many national missions are present in your country?
3. Do you initially come from the Commission, the Council or from your country of origin as a seconded diplomat?
4. How large is your Delegation?
5. Does the EU follow the Lead State concept in your respective receiving State?
6. Were you as a Delegation ever involved in coordination and rescue operations after a crisis situation?
7. How clearly do you divide between exclusive EU competences and shared EU-MS competences in your daily work?

*Interview questions on tasks*

1. Do you issue passport and travel documents to citizens of the EU?
  - a. If yes, how often does that approximately happen per year?
2. Do you issue visas or appropriate documents to persons wishing to travel to the EU?
  - a. If yes, in the form of Schengen visa?
  - b. What do you do in instances where persons wish to travel to the UK and Ireland?
3. Do you provide consular assistance to EU citizens?
  - a. If yes, can you give an example of a service?
  - b. What is your relationship with national missions regarding this aspect?
4. Do you provide diplomatic protection to EU citizens?
  - a. If yes, can you give an example of an instance when you had to take on such a task?
5. Do you subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the EU before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of the nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests?
  - a. Can you give an example of an instance where you had to take on such tasks?
6. Do you safeguard the interest of nationals, both individuals and bodies corporate, of the EU in cases of succession mortis cause in the territory of the receiving State, in accordance with the laws and regulations of the receiving State?
  - a. If yes, do you follow the guidelines as described in Regulation No. 650/2012?
7. Do you safeguard, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the EU, particularly where any guardianship or trusteeship is required with respect to such persons?
8. Do you promote friendly relations between the EU and the receiving State, and develop their economic, cultural and scientific relations?
  - a. Did the EU and your receiving country already have good relations, before the Delegation started its work?

9. Do you exercise rights of supervision and inspection provided for in the laws and regulations of the EU in respects of vessels having the nationality of the EU, and of any aircraft registered in that State, and in respect of their crews?
  - a. Do you to take statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents occurred during the voyage, and settle disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the EU?

*Interview questions on personal opinion*

1. Do you see a future for consular assistance by the EU Delegations?
2. Do you see a future for diplomatic protection by the EU Delegations?
3. Where do you see the Member States in this development?
4. Would you say that your Delegation has ever behaved like an embassy?

