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International and
Comparative Law**

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THE USE OF PUBLIC DOCUMENTS IN THE EU

Study on the difficulties faced by citizens and economic operators because of the obligation to legalise documents within the Member States of the European Union, and the possible options for abolishing or simplifying this obligation.

EXECUTIVE SUMMARY

presented by

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EXECUTIVE SUMMARY

PART I: The role of Public Documents in the process of recognition of EC rights by the Member States

- The process of recognition of an EC right may involve the requirement for a person to provide certain specific proof of factual circumstances under which the entitlement to the EC right exists. The EC Burden of Proof is, in principle, on the person claiming the right.
- If the conditions for recognition of EC rights are harmonised, Member States are not allowed to make recognition subject to other conditions, no discretion to recognise an EC right exists if all applicable conditions under EC law are fulfilled and the means of evidence provided for must be accepted as well as any other appropriate means.
- The EC Standard of Proof requires that Member States establish the fulfilment of requirements under EC law for the existence of an EC right on the basis of the evidence provided in a particular case. Authorities are not permitted to lower EC standards of proof unilaterally.
- Appropriate means of evidence for the purpose of proving EC rights must satisfy three conditions, they must: (1) be sufficiently objective; (2) leave no doubts; and (3) be satisfactory for purposes of verification. Public Documents derive from an objective source and represent a reliable and durable source of information. This makes them the most appropriate means of evidence for proving EC rights.
- In the absence of harmonisation, Member States must themselves assess whether an EC right must be recognised. The means of evidence provided for under national law have to be in line with the principle of EC loyalty (Article 10 EC), and the principles of effectiveness and equal treatment.
- Legal diversity between the Member States as regards the means of evidence that are required undermines the principle of legal certainty in the EC legal order. EC instruments often fail to clarify precisely the means of evidence that must be accepted by the Member States.

PART II: The role of Public Documents in the EC context of free movement and civil justice

- Public Documents fulfil an indispensable function for the purpose of ensuring that EC rights can be exercised effectively by their beneficiaries. Public Documents differ depending on the subject matter to which they relate and a wide variety of Public Documents are relevant under EC law.
- The indispensable function of Public Documents can be confirmed for the following areas: (1) free movement of goods; (2) free movement of Union citizens and their family members; (3) free movement of workers and self-employed persons; (4) freedom of establishment; (5) free movement of services; (6) mutual recognition of professional qualifications; (7) income tax of non-resident migrant workers; (8) social security; (9) refund of VAT for non-established taxable persons; (10) access to justice (legal aid) in civil and commercial matters for citizens and businesses; (11) effective justice in civil and commercial matters, including insolvency proceedings, for citizens and businesses; (12) effective justice for citizens in matrimonial matters and matters of parental responsibility
- The harmonisation of the form and substance of Public Documents is a development at EC level where their use is necessary for the proper functioning of the internal market and the civil justice area. This trend is not reflected equally in all analysed areas of EC law and in certain areas no harmonisation has taken place at all.
- Mutual cooperation and assistance between Member State authorities is a legal fact in many areas of EC law in relation to the administration of Public Documents originating in other Member States. Besides constituting a general principle of EC law, several EC instruments contain specific measures to ensure that such cooperation becomes a matter of fact in practice. In certain areas cooperation and assistance is not or insufficiently developed.

PART III: The acceptance, recognition and effect of Public Documents for evidentiary purposes

- The principal function of a Public Document is to provide factual proof of acts of a public authority recorded therein. Public Documents are generally accepted in the Member States subject to: (1) proof of their authenticity; (2) the production of the document in a particular form; and (3) the production of a (certified) translation of the document.
- Domestic Public Documents are presumed to be authentic without additional proof. In case of doubt the purported author of the document is usually contacted directly through administrative cooperation. Foreign Public Documents generally require some proof of authenticity. Legalisation is generally accepted as an appropriate means of evidence, but not always required.
- The division of the burden of disproving the authenticity of Public Document differs between Member States. In relation to domestic documents it usually on the party or public authority who challenges the authenticity. For foreign Public Documents it is commonly on the party wishing to rely on the document.
- Member States generally accept originals and certified copies of Public Documents. Simple photocopies are therefore not commonly accepted. EC law sometimes requires the Member States to accept simple photocopies.
- Certified translations are usually required before Public Documents are accepted. EC law does not address the issue in a uniform manner. In some areas, documents in any official language of the EC institutions must be accepted, while in other areas translations may be required.
- Domestic documents that purport to be Public Documents are automatically recognised as such for evidentiary purposes in a majority of the Member States. Most Member States do not require further conditions for recognition of foreign Public Documents apart from Legalisation.
- Domestic and foreign Public Documents are admissible as evidence as factual proof of the act of public authority recorded therein, including what is officially decreed, declared, or witnessed therein. Sometimes Domestic Public Documents are in addition admissible as proof of the validity of public acts recorded therein and the legal acts and relationships that were prerequisite for their execution.
- In most Member States domestic and foreign Public Documents have a privileged evidential value which is stipulated by law in shifting the Burden of Proof in relation to those issues for which the document is admissible into evidence.

PART IV: The Legalisation of Public Documents

- 'Legalisation' and 'authentication' are synonymous terms in that both concern the certification and verification of the authenticity of a Public Document. Legalisation does not concern a document's validity or accuracy or that of the act of public authority recorded therein.
- Legalisation usually establishes a legal presumption of a foreign Public Document's authenticity. Public Documents emanating from a third country that have already legalised or accepted by another Member State, are accepted only in a minority of Member States without Legalisation.
- The fragmentation at the national, European and international level of the legal framework concerning the issue of Legalisation affects legal certainty for both users of Public Documents and administrative and judicial officials.
- Legal certainty is further affected by the fact that the practice of Legalisation is sometimes unregulated or merely contained in internal ministerial guidelines not aimed at binding the competent domestic authorities.
- Legalisation in accordance with internal rules and procedures of the Member States is increasingly rare under influence of EC legislation and international agreements, which often abolish the requirement altogether between one or more Member States or in relation to specific types of documents.
- EC law regulates the issue of Legalisation on a sectoral basis, generally in an inconsistent and piecemeal manner. International agreements between the Member States have further reduced the importance of legalisation, but have also significantly fragmented the legal framework concerning legalisation.
- Seven Member States have mutually abolished entirely the requirement of Legalisation by applying provisionally the Brussels Convention of 25 May 1987 Abolishing the Legalisation of Documents in the Member States of the European Communities.
- The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents replaced existing Legalisation formalities with a simplified (Apostille) formality. The system introduced by the Convention as implemented by the Member States causes certain difficulties for users of Public Documents and does not adequately protect the Member States' interest of fraud prevention in relation to foreign Public Documents.

PART V: The compatibility of Legalisation with EC law

- The requirement of Legalisation of foreign Public Documents, including the formality it involves, does not amount to direct discrimination (conversely, charging a different rate for Legalisation depending on the applicant's nationality, as some Member States do, is directly discriminatory). The requirement is, however, indirectly discriminatory, since it is a measure that is intrinsically liable to affect non-nationals more than nationals in relation to the exercise of fundamental freedoms guaranteed by EC law.
- Member States do not only discriminate between domestic and foreign Public Documents, but also between the documents of different Member States as far as Legalisation is concerned. EC law allows for some degree of differential treatment between domestic and foreign Public Documents if this is proportionate to the objective differences between domestic and foreign Public Documents. In practice, however, the conditions and procedures for authentication of Public Documents do not vary significantly between the Member States.
- In general, authorities are not familiar with the requirements applicable to foreign Public Documents in the country of origin, including their signatures, seals and stamps. This cannot, however, justify discrimination between domestic and foreign Public Documents. Member States' domestic authorities are at the same time "EC authorities" (Article 10 EC) and are to be guided by mutual trust when asked to rely on Public Documents that have been executed by authorities of another Member State. On the other hand, it must be acknowledged that the establishment of mutual trust between authorities in this area depends on measures at EC level aimed at familiarising authorities with the form and substance of Public Documents of other Member States. The maintenance of mutual trust relies on measures to facilitate mutual cooperation and assistance between the Member States' authorities.
- Notwithstanding the consideration of Legalisation as an indirectly discriminatory measure, Legalisation equally qualifies as a restrictive measure that is liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by EC law. The requirement of Legalisation for foreign public documents implies a negative presumption as regards authenticity of foreign Public Documents. It therefore constitutes a procedural measure that governs actions at law intended to safeguard individuals' EC rights. The practical formalities regarding Legalisation also constitute a restriction. Legalisation creates extra transaction costs and delays, applies only in cross-border situations and is often perceived as complicating the exercise in practice of EC fundamental freedoms.
- The requirement of Legalisation of foreign Public Documents thus requires a justification on grounds set out in the Treaty or by overriding reasons in the public interest provided they are not protected by harmonising EC measures. The fundamental aim of Legalisation is fraud prevention. This aim cannot easily be associated with the Treaty exceptions, but is recognised as an overriding reason in the public interest under EC law. Secondary EC law, on the other hand, protects, in many areas, the interests involved with Legalisation through the harmonisation of form and substance of Public Documents and, in addition, through facilitating cooperation and assistance between the Member States.
- The principle of proportionality requires that restrictive measures adopted by Member States be appropriate to secure the attainment of the justified objective they pursue and that the measures adopted do not go beyond what is necessary in order to attain it. Legalisation is, however, not a suitable measure to prevent fraud in relation to the cross-border use of Public Documents. First, the formalities themselves are sensitive to fraud. Secondly, the systems used are not necessarily up to date and are flawed (e.g. signature comparison whereas in practice no signature is alike). Third, systems for administrative cooperation are at best only rarely used.

- Legalisation neither is a measure that is strictly necessary for fraud prevention. Necessity involves two related issues: (1) the rationale for imposing the restriction must be principally the pursuance of its justified aim, i.e. the requirement of Legalisation cannot be justified if the measure is inspired principally by the wish to increase state income (as is the case in some Member States) or the wish to limit the administrative burden or expenditure involved with administrative cooperation; and (2) there may not exist less restrictive alternatives for the restrictive measure, i.e. the national restrictive measures will be lawful only if the interest which they seek to protect cannot be protected as effectively by measures which restrict less intra-EC free movement and civil justice. In this regard, Member States have a duty to recognise the equivalence between their legal systems and the Member States have a duty to cooperate.
- The Member States must therefore recognise measures taken by other Member States to ensure the authenticity of their public documents that are equivalent to domestic ones and they must further communicate directly with the authorities of the Member State of origin to verify the authenticity of a document executed in that state or to obtain the information that is required to this end. Subject to the practicality of those requirements, which has in many areas been facilitated by measures at the EC level, the requirement of Legalisation cannot be justified.
- An apparent problem for the proportionality of the requirement of Legalisation for foreign Public Documents is its abstract nature and general application. A less restrictive approach is that Public Documents executed by the authorities of other Member States are accepted unless their authenticity is seriously in doubt because of concrete evidence relating to the individual case.

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