



**British Institute of  
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.**

# **RECOMMENDATIONS**

presented by

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## **INTRODUCTION**

The recommendations listed below reflect the conclusions as described in the Synthesis Report of the 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.

The recommendations take into account several issues that were identified in the study, which may currently prevent citizens and businesses from proving their EC rights effectively by means of foreign Public Documents and are thus liable to cause a distortion of the proper functioning of the EC's internal market and civil justice area. Ultimately, the recommendation may serve as a starting point on the basis of which appropriate measures could be considered by the European Commission to address these issues.

The recommendations have been drafted bearing in mind that any action at EC level to address the present must be suitable for securing the attainment of the objective it pursues and should not go beyond what is necessary to attain this objective. For ease of the reader, the recommendations are presented as straightforward as possible, following the basic structure of the synthesis report. Finally, the recommendations are presented as little prescriptive as is allowed by the conclusions of the study.

## RECOMMENDATIONS

1. The conditions under which EC rights exist and the formalities that may be imposed by the Member States prior to their recognition have in many areas been harmonised at the EC level. It is suggested, nonetheless, that the existing EC legislation in the field of free movement and civil justice be revised.
2. In the interest of legal certainty for beneficiaries of EC rights and the public authorities competent for the recognition of those rights, there is a need to clarify the EC Burden of Proof and the EC Standard of Proof in relation to EC rights to be applied by the Member States.
3. The clarification of the EC Burden of Proof in relation to EC rights may be achieved through the introduction of rules that clearly distribute the burden of proving the factual circumstances under which EC rights exist between the Member States and the persons claiming those rights.
4. It is suggested that the EC Burden of Proof ought to shift from the person claiming an EC right to the authority that is competent for its recognition, if the person claiming the EC right adduces the appropriate means of evidence to establish his/her claim.
5. Measures to clarify the EC Standard of Proof may include the precise description of the proof that may be required by the Member States of the factual circumstances under which EC rights exist and, in particular, the means of evidence that must be accepted by the Member States as appropriate to this end.
6. The elucidation of the EC Standard of Proof should further reflect the consistent case law of the European Court of Justice that the Member States may not make the recognition of an EC right subject to the production the means of evidence explicitly provided for in EC legislation if the facts required for the recognition of the EC rights that are claimed in a particular case can be proved unequivocally by other means.
7. Public Documents fulfill an indispensable evidentiary function in the EC context in relation to rights guaranteed under EC law. Public Documents are a particularly appropriate means of evidence, which are generally accepted by the Member States for the purpose of proving the factual circumstances under which EC rights exist: (1) they derive from an objective source; (2) they represent a reliable source of information; and (3) they constitute a durable source of information. It is suggested that the indispensable evidentiary function of Public Documents in relation to EC rights be emphasised and facilitated in current and prospective EC legislation.

8. Electronic Public Documents and paper-based Public Documents will co-exist in the EC, at least for the foreseeable future. Therefore, it is suggested that the mutual acceptance of both types of documents ought to be facilitated between the Member States.
9. With a view to enhancing the acceptance of Public Documents between the Member States, the trend at the EC level towards the harmonisation of the form and, where appropriate, the substance of Public Documents ought to be promoted in a consistent manner in all areas of EC law concerned with free movement and civil justice.
10. In addition, again with a view to enhancing the acceptance of Public Documents between the Member States, the mutual cooperation and assistance between Member State authorities in relation to the administration of foreign Public Documents, which exists already to lesser or greater extent in numerous areas of EC law, should be improved and facilitated at the EC level, in particular, in areas where they are not or insufficiently developed.
11. Achievements at EC level in the field of e-Government may assist in the process of ensuring the acceptance of paper-based Public Documents, since it will allow for an efficient administrative cooperation through electronic methods. Progress in this area exists mainly in the field of interoperable essential infrastructure services that allow for secure communications between administrations and the cross-border access to registers.
12. Foreign Public Documents are generally accepted by 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. It is suggested that certain measures at the EC level ought to be considered to address several problems that exist in practice concerning these conditions.
13. In order to prove the authenticity of foreign Public Documents, Legalisation is a measure often imposed by the Member States. The requirement of Legalisation, however, including the formality it involves, constitutes an indirectly discriminatory measure and can equally be characterised as a restriction, depending on the area of EC law in question.
14. The aim of fraud prevention is recognised as an overriding reason in the public interest that may justify such indirectly discriminatory measures and restrictions that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by EC law and fraud prevention is, indeed, a principal aim of Legalisation, since it enables the verification of a foreign Public Document's authenticity.
15. Nonetheless, in relation to many areas of EC law the interest of fraud prevention involved with Legalisation is already protected through measures contained in secondary EC instruments (i.e.

through the establishment of harmonised Public Documents and administrative cooperation between the Member States).

- 16.** Even in situations where EC law does not protect these interests, Legalisation cannot be justified, because in the way it is presently applied, the measure is not suitable to secure the attainment of the justified objective it pursues and it goes beyond what is necessary in order to attain its objective. In order to address this issue, a combination of measures to be taken at the EC level is suggested:
- 17.** (1) Legalisation ought to be abolished in areas of EC law where the justified interest of fraud prevention is adequately protected through measures at the EC level, i.e. through the harmonisation of Public Documents and the establishment of cooperation between authorities;
- 18.** (2) in areas where EC law does not (yet) adequately protect the interests involved with legalisation, the appropriate measures, i.e. the harmonisation of Public Documents and the establishment of cooperation between authorities, ought to be introduced progressively at the EC level; and
- 19.** (3) in situations where such measures are not (yet) feasible or desirable, the requirement of Legalisation, including the formality it involves, should be harmonised at the EC level to ensure that it is adapted to be more appropriate to secure the attainment of its justified objective and does not go beyond what is necessary to this end.
- 20.** In relation to the last suggested measure, the harmonisation at the EC level of the Apostille formality to address a number of the shortcomings of the system introduced by the 1961 Apostille Convention, as applied by the member States, should be considered, as well as the coordinated participation of the Member States in the eApostille program of the Hague Conference on private international law.
- 21.** In areas of EC law where the justified interest of fraud prevention is adequately protected through measures at the EC level, it is suggested that the burden of proving the authenticity of a foreign document that purports to be a Public Document that was executed in another Member State ought to shift from the person who requires this document for the purpose of proving his/her EC right to the authority that is responsible for the recognition of that right.
- 22.** Member States that currently discriminate between other Member States in terms of the requirement of or the exemption from Legalisation ought to be reminded that this practice must be ceased immediately, because it constitutes an unjustifiable (indirectly) discriminatory measure. The same applies for Member States that currently discriminate between the nationals of other Member States in terms of the costs that are charged for the Legalisation formality.
- 23.** In relation to Third State Public Documents that have been accepted in one Member State, a measure at the EC level is suggested requiring the other Member States to equally accept those

documents, subject to the condition that the measures of the Member State that accepted those documents are adequate to protect the legitimate interests of the other Member States to ensure those documents' authenticity in the light of the aim of fraud prevention.

- 24.** In relation to third state Public Documents that purport to be Public Documents that were previously accepted in another Member State, it is also suggested that the burden of proving the authenticity of such documents ought to shift from the person who requires this document for the purpose of proving his/her EC right to the authority that is responsible for the recognition of that right.
  
- 25.** In relation to the second (form) and third (language) conditions that generally apply in the Member States before foreign Public Documents are accepted, the study has concluded that issues concerning the requirement of the production of foreign Public Documents in a certain form and the requirement of a (certified) translation are not addressed in a uniform manner at the national level nor at the EC level. This has resulted in avoidable uncertainty for users of Public Documents and the authorities that are asked to administer such documents. It is suggested that uniform requirements ought to be established at the EC level.

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