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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.

SUMMARY OF CONCLUSIONS

presented by

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SUMMARY OF CONCLUSIONS

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

- The process of recognition of EC rights is characterised by the persistence of administrative formalities at the Member State level. The process of recognition may involve the requirement for the person claiming an EC right to provide certain proof of the existence of the factual circumstances under which the entitlement to the EC right exists. In principle, the person claiming the entitlement to an EC right bears the burden of proving the existence of the basic conditions for its existence.

- The rationale for authorising the Member States to demand proof of the existence of the factual circumstances under which the entitlement to an EC right exists is: (1) to enable the authorities in the Member States to confidently recognise EC rights; and (2) to enable Member States to gain precise information of movements of population in their territories.

- The process of recognition by the Member States of EC rights is of a declaratory nature only. EC rights are conferred on their beneficiaries directly, either directly by the Treaty or through secondary EC legislation adopted for their implementation, and exist independent from their recognition by the authorities of the Member States.

- If the precise conditions for the exercise of EC rights and the formalities for their recognition have been harmonised at EC level, the Member States are prohibited from making the recognition subject to other conditions than those expressly provided for by the applicable EC rules. The Member States further have no discretion in their decision to recognise an EC right if all conditions under EC law have been fulfilled

- In the absence of harmonisation, competent national authorities must themselves assess, in the light of all the relevant information, whether an EC right must be recognised pursuant to EC law. However, the authorities may ask persons claiming an EC right to produce the necessary information in their possession to establish whether the conditions for the existence of an EC right are met, in so far as they do not have it themselves.

- The EC Standard of Proof requires that competent national authorities establish that the requirements laid down by EC law for the existence of an EC right have actually been met on the basis of the evidence that has been provided in a particular case. Authorities are not permitted unilaterally to lower EC standards of proof.

- In case where EC harmonisation measures have been taken, the means of evidence explicitly provided for under EC law must be accepted by the Member States and, in principle, no other or additional requirements may be imposed.

- The recognition of an EC right may not be made subject to the production the means of evidence explicitly provided for in EC legislation, where the facts required for the recognition of the EC rights in question can be proved unequivocally by other means. In particular in case of imprecise harmonisation, the Member States are required to accept any means of evidence, provided it is appropriate. In the absence of EC harmonisation measures, the means of evidence provided for under national law may not undermine the scope or the effectiveness of EC law.

- There is an EC concept of an appropriate means of evidence for the purpose of proving an EC right. Under EC law, a means of evidence must generally satisfy three conditions before it can be deemed appropriate: (1) it must be sufficiently objective; (2) it must leave no doubts; and (3) it must be satisfactory for purposes of verification.

- National authorities are to be guided by general principles of EC law when administering under their domestic laws means of evidence that are produced for the purpose of proving EC rights. These include the principle of EC loyalty under Article 10 EC and the effectiveness of EC law and the principle of equal treatment.

- Public Documents are a crucial means of evidence for the purpose of proving EC rights and thus for the effective exercise of those rights. This fact is confirmed on the basis of the study of EC legislation that has harmonised the conditions for the exercise of EC rights and the formalities for their recognition. It is further confirmed on the basis of the analysis of the legal practices in the Member States.

- Public Documents are a particularly appropriate means of evidence for the purpose of proving the factual circumstances under which the entitlements to 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.

- Legal diversity exists between the Member States as regards the means of evidence that are issued and required for the purpose of proving the existence of EC rights. In the absence of harmonising measures, the question whether a particular type of Public Document is accepted as an appropriate means of evidence is answered differently from one Member State to another.

- Legal diversity undermines the principle of legal certainty in the EC legal order. The aims pursued by EC law in relation to free movement and civil justice require that the equality and uniformity of rights and obligations arising under EC law are ensured both for the Member States and the beneficiaries of EC rights.

- Frequently, EC instruments indicate what kind of proof may be required by the Member States in the process of recognising EC rights, but they fail to clarify precisely which means of evidence must be accepted as appropriate by the Member States. Member States are thus left with a degree of discretion in that they may, in principle, decide autonomously what are appropriate means of evidence.

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

- Public Documents are a common means of evidence in the framework of administrative formalities at the domestic level in the Member States. Public Documents fulfil the same role in the process of recognition of EC rights, which is characterised by the persistence of administrative formalities at the Member State level. This process of recognition often involves the requirement for the person claiming an EC right to provide certain [specific?] proof of the existence of the factual circumstances under which the entitlement to the EC right exists. Public Documents have been identified as a particular appropriate means of evidence and, in this regard, they 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 that are relevant by way of their function as proof of rights guaranteed under EC law. Nonetheless, a clear trend exists at EC level towards the harmonisation of the form and substance of Public Documents the use of which is necessary for the proper functioning of the internal market and the civil justice area. In the Member States Public Documents are present in the following forms: (1) domestic Public Documents; (2) domestic Public Documents based on an EC model; (3) domestic Public Documents based on an international model; (4) EC Public Documents.

- The importance of Public Documents for the effectiveness of EC law has been evaluated and 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

- For the operation of the EC Customs Union, Public Documents are generally required to prove the origin of goods (preferential origin goods: Movement Certificates EUR.1; EUR-MED Certificates; A.TR. Movement Certificates; and Certificates of Origin Form A; and non-preferential origin of goods: Universal Certificates of Origin). EC law provides for the use of harmonised Public Documents that may be required in the process of the EC customs procedure for which third country goods are declared. Furthermore, the form and contents of EC Certificates of Origin required in third countries in relation to goods originating in the EC is harmonised. As regards intra-EC trade, Public Documents may be required to prove the EC status of goods and their conformity with the rules in the Member State where they were lawfully marketed and registered (EC Certificates of Conformity and European Registration Certificates (for example for motor vehicles)).

- Prior to recognising the rights of Union citizens and their family members to move and reside freely within the territory of the Member States, the Member State in question may require proof of, for instance, identity and nationality, (self)employment, the existence of a family relationship or of a registered partnership, direct descendency, dependency, sickness insurance or sufficient resources. The relevant EC instruments regulate such matters in an erratic manner which means of evidence must be accepted by the member States as appropriate to this end. The form and substance of Public Documents that may be required by the authorities of the Member States is not harmonised at EC level in this area. The same applies in relation to rights of entry and residence of workers and self-employed persons.

- In relation to income tax issues of non-resident migrant workers, Public Documents may be required by non-resident workers for the purpose of proving that they derive at least 75 % of their income on the territory of a particular Member State. The form and substance of those documents have not been harmonised at EC level. In the area of social security of migrant workers and their dependants, Public Documents are frequently required in relation to the posting of workers, sickness benefits, pensions, unemployment benefits, family benefits and non-contributory benefits. The form and substance of Public Documents has been harmonised to a large extent at EC level (E-form certificates).

- In relation to the exercise of the freedom of establishment, authorisation schemes persist for which Public Documents may be required for the purpose of proving the fulfilment of certain requirements imposed by the Member State of origin (e.g. procedures under which a provider or recipient is required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof such as authorisations, licences, approvals or concessions, registration in a register, roll or database, official appointments etc.). The form and substance of Public Documents that may be required by the authorities of the Member States have not been harmonised at the EC level in this area, although EC legislation provides for the necessary legal basis to this end.

- These considerations for the freedom of establishment generally apply equally for the free movement of services. In the case of a provider established in another Member State, obligations on the service provider to obtain an authorisation from their competent authorities are however, in principle, prohibited. On the other hand, certain proof of lawful establishment in another Member State may be required by the Member State where the service is provided and which is responsible for the supervision of the activity of the provider in its territory involving the necessary checks, inspections and investigations.

- The mutual recognition of professional qualifications is of importance for the free movement of workers, freedom of establishment and the freedom to provide services alike. Evidence of formal qualifications is described as diplomas, certificates and other evidence issued by an authority in a Member State designated pursuant to legislative, regulatory or administrative provisions of that Member State and certifying successful completion of professional training obtained mainly in the EC. Apart from proof of professional qualifications, the Member States may require proof of certain other matters linked to the holder of a qualification. The proof that may be required by the Member States of those matters is specified in a changeable manner and this conclusion applies equally in relation to the means of evidence that must be accepted by the member States as appropriate. The form of documents proving professional qualifications has not been harmonised at EC level.

- The EC right to refund of VAT for non-established taxable persons may be subject to production to the tax authority of the Member State in which that reimbursement is applied of proof necessary to determine whether the application for refund is justified. This may involve proof of the capacity of the operator seeking that reimbursement as a taxable person liable to VAT in another Member State. The Public Document that may be used for this purpose has been harmonised at EC. The system of VAT reimbursement is based on a mechanism of cooperation and mutual trust between the authorities of the Member States. In addition, the authorities have at their disposal the EC instruments for cooperation and administrative assistance adopted to allow the correct assessment of VAT and counter evasion and avoidance in that area.

- In the framework of the operation of the EC civil justice area, effective justice may involve the cross-border use of decisions and certain procedural documents as well as accompanying certificates, which have been created in a harmonised form at EC level. As far as the authenticity of Public Documents in this area is concerned, the relevant EC instruments only require that a party seeking to use a document executed in another Member State produces a copy which satisfies the conditions necessary to establish its authenticity. Generally, Legalisation expressly prohibits Member States from requiring the Legalisation of such a document. In other words, the

Member States have to trust in the authenticity of documents that clearly purport to originate in another Member State.

- In relation to cross-border access to justice (legal aid), EC law provides for the use of harmonised forms for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation. In the EC civil justice area, the cross-border transmission of legal aid applications takes place directly between competent transmitting and receiving authorities in the Member States. The possibility of recourse to the service of the transmitting and receiving authorities appeared to provide a sufficient guarantee of authenticity of the documents.

- Mutual cooperation and assistance between the authorities of the Member States in relation to the administration of Public Documents originating in other Member States is a legal fact in many areas of EC law and several EC instruments contain additional measures aimed at the ensuring that mutual cooperation and assistance becomes a matter of fact in practice.

- As far as the free movement of goods is concerned, the customs administrations of the Member States are required to assist one another in checking the authenticity (and accuracy) of documents and verifying that the applicable procedures concerning the proof of the EC *status* of goods have been correctly applied. The same is true in relation to the requirement of proof of the *conformity* of EC goods.

- Concerning the free movement of EC citizens and their family members, workers and self-employed persons, EC law does not provide explicitly for administrative cooperation between the competent authorities of the Member States for the purpose of verifying the authenticity of Public Documents.

- In matters of social security and income tax, EC law does provide for an extensive degree of cooperation between the competent authorities involved in the coordination of the Member States' social security and income tax systems.

- For the freedom of establishment, the Member State authorities are required to give each other mutual assistance, and put in place measures for effective cooperation. The same applies in relation to the free movement of services.

- In relation to the mutual recognition of professional qualifications, administrative cooperation is required under EC law between the competent authorities of the Member States when the authenticity of Public Documents is concerned.

- Concerning the refund of VAT for non-established taxable persons, the EC instruments for cooperation and administrative assistance in tax matters apply.

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

- The term ‘Public Document’ covers all documents other than documents signed by persons in their private capacity. Public Documents are commonly executed by public officials on the basis of a specifically attributed or delegated authority and in a prescribed form. Public Documents can be distinguished on the basis of their source (i.e. court officials, administrative officials and notaries).

- The principal function of a Public Document is to provide factual proof of acts of a public authority recorded therein. In other words, the Public Document’s function is to demonstrate what was officially decreed, declared or witnessed by a public authority.

- A Public Document does not provide proof of the validity of the act of a public authority performed by a public official. Moreover, the document does not attest to the validity of the legal act or relation that the public official may have assisted in establishing through his intervention. The validity of both matters is subject to their compliance with independent legal requirements.

- Although a foreign Public Document may be recognised as factual proof of the act of a public authority, this does not guarantee that the validity of the act of the public authority will be recognised, nor does it guarantee that the act of public authority will be deemed to have had the effect of creating a valid legal act or relation. Legal diversity between countries as regards rules of private international law, and the limits imposed on the application of foreign law and the recognition of the effects of acts of public authorities by public policy may ultimately hamper the usefulness of a foreign Public Document in practice.

- Mutual trust in systems of public administration supports the presumption that public officials belonging to those systems will only perform acts of public authority that are valid in accordance with the law of the country to which they belong. Subject to that condition, a Public Document can be considered an appropriate means of evidence for the purpose of providing factual proof of the validity of the legal act or relation recorded therein under the law that was deemed applicable by the public official who performed the act of public authority.

- The administration of Public Documents in judicial situations and administrative situations differs in certain important respects. Courts are generally in a good position to evaluate, on a case by case basis, whether a document that purports to be a Public Document can be accepted and admitted into evidence. Besides legal expertise, which allows for the assessment of a Public Document’s formal validity and the competence of the public official who executed a document, courts have at their disposal various effective procedural instruments enabling them to scrutinise a document’s authenticity (e.g. examination under oath, hearing of forensic experts, burdens of proof etc.). The manner in which Public Documents are administered by courts may vary on the basis of three factors: (1) the procedural system (adversarial or inquisitorial); (2) the legal nature of the case (civil or administrative); and (3) the nature of the proceedings in question (contentious or non-contentious).

- Administrative officials generally manage a much higher number of Public Documents than courts and the cases involved are usually standard administrative procedures involving the proof of certain fact by means of Public Document. Officials tend to subject Public Documents to a more superficial level of scrutiny from a legal perspective (formal validity or the competence). Instead, officials generally use administrative cooperation and the assistance of expert investigation authorities (e.g. fraud investigation departments) in case of doubt over a document’s authenticity. Any applicable formalities and requirements are usually applied more rigidly and officials will inspect documents quite closely to satisfy themselves of the fact that those formalities and requirements have been fulfilled.

- In a majority of the Member States, Public Documents are accepted in both judicial and administrative proceedings if they are deemed authentic. More generally, the following conditions apply before Public Documents are accepted for the purpose of being admitted into evidence in judicial and administrative situations: (1) the proof of a document's authenticity; (2) the production of the document in a particular form; and (3) the production of a (certified) translation of the document.

- As a general rule in the Member States, documents that purport to be domestic Public Documents are presumed to be authentic without the requirement to produce additional proof of authenticity. The authenticity of domestic Public Documents is only subject to marginal scrutiny, which usually involves an on sight check of the document's signature and other formal characteristics specific for a domestic Public Document, and a general check whether the document looks suspicious in any way. In cases of doubt in respect of a domestic Public Document's authenticity, the general practice in the Member States is to contact the purported author of the document directly to confirm the document's authenticity.

- Foreign Public Documents do not generally benefit from the same presumption of authenticity as domestic Public Documents. This means that some proof of authenticity will normally be required. Some Member States accept any appropriate means of evidence to prove a foreign document's authenticity, including Legalisation. In other Member States (only) Legalisation is considered to be an appropriate means of evidence to prove a foreign Public Document's authenticity. Lastly, there are Member States where authorities have discretion as to which evidence to accept as sufficient to establish a foreign Public Document's authenticity. This means that even in cases in which a document has been legalised, additional evidence may be required if deemed necessary. The general rule at common law is that foreign Public Documents are accepted as authentic when it appears sufficiently that they have been kept or issued under the sanction of a public authority and are recognised by the tribunals of their own country as authentic records. This means that expert evidence may be required to determine whether a particular document meets these criteria, although the availability of an Apostille certificate may assist in the process of establishing authenticity.

- When the authenticity of a domestic Public Document is challenged, in a large number of Member States, the party or public authority making the challenge carries the burden of disproving the document's authenticity. In a number of Member States, the fact that a presumption of authenticity of domestic Public Documents exists does not shift the Burden of Proof. Consequently, the party wishing to rely on a domestic Public Document has the burden of proving its authenticity when this is challenged. In other Member States, the particular type of Public Document determines the answer to the question who has the Burden of Proof when the document's authenticity is challenged.

- As far as foreign Public Documents are concerned, the person producing the foreign document generally has the burden of proving its authenticity. In a majority of Member States, Legalisation has the effect of putting a foreign Public Document on the same footing as a domestic Public Document as far as proof of its authenticity is concerned. However, the proof of authenticity provided by Legalisation is generally considered to be rebuttable and in case of doubt, public authorities may make further inquiries and verify the document's authenticity.

- A large number of international agreements abolish the requirement of Legalisation. Those agreements often provide for non-compulsory administrative cooperation for the verification of the authenticity of documents. Administrative cooperation in this area implies that when an authority has (serious) doubts in relation to the authenticity of a foreign document that purports to be a Public Document, it can contact directly the competent authority in the country of the document's origin with a request for confirmation. Without clearly shifting the Burden of Proof concerning authenticity from the users of foreign Public Documents to the authorities, the users of foreign Public Documents are deprived of an accepted means of proving those documents' authenticity.

The lack of adequate means for establishing a foreign Public Document's authenticity may prevent an authority from resolving its doubts as regards a document's authenticity. Ultimately, this may ultimately to the refusal of the document.

- Besides the requirement of proof of authenticity, an evaluation of the Member States' legal practice shows that a person who wishes to rely on a Public Document as a means of evidence may be required to present his document in a certain specific form in order for it to be accepted in judicial and administrative situations (i.e. original, certified copy, copy etc.). Moreover, it has also become clear that prior to the acceptance of a foreign Public Document, judicial and administrative authorities usually require a (certified) translation of the document in question.

- The form in which domestic Public Documents are accepted varies according to the document in question and its intended use. A large group of Member States generally accepts originals and certified copies of Public Documents. Simple photocopies are therefore not commonly accepted in judicial or administrative situations in those countries for the purpose of being admitted into evidence as Public Documents. This does not mean that photocopies are not admissible as evidence at all; they may be admissible as evidence, but will in these circumstances generally produce a weaker evidential value. In some Member States, both originals and simple photocopies of Public Documents are, in principle, accepted, although it is often left to the discretion of the authority administering the document to require the production of the original. Lastly, there are Member States where the formality of the certification of copies no longer exists. Consequently, either originals or copies are required. With a few exceptions, the Member States requirements for the acceptance of foreign Public Documents are the same as those associated with domestic Public Documents.

- In relation to the freedom of establishment and the free movement of services, where Member States require the production of a certificate, attestation or any other document proving that a particular requirement has been satisfied, they must accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. Subject to certain exceptions, the Member States are prohibited from requiring that a document from another Member State be produced in its original form or as a certified copy.

- Foreign Public Documents must as a rule be accompanied by certified translations to be accepted in judicial and administrative situations. In Member States a certified translation is necessary without exception. The majority of remaining Member States also require certified translations, but provide for exceptions depending on the original language of the document, the authority's discretion, the parties in contentious court proceedings or the circumstances in which the document is intended for use.

- Translations of Public Documents sometimes constitute Public Documents themselves or require certification by a public official. Besides, the understanding of what constitutes "a certified translation" sometimes differs between the Member States. In some Member States the term includes (sworn) statements of the translator that the translation is accurate and true or statements by an official translator of a translation service or a Consulate/Embassy office. In other Member States, certification of a translation may only be done by specialised public authorities or notaries. Only a small number of Member States indicated specifically whether foreign certified translations are acceptable or whether translations certified by domestic competent translators are insisted upon. None of those Member States appear to accept foreign certified translations as such.

- In the area of freedom of establishment and free movement of services, the Member States are prohibited from requiring foreign documents to be produced in the form of a certified translation, except in the cases provided for in other EC instruments or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security. On the other hand, Member States are entitled to require non-certified translations of documents in one of their official languages.

- EC law in the field of social security prohibits the authorities, institutions and tribunals of one Member State from rejecting applications or other documents submitted to them on the grounds that they are written in an official language of another Member State, which is recognised as an official language of the EC institutions. In case of language problems, the competent authorities are to contact directly the authorities in the other Member States.

- As far as the area of civil justice is concerned, EC law addresses the issue, but not in a uniform manner. EC civil justice instruments provide that a translation 'may be required', be provided 'where necessary', or that documents may be drawn up in the language of the Member State in which they were executed and that a certified translation 'may not be required'. Some instruments further provide that the Member States must accept translations certified by a person qualified to do so in one of the Member States.

- Notwithstanding the general availability of remedies against substantive decisions of the judiciary or the administration, in a significant number of Member States, no separate remedies are available against decisions not to accept a Public Document due to, for example, an authority's doubts as regard a document's authenticity. In those countries, the refusal of an authority to accept a document is not characterised as an administrative decision that can be appealed against. This rule usually applies for reasons of efficiency. Questions regarding non-accepted documents are therefore dealt with incidentally as part of the substantive appeal.

- The validity of a Public Document may depend on rules relating to the capacity or competences of a public official and may depend further on rules relating to the way in which this competence must be exercised in terms of how an act of public authority is expressed by means of a document. The validity of a Public Document must be distinguished from the validity of acts of public authority. The latter relate to the grounds and consequences of the act of public authority and requirements relating to the enforcement of the act of public authority contained in a Public Document.

- The capacity in which a Public Document is signed refers to credentials in terms of a person's status as a public official authorised to carry out the task of executing (certain types of) Public Documents. The competence to sign a Public Document refers to the authority of the signatory public official to execute a specific Public Document.

- Requirements as to the form of Public Documents may vary depending on the type of act involved. Formal requirements may impose the obligation to use a particular type of document, to clearly identify the author of the act of public authority on the document, and to mark the document. Requirements applicable to the form of a Public Document must be distinguished from the requirements relating to the way in which an act of public authority is to be contained in a Public Document in order to render it enforceable, although some of these requirements overlap in practice.

- Rules that determine the validity of Public Documents relate directly to the organisation of a state and are, therefore, by nature rules of public law. Consequently, the idea of subjecting the question of a Public Document's validity to foreign law is inappropriate. It is not *a priori* clear whether it is a function of the rules on validity that require the application of the law of the state in which the public official acted in executing the Public Document ("*lex magistratus*"), or, more generally, the principle of state sovereignty that prevents the application of foreign law. It is questionable whether the question concerning a Public Document's validity can be subject to a conflicts analysis in the first place. In so far as this is deemed appropriate, however, a conflicts rule referring to the *lex magistratus* is the only acceptable rule since it refers structurally the question of validity to the law of the state in which the public official acted in executing the Public Document.

- In cases where the competence of a foreign public official to execute a Public Document is scrutinised, most Member States apply the principle of *lex magistratus* to the question of a foreign authority's competence to execute a Public Document. The *locus regit actum* rule is applied

generally in the Member States for the purpose of establishing the formal validity of all types of document, including Public Documents.

- Domestic documents that purport to be Public Documents, i.e. that appear to be authentic Public Documents duly executed by an authority competent to sign, are automatically recognised for the purpose of being admitted into evidence in a majority of Member States.

- In a large number of Member States, outside proof of a foreign document's authenticity by means of Legalisation (which is not associated as such with the recognition of the legal status of a document, but with the requirements that determine whether the document will be accepted) there are no further conditions for the recognition of foreign Public Documents for the purpose of being admitted as evidence. In other Member States, formal validity is verified as a precondition for the recognition of foreign Public Documents for the purpose of being admitted as evidence. Finally, there are some Member States where, in addition to formal validity, the competence of the foreign authority is subject to verification as a condition for the recognition of foreign Public Documents for the purpose of being admitted as evidence. In some Member States this scrutiny may involve the requirement to produce proof of the document's validity under foreign law.

- Domestic Public Documents are generally admissible as evidence as factual proof of the act of public authority that is contained in the Public Document. In other words Public Documents provide factual proof of what is officially decreed, declared (conclusions of law) or witnessed (findings of fact) therein by a public authority. In a number of Member States, domestic Public Documents are further admissible into evidence as proof of the public acts contained therein and legal acts and relationships that were prerequisite for their execution.

- In the same way as domestic Public Documents, foreign Public Documents are generally admissible into evidence as factual proof of what is officially decreed, declared (conclusions of law) or witnessed (findings of fact) therein by a public authority. Foreign Public Documents are not admissible into evidence as proof of the public acts contained therein and legal acts and relationships that were prerequisite for their execution.

- In contrast to the speculation made in the ALI/UNIDROIT rules and principles about a trend towards the free evaluation of the value of means of evidence (a speculation that was not based on a comparison of the legal systems of the EU Member States) the analysis of the legal systems of the Member States shows that in most Member States the evidential value of Public Documents is still stipulated by law. In those circumstances public authorities and parties to proceedings are to a certain extent bound to consider these means of evidence as trustworthy by virtue of legal provision with reference to the origin of the evidence. When determining which law is applicable to the question of the evidential value of foreign Public Documents, most Member States apply the principle of *lex fori*.

- In a large majority Member States, domestic Public Documents have a privileged value in terms of the proof for which they are admissible as evidence. This privileged evidential value generally consists of the fact that its production shifts the Burden of Proof in relation to proof of those issues for which the document is admissible as evidence. Consequently, a party who challenges the proof provided by a domestic Public Document bears the burden of producing evidence to this end. The production of evidence in order to challenge the proof provided by a domestic Public Document is usually admissible in the Member States. In some Member States special procedures apply for the purpose of challenging the (proof provided by a) domestic Public Document. In a number of Member States, different categories of domestic Public Documents are distinguished that accordingly have a different evidential value. In other Member States, documentary evidence does not have a preset evidential value in comparison to other means of evidence, which means that the admissibility and evidential value of Public Documents is left to the discretion of the court.

- Subject to the fulfilment of the requirements for acceptance and recognition/admissibility, foreign Public Documents are generally attributed the same evidential value as comparable domestic Public Documents in the Member States.

- Commission decisions are certified by the signatures of the President and the Secretary-General on the last page of the summary note to which it is to be attached in a way in which it can not be separated. Decisions entailing a financial obligation on a person other than a Member State constitute an enforcement order in the Member States, and may, therefore, give rise to enforcement measures (seizures) under the same conditions as a judgment delivered by that Member State. The only formalities that Member States may impose are the verification of the document's authenticity. Since, the Treaty does not specify which formalities the Member States may impose in this regard, the current practice of the Commission resembles the fulfilment of a Legalisation formality involving the permanent representation of the Member State to the EC which is asked to serve the enforcement order via the appropriate national authority. This procedure is inefficient and time-consuming.

- As regards documents in the ECJ system, for reasons of legal certainty, to ensure the authenticity of written applications and to eliminate the risk that a document is not, in fact, the work of the author authorised for that purpose, the ECJ Rules of Procedure on the admissibility of actions require documents that are submitted to be certified by means of a handwritten signature that for, documents require a handwritten signature. The absence of a handwritten signature leads to the inadmissibility of a document.

PART IV: The Legalisation of Public Documents

- Legalisation of Public Documents is synonymous with authentication of Public Documents in that both are aimed at the certification and verification of authenticity in terms of its integrity and origin. In principle, Legalisation does not concern a Public Document's validity in terms of its due execution in accordance with requirements of competence and form or its accuracy regarding the particulars of and facts recorded therein.

- Conventionally, Legalisation involves a two-tier process of certification of the authenticity of a Public Document's signature, the capacity in which the person signing a Public Document has acted and, where appropriate, the identity of the seal or stamp which a document bears, requiring the activity of both authorities in a Public Document's country or origin and the authorities of the country of a document's destination.

- In general, the ability of an authority to legalise a Public Document depends on whether it maintains up-to-date specimens of signatures, seals and stamps that are required for the purpose of verifying the authenticity of a Public Document's signature, the capacity in which the person signing a Public Document has acted and, where appropriate, the identity of the seal or stamp which a document bears. This applies for the public authorities of a document's country of origin and those of a document's country of destination.

- In general, the authorities of the Member State of a document's destination only keep specimen signatures, seals and stamps of certain superior authorities of the state of a document's origin. These authorities are generally competent to certify the authenticity of the documents executed by all authorities that fall under their authority (e.g. the Ministry of Justice in relation to documents executed by court officials). It may also happen that only specimens are mustered of the authority that is competent to certify all the Public Documents of the country it represents abroad (e.g. the Ministry of Foreign Affairs).

- Conversely, the superior authorities in the Member States of a document's destination do not always maintain specimens of all the domestic authorities that are competent to execute Public Documents. Consequently, intermediate Legalisation may be necessary by those authorities for which the superior authorities do actually keep the necessary specimens. In most Member States, the precise procedure to be followed in the process of intermediate Legalisation depends on the specific type of Public Document in question, although the Ministry of Foreign Affairs is normally the ultimately competent authority.

- Overall, three situations can be distinguished as far as the requirement of prior Legalisation by the authorities of a document's country of origin is concerned: (1) no prior Legalisation is required since the legalising authority disposes of specimen signatures and seals for all public authorities competent to execute Public Documents in the country of origin; (2) prior intermediate Legalisation is required since the legalising authority disposes of specimen signatures and seals for the higher authorities in the country of origin that are competent to legalise the documents executed by authorities under their authority; and (3) prior super-Legalisation is required by the authority that is regarded as competent to legalise all the Public Documents of the country of origin.

- The legal effect of Legalisation in a majority of Member States is the establishment of a legal presumption of a foreign Public Document's authenticity. Only a minority of the Member States accepts a Public Document emanating from a third country that has already been legalised or accepted by the authorities of another Member State as authentic without imposing the otherwise applicable domestic Legalisation requirements.

- In practice, situations involving the requirement of Legalisation of Public Documents in accordance with internal rules and procedures of the Member States have become increasingly rare under the

influence of EC legislation and international agreements between the Member States, which have abolished the requirement of Legalisation either in relation to specific documents or completely between one or more countries.

- The regulation of the issue of Legalisation or the authentication of Public Documents has been evaluated 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 for citizens and businesses; and (12) effective justice for citizens in matrimonial matters and the matters of parental responsibility.

- EC law addresses the issue of the authenticity of documents and, in particular, the issue of Legalisation on a sectoral basis, sometimes explicitly, but generally in an inconsistent and piecemeal manner. In general, three approaches can be distinguished: (1) the relevant EC instrument explicitly proscribes the requirement of Legalisation; (2) the instrument contains no explicit reference to Legalisation, but provides for other means to verify the authenticity of Public Documents originating in other Member States; and (3) the instrument contains neither an explicit reference to the abolition of Legalisation, nor does it provide alternative means to ensure the authenticity of Public Documents originating in other Member States. The first approach is prevalent in EC civil justice instruments and further in the relevant instruments concerning the coordination of the social security systems of the Member States. The second approach is used in relation to the free movement of goods and the mutual recognition of professional qualifications. The third approach applies to free movement of persons, freedom of establishment, free movement services, income tax issues of non-resident migrant workers and the refund of VAT for non-established taxable persons.

- In relation to the movement of goods, no express exemptions from the requirement of Legalisation under the internal domestic rules and procedures have been identified. However, most of the relevant EC instruments and free trade agreements concerning the operation of the EC Customs Union and the internal free movement of goods provide explicitly for the exchange between administrative authorities (usually through the intervention of the European Commission) of specimens of signatures and stamps used to certify documents proving, for example, the EC status of goods. Besides, those instruments then usually provide for extensive administrative cooperation and mutual assistance between authorities in relation to the verification of the authenticity of documents in case doubts arise.

- Public Documents that may be required in relation to the rights of Union citizens and their family members to move and reside freely within the territory of the Member States, have not been exempted explicitly from the requirement of Legalisation applicable in the Member States. In principle, therefore, the issue remains a matter to be dealt with by the Member States. Nonetheless, the relevant EC legislation proscribes the systematic verification by the Member States of the conditions applicable for the exercise of EC rights of entry and residence in question. This requirement may also apply in relation to the verification of the authenticity of documents used as proof of the existence of EC rights in this area. Consequently, authorities may verify the authenticity of a foreign Public Document only in case of doubt, but are prevented from doing this systematically. The same applies in relation to the rights of entry and residence of workers and self-employed persons.

- Concerning income tax issues of non-resident migrant workers, there is no explicit provision under EC law to exempt Public Documents in this area from Legalisation requirements either. EC legislation on the coordination of social security systems of the Member States, on the other hand,

explicitly exempts all documents that are required for this coordination from Legalisation formalities.

- In relation to the freedom of establishment, EC law does not contain an explicit provision preventing the Member States from insisting on the fulfilment of Legalisation formalities. However, EC law does expressly prohibit the Member States from requiring that foreign Public Documents be produced in their original form or as certified copies. In other words, the Member States must, in principle, accept simple photo copies to which Legalisation formalities are as such not applicable. For certain types of Public Documents, the Member States may continue to insist on the production of originals or certified copies of originals. Accordingly, the issue of Legalisation remains significant. The same considerations apply for the free movement of services. Legalisation has not been expressly abolished in relation to the implementation of the right guaranteed under EC law to a refund of VAT for non-established taxable persons.

- Public Documents required for the purpose of the cross-border recognition of professional qualifications are not explicitly exempt under EC law from Legalisation. Nonetheless, the relevant EC legislation provides for mandatory administrative cooperation between the authorities of the Member States in the event of justified doubts concerning the authenticity of Public Documents executed in other Member State.

- The only area of EC law reflecting a consistent policy concerning the issue of authentication of Public Documents, including the issue of Legalisation, is EC legislation in the area of civil justice. The EC instruments in this area have generally abolished the requirement of Legalisation and merely require that documents are produced which satisfy the conditions necessary to establish their authenticity. The EC civil justice instruments for the most part stipulate explicitly that the Member States are to abstain from requiring the Legalisation of documents. To strengthen trust in the authenticity of documents, the instruments generally require that documents are accompanied by a specific form, which contains information that may be necessary for the verification of the authenticity of documents.

- Aside from secondary EC legislation, seven Member States have mutually abolished completely the requirement of Legalisation through their provisional application of the Brussels Convention of 25 May 1987 abolishing the Legalisation of documents in the Member States of the European Communities. Moreover, the Member States have concluded a large number of bi- and multilateral agreements that concern specifically or address incidentally the issue of Legalisation.

- More than one hundred bilateral agreements apply between the Member States that provide explicitly for the exemption of Public Documents from Legalisation requirements. Those agreements exempt either (1) all Public Documents; (2) Public Documents used in particular situations (civil matters, family law matters, commercial matters, social security matters, employment matters, criminal matters, tax matters or IP matters); or (3) specific types of Public Document from Legalisation requirements.

- Besides, over twenty-five multilateral agreements apply between the Member States that explicitly exempt Public Documents from Legalisation requirements. Those agreements have been established in the framework of the Council of Europe, the Hague Conference on Private International Law and the International Committee on Civil Status. All conventions analysed for the purpose of the study, confirm that the current trend of practice is to abolish Legalisation requirements that restrict the cross-border use of Public Documents. Instead those agreements establish systems of administrative cooperation on a case-by-case basis for situations in which doubts arise in relation to the authenticity of Public Documents.

- The fragmentation of the legal framework concerning the issue of Legalisation of Public Documents at the national, European and international level affects legal certainty for both users of Public Documents and administrative and judicial officials in the Member States who administer

Public Documents. This concerns the requirements applicable to domestic documents to be used abroad and foreign documents to be used locally. Moreover, the legal practice concerning the issue of Legalisation is unregulated in a number of Member States or contained only in internal ministerial guidelines not aimed at binding the competent domestic authorities. This fact further affects legal certainty and confirms the conclusion that at present a clear policy and legal framework concerning the authentication of Public Documents, including the issue of Legalisation, is lacking at the Member State, European EC and international level.

- The Hague Convention of 5 October 1961 abolishing the requirement of Legalisation for foreign Public Documents is arguably the most significant multilateral agreement that applies between all the Member States. The Convention has abolished the conventional Legalisation formalities in relation to most types of Public Document and replaced them with a simplified certification formality carried out by central authorities in the country of a document's origin, without the additional requirement of Legalisation by the authorities of the country of a document's destination.

- The organisation of the Convention's system of competent authorities was left to the Member States. This has resulted in diversity in administrative organisation between the Member States. Some Member States use a centralised system of competent authorities and others a decentralised system. Moreover, in Member States with multiple competent authorities, there is often a further division of competences on the basis of territorial jurisdiction, different document types or a combination of both. Ultimately this diversity has the negative consequence of affecting legal certainty for citizens and companies requiring their Public Documents to be certified. Another effect of the diverging organisation of the implementation of the Convention is the existence of as many Apostille registers as there are competent authorities for the issuance of Apostilles (more than 350).

- The Apostille certificate itself is a Public Document. However, as any other Public Document, it is susceptible to fraud and the authorities in the Member States may have a legitimate interest in verifying its authenticity if doubts arise. The Convention explicitly exempts the signature, seal and stamp on Apostille certificates from any form of certification, including Legalisation. In other words, an Apostille certificate is self-proving. By proscribing legalisation, the Convention relieves users of Apostilles from burdensome legalisation formalities. On the other hand, the exemption also deprives the user of an Apostille of an appropriate means of evidence to prove its certificate's authenticity where this may be necessary. The success of this approach depends on the fact that proof to disprove the assumption of the Apostille's authenticity can be obtained in a simple manner in case of doubt. The lack of adequate means of verifying a foreign Apostille certificate's authenticity may force an authority to refuse to accept the certificate if he is unable to resolve his doubts in relation to its authenticity.

- To protect the interest of Contracting States to prevent fraud, the Convention system provides for a verification procedure safeguarding the reliability of Apostilles. The procedure is based on the assumption that the authorities of the Member States will actually contact each other to verify the authenticity of Apostille certificates where doubts in this regard arise. To this end the Competent Authorities keep records of the issuance of Apostilles in the form of registers or card indexes, which are to be generally available for consultation.

- The Convention does not clarify whether the resort to administrative cooperation in the framework of the verification procedure is compulsory for authorities in the Contracting States in cases where doubt arises in relation to an Apostille's authenticity and who carries the burden of proving the Apostille's authenticity in those circumstances.

- Only the actual and regular use of the verification procedure provided for by the Convention warrants an objectively justified trust in the reliability of Apostille certificates. In practice, however, there is no or hardly any communication between the authorities of the Member States with a view to verifying the authenticity of Apostilles and the available records are at best rarely consulted.

This suggests that either the authenticity of foreign Apostille certificates is never questioned, or that domestic authorities have recourse to alternative means for verifying the authenticity of foreign Apostille certificates in case of doubt.

- The following reasons have been identified for the lack of success of the verification procedure available under the Convention: (1) the Apostille registers or card indexes are generally maintained in the paper; (2) the Apostille registers or card indexes are maintained locally by each competent authority individually; (3) the communication between Competent Authorities is difficult due to language problems; (4) the ways in which registers can be consulted are limited due to the absence of internet or e-mail consultation; and (5) the access to registers is sometimes restricted. Consequently, in the present circumstances, the trust in the reliability of Apostilles is not objectively justified.

- The effects of non-compliance with the Apostille formality are diverse in the Member States. In some Member States, any appropriate means of evidence is accepted to prove a foreign document's authenticity, including Apostille certification. This means that the non-compliance with the Apostille formality does not automatically prevent the acceptance of the foreign document if other appropriate means are available. In other Member States, if certification by means of an Apostille is required, it constitutes a mandatory requirement, the fulfilment of which is necessary in order to prove a foreign Public Document's authenticity. In these Member States the non-compliance with the Apostille formality generally prevents the acceptance of the foreign document. In addition, there are Member States where authorities have full discretion as to which evidence to accept as sufficient to establish a foreign Public Document's authenticity. This means that even when a document has been certified by means of an Apostille, additional evidence may be required if deemed necessary; for example, an explicit confirmation by the embassy abroad. Conversely, the non-compliance with the Apostille formality does not automatically prevent the acceptance of the foreign document. At common law, the certification by means of an Apostille may assist in providing the necessary proof of a foreign Public Document's authenticity, although this is by no means certain. Alternatively, the non-compliance with the Apostille formality does not automatically prevent the acceptance of the foreign document.

- Difficulties have been identified that can be directly or indirectly associated with the requirement of legalisation for foreign Public Documents. General difficulties can be distinguished from difficulties specific to the operation of the Hague 1961 Apostille Convention and legalisation procedures under the internal law of the Member States. The following general difficulties have been identified: (1) legal diversity and fragmentation of the legal framework concerning the cross-border use of Public Documents; (2) the heterogeneity of Public Documents; (3) the heterogeneity of (competent) public authorities; (4) the divergences between the Member States' public administration systems; (5) the divergences between the Member States' public registration systems; (6) the differences between the Member States approaches and systems for the authentication of Public Documents; (7) the diversity of languages; (8) the uncertainty about the question which Public Documents are required abroad for the purpose of providing proof of EC rights; (8) the incorrect application or non-compliance with applicable formalities; (9) the lack of relevant and up-to-date information; (10) the lack of e-government; (11) the lack of trust in foreign public authorities and the documents they execute; (12) the lack of trust in the reliability of foreign public registers.

- In relation to the Hague 1961 Convention, the following general difficulties were identified: (1) the requirement of an Apostille while EC law or an international agreement precludes the formalitiy; (2) unfamiliarity of the administering pubic authorities with the existence and effect of the Apostille Convention; (3) conflicts between formalities enforced and legal and practical requirements; (4) national legislation does not adequately provide for all aspects of the Convention; and (5) applicant insists on Apostille even though the Convention does not apply.

- The following difficulties were reported in relation to the Apostille certificate itself: (1) the fraud-resistance of the Apostille; (2) the acceptance abroad of the Apostille certificate: (3) the laguages used on the Apostille certificate. In relation to the documents for which an Apostille is issued, the following difficulties were identified: (1) the practice of issuing Apostilles for documents which are not signed by officials; (2) the material scope of the Apostille Convention is not interpreted uniformly; (3) the refusal to issue an Apostille for documents within the scope of the Convention; and (4) the Increasing volume of documents.

- As regards the Competent Authorities under the Hague 1961 Convention, the next difficulties were identified: (1) understaffed and/or unqualified authorities; (2) human factor-related errors; (3) unclear whether and how the lists of public officials and the specimens of signatures and seals are kept up-to-date; (4) the Competent Authorities are not easily accessible; and (5) it is difficult to identify competent authorities in foreign states.

- The Apostille formality has further given rise to the subsequent difficulties: (1) the formality is too slow and cumbersome for today's business needs; (2) expensive couriers are often needed to deliver and collect documents; (3) the formality is too costly; (4) Apostilles are not placed on documents in a uniform and secure way; (5) the security regarding signatures; and (6) the formal requirements for issuing Apostilles are followed to different levels of precision.

- In relation to the use of the Apostille registers or card indexes maintained by the Competent Authorities, the lack of adequate records of the issuance of Apostilles has been identified as causing difficulties. Concerning the use and effect of Apostille certificates, the lack of understanding of the legal purpose and effect of Apostilles and the fact that formal requirements of Apostilles are scrutinised with differing levels of meticulousness have been indicated as causing difficulties in practice.

- As regards legalisation under internal law, the following difficulties were reported: (1) the delay of obtaining legalisation; (2) legalisation is too costly; (3) the legalisation formality is an unnecessarily onerous and complex procedure; (4) language/translation issues; (5) the lack of uniform requirements concerning incoming documents; (6) the lack of uniform requirements concerning outgoing documents; and (7) the lack of trust regarding certain countries leading to invocation of special procedures.

PART V: The compatibility of Legalisation with EC law

- The requirement of Legalisation in relation to foreign Public Documents is not a directly discriminatory measure. For the application of Legalisation requirements, the decisive factor is not, for example, the nationality of the user of the document or the origin of the good to which the document relates, but the origin of the Public Document itself.

- Irrespective of the nationality of their user or, for example, the origin of a good, foreign Public Documents must be legalised before their authenticity is accepted and can be used effectively as a means of evidence, while domestic documents are accepted directly on the basis of a legal presumption of their authenticity.

- Certain Member States have been identified which charge a different rate for the same Legalisation formality depending on the nationality of the applicant. Naturally, this practice is directly discriminatory, irrespective of the fact that the requirement of Legalisation itself is not.

- On the other hand, the requirement of Legalisation is indirectly discriminatory. The requirement divides by a criterion other than nationality (i.e. the country of a document's origin), but nonetheless tends to favour the nationals of one Member State over the nationals of other Member States, in that it gives rise to a difference in treatment to the detriment of non-nationals, or is at least liable to have such an effect.

- Legalisation requirements apply on the basis of a criterion that refers exclusively to the origin of Public Documents (i.e. only foreign documents are subject to Legalisation requirements). Domestic documents are thus favoured over foreign documents. Consequently, users of domestic documents are favoured over users of foreign documents.

- Moreover, non-nationals require the use of foreign documents comparatively more often than nationals, since the facts of which Public Documents constitute proof usually occur in a person's state of origin and are for that reason inherently linked with his nationality.

- Accordingly, a logical connection exists between the factor used for the application of Legalisation requirements and nationality and Legalisation is therefore intrinsically liable to affect non-nationals more than nationals.

- In the EC context some degree of differential treatment between domestic and foreign Public Documents (i.e. the requirement of Legalisation for foreign documents, while documents that purport to be domestic Public Documents are presumed to be authentic) may be accepted, if it is proportionate to the objective differences between domestic and foreign Public Documents.

- In the absence of harmonising measures at the EC level, the Member States are, therefore, not required to treat as equivalent domestic and foreign Public Documents, if ´considerable differences´ exist between the Member States' legal orders concerning the conditions and procedures for the execution of Public Documents and the certification of their authenticity.

- In practice, however, apart from differences in terms of language, form, substance and the internal distribution of competences for the execution of Public Documents, no considerable differences exist between the Member States in relation to the conditions and procedures for the certification of the authenticity of Public Documents. The issue of authenticity of Public Documents and the issue of accuracy of decisions of public authorities must be distinguished in this regard.

- The certification of Public Documents is a process that does not diverge significantly between the Member States. It commonly involves the completion of certain mandatory particulars (names, date, location, number) on the Public Document, followed by the official's signature and, where

appropriate, stamp or seal. Accordingly, Public Documents executed in the Member States have certain universal characteristics that should allow a well-trained or experienced public official to decide on their authenticity.

- Besides, in a significant number of areas of EC law, the issue of authenticity of Public Documents has been addressed through the harmonisation of the form and substance of Public Documents, and/or the development of mutual cooperation and assistance between the authorities of the Member States for the purpose of verifying the authenticity of documents. Consequently, the criterion on which the requirement of Legalisation is based (i.e. the distinction made between domestic and foreign Public Documents) is not objectively justified.

- Notwithstanding the absence of considerable differences between the Member States concerning the conditions and procedures for the execution of Public Documents and the certification of their authenticity, in practice, domestic authorities are generally not familiar with the formal requirements applicable to foreign Public Documents in their country of origin, the authorities competent for their execution and their signatures, seals and stamps.

- This unfamiliarity is the natural result of differences between legal systems and systems of public administration and the relative isolated co-existence over an extended period of time. This also explains the lack of effective cross-border administrative cooperation between authorities, while it normally exists between domestic authorities. Ultimately, it explains the absence of trust in the authenticity of foreign documents and the inception of the requirement of prior Legalisation.

- However, both the issue of unfamiliarity and the lack of administrative cannot be interpreted as indications of the existence of considerable differences between the national legal orders as regards the conditions and procedures for the execution and certification of Public Documents. Accordingly, they cannot serve to justify the systematic discrimination between domestic and foreign Public Documents.

- Moreover, in the EC context, the Member States' domestic authorities of the Member States are at the same time "EC authorities" (see Article 10 EC). In that capacity, the authorities of the Member States must ensure that EC law is properly implemented and that EC rights are effectively protected. To that end they must respect the EC principle of mutual trust in relation to other "EC authorities" of other Member States.

- Accordingly, in situations within the scope of EC law, where authorities are asked to rely on decisions contained in Public Documents that have been executed by authorities of another Member State, they are to be guided equally by the principle of mutual trust.

- Mutual trust forms the basis for the concept of mutual recognition and requires national authorities to rely on the authenticity of Public Documents of authorities in other Member States unless there are reasonable doubts based on concrete evidence in relation to the authenticity of the documents in a particular case. Without trust there is no basis for recognition, which is an essential feature of the internal market and the area of freedom, security and justice common to the Member States.

- Conversely, Mutual trust between authorities is not an intrinsic feature of the relationship between the authorities of different countries. In principle, this observation applies equally to the relationship between the authorities of the Member States. The natural state of the relationship between the authorities of different countries can be described as one of mistrust.

- Between the EU Member States, such mistrust is generally not based on a lack of trust in the reliability or quality of each others public authorities, but more on their mutual unfamiliarity and a lack of mutual cooperation and assistance between them.

- Not being innate in the relationship between the authorities of the Member States, the establishment of mutual trust in each other's Public Documents depends on measures at the EC level aimed at familiarising those authorities with the form and substance of Public Documents of other Member States.

- Besides, the maintenance of mutual trust relies on measures to facilitate mutual cooperation and assistance between the authorities in the Member States to allow for the efficient verification of the authenticity of those documents.

- The requirement of non-discrimination applies to all legal relationships, insofar as these relationships, by reason of the place where they are entered into or of the place where they take effect, can be located within the territory of the EC. Consequently, situations where national measures discriminate between non-nationals, or have this effect may therefore be as relevant as situations where national measures discriminate between nationals and non-nationals.

- Member States do not only discriminate between domestic and foreign Public Documents, but also between the documents of different Member States as far as the requirement of Legalisation is concerned. Most Member States discriminate between the Public Documents of other Member States. For instance, Belgium does not require Legalisation of any type of Public Document originating in Cyprus, Denmark, France, Germany, Ireland, Italy and Latvia; exempts most documents from Austria, Luxembourg, Netherlands, Poland, Portugal and Spain; and is more demanding in terms of Legalisation requirements in relation to documents from the remaining Member States. The example applies equally for the vast majority of other Member States

- No clear patterns exist between certain Member States or certain regions. The exemption by Member States of Public Documents from other Member States from the requirement of Legalisation is rooted in the development of bi- and multilateral relations between the Member States initially outside the scope of EC law.

- The comparative analysis of the formalities that apply between the Member States does not warrant the conclusion that specific Member States or certain regions of the EU or are considered by others as problematical in terms of the reliability or authenticity of Public Documents that originate there. For example, the fact that Estonia, Finland, Malta and Lithuania have not concluded many agreements concerning the issue of Legalisation is more a matter of coincidence rather than a sign that other Member States do not generally trust the authenticity of Public Documents originating in those countries.

- It is not always easy to distinguish between indirectly discriminatory and indistinctly applicable measures. In many areas of EC law, discrimination is not required as a condition for the prohibition of a national measure, where the effect of a measure is that free movement is restricted or that the exercise of fundamental freedoms is liable to be hindered or made less attractive by it (market access criterion).

- Foreign Public Documents do not benefit from the same presumption as domestic Public Documents as regards their authenticity. Without proof of authenticity (i.e. some form of Legalisation), foreign Public Documents are regularly not accepted at all.

- The requirement of Legalisation thus implies a *de facto* negative presumption in relation to the authenticity of foreign Public Documents, which constitutes a procedural measure that may qualify as a restriction, since it governs actions at law intended to safeguard the rights which individuals derive from the direct effect of EC law.

- In addition, there are important indications that the practical formality involved with the fulfilment of the requirement of Legalisation constitutes a restriction in that it is liable to hinder or make less

attractive the exercise of fundamental freedoms. Firstly, Legalisation formalities create extra (transaction) costs and cause additional delay.

- Secondly, the requirement of Legalisation does not apply in purely internal circumstances; it applies only if a Public Document is to be used internationally, thereby placing a specific burden on cross-border transactions or situations that involve the use of Public Documents.
- Thirdly, with a view to the essential role of Public Documents in the context of cross-border free movement and access to (effective) justice, any difficulty or extra burden in the process of using a domestic Public Document in another Member State will constitute a direct and substantial obstacle to free movement.
- Lastly, the requirement to legalise foreign Public Documents is often perceived by users of Public Documents as a measure that complicates the exercise of fundamental freedoms.
- Consequently, the requirement of Legalisation is a measure that requires a justification. EC freedoms may be restricted by national regulations justified on the grounds set out explicitly in the Treaty or by overriding reasons in the public interest, to the extent that there are no EC harmonising measures providing for measures necessary to ensure those interests are protected. Furthermore, it must be established whether the measure is suitable for securing the attainment of the objective which it pursues and whether it does not go beyond what is necessary in order to attain objective it pursues (proportionality).
- The fundamental aim of the requirement of Legalisation for foreign Public Documents is the prevention of fraud in relation to the cross-border use of Public Documents. The aim of fraud prevention cannot be easily associated with any of the available Treaty exceptions when considering whether the requirement of Legalisation for foreign Public Documents can be justified.
- This aim can be associated with the conventional concept of “public policy”. However, the public policy exception under Treaty is interpreted strictly and that its scope cannot be determined unilaterally by the Member States. Reliance on the exception presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society.
- On the other hand, the need for the prevention of fraud is recognised as an overriding reason in the public interest under EC law. Accordingly, aim of fraud prevention may be used to justify restrictive measures such as the requirement of Legalisation for foreign Public Documents.
- Treaty exceptions and objective justifications have a provisional character in that they apply only as long as the EC has not adopted the necessary harmonisation measures to unconditionally ensure the protection of the interest in issue. If those measures protect the legitimate interests of the Member States at the EC level, they preclude reliance on escape clauses.
- If the protection offered at the EC level through harmonisation measures does not provide an unconditional assurance of a Member State’s interest the possibility cannot be excluded that a restrictive measures may still be justified on the basis of a Treaty exception or an overriding reason in the public interest.
- Consequently, a restrictive national measure in an area of EC law which has been the subject of (exhaustive) harmonisation at EC level, must principally be assessed in the light of the provisions of the harmonising measure and not those of the Treaty.
- Analysis of secondary EC legislation shows, that there are EC harmonising measures that protect the interests involved with Legalisation. These measures include the harmonisation of the form and substance of Public Documents and, in addition, the establishment of mutual cooperation and

assistance between the public authorities in the Member States in relation to the authentication of Public Documents.

- In areas in which mutual trust and mutual recognition are required and justified as a result of the necessary flanking measures at the EC level, the Burden of Proof in relation to the authenticity of Public Documents originating or accepted in other Member States has shifted from the persons who wish to rely on those documents to the authorities who administer them.

- Ultimately, the power conferred on Member States by means of secondary legislation for the purpose of ensuring the authenticity of Public Documents executed in other Member States potentially has restrictive effects and must therefore also be exercised with due regard for the Treaty.

- Legalisation is not a measure that is proportional to the justified aim it pursues. As a rule, it is for the Member States to decide on the degree of protection which they wish to afford to lawful interests such as the prevention of fraud and on the way in which that protection is to be achieved, for instance through the requirement of Legalisation.

- The notion of proportionality has a close affinity to that of reasonableness. Member States are called upon to justify measures which cause obstacles to free movement and to search for less restrictive solutions. The principle of proportionality requires that restrictive measures adopted by the 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 not a suitable measure to prevent fraud in relation to the cross-border use of Public Documents. In the first place, the formalities involved in the process of Legalisation are themselves sensitive to fraud. Signatures can be forged, stamps can be stolen and (Apostille) certificates can be detached from the document to which they belong and attached to others.

- Secondly, the system used for the purpose of Legalisation relies on specimens of signatures, stamps etc. held by the competent authority, which are compared to those on the document that is to be legalised. No signature is alike, which makes any comparison difficult. In addition, there is the problem that systems and databases in which specimens are held are not updated every day.

- Lastly, notwithstanding their availability, systems for administrative cooperation to prevent abuse of Legalisation formalities (e.g. the abuse of Apostille certificates) are in practice never of very rarely used.

- The requirement of Legalisation for foreign Public Documents is not a measure that is necessary to achieve its legitimate aim of fraud prevention. The issue of the necessity involves two related issues: (1) the rationale for imposing the restriction must be principally the pursuance of its justified aim; (2) there may not exist less restrictive alternatives for the restrictive measure.

- Legalisation, though potentially beneficial to achieving the legitimate aim of fraud prevention, cannot be justified if the measure is inspired primarily by a concern to lighten the administration’s burden or reduce public expenditure, unless, in the absence of the said rules or practices, that burden or expenditure would clearly exceed the limits of what can reasonably be required.

- In the absence of the possibility to require Legalisation the authorities have to rely on administrative cooperation for the verification of a document’s authenticity. The administrative burden or expenditure involved with administrative cooperation between the authorities cannot be claimed to clearly exceed the limits of what can reasonably be required. Instead the Member States have supported its development in many areas of EC law.

- Legalisation can neither be justified if the measure is inspired primarily because it increases the state income (which is the case in some Member States). The measure cannot be justified with reference to its secondary aim of fraud prevention.

- 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. On the other hand, in areas where no harmonisation measures have been introduced, the rules of a Member State cannot be held to be disproportionate merely because another member State applies less restrictive rules. This could initiate a race to the bottom.

- The assessment of the existence of a less restrictive alternative to the requirement of Legalisation must, therefore, take into account all relevant domestic particularities and circumstances of the member States involved.

- Two inter-related factors must be taken into account for the evaluation of the question whether a less restrictive alternative exists. Firstly, the Member States have the duty to recognise the equivalence between their legal systems. Secondly, the authorities of the Member States have a general duty to cooperate with the authorities of other Member States.

- Accordingly, prior to imposing additional restrictions such as the requirement of Legalisation, the Member States must recognise the measures taken by other Member States in the form of formalities and checks that are equivalent to the domestic ones. Besides, the Member States must cooperate to establish equivalence between checks and formalities to prevent unnecessary duplication.

- In other words, the competent authorities must either rely on the documentary evidence of the fulfilment of those checks and formalities used for this purpose by the competent authorities of the Member State of origin, or communicate directly with the competent authorities of the Member State of origin to verify or obtain the necessary information required to prevent the duplication of those formalities and checks.

- This implies that when the authority of a Member State entertains serious doubts, which go beyond mere suspicion, about the authenticity of a document originating in another Member State which purports to be a Public Document, the issuing authority or institution must, on the application of the first authority, re-examine the basis of the document concerned and, where appropriate, withdraw it.

- An apparent problem for the proportionality of the requirement of Legalisation for foreign Public Documents is the general and abstract nature of the measure. A measure which limits in a general and abstract manner the admissibility into evidence of certain documentary evidence with a view to preventing fraud cannot justify the refusal to take account of relevant documents executed by courts in another Member State as evidence.

- Accordingly, the authorities of the Member States must adopt a less restrictive approach by accepting Public Documents executed by the authorities of other Member States unless their authenticity is seriously undermined by concrete evidence relating to the individual case in question.

PART VI: Suggested measures at the EC, international and national level

- The national reports have identified the a number of possible measures at the EC, international or national level to address the difficulties that relate to the cross-border use of Public Documents and in particular to the requirement of legalisation of foreign Public Documents. The actual recommendations of the British Institute are contained in the executive summary of the synthesis report.

- At the EC level the following measures were identified: (1) the establishment of a European central register for Public Documents; (2) the establishment of standard information sets for Public Documents; (3) the establishment of harmonised forms for Public Documents; (4) the prescription of an EC Standard of Proof; (5) the conversion of the 1987 Convention into a European Regulation; (6) the development of a European communication and exchange of information system; (7) the differentiation between document types as regards potential measures; (8) the designation of central authorities; (9) the complete or increased abolition of legalisation requirements; (10) the further harmonization of legalisation requirements.

- The subsequent measures were suggested for the international level: (1) the coordination of the international legal framework in the EU; (2) a better and more uniform implementation of the Hague 1961 Convention by all member States and the coordinated participation of the Member States in the Hague Conference's eApostille programme; (3) the closer co-operation between parties to multi-lateral instruments; and (4) making the applicable procedures more transparent so that individuals can identify the applicable requirements.

- At the national level the next measures were suggested in the national reports: (1) address the lack of adequate public information in relation to the documents required, the applicable formalities and the competent authorities; (2) Guidelines and information for public authorities concerning the proper implementation of changing EC, International and national requirements; (3) improvement of the availability and accessibility of Competent Authorities; (4) measures to decrease the number of authorities involved in the process of legalisation, for example by the establishment of a central record of signatures; and (5) the progressive introduction of e-Government; (6) the enactment of specific legislation with regard to national legalisation procedure.

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