

Simplifying the Circulation of Public Documents in the European Union – Present and Future Solutions

I The Genesis of a New Legislative Instrument of EU Law

1. Following the results of the Eurobarometer on civil status, in 2010 the European Commission¹ launched a debate on all the public documents that require administrative formalities for them to be used outside the Member State in which they were issued. These formalities include proof of authenticity or a certified translation. The purpose of this initiative was no less than finding the possible ways to simplify the existing legal framework. The traditional way of authenticating public documents designed for use abroad is *legalisation*. Another formality, which simplifies the traditional legalisation process, consists of the provision by the State issuing the document of an authentication certificate called an *apostille*. The apostille has the same objective as legalisation but involves a simplified procedure. An apostille is provided by the competent authorities only of the State which issued the document. Intervention by the authorities of the Member State in which the document is presented is no longer necessary. According to the EC, although the apostille facilitates the movement of public documents compared with the legalisation procedure, it also requires administrative steps and involves some loss of time and a quite considerable cost, which varies greatly from one Member State to another.

2. In the framework of the Green Paper on this matter, published the same year by the Commission, the eventual recognition of the effects of civil status records² was also examined. This document was the subject of a public consultation.³ As important as the solutions of the Proposal that followed this Green Paper may be, the latter is also interesting, at least from

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¹ http://ec.europa.eu/public_opinion/archives/eb/eb74/eb74_en.pdf

² Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records COM(2010) 747 final' (http://ec.europa.eu/justice/policies/civil/docs/com_2010_747_en.pdf).

³ For the reactions to the Green Paper see http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm.

a methodological point of view: in fact, among other solutions mentioned in this context, is also cited the recognition⁴ of the effects of certain types of civil status. We could cite the example of a registered partnership concluded in Member State A: if the method of recognition was adopted, the relationship thus created should be recognised in all the other Member State, at least concerning its existence, if not its results. It is evident that such a development would be very important for European private international law, because conflict of laws rules would then be of less 'utility'. The method in question is not only a subject of theoretical discussion – ECJ case law has also adopted the same approach in matters related to civil status.⁵ Two recent ICCS Conventions have adopted the method of recognition regarding the name⁶ and the registered partnership,⁷ too. As detailed below, this alternative was not retained in the framework of the Proposal on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union, because European lawmakers decided not to regulate questions concerning the content of public documents.

II The Proposal for a Regulation on Promoting the Free Movement of Citizens and Businesses by Simplifying the Acceptance of Certain Public Documents in the European Union⁸

1. The public consultation on the aforementioned Green Paper resulted, indeed, in a Proposal for a Regulation aiming at ensuring the simplification of the circulation of public documents.⁹ As already observed, in this context the idea of the recognition of the effects of civil status documents was rejected. It is not difficult to understand why such a solution, implying the application of the method of recognition, was not finally adopted: such an approach would oblige the Member States to accept as valid a relationship legally created in another Member State without applying the national rules of private international law and perhaps against the fundamental legal concepts of each Member State.¹⁰

⁴ See on this matter Paul Lagarde (dir.), *La reconnaissance des situations en droit international privé* (Editions A. Pedone 2013).

⁵ Case C-148/02 *Garcia Avello v Belgian State* ECR I-11613, Case C-352/06 *Stefan Grunkin, Dorothee regina Paul* ECR I-07639, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* ECR I-13693.

⁶ *Convention on the recognition of surnames* (signed in Antalya on 16 September 2005).

⁷ *Convention on the recognition of registered partnerships* (signed in Munich on 5 September 2007). For this Convention see Paul Lagarde, 'La convention de la CIEC sur la reconnaissance des partenariats enregistrés' in *Lebendiges Familienrecht Festschrift für Rainer Frank* (Verlag für das Landesamtswesen 2008, Frankfurt am Main) 125-138.

⁸ Proposal for a Regulation of the European Parliament and the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [COM(2013) 228 final].

⁹ On this Proposal see Paul Lagarde, 'The Movement of civil-status Records in Europe, and the European Commission's Proposal of 24 April 2013' (2013/2014) 15 *Yearbook of Private International Law* 1-12. See also Chr. Kohler, 'Towards the Recognition of Civil Status in the European Union' *op. cit.* 13-29.

¹⁰ This will be the case when national public order is contrary to European fundamental values, as expressed either in the Charter of Fundamental Rights of the European Union or in the European Convention on Human Rights.

2. The legal basis of this initiative is explained in the Explanatory Memorandum:

This proposal is based on Article 21(2) TFEU which empowers the European Parliament and the Council to adopt provisions with a view to facilitating the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the free movement of citizens. Thus, removing these obstacles would facilitate the exercise of the free movement of citizens as foreseen in Article 21(2) TFEU. This Article is combined with Article 114(1) TFEU which empowers the European Parliament and the Council to adopt measures for the approximation of the provisions which have as their object the establishment and functioning of the internal market. Administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the full enjoyment of the internal market freedoms of EU businesses as described in Article 26(2) TFEU and referred to in Article 114(1) TFEU. It is therefore the suitable complementary legal basis to cover public documents used by EU businesses in cross-border scenarios within the internal market.¹¹

3. The actual Proposal provides for a dispensation from legalisation or a similar formality and for the simplification of other formalities related to the acceptance of certain public documents issued by authorities of the Member States (article 4). It also establishes Union multilingual standard forms concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking (article 1). As to the scope of the future Regulation, article 2 provides that this Regulation will apply to the acceptance¹² of public documents which have to be presented to the authorities of another Member State, specifying at the same time that it does not apply to the recognition of the content of public documents issued by the authorities of other Member States.

4. For the purpose of the Regulation, ‘public documents’ means documents issued by the authorities of a Member State and having formal evidentiary value relating to: (a) birth; (b) death; (c) name; (d) marriage and registered partnership; (e) parenthood; (f) adoption; (g) residence; (h) citizenship and nationality; (i) real estate; (j) legal status and representation of a company or other undertaking; (k) intellectual property rights; (l) absence of a criminal record (article 3).

5. Another interesting point of the Proposal is the obligation imposed to on national authorities to accept non-certified translations of public documents issued by the authorities of other Member States (article 6 para 1).¹³

¹¹ COM(2013) 228 final 10.

¹² The term ‘acceptance’ caused serious criticism based on the similarity of this expression with the notion of recognition, apparently excluded from the scope of the Regulation.

¹³ It should however be noted that, according the second paragraph of the same article, ‘Where an authority has reasonable doubt as to the correctness or quality of the translation of a public document presented to it in an individual case, it may require a certified translation of that public document. In such a case, the authority shall accept certified translations established in other Member States.’

6. In case of reasonable doubt as to the authenticity of a public document, the authorities of the Member State in which a public document is presented may submit a request for information to the relevant authorities of the Member State where these documents were issued. To that end, the national authorities may use the Internal Market Information System (established by Regulation 1024/2012)¹⁴. The Internal Market Information System is a software application accessible via Internet, developed by the Commission in cooperation with the Member States in order to assist Member States with the practical implementation of information exchange requirements laid down in Union acts, such as in this Regulation. It allows templates of national public documents to be collected in its repository and these will also help the authorities to become familiar with the documents of other Member States, including on their linguistic aspects. Furthermore, the proposal contains detailed rules concerning the designation, functions and meetings of the central authorities. Among others, the central authorities provide and regularly update best practices on preventing public document-related fraud.

7. The proposal establishes Union multilingual standard forms in all official languages concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking. The Union multilingual standard forms will be available to citizens and companies or other undertakings in parallel and as an alternative to the national public documents on a voluntary basis and given the same formal evidentiary value as the similar public documents issued by the authorities of the issuing Member State. If a Union multilingual standard form has been established for a particular public document, the authorities of a Member State must issue such a form upon request if an equivalent public document exists in that Member State. The question of which authorities issue which forms falls under the national law of each Member State. They must be issued under the same conditions (e.g. as regards the fees) as the equivalent public document existing in that Member State. These standard forms do not produce legal effects as regards the recognition of their content in the Member States where they will be presented.

III Towards a New Legislative Text on the Circulation of Public Documents in the EU?

1. The above very briefly exposed solutions have been strongly criticised by the Member States. The scope of the Regulation was judged excessively broad, mostly because of the very complicated system for verification of a public document's authenticity. Equally dangerous was considered the fact that even an unofficial translation must in principle be accepted. On the other hand, the system of multilingual standard forms established by the Regulation provoked the reactions of the Member States which are at the same time Member of the International

¹⁴ Regulation (EU) No 1024/2012 Of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

Commission on Civil Status and have ratified the ICCS Conventions, because the latter also provide for an exchange of information on civil status and have established standard forms to that end. Finally, as to the verification of the authenticity of public documents, the Member States could not understand, why the system of the Hague Convention on the Apostille should be replaced by another, more complicated, system which will create a considerable burden for national Administrations and indirectly increase the cost of the free movement of documents at the citizens' expense. In other words, the Member States were not keen to abandon the existing solutions, which they judged sufficiently satisfactory.

2. After many discussion and modifications of the initial text, the Council, on 3 December 2015 has confirmed the political agreement reached during a trilogue between the Presidency (Luxembourg), the European Parliament and the European Commission on 13 October 2015. After the usual legal-linguistic revision, the text will be put to a vote in second reading at a plenary session of the European Parliament.

3. In the new text the purpose of the Regulation is still the simplification of the circulation of public documents within the European Union. At the same time the Internal Market Information System (IMI) remains the basic tool for information exchange regarding a document's authenticity. Nevertheless, several other rules have been drastically modified. Consequently, the whole system to be used to facilitate the free movement of documents within the European Union is almost completely different. As will be detailed below, its main characteristics are the recognition (and the acceptance) of the different systems existing in the international arena as to the circulation of public documents as well as the decisive role of the citizen concerned regarding the system to be finally applied.

4. More specifically, after the first reading of the Proposal in Council, the scope of the future Regulation has been mainly limited to public documents concerning the civil status, more precisely to public documents concerning birth, name, marriage, divorce, legal separation or marriage annulment, registered partnership, dissolution or annulment of a registered partnership, parenthood, adoption, domicile and residence, and nationality.¹⁵ On the other hand the nature of the multilingual standard forms has changed: as stipulated in a new article 8, they shall be used as a translation aid attached to the national public document without having an autonomous legal value.¹⁶

5. More importantly this is the purpose of the Regulation which has changed: as set in article 1 (2), 'this Regulation shall not prevent a person from using other systems applicable in a Member

¹⁵ It is however to note that, according to article 2, applies also to public documents, the primary purpose of which is to establish the absence of a criminal record, provided that such public documents are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality. 'This Regulation also applies to public documents the presentation of which may be required from citizens of the Union residing in a Member State of which they are not nationals when those citizens wish to vote or stand as candidates in elections to the European Parliament or in municipal elections in their Member State of residence, under the conditions laid down in Directive 93/109/EC and Council Directive 94/80/EC respectively.'

¹⁶ See also article 1 (3).

State on legalisation or similar formality'. This solution is further explained in a recital, according to which 'As regards the Apostille Convention, while Member States' authorities should not require an Apostille when a person presents to them a public document covered by this Regulation and issued in another Member State, this Regulation should nevertheless not prevent Member States from issuing an Apostille in the event that a person requests it'¹⁷.

6. As to the understanding of the document's content, the new version of the Proposal indirectly recognises the need for a certified translation: article 6 stipulates that

A translation shall not be required where: (a) the public document is in the official language of the Member State where the document is presented or, if that Member State has several official languages, in the official language or one of the official languages of the place where the document is presented or in any other language that that Member State has expressly accepted; or (b) a public document concerning birth, a person being alive, death, marriage, including capacity to marry and marital status, registered partnership, including capacity to enter into a registered partnership and registered partnership status, domicile and/or residence or absence of a criminal record is accompanied, in accordance with the conditions set out in this Regulation, by a multilingual standard form, provided that the authority to which the public document is presented considers that the information included in the multilingual standard form is sufficient for processing the public document.

If one this terms is not fulfilled, then there is a need for a certified translation as it results from the wording of article 6 (2).¹⁸

7. As important as the aforementioned elements may be, one should not overlook the technicalities of the system established by the Regulation, as they may influence in a negative manner the quality of the solutions to be applied. Although it is not possible here to describe this system in its entirety, even a few elements of this nature permit an understanding of the complexity of the system in question.

8. As regards the multilingual standard forms, though not of an obligatory nature,¹⁹ one must underline the necessity to complete them not only in the official language of the Member State in which the multilingual standard form is issued but also in the official language in which the public document to which the multilingual standard forms is attached is to be presented. On the other hand, the excessive length of the multilingual forms should be stressed, even concerning civil status acts, which in many national laws are characterised by their extreme briefness. This is the inevitable effect of the nature of the multilingual standard forms as

¹⁷ Recital 5.

¹⁸ According to this rule, 'A certified translation made by a person qualified to make such translations under the law of a Member State shall be accepted in all Member States.'

¹⁹ Article 7 (1) provides indeed that 'Public documents concerning birth, a person being alive, death, marriage, including capacity to marry and marital status, registered partnership, including capacity to enter into a registered partnership and registered partnership status, domicile and/or residence and absence of a criminal record communicated by the Member States in accordance with point (c) of Article 24(1), shall, upon request by the person entitled to receive the public document, be accompanied by a multilingual standard form established in accordance with this Regulation.'

translation aids and the subsequent will of the Member States to fully reproduce, in the standard form, the content of the concerned national document, even when many of the national inscriptions are of no interest to the Authorities of the State where the document (and the multilingual standard form) is to be presented. Article 9, relative to the content of multilingual standard forms reflects this situation.

9. Another expression of the complexity of the system provided for by the future Regulation concerns the request for information and administrative cooperation. Even though the articles of the new version of the Proposal dedicated to that matter have not suffered major modifications, it is not allowed to disregard the length of the whole procedure. According to article 14 (5) 'The authorities shall reply to requests for information made under this Article within the shortest possible period of time and in any case within a period not exceeding five working days or 10 working days where the request is processed through a central authority. In exceptional cases where the time limits referred to in the first subparagraph cannot be adhered to, the receiving authority and the requesting authority shall agree upon an extension of the time limit.'

IV Institutional Problems

1. From the above, it is obvious that one of the main problems that arose from the EU initiative in question is the relationship between the future Regulation and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, as well the ICCS Conventions. At first, the Proposal for a regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents provided for that this Regulation shall, as between Member States, take precedence over Conventions concluded by them in so far as such Convention concern matters governed by this Regulation.²⁰

2. The reason for the negative reactions of the Member States on that matter as mentioned above was that the Conventions in question have been applied for many years or even decades with mostly satisfactory effects. Replacing them with a more complicated system does not seem convenient for either citizens or national administrations. Moreover, this is not the only or the most important problem which arises as regards the relationship between the Regulation and existing international Conventions. More significantly, the discussion in that respect also presents an institutional dimension related to the eventual exclusive external competence of the European Union on the matters regulated by the Regulation.

3. Pursuant to the Opinion of the ECJ 1/13²¹ of 14 October 2014, it is not excluded that the European Union acquires exclusive external competence, including the right to accept the accession of a third State to the aforesaid Conventions. This would be an evolution which Member

²⁰ Article 18.

²¹ In Govaere, 'Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 *Common Market Law Review* 1277-1307.

States were not ready to allow. To that end, the new article 19 of the revised text of the Proposal provides that ‘this Regulation shall not preclude Member States from negotiating, concluding, acceding to, amending and applying international agreements and arrangements with third countries concerning legalisation or similar formalities of public documents on matters covered by this Regulation issued by the authorities of Member States or third countries concerned, nor from deciding on the acceptance of the accession of new Contracting Parties to such agreements and arrangements to which one or more Member States or may decide to become party’.

4. Another element one must take into account as regards the problem of the external competence of the European Union regarding the circulation of public documents is that the multilingual standard forms shall not include any of the following: extracts from civil status records, verbatim copies of civil status records, multilingual extracts from civil status records, multilingual and coded extracts from civil status records or multilingual and coded civil status certificates.²² In the light of this situation, it is clear that the subject matter of the Regulation and the ICCS Conventions is not the same. If this were the case, the European Union (and not the Member States) would be the only competent body for the Conventions in question.

V Conclusion

1. Certainly, no one can predict the outcome of the ‘bargaining’ between the Council and the European Parliament. It is however evident that the EU has abandoned its initial target, which was the ‘circulation’ of the legal relations within the EU, for the sake of creating, ultimately, a complicated administrative mechanism that is supposedly designed to facilitate the lives of citizens and generally those living in the EU territory. However, this aim seems to be achieved to a greater degree within the existing legal framework of international organisations, such as the Hague Conference on Private International Law with the creation of the electronic Apostille and the International Committee of Civil Status, together with the creation of an electronic platform for the implementation of Committee’s Conventions on the exchange of personal situation-related information. In this sense, the Regulation under consideration represents a step backwards in relation to these achievements, to the detriment of both citizens and administrations. This is why the Regulation’s Proposal allows the person concerned to choose the applicable system for themselves.

2. As stated before, national Authorities are not permitted to encourage the application of another system facilitating the international circulation of public documents. Nevertheless, because of the difficulties that may be caused by the solutions to be adopted in the European Union as to that matter, it could not be excluded (at least at the early stage of the Regulation’s application) that the persons concerned will be deterred from using the solutions laid down in the European Union.

²² Article 8 (2).